72869-5

FILED
Oct 14, 2015
Court of Appeals
Division I
State of Washington

No. 72869-5

THE COURT OF APPEALS OF THE
STATE OF WASHINGTON DIVISION 1

DONALD CANFIELD,

Appellant,

v.

MICHELLE CLARK,

Respondent.

BRIEF OF RESPONDENT MICHELLE CLARK

Earl Sutherland
WSBA #23928
Mark F. O'Donnell
WSBA #13606
Preg O'Donnell & Gillett PLLC
901 Fifth Ave., Suite 3400
Seattle, WA 98164
(206) 287-1775
Attorneys for Respondent
Michelle Clark

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

I. INTRODUCTION

A jury trial of Mr. Canfield's claims against Ms. Clark took place from October 27, 2014 through November 5, 2014. He claimed that he was damaged as a result of two statements made by his former co-worker in the Seattle Public School Electrical Department, Ms. Michelle Clark, to two individuals, Ms. Jeanette Bliss (former human resources representative) and Mr. Akira "Auki" Piffath (a co-worker and Ms. Clark's carpool friend). The alleged statements included or implied that Mr. Canfield may have had a gun on school district property.

While Mr. Canfield sought general damages as a result of her statements, Ms. Clark presented evidence that Mr. Canfield was placed on administrative leave based on Ms. Clark's complaints about a hostile work environment and bullying, not the gun statements. The disciplinary action taken by the District was the result of long-standing conflicts Mr. Canfield had with numerous employees who worked under him, with his co-workers, and with District management.

The totality of the evidence produced at trial convinced the jury that Ms. Clark's statements were not the cause of Mr. Canfield's poor reputation or poor relationships with his co-

workers and employer, or his claimed damages. The jury was not convinced that the statements injured Mr. Canfield in his business, trade or profession; they did not believe the statements subjected him to the kind of ridicule or contempt required for defamation per se.

The jury found that Ms. Clark's statements were defamatory but that Mr. Canfield suffered no damages from the statements. The evidence supports this verdict.

This appeal is meritless. The plaintiff Donald Canfield has litigated with his former co-employee Michelle Clark and his former employer the Seattle Public School District ("the District") for many years now. In an earlier appeal, this Court affirmed that Mr. Canfield's dispute with the District had no legal basis; but it also reversed the trial court's summary judgment dismissing his defamation claims against Michelle Clark.[1]

This Court reversed the original summary judgment in Ms. Clark's favor on Mr. Canfield's defamation claims because of a letter written in 2008 by someone named Jessie Logan. The Court of Appeals viewing this evidence in the light most favorable to

[1] ***Canfield v. Clark, et al.,*** **No. 67274-6-I** (May 28, 2013), a copy of which is attached as **Appendix A.** As this opinion represents the law of the case, citation to it is not prohibited by GR 14.1.

Canfield found that it created issues of fact as to the defamation claim and remanded back to the Superior Court. *See,* Appendix A at 5-6.

After remand, the trial court properly denied Mr. Canfield's affirmative motion for summary judgment to establish defamation per se based solely on the Logan letter. When time for trial arrived, Jessie Logan had not been deposed; she had never been put under oath. She did not testify at trial. Without the testimony of Ms. Logan, Mr. Canfield had little persuasive evidence to present to the jury in support of his defamation claims. In fact, the only evidence was from Mr. Canfield himself. It simply did not rise to the level of proof anticipated by this Court in the first appeal, when the Court reviewed the propriety of summary judgment and resolved all reasonable inferences in favor of Mr. Canfield.

The jury at Mr. Canfield's trial against Ms. Clark heard the evidence and concluded that while defamatory statements were made, Mr. Canfield suffered no injury or damage as a result of Ms. Clark's statements. The jury was presented with ample evidence from which it could reach this conclusion over the course of the trial.

Mr. Canfield's arguments on appeal ignore the reality that the Logan testimony was properly excluded and not considered by the jury. His arguments on appeal are based on a hoped-for record that Mr. Canfield did not develop at trial.[2] The trial court judge did not err in his evidentiary rulings. The judge properly left to the jury the determination of the elements of Mr. Canfield's claim of defamation.

The instructions read in conjunction with the special verdict form allowed Mr. Canfield to argue his theory of the case fully and completely to the jury. He simply did not have the evidence to support his theory of defamation per se. Ms. Clark presented evidence to convince the jury to reject Mr. Canfield's claims. The jury concluded he was not injured or damaged by the statements.

This court should affirm the judgment in all respects and finally put an end to this litigation.

II. STATEMENT OF ISSUES

The following issues relate to Mr. Canfield's assignments of error:

[2] In his appeal brief, Mr. Canfield cites the Logan letter as if it were evidence presented at trial. It was not. Other instances of evidence confusion exist in the statement of the case presented by Mr. Canfield, and in his argument sections in the brief.

1. The jury instruction on defamation per se[3] stated:

> [P]laintiff is not required to prove actual damages if a communication is 'defamatory per se.' A defamatory statement is defamatory per se if it exposes a person to hatred, contempt, ridicule or obloquy, to deprive him of the benefit of public confidence or social intercourse, or injures him in his business, trade, profession or office.

The special verdict form question no. 3 asked the jury whether any damages were proximately caused by the defamatory statements. The special verdict form, together with the jury instructions, allowed Mr. Canfield to argue his theory of the case to the jury, that Ms. Clark's statements were defamatory per se, and that he was entitled to damages as a result; but the jury awarded no damages. Was there any error including question no. 3 of the special verdict form where the evidence was such that a jury could conclude that Ms. Clark's statements were not defamatory per se and that Mr. Canfield suffered no actual damages? (Relates to Mr. Canfield's assignments of error 2 and 7.)

2. With only a letter signed by Jesse Logan and a declaration of Ms. Logan stating everything in her letter was true, did the trial court err in excluding the letter and declaration where

[3] Mr. Canfield has not assigned error to the Court's jury instruction no. 9 quoted here.

Ms. Logan did not give a deposition and did not testify at trial? (Relates to assignment of error 4.)

3. Trial of a case generally bars review of a denial of a summary judgment motion because the trial resolves material issues of fact. Mr. Canfield complains that the letter from Jesse Logan should have entitled him to summary judgment. Ms. Logan never testified under oath in a deposition or in person at trial. Did the trial court err in not entering summary judgment where it found issues of fact existed on the record before trial? (Assignment of error 1.)

4. Jessie Logan did not testify; other witnesses were vague about the statements that Ms. Clark made and the circumstances under which she made them; the jury could reasonably conclude she did not accuse Mr. Canfield of breaking any laws. Substantial evidence showed that Mr. Canfield's reputation in his trade or profession with the District was poor before any statements were made by Ms. Clark, and that her statements did not affect his reputation. Did the trial court err in refusing to enter judgment as a matter of law that Ms. Clark's statements were defamatory per se? (Assignment of error 8.)

5. Mr. Canfield opened the door to documents pertaining to the investigation of complaints about him made by Jeannette Bliss when he offered notes Ms. Bliss had taken of statements made by Ms. Clark as well as summaries of Ms. Bliss' investigation. Did the trial court err in admitting other similar and related notes when Ms. Clark offered them to complete the picture of the Bliss investigation? (Assignment of error 3.)

6. Mr. Canfield went to trial against the Seattle Public School District ("the District") and after appeal lost his case against the District on retaliation, prevailing wage claims and conspiracy. At this trial, Mr. Canfield attempted to re-argue those claims and offered evidence under the guise of showing "bias, conduct, and retaliation" of the District. Did the trial court in this defamation case against a co-worker properly limit the testimony and evidence to the statements made by Ms. Clark and the effect they had rather than on issues with the District which were the subject of the previous trial? (Assignments of error 5 and 6.)

III. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

1. Donald Canfield's Tenure at the Seattle Public Schools

Conflict marred Mr. Canfield's tenure as an electrician with the District, in particular his time with authority as a foreman over his fellow electricians. Mr. Canfield started work with the District in 1992 and became a foreman in 2001. RP 163. Mr. Canfield became a foreman after his supervisor Nam Chan quit in response to a conflict with Mr. Canfield. RP 165.

Once Mr. Canfield became a foreman, the conflicts escalated. Mr. Canfield had numerous conflicts with the District. RP 189-199. He had conflicts with Jeff Hillard, Nam Chan, Mark Johnson and Bill Wickersham, all before Ms. Clark started at the District. RP 301-303. He later had conflicts with Dan Bryant and Mike Jackson. RP 342-345.

When he became aware in 2006 that his supervisees were complaining about him, *see,* RP 213-214, Mr. Canfield began filing notifications of performance concerns regarding Jeff Hillard, Bill Wickersham and Nam Chan. RP 232-234.

In September 2006, before Ms. Clark started at the District, the District met with several electricians, two of Mr. Canfield's

supervisors, and a union business representative, to discuss complaints about Mr. Canfield's interactions and management style as the foreman over other electricians, concluding that he needed help with his management style. RP 235-236; RP 305-306.

2. The Relationship Between Mr. Canfield and Ms. Clark

Michelle Clark and Donald Canfield had known each other for seven years prior to Ms. Clark coming to work for the District through her work as a subcontractor to the District. RP 168-169. Over time, they found out they had mutual friends and interacted socially. RP 278-279. Mr. Canfield helped Ms. Clark with projects at her home. RP 613.

During this relationship, Mr. Canfield showed Ms. Clark his firearms at his home. RP 300. One time when Ms. Clark met him on a Saturday on District property to go with her and look at a large clay pot for her yard, he made her aware he was carrying a gun. RP 275-276; 278-279.

In August 2007, the District hired Ms. Clark as a fire alarm technician. Mr. Canfield helped Ms. Clark get the job. RP 200. Ms. Clark immediately began experiencing difficulties with Mr. Canfield as her supervisor. RP 857. Ms. Clark met with

Mr. Canfield and their supervisor Lynn Good to work through the conflicts between herself and Mr. Canfield. RP 859-861.

