

KHW 64852-7

64852-7

No. 64852-7-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

PAUL BRECHT, Appellant,

v.

FISHER COMMUNICATIONS, INC., JOHN CARLSON and JANE
DOE CARLSON, and KEN SCHRAM and JANE DOE SCHRAM,
Respondents,

and

MARK DOE and JANE DOE, CHRIS DOE and JANE DOE, and CHRIS
MORGAN and JANE DOE MORGAN, Defendants.

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BRIEF OF RESPONDENTS

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I. INTRODUCTION

Paul Brecht (hereinafter “Brecht”), Appellant, sued defendants Fisher Communications, Inc., John and Jane Doe Carlson and Ken and Jane Doe Schram¹ and two unidentified individuals for defamation. This defamation allegedly came from statements made by callers to the Carlson/Schram radio talk show “The Commentators” who claimed that Brecht was convicted of domestic violence and was a wife beater. Brecht also claimed defamation over Carlson’s recitation of statements from a campaign mailer of Jane Hague (“Hague”), then candidate for King County Council. The mailer stated that Brecht had “multiple domestic violence arrests and at least one assault conviction” and it was the source of a defamation lawsuit Brecht filed against Hague the day before a Schram/Carlson on-air interview of Richard Pope, Hague’s political opponent.

On December 29, 2009, King County Superior Court Judge Michael Trickey granted Fisher’s motion for summary judgment. (CP 419-21) As explained herein, Judge Trickey properly applied the law in dismissing Fisher, finding that Fisher could not be liable for statements of

¹ These defendants collectively will be referred to as “Fisher” unless the discussion requires separate mention. Brecht frequently and erroneously confuses or conjoins the actions or statements of Fisher with those of remaining individual defendants Mark Doe

callers to a talk show and that Fisher was not liable for reading from the Hague mailer because there was no actual malice.

This appeal is nothing but a continuation of Brecht's unsupported conspiracy theory and his denial of the consequences of his domestic violence conviction and claims of abuse made by his ex-wife during their divorce. It has no merit.

II. RESPONSE TO BRECHT'S ASSIGNMENTS OF ERROR

Brecht misstated the trial court's December 29, 2009 ruling granting Fisher's motion for summary judgment in his assignments of error.

1. The trial court, in its ruling, did not state "that it was allowable for the Fisher Defendants to falsely accuse Mr. Brecht of being a notorious wife beater with multiple assault convictions when the record shows he has only been convicted of violating a no contact order." Rather, the trial court's ruling held that Fisher could not be liable for statements made by callers to a radio call-in talk show, "The Commentators." (CP 419-20)

2. The trial court, in its ruling did not state "there was no actual malice." Rather, it stated that Brecht could not prove that Fisher

and Chris Doe (Chris Morgan). Brecht's case has not been dismissed against the remaining individual defendants and they are not parties to this appeal.

acted with actual malice with respect to the callers' statements at issue and that Fisher did not act with actual malice in reading directly from the Hague campaign brochure that allegedly defamed Brecht.

3. The trial court, in its ruling, did not state that "call-in radio talk shows such as Fisher Broadcastings 'The Commentators' are held at a different legal standard with regard to defamation than shows involving investigatory reporting." Rather, the trial court applied the same legal standard for defamation - the actual malice standard² - that applies to both investigative reporting and radio talk shows. The trial court's ruling acknowledged that the radio talk show format is a constitutionally protected forum, and therefore callers cannot be pre-screened before making their statements. Because broadcasters cannot know what callers will say beforehand, broadcasters cannot act with actual malice in broadcasting callers' statements.

III.FISHER'S STATEMENT OF THE CASE

A. The Alleged Defamatory Statements Were Made During a Public Interest Radio Call-In Show

In the fall of 2007, radio station KVI, owned by Fisher Broadcasting - Seattle Radio, L.L.C., aired a daily two-hour radio talk

² As discussed in Section IV. A.1., *infra*, this standard requires proof that the speaker (or republisher of the speech) knew that the statement was false or acted with reckless disregard of whether it was false. New York Times v. Sullivan, 376 U.S. 254, 279-80, 84 S. Ct. 719, 11 L.Ed. 2d 686 (1964).

show called “The Commentators” for the purpose of discussing current topics of public interest, including upcoming elections. Carlson, one of the hosts typically presented a more conservative point of view on an issue whereas Schram, the second host, presented a more liberal point of view.

The show’s format involved banter between the co-hosts and guests and a period for listeners to call in to the show.

