No. 43304-4-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

GREGORY R. HART,

Respondent/Cross-Appellant

Vs.

CITY OF LAKEWOOD, et. al.,

Appellant/Cross-Respondent.

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

Cause No. 11-2-09538-5

OPENING BRIEF OF RESPONDENT/CROSS-APPELLANT
RESPONSIVE BRIEF OF RESPONDENT/CROSS-APPELLANT

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III. STATEMENT OF THE CASE

A. Procedural History

On or about May 25, 2011, Mr. Hart filed a complaint for damages for malicious prosecution, defamation and intentional and/or negligent infliction of emotional distress for events that occurred on May 21, 2007. CP 219-230. Mr. Hart's complaint surrounded his arrest by Lakewood police officers for alleged theft and malicious mischief of a dismantled gate Mr. Hart found along the side of the road. Id.

On January 25, 2012, the City filed a motion for summary judgment to dismiss all claims. CP 20-33. On March 2, 2012, the court granted defendants' summary judgment motion with respect to the malicious prosecution and intentional infliction of emotional distress claims and negligent infliction of emotional distress claims. On March 5, 2012, the defense moved the court to reconsider its denial of its motion to dismiss the defamation claim, CP 190-200, which the court denied. CP 206-207. On April 19, 2012, the trial court ordered certification for discretionary review of the court's summary judgment orders and stayed further trial court proceedings pending this Court's review. CP 441-444. This appeal follows.

B. Facts

Gregory R. Hart, Respondent herein, is an entrepreneur, businessman and inventor who, for the past 40 years, has been involved in a variety of businesses inventing products that have been used worldwide. RP 345.

On or about May 21, 2007 at mid-morning Mr. Hart picked up an abandoned piece of gate lying along a road bordering Wards Lake Park in Lakewood, Washington. At that time, Mr. Hart had been a volunteer steward of Wards Lake Park for many years. On various occasions Mr. Hart noticed the gate improperly placed across an access road leading to the park as well as discarded in several areas around and in the park. Other individuals who also frequented the park witnessed the gate in various locations in and around the park. RP 346.

On May 21, 2007, Mr. Hart learned that the gate was outside the park. He removed the gate because it was a hazard and he didn't want any person or animal to be injured if they happened to walk into the gate that lay obscured by the roadside grass. Mr. Hart placed the gate in the back of his utility trailer and drove it to Dianna Kilponen's home, which was a short distance down the road. Mr. Hart subsequently removed the gate and placed it alongside the shed inside of Ms. Kilponen's fenced yard. RP 346.

Sometime later, at about 12:30 p.m. that same day, Mr. Hart was awakened by Lakewood Police officers who were yelling and pounding on Ms. Kilponen's front door. When Mr. Hart opened the door, he was questioned about the gate. When he did not respond to the Lakewood Police officers' questions,

they threatened to obtain a search warrant to search Ms. Kilponen's home. RP 346.

A short time later, the Lakewood Police officers re-contacted Mr. Hart, arrested him, handcuffed him, read him his Miranda rights, and thereafter questioned him. Mr. Hart explained to the officers why he moved the abandoned gate and that he planned on disposing of it. Mr. Hart then gave permission to Detective Dennis McCrillis, formerly of the Lakewood Police Department, to remove the gate from behind the residence, and the gate was taken into police custody as evidence. RP 347.

Mr. Hart was then booked into the Pierce County Jail on one count of felony theft and one count of felony malicious mischief. After Mr. Hart was bailed out of jail, he learned that the Pierce County Prosecutor's Office declined to file any criminal charges against him. RP 347.

Approximately one month later, on or about June 19, 2007, the City of Lakewood charged him with one count of malicious mischief in the third degree and one count of theft in the third degree for the events that occurred on or about May 21, 2007. The City alleged that Mr. Hart knocked the gate down and removed it from its location. The Lakewood Police officers had no evidence, however, that Mr. Hart had damaged the gate or that he was in the area when the gate was damaged. RP 347.

Mr. Hart appropriately denied the allegations for both charges because the allegations were patently false, and at the time the gate was damaged, he was in Canada. RP 347.

The Lakewood Police Department failed to conduct any investigation into Mr. Hart's whereabouts at the time the gate was placed across the access road, and subsequently knocked down, the City had no evidence as to who owned the gate in question, and the City did not own the gate. RP 347-48.