Ms. Clark became fearful and felt that Mr. Canfield's angry and controlling behavior was escalating. RP 862-863. Ms. Clark reported to her carpool partner, Mr. Akira "Auki" Piffath, about the incident involving the desks and that she was fearful because she knew Mr. Canfield sometimes carried a gun based on the incident involving shopping for the garden pot.[5] RP 858.

Mr. Piffath took it upon himself to report Ms. Clark's concerns to Human Resources. RP 366-367. As a result, Human Resources requested that Ms. Clark come in for an interview. Ms. Clark agreed to the interview, which led her to submit her formal complaint against Mr. Canfield in December 2007. RP 858; Ex. 238.

In her written December 2007 complaint, Ms. Clark alleged, among other items, that Canfield behaved in a way that was "deceitful" and "mean," and that he was not able to "control his argumentative and angry ways." Ex. 238. Ms. Clark reported

[5] Mr. Canfield does not deny that he carried a weapon when he was with Ms. Clark on the garden pot shopping occasion before she was employed at the District. RP 247-276. Mr. Canfield denies that he had the weapon on school grounds. *Id.* While Ms. Clark recalls Mr. Canfield was in the District's parking lot

feeling "fearful" for her safety, and more generally indicated a desire to work in a friendly environment. *Id.* Ms. Clark did not request that Mr. Canfield be fired. Instead she stated in her complaint, "If Don were to get counseling and medical help to control his argumentative and angry ways I do believe he may fit in." *Id.*

3. Disciplinary Proceedings Taken Against Canfield

a. Investigation of Mr. Canfield's Conduct

The District placed Mr. Canfield on administrative leave in December 2007; and Jeannette Bliss, the District's former HR manager, began investigating the complaints against Mr. Canfield. RP 365. Mr. Canfield admitted to the complained of incidents generally but provided excuses as to why the incidents were not harassing or intimidating as alleged. RP 237-243.

b. Arbitration of Mr. Canfield's Grievance of Discipline Decision of District

Mr. Canfield filed a grievance of the District's decision with his union. RP 252-254. Arbitration was held. *Id.* Mr. Canfield admitted the Arbitration Award and Opinion into evidence at trial. RP 254; Ex. 63. The opinion summarizes Ms. Clark's as well as

---

when she met him, Mr. Canfield states she picked him up from his home. *Compare,* RP 648-649, RP 275.

other District employees' complaints and testimony regarding Mr. Canfield's harassing and controlling behavior. Ex. 63.

When Mr. Canfield was reinstated following the investigation and Arbitration, over half of his crew refused to work with him. RP 284-285; 327. Mr. Canfield testified that Bill Wickersham, Nam Chan, Chris Simeon, Rick (last name unknown) and Ms. Clark were all moved to the electronics shop so that they would not be supervised by Mr. Canfield. *Id.* Mr. Canfield testified that they refused to work with him, "[B]ecause there was longstanding issues with them not performing as union electricians and doing the job they were supposed to do, coming in late, sleeping in vans." RP 327. None of this reaction was related to Ms. Clark's statements about him.

B. STATEMENT OF PROCEDURE

1. The Consolidated Cases and the First Trial

In December 2009 when Mr. Canfield was reinstated to his position, he filed his lawsuit against Ms. Clark for defamation and for outrage. CP 1-5. A few months later he filed suit against the District as well, alleging retaliation, violation of Washington's prevailing wage act, violation of Washington's wage payment act, civil conspiracy, negligent supervision, negligent hiring, and

intentional infliction of emotional distress. *See* App. A; CP 1783-1787. The cases were consolidated, and both defendants moved for summary judgment dismissal of all of Mr. Canfield's claims against them. *Id.*

The trial court dismissed all of Mr. Canfield's claims against Ms. Clark. The court, however, left Mr. Canfield's claims for Civil Conspiracy and Retaliation for trial. A nine day trial led to a verdict finding no Civil Conspiracy but in Mr. Canfield's favor as to his Retaliation claim. Appendix A. The District renewed its motion for judgment as a matter of law under Civil Rule 50. *Id.* The trial court vacated the jury's verdict in favor of Mr. Canfield on his retaliation claim and entered judgment for the District as a matter of law finding that Mr. Canfield's retaliation claim lacked a necessary statutory basis as a matter of law. *Id.*

Mr. Canfield appealed the entry of judgment for the District, the earlier dismissal of the prevailing wage act claim against the District on summary judgment. and the earlier summary dismissal of his defamation claim against Ms. Clark. *Id.* This Court upheld all of the trial court rulings except the summary judgment dismissing the defamation claim against Defendant Clark. *Id.* at 9. The Court

remanded for new trial as to the defamation claim only. *Id.* The Supreme Court denied review.

2. The Court of Appeals Remanded *Canfield v. Clark* for a Jury Trial

a. Plaintiff Moved for Summary Judgment Pre-Trial

The defamation claim against Defendant Clark was set for trial. Leading up to the new trial Mr. Canfield filed several motions. Mr. Canfield filed a motion for partial summary judgment that the statements made by Ms. Clark to temporary electrician Jessie Logan, as alleged in a letter by Ms. Logan, were defamatory per se. CP 13-26. Ms. Clark opposed the motion, moving to strike the letter and declaration by Ms. Logan. CP 215-232; CP 326-333.

The trial court denied Mr. Canfield's motion on defamation per se as a matter of law. CP 572-573. Judge Heller ruled that the jury needed to weigh the testimony of the witnesses. The judge had particular concerns that Ms. Logan's letter was not written under penalty of perjury and yet three years later Ms. Logan signed a declaration under penalty of perjury stating that everything in the letter was accurate. *See,* RP 35-38.

In another motion, Mr. Canfield asked the trial court to take judicial notice of the jury verdict from the prior trial, arguing that the

claims against the District and Ms. Clark were so entwined that the jury could not separate the damages between the two. RP 77-80; RP 180-182. Ms. Clark opposed the motion arguing it was improper for the court to take judicial notice of a jury verdict that was over-turned, and that the motion was just another attempt by Mr. Canfield to reinstate his claims against the District in the lawsuit against only Ms. Clark. CP 922-935; RP 78-79. The court denied Mr. Canfield's motion as an improper subject of judicial notice. The Court reiterated that the case against the District was not going to be re-tried in the defamation suit against Ms. Clark. RP 179-180.

b. Motions in Limine

Both parties filed extensive motions in limine. CP 484-516 (Defendant's Motions in Limine); CP 819-843 (Plaintiff's Motions in Limine). The Bliss investigation notes issue and the letter of Jessie Logan remain issues on this appeal.

1) The Jeannette Bliss Investigation Notes

Mr. Canfield introduced Ms. Bliss' notes regarding her interviews in direct examination of Ms. Bliss prior to the claimed error of the trial court allowing Ms. Clark to admit other parts of the notes of Ms. Bliss during cross-examination. RP 368-369; *see* CP 1892-1898 (copy of notes admitted by Mr. Canfield). Even though

Mr. Canfield was the first party to admit Ms. Bliss' notes into evidence, he objected when Ms. Clark moved for the admission of additional notes. RP 458.

Mr. Canfield also offered into evidence Ms. Bliss' June 28, 2008 letter that summarized her investigation into all of the complaints against Mr. Canfield by his supervisees, including the interviews of ten to eleven witnesses. RP 226-242; RP 439, Ex. 20. Mr. Canfield addressed his co-workers complaints summarized in Ms. Bliss' report extensively during his direct examination. *Id.*[6]

The jury heard significant evidence regarding the District investigation. In addition to Ms. Clark at least one other witness told Ms. Bliss that Mr. Canfield was known to carry a gun. RP 435-436. The notes of her interview of Auki Piffath were admitted into evidence to show the reasoning for the District's decision to keep Mr. Canfield on leave. RP 432-434; Ex. 300. Ms. Bliss testified that Mr. Piffath told her that Mr. Canfield carried a concealed weapon on his ankle and that Mr. Canfield had been seen walking

[6] Some of the complaints Mr. Canfield brought up and addressed on direct included that he gave minorities keys only to the back door of the office, locked people in the equipment storage cage to clean it, knocked screws out of Ms. Clark's hand, called Ms. Clark frequently on her cell phone, called school custodians to ensure his employees only took lunch from exactly 11:30 a.m. until noon, and put a supervisee on speaker phone in front of the crew when he was calling in sick. RP 226-242; RP 439, Ex. 20.

into a closed building with a pistol in his hand. RP 435-436. Ms. Bliss heard this from Mr. Piffath before she met with Ms. Clark. RP 436.

Evidence of District employees' complaints regarding Mr. Canfield, earlier addressed by Mr. Canfield, were again addressed with Ms. Bliss to provide evidence that the District's decision to demote Mr. Canfield was based on Mr. Canfield's history of controlling and harassing behavior. During Ms. Bliss' testimony the defense introduced additional exhibits of her witness notes as business records to provide a complete picture and to summarize her investigation. RP 457-461; Exs. 230, 231, 232, 233, 234, 240 & 300. Ms. Bliss interviewed at least eleven witnesses, including six hours with Mr. Canfield, prior to making her recommendations. RP 438-439.

Ms. Bliss initially concluded Mr. Canfield should be terminated, "Because I found such a pattern of harassment, bullying, intimidating behavior that I thought it warranted termination." RP 439. Ultimately the District decided to demote Mr. Canfield. RP 439.

2) The Logan Letter

Ms. Clark moved in limine to exclude Plaintiff's Exhibit 75, the Jesse Logan letter and a declaration written several years later purporting to authenticate the prior letter. CP 514-515. The court initially reserved ruling prior to trial. RP 124 (Defendant's motion in limine "W" relates to Jessie Logan).

At trial Mr. Canfield moved to admit the letter of Ms. Logan as the business record of Mr. Canfield's labor union representative, Ms. Nancy Mason, to whom Ms. Logan purportedly sent the letter. RP 499-503. The court sustained Ms. Clark's objections, holding that the letter was not being offered as documentation of Ms. Mason's work but instead to prove the truth of the matter asserted in the letter. RP 502. The trial court ruled that Ms. Logan could certainly testify at trial but her letter would not be admitted as a business record of Ms. Mason. RP 502-503. The following day the court made clear its reasoning in excluding the Logan Letter:

> I didn't want to belabor the point in front of the jury, but Ms. Logan's report, I mean the "To Whom it's Concerned" that she submitted to Ms. Mason, that is classic hearsay. And it's not business records because it is authored by Ms. Logan not by Ms. Mason, and it was voluntarily submitted. It doesn't become -- although it may become part of their records, the school district's records, because it is not authorized by someone at the school district,

> that's why I'm saying it's hearsay. I hope you understand what my reasoning was.

