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No. 72869-5-1

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

Donald Canfield, Appellant - Plaintiff

v.

Michelle Clark, Appellee - Defendant.

BRIEF OF APPELLANT

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ORIGINAL

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A. Assignments of Error

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2. The Court below erred in adopting the Special Verdict form submitted by Defendant including adoption of Question No. 3.

3. The Court below erred in ruling at trial to admit Defendant's exhibits 230, 231, 232, 233, 234, 240 & 300.

4. The Court below erred in failing to admit Plaintiff's exhibit 75.

5. The Court below erred in granting Defendant's Motion in Limine as to evidence relating to the relationship between Defendant Clark and Seattle Public Schools including suppressing evidence that Seattle Public Schools was paying Defendant Clark's attorney fees, had given her benefits not available to other employees including providing benefits after the termination of her employment and other evidence supporting bias of Seattle Public School witnesses.

6. The Court below erred in limiting Plaintiff's evidence regarding Seattle Public School's bias, conduct and retaliation.

7. The Court below erred in denying Plaintiff's objection to

defense counsel's closing arguments indicating Plaintiff was required to prove damage to reputation to prevail on his claims of defamation.

8. The Court below erred in denying Plaintiff's Motion for a Directed Verdict requesting the Court enter a finding of defamation per se as to the defamatory statements presented at trial and renewed in Plaintiff's Motion for a New Trial.

B. Issues Pertaining to Assignments of Error

1. Whether there was no dispute of material fact such that Plaintiff was entitled to entry of summary judgment on Plaintiff's claims of defamation relating to the statements made by Defendant Clark to Jesse Logan (Assignment of Error No. 1).

1. Whether adoption of a Special Verdict Form that included a provision requiring a jury to make a specific finding that defamatory statements were the proximate cause of damage to Plaintiff when the statements were or could be found by the jury to be defamatory per se hindered Plaintiff's ability to argue the theory of his case, was misleading and taken as a whole did not properly inform the jury of the applicable law. (Assignment of Error No. 2).

3. Whether the trial court abused its discretion in admitting hand written notes and an investigation report that included unsupported facts and conclusions was an abuse of discretion when the records contained

inadmissible hearsay, hearsay within hearsay, were not relevant and even if relevant their probative value was slight and was substantially outweighed by the risk of unfair prejudice to Plaintiff. (Assignment of Error No. 3).

4. Whether the trial court's abused its discretion in failing to admit Plaintiff's Exhibit 75 when the record was a business record and the witness was unavailable. (Assignment of Error No. 4).

5. Whether the trial court abused its discretion when it failed to allow Plaintiff to produce bias evidence of SPS witnesses and Defendant Clark. (Assignment of Error No. 5 & 6).

6. Whether misstatements of law by defense counsel in closing argument is one related to law that provides for de novo review. (Assignment of Error No. 7).

7. Whether defense counsel's closing argument was misconduct such that a new trial should have been granted. (Assignment of Error No. 7).

8. Whether the defamatory statements offered were of a character such that no juror could reasonably find they were not defamatory per se when the statements include an allegation that Plaintiff had a gun on him while at work at the school district and such an act is a violation of the law. (Assignment of Error No. 8).

II. STATEMENT OF THE CASE

A. BRIEF EARLY PROCEDURAL HISTORY OF THE CASE

Based upon the events described below, Plaintiff Donald Canfield filed two lawsuits, one against his former employer Seattle Public Schools ("SPS") and one against an employee Defendant Michelle Clark. CP 1-5 & 486. This case against Defendant Michelle Clark ("Defendant Clark") was filed in December 2009, and raised claims against Defendant Clark for defamation for statements made to fellow employees and Defendant SPS' HR personnel, Jeanette Bliss. CP486. The second case against Seattle Public Schools ("SPS") raised claims of violations of Washington's Prevailing Wage Act/Wage Payment Act, including retaliation. *See Canfield v. Clark and Seattle Public Schools,* 2013 Wash. App. Lexis 1280, 3-4(2013). On motion of Defendants, the Court consolidated the cases. The facts surrounding the outcome of the case filed against SPS are described below. This case addresses the defamation claims brought against Defendant Clark.

B. FACTS THAT GIVE RISE TO PLAINTIFF'S DEFAMATION CLAIMS

1. HISTORY OF EMPLOYMENT AND COMPLAINTS OF UNLAWFUL CONDUCT AT SEATTLE PUBLIC SCHOOLS.

a. Promoted to foreman, no history of discipline.

Plaintiff first began working as a journeyman electrician, in 1981, after completing a 4 year apprenticeship program. CP 615 (23:10-12). He has held his EL01, journeyman electricians commercial wiring license since that time. CP 616 (28:16-20). During the years he has been an electrician, he has been an active member of his union, IBEW Local 46. *Id.* He began working for Defendant Seattle Public Schools as a maintenance electrician in or about 1992. CP 615(26:1-10). He became the foreman of the electrical department in or around 2000. CP 619 (41:24-4). His duties as foreman of the electrical shop include assigning work and managing the other electricians. CP 759-760. Although he can discipline employees under him, he does not have the authority to terminate an employee. *Id.* During the time he has worked with Defendant SPS up until December 2007, Plaintiff Canfield had never had any disciplinary action taken against him. *Id.*

b. Problems with funding for purchase of safety equipment, allow unskilled workers to perform electricians work, and participation in supporting a strong Union.

During the time Plaintiff Canfield has worked for Defendant SPS, he has been active in his union and has worked with the union to ensure electricians were treated fairly. CP 760. Over the years there had been

problems with funding to purchase necessary safety equipment including aluminum ladders (using metal ladders is unsafe), flash protection (to protect electrician's in the event of an catastrophic electrical event), earthquake proof shelving, adequate heat in the office, safe trucks (including installation of the safety shield that protects drivers in the event of hard braking). CP 622-623 (81:21-85:18). There were always problems with funding and/or having money to purchase safety equipment. *Id.* Defendant SPS consists of two divisions, the maintenance division and the capitol division. CP 760. The capitol division has three separate divisions: Building Excellence ("BEX"), responsible for organizing new construction projects; Building Technologies Academics ("BTA"), responsible for remodel work, and Small Works, responsible for minority/small business contracts. *Id.*

c. Complaints regarding failure of Defendant SPS to pay his employees what he believed were appropriate wages - payment of prevailing wage and problems with Small Works, "Summit Meeting" just days before being escorted off school property by police.

During 2007, Plaintiff Canfield had made complaints that he believed his employees were not being paid correctly when they were used to perform work along side contractors on capitol projects. CP 761-762, ¶ 7, *See also*

CP 628 (169:4-170:16); CP 629 (176:2-182:24); CP 631 (185:20-189:20). Close in time to Defendant Clark's hire, the maintenance electricians were called to work on a BEX, or Capitol Works project involving the installation of cubicles. *Id.* Plaintiff Canfield had complained that he believed the maintenance electricians should be paid prevailing wage because they were doing work that was under contract, along side contractors, work that was not within the scope of their maintenance work. *Id.* Plaintiff Canfield had complained to the then new Senior Facilities Manager, Lynn Good. *Id.* Mr. Good had responded indicating Plaintiff Canfield and his employees would be paid the prevailing wage for the work completed. CP 761-762 & 779-780. During his deposition, Dan Bryant the Senior Shop Foreman acknowledged that payment of prevailing wages to maintenance employees had been a continuing issue. CP 636-638 (40:17-46:23); CP 642-643 (123:18-125:12).