The Lakewood City employee responsible for directing that the gate be placed on its old standards was Mary Dodsworth, who worked for defendant Lakewood Parks Department. Ms. Dodsworth had been receiving complaints that illegal activity had been occurring in the area of an abandoned Korean church, which was at the end of the access road, and she wanted a gate placed across the access road. She instructed Lakewood employee Jay Anderson to replace the gate. RP 348.

In response to Ms. Dodsworth's instructions, Mr. Anderson went onto a private property area at the end of the access road, found the old discarded and abandoned gate sections, and replaced the sections on the original pins that had previously been erected; thus attempting to secure the access road with the previously abandoned gate sections. RP 348.

Significantly, at the time of trial, the City of Lakewood claimed that the gate section was City property, yet provided no evidence that it purchased the gate or placed the gate within its inventory of City property. Rather, the City of Lakewood, through its employee, Mary Dodsworth, asserted that because the City claimed it as their property, the gate section became City property. RP 348.

On March 19, 2008, Mr. Hart went to trial on the two criminal charges. On March 26, 2008, a jury found Mr. Hart not guilty of the malicious mischief in the third degree charge, but guilty on the third degree theft charge. RP 348.

On appeal, Mr. Hart's conviction was reversed because the Lakewood Municipal Court judge failed to properly instruct the jury. Pierce County Superior Court Judge Lisa Worswick reversed Mr. Hart's third degree theft conviction and remanded his case for a new trial. RP 349.

Rather than dismiss the third degree theft charge because it had no evidence that the City owned the property at issue, the City proceeded with another trial against Mr. Hart. As such, Mr. Hart returned to trial on March 22, 2010 to address the third degree theft charge. The jury acquitted Mr. Hart of the third degree theft charge on March 23, 2010. RP 349.

Even though the City of Lakewood had knowledge of its lack of evidence of ownership of the gate, it still went forward, vindictively and maliciously, with Mr. Hart's prosecution when, in good faith, it had no evidence to support the prosecution. As such, the City's allegations that Mr. Hart maliciously damaged the gate in question and then subsequently stole said gate were false, without merit, and frivolous. RP 349.

The City's malicious prosecution of Mr. Hart caused him mental and emotional pain and suffering and his relationship with his domestic partner, Dianna Kilponen, was also damaged by the City's conduct. Furthermore, Mr. Hart's business activities were damaged as a result of the conduct of the

employees of defendants City of Lakewood, the Lakewood Police Department and the Lakewood Parks Department. RP 349-50.

During the pendency of the above-referenced prosecution, defendants transmitted photographs of Mr. Hart to other law enforcement officers and sent statements stating that he was extremely dangerous and likely to cause harm to law enforcement officers. Police also disseminated "Officer Safety Info" about Mr. Hart – accusing him of having a history of "assaultive behavior" and "hostility towards law enforcement" as well as being "very aggressive and irrational." See BOA at 5-6. Importantly, it is clear from this memo that the author, Sgt. John Unfred had had personal contact with Mr. Hart and appeared to not appreciate that Mr. Hart legally armed himself or that he would film the actions of police officers. Id. As stated above, Mr. Hart was informed of the actions of police by his domestic partner, Dianna Kilponen, who worked for the Fife Police Department at the time. RP 350. In her declaration – that was included in Mr. Hart's response to Appellant's motion for summary judgment, Ms. Kilponen discussed the reaction by police in Fife upon receiving the memo – specifically how the "nutcase" who lives on her street was causing problems in Lakewood. See CP at 147. She also noted that Sgt. Unfred's memo "was not sent in the usual format for officer notes and information, of which she [is/was] familiar."

The dissemination of the false and defamatory statements caused harm to Mr. Hart's professional reputation. See CP at 6-7. Specifically, Mr. Hart's longtime friend, mentor and business advisor, Bill Gates Sr., cut-ties with Mr.

Hart out of fear that his name – and his son's – could be damaged if associated with Mr. Hart's. Id. This action also caused Mr. Hart economic damages - in addition to pain and suffering - and also injured his relationship with his domestic partner. RP 350-51.

