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No. 65058-1-I

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**COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON**

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**PAUL BRECHT,  
APPELLANT,**

**v.**

**NORTH CREEK LAW FIRM, A PROFESSIONAL  
CORPORATION PS; MARK LAMB and JANE DOE LAMB  
RESPONDENTS.**

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**APPEAL FROM THE SUPERIOR  
COURT OF KING COUNTY**

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**REPLY BRIEF OF APPELLANT**

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Appellant Paul Brecht submits this Reply Brief to the Response Brief filed by Respondent Mark Lamb as follows.

**1. Mr. Brecht's Response to the CR 12(b)(6) Motion Was Timely Filed**

Mr. Lamb states that since he filed his CR 12(b)(6) motion more 28 days before the hearing date and Mr. Brecht filed his response on January 4<sup>th</sup> 2010, two days before the hearing, that the trial judge had discretion to strike said response as untimely. First, Mr. Lamb provides no case law or court rule to support this fallacious assertion that Mr. Brecht's response was due any sooner than when it was actually filed. Mr. Brecht filed his response within the timelines required for CR 12(b)(6), which is 2 days before the hearing. CR 12(b)(6) motions are governed by the timelines normally applying to motions (other than summary judgment motions). King County LCR 7(b)(4)(D) requires a motion response to be filed and served two court days before the hearing or noting date. The trial court erred when it struck Mr. Brecht's pleadings as untimely – they indeed WERE timely. If Mr. Lamb wanted to file a motion 28 days in advance of a hearing where a response was required 11 days in advance, he should have originally filed a CR 56 summary judgment motion.

**2. The CR 12(b)(6) Motion was not Converted into a CR 56 Summary Judgment Motion**

Mr. Lamb's premise is that the mere filing of Mr. Brecht's response with the addition of matters outside the pleading was sufficient to convert to a CR 56 summary judgment motion. This cannot be further from the truth. Washington case law is clear that in order for a CR 12(b)(6) motion to be converted into a CR 56 motion, the trial court must affirmatively act. It is at the motion hearing that a trial court either considers or excludes matters outside the pleadings. The trial court states in the written order whether the CR 12(b)(6) motion has been converted to a CR 56 motion. It is at this point that a CR 12(b)(6) can be converted into a CR 56 motion, NOT when the responding motion files response to the motion BEFORE a hearing as Mr. Lamb alleges in his Brief. This principle is illustrated in:

“Although the trial court dismissed this action under CR 12(b)(6) for failure to state a claim, it did not exclude St. Yves' supporting affidavits. We therefore treat this matter as a summary judgment, applying the following rule: If, on a motion asserting . . . [failure] to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56 . . .”

St. Yves v. Mid State Bank, 111 Wn.2d 374, 377, 757 P.2d 1384 (1988).

In this instance, the trial court ruled that it did not consider ANY of Mr. Brecht's pleadings, thereby excluding any matters outside of the

pleadings. (CP 70) This trial court action signified that the CR 12(b)(6) motion was NOT converted into a CR 56 motion and that the case was dismissed under the principles applying to CR 12(b)(6) motions.

Indeed, the trial court expressly treated the motion to dismiss as a CR 12(b)(6) motion in its written Order of Dismissal entered on January 7, 2010, with no indication of converting it to a CR 56 motion. The written Order of Dismissal starts with “THIS MATTER came for hearing of Defendants’ CR 12(b)(6) Motion to Dismiss”, expressly excludes any consideration of the matters outside the pleadings presented by Mr. Brecht, and concludes with “The court ... concludes that the motion is well taken and should be and is therefore GRANTED”. (CP 70)

**3. Mr. Lamb’s Pleadings Did Not Present Any Matters That Would Cause the CR 12(b)(6) Motion to be Converted into a CR 56 Summary Judgment Motion**

This leads into the next erroneous contention by Mr. Lamb. He now states that it was HIS OWN pleadings that converted his CR 12(b)(6) motion into a CR 12(b)(6) motion, not Mr. Brecht’s pleadings, as he originally claimed in his reply to the trial court (CP 58).

