

Appeal Case No. 47642-8-II

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JAMES JOHNSTON, M.D. and ULRIKE JOHNSTON,
Appellants

v.

HIDDEN COVE PROPERTY OWNERS ASSOCIATION LLC, *et al.*
Appellees

BY
DEPUTY

STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION II

APPELLANTS' BRIEF

On appeal from the Superior Court in and for Kitsap County, Washington
Cause No. 11-2-00174-3, The Honorable Jennifer A. Forbes Presiding

Delbert D. Miller, WSBA No. 1154
Al Van Kampen, WSBA No. 13670
Nathan Paine, WSBA No. 34487
ROHDE & VAN KAMPEN, PLLC
1001 Fourth Avenue, Suite 4050
Seattle, Washington 98154-1000
206.386.7353
206.405.2825 – Facsimile
ATTORNEYS FOR APPELLANTS

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I. INTRODUCTION

Plaintiffs/appellants, Dr. James and Ulrike Johnston, seek reversal of the trial court's order summarily dismissing all their claims against defendant/appellee Hidden Cove Property Owners Association's ("HCPOA"). This case involves unlawful efforts by the Johnstons' neighbors and their homeowners association to drive the Johnstons from their home and neighborhood, and prevent him from practicing medicine in Bainbridge Island. This court's *de novo* review of the record will reveal the existence of multiple material issues of fact and ample evidence from which a jury could conclude that the HCPOA participated in or encouraged a civil conspiracy to subject the Johnstons to hatred, contempt and embarrassment in a misguided attempt to force the Johnstons from their home. All of the tortious actions detailed herein were committed by either a member or officer of the HCPOA in furtherance of the group's objective. The HCPOA never made any attempt to admonish a member or distance itself from the unlawful actions of its members towards the Johnstons. Instead, officers of the HCPOA offered the HCPOA's support in those ill-conceived efforts. Summary judgment should be reversed.

II. ASSIGNMENTS OF ERROR

1. The Superior Court erred with its summary judgment order of October 5, 2012 dismissing all of Plaintiffs' claims against Defendant HCPOA and finding that "there has not been a nexus shown between the individual's actions and the LLC as to the causes of action." CP at 1177-79 and VRP at 30-31.

2. The Superior Court erred when it denied Plaintiffs' motion for revision of the interlocutory summary judgment order dismissing all claims against the HCPOA. CP at 1276-78.

3. The Superior Court erred when it denied Plaintiffs' motion for reconsideration of its order on Plaintiffs' motion for revision. CP at 1320-21.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether there are material issues of fact as to whether the HCPOA conspired with others to harm the Plaintiffs;

2. Whether there are material issues of fact on whether HCPOA is vicariously liable to the Plaintiffs for the tortious actions of the HCPOA members and officers;

3. Whether there are material issues of fact on whether the HCPOA is liable to the Plaintiffs for claims of defamation, outrage, invasion of privacy and harassment under a theory of civil conspiracy and/or vicarious liability.

IV. STATEMENT OF THE CASE

A. THE PARTIES AND THE TRAIL

Plaintiffs/appellants, Dr. James Johnston and Ulrike Johnston, husband and wife, along with their small children were residents of a relatively new subdivision at the end of Sivertson Road on north Bainbridge Island. CP at 725.

Defendant/appellee, HCPOA is a Washington limited liability company formed to serve as the property owners' association called for by

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the covenants, conditions and restrictions applicable to the subdivision in which all parties lived during the relevant time period. CP at 726. Defendants de Witt, Samaniego, Lorimer, Heater and de Rubertis all owned and occupied houses in the immediate neighborhood, and defendant Courtenay Heater at all times relevant acted as the president of the HCPOA. *Id.* Certain individual defendants also have served as officers of the HCPOA. Besides Courtenay Heater serving as president, Pam Heater and Susan de Witt served as treasurers and Corbin de Rubertis served as the vice president. CP at 892-95. During the relevant time period, all other defendants were members of the HCPOA. CP at 14.

The genesis of the entire dispute between the parties involved the defendants' unlawful attempts to gain control of a path located wholly within the property lines of a home that the Johnstons were renting. CP at 733, 736-37. Sivertson Road dead ends at the intersection of the property lines of the Johnston, de Witt and Samaniego parcels. CP at 726. If one wanted to go from the southerly dead end of Sivertson Road to Manual Road, one had to walk across either the Johnstons' yard or the Samaniegos' yard. *Id.* The initial dispute between the parties erupted when the plaintiffs became concerned for the safety of their daughters and attempted to limit the parade of strangers traveling through their front yard as well as the late night parties and other illicit activity on the trail. CP at 15-17, 737. Disregarding the plaintiffs' property and liberty interests, the defendants took it upon themselves to coordinate their efforts using unlawful means to force the Johnstons from their home in a misguided

attempt to achieve their collective goal of controlling the trail for use by the HCPOA's members. CP at 736-39.

B. DISPUTE OVER TRAIL LEADS TO HCPOA'S PARTICIPATION IN EFFORTS TO FORCE THE JOHNSTONS OUT OF THE NEIGHBORHOOD

Defendant Don Lorimer appears to be the first one in the neighborhood to raise an issue about the Johnstons' attempts to limit the neighborhood's use of their front yard as a trail. This he did in emails directed to Courtenay Heater, President of the HCPOA, on May 4, 2009. CP at 897.

Four months later, on August 8, 2009, Lorimer's teen-aged son, James, and a group of his friends, including one on a bicycle, used the trail and encountered Dr. Johnston who objected to their trespass. CP at 730. Dr. Johnston was pushed to the ground by one of the boys. *Id.* Mrs. Johnston called the police. *Id.* The police responded and a report was taken:

Johnston has posted no trespassing signs and has spoke at length with his neighbors not to come on his property, but they ignore his requests.

Johnston advised that a group of males walked through his property on the trail and ignored his requests to get off his property. Johnston advised that they pushed passed [sic] him and just bantered him. Johnston said that one of the males later identified as [redaction] pushed him down to the ground as he walked past.

The boys freely admitted to being on Johnston's property and [redaction] admitted to pushing Johnston.

Johnston said he did not want to press charges against any of the boys he just wanted them to stay off his property. The boys and [James Lorimer's] parents were advised and agreed to stay off Johnston's property.

CP at 899-902. A few minutes before the police arrived, Mr. Lorimer had a conversation with Dr. Johnston. CP at 730. Mr. Lorimer testified that they disagreed over whether the trail was in Dr. Johnston's front yard:

A. What I disagreed to was he [Johnston] said, "The kids were in my front yard."

Q. Yes.

A. And I said, "No, they were on the trail," and he said, "Well, the trail is my front yard." So I had a disagreement at the time of what's your front yard and where's the trail.

CP at 867, Don Lorimer Dep. at 60:25-61:6. Mrs. Johnston also testified:

A. I think one of the big turning points in the whole relationship was when my husband was assaulted by Lorimer's son. And apparently Mr. Lorimer and Mr. Samaniego are quite close. And I know my husband talked to Dan that night on the phone and called him up and said look, you know, this is what's going on. We had to call police. There were six or seven teenagers, apparently inebriated and this is getting out of hand, just to again show him this is a problem.

Q. Okay.

A. And apparently that's when Mr. Samaniego formed some sort of alliance with Mr. Lorimer and took issue with our position.

CP at 858, Uli Johnston Dep. at 118:23-119:10.

On August 10, 2009, two days after the assault upon Dr. Johnston, Mr. Lorimer sent a lengthy email to Courtenay Heater about Dr. Johnston. CP at 904. He sent this email to Mr. Heater "since you are the President of the HCPOA." *Id.* This email by itself defames Dr. Johnston. For instance, Mr. Lorimer falsely states that Dr. Johnston placed dangerous traps and hazards on the trail. *Id.* He also falsely states that Dr. Johnston assaulted Mr. Lorimer's son and his friend on a bike. *Id.* Mr. Lorimer further falsely states that Dr. Johnston threatened to assault the teenagers

with a stick, as well as a gun. *Id.* Mr. Lorimer's account, however, is second-hand as he was not present, and is contradicted by the police report. CP at 899-902. Had Dr. Johnston actually assaulted anyone or threatened anyone with a gun, surely that account would have been reflected in the police report recorded moments after the incident, but it was not because it didn't happen. Mr. Lorimer concluded his libelous email by describing Dr. Johnston as a threat to the health and safety of not just the Lorimer family but to the entire neighborhood. CP at 904.

The evidence establishes that Mr. Lorimer's libelous email is one of the precipitating causes for the neighbors to join together against Dr. Johnston as a group and to put it on the agenda of the HCPOA. Both Don Lorimer and Courtenay Heater orally repeated this defamation of Dr. Johnston to others. For instance, Kerry Samaniego testified as to what Lorimer told her husband:

Q. All right. And you also, as one of the reasons for researching Dr. Johnston on the Internet, you mentioned that you had heard that he had threatened boys?

