

No. 65058-1-I

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

Paul Brecht, Appellant

v.

North Creek Law Firm, and Mark and Jane Doe Lamb

Respondents.

RESPONDENTS' BRIEF

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 SEP 30 AM 9:22

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I. Assignments of Error

Respondents contend the trial court committed no error.

Issues Pertaining to Assignments of Error.

Respondents respectfully submit that the Issues Pertaining to the claimed Assignments of Error are more appropriately stated as follows.

1. Did the trial court abuse its discretion in striking Mr. Brecht's filings, which were submitted two days before the hearing of a motion that was filed more than 28 days before the hearing date?
2. Is a claim for defamation stated where the alleged defamatory statements are true?

II. Statement of the Case

A. The facts of the case.

Plaintiff, Paul Brecht, is a single man. Defendant, Mark Lamb, is a Washington lawyer. CP 1.

The claim in this lawsuit arises from events occurring during the 2007 King County Council election, in which Mr. Richard Pope ran against an incumbent King County Councilwoman, Jane Hague. CP 2. During the campaign, Ms. Hague's campaign issued a mailer containing assertions about Mr. Brecht. CP 3. Mr. Pope, who was at that time a practicing attorney, filed suit on behalf of Mr. Brecht against Ms. Hague

and her campaign consultants for damages allegedly caused by defamatory assertions about Mr. Brecht in the mailer. CP 4. Mr. Lamb was not a party to that suit, but he was counsel for the campaign consultants.

The case was tried, and on August 29, 2009 the jury returned a verdict finding that the statements about Mr. Brecht in the campaign mailer were defamatory and that the defendants did not act with malice. Consequently, no damages were awarded. CP 21.

Shortly after Mr. Pope filed the Complaint in *Brecht v Hague, et al*, the Seattle news media asked Mr. Lamb for comment. CP 5. Plaintiff's Complaint in the suit now before the court alleges that in responding to these media inquiries Mr. Lamb made the following statements about Mr. Brecht:

- a. "Mark Lamb, a lawyer for Hague's campaign, said Tuesday the allegation of an assault conviction was based on a Renton police report that said Brecht was convicted of violating a no-contact order." *Seattle Times Newspaper*.
- b. "Lamb said Hague campaign staffers were 'going on the information they had' when they wrote the Brecht was convicted of assault. 'I suppose you could make an argument it would be more accurate to say he was convicted of domestic violence,' Lamb said referring to his violation of the no-contact order. 'The campaign felt that was too inflammatory to include in the thing.'" *Seattle Times Newspaper*.
- c. "Lamb said he doesn't believe Hague owes Brecht an apology. 'It appears that Mr. Pope's complaint was that the piece didn't say that Mr. Brecht was convicted of domestic

violence. That's an odd complaint.” *Seattle Times Newspaper*.

- d. “Mr. Brecht said last night that [he does] not have a domestic violence conviction, that's not true.” *Seattle Television Station King 5*. CP 5, 6.

Mr. Brecht's Complaint also alleges that in 2001, in the context of domestic dissolution proceedings, the court issued a no contact order prohibiting Mr. Brecht from having contact with his then wife and that Mr. Brecht was found guilty of violating the no-contact order. Mr. Brecht's Complaint sets forth the following allegations:

In 2001, Mr. Brecht's then-wife phoned police and claimed that Mr. Brecht had assaulted her. This occurred on the same evening that Mr. Brecht informed his wife that he would like a divorce, before leaving to go to his office. Mr. Brecht was later arrested at his office and **a no-contact order was entered against him** solely on the basis of the wife's claims against him. The no-contact order required that Mr. Brecht have no contact or communication with his estranged wife.

About one month later after his wife phoned the police, **Mr. Brecht violated the no-contact order** when he met his estranged wife and their child in a public place in broad daylight, and gave her money she said she needed. There was no violence, nor any allegation of violence. Afterwards the wife contacted police and reported that her husband had violated the no-contact order. **The plaintiff was found guilty of a misdemeanor charge of violating a no-contact order.** CP 4. (emphasis added).

B. Procedural history.

On November 30, 2009, Mr. Lamb filed a CR 12(b)(6) Motion to Dismiss, which was set for hearing 35 days later on January 4, 2010. CP 18. The motion hearing date was moved to January 6, 2010 at the court's request. Mr. Brecht made no response to the motion until serving a Memo in Opposition and a Declaration of Paul Brecht on January 4, 2010.

