Intermediate Court of Appeals of Hawai'i.
Joseph **VLASATY**, Plaintiff-Appellant,
v.
The **PACIFIC CLUB** and William M. Swope, Defendants-Appellees.

No. 9093.
Sept. 29, 1983.

Terminated manager of private **club** sued the **club** and its president for defamation and breach of employment contract. The First Circuit Court, Honolulu County, James H. Wakatsuki, J., rendered summary judgment for the **club** and the president, and former manager appealed. The Intermediate Court of Appeals, Tanaka, J., held that: (1) it was not abuse of discretion to render summary judgment without giving manager opportunity to depose the president; (2) hearsay statements by fellow employees were admissible against employer as they were made within scope of employment; (3) allegedly defamatory statement of president to supervisory employees concerning alleged thefts by manager and board of governor's letter to **club** members refuting manager's allegations were qualifiedly privileged; and (4) absent violation of public policy the manager had no right of action in contract or tort for termination of employment, which was at will.

Affirmed.

West Headnotes

[1] Pretrial Procedure 307A ⚷724

307A Pretrial Procedure
307AIV Continuance
307Ak723 Motion and Proceedings Thereon
307Ak724 k. Affidavits and Evidence. Most Cited Cases

Affidavit requirement for continuance of summary judgment motion would not be overlooked notwithstanding contention that opponent was deprived of adequate opportunity to conduct discovery, where summary judgment motion was filed 14 months after commencement of action and opponent, asserting denial of opportunity to depose movement, was mainly responsible for moving the case forward. Rules Civ.Proc., Rule 56(f).

[2] Judgment 228 ⚷181(2)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(2) k. Absence of Issue of Fact. Most Cited Cases

Judgment 228 ⚷181(3)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(3) k. Presence of Question of Law. Most Cited Cases

Summary judgment can be rendered only when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Rules Civ.Proc., Rule 56(c).

[3] Libel and Slander 237 ⚷23.1

237 Libel and Slander
237I Words and Acts Actionable, and Liability Therefor
237k23 Publication
237k23.1 k. In General. Most Cited Cases
(Formerly 237k23)

Since law of defamation protects the interest of reputation, there is no actionable tort unless there has been a publication, and "publication" means a communication of defamatory matter to some third party other than the person defamed.

[4] Judgment 228 ⚷185(3)

228 Judgment

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228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(3) k. Admissibility. Most Cited Cases

Judgment 228 ⚷186

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k186 k. Hearing and Determination. Most Cited Cases

Hearsay evidence in a deposition is inadmissible and may not be considered on summary judgment. Rules Civ.Proc., Rule 56; Rules of Evid., Rule 801(3).

[5] Judgment 228 ⚷185(3)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(3) k. Admissibility. Most Cited Cases

Statements by several supervisory employees to another employee relating allegedly defamatory statement made about the latter by employer, i.e., that employee had been stealing from employer, were admissible against the employer, on summary judgment, under the vicarious admissions exception to the hearsay rule as statements were made in scope of employment. Rules Civ.Proc., Rule 56; Rules of Evid., Rule 801(3).

[6] Libel and Slander 237 ⚷45(1)

237 Libel and Slander
237II Privileged Communications, and Malice Therein
237k40 Qualified Privilege
237k45 Common Interest in Subject-Matter
237k45(1) k. In General. Most Cited Cases

To be entitled to qualified privilege which arises when author of defamatory statement reasonably acts in discharge of some public or private duty, is essential that the author and recipient have a common interest and that the communication be of the type reasonably deemed to protect or further that interest.

[7] Libel and Slander 237 ⚷44(3)

237 Libel and Slander
237II Privileged Communications, and Malice Therein
237k40 Qualified Privilege
237k44 Discharge of Duty to Others
237k44(3) k. As to Character of Employee. Most Cited Cases

A qualified privilege surrounded statements by president of private **club** at meeting with supervisor if employees accusing **club** manager of stealing **club** property and cloak of privilege also surrounded letter from board of governors apprising **club** members of result of board's investigation of charges raised in the manager's letter to members asserting that the president's accusation was untrue.