A. Yes

Q. What did you hear?

A. That he had threatened to shoot them.

Q. Who did you hear this from?

A. My husband.

Q. Do you know where he heard that Dr. Johnston had threatened to shoot the boys?

A. From Don Lorimer and James Lorimer.

CP at 884, Kerry Samaniego Dep. at 46:13-23. Mr. Lorimer also repeated his slanderous version of events to Corbin de Rubertis who repeated it to

his wife, Kathleen de Rubertis. CP at 805-89, Kathleen de Rubertis Dep. at 37:7-8, 37:24-38:8, 74:13-75:11, 76:23-77:6, 79:8-13, 79:21-80:23, and 82:2-9. Pamela Heater testified that she passed Mr. Lorimer's description of what occurred on to others in the neighborhood. CP at 838, Pamela Heater Dep. at 99:24-101:8. She testified that her conclusion that Dr. Johnston presented a danger to children using the trail came from what Mr. Lorimer had told her:

Q. Did you think it was dangerous for your children to go on that trail?

A. Well, you know, I was concerned by Johnston's behavior as it was reflected by Don Lorimer to me. I – it would be concerning to any parent. If that did happen, as Don said it did, that's concerning.

CP at 839, Pamela Heater Dep. at 105:10-15. Susan de Witt testified that:

A. Well, as a neighborhood we were all concerned about the behavior of Jim Johnston and all the things that had been going on in the neighborhood. So we were discussing things with everybody in the neighborhood because of his alarming behavior that kept increasing... We talked about the disturbing element in our neighborhood named Jim Johnston.

Q. And when you say "we", who are you referring to?

A. The Lorimers, the Heaters, the de Rubertises, Samanegos, de Witts. We were concerned neighbors.

CP at 815, Susan de Witt Dep. at 47:24-48:25. The behavior described included "threaten[ing] a child with a gun" and putting "wires across the trail at neck height to trip people or hurt people." *Id.*, Susan de Witt Dep. 48:5-8. Susan de Witt testified that she believed the source of the information that made her fearful of Johnston was Mr. Lorimer. CP at 816, Susan de Witt Dep. at 50:15-51:17. The version of events received

by Ms. de Witt is the same as that contained in the email Mr. Lorimer sent to Courtenay Heater on August 10, 2009. CP at 904.

Dr. Johnston's testimony as to what occurred is quite different and completely controverts the defamatory version circulated in writing and verbally by Don Lorimer, and republished by other defendants. CP at 846-49, Dr. Johnston Dep. Vol. II at 293:5-302:22. Dr. Johnston's account is, of course, corroborated by the police report, *cf.* CP at 899-902.

C. THE SEPTEMBER 12, 2009 HCPOA MEETING REGARDING THE JOHNSTONS.

On August 12, 2009, Mr. Lorimer was informed of a survey done of the property line between the Samaniego and Johnston properties. CP at 733. Mr. Samaniego confirmed that the "trail" is wholly on the Johnston property. CP at 868, Don Lorimer Dep. at 102:10-17. At that point, there was no legal basis for the HCPOA and its members to continue to trespass on the Johnstons' property over their objection. That should have been the end of the matter, but tragically it was not.

Approximately one month later, the HCPOA held a meeting on September 12, 2009. CP at 892-95. There were three "critically important business" items on the agenda for the meeting, one of which was the dispute with Johnson about the use of the trail. CP at 892-95, 906. The trail issue was one of the "critically important business" issues on the agenda for the meeting in large part, if not entirely, because of Don Lorimer's prior email to Courtenay Heater, and Mr. Heater's decision to

make it a matter of critical importance for the group to address. CP at 869, Don Lorimer Dep. at 111:1-112:7.

To be clear, while the defendants like to tout the minutes of the September 12, 2009 meeting as absolving them of any wrong doing, the evolution of the “final” September 12, 2009 minutes reveal that the minutes are of almost no probative value to the HCPOA’s defense. Despite the fact that the minutes were “approved” as of September 30, 2009, CP at 918-19, and subsequently distributed to the members, CP at 921, the defendants contend that the minutes were not “formally approved” until over a year later on November 20, 2010, CP at 923-24. The November 2010 meeting just happens to be the same HCPOA meeting held by the defendants to discuss a copy of the just received complaint in this case. *Id.* In other words, the 2009 meeting minutes were “finalized” in 2010 only after reading the Johnstons’ allegations in this case, which included an allegation that the defendants’ conspiracy was born at the September 2009 meeting.

While testimony of the defendants is in conflict on this point, there appears to have been extensive discussions concerning the trail issue at the 2009 association meeting. CP at 908-10, 912-14. The September 11, 2009 email setting the meeting also indicates that this was not the first meeting by the group to discuss the trail as “Homeowners trail review; Easement issues review” is identified in the “old business” column and not the “new business” column. CP at 906. The trail was discussed even though the survey obtained by Samaniego in August showed that the trail

was entirely on the Johnston property, and even though Mr. Lorimer reported that fact to the group at the meeting. CP at 870, Don Lorimer Dep. at 114:17-115:3. The minutes of the September 12, 2009 meeting, CP at 892-95, suspiciously do not reflect the substance of any of the discussion of the trail issue, unlike the other two “critically important business” issues. Some light is shed by the notes taken by Mr. Heater and by his deposition testimony. CP at 908-10, 912-14.

For example, there are significant inconsistencies between the handwritten notes kept by Mr. Heater¹ during the meeting and the “final” minutes as approved a year later by the defendants after receiving a copy of the complaint. *Cf.* CP at 908-10, 912-14 with 892-95. While the contemporaneous notes clearly reflect the votes of the association with respect to agenda item I (HCPOA organizational details) and item II (Decker appeal), no such vote was recorded for item III (the trail dispute). CP at 908-10, 912-14. Thus despite defendants’ efforts at revisionist history, the contemporaneous written record does not support the HCPOA’s assertion that the association voted not to take any action with respect to the trail.

The HCPOA president’s notes also reveal that the discussions concerning the Johnstons and the trail were much more detailed and extensive than what is reflected in the minutes approved only after receiving a copy of the complaint in this action. *Id.* For instance, as

¹ CP at 832-33, C. Heater Dep. at 109:11-110:14.

confirmed by Mr. Heater, the notes reflect that Ms. de Witt and Ms. Samaniego made substantive statements concerning the trail dispute at the September 12, 2009 meeting, but those statements are omitted from the final minutes. CP at 834, C. Heater Dep. at 120:3-11. Furthermore, the notes reveal that a number of discrete sub-topics concerning the trail dispute were discussed during the meeting, but the identification of those sub-topics and the substance of those discussions were clearly omitted from the “final” meeting minutes. *Cf.* CP at 908-10, 912-14 with 892-95. These omissions are striking in contrast to the level of detail in the minutes concerning agenda items I and II. CP at 892-95. In other words, the September 12, 2009 meeting minutes themselves raise issues of fact as they do not accurately reflect what actually occurred at the meeting with respect to the defendants’ dispute with the Johnstons over the trail and cannot serve as the basis for dismissing all of plaintiffs’ claims against the HCPOA as a matter of law. Instead, the probative value of the meeting minutes is dependent upon and can only be resolved by a jury determining the credibility of the evidence in light of the complete context and all the circumstances and testimony, including the cross examination of HCPOA members and officers regarding the same.

D. DEFENDANTS SEEK TO FORCE THE JOHNSTONS FROM THE NEIGHBORHOOD USING ANY MEANS NECESSARY

After the September 12, 2009 meeting, the HCPOA officers and members fully understood that there was no legal basis for using the trail over the Johnstons’ objection. At that point, the HCPOA determined that

the only way to achieve the goal of controlling the trail was to force the Johnstons from their home. To that end, the HCPOA members and officers escalated their coordinated efforts to harass, intimidate, and subject the Johnstons to hatred, contempt and ridicule throughout the neighborhood. They even went so far as to try to get the Johnstons evicted from their home and try to prevent Dr. Johnston from practicing medicine on Bainbridge Island. These unlawful objectives and the means for achieving the objective were succinctly summarized in emails between HCPOA members and officers. On October 3, 2009, Kerry Samaniego admitted in an email to the treasurer of the HCPOA,

Mostly, we just want [Jim Johnston] to leave. Wondering about the best way to make that happen...Back to the Jim thing....I think two things will cause them to move: a) not controlling the trail, or, b) knowing that everybody else knows about the charges that were brought against him.

CP at 926. And then in an email dated October 4, 2009, the HCPOA treasurer wrote, “[w]e, collectively, need to get rid of them, and any and all of these ideas are not bad ones.” CP at 928; *see also* CP at 931-32 (“Our little road. Our little community. I think it’s fair to say that everyone around here would like [the Johnstons] to leave”); CP at 934 (“I really feel if Jim had to dismantle his barricade, he’d leave.”).

The HCPOA’s strategy was further documented in an email exchange between the Samaniegos and the HCPOA president. On September 28, 2009, Mr. Heater, unequivocally acting as the president of the HCPOA, identified the trail dispute as **an HCPOA issue** and pledged the HCPOA’s support in “any effort” to control the trail for the

neighborhood. CP at 1209. The Samaniegos understood and accepted Mr. Heater's pledge of support from the HCPOA.

HCPOA's involvement in this issue would be most welcome. We believe that it would truly benefit the community as a whole to have the trail available to all. Speaking candidly and confidentially, we have never understood Jim Johnston's need to control the trail, or, as he calls it "his front yard." He has indicated that he and his wife will be purchasing the property in May...Of course, we are hoping that doesn't happen.

CP at 939 (emphasis added). Mr. Heater even went so far as to consider the drafting of and passage of new HCPOA rules to exclude the Johnstons.

[Courtenay Heater] wants to get the new LLC finished quickly (now) so that we can make rules, collect past dues, and make NEW rules that will exclude the Johnstons.