The trial court, the Honorable Steven Gonzales, heard oral argument on January 6, 2010 and on January 7, 2010 signed an Order of Dismissal and Striking Mr. Brecht's submissions as not timely. RP 2, CP 70, 71. Motions for Reconsideration were filed and denied, and Commissioner Ellis has ruled that this appeal is timely. CP 72, 82, 88.

III. Summary of argument.

The standard of review of a trial court order striking submissions in connection with a motion to dismiss is abuse of discretion and no abuse of discretion is argued, let alone shown. In any event, the order striking his late filed pleadings, if error, was harmless error. Mr. Brecht's Complaint alleged a claim for defamation that was based on facts that are, as he admitted and pled them, true. Because truth is an absolute defense to a claim for defamation, Judge Gonzales properly dismissed Mr. Brecht's suit. Finally, Mr. Brecht's apparent effort to resurrect a claim for defamation based on Mr. Lamb's alleged participation in the preparation

of the campaign mailer is barred under the rules of *res judicata* and/or *collateral estoppel*.

IV. ARGUMENT

A. The standard of review is abuse of discretion and no abuse of discretion is shown.

1. The standard of review is abuse of discretion.

The standard of review of a trial court's rulings on a party's motion to strike submissions is abuse of discretion. *Tortes v. King County*, 119 Wn. App. 1, 84 P.3d 252 (Div. 1, 2003). A trial court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds. *Mayer v. STO Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

Mr. Lamb's Motion to Dismiss was filed and mailed to Mr. Brecht on November 30, 2009, which was over 28 days before the original hearing date set on January 4, 2010. Mr. Brecht failed to file anything in response to the motion until January 4, 2010. It was well within Judge Gonzales's discretion to strike Mr. Brecht's pleadings as untimely.

2. Mr. Brecht's pleadings did not "convert" the motion to dismiss to a motion for summary judgment.

Mr. Brecht mistakenly argues that by refusing to consider his submissions, the trial court was not permitted to convert the motion to a CR 56 motion, and thereby apply the CR 56 requirements for filing

responses. His mistake is that Mr. Lamb's Motion to Dismiss presented matters outside the pleadings by asking the trial court to take judicial notice of the Court's Instructions and Jury Verdict in *Brecht v Hague, et al*, (CP 21). When matters outside the pleadings are considered, CR 12(b)(6) clearly provides:

the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

And that is precisely why the Motion to Dismiss was noted for hearing with more than 28 days notice, as required under CR 56.

The court's decision in *Foisy v. Conroy*, 101 Wn.App. 36, 4 P.3d 140 (Div. 1, 2000), which does not address the issue here in any event, does not help Mr. Brecht show an abuse of discretion. In *Foisy*, the court rejected defendant's claim that he was entitled to 28 days notice and barred plaintiff's claim, holding that the defendant was given a reasonable time to respond. In the present case, this is a non-issue, as Mr. Brecht was given more than 28 days notice to reply to the 12(b)(6) motion to dismiss.

A Division 2 decision in *Citizen v. Clark County Bd. of Comm's*, 127 Wn. App. 846, 113 P.2d 501 (Div. 2, 2005) clarified the *Foisy* holding:

The Citizens also argue that the court erred in considering the summary judgment motion on December 11, 2003,

because Clark County had not given it the 28 days' notice required under CR 56(c) for summary judgment motions. But when a CR 12(b)(6) motion is converted into a CR 56 motion, the notice requirements of CR 56(c) does not apply.

Id. In his appeal, Mr. Brecht does not claim to have had insufficient notice. In fact, the 30+ days notice given here meets the 28 day standard under CR 56 *as well as* the reduced *Foisy* “reasonable time” standard. In *Foisy*, the “reasonable time” was actually LESS than 28 days, not more.

Mr. Brecht would read *Foisy* as eliminating *all* timeliness requirements, which it simply does not do. In this instance Mr. Brecht, who had more than adequate notice, failed to file his reply within the 11 or more days prior to the hearing, as required by CR 56. The purpose of this rule is not to protect the filing party, but rather to protect the court and the opposing party from receiving a reply just days before the hearing date.

