

NO. 62505-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BARBARA COREY, individually,

Respondent,

v.

PIERCE COUNTY; PIERCE COUNTY
PROSECUTING ATTORNEY'S OFFICE,

Appellants.

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STATE OF WASHINGTON
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BRIEF OF RESPONDENT

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A. INTRODUCTION

Barbara Corey was a dedicated and skilled deputy prosecuting attorney in the Pierce County Prosecutor's Office who organized the first union for deputies in that office and rose to serve as the assistant chief criminal deputy attorney.

However, because of internal political issues in the Prosecutor's Office, Prosecutor Gerry Horne in 2004 chose to dispense with her services as assistant chief criminal deputy and broke his promise to her that she would never be dismissed without "just cause."

To compound his failure to live up to his commitment to Corey, he disclosed information to the media about Corey that he knew was false and that was designed to harm Corey's reputation in order to enhance his political position.

Corey sued Horne and Pierce County for invasion of privacy, defamation, defamation by implication, false light, outrage, and breach of a contract formed by promissory estoppel. Upon proper instructions to the jury on all theories, after a three week trial, the jury returned a verdict in her favor.

The trial court however, did not make an award of attorney fees to Corey pursuant to RCW 49.48.030 because the trial court believed the fee request was untimely under CR 54(d)(2) even though the County had

notice of Corey's intent to seek fees and RCW 49.48.030 has no time deadline for the fee request.

The County focuses its efforts on appeal essentially on one of the many theories on appeal on which Corey recovered – invasion of privacy – asserting that no cause of action exists or, alternatively, a prosecutor has carte blanche to make utterly false and damaging leaks to the media about a staff person. The County is wrong in both assertions.

The jury was properly instructed on defamation, defamation by implication, false light, and promissory estoppel, as the County ultimately concedes as it never argues in its brief that the specific wording of any of the instructions on those theories was erroneous. The County fails to demonstrate that the trial court erred in denying its CR 50 motion for judgment as a matter of law on those theories.

The trial court did err, however, in striking Corey's fee request under RCW 49.48.030 pursuant to CR 54(d)(2) where Corey prevailed, the trial court and the County had timely notice of her intent to seek fees, and RCW 49.48.030 cases do not recognize time deadlines for requesting fees.

B. RESTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Corey acknowledges the County's assignments of error,¹ but believes the issues pertaining to those assignments of error are more appropriately formulated as follows:

1. Was the trial court correct in determining that Pierce County's Prosecutor owed Barbara Corey a duty of care not to negligently disseminate false information about her to the media as part of the Prosecutor's political vendetta against his deputy?

2. Did the trial court abuse its discretion in admitting evidence from an expert on prosecutorial ethics to assist it in addressing the issue of the County's duty?

3. Where the trial court properly instructed the jury on defamation, defamation by implication, false light, and outrage, was the trial court correct in determining that the jury's verdict in favor of Corey on those theories was supported by substantial evidence?

4. Was the trial court correct in submitting Corey's promissory estoppel theory to the jury where there was evidence that the Prosecutor specifically promised Corey that if she took the position of

¹ Corey notes that the County made nine assignments of error in its brief, br. of appellant at 2-3, but the County failed to argue each of the assignments in its brief. For example, the County assigns error to the trial court's instructions on defamation, false light, and outrage, *id.* at 2, but does not even suggest anywhere in its brief how those instructions were erroneously worded. Its focus in its brief was whether the instructions should have been given at all.

chief criminal deputy, she would have the protection of “just cause” principles?

5. Did the trial court abuse its discretion in excluding evidence regarding Corey’s husband’s prosecution for embezzlement and subsequent bankruptcy or her prior internal investigations that was irrelevant to the issues in the case, or, if relevant, its prejudicial effect far exceeded its probative value?

C. ASSIGNMENT OF ERROR ON CROSS-APPEAL

(1) Assignment of Error

1. The trial court erred in striking Corey’s motion for attorney fees in its order dated December 3, 2008.

(2) Issues Pertaining to Assignment of Error

Did the trial court err in denying Corey as the prevailing party at trial an award of attorney fees under RCW 49.48.030 under its misreading of CR 54(d)(2) where the 10-day time deadline of that rule was inapplicable here because the County had notice of Corey’s intent to seek fees and RCW 49.48.030 is a remedial statute permitting a party to seek an award of fees at any time? (Assignment of Error on Cross-Review Number 1)

D. RESTATEMENT OF THE CASE

In 1981, just out of law school, Barbara Corey-Boulet (Corey) began her stellar career as a prosecutor, first in King County and then moving to Pierce County. RP 1733-38. She prosecuted some of the most difficult and high profile cases in the state, including *State v. Guy Rassmussen*, *State v. Shriner*, and *State v. Robert Yates*. RP 1742, 1799; CP 643. In addition to carrying a full caseload, Corey trained and educated attorneys and law enforcement professionals on a state and national level. RP 1741-45.

In the mid 1990s Corey co-organized a union for deputy prosecutors called “the Guild” in order to improve employment conditions. RP 1747. Due to the political nature of the prosecutor’s office, one of the first priorities for the Guild was bargaining for just cause employment termination rather than the standard at-will status for deputies.² *Id.* at 1749-50. Corey held various Guild officer positions, including president in 2000. *Id.* at 1747.

In 2001, Gerry Horne became Pierce County prosecuting attorney. RP 1754. He approached Corey about appointing her to the position of

² At-will employment means that a deputy’s employer, the elected prosecuting attorney, can terminate the deputy at the prosecutor’s discretion. *Roberts v. Atlantic Richfield Co.*, 88 Wn.2d 887, 891, 568 P.2d 764 (1977). In practical terms, at-will employment left deputies subject to the winds of any political change in the office. Prosecutors are elected on a partisan basis, and any change in parties could subject deputies to a loss of their jobs. *Spokane County v. State*, 136 Wn.2d 644, 655, 966 P.2d 305 (1998).

assistant chief criminal deputy a position that would put Corey third in command. RP 1755-56. Corey was interested in professional advancement, but with four children (two in college) and 20 years of time invested in her position and her pension, she was extremely concerned about job security. RP 1755-57. Concerned about the fact that the appointment might make her an at-will employee, RP 1756-58, Corey specifically raised the issue of receiving just cause termination protection from Horne:

A. I asked specifically about [just cause termination]. Not once, not twice, but numerous times. That was extremely important to me.

Q. And what specifically were you told?

A. I was told time and again, “Barbara, in my administration, you will have just cause termination.”

Q. Was there any equivocation?

A. None whatsoever.

RP 1759. In reliance on Horne’s promise, Corey took the assistant chief criminal deputy position. Had she not received the promise of just cause termination, she would not have taken the position because she did not want her employment to be “subject to the vagaries of Pierce County politics.” RP 1759-60.

Corey worked successfully in the new position for more than two years. Her work was so outstanding that in September of 2003, Horne

sent a lengthy and laudatory email to Pierce County Executive (and former Prosecutor) John Ladenburg outlining her many accomplishments and strenuously pleading for her reclassification to a higher paying level. CP 50. Horne stated, “One can only wonder how Barbara accomplishes so much for this office and county. Much is expected of her because she is exceedingly capable and exceedingly ‘driven’ to perform at the highest level. Barbara’s work ethic is unparalleled.” *Id.*

In late 2003, Corey raised concerns with Horne about an ethical matter involving Horne’s treatment of a case in which a good friend of his was a defense attorney. RP 1776. Horne attacked Corey in an email, angry that she had, in Horne’s view, attacked his credibility. RP 1777. He refused to speak with her for more than a week. RP 1779. Corey also argued with Horne about other issues, including his recommendation that a former Pierce County sheriff – caught in possession of child pornography – be sentenced to home detention on his yacht. RP 1780-82. Corey tried to resolve the issues face to face, but there was a “residual coolness” in the relationship. RP 1779-82.

In December 2003, Corey expressed long-held concerns about a particular prosecutor, John Neeb, who was assigned to the special assault unit. RP 1806. She believed Neeb was focusing too much on winning at all costs, rather than acting as a “minister of justice.” *Id.* He was rude and

condescending, and started contests with other attorneys to see who could pile up the highest number of criminal sentences the fastest. RP 1808. Corey discussed Neeb with administrative deputy Dawn Farina, who was familiar with the issues Corey raised. *Id.* In early January 2004, Corey recommended to Farina that Neeb be transferred out of the felony division. Farina's idea was to transfer Neeb to Remann Hall, the juvenile division. *Id.* Ultimately, however, the decision was up to Horne. RP 1810-11.

Horne was concerned that Neeb's transfer would be controversial because he was the Guild president at the time. *Id.* Farina and Corey explained that the transfer would be best for the office, and tried to address Horne's Guild concerns. RP 1812-14. Horne ultimately agreed that the transfer was appropriate, but emphasized that the move needed to have a "positive spin" to avoid Guild backlash. *Id.* Horne and Farina generated ideas on how to portray the new role to Neeb to make it seem positive. RP 1815. Corey assumed that Horne would announce the transfer to Neeb, as he had done with many other transfers in the past. RP 1817-22. Corey was astounded when Farina announced that she and Corey would speak to Neeb instead of Horne, something that was unprecedented in Corey's career. RP 1819. Not ten seconds later as they left Horne's office, Farina informed Corey that Farina herself would not sit in on the Neeb meeting, leaving Corey to inform Neeb alone. RP 1824. Corey was surprised, but

spoke to Neeb on January 15, 2004 and recited Horne and Farina's "positive spin" story about the transfer to Remann Hall. RP 1827. Corey then left town for a family event. RP 1830.

When she returned to work on January 20, Corey heard that the Neeb transfer had caused an uproar among the Guild officers. *Id.* There was controversy that Horne had not been honest during discussions about the transfer. RP 1844. Suspicion arose that the transfer was retaliatory because recent Guild contract negotiations had not gone well. RP 1848. Neeb had told Guild members that Corey had promised him honors that she had not. RP 1849. Farina turned on Corey, claiming that Farina had opposed the move when she never had. RP 1851.