CP at 1099-1100 (emphasis added). As late as February 10, 2010, Mr. Heater, as HCPOA president, continued to recruit the aid of the neighbors on Manual Road to join efforts to end the so-called "blockade" of the trail.

Of course the story has a wider, more sinister dimension which I can't cover in this short synopsis, but suffice it to say that if we can show the blockade of the trail was unlawful in the first place and that the Johnstons took it upon themselves to escalate the conflict with the neighbors and that the allegations contained in the legal actions are frivolous and without merit, we can hopefully bring an end to the blockade as well as relieve the neighborhood residents of fomentation by Johnston.

CP at 941-43.

1. DEFENDANTS CONSIDER ALL OPTIONS ON THE TABLE

As time passed, the defendants became especially determined to force the Johnstons from the neighborhood as a means for controlling the trail. CP at 978 ("We simply must get rid of them"); *see also* CP at 980 ("Mostly, we just want him to leave. Wondering about the best way to

make it happen”); CP at 928-29 (“Jim really needs to go”); CP at 931-32 (concluding detailed proposal of ideas to force the Johnstons from the neighborhood with the statement, “I think it’s fair to say that everyone around here would like them to leave”). As far as the defendants were concerned, when it came to forcing the Johnstons from the neighborhood, “any and all ideas” were considered and even implemented. CP at 928. And the more people involved in those efforts, the better. CP at 951 (“I say the more the better”).

2. THE GIBSON AMBUSH

In furtherance of their plan to force the Johnstons from the neighborhood, the HCPOA sent a contingent of its members to “ambush” the owner of the Johnston property, Dr. William Gibson, during an art show at his home to tell him, “hey – do you know you are renting to a pervert and we don’t like it.” CP at 1017; *see also* CP at 1019 (“I’m glad we went yesterday...even if it was a bit of an ambush”). The art show was held in a large open space above Dr. Gibson’s four-car garage. CP at 828, Gibson Dep. at 151:12-24. The open layout was such that it was possible for a person standing on one side of the room to hear a conversation taking place on the other side. *Id.* There were at least 10 artists in the space along with a number of other patrons. *Id.* at 152:3-24.

Four members of the HCPOA, including its treasurer, signed their name to a letter, and personally delivered it to Dr. Gibson.² In the letter

² CP at 1001. In addition to the four members who actually signed the letter, Mr. Lorimer admits that he was aware of the plan to ambush Gibson before it happened, yet he did
(continued...)

they falsely claimed that Dr. Johnston “molested 8 women” and that “he is no longer able to practice medicine in the United States.” CP at 1001-10. In the same letter, these HCPOA members and officers insinuated that Dr. Johnson presented a danger to the safety and well-being of children. *Id.* When Ms. de Rubertis and Ms. de Witt, the HCPOA treasurer, presented the letter to Dr. Gibson at the art show, they made similar slanderous statements. CP at 1012-13 (“he molested 8 women and pled guilty”). Other statements made by the HCPOA members and officer would lead the dozens of patrons present at the art show believe that Dr. Johnston molested children. CP at 829, William Gibson Dep. at 159:5-160:19. As Dr. Gibson testified, these four HCPOA members also “said, things to me like, We want your assistance in – in removing these people from the neighborhood.” CP at 1027, BIMC Hearing Transcript at 21.

Defendants made the false statements to Dr. Gibson despite personally investigating the veracity of those statements, and indisputably determining them to be false before making them. For instance, months before delivering the defamatory letter, they investigated Dr. Johnston’s credentials, and had learned he was licensed to practice medicine.

Now when I talked to [the woman at the Texas Medical Board], *she said he had been “cleared” to practice in like '98 or '99. So*

(...continued)

nothing to prevent it. CP at 871, Don Lorimer Dep. at 120:1-4. And as stated below, Mr. Heater learned of the ambush after it happened from Ms. de Witt, but voiced no objection or otherwise admonish Ms. de Witt or the other members directly involved.

*apparently he was able to get his license reinstated.*³

CP at 966-67 (emphasis added); *see also* CP at 951-52, 954-64 (“Can’t believe he’s been licensed by the State of Washington” and “Pam [Heater] says he IS licensed in the state of Wa”). And there was no basis for telling Dr. Gibson that Dr. Johnston was a child molester – those statements were completely fabricated by the defendants in order to shock Dr. Gibson and subject the Dr. Johnston to hatred and contempt by a person who was not just his landlord but also a member of the medical community.

The defamatory letter originally included a request that Dr. Gibson stop renting to the Johnstons, but fearing potential liability for making such a demand, Ms. de Rubertis asked that it be deleted.

I like the letter, but am concerned about the third paragraph asking not to rent to them – *I am no lawyer, but I am not sure if we can do that – I’m hoping it’s implied. I’d feel better if it weren’t in there legal wise.* I’m really hoping to actually seeing and talking with [Dr. Gibson] and not have the letter floating in his house.

CP at 1024 (emphasis added). In other words, the defendants hoped to convince Dr. Gibson to evict the Johnstons, but Ms. de Rubertis feared that expressly making the statement in writing could very well expose the defendants to legal liability if that letter ended up in the hands of the Johnstons. This concern, however, did not prevent Ms. de Rubertis and Ms. de Witt from making the same demand orally when they personally delivered the letter to Dr. Gibson at his home. As Dr. Gibson testified

³ To be clear, this assumption was false. There was no “reinstatement” as Dr. Johnston never lost his license.

under oath in court, “they said, things to me like, We want your assistance in – in removing these people from the neighborhood.” CP at 1027. Dr. Gibson, however, refused to aid in their misguided efforts.

3. GIBSON AMBUSH WAS ENDORSED BY THE HCPOA AND CARRIED OUT BY ITS MEMBERS

According to the sworn testimony of Kathleen de Rubertis, the plan to ambush Gibson to get the Johnstons out of the neighborhood was endorsed and/or encouraged by the HCPOA. In response to questions by attorney Vancil, who was also HCPOA’s attorney, Ms. de Rubertis testified as to why she participated in the Gibson ambush:

Q. Before you went and talked to Mr. Gibson, what led up to that? What kind of information did you get?

A. Before I talked to Mr. Gibson, there had been – we are in a homeowners association. This has been discussion at meetings. There had been discussions with neighbors.

CP at 1035 (emphasis added). Ms. de Rubertis subsequently testified,

Q. How did you come to the – how did you come to talk to Susan [deWitt] about it, and then how did she –

A. Well, Susan is a neighbor, and she is my friend. We don’t socialize. We – we have a neighborhood relationship. And it wasn’t just -- the whole thing wasn’t just, you know, one–one conversation. This – this conversation, you know, was not just myself and Susan DeWitt. It was also in the homeowners association. It was – it is information that is circulating throughout the neighborhood. It’s just not me. It’s just not Susan. It’s not – it’s – it’s – it’s a neighborhood, and it is an association.

So -- so this conversation, frankly, had started in homeowners association meetings and conversations with neighbors, you know, after one neighbor’s son was pushed down and that sort of thing. So it wasn’t just a conversation that started out of the blue.

In one of the homeowners association meetings, someone said, You know, well, what should we do? And, you know, the proper

course – the reasonable course was, well, someone should talk to Will Gibson.

CP at 1035-36 (emphasis added). This sworn testimony of a HCPOA member and alleged co-conspirator alone creates an issue of material fact, especially when the inferences are weighed in the Johnstons' favor, that the HCPOA is liable for its members' ambush of Dr. Gibson to defame Dr. Johnston in their ill-conceived attempt to force the Johnstons from their home.

4. THE HCPOA CLEARLY PARTICIPATED IN THE UNLAWFUL EFFORTS TO FORCE THE JOHNSTONS FROM THEIR HOME

The effort to force the Johnstons out of the neighborhood using any means necessary was not just an enterprise of a couple of rogue individuals, but instead was a coordinated effort with various HCPOA members and officers each making their own contribution to the HCPOA's cause. In fact, the documents establish that the individual defendants felt compelled to keep the HCPOA president apprised of their various unlawful efforts to force the Johnstons out of the neighborhood. Moreover, not once did any officer or member of the HCPOA admonish or otherwise disassociate themselves from the unlawful actions of the other members and officers. Instead, each offered nothing but encouragement to advance the common goal.

For instance, Ms. de Witt, in her capacity as the HCPOA treasurer, wrote to Courtenay Heater, the HCPOA president, to inform him of the neighborhood's most recent efforts to force the Johnstons out – the Gibson ambush. After summarizing events, Ms. de Witt wrote, "We all just want

[the Johnstons] to leave.” CP at 1087-88. Mr. Heater responded, but stated no objection or surprise to the efforts of the HCPOA members to ambush Dr. Gibson. Instead, the president of the HCPOA stated, “Thanks for keeping me posted on the neighborhood trends. I’d like to get a meeting going sooner rather than later so we will see how that develops.” *Id.* In other words, instead of admonishing the HCPOA treasurer and the other HCPOA members for wrongfully interfering with the Johnstons’ legal rights, the HCPOA president thanked the treasurer for the update and was anxious to schedule an HCPOA meeting to see how those efforts were developing.

