

No. 68025-1-I

COURT OF APPEALS

DIVISION I

FOR THE STATE OF WASHINGTON

Thomas Ostheller,

Appellant-Plaintiff,

v.

City of Burlington, WA,

Respondent-Defendant.

BRIEF OF RESPONDENT CITY OF BURLINGTON

PATTERSON BUCHANAN FOBES
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I. INTRODUCTION

The City of Burlington (hereinafter “City”) respectfully requests that this Court affirm Judge Meyer’s Order granting summary judgment in its favor and dismissing all claims brought against it by Plaintiff Thomas Ostheller, with prejudice.

Mr. Ostheller brought a lawsuit against the City for defamation and intentional interference with a business expectancy after being terminated from his employment with Skagit County following a work-related incident in which he assaulted a City employee. Summary judgment was, and continues to be, appropriate in favor of the City because there are no genuine issues of material fact and because Mr. Ostheller failed to make a *prima facie* case of defamation or intentional interference with a business relationship, as further discussed herein.

Significantly, on appeal, Mr. Ostheller has focused on only two narrow issues pertaining to the defamation claims, and only one narrow issue with respect to the intentional interference claim, but fails to address any of the other reasons for which summary judgment was appropriately granted. As demonstrated below, Mr. Ostheller’s claims should be dismissed for a variety of reasons, and the Order in favor of the City should be affirmed.

II. STATEMENT OF THE CASE

A. Statement of the Issue

Whether summary judgment in favor of the City of Burlington on all of Mr. Ostheller's claims is appropriate where there are no material issues of fact and Mr. Ostheller is unable to establish the requisite elements of defamation or intentional interference with a business expectancy.

B. Identification of the Parties

Although it is not always clear in Mr. Ostheller's brief, there are only two parties to the instant matter – Appellant, Mr. Ostheller, and Appellee, the City of Burlington. No individual parties have ever been named in this matter. Moreover, Mr. Ostheller's former employer, Skagit County, has also never been a named party.

As further discussed below, Mr. Ostheller was employed by Skagit County, but worked in a facility located in and serving the City of Burlington pursuant to an Interlocal Agreement. Mr. Ostheller was supervised by Jennifer Kingsley, who was also a County employee.

The property on which Mr. Ostheller's job was located was owned by the City of Burlington and managed by City of Burlington employees. Those employees included City of Burlington Parks and

Recreation Director Loren Cavanaugh, who supervised Building Maintenance Supervisor Paul Tingley and his employee Simeon Brown. During all relevant times hereto, Mayor Ed Brunz was the Mayor of the City of Burlington. Again, none of these individuals were ever named as parties to this litigation.

C. Procedural History

Mr. Ostheller filed a Complaint for Damages against the City of Burlington (hereinafter “City”), on December 20, 2010, in Skagit County Superior Court. The City filed a motion for summary judgment on August 22, 2011. CP at 22-52. Mr. Ostheller then filed a cross-motion for summary judgment on September 14, 2011. CP at 222-227. The Honorable Judge John M. Meyer heard oral argument on the cross-motions on October 31, 2011. Judge Meyer then issued an Order granting summary judgment in favor of the City and dismissing all claims against it. CP at 355-357. This appeal followed.

D. Summary of Facts

1. Mr. Ostheller's Employment with Skagit County

Mr. Ostheller was employed by Skagit County as the Senior Services Food Service Supervisor/Senior Nutrition Project Coordinator from July 18, 2005, until February 10, 2009. *See* CP at 57-62. He was

previously employed by the County as an on-call substitute, in a variety of positions. CP at 63-65. As the Food Service Supervisor/Senior Nutrition Project Coordinator, his job duties included supervising and directing all central kitchen food production; monitoring the operations of the central kitchen; preparing and cooking a wide variety of foods; estimating food requirements; controlling serving portions and eliminating waste and leftovers; and assuring that all equipment was cleaned and secured at the end of each work day. CP at 66-72. While employed as the Food Service Supervisor, Mr. Ostheller was physically located at the Burlington Senior Center, in Burlington, WA. He was supervised by the Director of Senior Services, Jennifer Kingsley, who is also an employee of Skagit County. Mr. Ostheller was terminated from his employment with Skagit County following an incident in which he shoved a City employee and called him a “dumb shit” while at work. *See* CP at 60-62.

At all relevant times to this lawsuit, Mr. Ostheller was an at-will employee of Skagit County. While employed with Skagit County, Mr. Ostheller was not a party to any employment contract, nor was he a party to any other written document that changed his at-will employment status. Although Mr. Ostheller was provided with written Personnel Policies and Procedures, Skagit County has made clear that its Personnel

Policies and Procedures Manual does not constitute a contract with employees, nor do the policies and procedures promise continued employment. *See* CP at 73-91. The Manual “contains general guidelines concerning the recruitment, selection, employment, transfer, removal, discipline and welfare of employees, and other aspects of County employment.” *Id.* at Section 1.1- STATEMENT OF PURPOSE. Further, “[i]t is not the intent of this manual to establish promises of specific treatment.” *Id.* In addition, the Manual informs employees that the County reserves full discretion to make any and all disciplinary decisions it determines is necessary. *Id.*

2. *Interlocal Agreement between Skagit County and the City of Burlington*

Skagit County provides senior services to the City of Burlington pursuant to an Interlocal Agreement between the City and County. *See* CP at 92-102. Under that agreement, the County employs a staff which provides certain administrative and professional services to the City, and for which the City pays the County a certain yearly fee. *Id.* at 1. The services provided by the County include operation of a Senior Center, at which comprehensive Senior Services programs are offered, along with meal services, including daily hot meals and meal delivery (*i.e.*, Meals on Wheels). *Id.* at 2. In addition to paying the County for the provided

services, the City pays for the utility costs associated with running the central kitchen. *Id.* at 3. The City also provides the site for the delivery of Senior Center Services, and is responsible for all maintenance, utilities, repairs and custodial services. *Id.* The Burlington Senior Center maintains the only commercial kitchen for on-site meal preparation operations for all of Skagit County.

