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No. 72869-5-1

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

Donald Canfield, Appellant - Plaintiff

v.

Michelle Clark, Appellee - Defendant.

REPLY BRIEF OF APPELLANT

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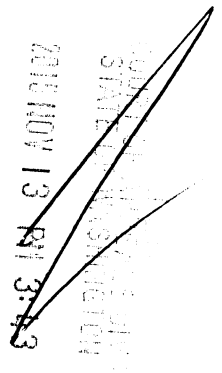

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I. INTRODUCTION

A large part of Defendant Clark's argument is based upon her inaccurate claim that Plaintiff Canfield did not present evidence of damage at trial and evidence of damage is necessary for Plaintiff Canfield to prevail. Defendant argues that the jury did not find the statements were defamatory per se, however, that is not the case and there is no evidence of that. At best what can be said is that there is no real way to tell for certain. Regardless, the evidence overwhelmingly shows that the statements were defamatory per se. Further, Defendant's argument guts a claim of defamatory per se eliminating any distinction between a claim based upon a defamatory statement and one based upon a defamatory per se statement. Defendant argues that it is still Plaintiff Canfield's burden to show damage when the statements at issue were defamatory per se. That is not the applicable law and adoption of Defendant's argument would result in no distinction between the two. Further, the defamatory per se statements made by Defendant Clark fall into two different categories, they are statements made that tend to harm Plaintiff Canfield in his business and they are statements that Plaintiff Canfield violated the law. These are two categories of defamatory statements that qualify the statements as defamatory per se. There is no issue that the statements made by Defendant Clark, that Plaintiff Canfield had gun on his person while working at the

School District are statements that Plaintiff Canfield violated the law. It is also hard to believe that there would be no damage associated with his business when he was escorted from his employment at the School District during working hours in a public manner by police. This is evidence of damage along with testimony offered from witnesses that Plaintiff Canfield was known as the guy that was escorted off the property for having a gun.

Defendant also argues that Plaintiff Canfield opened the door to admission of Ms. Bliss' notes from interviews with employees who did not testify at trial when Plaintiff offered as evidence notes from Ms. Bliss meeting with Defendant Clark. Statements by Defendant Clark to Ms. Bliss are statements of a party opponent and are admissible. Further, Defendant Clark testified at trial. The employees Ms. Bliss allegedly interviewed did not testify at trial, the interviews occurred over a month after her discussion with Defendant Clark and contained hearsay within hearsay, were not supported by any other evidence and were not reliable. They contained inflammatory statements labeling Plaintiff Canfield in a very negative way that would influence a jury against Plaintiff Canfield. The statements alone are very prejudicial but when coupled with the fact that Plaintiff Canfield was prevented from offering bias evidence or an explanation as to why the School District was supportive of Defendant Clark, the jury was left to conclude that Plaintiff

Canfield was a bad actor and not worthy of an award of damages.

The errors identified by Plaintiff Canfield are such that Plaintiff Canfield was not afforded a fair trial, the jury was provided with no means to award nominal or substantial damages as allowed for by law and Plaintiff Canfield should be allowed a new trial.

II. SUPPLEMENTAL STATEMENT OF THE CASE

A. Defendant Michelle Clark's defamatory per se statements made to Auki Piffath and Janette Bliss presented at trial.

As stated previously, at trial Plaintiff introduced evidence of the statements made by Defendant Clark to Auki Piffath and Jeanette Bliss as outlined above. RP Vol. IV, 367:9-374:1; RP Vol V, 405:23-407:25; RP, Vol VI 580:13-583:13. Both sets of statements included the allegation that Plaintiff Canfield had a gun on him while working at the school district on district property. *Id.*

According to Mr. Auki Piffath, the complaints made by Defendant Michelle Clark to him were not made to him as a representative of the business trades but were just made in conversation during the commute to and from work. RP Vol. VI, 577:10-21. In summary, Defendant Clark relayed the following about Plaintiff Canfield having a gun - Clark and Canfield met

during working hours at a school that they were doing fire alarm testing on before Clark was hired but while she was working as an outside contractor. RP VI, 580:13-583:9. Mr. Piffath was unclear as to what specifically they were doing but was told only that they were working on the fire alarm system. *Id.* They met, completed the work and then were leaving to go to lunch or "whatever." *Id.* As they left the school, they were walking out and there were a few men or boys across the street. *Id.* Don said to wait and then reached into his pants and grabbed a gun. *Id.*

