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SUPREME COURT
OF GUAM

IN THE SUPREME COURT OF GUAM

SCOTT K. MOYLAN,
Plaintiff-Appellant,

v.

**CITIZENS SEC. BANK (Member ANZ Group),
DOE CORPORATIONS 1-5, and JOHN DOES 1-5,**
Defendants-Appellees.

Supreme Court Case No.: CVA14-027
Superior Court Case No.: CV1537-09

OPINION

Cite as: 2015 Guam 36

Appeal from the Superior Court of Guam
Argued and submitted on May 21, 2015
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

TORRES, C.J.:

[1] Scott K. Moylan (“Scott”) appeals a judgment dismissing his Complaint against Citizens Security Bank (“Bank”) for wrongful termination, retaliatory discharge, civil conspiracy, false light invasion of privacy, negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress. The lower court determined in two separate summary judgment decisions that there was no genuine dispute as to any material fact and the Bank was entitled to judgment as a matter of law. Because we find that there is a genuine dispute as to material facts regarding whether Scott’s termination violated established public policy, we reverse in part and affirm in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Scott appeals from the Judgment of the Superior Court dismissing his complaint against the Bank. He argues that the lower court erred in finding that there was no genuine issue of material fact and granting summary judgment as to seven causes of action:¹ wrongful termination, retaliatory discharge, civil conspiracy, false light invasion of privacy, negligence, intentional infliction of emotional distress (“IIED”), and negligent infliction of emotional distress (“NIED”). In particular, he argues that the evidence he presented to the lower court created a genuine issue of material fact with regard to his claim for wrongful termination. The remaining causes of action flow from the wrongful termination claim.

¹ In his Complaint, Scott alleged eight causes of action, including one for fraud. The Superior Court dismissed Scott’s claim for fraud in its May 1, 2014 Decision and Order. However, since Scott does not raise this issue on appeal, the fraud claim is considered abandoned. *See Hemlani v. Flaherty*, 2003 Guam 17 ¶ 18.

[3] Scott was hired as “Controller” by the Bank in 1999. *See* RA, tab 19.1 at 11 (Pl.’s Dep., Mar. 1, 2011). As Controller, Scott’s responsibilities included but were not limited to managing and supervising the Bank’s internal accounting practices, financial reporting, monitoring cost control activities, and preparing budgets and budget analyses.

[4] Shortly after being hired, Scott signed an Acknowledgment Statement confirming that he had read and understood the Bank’s employment policies as outlined in the Employee Handbook. The statement drew specific attention to the at-will nature of Scott’s employment with the Bank:

No employee is guaranteed employment for any specific duration. . . . The [B]ank is an employment-at-will employer. This basically means that at any time during my employment I may resign, if it is in my best interest. The [B]ank has a commensurate right to protect the [B]ank’s best interest.

Id., Ex. 3 at 1 (Acknowledgment Statement, Sept. 22, 1999). The statement also drew attention to the Bank’s e-mail and electronic communications policy, emphasizing that there was no expectation of privacy when using the Bank’s electronic communication systems and that the systems are “for business purposes only.” *Id.* at 2.

[5] Scott signed a second Acknowledgment Statement and an Email Policy in 2004 confirming that he had read and understood the Bank’s Code of Ethics, E-mail & Electronic Communication Policy, Privacy Policy, and the Gramm-Leach Bliley Act (“GLBA”). By signing the Acknowledgment Statement, Scott agreed to “use computer systems solely for corporate business purposes,” “maintain the privacy and confidentiality of all confidential and [B]ank data,” “report information security violations immediately,” and “never transmit any proprietary, confidential, or otherwise sensitive information without proper authorization” under penalty of “disciplinary action up to and including immediate termination, without prior warning or notice.” RA, tab 80.1, Ex. 12 (Acknowledgment Statement, June 9, 2004). By signing the

Email Policy, Scott agreed not to exchange “confidential information to anyone not affiliated with the [Bank].” RA, tab 80.1, Ex. 11 (Email Policy, July 30, 2004).

[6] While Scott was working at the Bank, in 2006, his grandparents opened two Time Certificate of Deposits (“TCDs”), one for \$500,000.00 and another for \$1,000,000.00. Both were opened under four names: Frances Lester Moylan and Yuk Lan Moylan (collectively “Grandparents”), as well as Leialoha Moylan Alston (“Leialoha”) and Frances Lester Moylan, Jr. (“JR”) (collectively “Caretakers”).² The TCDs were set to mature in March and May of 2007, respectively.

[7] In May of 2007, during the course of his duties as Controller, Scott discovered that his Grandparents were depositors at the Bank, in possession of a \$1,000,000.00 TCD that was set to mature. Scott followed up on the TCD, discovering that the TCD was “rolled over” on its maturity date into two new TCDs worth \$515,689.00 each. *See* RA, tab 80.1, Ex. 46 at 22-23 (Partial Tr., Pl.’s Examination, July 24, 2008). Scott also discovered that the new TCDs were no longer in the name of his Grandparents but solely in the name of the Caretakers.

[8] After discovering that his Grandparents’ \$1,000,000.00 TCD had been rolled over, Scott investigated further. He discovered that his Grandparents had a second TCD for \$500,000.00 that matured on March 12, 2007. The second TCD had also been rolled over into two new TCDs on its maturity date, each worth approximately half of the original amount. Like the May TCD, the new TCDs were no longer in the name of the Grandparents but solely in the name of the Caretakers.

[9] After discovering the two TCD rollovers, Scott decided to conduct his “own internal investigation.” RA, tab 19.1 at 51 (Pl.’s Dep., Mar. 1, 2011). He reviewed his Grandparents

² The Caretakers are Scott’s aunt and uncle and his father Richard’s brother and sister.

accounts “as far as [the Bank’s] system could go.” *Id.* at 57. He discovered that the Caretakers had authorized various transfers of money from the TCD accounts to the business account of the F.L. Moylan Company. Scott grew suspicious of these transfers based on his personal knowledge of his Grandparents advanced age and deteriorating mental condition. Scott then created a written “audit trail” of his Grandparents accounts, showing multiple transactions and balances. *Id.* at 63.