RP 522. Ms. Logan did not testify. Ms. Logan was not deposed. Consequently, there was no testimony of Ms. Logan at trial.

3. The Alleged Defamatory Statements

At trial the jury heard evidence of Ms. Clark discussing Mr. Canfield and guns with two people[7]

1) Auki Piffath, a co-worker of both Mr. Canfield and Ms. Clark, and Ms. Clark's carpool partner; and

(2) Jeanette Bliss, Former District human resources manager at the District.

No other witness of either party testified that they had discussed Mr. Canfield and guns with Ms. Clark despite several current and former co-workers of Ms. Clark and Mr. Canfield being called to testify.

a. The Statements to Jeanette Bliss

At trial there was testimony that Ms. Clark told Ms. Bliss that prior to her time working at the District she met Mr. Canfield on District property to help her run an errand and he had a gun. RP

[7] Mr. Canfield's brief highlights the letter and declaration of a temporary electrical worker, Jessie Logan. Portions of Ms. Logan's letter, as well as Ms. Clark's testimony in a 2011 deposition as to what she recalled of her interactions with

405-406. There was also testimony that Ms. Clark told Ms. Bliss that when she started work at the District she asked Mr. Canfield if he still had a gun and he responded, "Yes, it's in my pants." RP 407-408.

b. The Statements to Auki Piffath

Auki Piffath testified by deposition. Ms. Clark told Mr. Piffath about a time she met with Mr. Canfield on District property at a closed school, Mr. Canfield went with Ms. Clark across the street on an errand and showed her he had a gun with him. RP 580-581. Mr. Piffath testified that when he heard this he went first to District H.R. manager, Laurie Taylor who directed him to Ms. Bliss. RP 583. Mr. Piffath felt it was important to go to H.R. because this was the second time he had heard someone say that Mr. Canfield was carrying a gun. RP 583-584. Ms. Clark was hesitant to talk to Ms. Bliss; Mr. Piffath testified that Ms. Clark initially did not want to talk to human resources. RP 588.

There was no evidence of any other allegedly defamatory statements by Ms. Clark. Mr. Canfield did not testify regarding the alleged defamatory statements because he did not hear them.

Ms. Logan, are included in appellant's statement of facts at pages 14-17. They should be stricken or disregarded. This evidence was not before the jury.

4. Testimony that Mr. Canfield had a Poor Reputation Before any Statements by Ms. Clark

Mr. Canfield could offer almost no evidence of how he was damaged by Ms. Clark's statements to Auki Piffath and Jeanette Bliss particularly in light of Mr. Canfield's serious unrelated issues with his co-workers and District management. Mr. Canfield testified extensively about conflicts with District management including his wage and safety allegations. RP 189-192.

Mr. Canfield actually testified that the District's action in keeping him on leave, their "discipline" of him, was motivated by his advocating prevailing wages and other changes for the electrical department workers; not that it was due to Ms. Clark's complaints. RP 282-283.

Mr. Canfield's former girlfriend, Kelly Knapp, testified that Mr. Canfield complained to her about, "the guys at work", harassment by his co-workers and that he thought District management was retaliating against him. RP 711-712. She testified that Mr. Canfield did not talk to her often about Ms. Clark's allegations but talked to her about other problems at work on a daily basis. RP 709.

Two current District employees Mr. Moreland and Mr. Gallagher were called to testify by Mr. Canfield regarding damage to his reputation and character. On the other hand, Mr. Martin Birnie, Mr. Walter Craig and Mr. Bruce Skowyra were current District employees who testified for Ms. Clark.[8] Mr. Canfield's witnesses actually confirmed that Mr. Canfield was perpetuating whatever statements Ms. Clark made by repeatedly bringing up the subject himself. *See,* RP 719; RP 732.

Further, Mr. Gallagher testified that Mr. Canfield's reputation was poor at all times he was aware. *See,* RP 726-732. Mr. Moreland testified that the gossip about Mr. Canfield was no different from other types of gossip he heard at the District. RP 721.

Nancy Mason, a union representative, testified that electrical workers with the District had many issues with Mr. Canfield's management style. The issues predated Ms. Clark's employment with the District. They did not go away over time. *See,* RP 506-507; 1028-1031.

[8] Mr. Skowyra testified generally to Mr. Canfield's poor reputation and its basis in other matters than the gun allegations, RP 801 *ff*, specifically that he never heard any allegations about Mr. Canfield having a gun, RP 816; Mr. Birnie related a bizarre incident where Mr. Canfield identified a drawer in a file cabinet and told him it was ideal for hiding a gun. *See,* RP 835.

Mr. Lynn Good, a former District employee testified that Mr. Canfield's reputation in his profession was poor at the District before Michelle Clark's arrival and did not change through 2009. RP 976, 988.

Mr. Good also rebutted Mr. Canfield's testimony that he was placed on administrative leave from the District offices in a manner that caused Canfield public humiliation. Mr. Good handled the event, and he testified that it was done without any commotion and without anyone taking notice. *See,* RP 985-986. His testimony in this respect agreed with the testimony of Ms. Bliss. RP 453-454.

5. Motions for Judgment as a Matter of Law

At the conclusion of Mr. Canfield's case Ms. Clark moved for a judgment as a matter of law, that defamation had not been proven. RP 1011-1016. The motion was denied.

At the conclusion of the defendant's case Mr. Canfield moved "for directed verdict" on defamation per se. RP 1147. The Court denied the motion, finding that the case should go to the jury. RP 1148.

6. Jury Instructions, the Special Verdict Form, the Verdict and this Appeal

The parties engaged in significant oral argument regarding the jury instructions as well as the format of the special verdict

form. Ultimately, the court included an instruction regarding defamation per se. RP 1108-1110. The court held that the parties could argue the details and meaning of the defamation per se instruction in closing. RP 1112. The court further included on the verdict form a question requiring the jury to state whether any damages were "proximately caused" by Ms. Clark's alleged defamatory statements. CP 1120. The court agreed with Ms. Clark that proximate cause of damages was a required element of both defamation and defamation per se. CP 1121.

Utilizing the court's instructions, each party argued its position on defamation per se in closing. Counsel for Mr. Canfield argued to the jury that if they found defamation per se they could presume damages exist:

> You can presume damages. And what you do is you presume damages that would naturally flow from that type of statement. So you need to keep this in mind when you're determining the damage portion as well. They still need to be damages that would be proximately caused by the statement, but you can presume they exist. It's a form of what they call strict liability.

RP 1167. Counsel for Mr. Canfield reiterated this argument in her rebuttal, implicitly acknowledging that causation remained a requirement:

> And if we show defamatory per se, you can presume damages. . . . I mean, you can't give him damages, for example, for a car accident in a defamation suit. They still have to relate to the defamatory statement, but you can award him damages, presumed damages.

RP 1207-1208.

The jury deliberated and found that Ms. Clark defamed Mr. Canfield but that Mr. Canfield was not damaged by the defamation. CP 1637-1638. The jury was polled and the "no damage" conclusion was unanimous. RP 1221-1223. Mr. Canfield made no request that the jury be sent back to make a finding of presumed or nominal damages.

Mr. Canfield moved for a new trial. CP 1669-1684. Ms. Clark opposed. CP 1685-1697. The Motion for new trial was denied. CP 1708-1713. In December 2014 Mr. Canfield filed the present appeal. CP 1714-1731.

IV. ARGUMENT

A. Summary of Argument

The parties spent almost two weeks in trial. Mr. Canfield failed to persuade the jury that the statements of Michelle Clark had proximately caused damages. He failed to prove defamation per se.

Ms. Clark's defense in large part focused on the fact that Mr. Canfield's reputation at the District, his reputation in his business, trade or profession, was poor prior to the time Michelle Clark arrived at the District. It was poor before; it was poor after the alleged statements were made; there was no change and therefore no injury or damage to his reputation.

Her proof related to the lack of damages dovetailed with Ms. Clark's defense against defamation per se. Mr. Canfield's evidence did not persuade the jury that Ms. Clark had accused him of a crime. Failing that, Mr. Canfield simply could not prove he had been injured in his business trade or profession by anything Ms. Clark said about him.

After all the efforts expended by Mr. Canfield, besides the lack of proof of any damages, he presented very scant evidence of defamation. The only evidence was that Ms. Clark talked to Jeannette Bliss about Mr. Canfield and that she talked to Auki Piffath about him. Mr. Piffath's testimony was by deposition.

Whether Ms. Clark's allegedly defamatory statements were even false was a significant jury question. The jury had to decide between Ms. Clark's testimony and Mr. Canfield's regarding the details of the clay pot incident as both parties agreed Mr. Canfield

had a gun with him on that date; and as to whether Mr. Canfield told Ms. Clark he "had a gun in his pants," or whether Ms. Clark made up this story in her interview with Ms. Bliss.

Reading the statement of the case from Mr. Canfield's opening brief, the Court may misapprehend that the Logan letter was evidence in the case. It was not. The letter from Jesse Logan was the rankest form of hearsay. Without any sworn testimony to support its admission, the trial court properly excluded it.

Taken as a whole, the jury rationally concluded that the defamatory statements it found from the evidence did not rise to the level of defamation per se. No statements accused him of a crime. No statements were established that exposed him to "hatred or contempt;" or "injured him in his business or trade or profession."

Despite the lack of evidence, Mr. Canfield had full and complete opportunity to argue his theory of the case to the jury. Mr. Canfield has not assigned error to any of the jury instructions. Instead, he argues that the existence of question no. 3 on the special verdict form requires a new trial. When read as a whole with the jury instructions, however, the special verdict form adequately presented the contested issues to the jury in an unclouded, fair manner.