On January 27, Horne summoned Corey to his office. He questioned her about what she had told Neeb and others about the transfer. RP 1855-57. Corey defended herself and recounted her story. *Id.* Despite severe stress and rumors circulating that she was going to be dismissed, Corey continued working on the many briefs she had due that week. RP 1864. On January 28, Corey was again summoned to Horne's office. RP 1866-67. Because she feared discipline, she asked Horne if she needed to have someone with her, which was her right under the just cause termination agreement. RP 1867. Horne told Corey he was dismissing

her. *Id.* Without any discussion, Horne gave Corey 40 minutes to resign in lieu of termination or be fired. *Id.*

Shocked and upset, Corey sought assistance from a colleague and returned to her office. She chose to resign instead of being fired. Horne ordered her to hand over her key and security cards, and she was escorted from the building. RP 1868-70. Thanks to a Guild benefit she had negotiated, Corey was entitled to compensation for time she had spent in trial. CP 28. Therefore, her official separation date was March 19, 2004. *Id.*

Someone from Horne's office contacted the *Tacoma News Tribune* the next day, January 29. RP 738-39, 888. The *Tribune* contacted Corey, and then published an article about Corey's departure on January 30. RP 847. Horne was upset by the article. RP 744.

While cleaning out Horne's office, Horne's investigator found an envelope Corey had used to collect private donations for a colleague whose child was ill. RP 432, 1274. In collecting the donations, Barbara had simply left the envelope out on a table for people to donate as they saw fit. RP 1885.³ Barbara had not yet made the gift when she was

³ This approach avoided any appearance that Corey was coercing subordinates to contribute. Historically, deputies have been required to contribute time and funds to their elected employers. In King County, former prosecutor Charles O. Carroll required employees to make contributions to his reelection fund. *State v. Carroll*, 83 Wn.2d 109, 515 P.2d 1299 (1973). In Pierce County, Prosecutor Don Herron and his staff were

abruptly fired, but did when she was contacted and reminded of it. RP 1893-94.

Horne seized upon the envelope and launched a massive internal investigation three weeks long, using two high investigators, and interviewing dozens of people about two collections of private donations Barbara had undertaken for co-workers. RP 466-70. Horne pushed to create a criminal case even when his own investigators had told him the case was not viable. *Id.*⁴ He was concerned about his media image. RP 503. Horne also wrote a letter to the Washington State Patrol (“WSP”) asking for investigative assistance. CP 729. The WSP did not respond. At the end of February, one of Horne’s investigators met with Horne and informed him there was no viable case to pursue against Corey. RP 468. Nevertheless, Horne’s office leaked to the *Tribune* that there was an internal investigation of missing funds, involving Corey. RP 1936-37.

Despite Horne’s knowledge that a criminal case was not viable, on March 6, 2004 an article appeared in the *Tribune* entitled, “Prosecutor fires aide; State will investigate.” In the article, Horne stated that Corey

enmeshed in political scandal. *See Herron v. KING Broadcasting Co.*, 112 Wn.2d 762, 776 P.2d 98 (1989).

⁴ The amounts in question were very small; in one of the two collections there was a discrepancy of \$3.50. RP 476-77.

was an at-will employee and he needed no cause to fire her. CP 732. The article contained a number of other statements from Horne about what had transpired, including the claim that Corey was subject to a “pending criminal investigation into whether money was mishandled in his office.” *Id.* This was not true; Horne had already been informed by his investigators that no viable case existed. RP 468. Horne also claimed in the article that he had “received confirmation that the [WSP] would participate in the investigation.” CP 732. This was not true; Horne had not, and never did, receive any such confirmation from the WSP. RP 1258, 1270-72. In fact, his investigatory did not even meet with the WSP until March 9, 2004, three days after the article was published. Ex. 116. He also stated that he had ordered Barbara to come into the office to discuss the matter, but she had “defied” him. CP 732. This also was not true. CP 732. Finally, he claimed that Corey had “told several lies” in connection with the Neeb transfer. CP 732. This was not true. RP 1827, 1938-39.

The article devastated Corey emotionally and professionally. RP 1939. She subsequently suffered severe depression, at one point was suicidal, and experienced an onset of epileptic seizures. RP 1942-43. It also prevented her from obtaining another position as a deputy prosecutor,

and all of her employment prospects evaporated despite her long and distinguished career. RP 1941.

Corey sued Horne⁵ and the County in the King County Superior Court for wrongful termination in violation of the just cause termination agreement, defamation, defamation by implication, outrage, invasion of privacy by publication in a false light, and invasion of privacy for dissemination of information about unsubstantiated allegations that Corey had behaved in a criminal manner. CP 13-16. The case was ultimately assigned to the Honorable Bruce Heller.

Corey retained two experts, Professors Larry Echohawk and David Boerner, to inform the jury about the standard of care with respect to her invasion of privacy claim, specifically about the role of prosecutors as ministers of justice and their responsibilities with respect to ongoing criminal investigations. CP 137. The County moved in limine to the expert testimony, arguing that the question of violation of an ethical rule is one of law, not fact, and that the RPC's cannot be the basis for a civil action. CP 97-98. The trial court granted the County's motion in part and denied it in part, allowing only Echohawk to testify as to matters within

⁵ Horne was eventually dismissed as a defendant by stipulated order. CP 34-35.

his expertise which may be relevant to issue in the case, but prohibiting opinions on questions of law, credibility of witnesses, “standards of care or conduct” of prosecutors, or existence, applicability, or violations of ethical rules. CP 204.

The County sought to introduce evidence of Corey’s past, including her husband’s embezzlement prosecution (in which Corey had no involvement and was exonerated), her subsequent divorce and bankruptcy, and that she had been the victim of domestic violence. CP 145-46. The trial court granted Corey’s motion in limine prohibiting any such evidence. CP 168-71.

The trial took place over three weeks. At the end of Corey’s case in chief and again post-trial, the County moved for judgment as a matter of law under CR 50 on all issues. RP 2528; CP 392-413. Specifically, the County argued against the existence of the negligence claim, but after substantial briefing and a considered oral ruling, the trial court, the Honorable Bruce Heller, concluded that a cause of action exists in Washington for negligent dissemination of confidential information, specifically the disclosure of unsubstantiated allegations. RP 2538-45. The County also argued that Corey had not met her burden on any of her intentional tort claims, and that promissory estoppel did not apply to

provide Corey a basis for her wrongful termination claim. CP 392-413. The trial court denied the County's motions. RP 2537; CP 468-69.

The jury returned a verdict for Corey on each and every one of her claims. CP 346-49. It awarded her \$125,994 in damages for breach of contract by promissory estoppel, \$1,500,000 for damage to her reputation under the defamation, defamation by implication, false light, and negligence claims, \$750,000 in noneconomic damages, and \$700,176 in economic damages beyond the breach of contract claim. *Id.* The County appealed. CP 465.

After the extensive post-trial motions, Corey moved for an award of attorney fees under RCW 49.48.030. The County moved to strike the request, arguing that it was untimely. CP 981. The trial court granted the motion and denied her fee request as untimely under CR 54(d)(2). CP 1159-62.

E. SUMMARY OF ARGUMENT

The County presents no basis for this Court to overturn the jury's considered verdict.

As the trial court carefully considered and explained, multiple sources of law support finding a cause of action for negligent dissemination of confidential information in this case. Washington is particularly protective of individuals who may be subject to the

publication of unsubstantiated allegations. If such allegations are prohibited from disclosure under the Public Records Act because of privacy concerns, then it follows that their negligent disclosure can be the basis for a claim for invasion of privacy.

Washington law permits expert testimony regarding the standard of care applicable in any tort action, even one against an attorney. Professor Echohawk's testimony related to the general standards of care expected of prosecutors, particularly the expectation that they will not prejudice the public against a defendant. His testimony did not presume to instruct the jury in the law or to argue that the County was liable for violating the RPCs.

There is ample evidence that Corey was the victim of defamation, both direct and by implication, false light, and outrage at the hand of the County. Even under the malice standard applicable to public figures, the County was liable. Horne knew or had reason to know that statements he made to the *Tacoma News Tribune* were untrue and/or created a false impression and cast Corey in a negative light that severely damaged her health and reputation.

The County's argument that the trial court should have allowed evidence regarding negative events in Corey's past was unfounded. A defamation defendant may introduce evidence, through testimony of

community members, that a plaintiff had a bad reputation in the community at large. This is not the same as introducing evidence of prior acts that the defendant believes will harm the plaintiff's reputation in the eyes of the *jury*. The latter is not permitted.

The trial court incorrectly ruled that Corey's attorney fee request was time-barred. RCW 49.48.030 must be liberally construed as a remedial enactment, and, by its terms, allows a fee request by prevailing plaintiff at any time. The statute establishes its own time frames, making the 10-day provision of CR 54(d)(2) inapplicable.

F. ARGUMENT

(1) Standard of Review

Given the County's varied challenges on appeal, there are several standards of review that apply. The County largely ignores the standard of review in its brief.

With respect to the County's motions for judgment as a matter of law pursuant to CR 50, the County faces a heavy burden:

Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party. Such motion can be granted only when it can be said, as a matter of law, there is no competent and substantial evidence upon which the verdict can rest.

Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907, 915, 32 P.3d 250 (2001) (citations omitted). In a recent formulation, the Supreme Court stated in *Schmidt v. Coogan*, 162 Wn.2d 488, 493, 173 P.3d 273 (2007), a court should grant judgment as a matter of law *only* in “circumstances in which there is *no doubt* as to the proper verdict” (emphasis added). This Court requires that the truth of the nonmoving party’s evidence must be accepted by the trial court, and the court must draw *all favorable inferences from that evidence that may reasonably be evinced from it*. *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 73, 684 P.2d 692 (1984).

The County also assigns error to several jury instructions. Br. of Appellant at 2-3. However, nowhere in its brief does the County challenge the accuracy of the language in the instructions; it argues that the instructions should not have been submitted to the jury at all. Therefore, the County’s instructional assignments of error are merely a recasting of its CR 50 challenges, and should also be reviewed under the CR 50 “substantial evidence” standard. *Guijosa*, 144 Wn.2d at 915.