[10] Scott disclosed the entirety of his findings to his brother, attorney Douglas Moylan (“Doug”). This involved divulging his Grandparents’ and the Caretakers’ confidential bank account information, without first obtaining their consent. Doug advised Scott that his findings may constitute “elder abuse” and that he had a mandatory duty to report the activity to Adult Protective Services (“APS”). Fearful that he may lose his job, Scott suggested that his father, Richard Moylan (“Richard”), make the report. This required sharing Scott’s findings with Richard without the Grandparents’ or the Caretakers’ consent.

[11] Doug and Richard met with the Public Guardian³ at the end of May 2007. At this meeting, they disclosed Scott’s findings of suspected financial abuse, including the details of the Grandparents’ and Caretakers’ confidential financial records. Doug, Richard, and the Public Guardian met with APS in early June 2007, to initiate an investigation into the welfare of the Grandparents.

[12] Later that month, Doug filed a petition to have Richard appointed as guardian for the estate and person of Frances Lester Moylan. Doug thereafter filed an objection to competing

³ The Public Guardian serves as guardian for persons or estates who are unable, unassisted to properly manage themselves. The Public Guardian also assists in the appointment and supervision of alternate guardians among family and friends, offering guidance and counsel and developing programs of public education on guardianship and alternatives to guardianship, supporting and encouraging the development of private guardians.

guardianship petitions filed by Kurt Moylan (“Kurt”) and Leialoha.⁴ Doug also filed an objection that the judge presiding over the guardianship proceeding “had an ongoing relationship” with the Bank. RA, tab 65 at 83-84 (Douglas B. Moylan’s Dep., Jan. 18, 2012). During the guardianship proceeding, Doug subpoenaed the Bank for copies of TCDs and checking account information using specific language provided by Scott. The motions and declarations filed by Doug in the guardianship proceeding were based on financial information provided by Scott.

[13] In late August 2007, Richard filed a complaint against the Bank with the Guam Banking Commissioner based on Scott’s findings and information. RA, tab 80.1, Ex. 33 (Richard Moylan’s Compl., Aug. 27, 2007). More than a month later, Scott gave Doug a copy of an internal Bank memo regarding his Grandparents TCD accounts and discussing internal operations at the Bank.

[14] In September 2007, Leialoha wrote a letter to the President and CEO of the bank, Larry Butterfield (“Butterfield”), complaining that Doug had received from Scott “detailed private information” about her TCD transactions, including balances, transfers, dates, and names. RA, tab 80.1, Ex. 1 (Leialoha’s Letter to Butterfield, Sept. 17, 2007). Butterfield forwarded this letter to Richard Northey, a Bank executive, who forwarded it to Ken Kent, Chief Operating Officer/Head of Country for Australian New Zealand Banking Group Limited (“ANZ”).⁵ RA, tab 76 at 2 (Butterfield Decl., Feb. 6, 2012). Kent initiated an investigation into Leialoha’s complaint. Investigators discovered that Scott had accessed the Caretakers accounts on several occasions in September 2007, using the Bank’s computer system.

⁴ Kurt Moylan is Scott’s uncle. Kurt, Richard, and the Caretakers are siblings and children of the Grandparents.

⁵ At this time, the Bank was in the process of merging with ANZ.

[15] The investigators interviewed Scott for the first time in September 2007. During the meeting, investigators testified that Scott admitted to accessing the Moylan accounts because of his “family connection” and because “there were legal proceedings pending concerning the accounts.” RA, tab 74 at 6 (Smith Decl., Feb. 6, 2012). Investigators testified that Scott denied disclosing the account details to anyone outside the bank.

[16] After the first interview, investigators discovered that Scott had previously sent an e-mail to a family member that violated the Bank’s confidentiality policies. Scott “obtained the amounts and the dispositions of the payments received by Larry Butterfield, Richard Northey and Franklin Remo for their shares of stock in [the Bank].” RA, tab 74 at 10 (Smith Decl., Feb. 6, 2012). Scott e-mailed his cousin Troy, telling him that these top executives had cashed their checks and the exact amounts of each payment.⁶

[17] Based on the findings that Scott had accessed the Caretakers’ account information without a business purpose and disclosed confidential financial information concerning the compensation of senior Bank executives to persons outside the Bank, the investigative team recommended that Scott be terminated. Investigators shared these findings with Butterfield, Kent, and other bank officials.

[18] Scott was interviewed again by the Bank in October 2007. When asked whether he had accessed the Caretakers’ accounts without a business purpose, or disclosed confidential information, Scott replied “no comment.” RA, tab 74 at 13 (Smith Decl., Feb. 6, 2012). At the conclusion of the interview, Butterfield informed Scott that his actions were in violation of the

⁶ The July 24, 2007 e-mail states: “[W]hat are u waiting for, butterfield (\$1,210,975); northey (\$616, 727); and remo (\$958,750) all cashed theirs . . . your father should’ve given u guys (instead of these 3) more shares/options . . .” *Id.*; RA, tab 80.1, Ex. 16 (Pl.’s E-Mail Troy Moylan, July 24, 2007).

Bank's Privacy Policy and its Code of Conduct and Ethics and provided him with a letter of summary dismissal.

[19] Approximately two years later, Scott filed a Complaint against the Bank alleging eight causes of action: (1) wrongful termination, (2) fraud, (3) civil conspiracy, (4) retaliatory discharge, (5) false light invasion of privacy, (6) negligence, (7) intentional infliction of emotional distress, and (8) negligent infliction of emotional distress. RA, tab 2 at 1 (Compl., Oct. 16, 2009).

[20] The Superior Court granted summary judgment on the wrongful termination claim and the remaining claims in favor of the Bank. The court thereafter entered a Judgment dismissing Scott's Complaint and the civil action and awarding costs to the Bank. Scott timely appealed the Judgment.

II. JURISDICTION

[21] This court has jurisdiction over appeals from a final judgment pursuant to 48 U.S.C.A. § 1424-1(a)(2)(Westlaw current through Pub. L. 114-61 (2015)) and 7 GCA §§ 3107(b) and 3108(a) (2005).