The trial court properly denied Mr. Canfield's motions post-trial. The evidence received at trial supported the jury finding in all respects. This Court cannot say that no rational trier of fact could have found as the jury found in Mr. Canfield's case.

The other evidentiary rulings, about which Mr. Canfield complains, were invited error, if error at all. Mr. Canfield opened the door to the evidence of the Bliss investigation notes and introduced part of the investigation. Ms. Clark appropriately supplemented the exhibits on cross-examination to give the jury a complete picture of the investigation.

The appeal should be rejected, and the judgment in the trial court affirmed.

B. The Trial Court Properly Denied the Motion for Judgment as a Matter of Law and Motion for New trial

1. Standard of Review

Ms. Clark agrees with Mr. Canfield's statement that the Court should review the order denying new trial for "abuse of discretion." ***Mears v. Bethel Sch. Dist. No. 403,*** 182 Wn. App. 919, 926 (2014). The court can grant a motion for judgment as a matter of law only if "there is no competent and substantial evidence upon which the verdict can rest." ***Guijosa v. Wal-Mart Stores, Inc.,*** 144 Wn.2d 907, 915, 32 P.3d 250, 254 (2001).

2. Substantial Evidence Supports the Jury Verdict

In ***Kohfeld v. United Pacific Ins. Co.,*** 85 Wn. App. 34, 42, 931 P.2d 911 (1997), the Court held that a new trial was not warranted because there was a reasonable basis for the jury verdict on damages. It was the province of the jury to accept or reject, in whole or in part the witnesses' testimony. The court would not second guess the jury's credibility determinations.

Appellate courts are properly reluctant to interfere with a jury's damage award because the determination of damages is within the province of the jury. ***Palmer v. Jensen***, 132 Wn.2d 193, 197, 937 P.2d 597 (1997). The Court should examine the record to determine whether the jury's award is contrary to the evidence. *Id*.

Where the jury could believe or disbelieve the evidence and weigh all of it and remain within the range of the evidence in returning the challenged verdict, then it cannot be found as a matter of law that the verdict was unmistakably excessive or inadequate to show that the jury was motivated by passion or prejudice based on the amount. ***James v. Robeck***, 79 Wn.2d 864, 870–71, 490 P.2d 878 (1971).

The jury found that Ms. Clark's statements were defamatory but that Mr. Canfield suffered no damages from the statements.

The evidence supports this verdict. This conclusion dovetails with the conclusion that the statements of Ms. Clark were not defamatory per se. The jury concluded that Mr. Canfield was not injured in his business, trade or profession by the statements. *See,* RP 1157, instruction no. 9 (Mr. Canfield has not assigned error to instruction no. 9).

3. Jury Concluded Mr. Canfield did not Carry His Burden of Proof on Damages; or on Defamation Per Se

a. No Damages

A prima facie defamation claim under Washington law requires a false statement that was not privileged, fault, and damage. ***See Mohr v. Grant***, 153 Wn.2d 812, 108 P.3d 768, 773 (2005).

Actual damages need not be proven when a statement is defamatory per se. ***E.g., Valdez–Zontek v. Eastmont Sch. Dist.***, 154 Wn. App. 147, 225 P.3d 339 (2010). Defamation per se exists where a statement alleges that the plaintiff: (1) committed a serious crime; (2) has a loathsome disease; (3) is unchaste; or (4) statement injures the plaintiff in his business, trade, profession, or office. *See* ***Davis v. Fred's Appliance, Inc.***, 171 Wn. App. 348, 287 P.3d 51 (2012).

Plaintiff claimed that he suffered injury or damage as a result of two statements made by Defendant, Ms. Clark, his former co-worker in the Seattle Public School Electrical Department, to two individuals, Ms. Jeanette Bliss (former human resources representative) and Mr. Auki Piffath (a co-worker and Ms. Clark's carpool friend). *See, e.g.,* RP 370-373; RP 404-408; RP 580-584.

Rebutting his claims of harm, injury or damage from the statements, Ms. Clark in turn presented evidence that Mr. Canfield was actually placed on administrative leave based on Ms. Clark's complaints about a hostile work environment and bullying and that the disciplinary action taken by the District was the result of long standing conflicts Mr. Canfield had with numerous employees who worked under him, with his fellow employees, and with District management. *See, e.g.,* RP 438-440. Mr. Canfield's own testimony supported Ms. Clark's position. *See,* RP 189-199; RP 301-303; RP 282-283; RP 342-345.

An extensive investigation was documented in Ms. Bliss' notes, some of which were admitted as exhibits and some of which were offered by Mr. Canfield. *See, e.g.,* RP 368-369. The evidence presented to the jury taken as a whole showed that Ms. Clark's statements were not the cause of Mr. Canfield's poor

reputation or poor relationships with his co-workers and employer or his claimed injury or damage.

The evidence supported the jury's finding. The jury heard overwhelming evidence about long standing and numerous conflicts between Mr. Canfield and his co-workers and between Mr. Canfield and Seattle Public Schools management unrelated to Ms. Clark's statements. *See, e.g.,* RP 189-192; RP 226-239.

Importantly, there was no evidence that Ms. Clark's statements had any effect on how Mr. Canfield's co-workers interacted with him. Several of the witnesses learned of Ms. Clark's statements from Mr. Canfield himself. RP 719; RP 732. The evidence was largely in conflict with, and did not support, Mr. Canfield's claim that he suffered any harm, injury or damage from the statements.

In summary, at trial the evidence was that Ms. Clark made the statements privately to two individuals, both in the context of Ms. Clark's complaints that she felt she was being bullied by Mr. Canfield, and in relation to an investigation into whether Mr. Canfield had created a hostile work environment in the electrical shop.

Mr. Canfield also claimed he was harmed or damaged by the manner of his removal from District property. Mr. Lynn Good, however, testified that he was present and that Mr. Canfield's removal from the property was uneventful and not a commotion. *See,* RP 985-986. Ms. Bliss testified she was nearby when he was escorted out of the building and that it was not done in a public or humiliating way. RP 453-454. The jury could conclude from this testimony that there was nothing to Mr. Canfield's claim of harm or injury in this episode.

b. No Defamation Per Se, and No Damages to Mr. Canfield, Viewing the Totality of the Trial Court Record

There was no evidence Mr. Canfield was damaged "in his trade or profession or subjected to hatred or ridicule" as a result of Ms. Clark's statements. Instead, the evidence showed that Mr. Canfield had a poor reputation before the statements and a poor reputation after the statements.

The evidence showed that Ms. Clark had no input into decisions about the personnel action taken against Mr. Canfield. The District disciplined him because of extensive evidence establishing that he had longstanding conflict with nearly every employee who worked for him and he created a hostile work

environment which was unrelated to Ms. Clark's statements about him. RP 438-440; Exs. 20 and 21.

Mr. Canfield argues that Ms. Clark's statements were defamatory per se and no reasonable juror could find otherwise. Brief at 46. But the only evidence cited in his brief to support defamation per se based on untrue statements that he committed some crime of moral turpitude was at the summary judgment stage where Mr. Canfield tried to convince the court to rule as a matter of law based solely on the Logan letter. Now in this appeal, that letter is discussed as if it were evidence introduced at trial. *See,* Appellant's brief at pages 30-32. The Court should disregard or strike repeated references to the excluded exhibit 75. See, note 7, *supra*.

The statements under consideration as defamation per se in ***Maison de France, Ltd. v. Mais Oui!, Inc.***, 126 Wn. App. 34, 44-45, 108 P.3d 787 (2005), are far different from the "statements" in this case. The analysis of this Court reviewing a judge-tried defamation case in ***Maison de France***, however, is instructive as to how review should proceed in this case.

In ***Maison de France***, one letter, the September letter, was found to be defamatory per se because it falsely imputed criminal

conduct to the appellants. 126 Wn. App. at 47. The letter specifically stated that the appellants were the "object of an investigation by United States Customs, the FDA and the Seattle Police for multiple counts of fraud," where at most the evidence supported an inference that they were investigated once. *Id.* The appeals court reversed a contrary finding of fact by the trial court and found that this specific statement in the letter constituted defamation per se. 126 Wn. App. at 54.

An April letter, however, did not specifically allege a crime, *i.e,* fraud. The Court of Appeals affirmed the trial court's finding of fact that it did not amount to defamation per se and did not support a claim for defamation at all:

> The record does not support a finding that the April 22nd letter exposed the appellants to hatred, contempt, ridicule or obloquy, deprived them of the benefit of public confidence or social intercourse, or injured them in their business, trade, profession or office. *Caruso*, 100 Wn.2d at 353, 670 P.2d 240. The record supports the trial court's conclusion that Mais Oui! sustained no actual damages as a result of the April 22nd letter.

Maison de France, 126 Wn. App. at 52.

Maison de France cites with approval ***Caruso v. Local Union No. 690 of Int'l Brotherhood of Teamsters***, 100 Wn.2d

343, 353, 670 P.2d 240 (1983). The ***Caruso*** court made an important distinction applicable to this case:

> The imputation of a criminal offense involving moral turpitude has been held to be clearly libelous per se. The instant case is quite different. It deals with rather vague areas of public confidence, injury to business, etc.
>
> * * *
>
> In all but extreme cases, the jury should determine whether the article was libelous per se.

Caruso*,* 100 Wn.2d at 354. [Emphasis added.]

This case should be governed by the same approach. It is the approach the Court took in analyzing the April letter in ***Maison de France****:* "Do the statements made by Ms. Clark satisfy the elements of defamation per se?" This is not the "extreme case" mentioned in ***Caruso.***

Mr. Canfield points to no statements by Michelle Clark that specifically accuse Mr. Canfield of committing a crime, such as the investigation of fraud in ***Maison de France***. He relies on innuendo and suggestion. The statements to Mr. Piffath and Ms. Bliss barely rise to the level of false statements at all. *See,* RP 370-373, 404-408, 580-584.

Instruction number nine correctly stated:

> A defamatory statement is defamatory per se if it exposes a person to hatred, contempt, ridicule or obloquy, to deprive him of the benefit of public confidence or social intercourse, or injures him in his business, trade or profession.