According to consistent station practice, an off-air producer on October 30, 2007 received calls from listeners and forwarded some of them to speak with Schram or Carlson. Callers did not have to give any identification, except their first name and calling location.

The station kept no records of these call-ins. The station has no delay mechanism to preview remarks from callers.

On October 30, 2007, Schram and Carlson invited Richard Pope to appear on The Commentators. Pope was a perennial political candidate who decided to run for King County Council against a longstanding incumbent, Jane Hague (“Hague”) in the November 2007 election. Schram and Carlson also invited Hague to appear on the same show, but she declined.

The race became heated between Pope and Hague when Pope revealed that Hague had lied about her academic credentials. Brecht publicly vouched for Pope during this controversial race and worked for

the Pope campaign. With the assistance of Brecht, Pope produced a mailer featuring a prominent endorsement from Brecht, sent to citizens in Pope's district.

The Hague campaign countered Pope's mailer by distributing a mailer that said:

“Paul Brecht tops Pope's endorsement list. Brecht also tops law enforcement's lists with multiple domestic violence arrests and at least one assault conviction. (Washington Courts Case Records Search).”

A week before the election, on October 29, 2007, Pope filed a defamation lawsuit on behalf of Brecht against Hague and her campaign for making the above statement. [*Brecht v. Hague*, No. 07-2-34389-02 SEA (King County Superior Court)(“*Hague* case”)]. (CP 41-47) On October 30, 2007, the Seattle Post Intelligencer ran a story about this lawsuit.³ The same day Pope was interviewed on The Commentators.⁴ One area of questioning by the show's hosts was the newly-filed defamation case. Carlson and Schram questioned Pope about his political motives behind the case. (CP 252-53) Pope first raised the issue of the mailer's content, claiming it was false. Carlson then read verbatim the

³ The *Hague* case went to trial in August of 2009. The jury returned a defense verdict. (CP 177-78) Judgment was entered on September 25, 2009. (CP 75-76)

⁴ The transcript of this show is CP 237-273.

statement from the mailer, the subject of the lawsuit, that Pope claimed to be false.

During the Pope interview, a call from “Mark from Bellevue” was put through for an on-air discussion. “Mark” vigorously questioned Pope about a number of things, including his key endorser, Brecht. “Mark” stated that Brecht had been convicted of domestic violence. Pope did not deny this. “Mark” specifically asked Pope, as attorney for Brecht, if Brecht had ever been convicted of domestic violence. Pope never answered the question. Indeed, Brecht has conceded that he was convicted of violating a no contact order (App. Br., p. 17), which by definition constitutes domestic violence under RCW 10.99.0205.

After a brief pause, a second caller, “Chris in Kirkland” was put through to the show. “Chris” also berated Pope for his failure to get endorsements from leaders on issues Pope allegedly campaigned about. “Chris” concluded his comments by claiming that Pope’s only supporter - Brecht - was “nothing but a wife beater.”

Carlson and Schram did not know either “Mark” or “Chris” and they had no idea about what they would say prior to accepting the on-air calls. (They also do not know Brecht). (CP 201-07) A review of the transcript reveals that neither Carlson nor Schram agreed with any of the statements at issue in this case, all of which originated from parties

unrelated to Fisher. Brecht presented no evidence in his response to Fisher's motion for summary judgment that proved that Carlson and Schram knew or should have known that any statements made about Brecht were false.

IV. ARGUMENT

A. **The Trial Court Correctly Ruled That Fisher Could Not Be Liable for Defamation Because of the Absence of Actual Malice.**

1. **The Trial Court Correctly Found That Brecht Could Not Meet His Legal Burden Of Proof On Summary Judgment.**

As plaintiff in his defamation action, Brecht was required to prove four essential elements regarding the defamatory statements: (1) falsity; (2) an unprivileged communication; (3) fault and (4) damages. Mark v. Seattle Times, 96 Wn.2d 473, 482-83, 635 P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124 (1982). When faced with Fisher's motion for summary judgment Brecht was required to make a prima facie case on each of the foregoing elements with convincing clarity. Mark v. Seattle Times, 96 Wn.2d at 486-487, 635 P.2d 1081; Dunlap v. Wayne, 105 Wn.2d 529, 533-535, 716 P.2d 842 (1986).⁵ To defeat a defense summary judgment motion in a defamation action, the plaintiff must raise a genuine issue of

⁵ Contrary to his claims that Fisher has the burden of showing the statements are substantially true (App. Br., p. 16), Brecht has the burden of making a prima facie case

material fact as to all four elements of the claim. LaMon v. Butler, 112 Wash.2d 193, 197, 770 P.2d 1027 (1989); Mark, 96 Wash.2d at 486, 635 P.2d 1081; Wood v. Battleground Sch. Dist. No. I, 107 Wash.App. 550, 27 P.3d 1208 (2001). “The prima facie case must consist of specific, material facts, rather than conclusory statements, that would allow a jury to find that each element of defamation exists.” LaMon, 112 Wash.2d at 197.