During a summit meeting, just days before his being escorted off school grounds by police, Plaintiff Canfield again raised the issue of payment of prevailing wages in relation to a project occurring at Nathan Hale. CP 761-762, ¶ 7; CP 628 (169:4-170:16); CP 629(176:2-182:24); CP 6311 (85:20-189:20). There were several supervisors and managers at the meeting, including union representatives. *Id.* Plaintiff Canfield explained

that Mr. Good had agreed to pay prevailing wages to the maintenance electricians on the BEX project and that he believed they should be paid the same on the Nathan Hale project. *Id.* It was obvious to Plaintiff Canfield that this did not sit well with at least one of his supervisors, Mark Walsh. *Id.* Within days Plaintiff Canfield was escorted off the school grounds by police in a very public and embarrassing manner. *Id.*

2. DEFENDANT MICHELLE CLARK MAKES DEFAMATORY STATEMENTS WITH ACTUAL MALICE.

a. Plaintiff Canfield helps get a friend hired whom he believed was a good worker only to find that she refused to comply with the terms of her employment, refused to take direction and was a difficult employee.

During his time with Defendant SPS, Plaintiff Canfield had also served as the firm alarm technician. CP 762-763, ¶ 8. He did this from 1997 to 2006. *Id.* Plaintiff Canfield was looking to hire a new maintenance electrician to fill the position during the summer of 2007. *Id.* He had known Defendant Clark for several years and knew that she had an ELO6 license and was a licensed fire alarm tech. *Id.* An ELO6 license is a low voltage electricians license. *Id.* The position he was looking to fill was an EL01 position with a certificate as a fire alarm tech. *Id.*, CP 781-785 (Ex D). He

discussed the position with Defendant Clark explained the position would require that she attend class through the union to obtain her ELO1 license and become a union member. *Id.* Defendant Clark indicated she was interested in the position and Plaintiff Canfield set up a meeting with her, Nancy Mason and Janet Lewis, his union representatives, and Ed Heller, the Facilities Manager. *Id.* Mr. Heller left Defendant SPS shortly thereafter. *Id.* An agreement was reached and the terms were documents in a letter dated July 7, 2007 signed by Ed Heller. *Id.*, CP 786-787 (Ex E); CP 647-648 (51:18-55:17). The agreement required that Defendant Clark obtain her journeyman electricians license by attending school and working with the Union. CP 762-763 & 786-787 (Ex E); Unfortunately, it became clear to Plaintiff Canfield rather quickly that Defendant Clark had no intentions of obtaining her EL01 license, was a difficult employee to work with who refused to take direction or follow instructions. *Id.*

b. Defamatory statements to Aki Piffath and Jeanette Bliss - "when [she] started working here, [at SPS in August 2007] she asked him if he still had a gun on him and he said, yes it was in his pants."

During the first few months of her employment, Plaintiff Canfield had ongoing problem with Defendant Clark. CP 763, ¶ 9. Defendant Clark refused to follow direction. *Id.* She began to take equipment off the truck

she was assigned including a ladder and pipe benders, something that was necessary in doing work as an ELO1 electrician. *Id.* Plaintiff Canfield asked Defendant Clark to leave the equipment on the truck as she was to obtain her ELO1 license and that there were times when she might be in the field when that equipment was necessary for other employees to use. *Id.* Defendant Clark ignored the request. *Id.* She also had a habit of failing to return phone calls and Plaintiff Canfield had a difficult time locating her. *Id.* To resolve this, he asked her to frequently check in with him. *Id.* This angered Defendant Clark. *Id.* Defendant Clark also had a habit of taking extended lunches and/or lunches at a time that was inappropriate. *Id.* Frustrated, Plaintiff Canfield contacted her previous supervisor to see if he had similar problems. *Id.* Unfortunately he learned that Defendant Clark had a history of failing to follow orders and other frustrating work conduct. *Id.*, CP 788-789.

Because of the issues the parties were having, a meeting was called by Lynn Good to discuss the problem. CP 763-764, ¶ 10. Plaintiff Canfield told Lynn Good that he wanted to write Defendant Clark up for failing to follow orders and failing to act to obtain her ELO1 license. *Id.* Her failure to obtain the licenses was causing difficulty in scheduling work for Plaintiff

Clark as he would have to ensure an EL01 was present and able to assist Defendant Clark with certain of her work projects. *Id.* Lynn Good told Plaintiff Canfield to wait, that she was a new employee and he would deal with it. *Id.* The parties did meet with the union representative present, Nancy Mason. *Id.* Each side discussed their issues and Plaintiff Canfield was hopeful that a resolution could be reached. *Id.* Unfortunately that was not the case and the problems continued. *Id.*

At the end of the week when the Summit Meeting occurred, the one in which Plaintiff Canfield raised the prevailing wage issue again to his supervisors, Plaintiff Canfield had scheduled the Friday off. CP 764-765, ¶ 11. He left Defendant Clark and another employee with instructions that they were to complete certain work orders. *Id.* Instead, Defendant Clark spent a good part of the day arranging to have desks delivered to the maintenance electrician's shop. *Id.* During the meeting with Lynn Good, the parties had discussed purchasing some desks for the shop. *Id.* With Mr. Good's approval, Plaintiff Canfield had planned on moving forward with picking some newer desks from the BEX warehouse. *Id.* While he was gone, Defendant Clark decided to move in some desks, used desks that she had located under the south stands of memorial stadium at the Seattle Center. *Id.*

Plaintiff Canfield had introduced Defendant Clark to Aki Piffath, a maintenance employee, not an electrician, that lived in Marysville as a possible car pool partner for Defendant Clark. CP 765, ¶ 12. The parties had been carpooling together. CP 656-660 (89:25-102:7). Apparently, after work that day, Defendant Clark complained to Mr. Piffath about Plaintiff Canfield. *Id.* In the process, she relayed to Mr. Piffath reports that Plaintiff Canfield carried a gun. *Id.* Plaintiff Clark testified that during that drive home, Mr. Piffath suggested that Defendant Clark talk with HR about her complaints. *Id.* It is unclear who first contacted HR, but Ms. Jeanette Bliss, Defendant SPS' HR representative contacted Defendant Clark to arrange a meeting a few days later. *Id.* During that meeting, Defendant Clark complained about Plaintiff Canfield, told Ms. Bliss she was afraid of Plaintiff Canfield and that he carried a gun. RP ,Vol 5, 405:8-408:24. Ms. Bliss took notes during the interview. *Id.* Ms. Bliss testified that Ms. Clark told her that Plaintiff Canfield had guns in his home. *Id.* Ms. Clark went on to describe an event that occurred several years ago where she met Plaintiff Canfield on a weekend to help her load a pot into her car she was purchasing at a pottery store. CP 657-658 (90:14-93:22). She indicated he instructed her to park on school property, across the street from the store, and they walked across the

street. *Id.* During the walk across the street, Defendant Clark claims that Plaintiff Canfield took out a gun and carried it in his hand. *Id.* After crossing the street, he put the gun back in his pocket. *Id.* However, that is the only statement Defendant Clark testified that she recalled making. *See* CP 656-660 (89:25-102:7). Ms. Bliss testified that Defendant Clark stated further that after she began work in August 2007, she asked Plaintiff Canfield if he still had a gun and he said, yes it is in my pants. RP ,Vol 5, 405:8-408:24. Mr. Piffath was present during this meeting as well. *Id.*