As outlined in ***Maison de France,*** *supra,* the first question is whether a statement was made with actual malice or reckless disregard for the truth; and the second is whether the statement is libelous per se. Where a statement is made with malice or reckless disregard for the truth but there is no evidence the statement, "exposes a person to hatred, contempt, ridicule or obloquy, to deprive him of the benefit of public confidence or social intercourse, or injures him in his business, trade or profession" libel per se has not been proven. There is no rule that a statement is automatically libelous per se if it is made with actual malice or reckless disregard for the truth. *Id.*

Mr. Canfield cites ***Michielli v. U.S. Mortg. Co.,*** 58 Wn.2d 221, 361 P.2d 758 (1961) for the principle that if defamation per se is found the defamed person is entitled to substantial damages. But the Court also stated:

> Whether the damages awarded are excessive depends on the facts in each case. . . . In the instant case . . . the record shows and the trial court found that the respondents' reputations were substantially damaged as a result of the defamatory statement.

Michielli v. U.S. Mortg. Co., 58 Wn.2d at 227-228. In Mr. Canfield's case, he produced no evidence of substantial – or any – damage to his reputation, particularly no evidence his business, trade or profession was affected.

The jury's determination that there were no damages should not be disturbed. Substantial evidence was presented from which the jury concluded that Mr. Canfield was not subjected to "hatred, contempt or ridicule" as the result of Ms. Clark's statements. There was no evidence Ms. Clark's statements damaged him in his business, trade or profession.

For example, there was no evidence that any witness had heard rumors about Mr. Canfield having guns at work and that they treated him differently because of the rumors. There was no evidence from any witness that Ms. Clark had stated to them that Mr. Canfield had guns at work and they thus treated Mr. Canfield differently or thought less of him.

The evidence showed that Mr. Canfield was demoted for reasons unrelated to Ms. Clark's statements. And he was eventually returned to his position leading the electrical department. Mr. Canfield continued working for the District for approximately

four more years after Ms. Clark's statements and now holds a similar position at the University of Washington.

The jury was within its province to consider whether those statements subjected Mr. Canfield to the opprobrium sufficient to support a finding of defamation per se. When the jury did not award damages, it made a finding consistent with no finding of defamation per se. From the totality of the record, this Court cannot say that no rational trier of fact could have reached that conclusion. The judgment should be affirmed.

C. The Trial Court's Instructions and The Special Verdict Form Allowed Mr. Canfield to Argue His Case to the Jury; Ms. Clark's Closing Argument Was Not Improper

1. Standard of Review

Mr. Canfield has not assigned error to any instruction in this case, only to one question on the special verdict form. *See,* RAP 10.3(g). The standard of review for jury instructions, however, informs the standard for review of special verdict forms.

Special verdict forms are reviewed together with the jury instructions as a whole. A special verdict form and accompanying instructions are sufficient if they: (1) permit each party to argue his theory of the case; (2) are not misleading; and (3) when read as a whole, properly inform the trier of fact of the applicable law. *See*

Hue v. Farmboy Spray Co., Inc., 127 Wn.2d 67, 92, 896 P.2d 682 (1995) (citing ***Adcox v. Children's Orthopedic Hosp. & Med. Ctr.***, 123 Wn.2d 15, 36, 864 P.2d 921 (1993); ***Farm Crop Energy, Inc. v. Old Nat'l Bank***, 109 Wn.2d 923, 933, 750 P.2d 231 (1988)).

Essentially, when read as a whole and with the general charge, the special verdict must adequately present the contested issues to the jury in an unclouded, fair manner. ***Capers v Bon Marche***, 91 Wn. App. 138, 142, 955 P.2d 822 (1998) (citing ***Lahmann v. Sisters of St. Francis***, 55 Wn. App. 716, 723, 780 P.2d 868 (1989).

2. The Trial Court did not Err Including Question Number Three in the Special Verdict Form

The court in ***Raum v. City of Bellevue,*** 171 Wn. App. 124, 286 P.3d 695 (2012) , considered a challenge to a special verdict form:

> Even on the merits, "a special verdict form need not recite each and every legal element necessary to a particular cause of action where there is an accurate accompanying instruction." *Capers v. Bon Marche*, 91 Wn. App. 138, 144, 955 P.2d 822 (1998).
>
> * * *
>
> **We presume jurors follow the court's instructions. *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 136, 875 P.2d 621 (1994).** Raum cites to nothing in the record indicating the jury failed to do so in this case. His challenge fails.

***Raum v. City of Bellevue**,* 171 Wn. App. at 148-149. [Emphasis added.]

The verdict form in this matter was clear and not erroneous or confusing. Mr. Canfield failed to prove defamation per se. This result is consistent with the jury finding Ms. Clark made a defamatory statement but awarding no damages. As described above, the jury had a reasonable basis for finding no damages. The jury was clear in their decision that Mr. Canfield suffered no harm or injury from the defamatory statement by Ms. Clark in responding "No" to question number three. Juries have considerable latitude in assessing damages, and a jury verdict should never be lightly overturned. ***Palmer v. Jensen***, 132 Wn.2d at 197.

The Court instructed the jury on defamation per se, instruction number nine. Mr. Canfield's counsel argued for applying the instruction in closing argument and in her rebuttal as well. *See,* RP 1167, 1207-1208. But the jury awarded no damages. Instruction Number Nine clearly instructed the jury that Mr. Canfield did not need to prove actual damages if he could show defamation per se.

3. Defense Counsel's Closing Argument Was Not Objectionable; It Surely Does Not Warrant a New Trial

Where an objection is made to closing argument, the trial court's ruling is reviewed for an abuse of discretion. ***State v. Gregory****,* 158 Wn.2d 759, 809, 147 P.3d 1201 (2006), *overruled on other grounds by* ***State v. W.R.****,* 181 Wn.2d 757, 336 P.3d 1134 (2014).

In this case, the following argument at RP 1183-1187 and RP 1199-1200 were not objectionable. The court ruled properly. The court emphasized Mr. Canfield's counsel could argue to the contrary.

Mr. Canfield's counsel indeed did argue to the contrary in her rebuttal. *See,* RP 1207-1208. No prejudice to Mr. Canfield can be divined from the argument of Ms. Clark's counsel. The trial court did not abuse its discretion.

D. Issues Surrounding the Letter from Jesse Logan

1. The Trial Court Properly Excluded the Letter from Jesse Logan

A trial court's rulings on the admission of evidence are reviewed for an abuse of discretion. ***Brundridge v. Fluor Fed. Servs., Inc.****,* 164 Wn.2d 432, 450, 191 P.3d 879 (2008). No evidence of Ms. Logan's interactions with Ms. Clark was presented

to the jury, except that union representative Nancy Mason was asked if she received a letter and/or spoke to Ms. Logan. She answered in the affirmative but further testimony regarding the interaction was excluded as hearsay. RP 502-503.

"Jessie Logan's Letter", Ex. 75, was properly excluded. *See,* ***Thomas v. French***, 99 Wn.2d 95, 103, 659 P.2d 1097 (1983) (A letter, an out of court statement made by those who signed the letter is hearsay and inadmissible unless an exception applies). Mr. Canfield offered Ex. 75, a letter purportedly written by a Ms. Jessie Logan regarding Ms. Clark, with a declaration to authenticate the letter.[10] RP 500.

The letter, dated September 2008, is replete with hearsay, double hearsay, and assertions of fact that are not within Ms. Logan's personal knowledge. The Court considered the letter and accompanying declaration several times, and each time the trial judge ruled it would not come in. RP 502-503, 522.

No hearsay exception applies to Ms. Logan's letter. Evidence Rule 804 includes an exception to the hearsay rule for former testimony when a witness is proved unavailable. But this

[10] The "declaration" is questionable on its face. The date of the declaration does not include a year. It does nothing more than purport to adopt the letter's contents as all true. Ex. 75.

letter and accompanying declaration are not former testimony. *See,* ER 804(b)(1). Ms. Clark was given no opportunity to "develop the testimony by direct, cross, or redirect examination." The court correctly excluded this letter from evidence.

Mr. Canfield sought to admit the letter as a business record of Ms. Mason. By that logic anything sent by anyone to someone's place of work loosely related to that person's work would then become a business record. *See* RP 500-501. No support exists for that proposition. The letter stands in contrast to Jeanette Bliss' notes that were actually drafted by Ms. Bliss to record her work.

Finally, also in contrast to the admission of Ms. Bliss' notes, Mr. Canfield did not seek to admit the letter to chronicle Ms. Mason's business decisions or explain the reasoning of her decisions, which are entirely irrelevant to this matter. Instead he sought to admit the letter as evidence of the truth of the matters asserted in the letter. Pages 14-17 of Mr. Canfield's Brief also contain lengthy quotes from the letter, as if it were evidence at trial. At page 32, statements from the letter are used as "evidence" of defamation per say. The Court should disregard them.

E. The Trial Court Properly Denied Summary Judgment Pre-trial

The Court should not review this pre-trial matter on appeal. "We may not review a denial of summary judgment following a trial if the denial was based upon a determination that material facts were in dispute and had to be resolved by the fact finder." ***Washburn v. City of Federal Way****,* 169 Wn. App. 588, 610, 283 P.3d 567 (2012) *aff'd on other grounds,* 178 Wn.2d 732, 310 P.3d 1275 (2013). The trial court explicitly denied the motion for summary judgment for the reason that material issues of fact existed that should be resolved at trial. *See,* RP 35-38.

F. The Court's Other Evidentiary Rulings Were Correct; Any Error Was Invited by Mr. Canfield and/or Harmless Error

1. Bliss Notes Properly Admitted

Again, the trial court's rulings on the admission of evidence are reviewed for an abuse of discretion. ***Brundridge v. Fluor Fed. Servs., Inc.****,* 164 Wn.2d at 450. Mr. Canfield assigns error to Ms. Clark's introduction into evidence of exhibits 230, 231, 232, 234, 240 and 300. Each of these exhibits is the interview and investigation notes of Jeanette Bliss, a former human resources employee for the District. Mr. Canfield asserts the notes show bias and he had no way to defend against them. He further alleges the

notes were unduly inflammatory and contained inadmissible hearsay.

