

FILED
Court of Appeals
Division II
State of Washington
12/19/2017 8:00 AM
DIVISION II
OF THE STATE OF WASHINGTON

Larry Seaquist & Carla Seaquist, Appellants

v.

Michelle Caldier, Respondent

BRIEF OF APPELLANTS

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A. INTRODUCTION

The parties were competing for the position of State Representative for the 26th Legislative District in 2014. Appellant Larry Seaquist was a four term incumbent. Respondent Michelle Caldier had lived in the 26th as a child, but was returning after many years away. After Appellant took a photo of her car, Respondent Caldier ran a number of ads on television, over radio, on the internet, and in mailers that Appellant had taken secret photos of her as she was getting into her car, had caused others to take photos of her home and family, caused her mailbox to be invaded, and was stalking her, making her feel unsafe in her home. Appellant sued for defamation and False Light. The court below dismissed his case on summary judgment. Appellant appeals.

B. ASSIGNMENTS OF ERROR

1. The court below erred by resolving disputed facts in favor of Respondent, contrary to Summary Judgment standards.
2. The court below erred by failing to recognize that even opinion can be the basis of defamation, if the opinion is based on false facts, if there are undisclosed facts which contradict the opinion, and if the opinion falsely implies that there are facts supporting the opinion.
3. The court below erred by engaging in and relying solely on analysis

Defamation by Implication, which requires true statements, juxtaposed to create a false impression, when the present case involved demonstrably false statements.

4. The court below erred by striking portions of the defamatory publications, when the court should instead permit and require the jury to view the publications as a whole.

C. STATEMENT OF THE CASE

I. Statement of Facts

Appellant Seaquist was an elected Representative to the Washington State Legislature, serving the 26th Legislative District in Position 2, having so served through four terms since 2007. In 2014, he was running for his fifth term. Clerk's Papers, hereafter referred to as CP, 685.

Appellant Seaquist has also served in the United States Navy, retiring at the rank of captain in 1994. His service was stellar, reflected by the navy's decision to assign him to command four separate warships, including the USS Iowa, an Iowa Class Battleship. He has earned the Legion of Merit and other service commendations. He was honorably discharged upon retirement after 32 years of service. CP 685-686.

As a warship commanding officer his character and probity were the cardinal qualities that led the Navy to repeatedly trust him with the lives of

thousands of sailors at sea sometimes in hostile waters and to be personally responsible for the custody of nuclear weapons. He was entrusted with special knowledge of extremely highly classified intelligence and special military capabilities. In each case, those responsibilities of high trust rested on special investigation procedures and the confidence of his chain of command as well as on his performance of those duties. On one occasion, Appellant Seaquist was entrusted with the safety and security of the sitting President of the United States, Ronald Reagan, when he came on board the USS Iowa. Further, in command, he was, and still is often called “the best captain I ever had.” Seaquist Declaration, CP 686.

After his service at sea, he served in Washington D.C. with the Joint Chiefs of Staff under Colin Powell as the deputy director of the division responsible for strategy and policy, J-5. He so served for about 18 months, until he was re-assigned to serve the Secretary of Defense as the Deputy Director of Strategy and Policy under the Presidency of George H.W. Bush. CP 686.

After his military service, Mr. Seaquist has written commentary for respected international newspapers and the Christian Science Monitor, which his background and standing qualify him to do. The reputation of Appellant Seaquist in the community was excellent, and this reputation is precious to

him in his public life, in his legislative career, and in his personal relationships and personal life. CP 686-687.

Appellant Carla Seaquist has been married to Larry Seaquist for 37 years. She is an author, commentator, and playwright in her own right and name. She is regularly published in the Huffington Post, and was previously published in the Christian Science Monitor. The topic of her writing is generally ethical and moral issues. Her reputation of integrity and the reputation of her husband for integrity is precious to her. CP 271-272.

