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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 39263-1-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

WARREN YEAKEY,

Respondent,

v.

HEARST COMMUNICATIONS, INC., a Delaware corporation, and
TEXAS NEWSPAPER, INC., a Delaware corporation, as General Partners
of HEARST NEWSPAPERS PARTNERSHIP, L.P., owner of and DBA
SEATTLE POST-INTELLIGENCER, and ANDREA JAMES and "JOHN
DOE" JAMES, a married couple, and JOHN IWASAKI and "JANE DOE"
IWASAKI, a married couple,

Petitioners.

RESPONDENT'S OPENING BRIEF

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ISSUES PRESENTED

1. Whether Washington recognizes a cause of action for defamation by implication through the juxtaposition of a series of facts so as to imply a defamatory connection between them.
2. Whether Defendants' communication implies defamatory meaning.
3. Whether the defamatory meaning implied by Defendants' communication is negated by contradictory statements within the article.
4. Whether Defendants' communication is non-actionable opinion or privileged.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On November 18, 2006, Defendant Petitioners (hereafter collectively referred to as Hearst Corp) devoted the majority of the front page of the *Seattle Post-Intelligencer* and several internal pages of the first section to coverage of the fatal collapse of a Bellevue construction crane. CP 11-16, Ex. F 1, 3.¹ Such coverage included a large headline proclaiming, “*Operator in crane wreck has history of drug abuse,*” a large color photo of the crane wreckage, references to the man killed in the collapse, the criminal history of the crane operator, and the perceived gaps

¹ All Ex. ___ citations are to the Appendix tab letters and page numbers filed with Hearst Corp's Motion for Discretionary Review.

in safety controls at the crane construction site. CP 11-16, Ex. F 1, 3.

On November 17, 2008, Plaintiff Respondent crane operator (hereafter referred to as Yeakey), filed suit against Hearst Corp claiming four causes of action arising from the publication of the article: defamation by implication, false light invasion of privacy, negligent infliction of emotional distress, and outrage. CP 1-19.

Before answering the complaint, Hearst Corp moved for dismissal under CR 12(b)(6), or in the alternative for summary judgment under CR 56. CP 20-48. The Hearst Corp alleged three grounds for its motion: 1) as a matter of law, the element of falsity could not be proved; 2) the complained of communication carried no defamatory meaning; and, 3) any defamatory implications carried by the communication were negated by contradictory statements within the article. CP 34-40.

Responsive briefing and oral argument were confined to these three grounds raised by Hearst Corp's motion. CP 75-86, RP 1-51. No extraneous materials or facts were presented to the trial court in the briefs or during oral argument. RP 1-51. After consideration of the briefing and oral argument, the trial court denied Hearst Corp's motion on April 7, 2009. CP 103.

Hearst Corp immediately moved for reconsideration of the denial. CP 104-125. Hearst Corp's motion was premised on the following

grounds: 1) as a matter of law, falsity cannot be proved by juxtaposition of facts; 2) any false defamatory implications raised by the article were non-actionable opinion; 3) the Fair Reporting privilege rendered Hearst Corp immune from liability; and, 4) the First Amendment rendered Hearst Corp immune from liability. CP 113, 116, 118-119. Again, no extraneous materials or facts were presented to the trial court in any briefing by the parties. Following consideration of the briefing, but without oral argument, the trial court denied Hearst Corp's motion. CP 249. Hearst Corp's Motion for Discretionary Review immediately followed. CP 244-248.

Following consideration of the briefing and oral argument of the parties, review was granted on July 8, 2009.

Additionally, parties agree that the complained of communication does not contain false statements or material omissions of fact. Parties further agree that Yeakey's prior criminal history is a matter of public record. CP 78, RP 18-19, CP 226-227.

Despite this agreement, the juxtaposition of Yeakey's criminal history with the massive front page headline, the large photo of the collapsed crane, the photo of the deceased Mr. Ammon, the graphic and bullet points contending "*GAPS IN SAFETY CONTROLS*," and the other statements within the article creates a false implication that 1) drug use

was a factor in the crane collapse which caused Mr. Ammon's death; 2) operator error was a factor in the crane collapse causing Mr. Ammon's death; and/or 3) Mr. Yeakey's failure to perform daily inspections or his faulty performance of the inspections was a factor in the crane collapse causing Mr. Ammon's death.