III. STANDARD OF REVIEW

[22] "We review the grant of a motion for summary judgment *de novo*." *Damian v. Damian*, 2015 Guam 12 ¶ 20 (quoting *Camacho v. Estate of Gumataotao*, 2010 Guam 1 ¶ 12).

IV. ANALYSIS

A. Summary Judgment Standard

[23] Guam Rule of Civil Procedure 56(c) provides that a court may grant summary judgment "if 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 a judgment as a matter of law.” Guam R. Civ. P. 56(c). A genuine issue of material fact exists when “there is ‘sufficient evidence’ which establishes a factual dispute requiring resolution by a fact-finder.” *Iizuka Corp. v. Kawasho Int’l (Guam), Inc.*, 1997 Guam 10 ¶ 7 (citing *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987)). “A ‘material’ fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment.” *Id.* “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.” *Id.* ¶ 8 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

[24] In order to determine whether summary judgment may be granted, “the court must view the evidence and draw inferences in the light most favorable to the non[-]movant.” *Edwards v. Pac. Fin. Corp.*, 2000 Guam 27 ¶ 7 (citing *Anderson*, 477 U.S. at 249). “The court’s ultimate inquiry is to determine whether the ‘specific fact’ set forth by the nonmoving party, coupled with undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence.” *Iizuka*, 1997 Guam 10 ¶ 8 (quoting *T.W. Elec. Serv.*, 809 F.2d at 631) (internal quotation marks omitted). “Stated simply, there is a trial issue if there is sufficient evidence for a jury to return a verdict in the non-moving party’s favor.” *Kim v. Hong*, 1997 Guam 11 ¶ 8 (citing *Anderson*, 477 U.S. at 250).

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B. Whether a Genuine Issue of Material Fact Exists that Scott's Termination Violated the Public Policy Exception to the At-Will Employment Doctrine, Giving Rise to his Claim for Wrongful Termination

[25] It is not disputed that Scott was an at-will employee of the Bank. An at-will employee may be terminated at any time, for any reason, as long as notice is provided. 18 GCA § 55404 (2005); *see also Quijano v. Atkins-Kroll, Inc.*, 2008 Guam 14 ¶ 7. However, an exception to the at-will employment doctrine exists for terminations that violate an established public policy. *Ramos v. Docomo Pac., Inc.*, 2012 Guam 20 ¶¶ 2, 13. To prevail under this public policy exception, an employee must prove that:

1. [A] clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the clarity element);
2. [D]ismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the jeopardy element);
3. The plaintiff's dismissal was motivated by conduct related to the public policy (the causation element); and
4. The employer lacked overriding legitimate business justification for the dismissal (the overriding justification element).

Id. (alteration in original). “The clarity and jeopardy elements are questions of law to be determined by the court, while the causation and overriding justification factors are for the trier of fact.” *Id.* ¶ 13 (citing *Collins v. Rizkana*, 652 N.E.2d 653, 658 (Ohio 1995)).

[26] The Superior Court dismissed Scott's claim of wrongful termination by ruling that Scott failed to show a genuine issue of material fact that the public policy exception to the at-will employment doctrine applies to the facts of his case. RA, tab 146 at 10-13 (Dec. & Order, Aug. 21, 2013). The court limited its analysis to the first prong of the test laid out by this court in *Ramos v. Docomo*, finding that Scott failed to create a genuine issue that a “clear public policy” exists under the applicable statute, 10 GCA § 21003(a). *Id.*; *Ramos*, 2012 Guam 20 ¶¶ 2, 13. In reaching this conclusion, the Superior Court found that (1) Scott did not make an oral report of

suspected elderly financial abuse “immediately,” and (2) he did not make a written report of suspected elderly financial abuse within 48 hours.⁷ RA, tab 146 at 12-13 (Dec. & Order, Aug. 21, 2013).

[27] On appeal, Scott argues that (1) “there is no specific number of hours or days identified in the APS Act in which a mandatory reporter must report or ‘cause a report’ to be made to APS once the person detects abuse or suspects it”; and (2) a written report was created by APS following the oral report which satisfies the statutory requirements. Appellant’s Br. at 10 (Nov. 4, 2014) (quoting 10 GCA § 21003(a)); Appellant’s Br. at 11.

[28] In deciding that the Bank was entitled to summary judgment, the Superior Court appropriately recognized that a facial exception to the at-will employment doctrine should be reasonably limited in order to reduce “the potential of reducing at-will employment to a legal fiction.” RA, tab 146 at 13 (Dec. & Order, Aug. 21, 2013); *see also Quijano*, 2008 Guam 14 ¶ 30. However, the court did not thoroughly consider the object and policy behind the Adult Protective Services Act (APSA) when granting summary judgment.

[29] The clarity element of the *Ramos* test requires that a statute be “definite enough, in itself, to create a clear, well-recognized public policy to serve as a foundation” for a plaintiff’s claim. *Ramos*, 2012 Guam 20 ¶ 16.⁸ The APSA establishes a clear, definite public policy to “recognize

⁷ In its August 21, 2013 Decision and Order, the Superior Court dismissed Counts I, II, III, and IV of Scott’s wrongful termination claim. RA, tab 146 at 13-14 (Dec. & Order, Aug. 21, 2013); *see also* RA, tab 2 (Compl., Oct. 16, 2009) (listing four counts under the claim of wrongful termination). On appeal, Scott raises only the issue of Count I, whether his termination constituted a violation of the protections of the Adult Protective Services Act. *See* Appellant’s Br. 8-27; RA, tab 2 at 19-21 (Compl., Oct. 16, 2009). Scott does not raise the issue of Counts II, III, and IV on appeal. *See generally* Appellant’s Br.; Appellant’s Reply Br. (Jan. 2, 2015).

⁸ *Ramos* also establishes that the clarity element may be met by a showing that federal law articulates Guam’s public policy and that a remedy should be created. 2012 Guam 20 ¶ 17. Such a situation is not at issue in the present case.

that abuse, neglect and exploitation of elderly or adults with a disability are problems that require attention and intervention.” 10 GCA § 21001 (amended by Pub. L. 31-278:2 (Dec. 28, 2012)).