At the time this case arose, Respondent Caldier was also seeking election to the 26th Legislative District Representative, Position 2, and was a political opponent of Appellant Larry Seaquist, seeking to take his position by defeating him in the general election on November 4, 2014. She is a public figure. CP 687. She had grown up in the 26th District, but had been away for a long time, and was returning to run. CP 77, 78. See also, e.g., CP 583, discussion about “growing up in the area to soften the moved into the district hit,” and CP 724 (Gardner Blog).

As a public figure she has a reduced expectation of privacy while in public places. Appellant Seaquist has lived in the public arena and with that reality for many years. CP 691.

In Ms. Caldier’s own advertising for her campaign, she had her own

portrait willingly displayed on her oversized roadside campaign signs. CP 704-705. In the experience of Appellant Seaquist, of all the campaigns having been run in the 26th Legislative District, in Kitsap County, and in Pierce County, in the years and many campaigns preceding and during the 2014 election season, she was the only candidate to use her own likeness in this manner. CP 692. She also had her image on balloons and other campaign handouts. She is not sensitive about publication of her image. She wanted the voters to contrast her age with Seaquist's age. He was 75 years of age during that campaign. She was then 38 years of age. CP 692.

August 29, 2014 Photos Taken

On August 29, 2014, both parties attended a political candidate endorsement interview at the Kitsap Sun in Bremerton, Washington. They both parked their vehicles on 5th Street, a public street outside the Kitsap Sun office to attend the interview event. Appellant Seaquist's vehicle was parked behind Respondent Caldier's vehicle.

The editorial interviews ended very cordially, each with praise for the other. CP 688. After the editorial interviews ended cordially, both candidates left the building and went into their cars to leave.

Respondent Caldier's vehicle was a late model, white Lexus IS250C, a convertible, with a retractable hard top. After she was in her car, as it was

a nice day, Caldier retracted the hard top roof. It is automatic with the trunk opening and the back window and roof folding into three pieces into the trunk space, then the trunk deck closing over them. The process takes 20 seconds. CP 688-689.

Right after the joint interview, Mr. Seaquist got into his car and started checking emails and schedule on his smart phone/cell phone. As he was sitting there, he saw her trunk pop up, and the roof retract automatically, as described above. Mr. Seaquist admired the mechanics of it, and wanted to make a note of the make and model. From where he sat, he could see the make and model, but it was a jumble of letters and numbers which he knew he would not be able to remember. He looked for a pen, but could not find one, so he took a photograph of the rear of the car with his cell phone camera, on his smart phone, which was already in his hands, to record the data. The camera actually snapped two identical photographs, sequentially, on his pushing the button once. The shot was a wide angle shot, showing the car, the street, and buildings on both sides of the street. CP 689.

Ms. Caldier cannot be seen in the photographs¹, except that, on full

1 A note on the record. Kitsap County scans as high contrast black and white images all documents, then destroys the originals. We have ensured that photographic exhibits have been sent as color images as exhibits to the court of appeals to assist the court in review.

magnification and close examination, part of a face with sunglasses can be seen in the vehicle's center rear view mirror. Even on close inspection of the photograph at full resolution, the occupant cannot be identified. It could be any white person with brown hair. Even gender cannot be conclusively determined. CP 689-670. Mr. Seaquist did not intend to take any photograph of Michelle Caldier, and did not do so. CP 690.

After he took the photo, he went back to looking at his schedule and emails. Mr. Seaquist did not notice Ms. Caldier get out of her car until she was standing beside his own car at his window, which was down. This surprised him. CP 690. Ms. Caldier asked Mr. Seaquist if he took a photo. He said "yes." She then walked away. She was very direct with Mr. Seaquist, and he was surprised at her tone. He had been happy with the amicable way in which the interview was conducted and concluded. CP 690.

Please see CP 699-700, the two photographs from his cell phone camera. See also the color exhibits. The images show the date the photos were taken, from the electronic data stored with the photos, and the date and time is also embedded in each photograph name automatically assigned by the cell phone. These two of her car are the only photographs Mr. Seaquist ever took on August 29, 2014. CP 690. The photo(s) he took are not of Ms. Caldier, and certainly are not of her as she "got in to" her car. CP 690.