Insofar as the County does oppose some jury instructions, it faces a daunting challenge. This Court must consider jury instructions as a whole. *Caruso v. Local Union No. 690*, 107 Wn.2d 524, 533, 730 P.2d 1299 (1987). Jury instructions are generally proper if they are supported by substantial evidence, allow a party to argue its theory of the case, and are

not misleading. *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). While this Court must review errors of law in a jury instruction de novo, *Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995), the Court reviews the decision to give a particular instruction or the refusal to give a particular instruction under an abuse of discretion standard. *Young v. Key Pharms., Inc.*, 130 Wn.2d 160, 176-77, 922 P.2d 59 (1996) (number and language of instructions left to trial court discretion); *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996). An abuse of discretion is present under Washington law when a judge exercises discretion for untenable reasons, *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971), or when no reasonable person would have adopted such a position. *Olver v. Fowler*, 161 Wn.2d 655, 663, 168 P.3d 348 (2007). An error on jury instructions is not grounds for reversal unless it is prejudicial, that is, unless it affects the outcome of the trial. *Id.* at 498-99.

The trial court had broad discretion to decide evidentiary matters, and will not be overturned unless there was a manifest abuse of that discretion. *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000). A trial court abuses its discretion when it bases its decision on untenable grounds or untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The trial court's application of court rules is a question of law reviewed de novo. *Wiley v. Rehak*, 143 Wn.2d 339, 343, 20 P.3d 404 (2001).

(2) The Tort of Invasion of Privacy Exists in Washington; the Trial Court Correctly Found That the County Owed Corey a Duty to Avoid Dissemination of Harmful Private Information

The County argues that it owed Corey no duty to avoid invading her privacy by disseminating information to the media about unsubstantiated allegations against her. Br. of Appellant at 13-31. Therefore, the County insists, the trial court erred by denying judgment as a matter of law on the negligence claim, and by offering a jury instruction on negligence. *Id.* For this proposition, the County offers a patchwork of arguments suggesting that invasion of privacy does not exist in Washington for public figures, and that the trial court misapplied the law. *Id.*

The County misconstrues the record and the legal principles involved here. For example, the County mistakenly suggests that the trial court *applied* the Public Records Act (PRA) and the Criminal Records Act (CRA) to this case, when those statutes merely *informed* the trial court's understanding of the common law duty owed to Corey. The County also wrongly asserts that the trial court should not have considered expert

testimony on the duty owed to Corey. Finally, it attempts to claim the benefit of immunity and the public duty doctrine, defenses that are inapplicable here.

(a) A Cause of Action Exists in Washington for Invasion of Privacy By Negligent Dissemination of Confidential Information; the Claim Was Properly Presented to the Jury

After a careful on-the-record analysis of relevant authority, the trial court concluded that Washington law provides a common law cause of action for negligent dissemination of confidential information. RP 2538-45. Specifically, the trial court looked at extensive briefing by the parties, Washington cases, foreign cases, and Washington statutes in reaching its conclusion. *Id.*⁶ The court concluded that when balancing an individual's right to privacy regarding unsubstantiated allegations against the public's right to know about those unsubstantiated allegations, the scales must tip in favor of the individual. RP 2543.

The trial court's instruction number 14 on the duty owed to Corey was proper statement of the law. *See* Appendix. It stated:

In this case Defendant had a duty to exercise reasonable care in the performance of its duties as the Pierce County Prosecuting Attorney's Office. This duty includes the duty to refrain from disseminating confidential information to

⁶ Three of these cases, the trial court said, weighed against finding a cause of action, and three weighed in favor of it. RP 2538-45. It is notable that the County has cited only those cases weighing against finding a cause of action in its brief.

the public that is not a matter of public concern and is harmful to the Plaintiff.

CP 310. This instruction describes a particular iteration of the tort of invasion of privacy, which is framed in the Restatement (Second) of Torts thus:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is a kind that (a) would be highly offensive⁷ to a reasonable person, and (b) is not of legitimate concern to the public.

REST. 2D OF TORTS § 652D. The tort of invasion of privacy includes the tort of publication in a false light, which Corey also successfully proved in this case. REST. 2D OF TORTS § 652E; 27 WASH. PRAC. §1.62; *Eastwood v. Cascade Broadcasting Company*, 106 Wn.2d 466, 722 P.2d 1295 (1986).⁸

Although the trial court characterized Corey's claim as one of "first impression" because of her public status, RP 2538, this is not entirely accurate. Washington law has long provided sound support for the trial court's decision that the County had a duty of care to prevent the

⁷ Although the court's instruction did not include the "highly offensive" language, the County does not object to or challenge the instruction on that basis. Instead the County argues that it owed no duty to Corey of any kind. Br. of Appellant at 13.

⁸ The County has not questioned Corey's *ability* to bring the false light claim. This reveals a flaw in the County's position on the invasion of privacy claim for improper dissemination. False light is an invasion of privacy claim. *Eastwood*, 106 Wn.2d at 471. Yet on the invasion by dissemination claim, the County argues that it owed Corey no duty to prevent invasion of her privacy, because she is a public figure. Br. of Appellant at 28. If the County truly believed that Corey had no right to privacy, then presumably it would have challenged her ability to bring the false light claim as well.

improper dissemination of confidential information against figures public and private alike.

Beginning in *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978), our Supreme Court recognized that a tort action for invasion of privacy existed in Washington and adopted the REST. 2D OF TORTS § 652. More recently in *Reid v. Pierce County*, 136 Wn.2d 195, 961 P.2d 333 (1998), the Court reiterated that a common law tort of invasion of privacy based on § 652D exists in Washington. The Court found that the plaintiffs, the families of former Governor Dixy Lee Ray, and Tacoma Mayor Jack Hyde, as well as private citizens, stated claims against Pierce County whose Medical Examiner's office staff shared the autopsy photographs of well-known decedents with others. The Court based its holding on § 652D, and found that RCW 68.50.105, which declares a public policy that autopsy records must be confidential informed the common law duty owed by the County to the decedents and their families. *Id.* at 212 (“To hold, as the County would suggest, that the relatives of a decedent have no cause of action, no matter how egregious the act, is counterintuitive.”)

In *Dawson v. Daly*, 120 Wn.2d 782, 797, 845 P.2d 995 (1993) (abrogated in part on other grounds by *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 174 P.3d 60 (2007)) the Supreme Court held that disclosure of

a deputy prosecutor's performance evaluation violated the prosecutor's right to privacy. 120 Wn.2d at 800. The court noted that disclosure of a performance evaluation would violate the prosecutor's right to privacy because it would be highly offensive and the public does not have a legitimate concern in such information. *Id.* at 796-98.

In light of *Reid* and *Dawson*, the County's contention that Corey cannot sue for invasion of privacy because she is a public figure, br. of appellant at 30, is unfounded. Certainly if public figures such as a former governor, a Tacoma mayor, and another deputy prosecutor just like Corey have a privacy interest, Corey has one as well.

The right to privacy for public figures extends to the dissemination of unsubstantiated allegations against them. Washington law recognizes a privacy interest on the part of someone subject to an investigation by a public organization. In *Bellevue John Does 1-11 v. Bellevue School Dist. No. 405*, 164 Wn.2d 199, 189 P.3d 139 (2008), our Supreme Court held that dissemination under the PRA of unsubstantiated allegations of sexual misconduct against a public school teacher would violate that teacher's right to privacy. *Id.* at 223. The court noted that if the allegations had been substantiated and been subject to discipline, then the right to privacy would no longer apply. *Id.* at 215. However, *Bellevue* makes clear that a public employee has the right to privacy regarding *unsubstantiated*

allegations, even when the allegations *would* be of public concern if they were substantiated. *Id.* The *Bellevue* court also noted language in *Cowles Publishing Co. v. State Patrol*, 109 Wn.2d 712, 748 P.2d 597 (1988) indicating that public figures do have a right to privacy with respect to unsubstantiated allegations. *Id.* at 223; *Cowles*, 109 Wn.2d at 727.⁹

Horne's leak to the press regarding his "investigation" into an intra-office collection of charity money for colleagues regarded Corey's private life, not her public life, particularly where those allegations were unsubstantiated. Corey's voluntary collection of money in order to give co-workers flowers did not implicate her public duties, and was of no concern to the public. Also, the fact that Corey was innocent of any wrongdoing completely negates any public concern. The dissemination was harmful and highly offensive to Corey, not only because it suggested that a highly respected prosecutor was a criminal, but because the unsubstantiated allegations implied that public funds were involved. Corey's right to privacy, under these circumstances, was not diminished by her status as a public figure.

⁹ The trial court acknowledged prior cases indicating that public figures have a more limited right to privacy than do private individuals, and cannot generally allege negligence against newspaper publishers. RP 2539-41 (citing *Clawson v. Longview Pub. Co.*, 91 Wn.2d 408, 589 P.2d 1223 (1979) and *Hoppe v. Hearst Corp.*, 53 Wn. App. 668, 770 P.2d 203 (1989)). However, *Bellevue* and *Cowles* both involved public figures: public school teachers and police officers.

The County incorrectly claims that Corey misled the jury by arguing her public status afforded her *greater* protection from invasion of privacy than a private person. Br. of Appellant at 30. The County cites RP 2800, 2804, 2807, 2809, 2829-31, and 2847-50 in support of that assertion.

But the portions of Corey's closing argument cited by the County do not suggest that she had greater protection than any other individual. They merely recite her long and distinguished career as a prosecutor, to emphasize the damage to her reputation:

What you have in this case is an incredibly arbitrary, capricious, impulsive decision that ended the career of a 20-year prosecutor...

RP 2800.

This was a community that she had worked in for 20 years, and then this article is put in the paper. She's in a profession where reputation is everything, and she is slammed to the point where she's not working as a prosecutor.

RP 2807.

And what we have in this case is a situation where we go from being a masterpiece being 20 years as a very top prosecutor teaching the FBI, teaching people across the country, and all of that is taken away. ... Your job as a jury is to determine what is that masterpiece. What value is that, and that's what those two blanks are for.

RP 2848.

Corey's sterling reputation, and the damage done to it, did not hinge on her position as a public figure, nor did Corey make any argument that her public status somehow increased her right to privacy. She proved to the jury that the disclosure of confidential unsubstantiated allegations about private matters invaded her right to privacy and severely damaged her reputation.