[8] Libel and Slander 237 ⚷123(8)

237 Libel and Slander
237IV Actions
237IV(E) Trial, Judgment, and Review
237k123 Questions for Jury
237k123(8) k. Privilege. Most Cited Cases

Question whether a communication is privileged is to be determined by the court.

[9] Libel and Slander 237 ⚷50.5

237 Libel and Slander
237II Privileged Communications, and Malice Therein
237k50.5 k. Exceeding Privilege or Right. Most Cited Cases

(Formerly 237k501/2)

Where statement by **club** president to several

supervisory employees concerning alleged stealing by **club** manager was privileged the same statement, as made by president to the manager the day before, did not lose its privilege merely because it was not made directly to one supervisor, who allegedly overheard it.

[10] Libel and Slander 237 ⚷50.5

237 Libel and Slander
237II Privileged Communications, and Malice Therein
237k50.5 k. Exceeding Privilege or Right. Most Cited Cases
(Formerly 237k501/2)
Qualified privilege arising where author of defamatory matter and recipient have a common interest and communication is in furtherance thereof is conditional and is lost if abused.

[11] Libel and Slander 237 ⚷123(8)

237 Libel and Slander
237IV Actions
237IV(E) Trial, Judgment, and Review
237k123 Questions for Jury
237k123(8) k. Privilege. Most Cited Cases
Whether qualified privilege was abused is for trier of fact.

[12] ⚷40(3)

231H Labor and Employment
231HI In General
231Hk37 Term, Duration, and Termination
231Hk40 Definite or Indefinite Term; Employment At-Will
231Hk40(3) k. Particular Cases. Most Cited Cases
(Formerly 255k30(1.5), 255k36 Master and Servant)
Where employment of manager of private **club**, who worked for **club** for 18 1/2 years, was under a contract of indefinite duration the contract was terminable at will by either party, for any reason or no reason, and absent a violation of public policy in termination decision, the manager had no actionable breach of contract or tort claim against employer.

⚷40(2)

231H Labor and Employment
231HI In General
231Hk37 Term, Duration, and Termination
231Hk40 Definite or Indefinite Term; Employment At-Will
231Hk40(2) k. Termination; Cause or Reason in General. Most Cited Cases
(Formerly 255k20 Master and Servant)
Generally, an employment contract of indefinite duration is terminable at the will of either party for any reason or no reason.

Principal and Agent 308 ⚷122(1)

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(A) Powers of Agent
308k118 Evidence as to Authority
308k122 Declarations and Acts of Agent
308k122(1) k. Declarations and Acts in General. Most Cited Cases
When offered against a party, a statement uttered by his agent or employee concerning a matter within the scope of his agency or employment and made during the existence of the relationship is admissible under the vicarious admission exception to the hearsay rule.

***829 Syllabus by the Court*

1. ***556** A summary judgment can be rendered only when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.

2. An actionable defamation requires publication. Publication means a communication of the defamatory matter to some third party other than the person defamed.

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3. Hearsay evidence in depositions is inadmissible and may not be considered on a motion for summary judgment.

4. When offered against a party, a statement uttered by his agent or employee concerning a matter within the scope of his agency or employment and made during the existence of the relationship is admissible under the vicarious admission exception to the hearsay rule.

5. A qualified privilege arises when the author of the defamatory statement reasonably acts in the discharge of some public or private duty, and where the statement involves a subject matter in which the author and the recipients thereof have a common interest or duty.

6. A qualified privilege is conditional and is lost if it is abused.

7. Generally, an employment contract of indefinite duration is terminable at the will of either party for any reason or no reason.

8. ***557** In the absence of violation of any public policy by the employer, a discharged employee under an employment contract of indefinite duration has no actionable claim for breach of contract or tort.
***565** David N. Ingman, Honolulu, for plaintiff-appellant.