3. *The Incident at the Senior Center*

On November 5, 2008, at approximately 2:30 p.m., City of Burlington employee Simeon Brown escorted Zaddian Mezo, a representative from Guardian Security, and another Guardian employee, through the Senior Center to conduct annual testing of the fire alarms. *See* CP at 168, ¶ 3. When Mr. Brown arrived at the Senior Center to test the fire alarms on the date of testing, he notified the front desk. CP at 168, ¶ 4. The City of Burlington's regular practice and procedure is for City staff to notify the Senior Center staff before fire alarm testing is conducted at the Senior Center. *See* CP at 166, ¶ 6. Before the testing that occurred on November 5, 2008, City of Burlington Grounds and Building Maintenance Supervisor Paul Tingley called the Senior Center to notify staff of the upcoming fire alarm testing. *Id.*

Guardian Security is the monitoring company used by the City of Burlington for all of its fire alarms, including those located at the Senior Center. *See* CP at 130-131. Guardian Security tests audible alarms, smoke detectors, and security systems annually. *Id.* Prior to the anticipated date of the testing, it is the typical practice that someone from the Public Works Department provides advance notice, either by phone or by e-mail, to Administrative Coordinator Kim Kelley (or whoever is working at the front desk at the Senior Center that week), informing her that an employee from the City and someone from Guardian will be at the Senior Center testing the alarms. *Id.* When they arrive at the Senior Center on the date of testing, they notify the front desk. *See* CP at 168, ¶ 4 and 166, ¶ 6.

Typically, two city employees and two Guardian employees are present for fire alarm testing. CP at 168, ¶ 3 and 126-133. Before testing each alarm, they notify people in the vicinity of the particular alarm being tested that they will be testing the audible alarm. CP at 131. During the testing, one City employee stands at the front door and notifies people entering the building that audible alarm testing is in progress, and one Guardian employee stays at the main alarm panel while testing is in progress. *Id.* One city employee and the other

Guardian employee move from room to room while the Guardian employee performs the testing of each alarm. *Id.* They start with the rooms farthest from the kitchen and work their way to the kitchen. *Id.* Each alarm can be heard in the kitchen while the employees work their way toward that location. *Id.* Mr. Brown and Mr. Mezo were assigned to move from room to room at the Senior Center on the day in question, and followed the general procedure outlined above. CP at 168, ¶ 3.

Eventually, Mr. Brown and Mr. Mezo arrived at the kitchen to perform audible alarm testing. CP at 170, ¶ 5. As the test was being conducted, Mr. Ostheller came out of the kitchen and physically confronted Mr. Brown. *Id.* Mr. Ostheller pushed Mr. Brown in the chest and called him a “dumb shit or something similar to that.” *Id.* Mr. Ostheller yelled at Mr. Brown, used profanity, and placed his hands on Mr. Brown multiple times during the altercation. *Id.* at ¶ 6.

After the altercation ended, Mr. Brown immediately notified the City of Burlington Parks and Recreation Director, Loren Cavanaugh. CP at 170, ¶ 7. Mr. Cavanaugh came to the Senior Center immediately. *See* CP at 159, ¶ 3. While Mr. Cavanaugh was present, Mr. Ostheller attempted to approach Mr. Brown and apologize for his behavior. *Id.* at

¶ 4. However, Mr. Cavanaugh informed Mr. Ostheller that he needed to leave the building, and could not return unless cleared to do so. *Id.*

Mr. Cavanaugh then called 911 to report the incident. CP at 161, ¶ 5. Then-Sergeant Tom Moser responded to the call. Mr. Ostheller had left the premises by the time Sergeant Moser arrived. *Id.* at ¶ 6. Mr. Brown reported to Sergeant Moser that he and a representative from Guardian Security had been testing the fire alarms at the Senior Center. *See* CP at 170, ¶ 8. Mr. Brown explained that Mr. Ostheller apparently had not been informed of the tests, and became agitated when the audible alarm went off. *Id.* Mr. Brown also informed Sergeant Moser that Mr. Ostheller confronted him (Brown), yelled at him, used profanity, and put his hands on him (Brown) multiple times. *Id.* However, Mr. Brown also told Sergeant Moser that he elected not to press charges against Mr. Ostheller for the assault. *Id.*

Mr. Cavanaugh then called Ms. Kingsley and informed her that Mr. Ostheller was no longer permitted at the City of Burlington Senior Center, and that if he arrived he would be trespassed from the premises. *See* CP at 161, ¶ 7; and CP at 175, ¶ 5.

Mr. Cavanaugh also completed an Incident Report on November 5, 2008. *See* CP at 103-104. In that Report, Mr. Cavanaugh explained that

he had informed Mr. Ostheller he was not welcome at the City Senior Center due to his conduct, and that if he came to the facility, he would be trespassing. *Id.* Mr. Ostheller has never returned to the Senior Center. *See* CP at 121.

Mr. Ostheller and Mr. Brown also completed written statements on November 5, 2008, just after the events occurred. *See* CP at 105-108. Mr. Mezo completed a written statement on November 7, 2008. *See* CP at 109-110.

On the afternoon of November 5th, Mr. Cavanaugh contacted Burlington Mayor, Ed Brunz, regarding the incident. *See* CP at 152-157. The Mayor returned his call on November 6th. *Id.* Mr. Cavanaugh relayed the events that occurred at the Senior Center to the Mayor, who responded that Mr. Cavanaugh should be sure to get written statements from witnesses. *Id.*; *see also* CP at 157, ¶ 8. Mr. Cavanaugh also told Mayor Brunz that this was not the first time there had been incidents with Mr. Ostheller. *Id.*; *see also* CP at 157, ¶ 8. The same day, Mayor Brunz saw Mr. Brown, who also related the events to the Mayor. *See* CP at 152-157.