The County raises the straw man argument that the CRA and the PRA, and case law discussing the right to privacy expressed in those statutes, "do not create a private cause of action for disclosure of confidential information." Br. of Appellant at 26. The County also avers that neither the CRA nor the PRA "governs" this case. Br. of Appellant at 26-27.

This argument is meritless because the trial court did *not* find a private right of action in the CRA or the PRA, nor did the trial court find that those statutes "governed" this case. Rather, the court relied on the policies expressed in those statutes to inform the issue of whether "care must be taken in disclosing information about pending criminal investigations." RP 2544. This is precisely the same kind of inquiry that the Supreme Court undertook in *Reid*. 136 Wn.2d at 211. The court there cited statutes as indicative of the policies guiding its decision. *Id.*

The trial court's consideration of the public policy behind the CRA and the PRA – in the context of evaluating the County's common law duty – was appropriate. When evaluating a common law tort claim, the public policy expressed in a statute may be considered by a trier of fact as evidence of negligence. RCW 5.40.050; *see, e.g., Ives v. Ramsden* 142 Wn. App. 369, 174 P.3d 1231 (2008). In *Ives*, a securities dealer violated a securities rule known as the "suitability rule," codified in RCW 21.20.072. His clients sued for breach of fiduciary duty. Although this Court concluded that the statute did not create private right of action, it held that the trial court properly used the statute's standard as evidence that securities dealer breached his fiduciary duty of reasonable care.

In its final challenge to the trial court's conclusion that a duty existed, the County contends that Corey was prohibited from offering expert testimony regarding duty. Br. of Appellant at 21-25, 32-36. The County avers that the trial court impermissibly informed its ruling regarding the negligent dissemination duty by relying in part on reference to such ethical obligations. *Id.* at 22.

In *Cotton v. Kronenberg*, 111 Wn. App. 258, 266, 44 P.3d 878 (2002), *review denied*, 148 Wn.2d 1011 (2003), this Court *rejected* the precise argument that the County makes here. *Cotton* involved a client's action against his attorney for breach of fiduciary duty. *Id.* at 264. The

trial court applied the RPCs and determined that the attorney's duty of care had been breached. On appeal, this Court made clear that the trial court's reliance on the RPCs was appropriate:

Relying heavily on *Hizey v. Carpenter*,¹⁰ Kronenberg argues that the trial court improperly considered and applied the Rules of Professional Conduct (RPC) in determining that he breached his fiduciary duty to Cotton. *Neither Hizey nor any other authority supports that proposition, and we reject it.*

Id. (emphasis added). The RPCs inform the determination of the duty owed by an attorney.

Nevertheless, the County tries to argue that expert testimony on the subject of duty is prohibited, relying principally on *Hizey*. *Hizey* merely stands for the proposition that violation of the RPCs does not create *per se* liability in a legal malpractice action. *Id.* at 265-66. *Hizey* also clarifies that the RPCs are not the appropriate standard of care in a civil action for malpractice. *Id.* This is appropriate, because the RPCs expressly disclaim any creation of an independent cause of action for malpractice. *Id.* at 259.

However, both before and after *Hizey*, and even within the *Hizey* opinion itself, Washington courts have made clear that – in tort actions other than those for legal malpractice – experts may testify regarding the standard of care outlined in the RPCs. *Hizey*, 119 Wn.2d at 653; *Eriks v.*

¹⁰ 119 Wn.2d 251, 830 P.2d 646 (1992).

Denver, 118 Wn.2d 451, 824 P.2d 1207 (1992); *Cotton*, 111 Wn. App. at 266. In *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992) our Supreme Court affirmed that an attorney breached his fiduciary duty to clients by violating the Code of Professional Responsibility (CPR), the predecessor to the RPC. *Id.* at 461. Four months after *Eriks*, the same court in *Hizey* expressly preserved the propriety of using the RPCs in cases other than legal malpractice: “We realize courts have relied on the CPR and RPC for reasons other than to find malpractice liability and our holding today does not alter or affect such use.” 119 Wn.2d at 653.

Decisions subsequent to *Hizey* continue to adhere to the *Eriks* view that the RPCs may be considered in cases other than legal malpractice.

Furthermore, ethics expert Professor Larry Echohawk did not, as the County suggests, testify that a breach of the RPCs was negligence *per se*. His testimony discussed the general expectations of conduct that apply to prosecuting attorneys:

Q. Now, when we talk about a prosecutor being a minister of justice, what does that – what’s meant by that?

A. ...Your job is to find the truth. It is not to get convictions. Your job is to do justice.

RP 1030.

A. And so when [Horne] makes comments like that, he may be referring to the employment matter, but he knows that there’s an ongoing criminal investigation. *And this is*

what a prosecutor has to be careful about. That's why they have the standard is [sic] not to allow a prosecutor to be, you know, giving information for public dissemination that will prejudice the rights of the suspect or the accused.

RP 1218.

The arguments that the trial court should have prohibited testimony about ethical standards, and that such testimony could not inform the trial court's duty inquiry, are without merit. Use of the RPCs and expert testimony to inform and illuminate the independent legal duty to avoid negligent dissemination of confidential information was appropriate in this case. The trial court did not err in considering expert testimony regarding the duty of care owed by prosecuting attorneys.

The County also argues that admission of Echohawk's testimony was prejudicial because the trial court "adopt[ed] it as its own" Echohawk's testimony "that the Pierce County Prosecuting Attorney owed Corey a duty...." Br. of Appellant at 34-35.

This argument was not raised below, and should be rejected. An issue, theory or argument not presented at trial is not considered on appeal. *Boeing v. State*, 89 Wn.2d 443, 450-51, 572 P.2d 8 (1978). In its objections to the invasion of privacy by dissemination instruction, the County did not argue that the trial court had lent its imprimatur to any

expert testimony. Instead, the County argued that the cause of action did not exist, citing Washington case law. CP 458.

Also, there is absolutely no basis in the record to support the County's claim that the trial court "adopted" Echohawks' testimony in the duty instruction. The instruction simply states that the defendant owed Corey a duty to exercise reasonable care in the performance of its duties, including a duty to refrain from dissemination confidential harmful information. CP 310. Colloquy on this issue demonstrates that the trial court instructed Corey to propose jury instructions, and no mention is made in the instruction of anything other than the trial court's articulation of the law. RP 2756-57; CP 310.

The jury instruction as drafted accurately reflected all of the cases, statutes, and standards cited by the trial court in support of its legal finding that a duty existed. The County's charge that the trial court gave an imprimatur of court approval to Echohawk's testimony is baseless.

The trial court here concluded that a cause of action for negligent dissemination of unsubstantiated allegations, even when the case involves a public figure, is consistent with Washington's ongoing effort – expressed in both common law and statutory law – to balance the public's right to know with a public official's right to privacy. RP 2542.

(b) The County's Defenses to the Invasion of Privacy Claim Are Inapplicable Here

(i) The Public Duty Doctrine Does Not Apply Because the County Had a Specific Legal Duty to Corey Based on Its Privity With Her

The County next argues that any suggestion Horne had a duty to exercise reasonable care is contrary to the public duty doctrine, citing *Osborn v. Mason County*, 157 Wn.2d 18, 134 P.2d 197 (2006). Br. of Appellant at 14, 28.

The public duty doctrine is a “focusing tool” courts use to analyze whether a public entity owes a legal duty to the public at large, rather than a specific legal duty to a particular individual. *Osborn*, 157 Wn.2d at 27. Even if the entity has a legal duty to the public, the public duty doctrine provides immunity from suit unless some special exception or circumstance creates a special duty to the victim. *Id.* In *Osborn*, the family of a murdered rape victim sued Mason County for failing to warn them about the presence of a sex offender. *Id.* at 21. Our Supreme Court concluded that the county could not be held negligent because it did not owe a specific legal duty to the family or the victim:

Assuredly, Mason County has a “duty” to protect its citizens in a colloquial sense, but it does not have a *legal* duty to prevent every foreseeable injury. An action for negligence does not lie unless the defendant owes a duty of care to the plaintiff, and a broad general responsibility to

the public at large rather than to individual members of the public simply does not create a duty of care.

Id. at 28 (citations and some quotation marks omitted). Moreover, the Court explained that the public duty doctrine was not even implicated, because Mason County owed no specific legal duty even to the public at large, let alone the victim. *Id.* at 27.

An example of proper application of the public duty doctrine can be found in *Chambers-Castanes v. King County*, 100 Wn.2d 275, 669 P.2d 451 (1983).¹¹ In that case, a crime victim called 911 requesting police assistance for a violent assault. *Chambers-Castanes*, 100 Wn.2d at 278-80. Police were dispatched, but then called off when another caller falsely claimed the incident had ended and all parties had left the scene. *Id.* When the victims and several witnesses called back pleading for police help, dispatchers claimed several times that police were en route when that was not the case. *Id.* The victims sued the county for negligent infliction of mental distress. *Id.* The Supreme Court noted that the county's

¹¹ Although *Chambers-Castanes* stood for the proposition that some citizen/government relationships carried implicit assurances, such that express assurances of aid were not required to overcome the public duty doctrine. *Chambers-Castanes* has since been overruled regarding this specific proposition: express assurances are now required. See *Honcoop v. State*, 111 Wn.2d 182, 192, 759 P.2d 1188 (1988); *Noakes v. City of Seattle*, 77 Wn. App. 694, 698, 895 P.2d 842, review denied, 127 Wn.2d 1021, 904 P.2d 299 (1995).

statutory public duty to provide police protection was not a proper basis for a negligence claim under the public duty doctrine. *Id.* at 284-85. However, the court held that the dispatcher created a specific relationship and duty to the victims by falsely reassuring them that police were en route. *Id.* at 287. The court based this holding on the concept of privity:

...[I]t appears then that an actionable duty to provide police services will arise if, (1) there is some form of privity between the police department and the victim that sets the victim apart from the general public....The term privity is used in the broad sense of the word and refers to the relationship between the police department and any “reasonably foreseeable plaintiff”.