Central to the trial court’s ruling was its conclusion that Brecht could not meet the standard of proof with respect to establishing the requisite fault. “The degree of fault necessary to make out a prima facie case of defamation depends on whether the plaintiff is a private individual or a public figure or official.” Bender v. Seattle, 99 Wn.2d 582, 599, 664 P.2d 492 (1983). Brecht does not challenge the trial court’s finding that he was a public figure so that finding is a verity on appeal. Robel v. Roundup Corp., 148 Wn.2d 35, 42, 59 P.3d 611 (2002).

It is a constitutional requirement that a public figure asserting a defamation claim must demonstrate that the defendant acted with “actual malice.” New York Times v. Sullivan, 376 U.S. 254, 279-80, 84 S. Ct. 719, 11 L.Ed. 2d 686 (1964). Malice *cannot* be presumed when the plaintiff is a public figure. *Id.* at 283-84. “Actual malice under the New York Times standard should not be confused with the concept of malice as

that the offensive statement is “provably false.” Schmalenberg v. Tacoma News, Inc., 87

an evil intent or a motive arising from spite or ill will.” Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 510 (1991). Instead, the plaintiff must demonstrate actual malice by producing evidence that the defendant knew the statement was false or acted with reckless disregard as to its falsity. New York Times, 376 U.S. at 280. To prove actual malice “[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained doubts as to the truth of his publication.” St. Amant v. Thompson, 390 U.S. 727, 733 (1968). The plaintiff must prove actual malice with “convincing clarity.” Clardy v. Cowles Publishing Co., 81 Wn. App. 53, 58, 912 P.2d 1078 (1996).

The trial court’s ruling found, first, that Brecht could not prove actual malice for the statements made by the callers and second, that Carlson did not act with actual malice in reading from the campaign mailer at the start of the Pope interview. The ruling is correct on both counts.

2. Fisher Cannot Be Held Liable For The Statements Of Anonymous Callers To A Public Interest Radio Talk Show As A Matter Of Law.

Fisher did not make the alleged defamatory statements from “Mark” and “Chris.” Neither Carlson nor Schram ever said anything

Wn. App. 579, 590, 943 P.2d 350 (1997).

about “wife beating” so they cannot be liable for these statements.⁶

Carlson or Schram did not adopt or agree with these statements. Brecht provided no evidence that Carlson or Schram agreed with, or adopted, the statements of the anonymous callers about Brecht. Carlson did acknowledge that Pope had criticized him in saying “yes” to Mark’s remark. (CP 257-58) Carlson also said “right” (CP 264) in response to Chris’ remarks, which covered several issues, including Pope’s failure to get endorsements and the debatability of whether Brecht was convicted. Carlson’s response does not tie to any specific statement and is just a general acknowledgment of the call.

The radio show hosts’ use of the colloquial term “all right” also does not indicate agreement with any statement made by “Chris” or “Mark.” The term “all right” means “adequate, permissible, and satisfactory.”⁷ Carlson and Schram said “all right” to indicate to the speaker that his speech was permissible but must be halted to allow Pope

⁶ At the most, they might be considered “republishers” of the defamatory statements of third parties -- “Mark” and “Chris” -- by broadcasting them during “The Commentators.” Like the originator of the defamatory statements, a republisher of a statement about a limited public figure, like Brecht, can be liable only under the New York Times v. Sullivan, 376 U.S. 254, 279-80, 84 S. Ct. 719, 11 L.Ed. 2d 686 (1964) “actual malice” standard that requires proof that the republisher knew that the statement was false or acted with reckless disregard of whether it was false. See Robert D. Sack, Sack on Defamation: Libel, Slander, and Related Problems § 7.3.2.1.1. (3rd ed. 2009).

⁷ <http://grammar.quickanddirtytips.com/all-right-versus-alright.aspx>

the opportunity to rebut what the caller was saying. This usage is evident from listening to the tape of the actual show (CP 237-73). It certainly does not express agreement with any specific statements made by “Chris” or “Mark.”