Importantly, Mr. Canfield was the first party to admit Ms. Bliss' notes into evidence. RP 369. Mr. Canfield offered Ms. Bliss' notes regarding an interview of Michelle Clark during his direct examination of Ms. Bliss. RP 369; Ex. 228. Ms. Clark then moved to admit additional notes regarding Ms. Bliss' interviews during her cross examination of Ms. Bliss.

Contrary to Mr. Canfield's complaints, the exhibits containing Ms. Bliss' notes offered by Ms. Clark were not hearsay because they were not offered to prove the truth of the matters asserted. ER 801(c).

Ms. Clark offered Ms. Bliss' notes to show that the District's reasons for Mr. Canfield's discipline were unrelated to Ms. Clark's statements; and to rebut Mr. Canfield's argument that Ms. Clark's statements about guns caused the District's disciplinary action.

Even if the court concludes they are hearsay, the notes fall under at least two exceptions to the hearsay rule. First, the notes provided evidence regarding Mr. Canfield's general reputation and relationship with his co-workers. ER 803(21). Second, these notes are a business record. Ms. Bliss was in the business of conducting

human resources investigations. "Under the business record statute, the trial court must be persuaded that the sources of information, and the method and time of preparation of the record were such as to justify admission." ***State v. Iverson***, 126 Wn. App. 329, 340, 108 P.3d 799 (2005). A sufficient foundation was laid by Ms. Bliss regarding how the admitted records were made in the regular course and scope of her work and thus they were properly admitted pursuant to RCW 5.45.020. *See* RP 433-434.

Any error in admitting the notes was harmless. The statements described in the notes were also addressed in the testimony of both parties, and in the testimony of other former school district employees including Mr. Good, Mr. Craig, and Mr. Gallagher, among others.

Also, Mr. Canfield introduced into evidence Exhibit 20, a letter from the District regarding a potential demotion. The letter, and Mr. Canfield's testimony about it, detailed his co-workers complaints against him including: that he put a staff member on speaker and mocked him while calling in sick, RP 240-241; that he locked minority staff members in the equipment cage to clean it, RP 241; and that he called school custodians to check on his staff, RP 242.

Finally, details of the findings, scope and course of Ms. Bliss' investigation, including the same incidents described in her notes were addressed in the Arbitration decision offered by Mr. Canfield and admitted into evidence. Ex. 63. This decision was repeatedly referred to by Mr. Canfield, along with Exs. 20–27 and Ex. 65 also admitted by Mr. Canfield. Given that the incidents and alleged hearsay in Ms. Bliss' notes was also described in at least eight exhibits offered by Mr. Canfield, any error in admitting the notes was harmless and did not change the trial outcome.

2. Bias or Prejudice Issues are Illusory

Mr. Canfield argues that he was unfairly excluded from presenting evidence of bias related to the notes. It is unclear whose bias is asserted or the nature of the bias. Ms. Bliss drafted the notes in question many years prior to the trial and was no longer employed by the District at the time of her testimony. Further, the District was not a party to the lawsuit.

Mr. Canfield asserts error in being prevented from presenting evidence of so-called bias by District employees based on Mr. Canfield's argument that the District had an interest in retaliating against Mr. Canfield. But only three current District employees testified for Ms. Clark, Mr. Martin Birnie, Mr. Bruce

Skowyra and Mr. Walter Craig. On the other hand, two current District employees were called to testify by Mr. Canfield to support Mr. Canfield's reputation and character, Mr. Moreland and Mr. Gallagher.

Mr. Canfield testified extensively about conflicts with District management including his wage and safety allegations. Ms. Clark agreed this evidence was relevant; but Ms. Clark argued it was relevant to a showing that Mr. Canfield's claimed damages and emotional distress arose from causes other than Ms. Clark's statements.

V. CONCLUSION

None of the assignments of error by Mr. Canfield have any merit. The judgment should be affirmed in all respects.

Respectfully submitted this 14th day of October, 2015.

PREG O'DONNELL & GILLETT PLLC

By _____

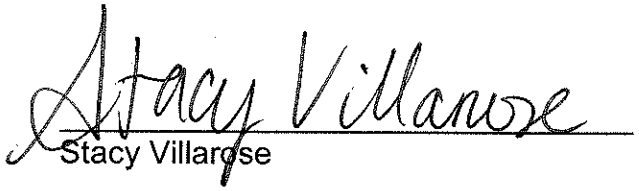
Earl Sutherland, WSBA #23928
Mark F. O'Donnell, WSBA #13606
Amber R. Gundlach, WSBA #41283
Attorneys for Respondent
Michelle Clark

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on this day the undersigned caused to be served via legal messenger a copy of the foregoing document directed to the following individuals:

Counsel for Appellant Donald Canfield:
Chellie Hammack, Esq.
CM Hammack Law Firm
801 Second Avenue, Suite 1410
Seattle, WA 98154

DATED at Seattle, Washington, this 14th day of October, 2015.



Stacy Villarose

TABLE OF CONTENTS OF APPENDIX

APPENDIX A

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle

DIVISION I
One Union Square
600 University
Street
98101-4170
(206) 464-7750
TDD: (206) 587-

May 28, 2013

Earl Maier Sutherland
Preg O'Donnell & Gillett
1800 9th Ave Ste 1500
Seattle, WA, 98101-1340
esutherland@pregodonnell.com

Mark F. O'Donnell
Preg O Donnell Et Al
1800 9th Ave Ste 1500
Seattle, WA, 98101-1340
modonnell@pregodonnell.com

Chellie Hammack
CM Hammack Law Firm
1001 4th Ave Ste 3200
Seattle, WA, 98154-1003
cmh@hammack-law.com

Emma O Gillespie
Preg O'Donnell & Gillett, PLLC
1800 9th Ave Ste 1500
Seattle, WA, 98101-1340
egillespie@pregodonnell.com

CASE #: 67274-6-I
Donald Canfield, App./Cr-Res. v. Michelle Clark, et al. & Sea. Public Schools, Res./Cr-App.
King County, Cause No. 09-2-44040-9 SEA

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

> "We reverse the summary judgment as to the defamation claim. In all other respects, the judgment of the trial court is affirmed"

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days. The Supreme Court has determined that a filing fee of $200 is required.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

ssd
Enclosure
c: The Honorable Susan Craighead

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DONALD CANFIELD, Appellant/ Cross-Respondent, v. MICHELLE CLARK and SEATTLE PUBLIC SCHOOLS, Respondents/ Cross-Appellants.	)	No. 67274-6-I DIVISION ONE UNPUBLISHED OPINION FILED: May 28, 2013

BECKER, J. — Donald Canfield, an electrician with the Seattle Public Schools, was demoted after the school district investigated a coworker's allegation that Canfield carried a gun on school property. An arbitration resulted in his reinstatement. His defamation suit against the coworker was dismissed on summary judgment. We reverse that ruling. A reasonable jury could find that the coworker made statements that were unprivileged and false. The dismissal of Canfield's claims against the school district is affirmed.

FACTS

Canfield began working for the Seattle school district as a maintenance electrician in 1992. He became foreman of the district's electrical shop in 2001.

Some of Canfield's subordinates complained that he had an intimidating manner, but Canfield was not disciplined.

In August 2007, the district hired Michelle Clark to work in the electrical shop as a fire alarm technician. Canfield suggested Clark for the position. Canfield had previously worked with Clark on electrical contract jobs, and they were social acquaintances. In early December 2007, Clark complained to Auki Piffath, her carpool partner from a different maintenance trade, about a particular incident when Canfield had gotten angry with her at work. Clark said she was concerned because she knew that Canfield carried a gun. She told Piffath that years before her employment at the school district, she had seen Canfield pull a gun from his pocket soon after he had walked off school district property.

Piffath reported Clark's statements to district management. The next day, a member of the human resources department, Jeanette Bliss, contacted Clark. Clark repeated her remarks about Canfield to Bliss. She added that Canfield, while at work, had recently confirmed that he was still carrying a gun.

Police were called to the school. Canfield was publicly escorted off school property by police officers. He was placed on paid administrative leave.

Bliss interviewed Canfield, Clark, and several other maintenance employees. Canfield insisted that he never brought a gun onto school property. Several employees told Bliss they were aware Canfield owned guns, but none reported seeing Canfield carrying a gun on school property. Bliss concluded Canfield had harassed his employees and created a hostile work environment.

She recommended that he be terminated. The district decided instead to demote him out of his foreman position. His pay was reduced, a written reprimand was added to his personnel file, and he was required to participate in anger management counseling.

Canfield's union filed a grievance on his behalf. After a two-day hearing in September 2009, the arbitrator sustained his grievance. The arbitrator found the school district's evidence had "certain significant defects," and Clark's initial gun allegation did "not appear to have had substance." The arbitrator lifted the demotion, awarded Canfield back wages, and converted the written reprimand to a documented oral warning, the lowest level of progressive discipline.

Canfield then sued Clark for defamation, outrage, and negligent infliction of emotional distress. Several months later, he filed a separate suit against the school district alleging retaliation, civil conspiracy, and a statutory wage claim, among other claims. The two lawsuits were consolidated, Clark and the school district were jointly represented, and both defendants moved for summary judgment. Canfield's claims against Clark and his wage claim against the district were dismissed. He was allowed to go to trial against the district on his claims of retaliation and civil conspiracy. After a nine-day trial in July 2011, the jury found for Canfield on the retaliation claim and awarded him $500,000. The trial court overturned the verdict on the school district's motion for judgment as a matter of law under Civil Rule 50. Canfield appeals.

DEFAMATION

Canfield contends the court erred by dismissing his defamation claim against Clark on summary judgment.

This court reviews summary judgment orders de novo, engaging in the same inquiry as the trial court. Mohr v. Grant, 153 Wn.2d 812, 821, 108 P.3d 768 (2005). Summary judgment is proper if the evidence shows there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c). Construing the evidence in the light most favorable to the nonmoving party, the court asks whether a reasonable jury could find in favor of that party. Mohr, 153 Wn.2d at 821.