Id. at 286. Therefore, if there is a relationship that sets the victim off from the general public, the public duty doctrine does not apply to prohibit a suit in negligence.

A finding of duty in this case does not violate the public duty doctrine. Corey did not argue that Horne violated some general legal duty to the public at large. Horne, the County, and Corey were in privity, because Corey was the specific target of an investigation. Horne owed Corey a particular duty of reasonable care in preserving the confidentiality of unsubstantiated and meritless allegations against her.

The County also argues that it owed Corey no duty as her employer or as an investigator to prevent “negligent investigation” or “infliction of emotional distress.” Br. of Appellant at 28-29. These

arguments are meritless and irrelevant to this case. The jury did not find that the County negligently investigated Corey or inflicted emotional distress arising from a dispute in the workplace. The jury found that the County negligently disseminated confidential information about Corey that injured her reputation.

(ii) The County Is Not Immune from the Negligence Claim Under Prosecutorial Privilege

The County argues that the statements Horne made about Corey to the *Tribune* were protected by prosecutorial privilege. Br. of Appellant at 15. It suggests that public disclosure of unsubstantiated allegations under investigation enhances community confidence in the mission of the prosecutor's office. Br. of Appellant at 17. The County argues that Horne's statements were protected by absolute prosecutorial immunity. Br. of Appellant at 16. Because Horne's statements were untrue and made for the purpose of harming Corey's reputation, they are not protected.

The County relies heavily upon *Gold Seal Chinchillas, Inc. v. State*, 69 Wn.2d 828, 420 P.2d 698 (1966) to support its argument for immunity. Br. of Appellant at 15-19. In *Gold Seal*, the Attorney General's office issued a press release concerning a recently filed lawsuit alleging violations of the Consumer Protection Act. 69 Wn.2d at 833. The defendants in the consumer protection suit initiated a libel action against

the state. *Id.* The Supreme Court affirmed the dismissal of the complaint on grounds that the Attorney General and his staff were absolutely privileged to make the statements contained in the press release because they were public officials speaking “with respect to their official duties.” *Id.*

The *Gold Seal* prosecutorial privilege upon which the County relies is an absolute privilege against all civil suits. Absolute privilege is usually confined to cases in which the public service and administration of justice require complete immunity. *Bender v. City of Seattle*, 99 Wn.2d 582, 600, 664 P.2d 492 (1983). Legislators in debate, judges and attorneys in court documents, statements of witnesses or parties in judicial proceedings, and statements of executive or military personnel acting within the duties of their offices are frequently cited examples. *See Twelker v. Shannon & Wilson, Inc.*, 88 Wn.2d 473, 475-78, 564 P.2d 1131 (1977). Generally, some compelling public policy justification must be demonstrated to justify the extraordinary breadth of an absolute privilege. *Bender*, 99 Wn.2d at 600.

Unlike this case, *Gold Seal* did not involve a pending investigation of unsubstantiated allegations. The press statements at issue were taken directly from a Consumer Protection Act complaint that the prosecutors had just filed in court. *Gold Seal*, 69 Wn.2d at 831-32. The right to

inform the public does not include a license to make gratuitous statements concerning the facts of a case or disparaging the character of other parties to an action. *Bender*, 99 Wn.2d at 601.

Here, Horne made statements to the press not in a judicial proceeding, but on his own initiative to spin the dismissal of a prosecutor. RP 466-70. The statements were about unsubstantiated and baseless allegations about a private office charity collection. RP 1885; CP 732. Those statements, rather than serving and informing the public, misled the public about the actions and status of a career county prosecutor. They were gratuitous and disparaged Corey's character. They had only a tenuous connection to his duties as a public official, and as such there is no extraordinary public policy justification to invoke absolute immunity. *Gold Seal*, 69 Wn.2d at 833; *Bender*, 99 Wn.2d at 600.

The trial court correctly held that Corey had a right to privacy that was invaded when Horne disseminated information about unsubstantiated allegations of fiduciary malfeasance. The County has no viable defenses to the tort. A well-instructed jury found, based on ample evidence, that the County breached its duty to Corey, causing her substantial harm. The jury's verdict should be upheld.

(3) Sufficient Evidence Exists to Prove All of Corey's Tort Claims

After hearing more than two weeks of testimony and viewing more than 100 exhibits, the jury found that Corey proved all *five* of her tort claims: negligent dissemination of confidential information, defamation, defamation by implication, false light, and outrage. CP 347-48. In addition to challenging the existence of the negligence claim as addressed (*supra* § 2), the County challenged in its motion for judgment as a matter of law the sufficiency of the evidence to support the jury’s verdict on the remaining four intentional tort claims. Br. of Appellant at 37-40.¹²

(a) Sufficient Evidence Supports the Defamation, Defamation by Implication, and False Light Claims Because Horne Made False Statements and/or Created Implications That He Knew to Be False or Recklessly Disregarded the Truth

The elements for proving defamation/false light torts are not in controversy. To prove defamation, Corey was required to show “falsity, an unprivileged communication, fault, and damages.” *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005).

Defamation by implication occurs where the defendant juxtaposes a series of facts so as to imply a defamatory connection between them, or

¹² For the County to overturn the jury award, it must persuade this Court that insufficient evidence exists with respect to every one of Corey’s tort claims. The jury awarded Corey damages of \$2,950,176. CP 349. The jury did not subdivide the damages relating to these claims. *Id.* The County is not challenging the amount of damages. If this Court finds substantial evidence to support *any one* of the five tort verdicts in Corey’s favor, the judgment must be affirmed.

creates a defamatory implication by omitting facts. *Id.* at 823; *Chase v. Daily Record, Inc.*, 83 Wn.2d 37, 515 P.2d 154 (1973).

A false light invasion of privacy claim requires a defendant “publicize” a matter placing another in a false light where: “(a) the false light would be highly offensive to a reasonable person and (b) the [defendant] knew of or recklessly disregarded the falsity of the publication and the false light in which the other would be placed.” *Eastwood*, 106 Wn.2d at 470-71.

Because Corey is a public figure, she must also prove that Horne had actual malice, that is, he knew the statements or implications therefrom to be false, or acted with reckless disregard as to their falsity. *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86, 84 S. Ct. 710, 11 L.Ed.2d 686, 95 A.L.R.2d 1412 (1964); *Margoles v. Hubbart*, 111 Wn.2d 195, 199-200, 760 P.2d 324 (1988).

A party can defend against these related tort claims by showing that the statements made were true, or that the gist or “sting” of the story is true when considered as a whole. 153 Wn.2d at 826. The only elements of these three torts that the County challenges are the falsity of the statements or implications therefrom, and whether Horne had actual malice.

The County argues that there was no evidence or reasonable inference of falsity or actual malice in any of Horne's statements to support the defamation, defamation by implication, and false light claims. Br. of Appellant at 37-38. Rather, the County argues, the undisputed evidence showed that the statements made to the *Tribune* were true and that Horne "subjectively" believed them to be true. *Id.*

The evidence at trial revealed that a number of statements Horne made to the *Tribune* were in fact false. Horne stated that Corey was subject to a "pending criminal investigation into whether money was mishandled in his office." *Id.* This was not true; Horne had already been informed by his investigators that no viable case existed. RP 468. Horne also claimed in the article that he had "received confirmation that the [WSP] would participate in the investigation." CP 732. This was not true; Horne had not received any such confirmation from the WSP. RP 1258, 1270-72. He also stated that he had ordered Barbara to come into the office to discuss the matter, but she had "defied" him. CP 732. This was also not true. RP 1925-32. Finally, he claimed that Corey had "told several lies" in connection with the Neeb transfer. CP 732. This was not true. RP 1827, 1938-39.

The evidence also revealed that Horne knew the statements to be false, or acted with reckless disregard of their falsity. Horne was not

recounting someone else's version of events, he was in a position to know the truth regarding every statement he made. Horne knew that the WSP had not confirmed to him that it would assist with any investigation, because the WSP never in fact issued any such confirmation. RP 1270-72. Horne's investigators met with Horne at the end of February and informed him there was no viable case to pursue against Corey. RP 468. Nevertheless, Horne subsequently told the *Tribune* that there was an *ongoing* internal investigation of missing funds. CP 732. Horne's own investigator testified as to Horne's malice, both in conducting the investigation and in leaking selective information to the press in order to disparage Corey. RP 460-75.¹³

Based on this evidence, the jury could and did reasonably conclude that several of Horne's the statements were false or at least misleading, and that Horne acted with malice.

(b) Corey Presented Sufficient Evidence to Support Her Outrage Claim Because the Jury Concluded that Actual Malice Existed

The County argues that the outrage claim should not have gone to the jury because the evidence did not support it, and because the evidence did not show that Horne acted with malice. Br. of Appellant at 40-41.

¹³ Many of the investigator's statements were made in a deposition, and he tried to backtrack at trial. RP 460-75. However, his deposition statements were read into the record on cross-examination. *Id.*

The basic elements of the tort of outrage are: “(1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress.” *Rice v. Janovich*, 109 Wn.2d 48, 61, 742 P.2d 1230 (1987); REST. 2D OF TORTS § 46 (1965). The conduct in question 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.*” *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975). The question of whether certain conduct is sufficiently outrageous is ordinarily for the jury, but it is initially for the court to determine if reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability. *Phillips v. Hardwick*, 29 Wn. App. 382, 387, 628 P.2d 506 (1981).

The County cites *Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989). In *Dicomes*, the State terminated an executive secretary from her administrative position because she had revealed budget information to interested third parties. 113 Wn.2d at 615-16, 782 P.2d 1002. She claimed the discharge constituted outrageous conduct because it allegedly showed her to be an incompetent and disloyal employee. *Id.* at 630. She further argued that management created an intentionally false report for the sole purpose of embarrassing, humiliating, and then

terminating her. *Id.* The Supreme Court disagreed and held that "even if the purpose of the study was to fire plaintiff, the fact of the discharge itself is not sufficient to support a claim of outrage," reasoning that "mere insults and indignities, such as causing embarrassment or humiliation, will not support imposition of liability on a claim of outrage." *Id.* The court also noted that the plaintiff had tried to rest her charge on the allegations in her pleadings, rather than specific evidence. *Id.*

Dicomes is inapposite in this case. Nothing the employer did in *Dicomes* bears any resemblance to Horne's conduct here. The trial court and the jury correctly concluded that sufficient evidence supported Corey's claim of outrage. Horne deliberately initiated and conducted a vendetta to fire, smear, and ruin Corey in order to improve his own public image regarding a petty internal political matter of a personnel transfer. Horne put his own political concerns above all other considerations and maliciously destroyed the distinguished career and reputation of a prosecutor who had done nothing more than follow Horne's instructions to the letter. He even attempted to trump up a bogus criminal charge, wasting valuable taxpayer resources and investigator time in the process. His conduct was atrocious, intolerable, and outrageous.