Hence, while the parties appear to agree with the factual allegations contained within the complaint, the parties disagree that such facts give rise to a cause of action.

STANDARD OF REVIEW

Here, the trial court denied Hearst Corp's motions for Dismissal and Reconsideration. CP 103, 249. While the trial court did not provide grounds for its rulings, implicit in those rulings was a finding that Yeakey's complaint did set forth facts upon which the court could sustain a claim for relief. This is so because dismissal of a claim under CR 12(b)(6) is only appropriate if it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle plaintiff to relief. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005); *Haberman v. WPPSS*, 109 Wn.2d 107, 120, 744 P.2d 254 (1987).

Because a plaintiff's factual allegations are presumed true for purposes of a CR 12(b)(6) motion, the only relevant facts in this case are the indisputable facts stated in the complaint. *Burton*, 153 Wn.2d at 422.

Here, because no extraneous materials or facts were presented to the trial court in any briefing or during oral argument, the motion was properly decided as a motion to dismiss under CR 12(b)(6). It is only in situations where the parties rely upon additional materials and facts outside of the complaint, or where the court deems it necessary to consider extraneous facts to decide the motion, that the CR 12(b)(6) motion to dismiss is converted to a motion for summary judgment under CR 56. CR 12(b); *Haberman*, 109 Wn.2d at 121.

Additionally, all responsive briefing and oral argument were limited to those grounds proffered by Hearst Corp. Hearst Corp elected to reserve any argument as to the remaining elements of defamation (fault and damages) and to any other defenses for a later date or motion. CP 34, note 4. As such, there can be no doubt that the motions were decided under the applicable standards of a CR 12(b)(6) motion and not under the alternative CR 56 standards for summary judgment.

Wherefore, this Court reviews the matter *de novo* to determine whether it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle plaintiff to relief.

Burton, 153 Wn.2d at 422; *Haberman*, 109 Wn.2d at 120.

**WASHINGTON LAW RECOGNIZES DEFAMATION BY
IMPLICATION**

Hearst Corp claims that falsity and defamatory meaning cannot be derived from true statements. *Petitioner's Opening Brief (herafter POB)* 10-14. Hearst Corp repeatedly points to *Lee v. Columbian, Inc.*, 64 Wn.App. 534 (1991) and *Auvil v. CBS "60 Minutes,"* 67 F.3d 816 (9th Cir. 1995) to support this proposition. *Id.* From *Lee*, Hearst Corp cites the following:

. . .Defamatory meaning may not be imputed to true statements. The defamatory character of the language must be apparent from the words themselves. Washington courts are bound to invest words with their natural and obvious meaning and may not extend language by innuendo or by the conclusions of the pleader. Even if language is ambiguous, resolution in favor of a disparaging connotation is not justified. 64 Wn.App. at 538, *POB* 11.

From *Auvil*, Hearst Corp cites as follows:

[Plaintiff's] attempt to derive a specific, implied message from the broadcast as a whole and to prove the falsity of that overall message is unprecedented and inconsistent with Washington law. No Washington court has held that the analysis of falsity proceeds from an implied, disparaging message. It is the statements themselves that are of primary concern. 67 F.3d at 822, *POB* 11-12.

Reliance upon these cases is misplaced. Both *Lee* and *Auvil* very

succinctly state the law as it existed in 1991 and 1995 respectively.

Without doubt it is true that prior to 2005, Washington courts did not recognize defamation by implication as a viable cause of action. As these cases made clear, it was the words themselves that were either false or true, defamatory or not.