Few cases address the liability of broadcasters for republishing the statements of persons not in their employ, or under their control. Those that do absolve the broadcaster. This makes legal sense because broadcasters, particularly of radio talk shows, have no control over creation of the alleged defamatory comments. *See, e.g., Auvil v. CBS "60 Minutes"*, 800 F. Supp. 928, 931 (E.D. Wash. 1992)(local network affiliate could not be liable for broadcasting a network-produced program without knowledge that the program’s content was defamatory); *Accord, Med. Lab. Consultants v. Am. Broad. Cos.*, 931 F. Supp.1487, 1492 (D.Ariz. 1996).

In the unique situation involving a live republication by broadcasters during the course of listeners’ call-in shows, the courts have also protected the broadcaster. *Adams v. Frontier Broad. Co.*, 555 P.2d 556 (Wyo. 1976) is most on point. In that case, an anonymous caller made a statement alleging that Adams had been discharged as Insurance Commissioner for dishonesty, which was broadcast directly during a radio talk show on the defendant’s station. The court concluded that, as a matter

of law, the plaintiff could never show knowing or reckless falsity on the part of the broadcaster for speech made by callers on “open microphone” programs. The constitutional actual malice criterion requires an opportunity for a defendant to evaluate the statement in question and come to a conclusion as to probable falsity. The court in Adams noted that this cannot happen in call-in situations because the broadcaster will not know what the caller will say until he makes the statement. The defendants did not use an electronic delay system so the defendant had no opportunity to evaluate contemporaneous speech. *Id.* at 565. The court said that broadcasters should not be required to use such a system to fend off potential defamation lawsuits. Such systems are nothing but a technique of potential self-censorship that can only result in the “ultimate” extinction of what the court labeled the modern version of the “town meeting.”

The court said:

“[c]ommitment to ‘uninhibited, robust and wide-open’ public debate must, in the balance, outweigh the common law right of an individual who is a public official or public figure to be free from defamatory remarks. Programs such as this [radio call-in talk shows] are the modern version of the town meeting in vogue earlier in our country’s history, and they are utilized in a similar way to afford every citizen an opportunity to speak his mind on any given issue.” 555 P.2d at 567.

Thus, to promote the purpose of the First Amendment to preserve an “uninhibited marketplace of ideas,” broadcasters cannot be liable for

failure to use an electronic delay system in connection with an open microphone talk show on which a public figure is defamed. Failure to use an electronic delay system, at best, amounts to a mere failure to investigate, which does not satisfy the constitutional criterion, the Court held. *See also* Weber v. Woods, 31 Ill. App.3d 122, 334 N.E.2d 857 (1975) (station owner ABC not liable for statements made by a participant in a television talk show who was in no sense an agent or employee of ABC); Demman v. Star Broad. Co., 28 Utah 2d 50, 497 P.2d 1378 (1972) (no radio or television station shall be guilty under the laws of libel on account of having originated or broadcast a program for discussion of controversial or any other subjects, in absence of proof of actual malice on the part of such owner or operator.)⁸

Even in cases where station employees uttered the alleged defamatory statements -- not the case here -- courts have dismissed defamation claims. In Eubanks v. North Cascades Broad., 115 Wn. App. 113, 61 P.3d 368 (2003) the court upheld the grant of summary judgment in favor of a radio station that reported based upon an internal review report condemning the plaintiff's actions in connection with a county remodeling project. The court found the plaintiff was a public figure and

⁸ Brecht cites RCW 19.64.010, claiming this is the only basis for broadcasting protection from defamation liability. This statute only applies to advertising and it does not, and cannot, supplant the protection of the First Amendment.

could not meet the constitutional actual malice standard. In Tait v. KING Broadcasting Co., 1 Wn. App. 250, 460 P.2d 307 (1969), the court upheld another grant of summary judgment where a radio talk show host called the plaintiff “our leading American local fascist and Jew hater.” Again, the plaintiff could not satisfy his evidentiary burden to present substantial evidence “which, if believed, could persuade a jury with convincing clarity the defendant was guilty of maliciously making libelous statement.” *Id.* at 255.⁹ (Emphasis supplied).

In Gardner v. Martino, 563 F.3d 981 (9th Cir. 2009) the court found that a radio talk show host could not be liable for calling the plaintiff a liar, based upon “facts” provided by a caller. The Ninth Circuit said that “given the nature of talk shows” the host was not required to investigate the caller’s claim, upon which he could reasonably rely. 563 F.3d at 989.¹⁰

⁹ See also Nat’l Assoc. of Gov’t Employers, Inc. v. Central Broad. Co., 379 Mass. 220, 231, 396 N.E.2d 996 (1979) (radio station absolved because caller’s allegedly libelous statement was not adopted by talk show host “with knowledge that it was false or with reckless disregard of whether it was false or not.”); MacGuire v. Harriscop Broad. Co., 612 P.2d 830 (Wyo. 1980)(broadcaster not liable for allegedly defamatory editorials under actual malice standard).