No abuse of discretion is shown, the order striking Mr. Brecht's late filed submissions should be affirmed.

B. Any error was harmless.

In any event, for the reasons set forth below, any error was harmless.

C. Truth is an absolute defense to a claim for defamation, and the truth is that Mr. Brecht was convicted of the crime of domestic violence.

The standard of review is *de novo*. *Korlund v. Dyncorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 125 P.3d 119 (2005).

A prima facie defamation case requires a showing (1) that the defendant's statement was false, (2) that it was unprivileged, (3) fault, and (4) that the statement proximately caused damage. *Wood v. Battle Ground School Dist.*, 107 Wn. App. 550, 567-568, 27 P.3d 1208, 1219 (Div. 2, 2001), citing *Mark v. Seattle Times*, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981).

A CR 12(b)(6) motion to dismiss is appropriate in defamation cases where a plaintiff's complaint has failed to demonstrate the existence of one of the four elements of defamation. *See Clapp v. Olympic View Publishing Co., LLC*, 137 Wn. App. 470, 154 P.3d 230 (Div. 2, 2007).

Here, Mr. Brecht failed to demonstrate the first element of defamation, *i.e.* that Mr. Lamb's statements were false. Statements are not false if they are substantially true. *Mark*, 96 Wn.2d at 494. To defeat a defamation claim, "[a] defendant need only show that the statement is substantially true or that the gist of the story, the portion that carries the 'sting', is true." *Id.* The "sting" of a report is defined as the gist or substance of a report when considered as a whole. *Mohr v. Grant*, 153 Wn.2d 812, 825, 108 P.3d 768 (2005). The entire statement must be

considered as a whole to determine whether it is true or false. *Clardy v. Cowles Publishing Co.*, 81 Wn. App. 53, 912 P.2d 1078 (Div. 3, 1996).

The “sting” is a question of law to be decided by court. *See Mohr*, 153 Wn.2d at 775. Here, the gist or the “sting” of Mr. Lamb’s report to the press was that Mr. Brecht was convicted of the offense of domestic violence under Washington law. This statement is true. Within the meaning of RCW 10.99.020(5)(r), “domestic violence” includes the crime of violation of a no-contact order; it states:

(5) “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 within, or knowingly remaining within, a specified distance of a location [internal citations omitted].

The no-contact order was issued prohibiting Mr. Brecht from contacting his wife, as alleged in the Complaint. On the strength of this statute, in the trial of *Brecht v. Hague, et al* the Honorable Judge Erlick gave the jury the following instruction:

A Washington statute provides:

“Domestic violence” includes the following crime when committed by one family or household member against another: violation of no-contact order. (Appendix)

It is undisputed that Plaintiff was charged with and found guilty of the charge of violating a no-contact order with a family member and, under Washington law, that is a crime of domestic violence.

Mr. Brecht's argument that there is a subset of domestic violence that is not really domestic violence because no physical touching occurred is simply wrong. The Washington statute codifies what every abused woman knows to be the case: domestic violence includes many forms of abusive behavior not all of which include a physical touching. In this instance, when Mr. Brecht violated the court issued "no-contact" order prohibiting him from having any contact with his married spouse he committed an act of domestic violence in this state. RCW 10.99.020(5)(r). According to his Complaint in this case he was guilty of the crime.

Truth is an absolute defense to the claim of defamation. *Ward v. Painters' Local 300*, 41 Wn.2d 859, 862, 252 P.2d 253 (1953). According to Mr. Brecht's Complaint the truth is that 1) his wife accused him of assaulting her and she called the police, 2) the police arrested him on her report, 3) a no contact order was issued that barred him from having any contact with his wife, 4) he violated the no-contact order, 5) he was charged with violating the no-contact order and 6) he was convicted. Assuming for the purposes of the Motion that all factual allegations in Mr. Brecht's Complaint are true,

there is nothing Mr. Brecht can say or do to change the fact that he was convicted of the crime of domestic violence. Because Mr. Brecht cannot present any set of facts under which Mr. Lamb's statements would be false, the Complaint was properly dismissed.

D. Mr. Brecht's Complaint did not allege liability for defamation in the campaign mailer, and no such claim is permissible now.