However in *Mohr v. Grant*, the Supreme court expanded the rule of law articulated cases such as *Lee* and *Auvil* and recognized the viability of defamation by implication. 153 Wn.2d 812, 108 P.3d 768 (2005). The issue in *Mohr*, as framed by the Court itself, was whether true statements could create a false impression and result in defamation by implication. 153 Wn.2d at 820-1. This was a direct departure from the defamation analysis announced in previous cases such as *Lee* and *Auvil*. The Court in *Mohr* established that Washington does recognize defamation by implication and that such defamation could occur in two separate factual patterns. 153 Wn.2d at 823. The Court stated, “**Defamation by implication occurs where ‘the defendant juxtaposes a series of facts so as to imply a defamatory connection between them, or creates a defamatory implication by omitting facts.’**” *Id.*, (quoting *PROSSER AND KEETON ON THE LAW OF TORTS* 116, 117 (W. Page Keeton ed., 5th ed. 1984, Supp. 1988)).

To support this departure from the then existent case law, the *Mohr*

court chronicled several cases in which the Court used implication language to look beyond the words of a communication to find a defamatory meaning. The Court cited *Chase v. Daily Record, Inc.*, 83 Wn.2d 37, 515 P.2d 154 (1973); *Taskett v. KING Broad. Co.*, 86 Wn.2d 439, 445, 546 P.2d 81 (1976); *Herron v. King Broad. Co.*, 112 Wn.2d 762, 768, 776 P.2d 98 (1989); and, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695 (1990). *Id.* at 823-826, and fn. 9.

In *Chase*, a port commissioner was asked to repay funds he received for a trip that he never took. *Chase* 83 Wn.2d at 38. When he learned that an article was to be published regarding the repayment request, Chase issued a statement explaining that he had not received any funds for a trip he did not take. *Id.* The article was printed, but it did not include Chase's statement. *Id.* Chase brought a defamation action against the publisher. *Id.* At trial, defendant prevailed on summary judgment as to the issues of falsity and fault and the Court of Appeals affirmed. *Id.* at 40. The Supreme Court reversed, finding evidence of falsity, not because the article omitted Chase's statement, but because "use of the word 'repayment' carries a possible implication of an improper receipt and use of public funds and subsequent repayment." *Id.* at 45.

In *Herron*, defendant published an article asserting that Herron, a county prosecutor, received roughly half of his campaign contributions

from bail bondsmen, when in fact the contributions from bondsmen formed a much smaller percentage of the total campaign contributions. 112 Wn.2d at 765. The trial court granted summary judgment for the defendant finding that no genuine question of fact was presented as to the issue of falsity. *Id.* at 767. Again, the Supreme Court reversed finding that although Herron did receive campaign contributions from bondsmen, the incorrect statement that Herron received half of his campaign contributions from bail bondsmen “added a distinct and separate implication that Herron had bargained away his ethics and integrity in exchange for campaign contributions” and/or “implied that Herron had taken a bribe.” *Id.* at 772, 774. Thus the Court in *Herron* found falsity based upon the article’s distinct implication that Herron’s acceptance of the campaign contributions connoted an ethical violation.

Additionally, the *Mohr* Court favorably cited *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695 (1990). *Mohr* 153 Wn.2d at fn. 9. The Court in *Milkovich* characterized the issue before it as “whether a reasonable factfinder could conclude that the statements in the [article] imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding.” *Milkovich*, 497 U.S. at 21. The Court answered this question affirmatively, stating, “[t]his is not the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer

was seriously maintaining that petitioner committed the crime of perjury. Nor does the general tenor of the article negate this impression.” *Id.* Again, the crux of the Court’s holding focused upon the Court’s impression that the article, when taken as a whole, implied a defamatory assertion of perjury beyond any statements found within the text of the article.

Hearst Corp is quick to point out that each of these cases cited by the *Mohr* court are distinguishable from the instant case. What Hearst Corp fails to note is that these cases are also distinguishable from the *Mohr* case itself. Prior to the *Mohr* case, defamation by implication did not exist as a cause of action in Washington. The *Mohr* court relied upon these named cases and the cases of other jurisdictions not as a reinforcement of the then existent defamation law, but as grounds for an expansion of the case law to now include defamation by implication. Thus the crucial determination is not whether the cases listed in *Mohr* are on all four legs with the instant matter, but rather did the *Mohr* court recognize defamation by implication as a viable cause of action and did the Court define defamation by implication to include instances where “the defendant juxtaposes a series of facts so as to imply a defamatory connection between them?” *Id.* at 823. Even a casual reading of *Mohr* reveals that the Court did recognize defamation by implication and did defined the

term to include Yeakey's theory of the instant case.