¹⁰ Brecht cited irrelevant cases, claiming that they prove that radio talk show hosts can be liable for defamation (App. Br., pp. 49-50). Embrey v. Holly, 48 Md.App.571, 429 A.2d 251 (1981) dealt with a radio talk show host who admitted that he was “joking” when he said the plaintiff television personality hurt his knee while looting a television set from a store during a snowstorm. The host knew the statement was not true before he uttered it, unlike this case where there is no evidence of knowledge of falsity. The plaintiff produced sufficient evidence that the statement was perceived by others as true [when it wasn’t] to allow the case to go to a jury which found against the radio talk show

Based upon the above authority, the Fisher Defendants cannot be liable for statements from callers that they could not predict, evaluate or silence.

3. Neither Carlson Nor Schram Could Have Acted With Actual Malice By Allowing Chris And Mark To Speak.

Brecht provided no proof that Carlson or Schram knew or should have known that the statements of “Mark” or “Chris” were false. Carlson and Schram do not know Brecht, a fact Brecht has not denied. (CP 201-07) Carlson and Schram do not, and could not know, “Mark” or “Chris,” because the station does not ask for full identification or keep any records capable of tracing callers which the Complaint admits.¹¹ (CP 201-07)

However, whether Carlson and Schram knew “Mark” or “Chris” is not dispositive. The determinative fact is whether they had knowledge of the falsity of what “Mark” or “Chris” would say on air. They could not have such knowledge simply due to the open microphone talk show format, which provides for unpreviewed, spontaneous speech from callers.

host. *Starr v. Press Communications*, 342 N.J. Super. 1, 775 A.2d 678, 200 N.J. Super. LEXIS 280 (2001) involved statements from a host of a “very entertainment driven” radio talk show. He called the plaintiff a “lesbian cowgirl.” He made this statement relying on sources of “dubious sources” so “vague that a jury could find that they were contrived after the fact.” 2001 N.J. Super. LEXIS 280 at ***16. In both cases, unlike here, the radio show hosts actually made the defamatory statements either knowing they were untrue or relying upon dubious sources.

¹¹ The law imposes no such requirements. The First Amendment protects a speaker’s right to speak anonymously. *See, e.g. McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341-43, 343 n.6, 115 S. Ct. 1511, 131 L.Ed. 2d 426 (1995).

Unless they had the psychic ability of “Carnac the Magnificent” (the fictional Johnny Carson clairvoyant) neither Carlson nor Schram could have foreseen what “Mark” or “Chris” would say, or that their statements might be false, particularly under the following circumstances.

- The show had no tape delay capability to pre-screen callers’ remarks.
- The show’s focus was upon Pope’s conduct and positions -- not Brecht.
- Pope, Brecht’s lawyer, did not dispute the fact of Brecht’s domestic violence conviction even when specifically asked about it.¹²
- The Pope/Hague contest was bitter with each side flinging allegations of untruthfulness against the other. Indeed, during the broadcast Pope lambasted Hague for telling lies. The charged nature of Pope’s appearance on the show created a hyperbolic, emotional context for the callers’ statements, making it impossible for Carlson or Schram to assess any falsity in the statements of others.

¹² Indeed, Pope’s conduct and statements on the show would make a reasonable listener conclude that Brecht may have been convicted of domestic violence, rather than that the conviction statement was false. Pope filed the Hague case on Brecht’s behalf. As his lawyer, Pope was in the best position to know about Brecht’s criminal record. By refusing to answer “Mark’s” direct question about whether Brecht had a domestic violence conviction, Pope created the impression that Brecht probably did have such a record, further removing any basis for a “reasonable doubt.”

Carlson and Schram did not have the time or ability to assess the truthfulness of the statements of “Mark” or “Chris” made spontaneously during their calls. As held in Adams v. Frontier Broad., where the broadcaster has no opportunity to evaluate the statement, because of the spontaneous nature of the caller’s remarks, there is no way to form a serious doubt as to its truthfulness. Therefore “[t]he legal effect in an action such as this is that this combination of circumstances makes it impossible for Adams to factually establish the actual malice required to show a violation of the constitutional standard.” 555 P.2d at 564.

In sum, because Carlson and Schram were not in a position to know or assess the truthfulness of what “Mark” and “Chris” said they could not have acted with actual malice.