IV. DIRECT APPEAL ARGUMENT

A. The trial court erred when it granted the City's motions for summary judgment.

The purpose of summary judgment is to avoid an unnecessary trial when there is no genuine issue of material fact. Pelton v. Tri-State Mem'l Hosp., Inc., 66 Wn.App 350, 355, 831 P.2d 1147 (1992). However, a trial is absolutely necessary if there is a genuine issue as to any material fact. Olympic Fish Products, Inc. v. Lloyd, 93 Wn.2d 596, 611 P.2d 737 (1980); Jacobsen v. Stay, 89 Wn.2d 1045 569 P.2d 1152 (1977). Thus, a court must be cautious in granting summary judgment so that worthwhile causes will not perish short of a determination of their true merit. Smith v. Acme paving Co., 16 Wn.App. 389, 558 P.2d 811 (1976). If a genuine issue of fact exists as to any material fact, a trial is not useless; rather it is necessary. Lish v. Dickey, 1 Wn.App. 112, 459 P.2d 810 (1969).

A genuine issue of material fact exists where reasonable minds could reach different factual conclusions after considering the evidence. Klinke v. Famous Recipe Fried Chicken, Inc., 94 Wn.2d 255, 616 P.2d 644 (1980). Furthermore, on a motion for summary judgment, a trial court is required to view all evidence, draw all reasonable inferences in favor of the nonmoving party, and

deny the motion if the evidence and inferences create any question of material fact. DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 140, 960 P.2d 919 (1998); Scott v. Pacific West Mountain Resort, 119 Wn.2d 484, 487, 834 P.2d 6 (1992). Summary judgments are reviewed de novo. Braaten v. Saberhagen Holdings, 165 Wn.2d 373, 383, 198 P.3d 493 (2008).

Here, this Court should reverse the trial court's order granting the City's summary judgment motion because material facts exist which, when taken in the light most favorable to the respondent, establish prima facie cases of malicious prosecution and intentional infliction of emotional distress.

1. The Trial Court Erred When it Granted the City's Summary Judgment Motion and Dismissed Mr. Hart's Malicious Prosecution Claim.

To prove a prima facie case of malicious prosecution, a plaintiff must show the following:

> (1) That the prosecution claimed to have been malicious was instituted or continued by the defendant; (2) that there was want of probable cause for the institution or continuation of the prosecution; (3) that the proceedings were instituted or continued through malice; (4) that the proceedings terminated on the merits in favor of the plaintiff, or were abandoned; and (5) that the plaintiff suffered injury or damage as a result of the prosecution.

Hanson v. City of Snohomish, 121 Wn.2d 552, 558, 852 P.2d 295 (1993).

Want of probable cause is the heart of the tort of malicious prosecution as the existence of probable cause is alone sufficient to relieve a defendant from liability for malicious prosecution. McBride v. Walla Walla County, 95 Wn.App. 33, 975 P.2d 1029 (1999). Probable cause is measured by an objective standard, and not by the subjective determination of a prosecutor. Bender v. Seattle, 99

Wn.2d 582, 664 P.2d 492 (1983). A prima facie case of want of probable cause is established by proof that the criminal proceedings were dismissed or terminated in favor of the party bringing the malicious prosecution action. Peasley v. Puget Sound Tug & Barge Co., 13 Wn.2d 485, 125 P.2d 681 (1942).

On the other hand, a conviction of the plaintiff conclusively establishes the existence of probable cause and defeats an action for malicious prosecution unless the conviction was obtained by fraud, perjury or other corrupt means. Brin v. Stutzman, 89 Wn.App. 809, 951 P.2d 291 (1998). A conviction, even though later reversed, is conclusive evidence of probable cause unless the ground for reversal was absence of probable cause. Fondren v. Klickitat County, 79 Wn.App. 850, 905 P.2d 928 (1995); Hanson v. City of Snohomish, 121 Wn.2d 552, 852 P.2d 295 (1993).

When the facts are not disputed, the question as to whether there was probable cause is a question of law for the judge. Restatement (Second) of Torts § 673, comments on clauses (b) and (c). However, "[a] corollary to this rule is that if any issue of fact exists, under all the evidence, as to whether or not the prosecuting witness did fully and truthfully communicate to the prosecuting attorney, or to his own legal counsel, all the facts and circumstances within his knowledge, then such issue of fact must be submitted to the jury with proper instructions from the court as to what will constitute probable cause, and the existence or nonexistence of probable cause must then be determined by the jury. Id. at 501.

Here, the trial court erred by granting the City's summary judgment motion in two primary areas. First, the City has no evidence that Mr. Hart was not subjected to malicious prosecution relating to the malicious mischief charge for which he was acquitted in the first trial. Because he was found not guilty of the malicious mischief charge, he may still proceed in this case based upon the malicious prosecution of that frivolous charge. As such, because the City prosecuted Mr. Hart for malicious mischief for "destroying" the gate without any evidence of such action, the malicious prosecution claim for that criminal charge should be allowed to succeed.