While the *Mohr* Court ultimately dealt with a case based upon defamation by factual omission and announced standards regarding such cases, given the Court's definition of defamation by implication, there can be no doubt that Washington law does indeed recognize defamation by implication based upon the juxtaposition of facts as a viable cause of action.

FALSITY AND SEPARATE HARM

Hearst Corp claims that defamation by implication cannot lie in the absence of a false statement or a material omission of fact. *POB* 10. Such is not the case. A defamation by libel plaintiff ordinarily must prove 1) falsity, 2) an unprivileged communication, 3) fault, and 4) damages. *Mohr*, 153 Wn.2d at 822; *Herron v. KING Broad. Co.*, 112 Wn.2d 762, 768, 776 P.2d 98 (1989). To satisfy the element of falsity, "plaintiff must show that the complained of statement is provably false, either because the statement is false **or because it leaves a false impression.**" *Mohr*, 153 Wn.2d at 825, (emphasis my own).

With respect to that falsity, Washington does not require a defamation defendant to "prove the literal truth of every claimed defamatory statement" or implication. *Id.* at 825, (quoting *Mark v. Seattle Times*, 96 Wn.2d 473, 494, 635 P.2d 1081 (1981)). Rather, a defendant

need only show that the statement or implication is substantially true or that the gist of the story, the portion that carries the “sting” is true. *Id.* The sting of a report or article is defined as the gist or substance of the communication when taken as a whole. *Id.* It is the Court, not the parties, that determines the sting of the article. *Id.* at 826.

In cases where there is a mix of both true and false statements or false implications, the false statements or implications “affect the ‘sting’ of a report only when ‘significantly greater opprobrium’ results from the report containing the falsehood than would result from the report without the falsehood.” *Herron*, 112 Wn.2d at 769 (quoting *Mark*, 96 Wn.2d at 496). Thus, more than simply showing the presence of a false statement or implication, the defamation plaintiff must show that the false statements or false implications caused harm distinct from the harm caused by the true portions of the communication. *Mohr*, 153 Wn.2d at 825.

Here, Hearst Corp’s article went into great detail chronicling Yeakey’s drug-related criminal history. The article also detailed Yeakey’s non-drug related history: a 2005 acquittal of two counts of child rape and convictions for domestic violence and soliciting a prostitute. Yeakey does not dispute that the article accurately detailed his criminal history. Such history is a matter of public record. Truly, the accurate reporting of his past criminal convictions is the “harm caused by the true portions of the

communication” and standing alone, it would not be actionable. *Id.*

Here, however, the article does not simply detail plaintiff’s prior criminal history; rather, it juxtaposes that history with the collapse of the crane, the death of Mr. Ammon and the following facts: 1) the company that erected the tower crane erects approximately 300 other cranes each year and was unaware of any other crane that had ever toppled; 2) the state does not require drug testing for crane operators prior to being hired or during the term of employment; 3) the state had not conducted a workplace-safety inspection of the crane or job site; 4) cranes must be inspected before each use, but it is usually done by the operator.

The article related these last three facts throughout the article and in a separate section entitled, “*GAPS IN SAFETY CONTROLS.*” The juxtaposition of Yeakey’s criminal history with these facts, the headline, the photos, the graphic “*GAPS IN SAFETY CONTROLS,*” and the other statements in the article, created a defamatory connection between the criminal record and the other elements of the article, and thus implied that one gave rise to the other.

Hearst Corp’s inclusion of Yeakey’s non drug-related criminal history– the acquittal of two counts of child rape and the convictions for domestic violence and soliciting a prostitute– is also particularly illuminating. The inclusion of such information serves no purpose other

than to imply that Yeakey is a bad-actor. Such information is entirely irrelevant to his fitness to operate or inspect the crane, and like the balance of the article, it serves only to reinforce the defamatory implications that Yeakey was at fault for the crane's collapse.