On Page 6 of the Respondent’s Brief, Mr. Lamb incorrectly states that his CR 12(b)(6) Motion to Dismiss (CP 20-28) presented materials outside the pleadings. This starts in the first (partial) paragraph of Page 6

with the words “His mistake is that Mr. Lamb’s Motion” and ending with words “as required under CR 56” at the end of that same paragraph.

There are simply no additional materials whatsoever that were attached to Mr. Lamb’s CR 12(b)(6) Motion to Dismiss (CP 20-28), which consists only of a seven page memorandum and a two page proposed order.

At most, Mr. Lamb made a parenthetical reference to a different defamation lawsuit of Paul Brecht v. Jane Hague, et al., King County Superior Court No. 07-2-34389-0SEA. Mr. Lamb appeared to mention that case merely to provide some additional context, and did not rely on anything in the prior lawsuit to support his CR 12(b)(6) Motion to Dismiss, stating that the prior defamation lawsuit was “not at issue here”. (CP 21)

In any event, when considering a CR 12(b)(6) motion, a trial court may take judicial notice of matters of public record, and the taking of such judicial notice does not convert a CR 12(b)(6) motion into a CR 56 motion. Berge v. Gorton, 88 Wn.2d 756, 763, 567 P.2d 187, 192 (1977) (alleged admission by party opponent before Supreme Court considered); see also Rodriguez v. Loudeye Corp., 144 Wn. App. 709, 718, 198 P.3d 168, 172 (2008) (corporate charter properly considered in shareholder lawsuit).

So even if the prior Brecht v. Hague lawsuit and its outcome was somehow relevant to the motion to dismiss, Mr. Lamb would have been

basically asking the trial court to take judicial notice of the following undisputed facts: (1) Mr. Brecht had filed a prior defamation lawsuit against Ms. Hague based upon a campaign mailer, (2) the prior jury found the statements about Mr. Brecht in the campaign mailer to be false and defamatory, and (3) the jury found that the Hague defendants did not act with actual malice in making those statements, and awarded no damages.

Mr. Lamb clearly did not present any outside materials to the trial court in relation to his CR 12(b)(6) motion to dismiss. A CR 12(b)(6) motion is not converted into a CR 56 summary judgment motion merely by the insertion of matters outside the pleadings. Washington case law requires that (1) those materials must first be considered by the trial court and if they are not there is no conversion, (2) there must be evidence of consideration by the trial court and this evidence must be available for appellate review, absent of which there is no conversion, and (3) the matter must be material to the question at hand. Appellate courts look for these three prerequisites, and in their absence there can be no conversion of a CR 12(b)(6) motion into a CR 56 motion. These prerequisites are exemplified in Grimsby v. Samson, 85 Wn.2d 52, 530 P.2d 291 (1975) and Parrilla v. King County, 138 Wn. App. 427, 157 P.3d 879 (2007):

Our review of the record compels us to deny defendants' motion. Kataisto was concerned with a defendant's motion for summary judgment made pursuant to CR 56. On the other hand, the instant motions were made pursuant to CR 12 (b)(6), based upon defendants' motions for dismissal stemming from an asserted failure to state a claim for which relief could be granted. Thus, we are here concerned

with CR 12(b)(6) rather than CR 56. As such, the compelling reasons for the necessity of a statement of facts set forth in Kataisto are not present in the issues raised by the instant motions and resultant orders.