Mr. Brecht's Complaint in this case is his third attempt to recover for defamation arising from the King County Council seat election of 2007. CP 59. The first suit alleged claims of defamation arising from a campaign mailer and it ended in a Judgment for the defendants. CP 63, 64. The second suit against two radio talk show hosts and the radio station was dismissed by summary judgment. CP 66-68. In this third suit, plaintiff alleged the defendant defamed him when responding to media inquiries after Mr. Pope filed the first lawsuit.

No allegations were made in this third Complaint that Mr. Lamb was liable also for the statements made in the campaign mailer, which was the subject of the first lawsuit. Mr. Brecht had his day in court on his claim of defamation for the statements contained in the campaign mailer, Judgment was entered in favor of the defendants in that case, and the rules of *collateral estoppel* prohibit Mr. Brecht from trying again against a new

defendant. *Dunlap v. Wild*, 22 Wn. App. 583, 591 P.2d 834 (Div. 2, 1979).

The purpose of collateral estoppel is to prevent relitigation of already determined causes, curtail multiplicity of actions, prevent harassment in the courts and inconvenience to the litigants, and promote judicial economy. *State v. Vasquez*, 109 Wn. App. 310, 34 P.3d 1255 (2001), *aff'd*, 148 Wn.2d 303, 59 P.3d 648 (2002).

In *Dunlap v. Wild*, plaintiff was a disgruntled investor who sued his stock brokerage but not his stock broker, and the matter was fully resolved in arbitration with a small award in the investor's favor. Unsatisfied with his recovery, the investor next sued the stock broker personally for the same claim that was resolved in arbitration, and the trial court granted a motion to dismiss the claim on the grounds of *res judicata* or *collateral estoppel*. The Court of Appeals affirmed the dismissal on grounds of *collateral estoppel* noting that the doctrines of *res judicata* and *collateral estoppel* are "kindred doctrines designed to prevent relitigation of already determined causes and curtail multiplicity of actions and harassment in the courts." *Dunlap v. Wild, supra* 22 Wn. App. at 591. The Court ruled that a non-party to the prior adjudication may invoke *collateral estoppel* defensively against a party to the earlier action if four elements are established:

(1) the issue decided in the prior adjudication must be identical with one presented in the action in question; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea of collateral estoppel is asserted must have been a party or in privity with a party to the prior litigation; and (4) application of the doctrine must not work an injustice.

Supra, 22 Wn. App at 590. Finding that all four elements were established, the Court of Appeals affirmed summary judgment dismissing the investor's second bite at the apple.

All four elements are shown here, too. In the first suit, Mr. Brecht sued for damages caused by the allegedly defamatory campaign mailer; a final judgment on the merits was entered; he is the plaintiff in both actions and application of the doctrine will not work an injustice. Indeed, application of the doctrine will work justice as the litigation over the 2007 campaign and its mailer has become vexatious and must end. Mr. Brecht's brief here maliciously stirs up once again his allegations about Ms. Hague with no apparent legitimate purpose. App. Br. 3-4.

Mr. Brecht is barred from now seeking a second bite at the apple for claims arising from the preparation and publication of the campaign mailer. He should not be allowed to boot strap another claim about the mailer into this third lawsuit.

V. CONCLUSION

For the foregoing reasons, the Order of Dismissal should be affirmed.


Michael J. Bond, WSBA # 9154
Attorney for Respondents

INSTRUCTION NO. 16

A Washington statute provides:

"Domestic violence" includes the following crime when committed by one family or household member against another: violation of a no-contact order.

COURT'S INSTRUCTIONS TO THE JURY

John P. Erlick, Judge
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Appendix

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION I

PAUL BRECHT,

Plaintiff/Appellant,

v.

NORTH CREEK LAW FIRM, P.S.,
MARK LAMB AND JANE DOE
LAMB,

Defendant/Respondents.

No. 65058-1-I

CERTIFICATE OF SERVICE

I, Patty Lionello, certify and declare as follows:

I am over the age of 18, competent to make this declaration upon personal knowledge setting forth facts I believe to be true.

That on September 29, 2010, I caused to be served via U.S. Mail, first class postage prepaid, a true and correct copy of the attached

Respondent's Brief, on the following:

Paul Brecht (pro se)
P.O. Box 3324
Bellevue, WA 98009

DATED: September 29, 2010 at Mercer Island, Washington.

By *Patty Lionello*
Patty Lionello, Assistant to Michael J. Bond