Further, Ms. Bliss testified there were two instances in which Defendant Clark indicated Plaintiff had a gun. RP Vol V, 405:23-407:25. The first instance was some two years prior to her working at the school district wherein she claimed she was having lunch with Plaintiff, they were walking across the street from the school district, and he showed her his gun. *Id.* Ms. Bliss is a bit vague on this report as she does not recall specifically but indicated that was contained in her notes. *Id.* In describing the second incident, Ms. Bliss stated with certainty that Defendant Clark reported that when she was first hired with the district, in late August, that she, ". . . asked him if he still had a gun on him; and he said, yes, it was in his pants." *Id.* Ms. Bliss testified that she recalled specifically that Defendant Clark reported that to her. *Id.*

B. Defendant Clark finally admits to making the statement at trial for the first time after a number of years of litigation, that it was a sexual innuendo.

Contrary to her prior deposition testimony, during trial Defendant Clark admitted making the statement but claimed the remark she attributed to Plaintiff, that he had a gun in his pants, was a sexual innuendo. RP, Vol. VII, 641:4-645:22. When asked if that were the case why she did not report it as sexual harassment, Defendant Clark had no explanation. RP, Vol. VII, 650:20-653:17.

C. Evidence presented at trial of harm to Plaintiff Canfield.

During the trial, excerpt from the deposition of Lynn Good, a former school district employee called by Defendant Clark were read into the record. RP Vol IX, 990:10-991:18. During his testimony on Plaintiff's cross examination, excerpts from Mr. Good's deposition were read into the record. Mr. Good testified as follows:

> Q "So tell me what you recall of that day." Go ahead and read your answer.
> A "The part that pertains to Mr. Canfield I assume you mean?"
> Q "Sure. Or even before. Right before, what were you doing and who approached you?"
> A "Someone informed me that an accusation had been made that Don Canfield might have a weapon on school property. Security was

notified, I was asked to do HR, notified HR. They contacted security.
" I was asked to accompany two security personnel to go find Don and ask him to come to the security office conference room. We found Don behind locked doors, having his lunch. He agreed to accompany us. When we arrived at the conference room, Laurie Taylor, Jeanette - - I'm forgetting her last name.

Q "Bliss?" Go ahead and read on page – your answer on page 54.

A " And I believe there were two Seattle police officers. I believe John Cerqui was there. And we proceeded to have a discussion, which was basically conducted by Laurie Taylor."

RP Vol IX, 990:10-991:18. After reading this excerpt from his deposition Mr. Good admitted that Plaintiff Canfield was placed on leave and escorted off the property by police because of the gun allegation raised by Defendant Clark. RP Vol IX, 991:18-21. It makes little sense that the school district would call outside police officers to escort an employee from the grounds if the employee was being placed on leave due to a complaint of discrimination and no doubt the police would not appear unless there was a threat of physical harm, or crime being committed, such as having a gun on school property. In this case there was no allegation of a threat of physical harm, only the gun allegation raised by Defendant Clark. *See* RP Vol IX, 990:10-991:21.

Further school district employees testified that talk about Plaintiff Canfield continued, that is that he was known for having been escorted off the property due to the gun allegation. RP Vol VII, 716:21-717:15 & 731:8-13. Plaintiff Canfield testified that he talked with new co-workers about it because he had to, they were aware of it as everyone talked about it and he needed to be able to assure the employees that the allegations were meritless so that he could work with them. RP Vol IX, 1041:18-1042:10. Plaintiff Canfield also explained to the jury that carrying a gun on school property during work hours was a violation of the law and described the events that occurred after the report by Defendant Clark, that he was escorted from school property by police in a public manner, that it was embarrassing and humiliating. RP, Vol III, 214:9-216:18, *See also* RP, Vol IV, 286:17-290:9.

III. ARGUMENT

A. The Statements Made by Defendant Clark were Defamatory Per Se.

1. The Statements Made by Defendant Clark included False Statements that Plaintiff Canfield Engaged in Criminal Conduct and Are Defamatory Per Se.