Mr. Lorimer also updated Mr. Heater on the neighborhood’s efforts to force the Johnstons out, and warned that the HCPOA must be more careful not to get caught lest it become embroiled in litigation. “I think we as an organization need to tread carefully around the topic of the tenants [the Johnstons] in the Gibson house. I know some pretty inflammatory things are being passed around about this guy and some have even approached Gibson himself. I would hate to get tied up in litigation over invasion of privacy or worse.” CP at 1090-91 (emphasis added). Despite Mr. Lorimer’s warning, the HCPOA and its members didn’t tread carefully enough. Make no mistake, Mr. Lorimer’s warning was not a disavowal of his support in the HCPOA’s efforts, which was evident from his subsequent email to Corbin de Rubertis, the HCPOA vice-president, in

which he proclaimed, “United we stand.”⁴ CP at 1093-95. Instead, it was merely a warning to the head of the organization that it needed to be more careful in implementing its plan for forcing the Johnstons’ from their home, or there may likely be legal consequences for their wrongful actions.

V. RELEVANT PROCEDURAL HISTORY

Two sets of events must be understood for this case.

Chronologically, the first set of events consists of what happened to Dr. Johnston in Texas beginning some 21 years ago. The second set of events consist of the legal actions the Johnstons took to protect themselves from the unlawful harassment and tortious actions of the defendants, which included the spreading of false and misleading distortions about what happened in Texas, in furtherance of their common goal of forcing the Johnstons out of their home.

The Texas Proceedings. The short version of what occurred in Texas is that in 1994, an unscrupulous lawyer solicited some of Dr. Johnston’s patients to assert false charges against him. Dr. Johnston refused to respond to the extortion attempt made against him by the lawyer and the lawyer took the false claims to the local district attorney who was running for re-election and whose assistant was married to the only competing physician in this small town. Dr. Johnston was charged with

⁴ Mr. Lorimer later confirmed at his deposition that “we” referred to the HCPOA. CP at 872, Don Lorimer Dep. at 140:8-19.

sexual assault and the case was brought before the local judge, who was also running for re-election. Johnston was not allowed to call any witnesses, or present any evidence or even demonstrative aids in his defense.

The circumstances that led to Dr. Johnston's reluctant decision to plead guilty to the low-level misdemeanor counts (equivalent of a traffic offense) were explained by Judge Marquardt, who later found Dr. Johnston to be completely innocent of the accusations made against him by the eight women.

All of the following factors convinced Dr. Johnston that his chance for a fair criminal proceeding following his first mistrial were nil: (1) although the complainants' allegations were improper touching, fondling and exposure, he was indicted for attempted sexual assault (rape); (2) despite extensive pretrial publicity, and a change of venue hearing in which Dr. Johnston presented evidence from some fifteen prominent citizens while the prosecution presented testimony from one courthouse employee, the request for change of venue for a trial in another county was denied; (3) despite the financial conflict of interest evident in the Assistant District Attorney's background, she was not removed from the prosecution team; (4) ***despite the fact that the judge denied admission of most of the evidence Dr. Johnston had prepared in his defense, and Dr. Johnston then rested his case without putting on any evidence, the jury unanimously acquitted him on the attempted rape charges but ruled ten-two in his favor on the lesser included misdemeanor charges***; (5) following the trial, a juror informed Dr. Johnston that the jury had not been chosen fairly; and (6) after the judge declared a mistrial, he announced a change of venue - the new trial would be held in about five weeks 500 miles away in Tahoka, Texas, and the same judge, District Attorney, and Asst. D.A. would travel to Tahoka to retry Dr. Johnston.

The District Attorney offered Dr. Johnston a plea bargain in lieu of a new trial, reducing the eight felony charges to Class C misdemeanor assault charges (equivalent to traffic offenses), but the Judge would only accept the plea bargain if Dr. Johnston pled

guilty to the charges. Although he did not want to plead guilty and had amassed overwhelming proof that he was not a sex offender, Dr. Johnston had spent about \$340,000 in his defense and had few financial resources left. He was assured by Board Staff that no matter what the outcome of his criminal case (including acquittal), he would be retried on the same charges in an administrative hearing seeking revocation of his medical license. Therefore, based on the advice of family, his attorneys and other experts, he entered the plea bargain, so that his remaining resources could be devoted to defending his medical license.

CP at 1385 (Proposal for Decision by Judge Barbara Marquardt).

The New York Times reported on the case after the guilty plea, CP at 1002-03, but before the Texas Medical Board trial at which Dr. Johnston was found to be unequivocally innocent of all the allegations made against him. CP at 1507-42. The article was published on January 29, 1995, and no follow up article was ever written.⁵ Consequently, the article provides only a snap shot of the events as of the date of publication, but has since become misleading with the passage of time and subsequent events.

One such event was the full scale trial held before the Texas Medical Board concerning the same allegations brought by the same 8 complainants, and the judge's finding that the allegations were complete fabrications. For the first time, Dr. Johnston was actually allowed to

⁵ The defendants used the misleading NYT article as a weapon to make sure that Bainbridge Island became such a toxic environment for Dr. Johnston that he would not be able to establish a medical practice in the community. As Ms. de Witt stated in response to Ms. Samaniego's discovery of Dr. Johnston's apparent office address, "If he IS working on B.I. [Bainbridge Island], all the more reason to get the word out about him. That should make him fold his tent." CP at 1082. And the defendants fully understood that getting the "word out" on the Bainbridge Island about the Texas criminal trial proceedings, especially the defendants' false and misleading account of those events, would destroy Dr. Johnston's ability to practice medicine on the island. CP at 1149-50. ("Once the word was out about [the criminal trial] he had to leave the state...who would have referred someone to him after the trial...NOBODY") (all caps in original).

present evidence in his defense. The complete story of what happened is set forth in comprehensive detail in the findings of fact and conclusions of law made in that proceeding by Judge Barbara Marquardt.

[T]here is absolutely no evidence to prove the alleged improper touching and fondling occurred, and there are many reasons (in addition to Dr. Johnston's spotless record prior to the filing of the complaints and *his steadfast denials from the day the complaints started*) to believe that the allegations are pure fabrications. ***In fact, in 21 years of practicing law, the ALJ has never seen a clearer case of pure fiction brought against an individual.***

CP at 1383 (page 3, Proposal for Decision by Judge Barbara Marquardt) (emphasis added). Dr. Johnston was completely exonerated of any wrongdoing. The final conclusion of law reads: "Because there is no credible evidence of misconduct by Dr. Johnston in this case, placing restrictions on his medical license would be improper." *Id.* at 123, ¶5(d). The Marquardt decision and the Texas Medical Board final order are publicly available. Had Dr. Johnston not been completely exonerated by the Texas Medical Board, then he would not presently be licensed to practice medicine or the law in multiple states given the gravity of the accusations.

To be clear, the NYT article, in and of itself, is relatively harmless. Jim Johnston is obviously an extremely common name. And there is nothing in the article to enable the objective reader to connect the Jim Johnston of Texas to the Jim Johnston living on Bainbridge Island. CP at 885 (admitting that extrinsic evidence is necessary to connect the Jim Johnston mentioned in the article to the plaintiff); CP at 810-11 (same); CP at 837 (same). Only through the defendants' commentary and actions would anyone in the neighborhood or on Bainbridge Island make the

connection. Thus, the defendants provided the missing link necessary to cause the archived NYT article concerning ancient events in Texas to become damaging to Dr. Johnston's reputation in Washington some 15 years after it was written and the events had long since been forgotten.

For example, in his email to Kim Murphy, a neighbor and Los Angeles Times reporter, Courtenay Heater directs her attention to the NYT article and tells her that it is a story about the plaintiff.

Part of the "wider dimension" involves legal action taken against Johnston during his practice as a physician in Texas. There was a NY Times article detailing the story. Sorry no link.

CP at 941-43. Seeing as Jim Johnston is a common name and the events occurred in Texas, upon finding the article Ms. Murphy's response is as expected, "Are you CERTAIN this is the same guy." *Id.* (emphasis in original). To which Mr. Heater responds, "yes, it is him." *Id.* Once that positive connection was made, just as Ms. de Witt and Ms. Samaniego had hoped, the NYT article quickly circulated through the neighborhood. Within hours of Mr. Heater directing Ms. Murphy to the NYT article and then confirming that the article was written about the plaintiff, Ms. Murphy forwarded the article to seven other individuals in the neighborhood. CP at 995-99. The damage was done.

Bainbridge Island Municipal Court Proceedings. The coordinated efforts of the defendants to harass and force the Johnstons from their home led the Johnstons to seek anti-harassment orders against Susan de Witt and Kathleen de Rubertis, the two who had personally

confronted Dr. Gibson, from the Bainbridge Island Municipal Court (BIMC). CP at 1026 (BIMC Cases No. 04-10 and 05-10). Susan de Witt also filed a claim for an order against the Johnstons. *Id* (BIMC Case No. 06-10). All three cases were consolidated and tried before Judge Carruthers on February 17, 2010. *Id*. The Johnstons appeared *pro se*. *Id*. De Witt and de Rubertis were represented by attorney Ryan Vancil, who also was the attorney for HCPOA. *Id*.

Despite the defendants' united stand against the Johnstons at the hearing, Judge Carruthers entered a protection order against Susan de Witt. In making her ruling, Judge Carruthers held:

The letter provided by the respondents to Dr. Gibson also state in unequivocal language. This man molested eight women. And that's a conclusion that they reached on their own, because that is not a finding of the court in Texas. It's not a finding of any court in Texas that Dr. Johnston molested eight women.