Furthermore, under Gardner, Carlson and Schram were entitled to rely upon the statements of “Mark” or “Chris” without further investigation into the truthfulness of their statements. In Gardner, the court said that the statements of the caller may have been false but the radio talk show host was not required to investigate before putting them on the air and relying upon them “given the nature of talk shows ... [P]rior investigation is not required in the context of a radio show that takes live calls on the air.” 563 F.3d at 989. Previously in the opinion the court commented that “a radio talk show program ... contains many of the

elements that would reduce the audience's expectation of learning an objective fact: drama, hyperbolic language, an opinionated and arrogant host, and heated controversy." 563 F.3d at 988. In this case, neither Carlson nor Schram could have expected they would hear objective facts from either "Mark" or "Chris" during their heated exchange with Pope -- further demonstration that neither host had or should have had any knowledge of falsity.

4. Brecht Provided No Evidence That Carlson Or Schram Acted With Actual Malice At Any Time During Their Show.

Brecht's brief primarily focuses on the "wife beating" claims from the callers but he muddles their calls with the only statement made by Fisher -- Carlson's reading of the Hague mailer during Pope's questioning. Brecht provided no evidence that Carlson read the mailer with "actual malice." The trial court properly found that such "actual malice" could not exist, given the evidence presented by Fisher. This evidence (also presented during the *Hague* case) establishes that the mailer's claims were not "provably false" so actual malice could not be established.¹³

The evidence also established that the "wife beating" claims were not necessarily false, given the public record in 2007. First, Brecht was in fact convicted of a crime of domestic violence for violating a no-contact

order that his wife obtained. He admits this violation. (App. Br. 17). This violation constitutes domestic violence under RCW 10.99.0205:

“Domestic violence” includes but is not limited to any of the following crimes when committed by one family or household member against another ... (r) **Violation of the provisions of a restraining order, no-contact order, or protection order restraining or enjoining the person or restraining the person from going onto** the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming with, or knowingly remaining within, a specified distance of a location.” (emphasis added)

Nonetheless, Brecht claims that stating he was convicted of domestic violence is false because it leaves a false impression that was violent. This argument is one for the legislature -- not the courts -- because the legislature crafted the precise language of RCW 10.99.0205 to apply to the crime that Brecht admits he committed, violation of a no-contact order.

Furthermore, his claim that such a violation does not involve violence is questionable in his case. The Renton Police Department report on the violation does contain indications of violence, contrary to Brecht’s claim in his brief (CP 343-46). It states that Brecht’s ex-wife told police that Brecht threatened “Things are gonna get bad if she doesn’t meet

¹³ If the authors of the mailer prepared it without actual malice, as the jury found in the *Hague* case (CP 177-78), then Carlson and Schram could have no “actual malice” either.

him...” The reporting officer left a message for the “Renton DV advocate about Margaret’s situation.”

The second type of statements that involve the claim of “wife beating” are also not provably false. Brecht’s ex-wife, Margaret M. Marealle, submitted seven declarations sworn under penalty of perjury that Brecht abused her in her divorce action and they were exhibits in the Hague case. (CP 96-159) In her petition for order of protection submitted to the Renton Municipal Court on February 14, 2001, Ms. Marealle stated:

“He grabbed insulted me [sic] shoved me against the wall twice. we had a struggle. I broke free and called police. [sic] and continued to threaten me than [sic] took off before the cops arrived. I have had other occasions he had beaten me the last one was in April.”

(CP 98)

This Petition resulted in the no-contact order that Brecht violated. Her other declarations repeated the allegations of physical abuse by Brecht:

“My husband has been both physically and emotionally abusive toward me for the past several years.”

(CP 103)

“Petitioner’s account of the events that led to our separation omit the most important facts -- his brutality. It was not the first time he had been violent or abusive to me. He had been so, on many occasions.”

(CP 113)

“He then became physical.”

(CP 120)

“The father engaged in domestic violence in front of the children...”

(CP 129)

“He has abused me repeatedly.”

(CP 132)

All of the foregoing were matters of public record, including the Parenting Plan Evaluation submitted in the divorce that recommended “26.09.191 restrictions in the Parenting Plan due to a history of domestic violence,” and that Brecht be required to enroll in domestic violence treatment. (CP 160-174). These certainly establish the truth of any allegation regarding wife beating, at least as of November 2007.

Because of these public records, the jury in the *Hague* case found that the defendants could not have issued the mailer with knowledge of its falsity or reckless disregard of falsity. (CP 177-78) Similarly, Carlson and Schram could not have known that Brecht was not a wife beater given the sworn statements of his ex-wife in the public record at the time of their show that proved that he was a wife beater. While Brecht might take issue with his ex-wife’s statements, they provide factual support for the reasonable conclusion that he beat her.