Second, material issues of fact exist regarding the ownership of the gate or whether it was a discarded piece of trash. In discovery requests submitted to the City, Plaintiff sought "copies of all documents that establish the City of Lakewood's ownership of the gate sections that Plaintiff is accused of maliciously damaging and stealing." RP 310, 312, 314. The City of Lakewood admitted that "No documents establishing the City's ownership of the subject gate are available." RP 314. Subsequently, the City of Lakewood supplemented its response by providing a copy of invoice for installation of a gate. RP 315, 318. The City, however, never produced any evidence that it had any legal ownership of the gate before the City of Lakewood filed the criminal complaint against Mr. Hart. In order to support a finding of probable cause, it would be a requirement that the City could establish ownership of the item it alleged Mr. Hart damaged and stole. Because it had no evidence to suggest such a finding, probable cause is lacking.

As set forth previously, Plaintiff sought evidence of ownership of the gate in question, yet no evidence exists that the City owns, or has over owned, the gate. That the defendant filed two criminal charges against Mr. Hart on the premise that the gate in question was owned by or property of the City was fraudulent. In Mr. Hart's complaint he alleged that the City prosecuted him without any evidence it owned the property it alleged was damaged and stolen, and that such allegations were false. CP 1-12. As such, the City's charge against Mr. Hart was based on fraud or other corrupt means. See Brin, supra.

Because the entirety of the defendants' prosecution of Mr. Hart was based on its alleged ownership of a gate it had no legal ownership of, significant issues of material fact exist and the trial court erred by granting the City's summary judgment motion of the malicious prosecution claim.

2. The Trial Court Erred When it Granted the City's Summary Judgment Motion and Dismissed Mr. Hart's Intentional Infliction of Emotional Distress Claim.

To make a prima facie case of the intentional infliction of emotional distress, the plaintiff must show "(1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) severe emotional distress on the part of the plaintiff." Reid v. Pierce County, 136 Wn.2d 195, 202, 961 P.2d 333 (1998). The defendant's conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Id. at 202.

The City's conduct of charging Mr. Hart with two criminal charges, subjecting him to two trials, and never producing any evidence that it owned the gate, was outrageous. To suggest otherwise lacks credulity. The trial court should have determined that subjecting Mr. Hart to an unwarranted criminal prosecution was sufficiently extreme and outrageous to warrant a jury determination. The defendants completely failed to investigate whether Mr. Hart was in the area at the time of the event and their failure to acknowledge that the City did not own the property in question created the outrage cause of action. For a government defendant to suggest otherwise is outrageous in and of itself. Our state and federal constitutions were constructed by leaders pledging a commitment to the principles of "limited government" and "separation of powers." Concluding that wrongful prosecutions grounded in malice do not rise to the level of "outrageous" is preposterous in the United States of America.

With regard to objective symptomology of emotional distress, neither testimony from doctors nor medical records are necessary to establish a claim for intentional infliction of emotional distress. See Bunch v. King County Dept. of Youth Services, 155 Wn.2d 165, 180-81, 116 P.3d 381 (2005)(evidence of anguish and distress can be provided by plaintiff's own testimony). See also Nord v. Shoreline Savings Ass'n, 116 Wn.2d 477, 483-84, 805 P.2d 800 (1991). Mr. Hart's declaration amply demonstrated the distress he suffered from defendants' actions. CP 348-350.

Here, accusing a man of a crime he didn't commit, and then, in the absence of any proof of the most major element of the charge, pursuing two

criminal trials against him constitutes "extreme and outrageous conduct." As such, Mr. Hart establishes a prima facie case of intentional infliction of emotional distress. The trial court erred by granting the City's summary judgment motion on the intentional infliction of emotional distress claim.

V. CROSS APPEAL

A. Procedural History

Mr. Hart adopts the procedural history as set forth above.

B. Facts

Mr. Hart adopts the facts as set forth above.

VI. CROSS APPEAL ARGUMENT

Appellant has made three arguments in favor of this Court reversing the trial court's denial of summary judgment relating to his defamation claim: (1) the defamatory statements amounted to only non-actionable opinion, (2) Mr. Hart cannot establish fault, and (3) the common interest qualified privilege protects Appellants. See BOA at 12-16. Respectfully, these arguments fail.