Although affidavits were apparently filed in connection with defendants' motions to dismiss for failure to state a claim, there is no indication of how or whether they were considered in determining the ultimate order issued by the trial judge. Thus, the order entered will be accepted at face value as one having been granted for failure to state a claim for which relief could be granted. CR 12(b)(6). Consequently, the only question before us, and the only issue actually before the trial judge, is whether it can be said that there is no state of facts which plaintiff could prove entitling him to relief under his claim. Barnum v. State, 72 Wn.2d 928, 435 P.2d 678 (1967). The factual allegations of the complaint must be accepted as true for the purpose of the motion. Hofto v. Blumer, 74 Wn.2d 321, 444 P.2d 657 (1968).

Grimsby, 85 Wn.2d at 55.

There is absolutely no indication by the trial court that it considered Mr. Lamb's claimed matter outside the pleadings. The hearing transcript from January 6, 2010 and the trial court's Order of Dismissal (CP 70-71) are completely void of any indication supporting his erroneous assertion.

And finally, the matter must be relevant. The law requires when "documents submitted to the trial court are not material to the question at hand, the submission of such documents is not sufficient to convert a motion..." Parrilla, 138 Wn. App. at 432. Mr. Lamb simply makes a passing reference to a jury instruction given in the prior Brecht v. Hague trial (CP 24), and now claims it was a "matter outside the pleadings" that could convert his CR 12(b)(6) motion into a CR 56 motion!

A jury instruction from another case is, at best, a statement of law given by that trial judge to the jury to instruct them on what principles to be used in rendering their decision. Unlike statutes or case law, a jury instruction does not have any precedent or controlling authority to be used in deciding a different lawsuit. In any event, a jury instruction from any other lawsuit can never be admitted into evidence in another proceeding for any purpose. While a declaration or documentary evidence might be “matters outside the pleading” – if they deal with facts relevant to the case at hand, a jury instruction in another case would never qualify as such..

As a preliminary matter, the Parrillas contend that this court should review the motion here at issue as a motion for summary judgment, rather than a motion for judgment on the pleadings, asserting that a manual for King County bus drivers was presented to the trial court for its consideration. Pursuant to CR 12(c), "If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." However, when documents submitted to the trial court are not material to the question at hand, the submission of such documents is not sufficient to convert a motion for judgment on the pleadings to a motion for summary judgment. Cary v. Mason County, 132 Wn. App. 495, 498-99, 132 P.3d 157 (2006); N. Coast, 94 Wn. App. at 858.

Here, the trial court's order articulates that it decided the motion pursuant to CR 12(c), presumably determining that the contents of the manual were not material to its determination. The Parrillas do not assign error to the trial court's decision to decide the motion pursuant to this rule. Accordingly, we review this matter as a CR 12(c) motion on the pleadings, considering the recitals of the pleadings in conducting our review.

Parrilla v. King County, 138 Wn. App. 427, 432, 157 P.3d 879 (2007).

**4. Mr. Lamb Misstates the Foisy Holding and Attempts to Hold Citizen as Valid Case Law**

GR 14.1(a) prohibits a party from citing an unpublished decision of the Court of Appeals as authority in an appellate brief.

The Division II decision in Citizen v. Clark County Board of Comm'rs, 127 Wn. App. 846, 113 P.2d 501 (No. 31276-0-II, 1995) was published only in part, with the remainder not published. (See Appellant's Motion to Strike Portions of Respondent's Brief, 10/15/2010, App. A)

Mr. Lamb attempts to cite to the unpublished portion of the Citizen decision, and make arguments thereon, starting in the last paragraph on Page 6 with the words "A Division 2 decision" and ending in the first paragraph on Page 7 with the words "does not apply. Id."

The language from Citizen quoted by Mr. Lamb in this improper portion of his brief comes solely from the unpublished portion of the opinion, and does not appear anywhere in the portion which the Court of Appeals ordered to be published in the Washington Appellate Reports. Nothing in the published portion of Citizen addresses the issue of whether CR 56(c) timelines apply when the trial court converts a CR 12(b)(6) motion into a CR 56 motion by choosing to consider materials outside the pleadings. Nothing in the published portion of Citizen can be properly cited to and argued by Mr. Lamb in his Respondent's Brief.