Ms. Bliss testified that Mr. Canfield was escorted off the property that day due to the gun allegation. CP 680 (57:4-59:25) & RP Vol. V, 413:14-414:15. Plaintiff Canfield was contacted and brought to the security office. CP 765, ¶ 13. When Plaintiff Canfield entered the office, the door was locked behind him. *Id.* He was told that he was being placed on administrative leave and that there was an allegation that he was carrying a gun. *Id.* Shocked, he stated he was not carrying a gun, had never carried a gun on school property and offered to be searched, offered his keys to his personal truck, the company truck and keys to his desk and file cabinets. *Id.* No one from the school district searched him or his things and the police did not search him. *Id.* When he was escorted off the property, he again offered

to be searched but was told no. *Id.*

Plaintiff Canfield was placed on administrative leave beginning that day, December 5, 2007. CP 680 (57:4-59:25). Ms. Bliss completed the investigation into Defendant Clark's complaints by the end of December 2007. *Id.* Plaintiff Canfield was left on leave through July 2008. *Id.* Defendant SPS imposed discipline including a demotion, allowing Plaintiff Canfield to return to work but as a maintenance electrician, not as a foreman. *Id.*

c. Defamation continues - She told other employees - "he carried a gun and never took it off his body", "I was in the electrical shop one day when he was there. I saw it on him."

During her deposition, Defendant Clark denies any recollection that she made any other statements regarding Plaintiff Canfield carrying a gun other than the story outlined above about the pottery store. CP 656-660 (89:25-102:7-103:6). Defendant Clark's defamatory statements did not end with the report to Aki Piffath and Jeanette Bliss. CP 816-818.

In June of 2008, while Plaintiff Canfield was still out on leave, Plaintiff Clark was working with another temporary electrician, Jessie Logan. *Id.* Ms. Logan describes her first day with Defendant Clark, stating, "[t]he

only thing I remember of that afternoon was of her going around to a lot of the office personnel on the second floor of the school district shop and talking about a "Don." *Id.* She goes on to describe the remainder of that week and the following week. *Id.* Ms. Logan explained she continued to talk about "Don" to various office personnel, school custodians and other craft workers at the shop. Ms. Logan goes on to describe:

> 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 carreid 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.

Id.

During her first deposition on March 23, 2011, Defendant Clark admitted that she did not know if she made much of what was stated in Ms.

Logan's deposition. CP 400-4041 (11:25-115:22). Defendant Clark was shown the letter authored by Ms. Logan and asked the following:

Q Okay. Then she goes on: **"She was going on and on about Don this and Don that. She started talking to one of the teachers at an elementary school we went to about Don carrying a gun and have such a terrible temper." Do you recall that?**

A No.

Q Do you have any reason to believe that statement's not true?

A No.

Q She goes on: **"When I overheard this, I asked Michele: Did you say that this guy Don was carrying a gun on school district property? She told me that he carrying 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."**

A I don't remember saying that to her

Q Do you believe that's a true or false statement?

. . .

A I don't remember saying it to her.

Q (by Ms. Hammack) **So you could have said it to her?**

. . .

A I don't remember saying it to her.

Q (By Ms. Hammack) Well, I understand you don't remember it. **So are you saying that Ms. Logan is lying in this statement?**

. . .

A I said I don't remember saying that to her.

Q (By Ms. Hammack) So I'm asking you: **Is it something, then, that you could have said?**

. . .

A I don't know.

Q (By Ms. Hammack) **You don't know?**

A **Right.**

Id., (113:14-114:24) (emphasis added, non-specific objections omitted).

Again, when asked:

Q **Is it true that you saw - - that you were in the electrical shop one day when Mr. Canfield was there and you saw a gun on him? Is that true?**
A **No.**
Q **But you could have made the statement? You don't recall?**
A **I said I don't recall making that statement to her.**

Id., (114:25-115:5) (emphasis added). Compare this with the next question,

Q **She goes on to say, "From the way she was talking about him, I really believed he was a potential mass killer."** That "Michele 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." **Did you tell her that?**
A **No.**
Q She goes on to say that "She said that nobody could stand him, not even the teachers in the school; everybody was just glad that he was gone and thanked her for getting rid of him." Did everybody thank you for getting rid of Mr. Canfield?
A Not everyone.
Q Some people thanked you for getting rid of Mr. Canfield?
A Yes.

Id. (115:6-22) (emphasis added).

C. EVENTS THAT OCCURRED BEFORE TRIAL RELEVANT TO APPEAL

1. PROCEDURAL HISTORY REMANDING DEFAMATION CLAIMS AGAINST DEFENDANT

CLARK FOR TRIAL.

After the cases against Defendant Clark and SPS were consolidated, Defendants filed a motion for summary judgment. CP 1733. Judge Craighead dismissed the claims against Defendant Clark but allowed the claim for retaliation for failure to pay prevailing wages to proceed against SPS. *Id.* After a trial, a jury entered a finding that SPS had retaliated against Plaintiff Canfield. *Id.*, CP 1738-1739. Upon motion by SPS, the trial judge ruled that as a matter of law Plaintiff did not have a claim for retaliation for raising a claim for failure to pay prevailing wages absent termination. CP 1733. The issue was appealed along with the dismissal of the defamation claims against Defendant Clark. *Id.* This Court upheld the trial court's ruling regarding the retaliation claims against SPS but overruled the decision dismissing the defamation claims against Defendant Clark and remanded the case for trial. *Id., See also* CP 421-439, *Canfield v. Clark and Seattle Public Schools,* 2013 Wash. App. Lexis 1280, 3-4(2013).

2. DEFENDANT CLARK'S MOST RECENT DEPOSITION TESTIMONY

During Defendant Clark's most recent deposition in September 2014, Plaintiff learned that Seattle Public Schools, after it had been dismissed from the case and was no longer a party, continued to pay Defendant Clark's

attorney fees and costs in defending this matter. CP 740-747 (14:1-16:24; 19:17-21:14; 23:3-24:14). It is doing this despite the fact that Defendant Clark is not in management or even a supervisor and her version of what she relayed to Seattle Public Schools regarding Plaintiff is different from what Seattle Public Schools alleges. *Id.* Plaintiff also learned that Defendant Clark was receiving worker's compensation benefits . CP 748-758 (15:12-27:9; 30:24-31:6; 31:23-35:18; 65:17-66:11). Although receiving worker's compensation benefits including time loss, Defendant Clark volunteered at SPS working as a project manager. *Id.*

3. TRIAL COURT DENIES PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO DEFAMATORY STATEMENTS MADE TO JESSE LOGAN

On October 17, 2014, the trial court denied Plaintiff's Motion for Summary Judgment. CP 572-573. In an oral ruling, the Court indicated it denied the motion as it believed that it was a jury question as to whether Defendant Clark made the defamatory statements to Jesse Logan. RP Vol. I, 34:24-38:23.