* * * * *

There's nothing in that Texas case that would indicate to anyone that the Johnstons represent a threat to anyone's children. And so I hope that everyone will look at all of the record from that case, and I hope that that – you're entitled to think or say whatever you wish, but **I would invite you to consider that perhaps the Johnstons were the victim of -- of terrible miscarriage of justice and a vendetta carried out by individuals who wish to do him harm, and that that was one unfairly and that it shouldn't continue.**

CP at 1038-39 (Prot. Order 148:4-11, 150:12-151:8) (emphasis added).

Eleven months later, on January 5, 2011, based on a narrow finding that Ms. de Witt was not likely to resume her harassment, the February 2010 order was not renewed.

Kitsap County Superior Court Proceedings. On November 14, 2010, counsel for the Johnstons sent to the defendants a copy of the complaint they intended to file in an attempt to resolve the matter short of litigation. CP at 923-24. The complaint was filed on January 20, 2011. CP at 13-24. On May 30, 2012, the Lorimer defendants filed a motion for summary judgment on all claims, including the claim that he participated in a civil conspiracy with the other defendants, CP at 79-87. The motion was denied on July 11, 2012, CP at 423-24.

On October 5, 2012, the trial court considered the HCPOA motion for summary judgment on all claims. CP at 425-438. The de Witt defendants filed a similar summary judgment motion. CP at 517-52. In opposition to the two summary judgment motions, the Johnstons filed a 66-page memorandum along with 73 exhibits, which created numerous issues of material fact especially when all reasonable inferences were weighed in favor of the Johnstons, the non-moving party. CP at 720-791 and 797-1168. After the plaintiffs' opposition was filed, the de Witt defendants withdrew their motion, and it was not considered by the Court. VRP at 2. The de Witts' voluntary withdrawal of their motion should be considered a concession by the de Witts that the Johnstons presented sufficient evidence to create issues of material fact on each of the Johnstons' claims, including the claim that the de Witts participated in a civil conspiracy with the HCPOA to force the Johnstons from their home.

Despite the concession by the de Witt defendants of an issue of material fact on the Johnstons' civil conspiracy claim as well as the trial

court's finding of the same with respect to the Lorimers, the trial court nevertheless granted defendant HCPOA's summary judgment motion. CP at 1177-79. This apparent inconsistency was not explained by the trial court. The order did not include the basis for granting the HCPOA's motion, but at the hearing, the trial court stated:

There has not been a nexus shown between the individual's actions and the LLC as to the causes of action alleged by the plaintiff, and I will find there are no disputed issues of material fact, and I will grant summary judgment as a matter of law to the Homeowners Association.

VRP at 30-31. In other words, the court found that there was no evidence of a connection between the tortious conduct of the HCPOA's members and officers and the HCPOA itself. Given the numerous remaining claims and parties still in the case at the time, the order granting summary judgment to the HCPOA did not become a final appealable order until the plaintiffs' claims against the other ten defendants were later settled and dismissed. *See* Civil Rule 54(b).

Days after entry of the summary judgment order, all parties (eleven defendants and two plaintiffs) tentatively reached a preliminary settlement agreement memorialized in the form of a Civil Rule 2A agreement. CP at 1289-90. The case was stayed while the parties negotiated and attempted to finalize the specific terms of the global settlement reached on all of plaintiffs' claims. *Id.* and CP at 1207. Ultimately, the Heater defendants along with the HCPOA, based on Heater's recommendation in his capacity as its president, backed out of the global settlement agreement, CP at 1303, 1306-07, the stay was lifted and the case continued with respect to the

Heater and HCPOA defendants, CP at 1310-12.⁶ During the stay, Judge Haberly retired and the case was assigned to a new judge.

Once the stay was lifted, pursuant to Civil Rule 54, plaintiffs filed a motion for revision of the summary judgment order dismissing claims against the HCPOA on the basis that there were numerous material issues of fact and law, including credibility determinations, which precluded summary judgment in favor of the HCPOA. CP at 1180-1202. Plaintiffs' motion for revision was denied. CP at 1276-78. Plaintiffs then filed a motion for reconsideration, CP at 1279-85, and in the alternative filed a motion for Civil Rule 54(b) certification for immediate appeal of the interlocutory summary judgment order dismissing the HCPOA, CP at 1322-27. Both motions were denied. CP at 1320-21 & 1347-48.

Just before trial, the plaintiffs settled its claims with the Heater defendants, and the court entered an order dismissing the claims against them with prejudice on April 30, 2015. CP at 1583-84. Once those claims were resolved, the summary judgment order dismissing plaintiffs' claims against the HCPOA became a final order and this appeal followed.

VI. ARGUMENT AND AUTHORITIES

A. STANDARD OF REVIEW

Summary judgment decisions are reviewed *de novo*. See *Int'l Bd. of Elec. Workers v. Trig Elec. Constr. Co.*, 142 W.2d 431, 434-35 (2000).

⁶ The case was settled and the claims were dismissed with respect to the other eight defendants. CP at 1578-82.

In doing so, the Court considers the facts in the light most favorable to the nonmoving party, the Johnstons. *See Folsom v. Burger King*, 135 Wn.2d 658, 663 (1998). Summary judgment is inappropriate where there are genuine issues of material fact or when credibility is disputed. *See Amend v. Bell*, 89 Wn.2d 124, 129 (1977). On summary judgment, the court's function is to determine whether a genuine issue of material fact exists; it is not to resolve an existing factual issue. *Jones v. State*, 140 Wn.App. 476, 494 (2007). Summary judgment is especially inappropriate in a case such as this “where material facts are particularly within the knowledge of the moving party.” *Michigan Nat. Bank v. Olson*, 44 Wn.App. 898, 905 (1986). Instead, “it is advisable that the cause proceed to trial in order that the opponent may be allowed to disprove such facts by cross-examination and by the demeanor of the moving party while testifying.” *Id.*

**B. NUMEROUS ISSUES OF MATERIAL FACT
PRECLUDE SUMMARY JUDGMENT**

In opposing the HCPOA's motion for summary judgment, the Johnstons presented a number of documents as well as the testimony of the defendants, which created issues of material fact as to whether the HCPOA should be held liable for the tortious actions of its members and officers. This evidence, which is addressed in further detail below, can be summarized as follows:

- (1) The sworn testimony of defendant Kathleen de Rubertis, given prior to the commencement of these proceedings, admitting to the HCPOA's involvement in the conspiracy, CP at 1035-36;

- (2) Admission of defendant Don Lorimer that the HCPOA, as an organization, was united in its efforts against the Johnstons, CP at 1093-95, CP at 872, Don Lorimer Dep. at 140:8-19;
- (3) Emails to and from Courtenay Heater, the president of the HCPOA, concerning the efforts of HCPOA members and officers' to force the Johnstons out of the neighborhood, CP at 904, 916, 918-19, 939, 941-43, 1087-88, 1209;
- (4) Email from Mr. Heater, as president of the HCPOA, pledging the HCPOA's support in efforts to force the Johnstons out of their home, CP at 1209;
- (5) Emails from Susan de Witt, the treasurer of the HCPOA, admitting that everyone in the neighborhood wanted the Johnstons gone, CP at 928-29, 931-32, 1087-88;
- (6) Emails sent between members of the HCPOA detailing their unlawful efforts to force the Johnstons from their home, CP at 926, 928-29, 931-32, 934-35, 985, 1012-13, 1019, 1080, 1082;
- (7) The HCPOA president's endorsement of those unlawful efforts, CP at 918-19, 1087-88;
- (8) The HCPOA's continued actions to recruit and encourage neighbors in the HCPOA's effort to force the Johnstons from their home, CP at 941-43, 1209;
- (9) Formal and informal meetings between the members and officers of the HCPOA to discuss ways, including unlawful means, to force the Johnstons to relent to their demands to let the HCPOA members use the

trail even after the HCPOA and its members knew that the trail was located entirely within the plaintiffs' property, CP at 892-95, 906, 923-24;

(10) Email from the HCPOA president identifying the "trail issue" as important to the HCPOA, CP at 906, and further identifying it as "critically important" in the HCPOA meeting minutes, CP at 892-96; and

(11) Email from the HCPOA president to an HCPOA member identifying the trail dispute as **an HCPOA issue**, pledging the HCPOA's support in "any effort" to control the trail, CP at 1209.

Even with all the evidence presented, the sworn testimony of Kathleen de Rubertis alone should have been sufficient to deny the HCPOA's motion for summary judgment. Ms. de Rubertis admitted in court under direct examination conducted by the HCPOA's own attorney that the plan to wrongfully confront the Johnstons' landlord with defamatory statements and convince him to evict the Johnstons from their home originated from the HCPOA meetings and subsequent discussions amongst the HCPOA members. CP at 1035-36. This unequivocal admission by an HCPOA member and alleged co-conspirator itself is enough to create an issue of material fact as to whether the HCPOA is liable for the torts committed by its members and officers. *Id.*

C. THE ADMISSIONS AND STATEMENTS OF THE HCPOA OFFICERS AND MEMBERS CREATE AN ISSUE OF MATERIAL FACT AS TO WHETHER THE HCPOA IS LIABLE

The scores of exhibits and admissions of the HCPOA officers and members create an issue of material fact as to whether the HCPOA can be held liable for the torts committed by its officers and members. There are

two theories advanced by plaintiffs under which the HCPOA should be found jointly liable with the individual defendants: civil conspiracy and vicarious liability. Plaintiffs address each theory in turn.