It is perhaps unfortunate that Division Two did not choose to publish the entire Citizen opinion. In fact, the unpublished portion of Citizen is completely in accord with (and follows) Foisy v. Conroy, 101 Wn. App. 36, 4 P.3d 140 (2000), where Division One held that the timelines of CR 56(c) do not apply to a CR 12(b)(6) motion that is converted to a CR 56 motion when the trial court chooses to consider materials outside the pleadings. While Mr. Lamb attempts to avoid the clear holdings of Foisy and Citizen, somehow arguing that they stand for the exact opposite of what the respective courts held, both Foisy and Citizen clearly support Mr. Brecht's position of this procedural issue.

**5. Mr. Lamb Falsely Claims His Statements were True and Avoids the Issue of his Defamation by Implication**

Mr. Lamb's response to the issue of falsity is summed up as revolving around the erroneous premise that since Mr. Brecht was convicted of violating a no contact order [where there were no allegations of violence], the false and defamatory implications of a violent crime about him in the Seattle Times and King 5 were true. Truth is only an absolute defense when it is the whole truth and nothing but the truth. Mr. Lamb completely avoids responding to the defamation by implication issues in his brief regarding his juxtapositions and omission of facts. He also erroneously states what the sting of his comments were. Mr. Lamb

turned Mr. Brecht's non-violent offense into one that was violent and that false and defamatory lie was spread to an audience of nearly 1.8 million people. Through his juxtapositions and omissions, he imputed the attributes of a violent crime where none had been committed. See the 'Falsity' section in the Brief of Appellant pages 17-22 for a complete comparison of Mr. Lamb's statements in context with the standards for defamation by implication as set forth in Mohr v. Grant, 153 Wn.2d 812, 108 P.3d 768 (2005). Mr. Lamb's non-response to these issues that were raised by Mr. Brecht's Appellant's Brief is tantamount to an admission of the falsity for his defamatory statements.

Furthermore, in another attempt to circumvent the court rules, Mr. Lamb attaches an appendix to his brief that is contained nowhere in the court record let alone the clerks papers. RAP 9.11 only allows for additional evidence, not previously presented to the trial court, to be considered by the Court of Appeals in special and unusual circumstances, and a party must actually move for such relief. Instead of following the requirements of RAP 9.11, and bringing a motion seeking such relief that explains why the Court of Appeals should take the unusual step of considering additional evidence, Mr. Lamb simply offers additional evidence that he wants the Court of Appeals to consider by attaching material to his brief that was not presented to the trial court.

Mr. Lamb attached a jury instruction from a different lawsuit, Paul Brecht v. Jane Hague, et al., King County Superior Court No. 07-2-34389-0SEA as an Appendix to his Respondent's Brief. This jury instruction was never submitted to the trial court as part of the materials considered in ruling on Mr. Lamb's CR 12(b)(6) motion to dismiss.

Had this jury instruction actually been presented to the trial court, it would have actually supported Mr. Brecht's position that a reasonable fact-finder could have found Mr. Lamb's statements about Mr. Brecht to be false by implication, and therefore defamatory. The jury instruction defines violation of a no-contact order to be a "domestic violence" offense, within the meaning of RCW 10.99.020(5)(r). The jury in the Brecht v. Hague case still found that statements made in the Hague campaign mailer to be false and defamatory, in spite of being instructed that Mr. Brecht's conviction for violating the no-contact order was a "domestic violence" offense. Therefore, a jury or other fact-finder could likewise find that Mr. Lamb's statements to the media about Mr. Brecht to be false by implication, in the same way the Brecht v. Hague jury did.

Mr. Lamb then makes arguments in his Respondent's Brief relating to this improperly submitted additional "evidence", starting in the last paragraph on Page 9 with the words "On the strength of this statute" and

ending at the bottom of Page 9, including quoting at length from the jury instruction in the prior case, and using this to support his position.