In the past Plaintiff's counsel has been in contact with Jesse Logan. CP 604-605, ¶ 7. However, it has been difficult to keep track of the witness as she has no permanent address. *Id.* Counsel did attempt to locate Ms.

Logan for trial but was unable to do so. *Id.*

D. ERRORS OCCURRING AT TRIAL.

1. PLAINTIFF'S MOTION FOR JUDICIAL NOTICE DENIED AND PLAINTIFF'S ABILITY TO INTRODUCE EVIDENCE OF SPS WITNESS BIAS LIMITED BY TRIAL COURT.

In preparation for trial, Plaintiff filed a Motion for Judicial Notice of the Verdict rendered by the jury in the case against SPS. CP 1732-1767. Plaintiff did this in part because SPS witnesses were scheduled to testify in the case including Jeanette Bliss, the Human Resource employee who Defendant Clark reported the gun allegation to, Lynn Good, one of Plaintiff's supervisors that had promised to pay the employees prevailing wages, and other employees of SPS. *Id.* These witnesses testified in the case against SPS as well. *Id.* The Court denied Plaintiff's motion and then went on to make an oral ruling limiting Plaintiff's evidence of retaliation by SPS. RP 179:12-182:3. The Court ruled that SPS conduct was not relevant to the case and for the most part, Plaintiff was instructed not to present evidence relating to it. *Id.*

During trial, Plaintiff attempted to comply with the Court's order but Defense counsel was allowed to inquire about the retaliatory conduct by SPS. RP Vol. IV, 312:21-314:8 (During Plaintiff's testimony on cross). Plaintiff attempted to explain the relationship between SPS and Plaintiff but the Court

would still not allow the testimony and again reiterated its ruling. RP Vol. IV, 379:9-383:20. During direct of Ms. Bliss, Plaintiff was stopped and further instructed by the Court not to pursue the matter. RP, Vol V, 419:1-426:4. Despite limiting Plaintiff's ability to diminish the effects of Ms. Bliss's investigation by showing it was biased, Defense counsel was allowed to question her about the specifics of the investigation and admitted hearsay evidence relating to it. RP, Vol. V, 433:23-437:15 (Ex 300); 439:2-451:5; 457:22-465:8 (Exs. 230-234 & 240); RP Vol. VI, 551:13-562:3 (Elwood Evans testimony stopped and instruction from the Court to limit testimony). Defendant's witnesses included management from SPS including Martin Bernie and Bruce Skowyra. RP Vol. VIII, 801:21-817:12 & 832:3-836:8.

2. PLAINTIFF WAS NOT ALLOWED TO INTRODUCE EVIDENCE OF THE RELATIONSHIP BETWEEN DEFENDANT CLARK AND SPS AT TRIAL.

In addition to the above, Plaintiff attempted to introduce into evidence facts surrounding the relationship between Defendant Clark and SPS. CP 594-595. Plaintiff attempted to do this to show bias and to explain why the SPS witnesses listed above were hostile toward Plaintiff. *Id., See also*, CP 740-747 (14:1-16:24; 19:17-21:14; 23:3-24:14); CP 748-758 (15:12-27:9; 30:24-31:6; 31:23-35:18; 65:17-66:11). RP, Vol II, 97:19-100:9. Again the Court would

not allow the evidence. RP, Vol II, 97:19-100:9.

3. DESPITE THE COURT'S LIMITATION ON PLAINTIFF'S ABILITY TO PRODUCE EVIDENCE OF BIAS, THE COURT ALLOWS DEFENDANT TO INTRODUCE EXHIBITS CONTAINING HEARSAY RELATING TO THE INVESTIGATION AND DISCIPLINE OF PLAINTIFF.

Although the Court restricted the evidence outlined above to show bias, the Court allow Defendant to present numerous exhibits relating to the investigation of Plaintiff by Jeanette Bliss. CP 820, 824-825.[1] RP, Vol. V, 433:23-437:15 (Ex 300); 439:2-451:5; 457:22-465:8 (Exs. 230-234 & 240). Defendant offered as exhibits 230, 231, 232, 233, 234, 240 & 300. All these exhibits are documents drafted by Ms. Bliss of alleged interviews with employees and her investigation report. *Id.* They contain hand written notes outlining content Ms. Bliss alleges was reported to her in employee interviews. The report also contains this information. *Id.* The information is inflammatory and found to be faulty by the previous jury. See CP 1741 - 1742. Because of the restrictions by the Court, Plaintiff had no way of defending against these allegations.

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[1] Originally Defendant had designated the relevant exhibits as Exhibits 31-34 & 40. Defendant later renumbered them as 231-234 & 240. Exhibit 300 was not originally listed as an exhibit by Defendant.

4. THE STATEMENT OF JESSE LOGAN IS EXCLUDED AS EVIDENCE.

As set out above, Jesse Logan could not be located to testify. However, the letter drafted by Jesse Logan was part of the record and investigative files of Plaintiff's Union. RP, Vol. VIII 258:22-259:6. Nancy Mason, the union representative that was assisting Plaintiff during the investigation testified that she had talked to Ms. Logan and the letter was drafted by Ms. Logan at her request. RP, Vol V, 499:16-503:9. She testified that she maintained the letter as part of her investigative file and that it was a business record. *Id.* Defendant objected to admission of the exhibit as containing hearsay and the Court sustained the objection. *Id.* Plaintiff's attempts to have the exhibit admitted were repeatedly denied. *Id.*

5. THE COURT ADOPTS DEFENDANT'S SPECIAL VERDICT FORM WITH QUESTION NO. 3 THAT IS MISLEADING AND DOES NOT ACCOUNT FOR A POSSIBLE FINDING BY THE JURY THAT STATEMENTS WERE DEFAMATORY PER SE.

At trial the Court adopted jury instructions setting out the definition of defamation, CP 1611 (Instruction No. 4), elements of the cause of action CP 1612 (Instruction No. 5), and the definition of defamation per se, CP 1616 (Instruction No. 9). *See also* CP 885-921; 960-996; 1639-1668 (Pl's proposed instruction). Given the issues with admission of reputation evidence and

Defendant's anticipated argument that Plaintiff would have to prove damage to reputation, Plaintiff objected to the Court's adoption of Instruction No. 4, the definition of a defamatory statement in that Plaintiff requested the trial court include language that clarified damage to reputation was not a requirement. RP, Vol. X 1134:13-1136:12. Plaintiff also objected to Instruction No. 4 and the Special Verdict Form, Question No. 3 based upon the concern that the jury would be confused and be mislead into believing that Plaintiff had to show damage and/or damage to reputation even if the statements were found to be defamatory per se. RP, Vol. X, 1138:14-1142:18; 1144:3-1146:14.