The juxtaposition of Yeakey's criminal record with the headline, the pictures, the "*GAPS IN SAFETY CONTROLS*," and the other statements in the article, created a false and defamatory implication of a connection between these otherwise true elements. The article contains a separate and distinctly false implication that 1) drug use was a factor in the crane collapse which caused Mr. Ammon's death; 2) operator error was a factor in the crane collapse and Mr. Ammon's death; and/or 3) Mr. Yeakey's failure to perform daily inspections or his faulty performance of the inspections was a factor in the crane collapse and Mr. Ammon's death.

Even a casual reader of the article could not avoid the clear implication that Yeakey, at least in some degree, must have been responsible for the crane collapse. Such a defamatory connection is clear and provably false, and results in "harm distinct from the harm caused by the true portions of the communication." *Id.*

**THE FALSE IMPLICATIONS ARE NOT CONTRADICTED BY
STATEMENTS WITHIN THE ARTICLE**

Hearst Corp argues that any such defamatory implication is negated by statements within the article. *POB* 14-15. Hearst Corp refers to several statements within the article, claiming that these statements alone are sufficient to expressly negate any possible defamatory implication. The statements are:

- 1) “Investigators are still working to determine whether operator error, structural failure or some combination of both caused the collapse.” *POB* 14, CP 4.
- 2) “L&I spokesman Charles Lemon said Yeakey is being tested for drug use, but he did not know the results Friday evening. The state doesn’t require drug testing of crane operators before they are hired, he said.” *POB* 14, CP 4.
- 3) “Regulations require that cranes be inspected before each use, and that responsibility falls to the operator in most cases. It was unclear Friday whether Yeakey or someone else had responsibility for daily inspections of the toppled crane.” *POB* 14-15, CP 4.

These statements do not appear together in the article; instead, they are isolated statements sprinkled throughout the body of the article.

Without authority, defendants claim that as a matter of law these statements expressly negate any possible defamatory implication. *POB*

14. Such is not the law.

It is the sting of the communication, the overall gist and substance of the communication that carries defamatory meaning. *Mohr*, 153 Wn.2d at 825. Therefore, if the finder of fact, after considering the communication as a whole (including the contradictory statements), finds a provably false implication which carries a separate and distinct harm from the true statements, then the communication is capable carrying defamatory meaning. *Id.* at 826. If on the other hand, the finder of fact considers the communication as a whole and finds no false implication carrying a separate and distinct harm, or finds that the contradictory statements are sufficient to dispel any false implications, then there is no defamatory meaning. *Id.*

Here, taking the communication as a whole, including the headlines, photos and graphics, there is an overwhelming sense of defamatory meaning arising from the false connection between Yeakey's prior criminal history and the collapse of the crane. Rather than dispelling the defamatory false implications, the proffered "contradictory" statements tend to support those false implications.

First, the article supplies three possible causes of the collapse:

operator error, structural failure, or both. Far from contradicting a false implication, the article attributes two of the three possible causes of the collapse directly to Yeakey. Second, after detailing Yeakey's "history of drug abuse" and "long rap sheet," the article reports that an L&I spokesman confirmed that Yeakey was being tested for drug use, but that he did not yet know the results of the drug testing. Following such a detailed chronology of Yeakey's prior drug history, the clear implication of this "contradictory" statement is that while the L&I spokesman does not yet know the results of the drug testing, there is reason to believe that such testing would be positive. Finally, the third statement makes clear that the regulations require inspection of the crane before each use and that such inspections are usually the responsibility of the crane operator, but that it was unclear "whether Yeakey or someone else had responsibility for daily inspections of the toppled crane." The clear implication of this "contradictory" statement within the context of the article is that either no inspection occurred, or that had the inspection been properly conducted the structural failings may have been detected. This implication is reinforced by the graphic labeled "*GAPS IN SAFETY CONTROLS*" wherein the article lists one such gap in safety as, "Cranes must be inspected before each use, but it is usually done by the operator." CP 11-16, Ex. F 1, 3.

These lone contradictory statements do not dispel the clearly

defamatory false implications communicated by the article.