[30] In furtherance of this policy, the APSA establishes mandatory reporting requirements for employees and professionals who uncover suspected abuse of elderly or adults with disabilities in the course of their employment. *See* 10 GCA § 21003(a).

(a) Any person who, in the course of his or her employment, occupation or professional practice . . . has actual knowledge or reasonable cause to believe that an elderly or adult with a disability is suffering from . . . abuse as defined in [§ 21002], shall immediately make a verbal report of such information or cause a report to be made to the Bureau of Adult Protective Services or its authorized agency and shall, within forty-eight (48) hours, make a written report to the Bureau or its authorized agency. If a verbal report is made on a Friday, a written report will be made by the next workday.

Id. As the Bank’s Controller, Scott was subject to the mandatory reporting requirements of 10 GCA § 21003(b) (“Persons required to report abuse under Subsection (a) include . . . banking or financial institution personnel . . .”).

[31] In order to satisfy the clarity element of the *Ramos* test, Scott had to meet the reporting requirements of 10 GCA § 21003(a). Specifically at issue is the requirement that a mandatory reporter “shall immediately make a verbal report . . . and shall, within forty-eight (48) hours, make a written report.” 10 GCA § 21003(a). The Superior Court found that (1) Scott’s verbal report was made seven days after the alleged abuse and therefore was not made “immediately”; and (2) “there [was] no evidence of a written report.” RA, tab 146 at 12-13 (Dec. & Order, Aug. 21, 2013). Accordingly, the court dismissed the wrongful termination claim.

[32] The record shows an oral report was made with APS “on or about June 6, 2007.” RA, tab 177 at 2 (Richard E. Moylan’s Aff., Mar. 13, 2014). Scott discovered the suspected abuse in late May 2007. Whether Scott’s action to report was sufficiently “immediate” to satisfy the requirements of 10 GCA § 21003(a) is a question of law.

[33] The Superior Court's assertion that there was no evidence of a written report is a question of fact left unanswered by the record. Scott argues that the written report requirement was satisfied by the APS Investigator immediately after receiving his oral report and that this vital record was not provided to the court because APS reports are sealed by law under 10 GCA § 21010.⁹ Appellant's Br. at 11. The record shows a Notice of Intent to Subpoena Records was submitted to the court by Scott. RA, tab 178 (Notice Intent Subpoena Records, Mar. 13, 2014). The record shows that a hearing was not provided to entertain Scott's request to subpoena the necessary records. Appellant's Br. at 11.

[34] We must now determine whether (1) an oral report made seven days after the discovery of suspected abuse fit the definition of "immediate" reporting under 10 GCA § 21003(a), and (2) a written report allegedly made by an APS Investigator as a matter of his employment duties fulfilled the 48-hour, written report requirement of 10 GCA § 21003(a).

[35] Because the object and policy of the APSA is to protect the elderly and disabled adults, the reporting requirements of 10 GCA § 21003(a) should be construed liberally in favor of promoting the reporting of suspected abuse. This approach is consistent with the fact that the legislature chose to include the term "immediately" instead of a specified reporting deadline. Therefore, we hold that in the limited context of the facts of this case, Scott's oral reporting within seven days after the discovery of alleged abuse qualifies as sufficiently immediate.

[36] The next issue we must address is whether a written report prepared by APS within 48 hours of Scott's oral report would satisfy the written report requirement of 10 GCA § 21003(a). Considering the policy reasons behind the APSA and the need to promote the reporting of suspected abuse, we hold that preparation of a timely written report by APS based on the verbal

⁹ Scott's brief cites the former 10 GCA § 2959. That section was codified as 10 GCA § 21010.

report of a person statutorily required to report abuse satisfies the written report requirement of 10 GCA § 21003(a). A question of fact still remains, however, whether a written APS report was created within the 48-hour statutory period.

[37] Construing the evidence and all reasonable inference therefrom in the light most favorable to Scott, a genuine issue of material fact exists as to whether a timely written report was prepared. The Superior Court erred by failing to hear Scott's request to subpoena the necessary records in order to determine whether a timely written report was prepared. Scott attempted to obtain the material records but was prevented from doing so by the court, which is probative evidence tending to support his claim.

[38] The APSA establishes a clear, definite public policy, and Scott has shown a dispute as to genuine issues of material fact that he has met the reporting requirements of 10 GCA § 21003(a). Based upon the available evidence and all reasonable inferences therefrom—when viewed in a light most favorable to Scott—one may infer that there is a genuine issue of material fact as to whether he has met the clarity element of the public policy exception.

[39] The jeopardy element, the second prong of the *Ramos* test, requires that terminating employees under circumstances like those involved in Scott's termination would jeopardize the public policy. *Ramos*, 2012 Guam 20 ¶¶ 2, 13. Allegedly terminating an employee in contravention of the protections provided by the APSA clearly satisfies this element.

[40] The Bank argues that, even if a clear public policy exists, Scott's termination also fails to satisfy the third and fourth prong of the *Ramos* test. Appellee's Br. at 39-41 (Dec. 18, 2014). Specifically, the Bank asserts that (1) Scott's reporting was not a cause for his termination; and (2) it had an overriding justification for terminating Scott. *Id.*

[41] The causation element of the *Ramos* test requires that Scott's termination was "motivated by conduct related to the public policy." *Ramos*, 2012 Guam 20 ¶¶ 2, 13. Therefore, to defeat summary judgment, Scott must create a genuine issue of material fact that his termination was motivated by his reporting of suspected abuse.

[42] The Bank argues that "it did not terminate [Scott's] employment because he caused a report to APS." Appellee's Br. at 40. To support this argument, the Bank offered evidence that top Bank executives Smith, Butterfield, and Kent, were unaware at the time of Scott's termination that Scott had disclosed any information about the Caretakers' accounts to anyone outside the Bank, including APS. Appellee's Br. at 42; RA, tab 74 at 15-16 (Smith Decl., Feb. 6, 2012); RA, tab 75 at 9 (Kent Decl., Feb. 6, 2012).