Although the jury in the case found Defendant Clark made defamatory statements with malice, in answer to Question No. 3, the jury answered no, finding the statements did not cause damage to Plaintiff. CP 1639-1668.

6. DEFENSE COUNSEL MISTATES THE LAW DURING CLOSING ARGUMENT STATING PLAINTIFF MUST SHOW DAMAGE TO REPUTATION TO PREVAIL ON HIS CLAIM.

Using the information contained in the exhibits outlined above and SPS employee testimony, Defense counsel argued that Plaintiff did not produce any evidence of damages at trial. RP, Vol. X, 1183:2-1184:17 & 1199:11-1200:4. In summary, during closing argument Defense counsel used the definition of

a defamatory statement to argue that Plaintiff must establish that his reputation was damaged to prevail on his claim. *Id.*

Plaintiff objected to these statements as an incorrect statement of law, pointing out that Plaintiff does not have to prove damage to reputation to recover damages. *Id.* The Court over ruled Plaintiff's objection allowed the comments to stand. *Id.*

7. THE COURT DENIES PLAINTIFF'S MOTION FOR A NEW TRIAL AND/OR DIRECTED VERDICT.

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

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

occurred after the report by Defendant Clark, that he was escorted from school property by police in a public manner, that it was embarrassing and humiliating. RP, Vol. III, 214:9-216:18.

Plaintiff also offered other evidence of damage including his testimony. RP, Vol. IV, 286:17-290:9. Other SPS employees testified that they had heard about the gun allegation and that Plaintiff was known for it, that is Plaintiff was identified as the guy that had been escorted off the school grounds based upon a gun allegation. RP, Vol. VII, 716:21-717:15 & 731:8-13.

After trial, Plaintiff renewed its motion for a directed verdict made at the close of evidence, requesting the Court enter as a matter of law a finding that the statements made by Defendant Clark were defamatory per se. RP Vol. IX, 1125:17-1126:10; 1147:1-1148:7; CP 1669-1684. The Court denied Plaintiff's motion. *Id.* Plaintiff also requested a new trial based upon the errors outlined in this brief. CP 1669-1684. The Court also denied that motion. CP1708-1713.

III. ARGUMENT

A. There was no issue of material fact that Defendant Clark made the statements indicated to Jesse Logan and that the statements were defamatory per se.

1. Standard of review on denial of a Summary Judgment motion.

Orders on summary judgment proceedings are reviewed de novo and the appellate court performs the same inquiry as the trial court. *Washburn v. City of Federal Way,* 178 Wn.2d 732, 752 (2013); *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 696, 994 P.2d 911 (2000). Under Washington law normally an order denying summary judgment based upon a disputed issue of material fact is not reviewed after a trial on the merits. citations omitted. In *Johnson v. Rothstein,* 2 Wn.App. 303, 308 (1988), this Court addressed that issue and adopted the current rule in part reasoning that, ". . . in most cases trial counsel can preserve the claimed error by a motion challenging the sufficiency of the evidence during trial or by a posttrial motion." This case is different in that Plaintiff Canfield could not directly produce Ms. Logan as a witness at trial, through no fault of his own, and was prevented from offering her statement as evidence by the trial court. The defamatory statements made by Defendant Clark to Ms. Logan and the claims arising from those statements were never allowed to go before the jury. Therefore, the rule prohibiting review of a summary judgment order should not apply in this case. Further, a determination of whether the statements were defamatory per se is a question of law subject to de novo review.

Summary judgment is appropriate when the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(C). All facts and all reasonable inferences from them are considered in the light most favorable to the nonmoving party. *Grundy v. Thurston County*, 155 Wn.2d 1, 6 (2005). The trial court should grant a summary judgment motion when from all the evidence, reasonable persons could reach but one conclusion. *Lilly v. Lynch*, 88 Wn.App. 306, 312 (1997).

2. Defendant Clark maliciously defamed Plaintiff Canfield.

Plaintiff Canfield hired a friend, he believed had good work ethic and skills. Unfortunately, he quickly learned that Defendant Clark was not the employee he had hoped for. Defendant Clark refused to attend classes to complete the terms and conditions of her employment, failed to follow direction and was engaging in other conduct her supervisor, Plaintiff Canfield found inappropriate. Defendant Clark saw the writing on the wall and lashed out, going on the attack. In doing so, she made an outrageous claim that Plaintiff Canfield was carrying a gun while at work. She did so knowing that the statement was false, with the intent to cause Plaintiff Canfield harm.

a. Elements of Defamation

"'In Washington, a defamation plaintiff must show four essential elements: falsity, an unprivileged communication, fault and damages.'" *John Doe v. Gonzaga University, et. al,* 143 Wn.2d 687, 701 (2001) (reversed on other grounds, *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002)), *quoting Commodore v. Univer. Mech. Contractors, Inc.*, 120 Wn.2d, 133 (1992).

When the Plaintiff is a private individual, a negligence standard applies. *Vern Sims Ford, Inc., et. al., v. Hagel,* 42 Wn.App. 675, 678 (1986), *citing Caruso v. Local 690, Int'l Bhd. Of Teamsters*, 100 Wn.2d 343, 352 (1983). A Plaintiff is a public figure or public official must show, "'actual malice' - that is knowledge of the falsity or reckless disregard of the truth or faslity of the allegedly defamatory statements. *Id.* (citations omitted). Public figures are, ". . .those who 'occupy positions of such persuasive power and influence that they are deemed public figures for all purposes', or those who become public figures with response to a particular public controversy because they have 'thrust themselves to the forefront . . . in order to influence the resolution of the issues involved..'" *Id.* at 679 *citing Hutchinson v. Proxmire,* 443 U.S. 111, 134-35 (1979). "Actual malice is knowledge of the falsity or reckless disregard of the truth or falsity of the statement." *Id.* at 681 (citation omitted). Actual malice can be inferred from facts, evidence of

negligence, motive and intent. *Id.* (citations omitted).

Slanderous statements that affect a person in his business or trade are defamatory per se. *A.F. Grein v. Nugent LaPoma et. al.*, 54 Wn.2d 844, 848 (1959). "Where a defamation is actionable per se, and neither truth nor privilege is established as a defense, the defamed person is entitled to substantial damages without proving actual damages." *Michielli et al., U.S. Mortgage Co.,* 58 Wn.2d 221, 227 (1961), *citing Cf. Arnold v. National Union of Marine Cooks & Stewards,* 44 Wn. (2d) 183 (1954).

b. Undisputed facts - Defendant Clark made false and defamatory statements about Plaintiff Canfield to Jesse Logan.