1. THERE IS INDISPUTABLE EVIDENCE OF A CIVIL CONSPIRACY INVOLVING THE HCPOA

The undisputed evidence creates an issue of material fact as to whether the HCPOA participated in the civil conspiracy to unlawfully interfere with the Johnstons' legal rights. "A conspiracy is a combination of two or more persons who contrive to commit a criminal or unlawful act, or to commit a lawful act for criminal or unlawful purposes." *See Adams v. King County*, 164 Wn.2d 640, 660 (2008). Because direct evidence proving the conspiracy is often held only within the hands of the conspirators, circumstantial evidence is sufficient to prove a conspiracy. *See Sterling Business Forms, Inc. v. Thorpe*, 82 Wn.App. 446, 453-54 (1996) ("Since direct evidence of a conspiracy is ordinarily in the possession and control of the alleged conspirators and is seldom attainable, a conspiracy is usually susceptible of no other proof than that of circumstantial evidence"); *see also Swartz v. Deutsche Bank*, 2008 WL 1968948 *12 (W.D. Wash. May 02, 2008) (evidence of an actual agreement to enter in the conspiracy is not required as a conspiracy can be established through circumstantial evidence). The Washington Supreme Court has explained,

To establish liability for conspiracy, it is sufficient if the proof shows concert of action or other facts and circumstances from which the natural inference arises that the unlawful overt act was committed in furtherance of a common design, intention, and purpose of the alleged conspirators. In other words,

circumstantial evidence is competent to prove conspiracy.

Lyle v. Haskins, 24 Wn.2d 883, 899 (1946). Even proof of the inaction of an alleged conspirator in preventing the conspiracy from continuing may be sufficient to create an issue of material fact to defeat summary judgment. See *Herrington v. David D. Hawthorne, CPA, P.S.*, 111 Wn.App. 824, 842 (2002) (reversing summary judgment order because plaintiff had presented sufficient evidence to create inference that defendant knew of the unlawful acts yet took no action to prevent them).

Because a civil conspiracy claim often requires the finder of fact to make credibility determinations upon the testimony and cross-examination of the alleged conspiracy, summary judgment is not appropriate. Instead, “the entire alleged conspiracy should be placed before the finder of fact, because... it could find that [the alleged conspirator] participated in the conspiracy... [and t]hat determination will require weighing of the evidence, credibility determinations and the drawing of legitimate inferences from the facts.” *Thorpe*, 82 Wn.App. at 454 (reversing summary judgment order on civil conspiracy claim).

The evidence establishes that the HCPOA participated in a conspiracy to achieve the unlawful objective of forcing the Johnstons from their home. This unlawful objective and the unlawful means were admitted to in emails from the defendants. For instance, on October 3, 2009, Kerry Samaniego admitted in an email,

Mostly, we just want [Jim Johnston] to leave. Wondering about the best way to make that happen...Back to the Jim thing...I think two things will cause them to move: a) not controlling the

trail, or, b) knowing that everybody else knows about the charges that were brought against him.

CP at 926. And then in an email dated October 4, 2009, Susan de Witt identified the defendants' unlawful objective of getting rid of the Johnstons, and offered a number of means for accomplishing the objective. CP at 928-29 ("We, **collectively**, need to get rid of them, and any and all of these ideas are not bad ones")(emphasis added); *see also* CP at 931-32 ("Our little road. Our little community. I think it's fair to say that everyone around here would like [the Johnstons] to leave"); Ex. 934-35 ("I really feel if Jim had to dismantle his barricade, he'd leave.").

Once the HCPOA affirmatively determined that the trail was wholly on the Johnstons' property, it had no lawful right to take action or encourage the action of others in furtherance of its goal of asserting its dominion over the trail. CP at 870 (testifying that he told the HCPOA on September 12, 2009 that a survey revealed that the trail was located wholly on the Johnston property). But that did not prevent the HCPOA and the other defendants from employing any and all means necessary to force the Johnstons from their home to achieve the HCPOA's goal of restoring the neighborhood's access to the trail. CP at 1212-14. Two weeks after learning about the survey, Mr. Heater pledged the HCPOA's support in "any effort" to reopen the trail to the neighborhood, CP at 1209-10, which the Samaniego defendants readily accepted, CP at 939.

Then on December 5, 2009, four members of the HCPOA including its treasurer, ambushed the Johnstons' landlord to enlist his assistance in removing the Johnston family from the neighborhood. CP at

1027. During this misguided attempt to wrongfully interfere with the lease agreement between the plaintiffs and their landlord (an unlawful purpose), the HCPOA members made a number of defamatory statements leading the landlord to believe that Dr. Johnston was a child molester (an unlawful act). CP at 829, Gibson Dep. at 159:5-160:19. While the HCPOA has now predictably attempted to distance itself from the Gibson ambush as the actions of rogue individuals, the sworn testimony of Ms. de Rubertis, CP at 1035-36, and the email exchange between the HCPOA president and treasurer, CP at 1087-88, create a genuine issue of material fact as to whether the Gibson ambush can be attributed to the HCPOA as a participant to the conspiracy. To be clear, never once did the HCPOA president or any other officer or member of the HCPOA denounce or attempt to put an end to the efforts of individuals to force the Johnstons from their home.⁷ To the contrary, after the Gibson ambush proved unsuccessful, the HCPOA president, Mr. Heater, considered creating new HCPOA rules to exclude the Johnstons, CP at 1099-1100, and attempted to recruit residents from the neighboring road to join the crusade to force the Johnstons from their home, CP at 941-43. The HCPOA's endorsement of the Gibson ambush and other efforts to force the Johnstons from their home are not surprising given Mr. Heater's admission that his "goal as HCPOA president is to promote the resolution of the trail dispute in a

⁷ Instead, Don Lorimer cautioned the HCPOA president that the organization needed to tread lightly in their collective efforts to regain access to the trail lest they be sued. CP at 1090-91.

manner consistent with the best interests of the homeowners in [the] neighborhood.” CP at 1212-14 (emphasis added). Of course, those interests would be that of the HCPOA members and officers, and not that of the Johnstons. As succinctly stated in the email communications of the HCPOA members and officers, the method employed to secure those interests was to take whatever action necessary, even if unlawful, to force the Johnstons out of their home.

The undisputed facts clearly establish an issue of material fact as to whether the HCPOA participated in the conspiracy to force the Johnstons from their home using any and all means necessary. The summary judgment order should be reversed with respect to this claim.

2. THERE ARE MATERIAL ISSUES OF FACT THAT PRECLUDE SUMMARY JUDGMENT ON PLAINTIFFS’ CLAIMS OF DEFAMATION, OUTRAGE, INVASION OF PRIVACY AND HARASSMENT

As demonstrated above, there is an issue of material fact as to whether the HCPOA participated in the civil conspiracy to force the Johnstons out of their home in order to control the trail for the neighborhood. But even if the HCPOA did not participate in the conspiracy, there remain issues of material fact as to whether the HCPOA is vicariously liable for the torts committed by its officers and members.

a. The HCPOA Is Jointly Liable for the Torts Committed by the Other Defendants

The same facts that create an issue of material fact on the Johnstons’ claim for civil conspiracy also create an issue of material fact with respect to the Johnstons’ claims for defamation, outrage, invasion of

privacy and harassment. The Johnstons allege in the complaint that these torts were committed by the HCPOA members and officers in furtherance of the organization's efforts to force the Johnstons from their home in order to gain neighborhood access to the trail wholly located on the Johnstons' property. CP at 17-18. HCPOA member and co-defendant Kathleen de Rubertis admitted as much under oath. CP at 1035-36. There is ample evidence to support each of these causes of action. Apart from the civil conspiracy claim, the only question is whether the individual members and officers of the HCPOA committed these torts on their own, or whether liability for these torts can be imputed to the HCPOA under a theory of vicarious liability. *See, e.g., Deep Water Brewing, LLC v. Fairway Resources Ltd.*, Wn.App. 229, 270 (2009) (affirming decision holding the homeowner's association jointly and severally liable with its president for the torts committed by its president).

Of course, a "corporation can act only through its officers and agents." *Richardson v. Brotherhood of Locomotive Firemen and Enginemen*, 70 Wn. 76, 79 (1912); *see also* 16 DAVID K. DEWOLF, WASH. PRAC., TORT LAW AND PRACTICE § 4:1 (accord). Here, each individual defendant was either an officer or member of the HCPOA at all relevant times. CP at 14, 892-95. In other words, they were the agents of the HCPOA. As made clear by Mr. Heater, the HCPOA president and the person charged with forming the HCPOA as a limited liability company, regaining dominion over the trail on the Johnston property was a neighborhood issue. CP at 906, 1209. Indeed, Mr. Heater identified the

“Homeowner’s trail review” issue as one of three “critically important” issues to be resolved by the HCPOA. CP at 892-95. To achieve this objective, Mr. Heater pledged the support of the HCPOA, CP at 1209, and participated in those efforts. *See State v. Ralph Williams' NW Chrysler Plymouth, Inc.*, 87 Wn.2d 298 (1976) (“If a corporate officer participates in the wrongful conduct, or with knowledge approves of the conduct, then the officer, as well as the corporation, is liable for the penalties”); *see also Grayson v. Nordic Const. Co., Inc.*, 92 Wn.2d 548, 553-54 (1979) (holding officer and company jointly liable for tortious conduct in which the officer participated).