To show a prima facie case of defamation, the plaintiff must show falsity, an unprivileged communication, fault, and damages. Mohr v. Grant, 153 Wn.2d 812, 822, 108 P.3d 768 (2005). The statement, in addition to being false, must also be defamatory, in that it must "harm the reputation of another as to lower him [or her] in the estimation of the community or to deter third persons from dealing with him [or her]." Right-Price Recreation LLC v. Connells Prairie Cnty. Council, 146 Wn.2d 370, 382, 46 P.3d 789 (2002). The element of "unprivileged communication" relates to communications between family members that are

made without malice, in good faith, and in an honest belief of their truth upon reasonable grounds. Twelker v. Shannon & Wilson Inc., 88 Wn.2d 473, 478, 564 P.2d 1131 (1977).

Here, Mr. Hart will show the following: (1) that as a matter of law, the defamatory statements were intended as statements of fact rather than mere opinion, (2) that material facts exist showing he can establish fault and (3) that material facts exist showing the qualified privilege does not apply and that it was abused by Appellants.

1. The trial court did not err in concluding that, as a matter of law, facts exist suggesting the defamatory statements by police amounted to more than mere opinion.

Before the truth or falsity of an allegedly defamatory statement can be assessed, a plaintiff must prove that the words constituted a statement of fact, not an opinion. This is because "expressions of opinion are protected under the First Amendment," and "are not actionable." Camer v. Seattle Post-Intelligencer, 45 Wn.App. 29, 39, 723 P.2d 1195 (1986) (*citing* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339, 94 S.Ct. 2997, 41 L. Ed. 2d 789 (1974) (observing that "[u]nder the First Amendment, there is no such thing as a false idea")). Whether the allegedly defamatory words were intended as a statement of fact or an expression of opinion is a threshold question of law for the court. Id. "To determine whether a statement is non-actionable, a court should consider at least (1) the medium and context in which the statement was published, (2) the audience to whom it was published, and (3) whether the statement implies undisclosed facts." Robel v. Roundup Corp., 148 Wn.2d 35, 56, 59 P.3d 611 (2002).

The Appellant argues that Sgt. Unfred's statements are non-actionable opinion. Significantly, however, when looking at the Robel factors set forth above, and comparing this case to the facts set forth in Robel, this Court should find, as a matter of law, that Sgt. Unfred's defamatory words were intended as a statement of fact as opposed to his opinion. Importantly, Sgt. Unfred set forth in the body of his memorandum what he perceived to be factual information including "a lengthy history of assaultive behavior in general and hostility toward law enforcement." Sgt. Unfred set forth arrests of Mr. Hart, as well as other conduct Mr. Hart purportedly engaged in, to support his statement that Mr. Hart was aggressive, irrational and a threat to law enforcement. These facts are different than those in Robel, where the plaintiff sought damages for being referred to as a "snitch," "squealer," and "liar" by her co-workers. Robel, 148 Wn.2d at 56. In addressing the medium and context of the use of such terms, the Court found that the statements were "made in circumstances and places that invited exaggeration and personal opinion ... [t]hose engaging in the name-calling were Robel's co-workers and superiors ..." Id. The Court further reasoned that the audience was "prepared for mis-characterization and exaggeration." Id (*quoting* Dunlap v. Wayne, 105 Wn.2d 529, 539, 716 P.2d 842 (1986). Surely, Appellant is not arguing that the City of Lakewood or its police department is a place that invites exaggeration and personal opinion in its conduct or that its "audience" – such as city workers or other police agencies – was prepared for mis-characterization and exaggeration in memos or other communication.

As such, this Court should find as a matter of law – as the trial court did – that Sgt. Unfred's defamatory words about Mr. Hart were intended as statements of fact.

2. The trial court did not err in concluding that material facts exist as to the issue of fault.

Without citing any specific authority, Appellant contends that Mr. Hart cannot establish fault. See BOA at 14-15. Respectfully, this is false.

First, it is important to point out that Mr. Hart must only meet the low summary judgment threshold of showing any material fact(s) suggesting that the conduct of Appellants was negligent. As such, Mr. Hart has cited numerous facts and statements within the record showing that there is simply no evidence that he is dangerous or a threat to law enforcement, etc. Such evidence has been confirmed by persons other than Mr. Hart as well. Because material facts exist as to whether Sgt. Unfred's memo, or any of the other statements by the City of Lakewood were made negligently, summary judgment was appropriately denied and this Court should not reverse the trial court.

3. The trial court did not err in concluding that material facts exist suggesting police abused the common interest privilege.