Defendant argues, without any actual support, that the jury found that

the statements were not defamatory per se. However, there is nothing that supports that conclusion and in fact, the special jury verdict form is such that it does not provide for the distinction between the two. At best, Defendant's argument is based upon inaccurate speculations and assumptions. In addition, Defendant entirely ignores the fact that the statements made are statements that Plaintiff Canfield violated the law. The statements made by Defendant Clark are defamatory per se as they fit within two categories, they are harmful to Plaintiff Canfield's business and they are statements that he violated the law.

As set out in RCW 9.41.280 provides, "[i]t is unlawful for a person to carry onto, or to possess on, public or private elementary or secondary school premises, school-provided transportation, or areas of facilities while being used exclusively by public or private schools: (a) Any firearm; . . .".

In *Maison De France v Mais Oui!, 126 Wn. App. 34,43-49 (2005)*, in part the Court addressed two letters containing statements. As to both letters, the trial court found the statements were not defamatory per se and they were substantially true in their stinging points. *Id.* In reviewing the decision, this Court determined that the first letter included allegations of criminal conduct and held, "[u]nder *Caruso* and *Ward*, the accusations of fraud contained in the September 8th letter were defamatory per se because they falsely imputed criminal conduct to the appellants." *Id.* at 47, referring to *Caruso v. Local*

Union No. 690 of Int'l Brotherhood of Teamsters, 100 Wn.2d 343 (1983) & *Ward v. Painters' Local 300, 41 Wn.2d 859* (1953). As to the second letter, this Court found the trial court properly concluded that the statements contained in that letter were not defamatory and that the Defendant had a reasonable belief that they were true at the time. *Id.* at 49.

This Court then went on to discuss evidence of damage concluding that no actual damages were shown by statements contained in either letter. *Id.* 50-53. However, this Court adopted *Dunn & Bradstreet, Inc., v. Greenmoss Builders, Inc.,* 472 U.S. 749 (1985) and held that presumed damages are available in defamation per se cases to a private person without proof of actual malice. *Id.* at 54. In this case, actual malice was shown and found by a jury. This Court went on to explain, ". . . while the trial court has found no economic or other actual damages, a finding we do not disturb, it must address the question of presumed damages." In this case, Plaintiff Canfield is not required to prove actual damages and is entitled to a presumption of damage. Defense counsel's closing argument along with adoption of the Special Verdict form Question No. 3 was misleading and took that opportunity away from the jury.

The allegations in this case include statements that Plaintiff Canfield engaged in criminal conduct. The allegations are on point with the September

8th letter this Court found contained defamatory per se statements in *Maison De France*.

2. Defamatory Statements that Tend to Cause Harm to a Person's Business are Defamatory Per Se.

Defendant also seems to argue that Plaintiff Canfield did not show damage to his business and therefore the statements are not defamatory per se. However, this argument is faulty in that it requires Plaintiff Canfield to establish damages, something that is not required when a statement is defamatory per se. Regardless, Plaintiff Canfield did show damage. He testified about the impact it had upon him, witnesses testified about his reputation for carrying a gun on school property and testimony was offered regarding his being escorted off School District property during the day in public by police. RP Vol. VII, 716:21-717:15 & 731:8-13; RP Vol IX, 1041:18-1042:10; RP Vol. III, 214:9-216:18; RP Vol IV, 286:17-290:9. This is evidence of damage and is sufficient to show damage to reputation. Mr. Good admitted that Plaintiff Canfield was initially placed on administrative leave because of the gun allegation. RP Vol IX, 990:10-991:21. Plaintiff Canfield has established damage to his business/employment.

B. The Special Verdict Form, Question No. 3 is Misleading and Clouded the Jury's Vantage Point of the Contested Issues.

Defendant argues that the instructions as a whole provided the jury with the applicable law. However, "[a]lthough a special verdict form need not recite each and every legal element necessary to a particular cause of action where thee is an accurate accompanying instruction, it may not contain language that is inconsistent with or contradicts that instruction." *Capers v. Bon Marche,* 91 Wn. App. 138, 144 (1998). This case is on point with *Capers v. Bon Marche.*

In *Capers,* this Court was presented with an issue wherein a jury instruction was not consistent with a special verdict form, as in this case. Instructions adopted the correct standard of proof applied in discrimination cases. *Id.* 144-145. A jury instruction was provided with the applicable law and instructed the jury that the plaintiff must show her race was a substantial factor in her termination. *Id.* The special jury verdict form asked the jury if plaintiff was terminated because of her race. *Id.* Although legal sufficient, the Court found that the instructions were misleading. Id. In addition, this Court explained, "[t]his facial inconsistency between the correct instruction and the special verdict form was made manifest by the inaccurate closing arguments of the Bon's counsel." *Id* at 144. The Capers Court found, ". . .counsel's

closing argument, together with the omitted "substantial factor" language in the special verdict form, undermined the efficacy of the jury instructions as a whole. Consequently, although not legally erroneous, the instructions were prejudicially misleading." *Id.* at 145.