Mr. Seaquist has never taken a photograph of Ms. Caldier's person. He likewise never authorized nor directed any of his campaign staff to photograph Respondent Caldier. In fact, he repeatedly instructed his staff and his friends to stay away from personal attacks on Ms. Caldier, and stay focused on issues and voters. To his knowledge, after inquiring of his staff, and volunteers, they have never violated his instructions. CP 690-691.

It is generally known that there is no right of privacy as to images taken of one displaying herself openly in public, in daylight, on a city street, in a flashy convertible with its top down. This is known to Ms. Caldier, as it is to most people. In fact, it is now commonplace for there to be security surveillance video cameras on buildings in downtown areas, like Fifth Street in downtown Bremerton. CP 691.

The photograph(s) Mr. Seaquist took of the car were taken openly with no effort to disguise what he was doing. It was taken for a legitimate purpose, in a manner that is now commonplace. He had no reason to be covert. CP 691. Cell phone cameras are so ubiquitous and readily available, that it is common for people to take photos of anything of interest. CP 691.

September 2, 2014 Facebook Post

As part of her political campaign, Respondent Caldier had a Facebook page, which she invited others to view. On September 2, 2014, Respondent

Caldier posted a comment on her Facebook.com page as follows:

“I came out of a candidate interview and saw Rep. Larry Seaquist, my opponent, taking pictures of me as I got into my car. Wow.... I felt like I was being stalked!” [emphasis added].

In this context, more than 50 people commented in response to this Facebook posting, with the consensus that it was wrong that Appellant Seaquist had done so. Many inferred a sexual motivation to his acts, or intent to intimidate. CP 692, 693, 708, 709, color exhibits. Caldier herself “liked”² many of the most extreme comments. CP 508-513.

September 5, 2014 Police Report

After the Facebook.com posting, being encouraged by the commentary, and by her campaign manager, CP 530 (Deposition of Chuck Adams, page 48, Line 18), on September 5, 2014 Respondent Caldier went to the Bremerton Police Department and filed a report³ complaining of harassment because of this incident. She explained to Officer Robert Davis, Jr. that Mr. Seaquist took her photo on August 29, 2014, but that Appellant Seaquist had said nothing to her of a threatening nature. The officer

² In Facebook, viewers can post a “like” by clicking a button, giving feedback to the post.

³ Note that filing a police report, even a false one, is not part of this complaint, as that is conduct protected with immunity by RCW 4.24.510. Please see § 2.21 of the complaint, CP 9.

explained to her that “Seaquist has not committed any crime.” Respondent Caldier stated that she did not want Mr. Seaquist contacted by the police about this incident. CP 553, 555.

Respondent Caldier also reported to the police other false claims about Appellant Seaquist, including 1) that Appellant Seaquist photographed her on a couple of additional occasions while in downtown Bremerton, while she was getting out of her vehicle or in public, with only the last one being the August 29, 2014 event; 2) in the past Appellant Seaquist has been violent⁴ with people, so she was concerned. CP 554.

Respondent Caldier also reported to the officer that “subjects” had trespassed on her property in Port Orchard, and had taken photographs of her residence and children, though she did not attribute those incidents to Appellant Seaquist or his campaign staff at that time. CP 554. Note that there is no mention to the officer that anyone tampered with her mail, at that time. CP 554.

Caldier and her campaign managers had their campaign attack theme. After the police report was made, Caldier’s campaign manager wanted a copy of it to include in campaign literature. CP 561, 563, 571, 587.

⁴ The article referenced as supporting a history of violence by Seaquist, CP 102,103, does not support an allegation of a history of violence.