The issue of whether a statement is privileged is a question of law to be decided by the court. Liberty Bank of Seattle, Inc. v. Henderson, 75 Wash.App. 546, 878 P.2d 1259 (1994). As it relates to qualified privileges, the speaker's purpose and manner of publication may be relevant to the exercise of the privilege. Wood v. Battle Ground School Dist., 107 Wash.App. 550, 27 P.3d 1208 (2001). A qualified or conditional privilege acts to defeat the initial presumption

of liability raised by the publication of defamatory statements. Alpine Industries Computers, Inc. v. Cowles Pub. Co., 114 Wash.App. 371, 57 P.3d 1178 (2002).

Qualified or conditional privileges may be lost if the plaintiff can show that the privilege has been abused. Id. In such case, the defendant must show the challenged communication falls within the scope of the privilege and then the burden shifts to the plaintiff to prove any abuse of that privilege. Id. A person alleging abuse of a qualified or conditional privilege must show actual malice by clear and convincing evidence. Right-Price Recreation, L.L.C v. Connells Prairie Community Council, 146 Wash. 2d 370, 46 P.3d 789 (2002), *cert. denied*, 540 U.S. 1149, 124 S.Ct. 1147 (2004). A plaintiff can show actual malice by showing the declarant's knowledge of the falsity, the declarant's reckless disregard as to the falsity of the statement, or that the declarant in fact entertained serious doubts as to the statement's truth. Wood v. Battle Ground School Dist., 107 Wash.App. 550, 27 P.3d 1208 (2001).

Finally, an abuse of a qualified privilege can occur if the defendant acted without fair and impartial investigation or without reasonable grounds for believing in the truth of the defamatory statement. Dunlap v. Wayne, 105 Wash.2d 529, 716 P.2d 842 (1986); Turngren v. King County, 104 Wash.2d 293, 705 P.2d 258 (1985).

Here, a review of Sgt. Unfred's memo labeling Mr. Hart as very aggressive and irrational suggests it went far beyond the scope of what constitutes reasonable police conduct. First, it drew factual conclusions about Mr. Hart's temperament that were not supported by any evidence. Simply put, the memo

was silent as to whether Mr. Hart had ever been convicted of any crimes. Moreover, the memo itself even suggested a personal animus towards Mr. Hart for being a citizen who (a) exercised his Second Amendment rights by legally arming himself and, (b) exercised his First Amendment rights by "documenting scenes with cameras." See BOA at 5-6. As set forth in Dunlap and Turngren, a defendant abuses and subsequently loses his/her qualified privilege when acting without engaging in fair and impartial investigation. The unique circumstances in this case suggest that is exactly what happened to Mr. Hart.

Second, where the memo was improperly disseminated such that non-police entities such as Ms. Kilponen and even Mr. Hart's business partner, Bill Gates Sr. became aware of the allegations, the privilege was abused and lost. As noted above, the manner in which the communication is published is relevant to whether the privilege is lost. Appellants in this case should not be permitted to argue that the memo was necessary for police protection when it was recklessly disseminated.

Third, as Ms. Kilponen pointed out in her declaration, the memo "was not sent in the usual format for officer notes and information, of which she [was/is] familiar." The inference from this statement is that the memo was not sent in the course of routine police-work but part of a personal attack on Mr. Hart. This is supported by statements by Fife Police officers – made after reading the memo – that Mr. Hart was/is a "nutcase." See CP at 147-148. As such, it is clear that the Sgt. Unfred's memo set forth gratuitous statements with the clear intent of

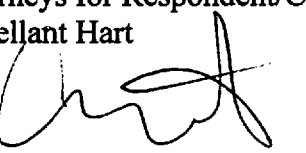
disparaging Mr. Hart's character. Accordingly, this court should affirm the trial court's denial of summary judgment.

VII. CONCLUSION

Based upon the aforementioned, Mr. Hart urges this Court to reverse the trial court's orders granting summary judgment in favor of the City and to remand the malicious prosecution and intentional infliction of emotional stress claims for trial. Mr. Hart additionally requests that this Court uphold the trial court's denial of the City's motion for summary judgment relating to Mr. Hart's defamation claim.

DATED this 24 day of October, 2012.

HESTER LAW GROUP, INC. P.S.
Attorneys for Respondent/Cross-Appellant Hart



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For BRETT A. PURTZER
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CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the opening brief of respondent/cross-appellant and the responsive brief of respondent/cross-appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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Comments:

This brief replaces the one filed 09/12/12, which the court indicated it would reject. Thank you.

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