This challenged portion of Mr. Lamb's brief, based on new "evidence" submitted for the first time on appeal and arguments based upon this newly proffered "evidence" should therefore be stricken.

It is indeed ironic that Mr. Lamb attempts to offer new evidence for the first time on appeal, while arguing that the Court of Appeals should not at all consider Mr. Brecht's January 4, 2010 response to Mr. Lamb's motion to dismiss (CP 29-51) – which WAS part of the record before the trial court at the January 6, 2010 hearing (CP 69, RP) and which the trial court had the opportunity to review before entering the dismissal order on January 7, 2010. (CP 70-71) If Mr. Lamb is able to demonstrate the extraordinary circumstances under RAP 9.11 which would allow his new "evidence" to be considered for the first time on appeal, then there should be no question that Mr. Brecht's motion response should likewise be considered, and Mr. Brecht's appeal should be summarily granted on the merits, without the need for any further argument, pursuant to RAP 18.14.

**6. Mr. Lamb Responds to a Totally Non-existent Argument  
Contained Nowhere in Mr. Brecht's Brief**

In Section D of the Respondent's Brief (starting near the top of Page 11 and ending at the bottom of Page 13), Mr. Lamb "responds" to a totally non-existent argument contained nowhere in Mr. Brecht's brief.

Mr. Lamb devotes this entire section to arguing why Mr. Brecht should not be allowed to sue him over the Hague campaign mailer.

However, Mr. Brecht's current lawsuit is not about the Hague campaign mailer. Instead, it concerns Mr. Lamb's defamatory statements to the media (namely the Seattle Times newspaper and KING-5 TV) about Mr. Brecht. Mr. Lamb made these statements to the media after Mr. Brecht sued Ms. Hague over the campaign mailer.

Mr. Brecht makes no allegations in his Complaint for Damages (CP 3-15) that Mr. Lamb should be held liable for anything contained in the Hague campaign mailer – only for Mr. Lamb's defamatory statements to the media after the Hague lawsuit was filed. Similarly, in his Opening Brief, Mr. Brecht only argues that Mr. Lamb is liable for his defamatory statements to the media, and not for the Hague campaign mailer.

The issue of Mr. Lamb's involvement in the Hague Campaign and his production of the defamatory campaign mailer that was subject to the Brecht v Hague case are all important issues to state of mind and actual malice in this instance. Mr. Lamb can protest but not hide from his unlawful actions in that case as well as this one.

**7. Motion to Strike Reserved to the Merits**

On October 15, 2010, Mr. Brecht filed a "Motion to Strike Portions of Respondent's Brief". The Commissioner ruled on October 28, 2010 that this Motion to Strike was reserved to the merits, to be decided by the appellate panel of judges considering this appeal. Mr. Brecht would urge the appellate panel to grant the Motion to Strike, for the reasons set forth in Mr. Brecht's Motion to Strike and in his reply in support of the motion.

**8. Conclusion**

The trial court granting of dismissal was error because it failed to follow explicit court rules on the handling of CR 12(b)(6) motions. It was also error to assign timelines for summary judgment when the case was not properly converted as such by the court. Finally, the court was in error when it failed to rule that Mr. Brecht properly stated a claim of defamation. Appellant Paul Brecht respectfully requests that the Court of Appeals Court reverse the trial court's January 7, 2010 order of dismissal and remand his case for trial.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of December, 2010.

  
Paul Brecht  
Appellant, Pro Se

**DECLARATION OF SERVICE**

I declare under penalty of perjury under the laws of the State of Washington that I will have mailed a copy of this Reply Brief of Appellant to the office of Michael J. Bond, 2448 – 76<sup>th</sup> Avenue SE, Suite 202, Mercer Island, Washington 98040, prior to filing with the Court of Appeals.

Signed at Bellevue, Washington on December 10, 2010.

  
PAUL BRECHT