On November 7, 2008, Mayor Brunz contacted the City of Burlington Police Department and inquired about the incident. *See* CP at

148, ¶ 3. He learned that Sergeant Moser had responded and taken a brief report, but that Mr. Brown had not wanted to press charges. *Id.*

Later that afternoon, Mayor Brunz received a call from Jeff Greiner, whose wife worked in the central kitchen with Mr. Ostheller. CP at 148-150, ¶ 4. Mr. Greiner stated that his wife had witnessed the incident and had told him that Mr. Brown had pushed Mr. Ostheller first. *Id.* Mayor Brunz stated that he did not have all the facts yet, and asked for a written statement from Mrs. Greiner. *Id.*

On December 17, 2008, Mayor Brunz received a message from Mr. Greiner, which apparently had been left on December 8th, inquiring about the investigation of Mr. Ostheller. CP at 150, ¶ 5. Mayor Brunz contacted Mr. Cavanaugh, and asked if he had heard anything about Mr. Ostheller. *Id.* Mr. Cavanaugh told him that all he knew was that there would be an investigation and that he had been told he and Mr. Brown would be contacted, but he was not aware of anything else. *Id.*; *see also* CP at 161, ¶ 9.

4. Skagit County's Investigation and Termination of Mr. Ostheller's Employment

On November 5th, after she was informed of the incident, Ms. Kingsley placed Mr. Ostheller on paid administrative leave pending an investigation. *See* CP at 111-112 and CP at 176, ¶ 6. During the time

he was on leave, Mr. Ostheller was paid his regular salary and continued to receive all of his regular benefits. CP at 111-112.

Over the next two months, the County collected the written witness statements that had been submitted to the City, and conducted interviews with those who witnessed the events at the Senior Center. On January 5, 2009, Jennifer Kingsley notified Mr. Ostheller that she intended to terminate his employment with Skagit County because of work-related conduct related to the November 5th incident. *See* CP at 113-15 and CP at 176, ¶ 8. Ms. Kingsley stated that his actions violated Section 12.2 of the Skagit County Personnel Policies and Procedures Manual, that she could no longer rely on him as an employee, and that his behavior was unacceptable. CP at 113-15 and CP at 176, ¶ 8. She also informed Mr. Ostheller that a meeting had been scheduled for January 13, 2009, to provide him with the opportunity to respond to the allegations prior to the County making a final employment decision. CP at 113-15 and CP at 176, ¶ 8.

On January 9, 2009, Skagit County Human Resources Director, Billie Kadrmas, and Skagit County Administrator, Tim Holloran, called Mayor Brunz to discuss the November 5th incident. CP at 150-51, ¶ 7 and at 152-57. They informed the Mayor that if the City really did not want

Mr. Ostheller back on the property, they had no other location to place him. Mayor Brunz responded that it was his understanding that the November 5th incident was not the first involving Mr. Ostheller, that he understood there had been problems with Mr. Ostheller prior to the time he took office in 2008, and that his employees were afraid to work around Mr. Ostheller, and therefore he did not want him back at the Senior Center. *Id.*

On January 27, 2009, Ms. Kadrmas and Ms. Kingsley met with Mr. Cavanaugh to ask him some additional questions about the November 5th incident. CP at 161, ¶ 10. Ms. Kadrmas referenced Mr. Cavanaugh's written statement, and asked him if it was complete and accurate. *Id.* He confirmed that it was. *Id.*

Ms. Kadrmas then inquired about prior incidents involving Mr. Ostheller. CP at 186, ¶ 11. Mr. Cavanaugh responded that one of the City's employees, Paul Tingley, had told him that Mr. Ostheller had confronted him in the kitchen one time while holding a knife in his hand toward Mr. Tingley's face. *Id.* Mr. Tingley had not reported the incident because he hoped that it would resolve itself and that there would not be any further problems. *Id.* Mr. Cavanaugh acknowledged that there was no documentation of the previous incident. *Id.* Due to the passage of time

since the November incident, Mr. Cavanaugh also mistakenly relayed to Ms. Kadrmas that Sergeant Moser had responded to the Senior Center while Mr. Ostheller was still on the premises. CP at 186, ¶ 12.

On February 10, 2009, Ms. Kingsley notified Mr. Ostheller that the County had made its final decision to terminate his employment with Skagit County. *See* CP at 60-62 and CP at 146, ¶ 9. The following bases were provided for his termination:

1. Treating others disrespectfully.
2. Being asked to leave City property due to the incident.
3. Embarrassing the County and the Department as a result of your conduct.
4. Calling an employee of the City of Burlington a “dumb shit.”
5. City of Burlington Police called on site due to report of assault and aggression.
6. Expulsion from a building owned by the City of Burlington.

CP at 60-62.

Ms. Kingsley also noted that when given the opportunity to respond to the allegations on January 13, 2009, Mr. Ostheller merely argued with her. *Id.* She explained that after the meeting on January 13th, additional investigation was conducted, and the misconduct listed above

had been confirmed. *Id.* Apparently recalling Mr. Cavanaugh's misstatement about Sergeant Moser, Ms. Kingsley also noted that Mr. Ostheller had contact with law enforcement after the incident, but that Mr. Ostheller had not admitted to any contact with law enforcement. CP at 60-62

Mr. Ostheller now argues that Mr. Cavanaugh deliberately made false statements to Ms. Kadrmas and Ms. Kingsley, and that those statements caused Mr. Ostheller to be fired. *Appellants' Opening Brief* ("AOB") at pp. 14-15. Mr. Ostheller alleges that these opinions/statements were defamatory and also constituted intentional interference with his expectancy of continued employment with the County.

III. LEGAL ARGUMENT

A. Standard of Review

On an appeal from summary judgment, this Court engages in the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860-61, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993)). The Court's standard of review is *de novo*. *Id.*

Accordingly, summary judgment is appropriate if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). This Court construes all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) (citing *Atherton Condo. Apartment-Owners Ass’n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990)). But “bare assertions that a genuine material [factual] issue exists will not defeat a summary judgment motion in the absence of actual evidence.” *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000).