Having no evidence that Carlson or Schram knew he was not a wife beater, Brecht simply assumes that somehow Carlson was motivated to help his friend Brett Bader, who worked for Hague, and that therefore Carlson agreed to facilitate an attack on Pope and his supporter, Brecht, by accepting the calls of “Mark” and “Chris.” (App. Br. 30-31). There is no actual evidence of this paranoid conspiracy. To the contrary, the evidence of record shows that Carlson could not know and did not know who would call-in to his show, so he could not have helped Bader even if he wanted to! (CP 204-07) Furthermore, Brecht provided no evidence to establish that Carlson even knew that Bader prepared the mailer. Even if Carlson had such knowledge, Carlson did not support Hague or Pope for the King County position because of the serious defects each candidate demonstrated, such as Pope’s rambling, incoherent responses to questioning and Hague’s behavior when arrested on a DUI charge. (CP 204-07) Therefore, Carlson had no motive to help the Hague campaign.

Next Brecht argues that Carlson and Schram knew the statements were false because they knew that Brecht had sued Hague for defamation. (Complaint ¶¶ 3.40, 3.41, CP 3-19). Knowledge of the filing of a defamation lawsuit by Brecht could not raise “serious doubts” as to the truthfulness of the spontaneous statements of “Mark” or Chris.” The filing of a lawsuit against Hague only demonstrates that Brecht disagreed with

speech for which Hague was responsible and it does not prove the falsity of statements made by different parties -- “Mark” and “Chris.”¹⁴ Mere knowledge of Brecht’s denial does not demonstrate “actual malice.” In Harte-Hanks Comm’n v. Connaughton, 491 U.S. 657, 692 n.37 (1974) the court said:

Of course, the press need not accept such denials, however vehement; such denials are so commonplace in the world of polemical charge and countercharge, in themselves, they hardly alert the conscientious reporter to the likelihood of error.

Brecht also claims that due to knowledge of the P-I story, Carlson and Schram should have made further inquiry, should have doubted the statements from the Hague campaign in the P-I article because they were “questionable,” and should have called Brecht. Courts routinely find that a general failure to investigate,¹⁵ failure to talk to the plaintiff before publication,¹⁶ failure to verify information,¹⁷ or failure to discover that

¹⁴ The Complaint states that “Mark” and “Chris” had no connection to the Hague campaign and acted independent of it. (Complaint ¶¶ 3.26, 2.39, 3.33)(CP 3-19). This admission further decreases the likelihood that Carlson or Schram would connect them to the *Hague* lawsuit or that Carlson would be motivated somehow to assist the Hague campaign by accepting the calls from “Mark” or “Chris.”

¹⁵ See Robert D. Sack, Sack on Defamation: Libel, Slander and Related Problems, § 5.5.2.2. (3rd ed. 2009) in general; see also St. Amant v. Thompson, 390 U.S. 727, 733 (1968).

¹⁶ See Secord v. Cockburn, 747 F.Supp. 779 (D.D.C. 1990). Here, Schram and Carlson had Brecht’s attorney on the show who was in the best position to establish the truth of Plaintiff’s domestic violence record.

¹⁷ N.Y. Times Co. v. Connor, 365 F.2d 567, 576 (5th Cir. 1966).

material relied upon had later been retracted does not constitute actual malice.¹⁸

Brecht also speculates that because Carlson and Schram knew about Brecht's name change, which was not mentioned in the P-I article, they "must have" got the information from the Hague campaign and therefore "had a preconceived plan to get the plaintiff." (App. Br., pp.30, 33-34) Brecht provides no evidence to support this paranoid surmising. A plaintiff in a defamation action "may not rely upon the bare allegations of falsity in his pleadings and upon speculation to carry the issue to trial." Mark v. King Broadcasting Company, 27 Wn. App. 344, 353, 618 P.2d 512 (1980). More important, this fact has no connection to whether Schram or Carlson knew that statements about Brecht's convictions could be false, or acted with reckless disregard. In sum, Brecht has only presented *ipse dixit* conclusions or unsupported speculation on the issue of actual malice. Given the record, the trial court properly found that it did not exist, when granting Fisher's motion.