[43] To rebut this evidence, Scott offered an affidavit from Franklin Remo which asserted that Mr. Remo notified Kent of Scott's reporting to the APS by giving him a copy of a September 17, 2007 letter which detailed Scott's role as a whistleblower. RA, tab 139 at 2 (Supp. Remo Aff., Apr. 18, 2013). In the affidavit, Remo stated the following:

I personally gave to [Kent] the September 17, 2017 letter from [Richard] to the Banking Commissioner, before [Scott] was terminated, and while I was still employed with the Bank That September 17, 2007 letter identified [Scott] as the person who reported the alleged embezzlement and the theft of over \$1,500,000.00 from elderly [Grandparents] to the Guam Public Guardian and to [APS]. Along with [Kent], I observed [Butterfield] and [Smith] were also involved in responding to the Banking Commissioner investigators that had been at the Bank because of the September 17, 2007 letter from [Richard] to the Banking Commissioner.

RA, tab 139 at 3 (Supp. Aff. Frank A. Remo, Apr. 18, 2013).

[44] Termination motivated by Scott's mandatory reporting would jeopardize the public policy to protect elderly and disabled adults from abuse because it would discourage future

reporting. Scott presented evidence that at least one Bank executive knew that Scott had caused a report to APS before Scott was terminated.

[45] The Bank argues that “[a]t best, the fact that Ken Kent received a copy of Richard Moylan’s letter only created the *possibility* that he knew Scott had caused something to be reported.” Appellee’s Br. at 43. However, the evidence points to the possibility that Scott’s termination was motivated by his reporting, which is sufficient to overcome a motion for summary judgment. It is this possibility that creates a genuine issue of material fact when all inferences are reviewed in the light most favorable to Scott. To defeat the Bank’s motion for summary judgment, Scott need not conclusively prove the elements of his claim. He must only provide some probative evidence in support of his claim sufficient that a rational or reasonable jury might return a verdict in his favor.

[46] The Bank argues that “Scott has produced no evidence that show[s] Mr. Kent read the letter, that he understood the functions of APS or the Public Guardian or that he understood that Scott had used confidential customer financial information to make the report” or that establishes that Kent “provided copies of the letter to or even told Butterfield, Smith or any other senior executive what the letter said.” Appellee’s Br. at 43-44. Here, again, the Bank overlooks the fact that when deciding a motion for summary judgment, the Superior Court must draw inferences in the light most favorable to the non-movant. Scott need not prove the elements of his claim by the applicable burden of proof at trial. He need only provide evidence that, when coupled with the undisputed background or contextual facts, is such that a reasonable jury *might* return a verdict in his favor. He need only provide sufficient evidence to establish a factual dispute requiring resolution by a fact-finder.

[47] Finally, the Bank notes that the Superior Court found that the September 17, 2007 letter did not create a genuine issue of material fact. Appellee's Br. at 44 (citing RA, tab 182 at 15-16 (Dec. & Order, May 1, 2014)). Our review in this matter, however, is *de novo*. This means that while we refer to the Superior Court's record to determine the facts, we rule on the evidence and matters of law without deference to findings below. Contrary to the findings of the Superior Court, we find that the evidence creates a genuine issue of material fact as to whether the Bank executives were aware of Scott's reporting and the details of the report before the Bank made the decision to terminate Scott.

[48] Scott relies on the evidence as circumstantial evidence that his reporting activity was the cause for his termination. Viewed in the light most favorable to Scott, the specific fact that the executives of the Bank knew that he reported suspicious financial activity by disclosing confidential Bank information, coupled with the undisputed background, is such that a rational or reasonable jury might return a verdict in Scott's favor. Because a genuine issue of material fact exists as to whether Scott's termination was caused by his reporting, the third prong of the *Ramos* test does not prevent Scott from prevailing against the Bank's Motion for Summary Judgment.

[49] The fourth element of the *Ramos* test requires that the Bank did not have an "overriding legitimate business justification" for Scott's termination. *Ramos*, 2012 Guam 20 ¶¶ 2, 13. Therefore, to defeat summary judgment, Scott must create a genuine issue of material fact that the Bank did not have an overriding, legitimate business reason to terminate his employment.

[50] The Bank argues that Scott was terminated because "(a) he violated [B]ank policy and federal banking law by disclosing non-public financial information about three executives to persons outside the Bank" and "(b) . . . he accessed [the Caretakers'] accounts at the Bank

without a business purpose.” Appellee’s Br. at 39. To support this argument, the Bank offers evidence that Scott sent an e-mail to his cousin, Troy, disclosing that Bank executives Butterfield, Remo, and Northey cashed their checks and the exact amount they were paid as a result of the Bank’s merger with ANZ, and that Scott had accessed the Caretakers’ account information without a legitimate business purpose. *Id.* at 47.

[51] Scott contends that Troy had a right to the salary information because he was a shareholder of the Bank and that the same figures were included in the shareholders’ proxy statement which Troy should have received. Appellant’s Br. at 5; RA, tab 87 at 21 (Pl.’s Aff., Mar. 30, 2012). Scott further argues that his comments did not reveal confidential information about the executives’ personal accounts, only information about the Bank’s escrow account. RA, tab 87 at 22 (Pl.’s Aff.). Scott also offered a formula with which he claims anyone with access to the proxy statement could calculate the values of the executives’ compensation. *Id.* at 23.

[52] The Bank argues that as a result of the merger, all former shareholders ceased to have any rights as such on July 1, 2007. Appellee’s Br. at 49. The Bank also asserts that even if Troy was a shareholder, he had no right to know that the executives had “cashed” or “deposited” their checks in their personal accounts. Appellee’s Br. at 47. An investigation conducted under the direction of Kent uncovered that Scott had accessed the Caretakers’ account information “on several occasions in September using the Bank’s computer system.” RA, tab 75 at 4 (Kent Decl.). Reports generated as a result of that investigation confirm that Scott accessed the Caretakers’ accounts on September 7 and 14, 2007. RA, tab 80.1, Ex. 3 (Access Logging Report, Sept. 8, 2007). When confronted by the Bank about this access, Scott stated that he accessed the accounts because of a “family connection and the fact that there were legal matters pending.” *See* RA, tab 19.1 at 35 (Pl.’s Dep., Mar. 1, 2011).