In her declaration and attached letter, Ms. Logan outlines the statements made to her by Defendant Clark. She indicated that Plaintiff Clark made several statements regarding Plaintiff Canfield carrying a gun, not only to her but to others including a teacher and custodians. Defendant Clark stated he carried a gun and never took it off his body. When specifically questioned as to whether she actually saw the gun on him at the school district shop, Defendant Clark stated, "Yes, I was in the electrical shop one day when he was there. I saw it on him." Ms. Logan goes on to explain, "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." This is also a statement that by everyone's account is false.

In Defendant Clark's testimony during the deposition in this case, most frequently when asked if she made these statements, she indicated she did not recall. With the exception of the last statement listed above regarding the SWAT team, Defendant Clark did not deny making the statements to Ms. Logan that Plaintiff Canfield had a gun on him at work. Further, she does acknowledge that a statement that she saw Plaintiff Don Canfield with a gun during work while she was employed at the school district, would be false. There is no issue of fact as to the truth or falsity of these allegations. Defendant Clark has admitted they are false. Further, there is no testimony disputing Ms. Logan's as Ms. Clark has acknowledged she simply cannot recall if she made the statements or not.

When an opposing party cannot recall facts in sufficient detail to confirm or deny them, the lack of memory does not create a factual issue sufficient to preclude summary judgment. Tegland & Ende, Wash. Handbook on Civil Procedure § 69.14, pg. 520, (2007 Ed.) *citing Overton v. Consolidated Ins. Co.,* 145 Wn.ed 417 (2002). "As a general rule, a party cannot create an issue of fact and prevent summary judgment simply by

offering two different versions of a story by the same person. *Id.*, at 519, *citing McCormick v. Lake Washington School District,* 99 Wn.App. 107, 992 P.2d 511 (1999); *Selvig v. Caryl,* 97 Wn.App. 220, 983 P.2d 1141 (1999). "When a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony." *Klontz v. Puget Sound Power & Light Co.* 90 Wn. App. 186, 192, 951 P.2d 280 (1998), *quoting Marshall v. AC & S. Inc.*, 56 Wn.App. 181, 185, 782 P.2d 1107 (1989). Defendant Clark's statements that she does not recall if she told Ms. Logan something, does not create a genuine issue of fact. Ms. Logan's statements remain uncontradicted.

The fact that Defendant Clark made the statements to Ms. Logan is undisputed. The fact that the statements were false is also undisputed. Defendant Clark admits that any statement that Mr. Canfield had a gun on his person at the school district during the time Ms. Clark was employed there is false.

c. The false statements made by Defendant Clark are defamatory per se.

The statements made by Defendant Clark are defamatory per se, and

Plaintiff Canfield is not required to prove actual damages. Ms. Logan describes the effect Defendant Clark's words had upon her and the impression she had of Plaintiff Canfield. Her impression and description of the impact of Defendant Clark's statements remains unopposed. RCW 9.41.280 provides, "[i]t is unlawful for a person to carry onto, r to possess on, public or private elementary or secondary school premises, school-provided transportation, or areas of facilities while being used exclusively by public or private schools: (a) Any firearm; . . .". Plaintiff Canfield presented undisputed facts that meet both requirements establishing defamation per se.

B. The Special Verdict Form, Question No. 3 was adopted in error in that it hindered Plaintiff's ability to argue his theory of the case as it related to defamation per se, was misleading, and taken as a whole did not properly inform the jury of the applicable law.

Errors of law in jury instructions are reviewed de novo. *Hue v. Farmboy Spray Co.* 127 Wn.2d 67, 92 (1995), *citing State v. Wanrow,* 88 Wn.2d 221 (1977). An instruction's erroneous statement of applicable law is reversible error when it prejudices a party. *Id.* "An error is prejudicial if it affects the outcome of the trial." *Anfinson v. FedEx Ground Package Sys., Inc.,* 159 Wn.App. 35, 44 (2010), *citing State v. Wanrow,* 88 Wn.2d at 237.

> "'When the record discloses an error in an instruction given on behalf of the party in whose favor the verdict was returned, the error is presumed to have been prejudicial, and to furnish

> ground for reversal, unless it affirmatively appears that it was harmless . . .
> A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.'"

Id., citing State v. Wanrow, 88 Wn.2d at 237 (*quoting State v. Golladay*, 78 Wn.2d 121, 139 (1970)).

As set out above, slanderous statements that affect a person in his business or trade are defamatory per se. *A.F. Grein v. Nugent LaPoma et. al.*, 54 Wn.2d 844, 848 (1959). "Where a defamation is actionable per se, and neither truth nor privilege is established as a defense, the defamed person is entitled to substantial damages without proving actual damages." *Michielli et al., U.S. Mortgage Co.,* 58 Wn.2d 221, 227 (1961), *citing Cf. Arnold v. National Union of Marine Cooks & Stewards,* 44 Wn. (2d) 183 (1954).

Special Verdict Form, Question No. 3 is misleading in that it could lead the jury to conclude that it was required to find Plaintiff was damaged even if the jury were to find the statements made by Defendant Clark to be defamatory per se. If the statements made by Defendant Clark were found by the jury to be defamatory per se, and it is hard to argue that they are not defamatory per se, then it appears Question No. 3 would still require the jury to find actual damages. This is also enforced by Question No. 4. That is an

incorrect statement of the law and when Question No. 3 is read with the other questions posed on the Special Jury Verdict Form, it is even more confusing. This confusion was enhanced by opposing counsel's inaccurate statements of law set out in the closing argument, described below. Question No. 3 appears to require Plaintiff to prove damages even if the statements made were defamatory per se. The instruction affected Plaintiff's ability to argue his case, was misleading and taken as a whole did not properly inform the jury of the law. This jury found the statements were defamatory and were made with actual malice. At a minimum the jury should have entered an award of nominal damages given the statements made but Question No. 3 hindered them from doing so and took that option away.

C. Errors in evidentiary rulings.

Assignments of error numbers 3 through 6 address errors by the trial court in either admitting evidence or denying the admission of evidence. Each is addressed below in turn. The same standard of review applies.

1. Standard of review of trial court's evidentiary rulings.

A trial court's evidentiary rulings are reviewed under an abuse of discretion standard. *Brundridge v Flour Fed. Servs., Inc.,* 164 Wn.2d 432, 450 (2008) (*citing State v. Woods,* 143 Wn.2d 561, 602 (2001)); *Lewis v.*

Simpson Timber Co. 145 Wn. App. 302, 327 (2008) (*citing Spokane v. Neff*, 152 Wn.2d 85, 91 (2004)).

> The trial court abuses its discretion when its "decision is 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Mayer v. Sto Indus., Inc.,* 156 Wn.2d 677, 684 132 P.3d 115 (2006) (*quoting Associated Mortgage Investors v. G.P. Kent Constr. Co.,* 15 Wn. App. 223, 229, 548 P.2d 558 (1976)). "[I]f the trial court relies on usupported facts or applies the wrong legal standard," its decision is exercised on untenable grounds or for untenable reasons; and "if 'the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take,'" the trial court's decision is manifestly unreasonable. *Mayer,* 156 Wn.2d at 684 (internal quotation marks omitted) (*quoting State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

Lewis v. Simpson Timber Co., 145 Wn.App. 302, 328 (2008).