NON-ACTIONABLE OPINION

Hearst Corp claims that any defamatory meaning conveyed by the article is non-actionable opinion. *POB* 19-20. Hearst Corp cites to *Dunlap v. Wayne* for support. 105 Wn.2d 529, 716 P.2d 842 (1986), *POB* 19. However, the *Dunlap* court made clear that a court must first determine whether a statement is an expression of fact or opinion before it determines whether the opinion is non-actionable. 105 Wn.2d at 539. The *Dunlap* court stated,

First, the nature of the medium can affect whether a statement is received as “fact” or “opinion:” statements of opinion are expected to be found more often in certain contexts, such as editorial pages or political debates. The court should consider the entire communication and note whether the speaker qualified the defamatory statement with cautionary “terms of apparency.” Second, the nature of the audience is important. As one commentator writes, “Paramount are audience expectations. In the context of ongoing public debates, the audience is prepared for mischaracterizations and exaggerations, and is likely to view such representations with an awareness of the subjective biases of the speaker.” The court should thus consider whether the audience expected the speaker to use exaggeration, rhetoric, or hyperbole. *Id.* (internal quotations omitted).

Thus before any determination can be made of whether an opinion is

actionable, the court must first determine whether such statement should be considered “fact” or “opinion.”

Here, the medium was the front page of the newspaper and in the pages that followed. The article was not conveyed as part of the Op. Ed. section, nor did it recount some ongoing public debate or political topic. No part of the communication was qualified with cautionary “terms of apparency.” Indeed, Hearst Corp’s original Motion to Dismiss characterized the article as an in-depth, investigative report, “based on extensive news gathering.” CP 29. During oral argument, counsel for Hearst Corp described the article as “a full-bodied investigatory piece which cited ten different people who had been interviewed.” RP 42. In this medium and in this context, the audience is meant to assume facts, not opinions.

Secondly, the audience of such an investigative newspaper article typically does not expect to find mischaracterizations, exaggerations, rhetoric, or hyperbole as it reads a front page article reportedly based on such extensive news gathering. As such, the instant communication and any defamatory implications that arise therefrom, cannot be said to have been received as opinions, actionable or non-actionable. Instead, given the medium and context in which the article was published and the audience to whom the article was published, the communication and all

the implications drawn therefrom clearly should be categorized as fact and not as non-actionable opinion.

PRIVILEGE AND THE FIRST AMENDMENT

Finally, Hearst Corp claims that the decisions below violate both the Fair Reporting privilege and the First Amendment. *POB* 16-18.

A defamation by libel plaintiff ordinarily must prove 1) falsity, 2) an unprivileged communication, 3) fault, and 4) damages. *Mohr*, 153 Wn.2d at 822; *Herron*, 112 Wn.2d at 768. One privilege which may render a defamatory communication non-actionable is the Fair Reporting privilege. Likewise, unconstitutionally burdening the protections of the First Amendment may render a defamatory communication non-actionable. Neither the Fair Reporting privilege, nor the First Amendment render the defamatory implications here non-actionable.

Washington recognizes a conditional privilege for news media defendants for reporting on defamatory statements *contained* in official proceedings and records. *Mark v. Seattle Times*, 96 Wn.2d 473, 487, 635 P.2d 1081 (1981); *Clapp v. Olympic View Publ'g Co.*, 137 Wn.App. 470, 474, 154 P.3d 230 (2007)(my emphasis). For protection under the privilege, the re-publication of the defamation contained within the official proceedings or record must be an accurate and complete repetition of the record or a fair abridgment of the same. *Mark* 96 Wn.2d at 487.

Likewise, the First Amendment will not expose a media defendant to liability for truthfully publishing information released to the public in official court records. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975). As stated above, the parties agree that Yeakey's prior criminal history is a matter of public record. Yeakey agrees that if the article had done nothing more than to simply relate his prior history, there would be no sustainable cause of action. In such a scenario, both the Fair Reporting privilege and the First Amendment would make such communication privileged and the second element of a defamation claim could not be satisfied. However, that scenario is not present in the instant case.