[53] The Bank argues that Scott accessed the accounts in order to aid Doug and Richard in their ongoing petition for guardianship over the estate and person of his Grandparents, in violation of Bank confidentiality policies and federal banking law. Appellee's Br. at 12 and 14. Scott concedes that he "participated in SP0110-07 guardianship action by providing crucial financial information to the [Superior Court] and testifying to help [his Grandparents] recover their over \$1.5M in life savings."¹⁰ Reply Br. at 18. He argues that this participation and continued access is protected under the public policy exception to the at-will employment doctrine because it stemmed from his duties to report suspected financial abuse under 10 GCA § 21003. *See id.* at 18-19.

[54] Viewed in the light most favorable to Scott, a genuine issue of material fact exists as to whether Scott had a valid business purpose to access the Moylan Accounts in September 2007. This is a material issue with regard to whether or not the Bank had an overriding justification to terminate Scott.

[55] On a motion for summary judgment, the trial court must construe all evidence in the light most favorable to the nonmoving party, drawing all inferences and resolving all ambiguities in its favor. *Edwards*, 2000 Guam 27 ¶ 7. The evidence, viewed in the light most favorable to Scott, the non-movant, that Scott sent an e-mail to his cousin commenting on executive salaries and continued to access the Moylan accounts are such that a rational or reasonable trier of fact might still find in Scott's favor.

¹⁰ As a result of his participation in the guardianship proceeding, the Superior Court ultimately found that the Caretakers were not authorized to transfer the approximately \$1,500,000.00 out of the names of the Grandparents and ordered the money returned. RA, tab 90, Ex. 1 (Finds. Fact & Concl. L., Nov. 10, 2008). The decision was affirmed by this court in *In re Guardianships of Francis L. Moylan & Yuk Lan Moylan*, 2011 Guam 16.

[56] Because a genuine issue of material fact exists as to whether his termination violated the public policy exception to the at-will employment doctrine, the decision granting summary judgment on the wrongful termination claim should be reversed.

C. Whether Retaliatory Discharge is a Separate Cause of Action from Wrongful Termination

[57] The Superior Court declined to recognize retaliatory discharge as a cause of action separate from wrongful termination, noting that this court has yet to do so. RA, tab 182 at 14-15 (Dec. & Order, May 1, 2014). The Bank supports this decision, arguing that retaliatory discharge and wrongful termination are “simply different names for the same claim.” Appellee’s Br. at 59. Scott argues that retaliatory discharge is a “different [and] distinct sub-category cause of action to wrongful discharge.” Appellant’s Br. at 26 (citing *Tiede v. CorTrust Bank, N.A.*, 748 N.W.2d 748, 751 (S.D. 2008)). However, the authority cited by Scott does not support his argument that retaliatory discharge is a distinct subcategory of wrongful termination.

[58] Scott first cites *Tiede v. CorTrust Bank, N.A.*, 748 N.W.2d 748, 751 (S.D. 2008), a South Dakota case. Appellant’s Br. at 26. The primary issue in that case was whether a state law claim was preempted by federal law. *Tiede*, 748 N.W.2d at 749. The Supreme Court of South Dakota acknowledged a distinction between wrongful termination and retaliatory discharge by explaining South Dakota has historically recognized both a contract action for wrongful termination and a tort action for retaliatory discharge. *Id.* at 752 (“Although retaliatory discharge is concededly an exception to the employment at-will doctrine, the latter concept being rooted in contract, retaliatory discharge is a tort arising from a breach of public policy duties independent of the employment contract.”). South Dakota initially made this distinction in an attempt to avoid federal preemption of a state law tort action for retaliatory discharge. *Id.* at 751; *see also Weber v. First Fed. Bank*, 523 N.W.2d 720 (S.D. 1994) (holding that federal regulations on bank

employment relations preempted a state law claim for wrongful termination). However, the *Tiede* court contested the efficacy of this distinction, determining that an arbitrary distinction between contract and tort claims—wrongful termination and retaliatory discharge—had no effect on federal preemption. 748 N.W.2d at 753 (“[T]he [defendant] may preempt conflicting state law employment claims regardless of any distinction between claims based in tort and contract.”). The court ultimately treated retaliatory discharge as a breach of public policy in the same way that this court has consistently treated wrongful termination. *See, e.g., Ramos*, 2012 Guam 20.

[59] Scott next cites *Quijano v. Atkins-Kroll*, 2008 Guam 14, for the proposition that retaliatory discharge is “one of many categories for wrongful discharge.” Appellant’s Br. at 26. This case, however, only speaks of wrongful termination, makes no mention of “retaliatory discharge,” and does not support Scott’s proposition in any way.

[60] Scott is mistaken when he claims that the United States Supreme Court recognized the distinction between wrongful termination and retaliatory discharge in *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987). *See* Appellant’s Br. at 26. That case was about federal preemption of state law and removal to federal court. *See Metro. Life*, 481 U.S. at 58 (involving the removal to federal court of state law claims stemming from an action to recover employee benefits under the Employee Retirement Security Income Act of 1974). The Court never expressly discussed any distinction between wrongful termination and retaliatory discharge other than mentioning them as claims brought by the plaintiff in the case below. The Court then lumped the causes of action together and held that all of the plaintiff’s common-law claims were preempted by federal law. *Id.* at 67.

[61] Scott's remaining authority is equally unpersuasive. See *Stebbins v. Univ. of Chicago*, 726 N.E.2d 1136 (Ill. App. Ct. 2000); *Witt v. Forest Hosp., Inc.*, 450 N.E.2d 811 (Ill. App. Ct. 1983); *Petermann v. Int'l Bd. of Teamsters*, 344 P.2d 25, 27-28 (Dist. Ct. App. 1959).

[62] The strongest support for the Scott's proposition that retaliatory discharge should be considered a separate cause of action is found in *Tiede*, 748 N.W.2d at 749, where South Dakota explicitly acknowledges a tradition of treating the action separately. However, even in that case, the court does not ultimately apply a different standard to the actions. It treats retaliatory discharge as a violation of public policy in the same way that this court treats wrongful termination. *Id.* at 752 ("[R]etaliatory discharge is a tort arising from a breach of public policy . . ."). Therefore, if we were to create a separate cause of action for retaliatory discharge, we would still apply the public policy exception to the at-will employment doctrine as the applicable standard. Taken together with the fact that we have not previously recognized retaliatory discharge as a separate cause of action, Scott's arguments are unpersuasive.