There was ample evidence of malice here. The trial court correctly sent Corey's outrage claim to the jury. The jury correctly concluded that the County was liable for outrage.

(4) Expert Testimony Was Admissible to Inform the Jury's Decision on the Factual Issue of Whether the County Met the Standard of Care

The County argues that the trial court erred in admitting Echohawk's expert testimony about prosecutorial ethical standards because those standards are a question of "law, not fact." Br. of Appellant at 32. In support, the County cites *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993) and *Hyatt v. Sellen Construction Co., Inc.*, 40 Wn. App. 893, 700 P.2d 1164 (1985). However, the trial court did not abuse its discretion in admitting Professor Echohawk's testimony.

Fisons and *Hyatt* stand for the proposition that an expert may not instruct the jury in the law, nor may an expert testify as to an ultimate legal issue, because those matters are for the court. *Fisons*, 122 Wn.2d at 344; *Hyatt*, 40 Wn. App. at 899. In *Fisons*, the trial court erred because it sought expert testimony on whether the trial court should impose sanctions. *Fisons*, 122 Wn.2d at 344. *Hyatt* distinguishes between expert testimony regarding the standard of care, which is permissible, and expert

testimony regarding whether certain laws apply and where the defendant violated those laws. *Hyatt*, 40 Wn. App. at 899.

The principles of *Fisons* and *Hyatt* were not violated here. Nothing in Echohawk's testimony spoke to an ultimate issue of fact, or instructed the jury on the law. Echohawk did not testify that the RPC's were applicable laws, nor did he state that the County had violated the law. The testimony of which the County complains related to the general national standards of care that prosecutors are trained to follow:

Q. And can you tell us what this standard means?

A. Well, what we're on guard for here is to make sure that, as I said, people are not unfairly disparaged or damaged in this process of investigation. Because there can be a substantial likelihood of heightened public condemnation. ...And so prosecutors are supposed to be on guard. And – to make sure that there's a valid law enforcement purpose to making any statement that would give this kind of confidentiality. [sic]

RP 1033-34. Echohawk went on to testify about the Pierce County Prosecuting Attorney's office policy, which he noted was consistent with that national standard. RP 1035.

Echohawk did not instruct the jury on the law to apply, nor did he testify as to the existence of duty. The trial court had already established as a matter of law that a duty existed. Echohawk's testimony related to

reasonable standards of care prosecuting attorneys should follow, which was permissible. *Hyatt*, 40 Wn. App. at 899.

(5) Corey Established Her Promissory Estoppel Claim

The trial court denied the County's motion for judgment as a matter of law and concluded that Horne's promise to Corey – that she would only be dismissed for just cause – was enforceable under a theory of promissory estoppel. CP 468-69.

To prove promissory estoppel, a plaintiff must show five prerequisites: (1) A promise which (2) the promisor should reasonably expect to cause the promisee to change his position and (3) which does cause the promisee to change his position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise. *King v. Riveland*, 125 Wn.2d 500, 506, 886 P.2d 160 (1994).

The County challenges Corey's claim on three of these elements: existence of a clear promise, Corey's justifiable reliance, and avoidance of injustice. Br. of Appellant at 42-47.

(a) Horne's Promise to Corey Was Clear and Definite

The County first argues that Corey's testimony regarding the promise is insufficient as a matter of law, citing *Rolph v. McGowan*, 20 Wn. App. 251, 255-56, 579 P.2d 1011 (1978), *review denied*, 91 Wn.2d

1004 (1978). In *Rolph*, a party seeking contract reformation on the basis of mutual mistake testified as to the mistake, but no other evidence supported the claim. *Id.* at 255-56. This Court concluded that, because mutual mistake of fact must be shown by clear, cogent and convincing evidence, the party's uncorroborated testimony did not suffice. *Id.* The County argues that because only Corey testified to Horne's promise, it does not meet the "clear and definite promise" standard outlined in *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 173, 876 P.2d 435 (1994) and thus fails as a matter of law.

The County's error lies in conflating the promissory estoppel "clear and definite promise" requirement with the "clear, cogent, and convincing" standard of proof applicable to contract reformation. "Clear, cogent and convincing" is a *standard of proof* that a party must meet. *Kessinger v. Anderson*, 31 Wn.2d 157, 168, 196 P.2d 289 (1948). The "clear and definite promise" provision from *Havens* is a description of the *factual nature* of the statements made to the employee. *Havens*, 124 Wn.2d at 174. In other words, the promise made must be stated clearly, it cannot be implied, ambiguous, or debatable. *Id.*

Corey described Horne's promise to her at trial, and it was stated in the most clear and definite of terms:

And so I had more than one conversation with Gerry about my concerns. And he repeatedly, unequivocally told me that in his administration, I would have just cause termination. I would have that benefit.

...I asked him specifically about that. Not once, not twice, but numerous times. That was extremely important to me.

...I was told time and again “Barbara, in my administration, you will have just cause termination.

RP 1758-59. This testimony meets the definition of a “clear and definite promise” under *Havens*. 124 Wn.2d at 174.

(b) Corey Justifiably Relied on Horne’s Promise

Next, the County argues that Corey could not have justifiably relied on Horne’s promise, arguing that he did not have express or implied authority to bind the County to an employment contract. Br. of Appellant at 43. The County points to statutes, the Pierce County Charter, and Pierce County guidelines to support the proposition that deputy prosecutors are at-will employees. *Id.* Therefore, the County argues, Corey should not have believed the Pierce County Prosecuting Attorney when he promised her just cause termination. Br. of Appellant at 43-45.

The County’s argument is without merit. RCW 36.27.040 provides in relevant part: “The provisions of RCW 41.56.030(2) shall not be interpreted to permit a prosecuting attorney to alter the at-will relationship established between the prosecuting attorney and his or her

appointed deputies by this section *for a period of time exceeding his or her term of office.*”

Therefore, Horne had authority to promise Corey precisely what he did promise: “Barbara, *in my administration*, you will have just cause termination. RP 1759. Moreover, nothing in any of the documents cited by the County suggests that a Prosecuting Attorney is not bound to a promise he or she makes to an individual employee, when that employee relies on the promises to his or her detriment.

(c) Public Policy, Even When Expressed in the Form of a Statute, Does Not Support the Argument That Prosecuting Attorneys Should Be Free to Lie to Their Employees to the Employees’ Detriment

Lastly, the County argues that public policy should not permit Horne to make a promise that is contrary to RCW 36.27.040. Br. of Appellant at 46.

Given the fact that a promise of at-will employment for the remainder of Horne’s term is *not* contrary to the statute (*see supra* § E.2), public policy actually supports application of promissory estoppel in these circumstances.

Equity cannot be applied to directly contravene a statute, but when no direct violation of a statute is implicated, equitable principles can apply. *Dependency of Q.L.M. v. State, Dep’t of Social & Health Services*,

105 Wn. App. 532, 539-40, 20 P.3d 465 (2001). For example, in *King*, the Department of Corrections (DOC) instituted the Sex Offender Treatment Program in 1988, and asked participants to sign confidentiality agreements. 125 Wn.2d at 503. In 1990, DOC revised the confidentiality agreements to warn inmates that the materials would not be confidential if the prosecutor considered a sexual predator filing. *Id.* at 504. When DOC sought to apply the new policy retroactively, inmates who had been in the program before 1990 sought injunctive relief to prohibit DOC from violating the original confidentiality agreements. *Id.*

The Supreme Court found the confidentiality agreement enforceable under the equitable theory of promissory estoppel, rejecting DOC's argument that enforcing the agreement would violate the sexual predator statutes. *Id.* at 513. In so holding, the Court interpreted an early version of RCW 71.09.025 which did not require release of treatment records. *Id.* After examining the legislative history, it concluded that the records were not within the scope of the statute. Thus, as interpreted by the Court, there was no conflict between the statutory mandate of RCW 71.09.025 and equitable enforcement of the confidentiality agreement.¹⁴

Id.

¹⁴ One year after the *King* decision, the Legislature amended RCW 71.09.025 to require release of additional information. The amendment added language directing that the referring agency “shall” forward “[a]ll records relating to the psychological or

(6) The Trial Court Did Not Abuse Its Discretion in Rejecting Irrelevant Evidence About Corey's Past

Compounding its tortious conduct in invading Corey's privacy by disseminating false information, the County sought to introduce evidence regarding Corey's past, including her former husband's embezzlement, her subsequent divorce and bankruptcy, and prior unfounded internal investigations. The trial court granted Corey's motion in limine to exclude such evidence as irrelevant to the present case and needlessly intrusive into her privacy. CP 168-71.

The County now argues that the trial court "erred" in granting Corey's motion in limine, citing *Gaglihari*, 117 Wn.2d at 438, and *Arnold v. National Union of Marine Cooks & Stewards*, 44 Wn.2d 183, 188, 265 P.2d 1051 (1954). Br. of Appellant at 48. The County suggests that such evidence was relevant to the "reasonableness of the investigation into missing monies, and to plaintiff's claimed damage to her reputation." *Id.* The County does not mention the standard of review, which as mentioned *supra* is manifest abuse of discretion.