B The Trial Court Correctly Decided that Mr. Ostheller Cannot Establish a *Prima Facie* Case of Defamation

As a threshold matter, Mr. Ostheller fails to correctly identify the elements of a defamation claim, suggesting that he must prove the statement was (1) false; (2) defamatory; and (3) published.¹ The actual elements that must be proven by Mr. Ostheller are that the statement was:

¹ In support of this standard, Plaintiff cites to *Taskett v. King Broadcasting*, 86 Wn.2d 439, 458, 546 P.2d 81 (1976). What Plaintiff fails to note is that he cites to a portion of the concurring opinion in *Taskett*, in which the concurring judge is discussing the history of common law defamation, which has since been changed by subsequent case law. *Id.*

(1) false and defamatory; (2) not privileged; (3) published; and (4) resulted in damage to the plaintiff. *See Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005); *Bender v. City of Seattle*, 99 Wn.2d 582, 599, 664 P.2d 492 (1983). Mr. Ostheller fails to even discuss two of these elements, publication and damages, which proves fatal to his claim as highlighted below.

Further, to defeat a summary judgment motion on a defamation claim, a plaintiff must present sufficient evidence to raise a genuine issue of material fact as to each element of the claim. *See Mohr, supra*. Mr. Ostheller must present both the trial court and this court with “specific, material facts” to support each element of a defamation claim; it is not enough for a plaintiff to raise a genuine issue of material fact as to one element, he must do so individually for each element. *LeMon v. Butler*, 112 Wn.2d 193, 197, 770 P.2d 1027 (1989). Mr. Ostheller has not done so in this case.

1. There Is No Evidence in the Record To Prove that the City of Burlington Was Bound by the Speakers of the Allegedly Defamatory Statements

As an initial matter, the Court must examine whether the City made a false and defamatory communication. Because the only named defendant in this action is a municipal entity, Mr. Ostheller has the burden

of proving that the individuals accused of making defamatory statements were agents of the entity, such that their statements or actions could bind the City. It is well-settled that an entity can only be bound by statements made by those authorized to speak on its behalf. *Crest Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 771, 115 P.3d 349, 355 (2005) (“Statements made by a party’s agent are not admissible unless the speaker had authority to make such a statement.”). Further, “it is not enough that the principal is willing or permits the agent to speak. The speaking must be done in the capacity of agent[.] . . . If [the agent’s] authority is to make statements only to particular persons or upon a particular occasion, the principal is not affected by statements made by him to other persons or upon other occasions.” Restatement (Second) of Agency, sec. 288 cmt. c (1958), quoted in *Hartman v. Port of Seattle*, 63 Wn.2d 879, 885, 389 P.2d 669 (1964), *overruled in part on other grounds* by *Nordstrom v. White Metal Rolling & Stamping Corp.*, 75 Wn.2d 629, 453 P.2d 619 (1969).

In the trial court, Mr. Ostheller did not clearly identify who was alleged to have made defamatory statements about him. Rather, he vaguely alleged that “agents” of the City made certain statements. As a result, the City argued that no speaking agent had been clearly identified,

and therefore, Mr. Ostheller had failed to demonstrate that anyone binding the City had made any defamatory statements. *See generally* CP 34-35.

On this appeal, it appears that the only “agent” alleged to have defamed Mr. Ostheller is City of Burlington Parks and Recreation Director Loren Cavanaugh. However, in order to succeed on any of his claims, Mr. Ostheller must first prove that Mr. Cavanaugh was a speaking agent for the City at the time he made the allegedly defamatory statements, and could therefore bind the City with such statements.

Whether someone is a speaking agent for an entity is determined on a case by case basis. The “managing-speaking” agent test has its roots in agency and evidence law. The well established test is a flexible one under the circumstances of each case. *Wright by Wright v. Group Health Hosp.*, 103 Wn.2d 192, 201, 691 P.2d 564, 569-70 (1984); *compare Young v. Group Health Coop.*, 85 Wn.2d 332, 534 P.2d 1349 (1975) (doctor had “speaking authority” for hospital) *and Griffiths v. Big Bear Stores, Inc.*, 55 Wn.2d 243, 347 P.2d 532 (1959) (manager for supermarket had “speaking authority”) *with Kadiak Fisheries Co. v. Murphy Diesel Co.*, 70 Wn.2d 153, 422 P.2d 496 (1967) (maintenance manager for commercial fishing company did not have “speaking authority”). *See also Vannoy v. Pacific Power & Light Co.*, 59 Wn.2d 623, 636, 369 P.2d 848 (1962); *Hodgins v.*

Oles, 8 Wn. App. 279, 282, 505 P.2d 825 (1973); 5A K. Tegland, Wash. Prac., *Hearsay* § 349 (2d ed. 1982). Mr. Ostheller fails to present any facts demonstrating that Mr. Cavanaugh was a speaking agent for the City at the time he made the allegedly defamatory statements about him.

Furthermore, if Mr. Ostheller is alleging that individuals other than Mr. Cavanaugh made defamatory statements, such allegation must fail because there is no way to identify whether such unnamed individuals are speaking agents for the City.

2. *Alleged Statements by Loren Cavanaugh*

Even if Mr. Cavanaugh was construed to be a speaking agent for the City, the Court must next determine whether he made any defamatory statements. Whether a statement or communication is capable of a defamatory meaning is generally an issue of law for the trial court to decide. *Swartz v. World Pub. Co.*, 57 Wn.2d 213, 215, 356 P.2d 97 (1960).