And as demonstrated by the sworn testimony of Kathleen de Rubertis, the plan to ambush Dr. Gibson with the defamatory letter and slanderous accusations was born from the HCPOA during meetings amongst the members and officers as a means of forcing the Johnstons out of their home in order to regain control over the trail for the neighborhood. CP at 1035-36. Even if this tortious conduct was not officially authorized by the HCPOA that does not absolve the HCPOA of vicarious liability for the torts of its members and officers. After all, a principal may be vicariously liable for the unauthorized conduct of an agent who is acting on the principal's behalf. *See McGrane v. Cline*, 94 Wn.App. 925, 929 (1999). Given the common goal and overarching purpose of the defendants’ harassment and defamation of the Johnstons was to force the Johnstons out of the neighborhood to re-open the trail to the HCPOA members, even if the tortious conduct was not authorized by the HCPOA,

the organization should still be held accountable for the torts of its members and officers. Just as the HCPOA and its members were “united” in their efforts to force the Johnstons out, even if the civil conspiracy claim fails, they should similarly be united in the imposition of liability against them for the harm they caused the Johnstons in coordinated efforts to control the trail using any means necessary.

b. Defendants Defamed the Johnstons

A defamation claim comprises of four elements: (1) falsity, (2) an unprivileged communication, (3) fault, and (4) damages. *See Maison de France, Ltd. v. Mais Oui!, Inc.*, 126 Wn. App. 34, 43-44 (2005). The necessary degree of fault depends on whether the plaintiff is a private individual or a public figure or public official. *Id.* Because Dr. Johnston is a private individual, he need only prove that the HCPOA members and officers negligently made the false statements. And because many of the alleged false statements, whether through written communication or slanderous oral accounts, also implicated crimes of moral turpitude (i.e. child molestation, child predation, molestation of women and larceny), the statements are *per se* defamatory and damages are presumed. *See Maison de France*, 126 Wn. App. at 43.

There is an issue of material fact of whether the HCPOA members and officers, at the very least, negligently made false statements regarding Dr. Johnston and Uli Johnston to the neighbors as well as numerous other individuals. *See Funderburk v. Bechtel Power Corp.*, 103 Wn.2d 796, 800 (1985) (“Whether a statement is understood to be defamatory is a question

for the trier of fact to determine”). HCPOA members and officers defamed the Johnstons on numerous occasions. The HCPOA’s defamation campaign began with the letter that Mr. Lorimer wrote to the HCPOA president in which he falsely claimed that Dr. Johnston threatened his son with a stick and a gun. CP at 904. Mr. Lorimer also falsely accused the Johnstons of placing booby traps on the trail and labeled the Johnstons a threat to the entire neighborhood. *Id.* As explained above, and as corroborated by the police report, *cf.* CP at 899-902, Mr. Lorimer’s statements concerning Dr. Johnston were false. But once Mr. Lorimer published these false statements to the president of the HCPOA, other members and officers of the HCPOA quickly spread the defamation throughout the neighborhood. *See, supra*, (page 5-7).

In addition, Ms. de Witt, the HCPOA treasurer, made numerous defamatory statements to others including that Dr. Johnston threatened to “blow [the] brains out” of neighborhood kids, CP at 928-29, that Dr. Johnston committed child abuse, CP at 969-70, that Dr. Johnston was “not a man to be trusted,” CP at 1001, that Dr. Johnston was a “molester,” CP at 829, Gibson Dep. at 159:5-160:19, that Dr. Johnston was a “child predator,” *id.*, that the Johnstons were “crazy people who want nothing more than to take over the entire neighborhood,” CP at 1137-38, that the Johnstons are thieves, CP at 1140, that Dr. Johnston is “totally insane and capable of God knows what,” CP at 1142-43, and that Dr. Johnston lied repeatedly under oath, CP at 1145, 1147. Multiple members of the HCPOA also signed their name to a letter, personally delivered to Dr.

Gibson, in which they unequivocally stated “that [Dr. Johnston] is no longer able to practice medicine in the United States,” CP at 1001-1010. The HCPOA members published this false information despite that fact that they had investigated and knew that Dr. Johnston was licensed to practice medicine in Washington, CP at 951-52, and Texas, CP at 954-64. The truth, however, was immaterial to defendants who wanted nothing less than “jim johnston’s name plastered across America.... [and] his name synonomous (sic) with twisted, evil morons of the world.” CP at 1135.

There is clearly an issue of material fact as to whether the HCPOA members and officers defamed the Johnstons in furtherance of the organizations efforts to force the Johnstons from their home in order to re-open the trail for the neighborhood.

c. Defendants’ Conduct Fully Supports an Outrage Claim

There are material issues of fact with respect to the Johnstons’ claim of outrage. “The question of whether conduct is sufficiently outrageous is ordinarily for the jury.” *Birklid v. Boeing Co.*, 127 Wn.2d. 853, 867 (1995); accord *Chamber-Castanes v. King County*, 100 Wn.2d 275, 289 (1983) (“The determination of whether such conduct is outrageous and reckless rests with the jury”). A defendant is liable for outrage for any conduct that is “beyond all possible bounds of decency.” *Seaman v. Karr*, 114 Wn.App. 665, 686 (2002). A judge should take an outrage claim from the jury only when no “reasonable minds could differ on whether the conduct has been sufficiently extreme and outrageous to

result in liability.” *Phillips v. Hardwick*, 29 Wn.App. 382, 387 (1981).

Accord RESTATEMENT (2d) OF TORTS § 46, *comment h*.

The outrageous conduct of the HCPOA’s officers and members can be summarized as follows:

- (a) Engaging in an 18-month long harassment and defamation campaign aimed to force the Johnstons from their home and destroy Dr. Johnston’s professional reputation in the community, CP at 904, 1061-78, 1001-1010, 1135; CP at 884, Kerry Samaniego Dep. at 46:13-23; CP at 805-89, Kathleen de Rubertis Dep. at 37:7-8, 37:24-38:8, 74:13-75:11, 76:23-77:6, 79:8-13, 79:21-80:23, and 82:2-9; CP at 838, Pamela Heater Dep. at 99:24-101:8; CP at 839, Pamela Heater Dep. at 105:10-15; CP at 815, Susan de Witt Dep. at 47:24-48:25; CP at 816, Susan de Witt Dep. at 50:15-51:17;
- (b) Announcing in a public space that Dr. Johnston is a child molester or child predator, CP at 829, 1012-13 and 1027;
- (c) Making salacious statements to medical professionals such that one recipient of those statements thought that the police needed to be called on the Johnstons, CP at 1164;
- (d) Accusing Dr. Johnston of abusing his daughter with his medical equipment, CP at 969-70;
- (e) Spreading *per se* defamatory statements about Dr. Johnston throughout the community such as Dr. Johnston threatened a teenager with a gun or a stick, he threatened to blow a kid’s brains out, he molested 8

women, he is not licensed to practice medicine, he is a thief, he is a perjurer, etc., CP at 904, 928-29, 1001-1010, 1145, 1147;

(f) Like a stalker, keeping the Johnstons under constant surveillance and reporting the Johnstons' personal affairs to others, CP at 1061-78;

(g) Continuously interfering with the Johnstons' right to exclusive possession of their property even after the defendants undeniably knew that the trail at issue was entirely located within the boundaries of the Johnstons' property. CP at 926, 928, 932-32, 934, 941-43, 1209.

Courts have found conduct outrageous that is not nearly as offensive and reckless as the actions of the HCPOA's officers and members in this case.

In *Phillips*, the defendants were held liable for outrage when they held over their tenancy in a house they had rented from the plaintiffs. The court upheld the trial court's judgment in favor of the plaintiffs, ruling that these actions were such that "a trier of fact could find [them] outrageous and beyond the bounds of decency." 29 Wn. App at 389.

In *Brower v. Ackerley*, 88 Wn. App. 87 (1997), the court reversed the trial court's dismissal of an outrage claim based on mere anonymous telephone calls, finding the conduct sufficiently outrageous to cause severe emotional distress and support a claim of outrage. "[T]he telephone harassment as alleged by Brower fits within the definition of a criminal statute, with no imaginable purpose except to cause emotional distress.... a rational jury could conclude the entire episode was extreme and outrageous." *Id.* at 102.

The Washington State Supreme Court reversed the trial court's dismissal of an outrage claim in *Chamber-Castanes v. King County*, 100 Wn.2d 275 (1983), holding that the slow response by police could be found by a jury to be "sufficiently extreme and outrageous as to result in liability." *Id.* at 289. The court found that a jury should determine whether "the police conduct was extreme and outrageous, and whether appellants suffered extreme emotional distress from such conduct." *Id.*

Similarly, in *Seaman*, the court reversed summary judgment on an outrage claim when police entered an apartment pursuant to a lawful warrant, accused the plaintiffs of committing a crime and searched their belongings. The court found that the plaintiffs "produced sufficient evidence such that a trier of fact could find Defendants' conduct exceeded 'all possible bounds of decency,' measured against an objective standard of reasonableness." 114 Wn. App at 685-86.

In this case, a jury could easily find that defendants' actions were much more offensive and outrageous than the actions of the defendants in the above-cited cases. Indeed, the illustrations in the Restatement makes plain that conduct far less extreme than that at issue in this case – including even practical jokes – are sufficient for an outrage claim. *See* RESTATEMENT (2d) OF TORTS § 46, *illustrations* 1 and 3.

The totality of the defendants' behavior, including their concerted efforts to harass and defame the Johnstons, their conspiratorial and extreme conduct over more than 18 months, and their specific intent to inflict emotional harm, fully support an outrage claim. The conduct at

issue had “no imaginable purpose except to cause emotional distress,”
Brower, 88 Wn. App. at 102.