[63] Because this court has not previously recognized retaliatory discharge as a separate cause of action and Scott has presented no compelling reason to do so now, we affirm the Superior Court's grant of summary judgment on the retaliatory discharge claim.

D. Whether a Genuine Issue of Material Fact Exists that Scott's Termination Gave Rise to a Claim for Negligent Disclosure or False Light Invasion of Privacy

[64] At trial, Scott asserted claims on two different theories stemming from the same set of alleged facts. First, Scott asserted an action for negligent disclosure. Second, Scott asserted a claim of false light invasion of privacy. The only evidence offered in support of either of these claims was an e-mail the Bank sent to its employees, notifying them of his termination. RA, tab 2, Ex. C (Notice E-Mail, Oct. 19, 2007). The e-mail stated the following:

To: All Employees of Citizens Security Bank

It is with disappointment that I announce that [Scott] has left the employment of [the Bank] effective earlier today. As with all internal matters, further information regarding Scott's departure remains confidential.

Scott's role will be posted and advertised at the earliest opportunity. Should you have any finance questions in the interim please refer these to Jennie-Lyn, Josie, or [Kent] following his return on Monday.

Larry Butterfield
President and CEO

Id.

[65] The Superior Court dismissed Scott's claim for negligent disclosure after finding that there was no genuine issue of material fact on a claim of "negligent discharge." RA, tab 182 at 17 (Dec. & Order, May 1, 2014). Scott argues on appeal that the court misinterpreted his negligence claim, which is "for negligently disclosing that he was terminated to others." Appellant's Br. at 29. In his Complaint, Scott stated that "[o]n information and belief, [the Bank] failed to exercise reasonable care or competence in maintaining such confidential personnel information." RA, tab 2 at 36 (Compl.). This suggests that the court misconstrued Scott's cause of action.

[66] "In a case for negligence, the establishment of tort liability requires the existence of a duty, the breach of such duty, causation and damages." *Guerrero v. McDonald's Int'l Prop. Co.*, 2006 Guam 2 ¶ 9 (citations omitted). Because a negligence action is based on the breach of a duty to the plaintiff, Scott must show that the Bank owed him a duty, such as one of confidentiality. Here, Scott has failed to provide any evidence that the Bank owed him any duty whatsoever upon termination.

[67] Even when the trial court makes an erroneous finding, this court may affirm the judgment on any grounds supported by the record. *Joseph v. Guam Bd. of Allied Health Exam'rs*, 2015

Guam 4 ¶ 13 (citations omitted). It is true that the Superior Court based its decision to grant summary judgment on Scott's negligence claim based on a misapprehension of his pleadings. Scott's claim for "negligence" was based on the allegation that the Bank "negligently disclos[ed] that he was terminated to others." See Appellant's Br. at 29; see generally RA, tab 2 at 36-37 (Compl.). Nonetheless, the Bank demonstrated that Scott produced no evidence that showed a genuine issue of material fact that the Bank disclosed the reasons for his termination to anyone inside or outside of the Bank. RA, tab 171 at 13 (Def.'s Mem. Law Supp. Mot. Summ. J., Feb. 14, 2014). Therefore, we may affirm the judgment on the proper ground that Scott failed to show a genuine issue of material fact with regard to his negligent disclosure claim.

[68] In response to a motion for summary judgment, it is Scott's burden to produce "at least some significant probative evidence tending to support the complaint." *Iizuka*, 1997 Guam 10 ¶ 8 (citations omitted). Scott does not identify any specific facts from the record to support his claim that the Bank was negligent, or breached a duty, when it shared news of his leaving the employment of the Bank to its employees.

[69] The invasion of an individual's right to privacy gives rise to four potential causes of action in tort: (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of the other's name or likeness; (3) unreasonable publicity given to the other's private life (public disclosure of private facts); and (4) publicity that unreasonably places the other in a false light before the public (false light invasion of privacy). *Varnado v. Midland Funding LLC*, 43 F. Supp. 3d 985, 991 (N.D. Cal. 2014) (applying California law); *Cumberland Contractors, Inc. v. State Bank & Trust Co.*, 755 S.E.2d 511, 517 (Ga. Ct. App. 2014); see also Restatement (Second) of Torts § 652A (1977).

[70] False light invasion of privacy (1) is publicized; (2) is false representation; (3) is highly offensive to a reasonable person; and (4) is made with knowledge that it was false or reckless disregard as to its truth or falsity. *See Lorenzo v. United States*, 719 F. Supp. 2d 1208, 1213 (S.D. Cal. 2010) (citing *Fellows v. Nat'l Enquirer, Inc.*, 721 P.2d 97, 99-100 (Cal. 1986)); Restatement (Second) of Torts § 652E (1977).

[71] Scott has failed to show that the Bank made public any information about him that was false or that would be considered “highly offensive” to a reasonable person. The internal Bank e-mail reveals that Scott “has left the employment of [the Bank]” and “further information regarding Scott’s departure remains confidential.” RA, tab 2, Ex. C (Notice E-Mail). The e-mail revealed this information only to Bank employees. Scott failed to raise a genuine issue of material fact that the Bank violated a duty to him or disclosed any information that was false or would be highly offensive to a reasonable person, and the decision of the Superior Court to grant summary judgment on both the negligence and false light invasion of privacy claims was sound.

E. Whether a Genuine Issue of Material Fact Exists that Scott’s Termination Gave Rise to a Claim for Civil Conspiracy

[72] Although we have not yet spoken on the legal doctrine of civil conspiracy, the doctrine gives rise to a well-settled cause of action in both federal and state law. A *prima facie* showing of civil conspiracy requires the plaintiff to allege in his complaint “(1) the formation and operation of the conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3) the damage resulting from such act or acts.” *Wasco Products Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006) (citations omitted); *see also Prakashpalan v. Engstrom, Lipscomb & Lack*, 167 Cal. Rptr. 3d 832, 858 (Ct. App. 2014); *Vom Lehn v. Astor Art Galleries, Ltd.*, 380 N.Y.S.2d 532, 538 (Sup. Ct. 1976) (emphasizing need to show intentional participation and damage); *Van Royen v. Lacey*, 277 A.2d 13, 14 (Md. 1971) (emphasizing the need for an act and

damage); 16 Am. Jur. 2d *Conspiracy* § 51; 12 Cal. Jur. 3d *Civil Conspiracy* § 2. Formation of a civil conspiracy requires facts showing “a group of two or more persons who agreed to a common plan . . . to commit a tortious act.” *Rockridge Trust v. Wells Fargo, N.A.*, 985 F. Supp. 2d 1110, 1157 (N.D. Cal. 2013) (citation omitted).