Summary judgment "plays a particularly important role in defamation cases" because permitting unwarranted defamation suits to proceed to trial can chill speech protected by the First Amendment. Mohr, 153 Wn.2d at 821. Competing with these free speech concerns is society's "'pervasive and strong interest in preventing and redressing attacks upon reputation.'" Mohr, 153 Wn.2d at 821 n.5, quoting Rosenblatt v. Baer, 383 U.S. 75, 86, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966). The plaintiff in a defamation suit must prove falsity, an unprivileged communication, fault, and damages. Duc Tan v. Le, No. 86021-1, slip op. at 12 (Wash. May 9, 2013). To withstand summary judgment, the plaintiff must show a genuine dispute as to each element. Mohr, 153 Wn.2d at 822.

A. Falsity

In sworn testimony, Clark did not deny making statements to school district employees that she had seen Canfield carrying a gun on school property. She admitted telling several people about the long-ago incident when she claims she saw Canfield take a gun from his pocket soon after stepping off of district property. Bliss testified that Clark also told her that after she began working with Canfield at the school district, she once asked him if he still kept a gun on him, and that he responded by saying "yes," it was in his pants. Clark admitted telling Piffath and Bliss about seeing Canfield's gun cabinet at his house—in Bliss's notes of the interview, Clark called it "an arsenal."

Clark also admitted making statements about Canfield's gun possession to other school employees, including Jessie Logan and Bill Wickersham, while Canfield was on administrative leave. Logan's declaration reports that Clark definitely said she saw Canfield carrying a gun at school:

> She started talking to one of the teachers at an elementary school we went to about Don carrying a gun and having such a terrible temper. *When I overheard this I asked Michelle, "Did you say that this guy, 'Don,' was carrying a gun on the school district's property?" She told me that he carried a gun and never took it off his body. I asked her if she ever actually SAW the gun on him at the school district shop and she told me, "Yes, I was in the electrical shop one day when he was there. I saw it on him."* I was flabbergasted.
>
> From the way she was talking about him, I really believed he was a potential mass killer. Michelle explained what had happened in the electrical shop just months before I took the call. She said that "Don" went off on her and became very violent on the job, and that it took a SWAT team to remove him from the school district shop. She said that nobody could stand him (not even the teachers in the schools) and that everybody was just glad that he was gone and thanked her for "getting rid of him." She told me that "Don" was

> currently on paid administrative leave while the school district could figure out a way to fire him.

(Emphasis added.) Although Clark testified that she believed Logan was exaggerating, she did not deny the substance of Logan's remarks. She admitted that until someone at the school district instructed her not to talk about Canfield's gun possession, she "didn't have an issue talking about it . . . . Don's name came up a lot, yes."

In his arbitration testimony, Canfield denied ever bringing a gun on school district property: "Never, never. Wouldn't think of it. . . . I know the laws. I have a concealed weapons permit." He also denied Clark's account of the incident from years before. Canfield testified that the outing in question was on a Saturday, Clark picked him up at his home and drove him to the store, they did not park on or enter school district property, and he decided to bring a gun with him for "protection" because the store was not in a good part of town. In his declaration filed in opposition to summary judgment, Canfield reaffirmed his arbitration testimony as being "true and correct." Canfield's insistence that he never carried a gun on school property creates a genuine dispute as to the truth or falsity of Clark's statements about him. See Lawson v. Boeing Co., 58 Wn. App. 261, 267, 792 P.2d 545 (1990) ("On summary judgment we must assume that the statements were false, since they are denied in [the plaintiff's] affidavit."), review denied, 116 Wn.2d 1021 (1991).

A defendant in a defamation case need not prove the literal truth of every statement, so long as the "gist" of the statements or the portion that carries the

"sting" is true and the false statements do not cause any separate or additional harm. Mohr, 153 Wn.2d at 825; Duc Tan, slip op. at 17-18. Clark contends her statements were all "substantially true" because they were all corroborated by the common understanding among electrical employees that Canfield habitually carried a gun.

Clark's argument fails. The "sting" of Clark's statements was not the mere fact that Canfield habitually possessed guns. Gun possession is generally a lawful activity. The portion that carried the "sting" and did harm to Canfield's reputation was the allegation that he carried guns with him *onto school property*. Such an action would violate state law, see RCW 9.41.280, as well as school district policy. It was this allegation that gave the school district grounds for having Canfield escorted off of school property by armed police, for placing him on an indefinite period of administrative leave, and for investigating him over a period of several months.

Bliss's interview notes recorded a statement that "Anyone who knows Don knows that he carries his gun everywhere he goes." Clark also cites the declarations of Piffath, Bill Wickersham, and Jeff Hilliard to show that it was common knowledge Canfield carried a gun on school property. This evidence amounts to little more than vague reports of hearsay by unnamed coworkers. The declarations provide no personal knowledge that Canfield ever carried a gun on school property. Bill Wickersham was the only one who actually saw Canfield with a gun, but Wickersham was indefinite as to when or where this occurred.

Clark's argument that her remarks were all "substantially true" also fails because at her deposition, she admitted the statement she made to Logan was false.

> Q: . . . Did you ever – during the time that you worked at the school district, did you ever see Mr. Canfield carrying a gun on school property?
> A: No.
> Q: Did you ever ask him, Mr. Canfield, if he had a gun on school property during the time that you worked there?
> A: I don't know. I don't remember.
> Q: Okay. Do you ever recall Mr. Canfield showing you a gun on his person while he was working at Seattle School District during the time you worked there?
> A: No.
> . . . .
> Q: . . . *Is this a false statement: That you saw Mr. Canfield carrying a gun on his person while working at Seattle Public Schools during the time you were employed there?*
> . . . .
> A: *That would be a false statement.*

(Emphasis added.)

B. Privilege

A conditional or qualified privilege can attach to otherwise slanderous statements made to a third person "who has a common interest in the subject and is reasonably entitled to know the information." Pate v. Tyee Motor Inn, Inc., 77 Wn.2d 819, 820-21, 467 P.2d 301 (1970); see also Corbally v. Kennewick Sch. Dist., 94 Wn. App. 736, 973 P.2d 1074 (1999). Although the common interest privilege has been applied to communications between employees, the privilege is lost if the statements go beyond the ordinary course of the employees' work. Doe, 143 Wn.2d at 703.

Piffath was a union steward for the school district. Clark claims her statement to Piffath was privileged because she was reaching out for help from someone whose job it was to be concerned. A jury, however, would not have to accept this characterization of Clark's motivations. Clark testified that she talked to Piffath because he was her carpool partner. Piffath confirmed his belief that Clark's remarks about Canfield were made in the course of "just casual conversation" during the commute home, and not as a report related to her employment with the school district.

Also, a conditional privilege may be abused and its protection lost if the person made the statement with knowledge of—or by exercising reckless disregard for—the probable falsity of the defamatory matter. Hitter v. Bellevue Sch. Dist. No. 405, 66 Wn. App. 391, 401, 832 P.2d 130, 120 Wn.2d 1013 (1992); Duc Tan, slip op. at 20. Even if a privilege did apply to Clark's remarks to Piffath, a jury could conclude she lost it through abuse if the stories she told were knowingly false or told with a reckless disregard for its probable falsity. As to the story from years before that Clark relayed to Piffath, the record presents numerous variations. Canfield adamantly refutes Clark's version. This dispute calls into question the veracity of the version Clark recounted to Piffath. It is a credibility question for a jury to decide whether Clark's version was false, knowingly false, or told with a reckless disregard for its probable falsity.

Clark's reports to Bliss and other individuals in management arguably could invoke the common interest privilege. Bliss was a member of the human

resources department charged with addressing employee concerns. An employee's complaints that a supervisor is intimidating employees and carrying a gun to school is plainly a matter of common interest to the school district.

But the possibility of abuse hovers around certain of Clark's statements to Bliss as well. Clark told Bliss about the contested incident from years before which, as discussed above, could have been a knowingly false statement. Clark also told Bliss about a conversation when Canfield allegedly told Clark he was carrying a gun at work "in his pants." Whether such a conversation with Canfield ever occurred must be left to a jury, given Clark's inconsistent testimony on cross-examination concerning these remarks and Canfield's denial. Cf. Lambert v. Morehouse, 68 Wn. App. 500, 506-07, 843 P.2d 1116 (a person who complains about harassment necessarily has knowledge of whether the complaints are true or false), review denied, 121 Wn.2d 1022 (1993). Because Clark described statements she claims she heard Canfield make and actions she claims she saw Canfield take, if her reports were false, they were knowingly false. In such a case, whether she abused a privilege is an issue of fact for the jury, which must decide whether or not Clark was telling the truth. Lambert, 68 Wn. App. at 507.

In any event, no privilege applied to Clark's remarks to her coworker Logan. Logan had nothing to do with Canfield's investigation or the disciplinary process. Logan had never met Canfield when she heard Clark talk about seeing Canfield with a gun in the electrical shop. A jury could find that these remarks by

Clark were not within the ordinary course of Clark's and Logan's electrician work.

C. Fault

If Canfield is a private individual, he must demonstrate that Clark made her false statements negligently. Hitter, 66 Wn. App. at 400. If Canfield is a public figure, he must demonstrate by clear and convincing evidence that Clark made her remarks with actual malice. Corbally, 94 Wn. App. at 741; Duc Tan, slip op. at 20. Whether the plaintiff is a private individual or a public figure is a question of law for the court to decide. Valdez-Zontek v. Eastmont Sch. Dist. 154 Wn. App. 147, 159, 225 P.3d 339 (2010). Clark contends Canfield is a public figure since he held a position of authority in the electrical shop and he worked for a public entity. She cites Corbally, where the court ruled a public school teacher was a public official for purposes of his defamation lawsuit since his conduct "involved the manner in which he performed his teaching duties pursuant to public contract." Corbally, 94 Wn. App. at 741.