On appeal, Mr. Ostheller focuses on a single alleged statement by Mr. Cavanaugh. Mr. Ostheller claims that Mr. Cavanaugh defamed him by mistakenly reporting to the County that Mr. Ostheller was still present at the Senior Center when then-Sergeant Moser responded to the 911 call. However, Mr. Cavanaugh had also completed a written statement

immediately after the incident on November 5, 2008, in which he correctly identified that Sergeant Moser did not arrive until after Mr. Ostheller had left the premises. CP at 161. Skagit County was in possession of his incident report during its investigation. Thus, the County was in the position to evaluate the facts of the situation and determine the truth or falsity of Mr. Cavanaugh's statement. Accordingly, Mr. Ostheller cannot establish that the comment presented a "substantial danger" to his reputation. Under such circumstances, Washington courts hold that there is no defamation. *See Wood v. Battle Ground Sch. Dist.*, 107 Wn. App. 550, 27 P.3d 1208 (2001) (quoting *Ernst Home Ctr., Inc. v. United Food & Commercial Workers Int'l Union Local 1001*, 77 Wn. App. 33, 44, 888 P.2d 1196 (1995)).

3. Even if the Alleged Statement Was False, It Was Not Published

In order to sustain a defamation claim, Mr. Ostheller must also establish that the alleged defamatory statement was published to a third party. In the instant matter, Mr. Ostheller's claims must fail because he cannot establish that the allegedly defamatory statement was "published." *See Lunz v. Neuman*, 48 Wn.2d 26, 33-34, 290 P.2d 697 (1956).

Indeed, any statements made by Mr. Cavanaugh to Ms. Kadrmas, Ms. Kingsley or Mr. Holloran, are analogous to intra-corporate

communications which are not considered published for purposes of a defamation claim when the statements are made within the “limits of their employment.” *Doe v. Gonzaga Univ.*, 143 Wn. at 702, 24 P.3d 390 (citing *Prins v. Holland-North Am. Mortgage Co.*, 107 Wn. 206, 208, 181 P. 680 (1919)). Washington courts consistently hold that communications which are intra-corporate communications are not “published” for the purposes of a defamation claim because the entity is essentially communicating with itself. *See id.* at 701. Communications made only among corporate personnel as part of the ordinary course of employment are privileged and not “published” for purposes of defamation. *See Doe v. Gonzaga University*, 99 Wn. App. 338, 348, 992 P.2d 545 (2000), *reversed on other grounds*, *Gonzaga University v. Doe*, 536 U.S. 273, 122 S. Ct. 2268 (2002); *Woody v. Stapp*, 146 Wn. App. 16, 21, 189 P.3d 807 (2008); *Prins v. Holland-North America Mortg. Co.*, 107 Wn. 206, 208, 181 P. 680, 680 (1919). This rule shields individual employees as well as the corporation itself. *See Doe*, 99 Wn. App. at 348 (noting that, “after all, the corporation can speak to itself only through the individuals who work for it.”)

Further, although the privilege is not absolute, to establish liability Mr. Ostheller must prove the City made the statement with actual malice or that the statement was made outside the employee’s normal course of

business. *Id.* at 702-03. Actual malice means the statement is made “with knowledge of its falsity or with reckless disregard of its truth or falsity.” *Id.* at 703.

This privilege should be extended to the communication at issue in the instant matter because the statement was made by an employee of the City to employees of the County in the course and scope of employment, during an investigation, and is analogous to intra-corporate communication by virtue of the Interlocal Agreement between the two entities. Although Skagit County and the City of Burlington are separate public entities, the two municipalities had established a relationship in which the County would provide employees to work at the City of Burlington’s Senior Center, and the City would pay the County for those services. The alleged statements made between the two entities were made in the context of that employment relationship. It is the intent of the privilege to protect communications in such a context. *See id.* To hold otherwise would be nonsensical, and would create an atmosphere where the City could not communicate legitimate employee concerns to the County, about employees working on its property, without the fear of being sued for defamation. The City submits that this is exactly the situation where the privilege should apply.

Additionally, Mr. Ostheller cannot establish that the City of Burlington acted with actual malice in making any statements related to the incident that preceded Mr. Ostheller's termination from Skagit County, or that any of the statements were made outside the scope of City employees' business. Accordingly, he does not present any exception to the application of the privilege in his case. As a result, this Court should find that the statements were not published, and the defamation claim must fail.

4. The Alleged Defamatory Statement Was Privileged for Other Reasons

Similarly, as discussed in the context of intra-corporate communication, it is well-settled in Washington that a defendant is not liable for defamation when the communication is "privileged." A privileged communication occurs when an otherwise defamatory statement is shared with a third person who "has a common interest in the subject and is reasonably entitled to know the information." *Pate v. Tyee Motor Inn, Inc.*, 77 Wn.2d 819, 820-21, 467 P.2d 301 (1970) (citing *Ward v. Painters' Local Union No. 300*, 41 Wn.2d 859, 866, 252 P.2d 253 (1953)).

Here, any statements by Mr. Cavanaugh were made for the purpose of sharing relevant information with individuals at Skagit County who had

a common interest in knowing the information. The statements were made for the purpose of providing relevant facts to the County to explain what had happened between Mr. Ostheller and Mr. Brown at the Senior Center, and why the City of Burlington no longer wanted Mr. Ostheller on its property. It is irrelevant whether Sergeant Moser had arrived before or after Mr. Ostheller was escorted from the building because that fact does not change that the City of Burlington no longer wanted Mr. Ostheller to work at the Senior Center. Mr. Cavanaugh made statements about Mr. Ostheller in the course of an internal investigation by the entity that directly employed him, they were provided for the common purpose of illuminating such factual information, and therefore were not published statements. As a result, Mr. Ostheller's claims must fail.