Walter Davis, Honolulu (Ashley K. Fenton and John C. Wong, Honolulu, with him on the brief; Davis, Playdon, Reid & Richards, Honolulu, of counsel), for defendants-appellees.

Before BURNS, C.J., and HEEN and TANAKA, JJ.

TANAKA, Judge.
In this action for defamation and breach of an employment contract, plaintiff Joseph **Vlasaty** (**Vlasaty**) appeals from the summary judgment in favor of defendants The **Pacific Club** (**Pacific**) and William M. Swope (Swope).

The sole issue on appeal is whether viewing the evidence in the light most favorable to **Vlasaty** there is no genuine issue as to any material fact and defendants are entitled to a judgment as a matter of law. We answer yes and affirm.

Pacific, a private **club** in Honolulu, is a Hawaii non-profit corporation. Swope was the president of **Pacific** from April 1980 through April 9, 1981. **Vlasaty** was an employee of **Pacific** from June 1, 1962 and served as its **club** manager from March 1964 to June 19, 1980, when his employment was terminated.

On March 2, 1981, **Vlasaty** filed a complaint alleging that (1) in May and June of 1980, defendants falsely and maliciously accused him of stealing and (2) on June 19, 1980, defendants breached his employment contract with **Pacific** "by unilaterally terminating it." Record at 3. On March 12, 1981, defendants filed their answer and Swope counterclaimed for damages resulting from **Vlasaty's** allegedly defamatory letter of June 14, 1980.

On May 28, 1982, defendants filed a motion for summary judgment, which was granted on September 15, 1982. After the stipulated dismissal of Swope's counterclaim, judgment was entered on November 23, 1982, and **Vlasaty** appealed.

****830** I.

Initially, we address **Vlasaty's** claim that the lower court erred in granting defendants' motion for summary judgment without giving him an opportunity to depose Swope. He argues that, although there was an agreement between counsel that Swope would be deposed after **Vlasaty's** deposition was ***558** completed, defendants filed their motion for summary judgment before the completion of **Vlasaty's** deposition.

In his Memorandum in Response to Motion for Summary Judgment filed on July 20, 1982, **Vlasaty** stated:

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> There is an agreement of the parties in this case that the deposition of defendant Swope be taken as soon as defendants complete the deposition of plaintiff. Prior to filing their motion for summary judgment, and since, defendants have not indicated that plaintiff's deposition is completed, Plaintiff would therefore appreciate an opportunity to take defendant Swope's deposition before a final ruling is made on defendants' motion for summary judgment.

Record at 116.

Other than the foregoing, there is nothing in the record indicating **Vlasaty's** objection based on the alleged agreement. We do not know whether **Vlasaty** raised any objection at the hearing on the motion since the transcript of the hearing is not a part of the record. The record does not include any evidence of an agreement that Swope would be deposed after the completion of **Vlasaty's** deposition. FN1

> FN1. In his opening brief, Joseph **Vlasaty** (**Vlasaty**) states:
>
> > There is no question that an agreement of counsel existed to take Swope's deposition after plaintiff's deposition was completed. It has not been denied and plaintiff has letters not of record to substantiate it.
> >
> > Opening Brief at 13.
> >
> > During oral arguments, counsel for defendants denied the existence of any agreement.

In essence, **Vlasaty's** objection is based on the ground that he was deprived of an adequate opportunity to conduct discovery. Rule 56(f), Hawaii Rules of Civil Procedure (HRCP) (1981), provides:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

***559** However, **Vlasaty** failed to submit any affidavit as required by Rule 56(f).

Citing *Crutchfield v. Hart,* 2 Haw.App. 250, 630 P.2d 124 (1981), **Vlasaty** argues that Rule 56(f) should be liberally construed. In *Crutchfield,* defendant's motion for summary judgment was served within three months of the filing of the complaint, and plaintiff's interrogatories to defendant were pending and unanswered when the court granted summary judgment. There, we properly reversed the summary judgment despite the lack of a Rule 56(f) affidavit.