The same is true in this case, it is hard to know how a jury could get past Question No. 3 if it did find the statements defamatory per se. Question No. 3 forced the jury to find actual damages and if it did not find damages, the inquiry ended. There was no provision for a finding of defamation per se in response to the question posed in the special verdict form. It was prejudicially misleading especially when considered with defense counsel's closing argument.

C. Defendant's Argument that Plaintiff Canfield Opened the Door to Admission of Ms. Bliss' Notes Was Not Raised at Trial and is Erroneous. Admission of the Notes was in Error and Prejudicial Especially Given Plaintiff's Inability to Offer Bias or Impeachment Evidence.

The notes taken by Ms. Bliss offered for admission by Plaintiff Canfield were notes of her conversation with Defendant Clark. Ex 228. They are admissions of a party opponent and are not hearsay. ER 801(d)(2). The notes offered by Defendant are notes of third parties who did not testify at trial and are not parties to the action. Exhibits 230, 231, 232, 233, 234 & 300.

They contain hearsay, hearsay within hearsay and have no indicia of reliability. They are highly prejudicial. Further, as argued previously, they are not admissible business records pursuant to RCW 5.44.040. The records should have been excluded. These records caused irreparable harm to Plaintiff's case, especially given the limitations placed upon the evidence Plaintiff was allowed to submit.

D. The Were No Material Facts Contained in Ms. Logan's Statement in Dispute.

Defendant argues that *Washburn v. City of Federal Way,* 169 Wn. App. 588, 610 (2012) prohibits this Court from reviewing a decision on Summary Judgment after a trial if the denial is based upon a determination that material facts were in dispute. However, there was no dispute of material fact as to the statements made by Ms. Logan. CP 816-818 & CP 656-660 (89:25-102:7-103:6). Defendant Clark did not dispute the fact that she told Ms. Logan Plaintiff Canfield had a gun on him while at work. CP 656-660 (89:25-102:7-103:6). What she indicated was that she did not recall. *Id.*

When an opposing party cannot recall facts in sufficient detail to confirm or deny them, the lack of memory does not create a factual issue sufficient to preclude summary judgment. Tegland & Ende, Wash. Handbook on Civil Procedure § 69.14, pg. 520, (2007 Ed.) *citing Overton v.*

Consolidated Ins. Co., 145 Wn.ed 417 (2002). "As a general rule, a party cannot create an issue of fact and prevent summary judgment simply by offering two different versions of a story by the same person. *Id.,* at 519, *citing McCormick v. Lake Washington School District,* 99 Wn.App. 107, 992 P.2d 511 (1999); *Selvig v. Caryl,* 97 Wn.App. 220, 983 P.2d 1141 (1999). "When a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony." *Klontz v. Puget Sound Power & Light Co.* 90 Wn. App. 186, 192, 951 P.2d 280 (1998), *quoting Marshall v. AC & S. Inc.*, 56 Wn.App. 181, 185, 782 P.2d 1107 (1989). Defendant Clark's statements that she does not recall if she told Ms.Logan something, does not create a genuine issue of fact. Ms. Logan's statements remain uncontradicted. Further, if Defendant Clark's statements in her second deposition were contradictory to her first, which they are not as they are in response to questions about the School District, not Ms. Logan, she cannot offer a later contradictory statement in hopes of creating a genuine issue of fact. There was no material issue of fact as to the defamatory statements attributed to Defendant Clark by Ms. Logan. Summary Judgment should have been granted to Plaintiff Canfield.

IV. CONCLUSION

For the reasons stated above, Plaintiff requests the Court grant the relief requested as set out in his original brief.

Dated this 13th day of November, 2015.

Respectfully submitted,

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Certificate of Service

I, Chellie Hammack, attorney for Appellant certify that on November 13, 2012, I placed a true and correct copy of the Appellant's Brief and this Certificate of Service for hand delivery via legal messenger service to:

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DATED this 13th day of November, 2015.

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