5. *Defamation by Implication*

To the extent that Mr. Ostheller continues to allege that the City defamed him by implication rather than through specific defamatory statements, as he did before the trial court, that argument must also fail. To satisfy the falsity prong of a defamation claim, a plaintiff must show that the statement was probably false or left "a false impression due to omitted facts." *Yeakey v. Hearst Communications, Inc.*, 156 Wn. App. 787, 792, 234 P.3d 332 (2010) (citing *Mohr v. Grant*, 153 Wn.2d 812,

822, 108 P.3d 768 (2005)). However, a plaintiff may not base a defamation claim on facts that are true but have a negative implication. *Lee v. Columbian, Inc.*, 64 Wn. App. 534, 538, 826 P.2d 217 (1991). The “defamatory character of the language must be apparent from the words themselves.” *Id.* at 538. The relevant concern here is whether the statement results in a “provably false impression contradicted by the inclusion of omitted facts.” *Id.*

Defamation by implication occurs when “the defendant juxtaposes a series of facts so as to imply a defamatory connection between them, or creates a defamatory implication by omitting facts.” *Mohr*, 153 Wn.2d at 823 (quoting Prosser and Keeton on the Law of Torts § 116, at 117 (W. Page Keeton ed., 5th ed. 1984 & Supp. 1988)). However, Washington courts do not recognize claims of defamation by implication through juxtaposition of truthful facts. *Yeakey*, 156 Wn. App. 787, 234 P.3d 332. This is distinguished from a situation in which material facts are omitted and that omission results in a provably false impression. *Mohr*, 153 Wn.2d at 827.

In the instant matter, Mr. Ostheller has not alleged that any material facts were omitted by Mr. Cavanaugh during the course of the investigation into his conduct. Rather, he appears to allege

Mr. Cavanaugh created a false impression of Mr. Ostheller by stating that he was previously involved in an altercation with Paul Tingley and by mistakenly stating that he had contact with Sergeant Moser. However, the County also had the opportunity to speak with Mr. Ostheller, who provided his own evidence in response to the allegations made against him, and the opportunity to review written statements which made clear that Mr. Ostheller did not have contact with Sergeant Moser. Accordingly, there was no defamation. *See, e.g., Yeakey, supra.*

6. *Mr. Ostheller Is Unable To Establish Fault or Damages*

Finally, in order to make a *prima facie* case of defamation, the inquiry regarding the “fault” element rests on whether the plaintiff is a private individual or a public official or figure. *Bender*, 99 Wn.2d at 599, 664 P.2d 492. If the plaintiff is a private individual, as is the case here, the negligence standard of fault applies. *Id.* Mr. Ostheller must establish negligence by a preponderance of the evidence. *Id.* Accordingly, Mr. Ostheller must prove that the City “knew or, in the exercise of reasonable care, should have known that the statement was false or would create a false impression in some material way.” *Maison de France, LTD., v. Mais oui!, Inc.*, 126 Wn. App. 34, 44, 108 P.3d 787 (2005) (quoting *Vern Sims Ford, Inc. v. Hagel*, 42 Wn. App. 675, 680, 713 P.2d

736 (1986). Mr. Ostheller must establish that “but-for” the defendant’s alleged wrongful conduct; he would not have suffered damages. *Mark v. Seattle Times*, 96 Wn.2d 473, 635 P.2d 1081 (1981). He cannot do so here.

In this case, Mayor Brunz shared with Ms. Kadrmas and Mr. Holloran that due to Mr. Ostheller’s behavior during his confrontation with Mr. Brown, and due to safety concerns for his employees, Mr. Ostheller was no longer welcome at the Senior Center. At no time did the Mayor make any false statements about why he did not want the Mr. Ostheller on City property; rather, he reported what had been told to him by the City’s employees – that Mr. Ostheller had been involved in a previous altercation with Mr. Tingley and that his employees were afraid of Mr. Ostheller. Mayor Brunz had no reason to believe that the report of the previous incident was false or that his employees were lying about the fact that they were scared of Mr. Ostheller. *Brunz Dec.* at ¶ 6. CP at 150.

Likewise, while Mr. Cavanaugh mistakenly informed Ms. Kadrmas that Mr. Ostheller had been contacted by then-Sergeant Moser, Ms. Kadrmas was also in the possession of Mr. Cavanaugh’s written statement that correctly reflected that Mr. Ostheller had left the premises before Sergeant Moser arrived.

Significantly, it is clear that Mr. Ostheller was terminated for reasons other than his alleged contact with Sergeant Moser. While his termination letter does note that Mr. Ostheller failed to mention he had contact with law enforcement (which did not actually occur), the letter also clearly sets out the bases for his termination, which constitute specific policy violations. *See* CP at 60-62. These are the same bases for termination relayed to Mr. Ostheller at the beginning of the investigation, prior to the County ever hearing about law enforcement contact. *See* CP at 60-62, 111-12 and 113-15. As a result, Mr. Ostheller cannot demonstrate that “but-for” Mr. Cavanaugh’s comments, or Mayor Brunz’s comments, he would not have been terminated from employment.

Further, Mr. Ostheller claims that the alleged defamatory comments have damaged his business reputation. There is no evidence to support this position. Indeed, prior to being employed by Skagit County, Mr. Ostheller worked as an independent contractor for a company called TruckVault. *See* CP at 134-35 and 136-43. During his employment at the Senior Center, Mr. Ostheller continued to work for TruckVault. *Id.* More significantly, since his termination from Skagit County, he has continued to receive work from TruckVault as an independent contractor. *Id.* Under

these circumstances, Mr. Ostheller cannot prove his business reputation has been damaged.

C. Mr. Ostheller Cannot Establish a Claim for Intentional Interference with a Business Expectancy

For the following reasons, Mr. Ostheller's intentional interference claim must also fail. Mr. Ostheller has alleged the following with respect to his intentional interference claim: (1) as an employee of Skagit County, Mr. Ostheller claims he had a reasonable business expectancy in a system of progressive discipline as defined by the personnel policies of Skagit County; (2) that the City of Burlington, through Loren Cavanaugh, was fully apprised of Mr. Ostheller's business relationship and business expectancy with Skagit County; and (3) that Mr. Cavanaugh's statements and actions were designed to intentionally induce and cause Skagit County to terminate its relationship with Mr. Ostheller. *See* AOB at pp. 26-31. As with his claim of defamation, Mr. Ostheller fails to set forth a *prima facie* case of intentional interference with a business expectancy, or to present any genuine issue of material fact necessary to preclude summary judgment in favor of the City.