[1] Unlike *Crutchfield,* however, the facts here do not justify our overlooking the Rule 56(f) affidavit requirement. Defendants' motion for summary judgment was filed on May 28, 1981, about 14 months after the commencement of **Vlasaty's** action. **Vlasaty's** deposition was taken on May 5 and December 16, 1981, and upon adjournment at the latter date, defendants' counsel stated, “We will continue this over to another date.” II **Vlasaty's** Deposition at 66. As plaintiff, **Vlasaty** was mainly responsible for moving the case forward by inquiring when the deposition was to be completed.

Based on the circumstances of this case, the lower court did not abuse its discretion and we find no reversible error.

II.

[2] Under Rule 56(c), HRCP (1981), a summary judgment can be rendered only when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. ****831***Hulsman v. Hemmeter Development Corp.,* 65 Haw. 58, 647 P.2d 713 (1982); *Bank of Honolulu v. Anderson,* 3 Haw.App. 545, 654 P.2d 1370 (1982). **Vlasaty** contends that there are genuine is-

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sues of material fact regarding his defamation claim and, therefore, the granting of summary judgment was improper. We disagree.

A.

Vlasaty claims that the record discloses three incidents of defamation by defendants. The first allegedly occurred on the afternoon of May 22, 1980. **Vlasaty** testified that when he was ***560** standing close to the **club's** dining room bar, Swope accused him of "stealing food, liquor and wine from The **Pacific Club**." I **Vlasaty's** Deposition at 73. He further testified that a bartender, whose name he could not recall, and a bar waitress were on duty, but he did not know whether they overheard Swope's accusation. However, he went on to testify that later in the same afternoon Ronald Drummondo (Drummondo), then assistant manager of **Pacific**,[FN2] told him that he overheard Swope accusing him of stealing.

FN2. Ronald Drummondo was later promoted to manager.

The second incident allegedly occurred on the morning of May 23, 1980. On that date, there was a supervisors' meeting which **Vlasaty** did not attend. **Vlasaty** testified that **Pacific's** office manager Kiyoshi Uyeno (Uyeno) and head chef Wilbert Kaya (Kaya), who were both present at the meeting, told him that Swope accused **Vlasaty** of stealing.

The third alleged defamation was in response to a letter **Vlasaty** mailed to each Oahu resident member of **Pacific** on June 14, 1980. It stated that Swope had accused him of stealing, that the accusation was untrue, and that such accusation had resulted in damages to him and his family.[FN3] On June 17, 1980, the secretary of **Pacific** sent each member a letter which stated:

FN3. **Vlasaty** mailed the letter at The **Pacific Club's** expense.

> The Board of Governors at a special meeting held on June 17, 1980, has investigated the allegations contained in Mr. **Vlasaty's** letter of June 14, 1980, and has concluded that there is no basis in fact to support any of the allegations.

Record at 127.

B.

[3] Since the law of defamation protects the interest of reputation, there is no actionable tort unless there has been a "publication" of the defamatory matter. "Publication" means a ***561** communication to some third party other than the person defamed. *Runnels v. Okamoto,* 56 Haw. 1, 525 P.2d 1125 (1974); 1 F. Harper & F. James, *The Law of Torts* § 5.15 (1956).

Defendants contend that (1) the only evidence supporting the publication of Swope's May 22, 1980 and May 23, 1980 defamatory statements is the hearsay testimony of **Vlasaty**; (2) hearsay is not competent evidence under Rule 56, HRCP; and (3) consequently, there is no evidence of publication in the record. **Vlasaty** argues that his testimony regarding publication is not hearsay and, even if it is, it falls within an exception to the hearsay rule.

Rule 801(3), Hawaii Rules of Evidence (HRE) (1981), defines "hearsay" to be "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." **Vlasaty** sought to offer in evidence what Drummondo, Uyeno, and Kaya told him to prove the truth of the matter asserted—that Swope accused **Vlasaty** of stealing, they heard such accusation and, therefore, there was publication. Thus, **Vlasaty's** testimony as to the statements of Drummondo, Uyeno, and Kaya was clearly hearsay.