2. Defendant's exhibits 230, 231, 232, 233, 234, 240 & 300 are inadmissible as they contain hearsay, hearsay within hearsay and if relevant, their probative value is substantially outweighed by the risk of unfair prejudice, confusion of the issues, and misleading the jury.

Under the rules of evidence only relevant evidence is admissible. ER 402. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401.

Generally, hearsay evidence is not admissible. ER 802. "Out-of-court

statements offered in court to prove the truth of the matter asserted are hearsay, which is generally not admissible." *Brundridge v Flour Fed. Servs., Inc.*, 164 Wn.2d 432, 450 (2008). ER 803(a)(6)/RCW 5.45.010 & 5.45.020, establishes an exception to the hearsay rule for business records that are properly authenticated. Pursuant to RCW 5.45.020,

> A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and its mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

Although RCW 5.45.020 allows for admission of business records that are properly authenticated the statute,

> . . . does not render admissible such parts of the records as are otherwise excludable under well-established rules of evidence. If regularly maintained under a prearranged and established scheme, business records may be admitted to show the occurrence of events, conditions, and status of things existing or occurring contemporaneously with the making of the records, but they are not admissible as a narrative of occurrences antedating the making of the notations. In short, although the Uniform Business Records as Evidence Act establishes statutory exception to the common-law rule against hearsay evidence, it does not in all respects render admissible evidence contained in the records which should ordinarily be excluded.

State v. White, 72 Wn.2d 524, 530 (1967). If the business records contain evidence that is not encompassed within the exception, such as hearsay within hearsay, it is not admissible under this provision. *State v. Monson,* 113 Wn.2d 833, 850 (1989).

At trial Defendant also argued that it was allowed to submit reputation evidence in the form of hearsay. ER 405(a) provides, "[i]n all cases in which evidence of character or a trait of character of a person is an essential element of a charge, claim or defense, proof may also be made of **specific instances** of that person's conduct." (emphasis added). However, "the courts have said that to be admissible, the reputation must be shown to exist within a neutral and generalized community. Tegland, Courtroom Handbook on Washington Evidence, pg. 238, (2006 Ed) *citing State v. Callahan*, 87 Wn.App. 925 (1997) (assault victim's reputation among law enforcement officers inadmissible); *State v. Thach*, 126 Wn.App. 297, 106 P.3d 782 (2005) (defendant's reputation among members of family inadmissible). Further, "[e]fforts to prove character by the opinion of a witness have been consistently rejected in Washington . . ." *Id.,* pg. 238.

Finally, relevant evidence may be excluded if, "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of

issues, or misleading the jury." ER 403.

Defendant's exhibits 230, 231, 232, 233, 234 & 300 are all handwritten notes Ms. Bliss claims she took of reports that third parties gave her about Plaintiff Canfield. These records have very little if any probative value related to this case. They are hearsay and include hearsay within hearsay. The records have no support, the third parties did not testify and the trial court allowed the evidence in without even a limiting instruction. Like the statements, the investigative report include inflammatory statements about Plaintiff Canfield with no support. This evidence was admitted in the trial against SPS by that trial court to show intent, that is why SPS allegedly took the action it did. After allowing Plaintiff's to submit his evidence regarding the matter, the jury found SPS contentions without support and concluded its actions were retaliatory. In this case the report was used by Defendant to show Plaintiff had a bad reputation.

Under Washington law, reports contained in public records may be admissible under RCW 5.44.040. However, even under that statute only reports or documents prepared by public officials which contain facts and **not** conclusions involving the exercise of judgment or discretion or the expression of opinion are admissible. *Brundridge v. Flour Fed. Servs., Inc.*,

164 Wn.2d 432, 451 (2008). In *Brundridge*, the Court held that an EEOC investigative report was not admissible evidence and the trial court abused its discretion in admitting it. As the Court explained, the report was the product of an investigation involving interviews with others and the investigator's evaluation of the evidence. *Id.*, 451. It provided the opposing party with no opportunity to challenge the factual conclusions contained in the report. *Id.* at 452. That is true in the case before this Court. In fact, the investigative report admitted is one wherein not only did a jury after submission of it as evidence find SPS retaliated, the discipline imposed by SPS was challenged and overturned by an arbitrator after a hearing as the result of the related union grievance. The summary section of the report labels Plaintiff as, "harassing, bullying and discriminatory" and that he, "treats woman and minorities differently (inferior) than he treats white males." It is inaccurate, has found to be unsupported by evidence and is inflammatory. In this case the jury found Defendant Clark's actions malicious but awarded Plaintiff no damages. This type of evidence is such that it is highly probable that the jury did not award damages because it appeared Plaintiff was a terrible person. The evidence is intended to evoke emotions that would result in a jury being put off by awarding damages to Plaintiff in a way that is improper and unjust.

This is not harmless error, as it is reasonably probable that it changed the outcome of the trial and the lack of award of damage to Plaintiff. *See Brundridge*, 164 Wn.2d at 452.

3. Plaintiff's Exhibit 75 was admissible as a business record.

Ms. Logan's letter outlining what Defendant Clark had told her and describing the impact upon her of hearing the allegations was admissible. Ms. Nancy Mason, the union representative involved in investigating and representing Plaintiff Canfield testified that she obtained the letter from Ms. Logan after Ms. Logan described the events to her. The trial court ruled that the evidence was inadmissible finding it was not a business record, as it was not drafted by Ms. Mason and was inadmissible hearsay. The letter describes the events that took place shortly after they occurred and described the emotional impact they had upon Ms. Logan.

ER 803(a)(1) provides that evidence of a statement describing or explaining an event or condition made while the declarant was perceiving it or immediately thereafter is not excluded by the hearsay rule. ER 803(a)(3) provides, "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health) . . . is not excluded by the

hearsay rule. In this case Ms. Logan drafted the letter shortly after the events occurred. She describes what was said, admissions of a party opponent, and then goes on to describe how the statements impacted her and her beliefs about Plaintiff Canfield. The information is relevant to Plaintiff Canfield's damages, as it shows damage to his reputation and the impact the statements had on a fellow employee. These records were admissible and given the other evidence allowed in and Defendant's argument that Plaintiff's reputation suffered no harm, it is probable it would have had a substantial impact on the outcome of the case.

4. Plaintiff was prevented from offering impeachment evidence showing the bias of SPS witnesses and Defendant Clark.

ER 607 provides, [t]he credibility of a witness may be attacked by any party, including the party calling the witness. "A party has the right to cross-examine a witness to reveal bias, prejudice, or a financial interest in the outcome of the case." Tegland, Courtroom Handbook on Washington Evidence, pg. 294, (2006 Ed.), *citing Delaware v. Van Arsdall,* 475 U.S. 673 (1986).