Relevant evidence is evidence having a tendency to make a consequential fact more or less probable. ER 401. Any evidence that

psychiatric evaluation and/or treatment of the person" to the prosecutor. However, *King's* holding still stands with respect to statutes that are not obligatory. See *Dependency of Q.L.M.*, 105 Wn. App. at 539-40.

adversary is also relevant. *Hayes v. Wieber Enters., Inc.*, 105 Wn. App. 611, 617, 20 P.3d 496 (2001). Relevant evidence is, generally, admissible. *Hayes*, 105 Wn. App. at 617. Relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice.” ER 403. While nearly all evidence prejudices one side or the other, unfairly prejudicial evidence is evidence that is “likely to trigger an emotional response rather than a rational decision among the jurors” and may be excluded. *Hayes*, 105 Wn. App. at 618 (citing *Carson v. Fine*, 123 Wn.2d 206, 223-24, 867 P.2d 610 (1994)). The burden of showing prejudice is on the party seeking to exclude the evidence. *Hayes*, 105 Wn. App. at 618 (citing *Carson*, 123 Wn.2d at 225).

Evidence of a plaintiff’s prior acts is inadmissible to prove conformity therewith. ER 404. In the defamation context, although a defendant may adduce evidence of a defamation plaintiff’s bad reputation in the community, the evidence must show just that: that the plaintiff had a bad reputation in the community. *State v. Swenson*, 62 Wn.2d 259, 281-83, 382 P.2d 614 (1963), *overruled on other grounds*, *State v. Land*, 121 Wn.2d 494, 498, 851 P.2d 678, 680 (1993); *Roper v. Mabry*, 15 Wn. App. 819, 823, 551 P.2d 1381 (1976), *review denied*, 88 Wn.2d 1001 (1977). Testimonial evidence from community members that the plaintiff had a bad reputation qualifies. *Swenson*, 62 Wn.2d at 281-83.

Evidence of past acts or event that cast the plaintiff in a bad light to the jury is not “reputation” evidence. *Roper v. Mabry*, 15 Wn. App. at 823. In *Roper*, a defamation defendant had made statements that the plaintiff was a “thief.” 15 Wn. App. at 820. Citing the *Arnold* case, the defendant sought to introduce evidence that the plaintiff had been adjudged liable for fraud, arguing that it would serve to “diminish the character and reputation of the plaintiff in mitigation of damages.” *Id.* at 823. Division III of this Court affirmed exclusion of the evidence, noting that it was not true “reputation” evidence:

A finding of 'fraud' by a trial court in a previous civil action does not prove that plaintiff's reputation is bad. Here, defendants have not been denied the opportunity to offer testimonial proof that plaintiff's reputation in the community is bad in order to mitigate damages. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). We find no error.

Id.

Here, as in *Roper*, the trial court properly excluded the County’s evidence which suggested that Corey was a bad person, rather than showing that she had a bad reputation. CP 168-71. The County was not permitted to smear Corey to the jury in an effort to suggest that she was not worthy of having an excellent reputation. If the County had evidence that Corey’s reputation was poor, it should have adduced it. The trial

court did not abuse its discretion in excluding irrelevant and ugly evidence regarding past events.

(7) The Trial Court Erred in Striking Corey's Attorney Fee Request

The trial court here struck Corey's request for attorney fees under RCW 49.48.030 as untimely under CR 54(d)(2). CP 1162. The trial court misread CR 54(d)(2).

There is little question that Corey as the prevailing party in a wrongful termination case in which she recovered lost wages would be entitled to recover her reasonable attorney fees under RCW 49.48.030, a statute authorizing recovery of fees in any action in which a person successfully recovers a judgment "for wages or salary owed to him." See *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 450, 815 P.2d 1362 (1991) (fees recoverable under statute in wrongful termination action); *Hayes v. Trulock*, 51 Wn. App. 795, 806, 755 P.2d 830, review denied, 111 Wn.2d 1015 (1988) (same).

Nevertheless, the trial court here relied on CR 54(d)(2) to deny Corey an award of attorney fees under RCW 49.48.030 because her fee request was filed October 30, 2008, more than 10 days after the trial court entered the judgment on the verdict of the jury. CP 992-1007.¹⁵

¹⁵ The judgment was entered on September 24, 2008. CP 474.

CR 54(d)(2) states: “*Unless otherwise provided by statute or order of the court, the motion [for fees] must be filed no later than 10 days after the entry of the judgment.*” (emphasis added). This rule is a relatively new addition to CR 54, having been adopted by the Supreme Court on June 7, 2007 and made effective September 1, 2007. 160 Wn.2d 1117-18. The drafters of the rule indicated that its purpose was twofold – to prevent parties from raising trial-level attorney fees issues very late in the appellate process and to harmonize the time periods for post-judgment motions, requests for costs, and requests for attorney fees. 3B WASH. PRAC. (2008 suppl.) at 32. In this case, of course, even the short delay in the request for attorney fees (October 30, 2008 instead of October 6, 2008 – 10 days post-judgment) would have little impact on the appellate process in this case.

CR 54(d)(2) is analogous to Fed. R. Civ. Proc. 54(d)(2) in imposing a ten-day deadline post-judgment on fee requests.¹⁶ The purpose of the analogous federal rule “is to ensure that parties properly notify their counterparts of their requests for attorney fees.” *Romaguera v. Gegenheimer*, 162 F.3d 893, 895 (5th Cir. 1998).

¹⁶ Where the language of a counterpart federal procedural rule is analogous to a Washington rule, federal authorities may assist Washington courts in interpreting the Washington rule. *State v. Burton*, 101 Wn.2d 1, 6, 676 P.2d 975 (1984); *DGHI, Enterprises v. Pacific Cities, Inc.*, 137 Wn.2d 933, 941-42, 977 P.2d 1231 (1999).

After the jury entered its verdict in this case on August 15, 2008, Corey moved for entry of judgment on August 21, 2008. CP 1113. The cover letter provided to the trial court and copied to the County's counsel stated that Corey would file a separate motion for attorney fees under RCW 49.48.030, CP 1112, placing the County on notice of Corey's intent to file her motion for attorney fees. In interpreting Fed. R. Civ. Pro. 54(d)(2), the *Romaguera* court held this would constitute sufficient notice. There, the plaintiff prevailed in an action under 42 U.S.C. § 1983 and sought attorney fees under § 1988. The motion for attorney's fees was filed 343 days after the final judgment and 199 days after the denial of the defendant's motion for new trial. The defendant opposed the motions as untimely under Rule 54(d)(2), which provides 14 days to file the motion. The Fifth Circuit concluded that notice was the central function of the rule, and held that because the defendant has been placed on notice, the motion for attorney fees was not waived by the fact that the motion was not filed for nearly a year. *Romaguera*, 162 F.3d at 895-96. *See also*, *Wells v. City of Alexandria*, 2004 WL 5569071 (W.D. La. 2004) (following *Romaguera*; *Mendoza v. Brewster Sch. Dist. No. 111*, 2008 WL 4912047 (E.D. Wa. 2008)).

The result in this case should be the same. Corey placed the County on notice on August 21, 2008. The County had ample notice of Corey's intent to seek fees.

An additional reason as to why the trial court erred in striking Corey's fee request stems from the language of CR 54(d)(2). The ten-day period of the rule is inapplicable where a separate time period applies by statute or court order. Here, a distinct time period applies to fee claims under RCW 49.48.030.¹⁷

Washington courts have repeatedly recognized that RCW 49.48.030 is a remedial statute that must be liberally construed. *Gaglidari*, 117 Wn. App. at 450-51; *Hume v. American Disposal Co.*, 124 Wn.2d 656, 673, 880 P.2d 988 (1994), *cert. denied*, 513 U.S. 1112 (1995); *Peninsula Sch. Dist. No. 401 v. Public School Employees*, 130 Wn.2d 401, 407, 924 P.2d 13 (1996). Consistent with this liberal construction imperative, Washington courts have waived strict compliance with time deadlines for fee requests. For example, under a former version of RAP 18.1, an affidavit in support for an appellate fee request was due 7 days before oral argument. Washington appellate courts waived this 7 day deadline. *See, e.g., Scully v. Employment Security Dep't*, 42 Wn. App.

¹⁷ For example, under federal law, no time deadlines apply to fee requests under 42 U.S.C. § 1988. *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 451, 102 S. Ct. 1162, 71 L.Ed.2d 325 (1982).

596, 606, 712 P.2d 870 (1986). The rationale for a waiver was well-stated

in *Simonson v. Fendell*:

We hold the proper sanction to be imposed for an attorney's noncompliance with RAP 18.1 is the imposition of monetary sanctions to be paid from the attorney's account. This sanction serves two purposes. First, it protects the client's right to recover his reasonable attorney's fees. The client is not being penalized for his counsel's oversight or lack of familiarity with appellate practice. Second, it places the financial burden for noncompliance on the attorney.

34 Wn. App. 324, 332, 662 P.2d 54 (1983), *rev'd on other grounds*, 101 Wn.2d 88, 675 P.2d 1218 (1984).

In *Internat'l Ass'n of Firefighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002), our Supreme Court reaffirmed this remedial purpose of RCW 49.48.030:

[R]emedial statutes 'should be liberally construed to advance the Legislature's intent to protect employee wages and assure payment.' Therefore, the terms of RCW 49.48.030 must be interpreted to effectuate this purpose.

In that case, the prevailing plaintiff did not seek fees in the arbitration in which it prevailed, and instead instituted a separate lawsuit for fees. That lawsuit was filed long after the arbitrator ruled in favor of the Union on its member's wage claim. Our Supreme Court held that a party can request attorney fees in either the present action or in a subsequent action,

approving a separate action for attorney fees *after* obtaining a judgment for wages and salary owed (in that case through arbitration):

The City also argues that the plain meaning of RCW 49.48.030 does not authorize a separate action for attorney fees. The City comes to this conclusion by emphasizing the word “in” in the statute. Thus it asserts that “reasonable attorney’s fees’ are to be assessed ‘**In**’ the action in which the employee recovers a ‘judgment for wages or salary owed.’” *Id.* The City’s interpretation would seem to substitute “the same” for “any” in the statute. Thus, the statute would read “In *the same* action in which any person is successful in recovery judgment for wages or salary owed to him, reasonable attorney’s fees . . . shall be assessed.” This restrictive interpretation is contrary to the liberal construction doctrine and Washington’s courts’ holding in other cases. Rather, the statutory language would seem to only require that an employee receive wages or salary owed “in any action” in order to recover attorney fees. The attorney fees, however, need not be awarded in the *same action* as that in which wages or salary owed are recovered.