[4] The use of depositions under Rule 56, HRCP, is limited to statements "made on personal knowledge" that "would be admissible in evidence." *Liberty Leasing Co. v. Hillsum Sales Corp.,* 380 F.2d 1013, 1015 (5th Cir.1967). Hearsay evidence in depositions is inadmissible and may not be considered****832** on a motion for summary judgment. *Sires v. Luke,* 544 F.Supp. 1155

(S.D.Ga.1982). *See also Blair Foods, Inc. v. Ranchers Cotton Oil,* 610 F.2d 665 (9th Cir.1980); 6 J. Moore, W. Taggart, & J. Wicker, *Moore's Federal Practice* ¶ 56.11[4] (2d ed. 1982). *Cf. Cahill v. Hawaiian Paradise Park Corp.,* 56 Haw. 522, 543 P.2d 1356 (1975); *Brown v. Bishop Trust Co., Ltd.,* 44 Haw. 385, 355 P.2d 179 (1960).

However, we find that the statements of Drummondo, Uyeno, and Kaya, testified to by **Vlasaty**, are admissible as an exception under Rule 803(a)(2)(B), HRE, which provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (a) Admissions.
>
> ***562** (2) Vicarious admissions. A statement that is offered against a party and was uttered by ... (B) his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, ...

[5] Drummondo, Uyeno, and Kaya were supervisory employees of **Pacific** and their statements to **Vlasaty**, another supervisory employee, were made within the scope of their employment. Therefore, those statements testified to by **Vlasaty** were admissible against their employer **Pacific**. *Hoptowit v. Ray,* 682 F.2d 1237 (9th Cir.1982); *Nekolny v. Painter,* 653 F.2d 1164 (7th Cir.1981), *cert. denied,* 455 U.S. 1021, 102 S.Ct. 1719, 72 L.Ed.2d 139 (1982).

Thus, the record includes admissible evidence of publication of the allegedly defamatory matters. However, the evidence does not help **Vlasaty**.

C.

[6] A qualified privilege "arises when the author of the defamatory statement reasonably acts in the discharge of some public or private duty, legal, moral, or social, and where the publication concerns subject matter in which the author has an interest and the recipients of the publication a corresponding interest or duty." *Aku v. Lewis,* 52 Haw. 366, 371, 477 P.2d 162, 166 (1970). *See also Russell v. American Guild of Variety Artists,* 53 Haw. 456, 497 P.2d 40 (1972); *Kainz v. Lussier,* 4 Haw.App. 400, 667 P.2d 797 (1983); *Chow v. Alston,* 2 Haw.App. 480, 634 P.2d 430 (1981). In claiming such privilege, it is essential that the author of the defamatory matter and the recipients have a common interest and the communication is of a type reasonably deemed to protect or further that interest. *Kainz v. Lussier, supra. See also* Comment, *Defamation: A Study in Hawaii Law,* 1 U.Hawaii L.Rev. 84 (1979); Restatement (Second) of Torts § 596 (1979); W. Prosser, *Handbook of the Law of Torts* § 115 (4th ed. 1971).

[7] Defendants claim that the allegedly defamatory statements of Swope and the June 17, 1980 letter were qualifiedly privileged. We agree with defendants regarding Swope's accusation at the May 23 meeting and the June 17 letter.

***563** As the president of **Pacific**, Swope had the private duty of protecting the interest of **Pacific** and its members. The recipients of Swope's accusatory statement at the May 23 meeting were supervisory employees of **Pacific** who worked with **Vlasaty**, the **club** manager. The president and supervisory employees of **Pacific** had a common interest in the subject matter concerning the conduct of **Pacific's** affairs. *See Williams v. Taylor,* 129 Cal.App.3d 745, 181 Cal.Rptr. 423 (1982); *Bergman v. Oshman's Sporting Goods, Inc.,* 594 S.W.2d 814 (Tex.Civ.App.1980).