To survive a motion for summary judgment on an intentional interference claim, Mr. Ostheller must prove: (1) the existence of a valid contractual relationship or business expectancy; (2) that defendant had

knowledge of that relationship; (3) that defendant engaged in intentional interference inducing or causing breach or termination of the relationship or expectancy; (4) that defendant interfered for an improper purpose or used improper means; and (5) that plaintiff suffered resulting damages. *Woody v. Stapp*, 146 Wn. App. 16, 23, 189 P.3d 807 (2008); *Commodore v. Univ. Mech. Contractors, Inc.*, 120 Wn.2d 120, 138, 839 P.2d 314 (1992). Failure to plead sufficient facts supporting any elements will lead to dismissal. *See Havsy v. Flynn*, 88 Wn. App. 514, 518-19, 945 P.2d 221 (1997). “[A] cause of action for tortious interference arises from either the defendant’s pursuit of an improper objective of harming the plaintiff or the use of wrongful means that in fact cause injury to plaintiff’s contractual or business relationships.” *Pleas v. City of Seattle*, 112 Wn.2d 794, 804, 774 P.2d 1158 (1989). Such a claim is established: “when interference resulting in injury to another is wrongful by some measure beyond the fact of the interference itself.” *Id.* (citing *Top Service Body Shop, Inc v. Allstate Ins. Co.*, 582 P.2d 1365, 1371, 283 Or. 201 (1978)).

Mr. Ostheller improperly relies solely on the allegations in his own pleadings in an effort to defeat summary judgment in favor of the City and support his own summary judgment motion. However, it is well established that a nonmoving party may not rely on allegations made in his

own pleadings. *See Young*, 112 Wn.2d at 225, 770 P.2d 182. Here, Mr. Ostheller has not set forth any evidence outside of his own uncited accusations that would support any of the elements of a *prima facie* case.

1. Mr. Ostheller Was an At-Will Employee with Skagit County

As a substantive matter, Mr. Ostheller cannot establish a legitimate expectancy of continued employment with Skagit County, nor can he establish a legitimate expectancy in the use of progressive discipline, because he was not a contracted employee. On a tortious interference claim, a claimant is required to show a “relationship between parties contemplating a contract.” *Scymanski v. Dufault*, 80 Wn.2d 77, 84-85, 491 P.2d 1050 (1971). Mr. Ostheller must show more than “merely wishful thinking.” *Caruso v. Local 690*, 33 Wn. App. 201, 208, 653 P.2d 638 (1982), *rev'd on other grounds*, 100 Wn.2d 343 (1983). In his brief, Mr. Ostheller completely ignores the fact that he was an at-will employee, and did not have an employment contract or any expectation of continued employment with the County. *See Jolley v. Blueshield*, 153 Wn. App. 434, 449, 220 P.3d 1264 (2009) (finding that the court properly dismissed the claim of an employee who was an at-will employee holding that an at-will employee can be terminated “for no cause, good cause or even cause morally wrong.”).

The Washington case *Woody v. Stapp*, is instructive here. *See* 146 Wn. App. 16, 189 P.3d 807 (2008). In that case, Plaintiff Woody was an at-will employee who sued his co-workers after they provided statements to their employer in the course of an investigation into his alleged inappropriate conduct. *Id.* Woody sued his co-workers for defamation and tortious interference. *Id.* On appeal, the Court held that Woody failed to show that his co-workers made any false statements with the intent to cause him to be terminated. *Id.* at 22-23. The Court explained that “[g]enerally, at-will employees do not have a business expectancy in continued employment.” *See id.* at 24 (citing *Raymond v. Pac. Chem.*, 98 Wn. App. 739, 747, 992 P.2d 517 (1999), *rev’d on other grounds*, *Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 20 P.3d 921 (2001)). “Considering [the Plaintiff’s] at-will status, he fails to establish either causation for his discharge or any damages flowing from his discharge.” *Id.* at 24. The same reasoning is persuasive in the instant matter.

Similar to *Woody*, the statements made by Mayor Brunz and Mr. Cavanaugh were made in the context of an internal investigation by his employer, and were not the sole basis for Mr. Ostheller’s termination. Mr. Ostheller was terminated for engaging in inappropriate behavior, in violation of County policy, as was Plaintiff Woody. *See id.* at 23.

Likewise, Mr. Ostheller “fails to show evidence of purpose or intent to interfere with his employment.” *See id.* Additionally, Mr. Ostheller was an “at-will” employee of Skagit County, he was not a party to any employment contract, nor was he a party to any other written document that changed his at-will employment status. In fact, Skagit County has made clear that its Personnel Policies and Procedures Manual do not constitute a contract with employees, nor do the policies and procedures promise continued employment. The Manual “contains general guidelines concerning the recruitment, selection, employment, transfer, removal, discipline and welfare of employees, and other aspects of County employment.” CP at 73-91. Further, “[i]t is not the intent of this manual to establish promises of specific treatment.” *Id.* In addition, the Manual informs employees that the County reserves full discretion to make any and all disciplinary decisions it determines is necessary. In Washington, an “at-will” employee may quit or be fired for any reason. *Danny v. Laidlaw Transit Services, Inc.*, 165 Wn.2d 200, 207, 193 P.3d 128, 131 (2008); *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 935, 913 P.2d 377 (1996) (emphasis added).

The City anticipates that in reply to this brief, Mr. Ostheller will attempt to distinguish *Woody v. Stapp* as he did before the trial court.

There, Mr. Ostheller attempted to sidestep the legal principles in *Woody* by asserting first that the law allows for wrongful discharge claims, and then proposed that the Court adopt a new balancing test. Such an argument would be nonsensical given that Mr. Ostheller did not bring a wrongful discharge claim in this case and did not provide any legal authority for his claim, and he fails to rebut the case law established by Washington courts. Likewise, the balancing test that Mr. Ostheller proposed to the trial court appeared to have been made up out of thin air, and is completely without legal support. CP at 320.