At trial Plaintiff was limited in offering evidence related to the bias of SPS witnesses. The trial court limited Plaintiff's evidence showing bias

in that it prevented Plaintiff from introducing evidence of retaliation by SPS and providing the reasons why it retaliated and used Defendant Clark's statements as a means to attack Plaintiff. The trial court also prohibited Plaintiff from offering evidence showing the relationship between Defendant Clark including the evidence that SPS was and continued to pay for her attorney fees, although she was not a manager and they had no legal obligation to do so, and evidence that Defendant Clark was provided with other benefits including being allowed to collect worker's compensation time loss benefits while still working at SPS as a volunteer. Because all of Defendant's witnesses were SPS employees or former employees, this evidence was important to explain why the employees might be motivated to provide testimony that did not support Plaintiff. Again, this goes to Plaintiff's damages. The evidence explains Ms. Bliss's conduct, her report and SPS employee's motives in testifying. It was not harmless error as goes directly to the issue of damages.

D. Plaintiff was entitled to a new trial because of the error occuring in the Special Jury Verdict From, Question No. 3 that was reinforced by Defense counsel's misstatements in closing argument, and a directed verdict finding that defamatory statements by Defendant Clark to Auki Piffath and Jeanette Bliss were defamatory per se.

1. Defense counsel's closing argument that Plaintiff must

show damage, reinforced by his reference to Question No. 3 on the Special Verdict Form is reversible error.

In *Mears v. Bethel Sch. Dist. No. 403,* 182 Wn.App. 919, 926 (2014), the Court explained,

> [w]e review an order denying a motion for a new trial for abuse of discretion by the trial court. *See Alum. Co. Of Am. v. Atena Cas. & Sur. Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000) (ALCOA). Generally a trial court abuses its discretion in denying a motion for a new trial if "'such a feeling of prejudice [has] been engendered or located in the minds of the jury as to prevent a litigant from having a fair trial.'" ALCOA, 140 Wn.2d at 537 (*quoting Moore v. Smith* 89 Wn.2d 932, 942, 578 P.2d 26 (1978)). However, the deference usually shown a trial court's denial of a new trial does not apply when the court based the decision on an issue of law. *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wn.2d 747, 768, 818 Pl2d 1337 (1991). Review of a denial of a new trial based on an issue of law is de novo. *Ayers,* 117 Wn.2d at 768; see CR 59(a)(ground for new trial).

As indicated above, the Special Jury Verdict Form, Question No. 3 was adopted in error as it provided no avenue for a jury to find defamation per se and award even nominal damages. In closing argument, defense counsel argued that Plaintiff was required to produce evidence of harm to reputation to prevail on his claims. RP, Vol. X, 1183:2-1184:17 & 1199:11-1200:4. Defense counsel used the definition of defamation to support this argument. *Id.* Then when referring to the Special Jury Verdict Form, Question No. 3, Defendant again reiterated that Plaintiff was required to

prove damages. *Id.,* 199:11-12:00:4. This reinforced the error and the problem with Question No. 3. While Defense counsel was free to argue that the statements were not defamatory per se, that is not what he did. He argued that under the law Plaintiff must prove damages and then pointed to Question No. 3, telling the jury that was the question where they would have to determine if Plaintiff suffered damages. This case is on point with the issue raised in *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 876 (2012). The Court in addressing whether a jury instruction was reversible error, that is whether it was misleading to the jury and prejudcial, the Court found the prejudice occurred during closing argument when counsel for FedEx used the faulty jury instruction to argue application of erroneous legal standard. The Court explained,

> [t]his argument took what had been a mere latent possibility of a misunderstanding and actively encouraged the jury to apply an erroneous legal standard. It is no answer that Anfinson remained free to argue the alternative - and correct - interpretation of "common"; FedEx urged the jury to rely on an incorrect statement of law . . . ." Id. The Court in Anfinson found the closing argument was not the error but the source of prejudice. *Id.*

While Plaintiff argues that there are reversible errors with both Question No. 3 and Defendant's closing argument individually, What *Anfinson* does is clarify that this Court can find prejudice when additional errors occurring at

trial contribute to a potential problem with a jury instruction. In this case almost all errors outlined by Plaintiff contributed to the primary problem, Question No. 3. Plaintiff was not allowed to fully explain the damages issues in the case, including the bias of witnesses and that in turn fed into the problem with the arguments presented to the jury that they must find actual damage was caused to Plaintiff despite the fact that the statements made harmed Plaintiff in his business and were defamatory per se. Counsel's closing argue was error in itself but when combined with Question No. 3, it encouraged the jury to rely on an incorrect statement of law. As explained by the Anfinson Court, "[n]o greater showing of prejudice from a misleading jury instruction is possible without impermissibly impeaching a jury's verdict." *Id.*, at 876-877, *citing Cf. State v. Ng,* 110 Wn.2d 32, 43-44 (1988).

2. The statements found by the jury to be defamation were defamatory per se and no reasonable juror could find otherwise.

When reviewing a motion for judgment notwithstanding the verdict (judgment as a matter of law), the same standard of review is used as that applied by the trial court. *Goodman v. Goodman*, 128 Wn.2d 366, 371 (1995). "Motions for directed verdicts or judgment as a matter of law are appropriate if, after viewing the evidence in the light most favorable to the nonmoving party, the trial court determines there is no substantial evidence or reasonable

inferences therefrom to support a verdict for the nonmoving party." *Caulfield v. Kitsap County,* 108 Wn. App. 242, 250 (2002), *citing Goodman* at 371.

The defamatory statements at issue and presented at trial were those made by Defendant Clark to Auki Piffath and Jeanette Bliss and in summary included that Plaintiff Canfield had a gun on him while at work at the school district. Such an action would violate state law, see RCW 9.41.280, as well as school district policy. Slanderous statements that affect a person in his business or trade are defamatory per se. *A.F. Grein v. Nugent LaPoma et. al.*, 54 Wn.2d 844, 848 (1959). "Where a defamation is actionable per se, and neither truth nor privilege is established as a defense, the defamed person is entitled to substantial damages without proving actual damages." *Michielli et al., U.S. Mortgage Co.,* 58 Wn.2d 221, 227 (1961), *citing Cf. Arnold v. National Union of Marine Cooks & Stewards,* 44 Wn. (2d) 183 (1954). In this case the jury found that the statements made by Defendant Clark were defamatory and uttered with actual malice, that is they were false and not subject to a privilege. In that event, Plaintiff is not required to prove actual damages and damages are presumed. Plaintiff was entitled to an award of presumed damages even if the award is for nominal damages. *See Maison de France v. Mais Oui!*, 126 Wn.App. 34, 53-54 (2005).

Plaintiff moved for a directed verdict at trial and then renewed him motion in the motion for a new trial. The evidence is undisputed and it is difficult to determine how anyone could hold that the statements were not defamatory per se given their content. Failure to enter a directed verdict regarding this issue was reversible error.

IV. CONCLUSION

For the reasons stated above, Plaintiff requests the Court find that the defamatory statements made by Defendant Clark were defamatory per se. Further based upon the errors outlined above, Plaintiff's request the Court remand this case back to trial court for a new trial.

Respectfully submitted,

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Certificate of Service

I, Chellie Hammack, attorney for Appellant certify that on July 27, 2015, 2012, I placed a true and correct copy of the Appellant's Brief and this Certificate of Service for hand delivery via legal messenger service to:

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