Likewise, **Pacific's** board of governors, through its secretary, had the duty of apprising the members of the result of its investigation of **Vlasaty's** charges raised in his own letter of June 14, 1980. The members had a common interest with the board concerning the charges made by the **club** manager against the president. *See Kainz v. Lussier, supra; Chow v. Alston, supra.*

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[8] The question of whether a communication is privileged is to be determined by ****833** the court. *Kainz v. Lussier, supra;* Restatement (Second) of Torts § 619(1) (1977). We hold that Swope's May 23 statement made at the supervisors' meeting and the June 17 letter were qualifiedly privileged.

D.

Since **Vlasaty** was the intended recipient of Swope's May 22 statement which was overheard by Drummondo, a question arises whether the defendants may claim qualified privilege for that specific utterance. As discussed above, such privilege is applicable where the recipient to whom a defamatory matter is directed shares a common interest or duty with the author thereof.

[9] The undisputed evidence in the record is that Drummondo was present with Uyeno, Kaya, and Fely Fernando at the May 23 meeting when Swope allegedly accused **Vlasaty** of stealing.[FN4] ***564** We have already held that that accusation was qualifiedly privileged and, therefore, not actionable. We do not think that the same statement made on May 22 lost that privilege merely because it was not made directly to Drummondo.

FN4. In the affidavits attached to defendants' motion, beside indicating who were present at the meeting, Ronald Drummondo, Kiyoshi Uyeno, and Wilbert Kaya state that (1) "at no time prior to, during, or subsequent to [the May 23, 1980] meeting" did they hear William M. Swope (Swope) accuse **Vlasaty** of stealing; (2) at no time did they hear "any accusations" by Swope or by any other member of The **Pacific Club** (**Pacific**) "regarding any alleged criminal conduct" on part of **Vlasaty** ; and (3) they had not at any time told **Vlasaty** about any accusations made by Swope or by any member of **Pacific** to the effect that **Vlasaty** "was stealing" from **Pacific**. Record at 106, 108, 110.

Consequently, under the facts and circumstances of this case, we hold that the May 22 statement overheard by Drummondo was likewise privileged.

E.

[10][11] The qualified privilege is conditional and is lost if it is abused. *Russell v. American Guild of Variety Artists, supra; Aku v. Lewis, supra; Chow v. Alston, supra.* Although, whether the qualified privilege was abused is for the trier of fact to determine, *Kainz v. Lussier, supra;* Restatement (Second) of Torts § 619(2) (1977), in reviewing the record, we find no evidence of abuse of the qualified privilege and hold that there is no genuine issue of material fact on this matter.

III.

[12] Although **Vlasaty** asserts that he had been employed by **Pacific** for 18 1/2 years and had "permanent status" when he was terminated on June 19, 1980, it is clear from the record that his employment was under a contract of indefinite duration. Such contract, generally, is "terminable at the will of either party, for any reason or no reason." *Parnar v. Americana Hotels, Inc.,* 65 Haw. 370, 374, 652 P.2d 625, 627 (1982).

In *Parnar,* our supreme court ruled:

> Because the courts are a proper forum for modification of the judicially created at-will doctrine, it is appropriate that we correct inequities resulting from harsh application of the doctrine by recognizing its inapplicability in a narrow class of cases. The public policy exception herein represents wise and progressive social policy which both addresses the need for greater job security and preserves to the employer sufficient latitude to maintain profitable and efficient business operations. We therefore hold that an employer may be held liable in tort where his discharge of an employee violates a clear mandate of public policy.

Id. 65 Haw. at 379–80, 652 P.2d at 631

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(footnotes omitted).

The record in this case discloses no evidence of violation of any public policy by **Pacific** in the discharge of **Vlasaty** as an employee. Since the employment contract was terminable at the will of **Pacific** and there was no violation of any public policy by **Pacific**, **Vlasaty** had no actionable breach of contract or tort claim and **Pacific**, therefore, was entitled to a summary judgment as a matter of law.

Affirmed.

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