As the *Woody* court properly held, in the absence of something that establishes a continuing right to employment, an at-will employee cannot establish a valid contractual or business expectancy to survive summary judgment on an intentional interference with a business expectancy claim.

Further, Mr. Ostheller's allegations that the County failed to follow its own discipline policies and procedures is without basis, and is really of no import since the County is not a party to this lawsuit. Moreover, the County has made clear that discharge is a potential consequence at each level of discipline, and that it reserves the right to discharge employees for conduct not specified on the list contained in the Manual. *See* CP at 179, Section 12.2. The Manual also states that progressive discipline will be

followed unless individual circumstances merit otherwise. *Id.* Significantly, the policy denotes certain infractions justifying discharge. Mr. Ostheller was charged with four infractions, two in the category justifying discharge. *See* CP at 60-62 and 179, Section 12.2.

Skagit County made an independent decision to terminate Mr. Ostheller in lieu of relocating him to another worksite, or providing him with a different position. There is no dispute that Mr. Ostheller did not have a contract with Skagit County, that he was an at-will employee, and that he could be terminated at any time. For all of these reasons, Mr. Ostheller cannot establish a valid expectancy in continued employment with the County.

2. Loren Cavanaugh's Statements

Likewise, Mr. Ostheller fails to establish that Loren Cavanaugh intentionally interfered with a business expectancy of Mr. Ostheller or that he did so with an improper purpose. Mr. Cavanaugh provided a written statement on November 5, 2008. In the statement, he explained what he knew of the incident. Nearly three months later, Mr. Cavanaugh was interviewed by Ms. Kadrmas and Ms. Kingsley about the incident. Due to the passage of time, Mr. Cavanaugh mistakenly reported that Mr. Ostheller was still at the Senior Center when then-Sergeant Moser

arrived in response to Mr. Cavanaugh's 911 call. However, his misstatement was not made intentionally for any nefarious purpose, and was not made by any improper means, and Mr. Ostheller points to nothing other than his own speculation to the contrary.

Interference must also be "wrongful" to sustain a cause of action for intentional interference. Mr. Ostheller may show such interference is wrongful "by reason of a statute or other regulation, or a recognized rule of common law, or an established standard of trade or profession." *Pleas*, 112 Wn.2d at 804. Not only does Mr. Ostheller need to prove that the City intentionally interfered, he must show that "defendant had a 'duty of non-interference, i.e., that he interfered for an improper purpose . . . or used improper means" *Id.* (citing *Straube v. Larson*, 287 Or. 357, 361, 600 P.2d 371 (1979)). Mr. Ostheller has not met that standard in this matter.

3. *Mr. Ostheller Has Not Demonstrated that the City Engaged in Intentional Interference of that Relationship*

Mr. Ostheller's claim must also fail because he has not demonstrated that the City engaged in any intentional interference with a business expectancy. The City, through its Mayor and department heads, exercised its discretion in handling the incident at the Senior Center, and made an independent determination that Mr. Ostheller was not welcome at

the Senior Center due to his role in the altercation with Mr. Brown. Further, the City responded to the County's inquiries during the course of its own independent investigation into Mr. Ostheller's conduct and provided information to the County to assist the County in making its determination whether to retain Mr. Ostheller. Mr. Ostheller simply has not set forth any relevant evidence to support his claim that the City engaged in intentional interference.

4. The City of Burlington Did Not Interfere with an Improper Purpose or with Improper Means

As with the previous element, Mr. Ostheller fails to cite to any admissible evidence or legal authority to support his argument that the City interfered with his employment with an improper purpose or improper means. Instead he speculates that Mr. Cavanaugh purposefully embellished his account of the incident to induce a separation of employment between Mr. Ostheller and the County. Nothing in the record supports such speculation, nor can such speculation call into question any material fact to defeat summary judgment in favor of the City.

5. Mr. Ostheller Has Not Shown that He Suffered Any Damages

Finally, Mr. Ostheller has failed to demonstrate that he suffered any damages as a result of his termination. Further, he has failed to rebut the City's evidence that Mr. Ostheller worked and continues to work as an

independent contractor with TruckVault. For this reason alone, his claim must fail.

IV. CONCLUSION

Mr. Ostheller was fired from his employment at Skagit County after he violated County policies, used profanity, engaged in a physical altercation while at work, and behaved in such a manner as to embarrass the County. His behavior was wholly inappropriate, and was frightening to City employees. For the safety of City employees and the general public, Mr. Cavanaugh appropriately reported the incident to Mr. Ostheller's supervisor, and made the decision to preclude Mr. Ostheller from returning to City property. In cooperation with the County's internal investigation, Mr. Cavanaugh provided factual information about the incident. He did not engage in a negative campaign against Mr. Ostheller or intentionally lie to County officials in an effort to terminate Mr. Ostheller's employment. Under these circumstances, even when the facts are viewed in a light most favorable to Mr. Ostheller, Mr. Ostheller is simply unable to establish any genuine issues of material fact with respect to his claims of defamation and intentional interference with a business expectancy. Accordingly, the City respectfully requests that this Court affirm Judge Meyer's Order granting the City's Motion for

Summary Judgment and dismissing all of Mr. Ostheller's claims against it
with prejudice.

RESPECTFULLY SUBMITTED this 29th day of June, 2012.

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CERTIFICATE OF SERVICE

I, Karen L. Yun, hereby certify that on the date below I caused the foregoing **Respondent City of Burlington's Response Brief** to be served upon each and every attorney of record as noted below:

Via Federal Express

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I certify under penalty of perjury under the laws of the State of Washington that the above is correct and true.

Executed in Seattle, Washington, on June 29, 2012.



Karen L. Yun
Paralegal/Legal Assistant to Sarah S. Mack