There are issues of material fact as to whether the HCPOA should be held liable for the outrageous conduct of its officers and members. After all, one of the most outrageous acts of the HCPOA officers and members was the authorship and delivery of the defamatory letter to Dr. Gibson, in which they falsely claimed that Dr. Johnston molested women, lost medical license, presented a danger to children and otherwise attacked his character. CP at 1001-1010. Moreover, when they delivered the letter, they made outrageous statements to the effect that Dr. Johnston was a child molester. There is hardly a more outrageous accusation than to call a medical professional, especially one with two young daughters, a child molester. Between (1) Kathleen de Rubertis’s testimony admitting that scheme to ambush Dr. Gibson with the outrageous letter was hatched within the HCPOA; (2) the participation of the multiple members and an officer of the HCPOA to carry out the ambush; and (3) the HCPOA president’s endorsement of the ambush when he learned of it after the fact, there is clearly an issue of material fact as to whether the HCPOA should be liable for the outrageous conduct of its members and officers.

d. There is No Basis for Granting Summary Judgment on the Invasion of Privacy Claims

The Johnstons asserted two causes of action for the defendants’ repeated invasion of their privacy: false light and intrusion upon seclusion. There are material issues of fact with respect to each claim that

should be decided by the jury.

1. The False Light Claims Must Be Resolved by the Jury

For the same reasons the Johnstons' defamation claim should continue, so should their claim for false light. A false light claim arises:

when someone publicizes a matter that places another in a false light if (a) the false light would be highly offensive to a reasonable person and (b) the actor knew of, or recklessly disregarded, the falsity of the publication and the false light in which the other would be placed. A plaintiff need not be defamed to bring a false light claim. It is enough that the plaintiff is given unreasonable and highly objectional publicity that attributes to him characteristics, conduct, or beliefs that are false and thus places the plaintiff before the public in a false position. If the statement complained of is both false and defamatory, the plaintiff can proceed upon either theory (defamation or invasion of privacy) or both.

16A DAVID K. DEWOLF, WASH. PRAC., TORT LAW AND PRACTICE § 20.6.

The same set of facts that support the Johnstons' defamation and outrage claims also create an issue of material fact with respect to their false light claim. As specified *supra*, the evidence shows that the HCPOA members and officers publicized Dr. Johnston to be a predator, a molester, a liar and a thief. Obviously, such portrayal is offensive, especially for a medical professional with an esteemed international reputation, and the HCPOA members and officers acted willfully, or at the very least in reckless disregard, in publicizing the Johnstons in such a manner. Taken in the light most favorable to the Johnstons, the evidence overwhelmingly establishes that the defendants portrayed the Johnstons in a false light and as such the Johnstons' claim should be heard by the jury.

2. The Evidence Supports the Intrusion upon Seclusion Claims

A “protectable interest in privacy is invaded by: (a) unreasonable intrusion upon the seclusion of another or into his private affairs, *or* ... (c) unreasonable and unwanted publicity given the other’s private life or disclosure of embarrassing private facts, *or* (d) publicity that unreasonably places the other in a false light before the public.” *Mark v. King Broad. Co.*, 27 Wn. App. 344, 354 (1980). When the evidence and reasonable inferences therefrom are weighed in the Johnstons’ favor, there are issues of material fact that need to be decided by the jury on this claim.

Ms. de Witt, an HCPOA officer, monitored the Johnstons, even in violation of a restraining order,⁸ and reported on their activities to others. *See, e.g.*, CP at 931-32. There can be no doubt that constant surveillance over the Johnstons (which the general public would not be free to view) while alleging that Dr. Johnston abuses his children, CP at 969-70, and that the family abused its dog, CP at 990, all qualify as unreasonable publicity, intrusions on a families’ private affairs and/or cast the Johnstons in a false light. Indeed, Ms. de Witt’s unlawful conduct led to the BIMC issuing a restraining order against her and, as documented herein, Ms. de Witt continued her surveillance of the Johnstons in violation of that restraining order. CP at 1058-59, 1061-78, 1080. Of course, any and all of these actions a jury could find to be substantial and highly offensive and objectionable to the ordinary person. *Mark*, 27 Wn. App. at 356.

⁸ The Bainbridge Island Municipal court (“BIMC”) entered a protective order against Susan de Witt, an HCPOA officer, ordering her to cease her harassment and constant surveillance of the Johnstons. CP at 1110-11.

There are issues of material fact as to whether these actions by the HCPOA officers and members invaded the Johnstons' right to seclusion.

e. The HCPOA Members and Officers Harassed the Johnstons

“Washington has taken a strong interest in protecting its citizens against harassment.” *See, e.g., Burchell v. Thibault*, 74 Wn. App. 517, 520 (1994). The civil anti-harassment statute provides a cause of action for harassment. *Id.* at 521. The elements this cause of action are: (1) a knowing and willful (2) course of conduct (3) directed at a specific person (4) which seriously alarms, annoys, or harasses such person, and (5) which serves no legitimate or lawful purpose. *See* RCW 10.14.020(1). The course of conduct may be brief, but must evidence “continuity of purpose.” *See* RCW 10.14.020(2). To be actionable, the harassment must be “such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress.” *Burchell*, 74 Wn. App. at 521.

The defendants' joint efforts to force the Johnstons from their home led the Johnstons to seek anti-harassment orders against Susan de Witt and Kathleen de Rubertis, the two HCPOA members who had personally confronted Dr. Gibson. CP at 1026 (BIMC Cases No. 04-10 and 05-10). Susan de Witt also filed a claim for an order against the Johnstons. All three cases were consolidated and tried before Judge Carruthers on February 17, 2010. *Id.* The Johnstons appeared *pro se*. De Witt and de Rubertis were represented by attorney Ryan Vancil, who also was the attorney for HCPOA. *Id.*

In response to the Johnstons' petition for an anti-harassment order, the defendants maintained their united front. Declarations were submitted by defendants Don Lorimer, Susan de Witt, Kathleen de Rubertis and Courtenay Heater. The Lorimer declaration filed with BIMC, CP at 1102-08, contains much of the same defamatory material found in his August 10, 2009 email to Mr. Heater. CP at 904. Leading up to the BIMC hearing, Mr. Lorimer confirmed his view that the neighbors, "as an HOA" [homeowners association], needed to actually come together and discuss how to respond as a group. He ended his email of February 11, 2010 to Corbin de Rubertis (the HCPOA vice president) with the motto, "United we stand." CP at 1093-95. And Mr. Lorimer testified that "we" meant the HCPOA. CP at 872, Lorimer Dep. at 140:8-19. Despite the defendants' united stand, the court found that Ms. de Witt in fact harassed the Johnstons and entered a protective order against her. CP at 1110-11. Thus, there has already been an affirmative finding by a court that an officer of the HCPOA harassed the Johnstons. Despite the protective order, the harassment continued. *See, e.g.*, CP at 1058-59, 1061-78, 1080. (establishing that Susan de Witt, the HCPOA treasurer, kept the Johnstons under surveillance, a form of harassment specifically prohibited by the BIMC protective order).

Moreover, the same evidence that supports the Johnstons' claims of civil conspiracy, defamation, outrage and invasion of privacy also creates an issue of material fact for their civil harassment claim. This evidence when viewed in a light most favorable to the Johnstons,

establishes that HCPOA's actions, including but not limited to his defamation campaign and efforts to interfere with the Johnstons' right to exclusive possession of their property, were committed knowingly and willfully, were directed at the Johnstons and served no legitimate or lawful purpose. The Johnstons have also presented evidence that the HCPOA's course of conduct seriously annoyed and harassed them, causing substantial emotional distress. *See* CP at 184-86; *see also* CP at 220-21.

When the evidence is weighed and reasonable inferences considered in the light most favorable to the Johnstons, there are issues of material fact that need to be resolved by the jury on the Johnstons' claim for harassment.

CONCLUSION

For the reasons stated herein, there are numerous issues of material fact from which a reasonable jury could find the HCPOA liable for the harm its members and officers inflicted upon the Johnstons throughout the course of their efforts to force the Johnstons out of the neighborhood in order to control the trail. The Johnstons respectfully request that the Court reverse the summary judgment order dismissing all claims against the HCPOA and remand the matter for a jury trial.

DATED this 10th day of August, 2015.

ROHDE & VAN KAMPEN PLLC



Delbert D. Miller, WSBA No. 1154
Al Van Kampen, WSBA No. 13670
Nathan Paine, WSBA No. 34487
Attorneys for Plaintiffs James and
Ulrike Johnston

DECLARATION OF SERVICE

The undersigned hereby declares, under penalty of perjury under the laws of the State of Washington, that on this day, he caused a true and correct copy of the foregoing to be sent via email per the parties CR 5 agreement concerning service by electronic means to the following:

Hayes Gori
271 Wyatt Way NE, Ste. 112
Bainbridge Island, WA 98110
Email: Hayes@hayesthelawyer.com
*Attorney for Defendants Hidden Cove
Property Owners Association LLC*

Shelby Lemmel
Masters Law Group, PLLC
241 Madison Avenue North
Bainbridge Island, WA 98110
Email: Shelby@appeal-law.com
*Attorney for Defendants Hidden
Cove Property Owners
Association LLC*

Signed at Seattle, Washington on this 10th day of August, 2015.



E. Birch Frost