5. Carlson's Reading Of The Mailer Was Privileged.

While the trial court did not discuss whether Carlson's recitation of the mailer was privileged, this court can consider the applicability of a privilege on appeal. When reviewing an order of summary judgment, the

¹⁸ Alpine Constr. Co. v. Demaris, 358 F.Supp. 422 (N.D. Ill. 1973).

appellate court may sustain such an order on any basis supported by the record. Coppernoll v. Reed, 155 Wn.2d 290, 296, 119 P.3d 318 (2005) citing LaMon v. Butler, 112 Wn.2d 193, 2001, 770 P.2d 1027 (1989). Here the record supports the applicability of a privilege to Carlson's statements, made in the context of litigation, to protect him from liability for defamation. Herron v. Tribune Publishing Co., 108 Wn.2d 162, 179, 736 P.2d 249 (1987).

As noted, the only actual statement marginally at issue made by a Fisher defendant, Carlson, was the recitation of language from the brochure at issue in the Hague case. The context of this recitation was a discussion of the defamation lawsuit filed by Pope, on Brecht's behalf, about that statement. Carlson simply read it and did not endorse it. It was clear that Carlson was not agreeing with the statements because he questioned Pope about it: "He has been arrested for domestic violence, but I guess it's questionable whether he's got the conviction, is that it?" (CP 252)

Pope explained there was no assault convictions but never said that there was no domestic violence conviction because Brecht had such a conviction. (CP 251) Carlson read the statement because it was the basis for the defamation lawsuit filed by Pope on Brecht's behalf, against Pope's political opponent, Jane Hague. The Pope/Hague race was a

matter of considerable public interest and the filing of the Brecht lawsuit was a publicized fact that was germane to the election of either Hague or Pope. Carlson and Schram questioned Pope about his personal involvement in a lawsuit against his political opponent, the timing of the filing (a week before the election) and its publicity. Despite Brecht's strenuous protests on appeal the transcript of the show demonstrates that Carlson did not read from the mailer to defame Brecht but did so only to question Pope about his political motivation. Indeed, Pope admitted that he brought the lawsuit because "it was necessary to immediately expose Jane Hague's deliberate lies to the public." (TR. 15).

Pope also said "Jane defamed this man by sending out tens of thousands of brochures falsely saying that he was convicted of assault." Carlson then read the language from the brochure in response so that audience would know what Pope was referring to. In that context Carlson was not even uttering a defamatory statement about Brecht but was providing background for Pope's claims that Brecht was falsely labeled with assault convictions.¹⁹

Even if construed as defamation, Carlson's statement is privileged because he was reporting on a judicial proceeding - the *Hague* case. As

¹⁹ Brecht claims (App. Br., p.45) that "The Commentators" provided no exculpatory information, when in fact, his lawyer, repeatedly explained that Brecht had no assault convictions.

explained in Alpine Industries, Computers, Inc. v. Cowles Publishing Company, 114 Wn. App. 371, 57 P.3d 1178 (2002):

The fair reporting privilege applies where the communication is attributed properly to an official proceeding and the report is an accurate report of that proceeding or a fair abridgement. Restatement, *supra*, § 611 cmt. d, f; *see also* Ditton v. Legal Times, 947 F.Supp. 227, 230 (E.D. Va. 1996), *aff'd*, 129 F.3d 116 (4th Cir. 1997). The fair reporting privilege may protect the publisher even if the publisher does not believe defamatory statements contained in the official report to be true or even knows the defamatory statements to be false. Restatement, *supra* § 611 cmt.a.

Accordingly, to determine whether a communication falls within the fair reporting privilege, we engage in two inquiries: (1) whether the report is attributable to an official proceeding; and (2) whether the report is accurate or a fair abridgement. Restatement, *supra* § 611 cmt. d, e, f; *see also* Rushford v. New Yorker Magaine, Inc., 846 F.2d 249, 254 (4th Cir. 1988); Ditton, 947 F.Supp. at 230. “If the report of a public official proceeding is accurate or a fair abridgment, an action cannot constitutionally be maintained, either for defamation or for invasion of the right of privacy.” Restatement *supra* § 611 cmt. b; *see also* Ditton, 947 F.Supp. at 230.

Id. at 384.

Carlson’s reading of the mailer was attributable to the Hague case and it was a direct quote, so its accuracy must be unchallenged. Therefore, the fair reporting privilege protects Fisher from any liability for defamation for the mailer.

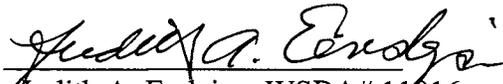
V. CONCLUSION

The trial court's ruling granting summary judgment to Fisher should be sustained on appeal.

Dated: July 16, 2010

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that on this 16th day of July, 2010, I caused a true and correct copy of the Brief of Respondents to be delivered via United States First-Class Mail and electronically as follows:

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