[73] In his Complaint, Scott alleged that “managerial agents, employees and/or representatives” of the Bank conspired to terminate him. RA, tab 2 at 31 (Compl.). Importantly, he did not allege at trial or on appeal that anyone outside of the Bank conspired with Bank personnel.

[74] The intracorporate conspiracy doctrine states that members of a corporation cannot conspire amongst themselves in their capacity as agents of the corporation. *See L.L. Nelson Enters., Inc. v. County of St. Louis, Mo.*, 673 F.3d 799, 812 (8th Cir. 2012) (“[A] corporation and its agents are a single person in the eyes of the law, and a corporation cannot conspire with itself” (citation omitted)); *Harp v. King*, 835 A.2d 953, 971 (Conn. 2003) (explaining majority view of intracorporate immunity is that “wholly intracorporate conduct does not satisfy the plurality requirement necessary to establish an actionable conspiracy claim”); *Black v. Bank of Am.*, 35 Cal. Rptr. 2d 725, 728 (Ct. App. 1994) (“When a corporate employee acts in the course of his or her employment, on behalf of the corporation, there is no entity apart from the employee with whom the employee can conspire.”); *see also* Robin Miller, Annotation, *Construction and Application of “Intracorporate Conspiracy Doctrine” as Applied to Corporation and Its Employees—State Cases*, 2 A.L.R.6th 387, 387 (2005).

[75] Because those named by Scott in his Complaint are all agents of the Bank, they cannot be viewed as conspiring with one another or with the Bank and no conspiracy could be formed. Therefore, Scott did not raise a genuine issue of material fact and the Superior Court did not err

in dismissing the civil conspiracy cause of action. *See* RA, tab 182 at 14 (Dec. & Order, May 1, 2014).

F. Whether a Genuine Issue of Material Fact Exists that Scott's Termination Gave Rise to Claims for Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress

[76] Scott argues on appeal that the Superior Court erred in dismissing his IIED and NIED claims because the dismissal was predicated upon the court's dismissal of the wrongful termination claim. Appellant's Br. at 30. He argues that when the court determined that the public policy exception to the at-will employment doctrine did not apply, it consequently determined that the Bank could not have intentionally or negligently inflicted emotional distress. He further argues that if his allegations are taken as true—that the Bank used false justifications to terminate him—then such conduct meets the “extreme and outrageous” element of IIED and NIED. Reply Br. at 21. The Bank argues the Superior Court did not tie the IIED and NIED claims to its ruling and that Scott simply failed to allege sufficient facts to establish his claims. Appellee's Br. at 58-59.

[77] The elements of IIED are “(1) extreme and outrageous conduct by the defendant; (2) intention to cause or reckless disregard of the probability of causing emotional distress; (3) severe emotional distress, on the plaintiff's part; and (4) actual and proximate causation of that emotional distress.” *Cruz Reyes v. United States*, Civ. No. 08-00005, slip op. at *5 (D. Guam, Dec. 15, 2010) (citing Restatement (Second) of Torts § 46 (1965)).

[78] The elements of NIED are (1) extreme and outrageous conduct by the defendant; and (2) the defendant should have realized that his conduct posed an unreasonable risk of causing distress that might result in illness or bodily harm. *Guerrero v. DLB Constr. Co.*, 1999 Guam 9 ¶ 17 (citing Restatement (Second) of Torts §§ 46, 313 (1988)).

[79] We agree with the Bank that the Superior Court did not expressly tether its ruling on the IIED and NIED claims to its ruling on wrongful termination and the public policy exception. *See* RA, tab 182 at 17, 18 (Dec. & Order, May 1, 2014) (“In this case the [c]ourt is not persuaded that [Scott] has asserted sufficient facts Under the above findings of undisputed fact the [c]ourt is unable to find that a material issue of disputed fact remains as to this cause of action.”).

[80] However, Scott’s argument is persuasive that if taken as true, his allegations and evidence might persuade a trier of fact to return a verdict in Scott’s favor. As discussed above, Scott has brought forth sufficient evidence that a genuine issue of material fact exists as to his wrongful termination claim. The ultimate decision whether Scott’s termination violated established public policy will satisfy or conclusively negate the “extreme and outrageous” conduct element of IIED and NIED. Therefore, the fate of the IIED and NIED claims are dependent upon and related to the claim for wrongful termination.

[81] Because the IIED and NIED claims are related and dependent upon the outcome of the wrongful termination cause of action, the decision of the Superior Court to grant summary judgment on these claims should be reversed.

V. CONCLUSION

[82] We reverse the decision of the Superior Court to grant summary judgment. Because there are genuine issues of material fact as to whether Scott’s termination violated established public policy, the lower court’s dismissal of Scott’s claims for wrongful termination, intentional infliction of emotional distress, and negligent infliction of emotional distress were in error.

[83] We affirm the decision of the Superior Court dismissing Scott’s claims for retaliatory discharge, civil conspiracy, negligent disclosure, and false light invasion of privacy because

there is no genuine dispute as to any material fact and the Bank was entitled to judgment as a matter of law.

[84] For the reasons set forth above, we **REVERSE** in part, **AFFIRM** in part, and **REMAND** for further proceedings not inconsistent with this opinion.

Original Signed : **F. Philip Carbullido**
By

Original Signed : **Katherine A. Maraman**
By

F. PHILIP CARBULLIDO
Associate Justice

KATHERINE A. MARAMAN
Associate Justice

Original Signed : **Robert J. Torres**
By

ROBERT J. TORRES
Chief Justice