We need not now resolve whether or not Canfield should be deemed a public or private figure. Even if Canfield is held to the higher fault standard of actual malice, he has shown a genuine dispute of fact as to Clark's fault. As noted above, Clark admitted that at least one of the statements reported by Logan was false. If so, it was "unquestionably knowingly false." Lawson, 58 Wn. App. at 267. At trial, the court will decide as a threshold matter whether Canfield was a private individual or a public figure.

D. Damages

That Canfield suffered damages is undisputed in this appeal. Damages for emotional distress are available in defamation suits. Cagle v. Burns & Roe, Inc., 106 Wn.2d 911, 915-18 & n.1, 726 P.2d 434 (1986).

Having raised a genuine dispute of fact as to the challenged elements of defamation, Canfield is entitled to a jury trial.

Canfield also assigns error to the court's summary judgment dismissal of his outrage claim against Clark. He advances no argument as to that claim in his briefs, however. We treat this assignment of error as abandoned.

PREVAILING WAGE ACT

Canfield made a wage claim against the district based on chapter 39.12 RCW, commonly referred to as the prevailing wage act. He appeals the summary dismissal of this claim. The issue raised is one of statutory interpretation, which we review de novo. Litchfield v. KPMG, LLP, 170 Wn. App. 431, 437, 285 P.3d 172 (2012).

As a regular employee of the school district, Canfield sometimes worked on school building projects alongside workers hired by private contractors. Such contractors are required to pay the prevailing hourly wage to the "laborers, workers, or mechanics" they hire to perform under contracts. RCW 39.12.020. Canfield complained to the district on various occasions that he and his crew were likewise entitled to receive the prevailing wage when they collaborated on

these projects with the private laborers.

The statute expressly excludes regular public employees from its coverage:

> The hourly wages to be paid to laborers, workers, or mechanics, upon all public works and under all public building service maintenance contracts of the state or any county, municipality or political subdivision created by its laws, shall be not less than the prevailing rate of wage for an hour's work in the same trade or occupation in the locality within the state where such labor is performed. . . .
>
> . . . .
>
> *This chapter shall not apply to workers or other persons regularly employed by the state, or any county, municipality, or political subdivision created by its laws.*

RCW 39.12.020 (emphasis added).

Canfield's brief makes a policy argument that the school district "should not be allowed to circumvent the laws by allowing contractors on public works projects to utilize its employees," and thereby avoid paying the higher prevailing wage. This hint at some type of conspiracy to lower wages finds no clear support in the record. Nor is it supported by any citation to legal authority. Canfield's other arguments on this issue are similarly unsupported. The language of the statute unambiguously defeats them. The trial court did not err in dismissing the prevailing wage claim.

RETALIATION CLAIM

The only claims by Canfield that went to the jury were his claims of retaliation and civil conspiracy against the district. Canfield alleged, in essence, that the gun investigation was a sham concocted to retaliate against him for

complaining that he and his workers should be paid prevailing wages.

The school district moved for summary judgment on the retaliation claim on the basis that no Washington statute protects employees from retaliation for complaining about prevailing wages. Under CR 50, the district moved again for dismissal of the claim at the close of Canfield's evidence. The trial court denied the motion and allowed the jury to deliberate. The jury brought in a verdict for Canfield on the retaliation claim and awarded him $500,000. The district then renewed the CR 50 motion. The trial court granted the motion, leaving Canfield with no recovery. Canfield appeals this ruling.

The issue comes to us on a stipulated record that contains an excerpted transcript of the colloquies on the CR 50 motion and its renewal. The appellate record does not contain a transcript of the trial itself.

The Minimum Wage Act, chapter 49.46 RCW, is the only Washington wage statute containing an express anti-retaliation provision. The Minimum Wage Act makes an employer guilty of a gross misdemeanor "who discharges or in any other manner discriminates against any employee because such employee has made any complaint to his or her employer . . . that he or she has not been paid wages in accordance with the provisions of this chapter." RCW 49.46.100(2).

Canfield argues that the anti-retaliation provision of the Minimum Wage Act is equally applicable to workers who make wage complaints under other wage statutes, such as the prevailing wage act. The trial court correctly rejected

this interpretation of the statute. The court's primary purpose in interpreting a statute is to ascertain and give effect to the legislature's intent. Litchfield, 170 Wn. App. at 437. If a statute's meaning is plain on its face, the court gives effect to that plain meaning. Litchfield, 170 Wn. App. at 437.

The anti-retaliation provision in the Minimum Wage Act specifies that the wage complaints protected from retaliation are complaints that a worker has "not been paid wages *in accordance with the provisions of this chapter*." RCW 49.46.100 (emphasis added). Complaints related to prevailing wage entitlements under RCW 39.12.020 fall outside that limiting language.

Other statutes relating to employment contain specific language protecting against retaliation. See, e.g., RCW 51.48.025(1); RCW 49.60.210; and RCW 41.80.110(1)(d). The legislature could have easily included such language in the prevailing wage act, but it did not. Individual provisions of the Minimum Wage Act cannot be parceled out and exported into other statutes in entirely separate titles of the RCW. The function of the Minimum Wage Act is to establish the minimum wage and minimum standards of employment. See Seattle Prof'l Eng'g Emps. Ass'n v. Boeing Co., 139 Wn.2d 824, 835, 991 P.2d 1126, 1 P.3d 578 (2000). The prevailing wage act has a different function. The trial court correctly concluded that Canfield's claim of retaliation lacked a statutory basis.

CIVIL RULE 50

The judge who presided over the trial of the retaliation claim, and then granted the CR 50 motion, was not the same judge who denied the district's

pretrial motion for summary judgment on the same legal issue. Canfield contends the decision of the first judge must be given effect, and the judge who presided over the trial lacked authority to reach a different conclusion about the meaning of the various statutes. We disagree. A transfer of judges has no legal effect, and an interlocutory decision can be corrected by a different judge before a final judgment is rendered.

> [T]he succession of judges cannot be considered by this court; the office is a continuing one; the personality of the judge is of no legal importance. The action of [a subsequent judge, reversing his predecessor's ruling] was in legal effect a correction of his own action, which he deemed to have been erroneous; and it were far better that he should correct it, than to perpetuate an error which would have to be corrected by this court.

Shephard v. Gove, 26 Wash. 452, 454, 67 P. 256 (1901).

Canfield also argues it was procedurally inappropriate for the court to decide the validity of the retaliation claim under CR 50. He contends CR 50 motions are confined to situations where the evidence at trial is factually insufficient and that it may not be used to decide that a claim is legally insufficient.

Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party. Sing v. John L. Scott, Inc., 134 Wn.2d 24, 29, 948 P.2d 816 (1997). Often, the question concerns the sufficiency of the evidence viewed in the light most favorable to the nonmoving party. But the

reach of CR 50 is not confined to factual insufficiency. "A judgment as a matter of law may also be appropriate when, instead of the evidence being insufficient, the plaintiff's right to recovery (or the defendant's defense) is barred by a statute or other applicable law." 4 KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE CR 50 author's cmt. 1, at 213 (6th ed. 2013). The rule permits a party to move for judgment *as a matter of law* where "there is no *legally sufficient* evidentiary basis for a reasonable jury" verdict. CR 50(a)(1) (emphasis added). There cannot be a legally sufficient evidentiary basis to support a nonexistent statutory claim.

In that sense, the district's CR 50 motion did ultimately rest on an argument that Canfield's evidence was insufficient. A statutory claim of retaliation under the Minimum Wage Act would have required evidence that Canfield complained about not receiving minimum wages or overtime. Canfield's only complaints were about not receiving the prevailing wage.

The court's instructions informed the jury that a worker has a valid claim for retaliation based on making a complaint about prevailing wages. Canfield argues in his reply brief on appeal that the court's CR 50 ruling dismissing that claim was legal error because it contradicted the law as stated in the jury instructions. Once the court read the instructions to the jury, he contends, the school district lost its right to raise purely legal challenges.

This argument was raised too late. "An issue raised and argued for the first time in a reply brief is too late to warrant consideration." Cowiche Canyon

Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). The jury instructions were not made part of the record on appeal until the day after Canfield filed his reply brief. The record is also incomplete. The school district's proposed instructions and the jury instruction colloquy were never made part of the record on appeal.

A reply brief is limited "to a response to the issues in the brief to which the reply brief is directed." RAP 10.3(c). The district correctly notes that Canfield's inclusion of a new argument in his reply brief, and his belated attempt to submit the jury instructions for our review, are violations of the appellate rules. To that extent, we grant the district's motion to strike. This ruling affords the district sufficient redress for the rule violations. Its request for sanctions is denied.

Canfield's new argument would fail on the merits even if it could be considered. Jury instructions, once announced by the court, become the "law of the case." Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907, 917, 32 P.3d 250 (2001). But the law as pronounced in the jury instructions is not binding on questions of law raised later in a motion for a directed verdict. Kim v. Dean, 133 Wn. App. 338, 349, 135 P.3d 978 (2006); Rhoades v. DeRosier, 14 Wn. App. 946, 948 n.2, 546 P.2d 930 (1976). "Whether a verdict should have been directed is a question of law, and its resolution is not controlled by the pronouncements of the instructions, but by the *applicable* law." Rhoades, 14 Wn. App. at 948 n.2. This same rationale controls where, as here, the question of law is raised in a CR 50 motion for judgment as a matter of law. Motions for directed

verdict and motions for judgment notwithstanding the verdict were renamed "'motions for judgment as a matter of law'" effective September 17, 1993. Guijosa,144 Wn.2d at 915, quoting Litho Color, Inc., v. Pac. Emp'rs Ins. Co., 98 Wn. App. 286, 298 n.1, 991 P.2d 638 (1999).

Canfield claims that a CR 50 ruling cannot undo the law set forth in jury instructions to which no objection was made, relying for this proposition on Washburn v. City of Federal Way, 169 Wn. App. 588, 283 P.3d 567 (2012), review granted, 176 Wn.2d 1010 (2013). But Washburn is not on point because this court disregarded the CR 50 argument as not preserved. Washburn, 169 Wn. App. at 592, 614.

We reverse summary judgment as to the defamation claim. In all other respects, the judgment of the trial court is affirmed.

Becker, J.

WE CONCUR:

Spearman, A.C.J.

Leach, J.