Here, the article does not simply relate Yeakey's prior criminal history. Rather, it juxtaposes that history against the front page headline, the large photo of the collapsed crane, the photo of the deceased Mr. Ammon, the graphic and bullet points contending "*GAPS IN SAFETY CONTROLS*," and all the other statements within the article so as to imply a defamatory connection between all these elements. It is the false connection between these elements that creates the separate and distinctly false implication that 1) drug use was a factor in the crane's collapse which caused Mr. Ammon's death; 2) operator error was a factor in the crane's collapse and Mr. Ammon's death; and/or 3) Mr. Yeakey's failure to perform daily inspections or his faulty performance of the inspections

was a factor in the crane's collapse and Mr. Ammon's death.

The false implications raised by the article do not originate from the public record, nor are they somehow contained within official records released to the public. Here, the additional opprobrium comes not from the recitation of Plaintiff's prior criminal history, but from the juxtaposition of that history with the other elements of the article. As such, the defamatory meaning does not originate within the official report, nor is its sting limited to the mere repetition of publishing information already released to the public in official court records. Therefore, Hearst Corp's reliance on the Fair Reporting privilege and the First Amendment concerns raised below are not properly applicable to this case.

REMAINING CAUSES OF ACTION

All motions below were premised solely upon the defamation element of falsity and the collateral arguments of contradictory statements, privilege, and First Amendment concerns. No argument was made or proffered in connection with Yeakey's other causes of action. Yeakey's complaint alleges uncontradicted facts which give rise to claims for which relief can be granted. While Yeakey agrees that these claims rise or fall upon the viability of the defamation claim, the denial of Hearst Corp's motions below leaves these claims undisturbed. For all the reasons stated above, the trial court's rulings should not be reversed and all of Yeakey's

causes of action should be allowed to proceed.

CONCLUSION

The trial court's decision to deny Hearst Corp's CR 12(b)(6) Motion to Dismiss was not error. Yeakey has stated a claim upon which relief can be granted. Washington has clearly adopted defamation by implication. The *Mohr* Court defined such defamation as occurring in two factual patterns: "Defamation by implication occurs where 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.

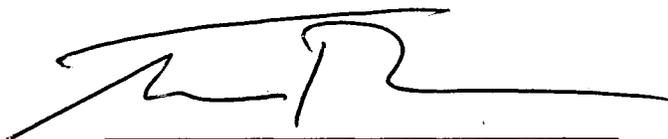
Hearst Corp's article creates a false defamatory implication. When the communication is taken as a whole, and Yeakey's criminal history is juxtaposed with the front page headline, the large photo of the collapsed crane, the photo of the deceased Mr. Ammon, the graphic and bullet points contending "*GAPS IN SAFETY CONTROLS*," and the other statements within the article, there is a separate and distinctly false implication that 1) drug use was a factor in the crane collapse which caused Mr. Ammon's death; 2) operator error was a factor in the crane collapse and in Mr. Ammon's death; and/or 3) Mr. Yeakey's failure to perform daily inspections or his faulty performance of the inspections was a factor in the crane collapse and in Mr. Ammon's death. Such implications are clear,

are provably false, and result in harm distinct from the harm caused by the true portions of the communication.

When taken as a whole, the communication conveys an overriding impression of defamatory connection between the collapse of the crane, the death of Mr. Ammon and Yeakey's prior criminal history. These defamatory implications are not opinion, nor are they privileged communications. The trial court's denial of Hearst Corp's 12(b)(6) Motion to Dismiss and the denial of the Motion to Reconsider were not error and should not be disturbed upon review.

RESPECTFULLY SUBMITTED this 21st day of October, 2009.

LAW OFFICE OF MATT A. RENDA

A handwritten signature in black ink, appearing to be 'M. A. Renda', written over a horizontal line.

Matt A. Renda, WSBA # 31155
Attorney for Respondent Yeakey

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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CERTIFICATE OF SERVICE

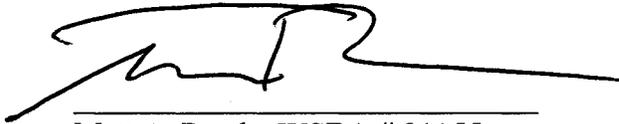
I hereby certify that on the 21st day of October, 2009, a true and correct copy of the foregoing Respondent's Brief was deposited in the U.S. mails, postage prepaid, to the following addresses and addressees:

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DATED this 21st day of October, 2009.

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