We therefore hold that RCW 49.48.030 does not require that for attorney fees to be awarded in *any* action, that action must be the “same action” in which wages or salary owed are recovered.

Id. at 43-44 (internal citations omitted) (emphasis in original).¹⁸

¹⁸ Nothing about CR 54(d)(2) or its history suggests that it is jurisdictional in nature, indicating that this Court should be guided by the liberal and remedial purpose of the statute. See *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 364, 617 P.2d 704 (1980) (time for notice of written motions in CR 6(d) was not jurisdictional and motion could be heard even where notice was insufficient unless prejudice could be demonstrated by the party entitled to notice). Here, the County was not prejudiced by Corey’s filing of the fee request. The County vigorously argued her entitlement to fees. CP 992-1038. The appellate process was not adversely affected.

The Supreme Court's interpretation of a statute becomes a part of that statute, as if that interpretation had been part of the statute since its enactment. *Ino Ino v. City of Bellevue*, 132 Wn.2d 103, 137, 937 P.2d 154 (1997), *cert. denied*, 522 U.S. 1077 (1998). RCW 49.48.030 must be interpreted as permitting fee requests *at any time*. It would be anomalous to say that CR 54(d)(2) barred a fee request under the statute but nevertheless allowed a plaintiff prevailing in a wage claim to file a separate lawsuit *at any time*, notwithstanding that alleged 10-day limitation period. Instead, the better-reasoned principle derived from *International Ass'n of Firefighters* is that RCW 49.48.030 must be liberally construed as a remedial enactment, and, by its terms, allows a fee request by prevailing plaintiff at any time. The statute establishes its own time frames, making the 10-day provision of CR 54(d)(2) inapplicable. Corey was entitled to an award of fees below.

(8) Corey Is Entitled to Her Attorney Fees on Appeal

Corey is entitled to her attorney fees on appeal pursuant to RCW 49.48.030 for the reasons enumerated *supra*, and she provides this separate section of her brief in support of her appellate fee request. RCW 49.48.030 has supported an award of fees on appeal in a wrongful discharge case. *Hayes*, 51 Wn. App. at 806.

Corey has a right to fees on appeal even where fees were not awarded to her at trial. *Mutual of Enumclaw Ins. Co. v. Jerome*, 66 Wn. App. 756, 766, 833 P.2d 429 (1992), *rev'd on other grounds*, 122 Wn.2d 157, 856 P.2d 1095 (1993).

This Court should award Corey her attorney fees on appeal.

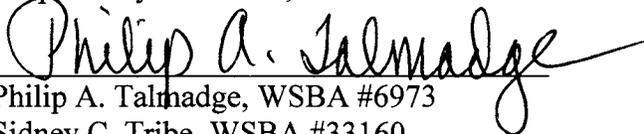
G. CONCLUSION

Pierce County's brief offers no reason why this Court should overturn the judgment on the verdict of the jury after a lengthy trial in which the jury was properly instructed on the law and the trial court did not abuse its discretion in admitting the testimony of Professor Larry Echohawk on prosecutorial ethics. The County owed Corey a duty not to leak false information to the media, invading her privacy. Moreover, ample evidence supported the jury's verdict on defamation, false light, outrage, and promissory estoppel.

The Court should affirm the judgment on the verdict of the jury. The Court should reverse the trial court's order striking Corey's request for fees. Costs on appeal, including reasonable attorney fees, should be awarded to Corey.

DATED this 19~~th~~ day of June, 2009.

Respectfully submitted,



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Appendix

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INSTRUCTION NO. 4

On Barbara Corey's defamation and false light claims she has the burden of proving that Defendant acted with knowledge of falsity or reckless disregard for the truth by clear and convincing evidence. All other allegations of Plaintiff must be proved by a preponderance of the evidence as that term is more fully defined in other instructions.

When it is said that a proposition must be proved by clear and convincing evidence it means that the proposition must be proved by evidence that carries greater weight and is more convincing than a preponderance. However, it does not mean that the proposition must be proved by evidence that is convincing beyond a reasonable doubt.

INSTRUCTION NO. 2

Plaintiff claims that she had an employment contract based on promissory estoppel. Promissory estoppel means that when justice requires it, a person will be prevented (estopped) from denying a contract based on his or her promise, when another person reasonably relied upon that promise.

Plaintiff asserting a contract based on promissory estoppel has the burden of proving, by a preponderance of the evidence, each of the following:

(1) That Gerald Horne, on behalf of Defendant, made a clear and definite promise to Plaintiff that she would have just cause termination protection if she accepted the position of Assistant Chief Criminal Deputy.

(2) That Gerald Horne should reasonably have expected that promise to cause Plaintiff, Barbara Corey, to change position by accepting the position and leaving the Guild which had the protection of just cause termination.

(3) That Plaintiff actually did change her position.

(4) That when Plaintiff changed position she was relying on the promise of Gerald Horne and was justified in so doing, and

(5) That injustice can be avoided only if the promise is enforced.

If you find from your consideration of all of the evidence that each of these propositions have been proved, your verdict should be for Plaintiff on this claim. On the other hand, if any of these propositions has not been proved, your verdict should be for Defendant on this claim.

INSTRUCTION NO. 14

In this case Defendant had a duty to exercise reasonable care in the performance of its duties as the Pierce County Prosecuting Attorney's Office. This duty includes the duty to refrain from disseminating confidential information to the public that is not a matter of public concern and is harmful to the Plaintiff.

INSTRUCTION NO. 17

On Plaintiff's defamation claim, Plaintiff has the burden of proving each of the following propositions:

- (1) That Defendant made false statements of fact about Plaintiff;
- (2) That the speaker either knew that the statements of fact were false, or the speaker acted with reckless disregard of whether the statements were true or false; and
- (3) That Plaintiff sustained damages as a result of Defendant's conduct.

A statement is defamatory if it tends to harm the reputation of another to the extent of lowering him or her in the estimation of the community, or to deter third persons from associating or dealing with him or her, or prejudices a person in his or her profession or trade. In determining whether a statement is defamatory, it must be read as a whole and not in part or parts detached from the main body.

If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for Plaintiff on the defamation claim. On the other hand, if you find that any of these propositions has not been proved, your verdict should be for Defendant on this claim.

INSTRUCTION NO. 18

On Plaintiff's defamation by implication claim, Plaintiff has the burden of proving each of the following propositions:

- (1) That Defendant made statements that were substantially true which left a false impression which would have been contradicted by inclusion of omitted facts;
- (2) That the speaker either knew that the false impression created by omission of facts was false, or the speaker acted with reckless disregard of whether the impression created by omission was true or false; and
- (3) That Plaintiff sustained damages as a result of Defendant's conduct.

With regard to element (1), merely omitting facts favorable to the Plaintiff or facts that the Plaintiff thinks should have been included does not make a publication false. The omitted information must be such that it would negate the false impression.

If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for Plaintiff on the defamation claim. On the other hand, if you find that any of these propositions has not been proved, your verdict should be for Defendant on this claim.

INSTRUCTION NO. 19

On Plaintiff's invasion of privacy false light claim, Plaintiff has the burden of proving each of the following propositions:

(1) That Defendant caused publication of a matter that placed Plaintiff in a false light;

(2) That the false light would be highly offensive to a reasonable person;

(3) That Defendant knew or recklessly disregarded the falsity of the publication and the false light in which Barbara Corey would be placed.

(4) That Plaintiff sustained damages as a direct and proximate result of the conduct of Defendant.

If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for Plaintiff on the invasion of privacy false light claim. On the other hand, if you find that any of these propositions has not been proved, your verdict should be for Defendant on this claim.

INSTRUCTION NO. 20

With regard to Plaintiff's defamation and false light claims a speaker acts with "reckless disregard" if he either had a high degree of awareness of the probable falsity or false impression of the statement, or in fact entertained serious doubts as to the statement's falsity or false impression. The standard for determining knowledge of falsity or reckless disregard is subjective, focusing on the defendant's belief in or attitude toward the truth of the statement, not the defendant's person hostility toward the plaintiff. In determining whether the Defendant acted with reckless disregard you may look to various factors including the Defendant's hostility toward Plaintiff or failure to investigate.

In addition, you may infer knowledge of falsity and reckless disregard for the truth from objective facts, motive and intent, and appropriate inferences. Further, the speaker's mere statement of his belief in the statement's truth must be weighed against the evidence supporting a finding of knowing falsity or recklessness.

While none of these factors alone are sufficient, you may take them into consideration.

INSTRUCTION NO. 21

On plaintiff's outrage claim, the plaintiff has the burden of proving each of the following propositions:

- (1) That the defendant engaged in extreme and outrageous conduct;
- (2) That the defendant intentionally or recklessly caused emotional distress;
- (3) That the defendant's conduct caused severe emotional distress on the part of the plaintiff.

If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for the plaintiff on the outrage claim. On the other hand, if you find that any of these propositions has not been proved, your verdict should be for the defendant on this claim.

Plaintiff's outrage claim does not apply to Plaintiff's resignation and/or termination from employment, but can be considered for all other actions by Defendants.

INSTRUCTION NO. 23

Conduct may be considered extreme and outrageous only when the conduct is so extreme in degree and outrageous in character as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community.

In deciding whether the defendant's conduct was extreme and outrageous, you should consider all the evidence bearing on the question and may consider, among others, the following specific factors: (1) the position occupied by the defendants; (2) whether the degree of emotional distress caused by the defendant was severe as opposed to mere annoyance, inconvenience, or normal embarrassment; and (3) whether the defendant was aware that there was high probability that his or her conduct would cause severe emotional distress and proceeded in a conscious disregard of it.

DECLARATION OF SERVICE

On said day below I had delivered by ABC Legal Messengers a true and accurate copy of the following document: Brief of Respondent and Corey's Motion for Leave to Submit Over-Length Brief of Respondent in Court of Appeals Cause No. 62801-1-I, to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: June 19, 2009, at Tukwila, Washington.



Christine Jones, Legal Assistant
Talmadge/Fitzpatrick

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