September 12, 2014 Gardner Blog/Online News Article

As Respondent Caldier had made public the allegations that Appellant Seaquist had taken photographs of her person as she “got into my car” making her feel stalked, in her Facebook page, published for all to see on the internet, Kitsap Sun reporter Steve Gardner ran an online news article, web log (blog) about it, at pugetsoundblogs.com, on September 12, 2014. CP 105-110, CP 721-725, Color Exhibits. He reviewed the police report, interviewed both parties about the incident, obtained from Mr. Seaquist the actual photo taken of the car, and published it, along with his online blog report. Because of this, Respondent Caldier has seen the actual photograph in which she says Mr. Seaquist was taking her photograph, and knows she cannot be seen in it or identified by it, and that she was not getting into or out of her car when it was taken. She admitted she saw the actual photo in the Gardner Blog, the online Kitsap Sun article⁵. CP 564, 655, answer to interrogatory 36.

There is proof of where she was at the time of the photo, as there are sunglasses in the rearview mirror, so she was clearly seated at the time. We

⁵ This proves she knew the actual image does not show her, before she published subsequent attacks about her taking photos of her getting in to her car, as detailed below.

cannot know from the picture alone who is there. It also takes 20 seconds to retract her hardtop, so she was in the car for a while. She was not “getting in to” her car when the photos were taken.

The Gardner Blog also contains the first reference to Respondent Caldier’s mail being tampered with. She is quoted as saying that one day a neighbor caught “people” going through her mail, with no further description of the people. This was later shown to be untrue. CP 741, 742. The neighbor actually found mail in a pile either in or in front of Caldier’s carport.

Mail theft is a growing problem in Kitsap County, as demonstrated by the record. CP 658-668. Before she later accused Appellant Seaquist of tampering with her mail, Ms. Caldier never considered the possibility of identity theft. She says she never considered the possibility that anyone other than Mr. Seaquist was responsible. Exhibit J, page 60-63.

September 15, 2014 Communications

Two things occurred on this date, both by Ms. Caldier, and both contradictory to each other. She posted on facebook a picture of Mr. Seaquist, with her own comment: “I believe it is fair to attack a politician’s voting record in a debate, and hope our race stays on the issues.” CP 635. That same date, there is a draft to her from her campaign consultant, Chuck Adams, with what he called the “photogate” piece, which, in part, spawned

this lawsuit, and resulted in the offending images and messages mailed into the homes of thousands of voters. CP 553.

October 8, 2014 Video Published

On October 8, 2014, defendant Caldier published a 30 second campaign video on youtube.com, on the worldwide web, viewable from anywhere on the globe by internet. CP 79. As part of her political campaign, Respondent Caldier also began broadcasting the same video as a 30 second television advertisement on cable television and on local television over the public airwaves into the homes of citizens of the community, in which her spokesperson makes the following written and verbal statements:

“...Seaquist was caught secretly photographing Caldier, invading her privacy.”

“Larry Seaquist was caught secretly taking photos of Caldier.”

“Source: Police report filed September 5, 2014.”

Caldier herself then says: “I am Michelle Caldier, and I approve this message.” This video falsely claims that the information that 1) Seaquist invaded her privacy, 2) that he was caught secretly taking photos of Caldier and 3) this was learned from the source police report, when the sole source of information is Caldier herself. The electronic file of the video is referenced as Exhibit B to Ms. Caldier’s declaration, CP 77. See Exhibits sent to the court of appeals in CDs.

Included in the broadcast video is a photo-shopped image of the face of Larry Seaquist, onto which another person's hands are grafted, holding a camera. The image of Mr. Seaquist is rotated to give the impression that he is hunched over, trying to hide, as his camera takes a photo. In it, Mr. Seaquist has a gray turned up collar, partially covering his face, adding to the intended impression that he is trying to be covert. He is in a grassy area, perhaps a park, not a car. The image selected shows an intense look on his face, as if Mr. Seaquist is viewing and photographing something salacious, with lecherous intent. CP 712, also used in later publications, CP 93. See also color exhibits. The image misrepresents what Mr. Seaquist actually did.

In discovery, we were able to obtain emails showing why he has a lecherous appearance in this photograph. It was not by accident. Please see CP 570, emails from Chuck Adams, Ms. Caldier's campaign coordinator, directing his graphic artist to 1) have fun with it, and 2) get a photograph with a "more animated" look on his face, and 3) calling it "photogate." He was happy with the result. CP 540.

October 10, 2014 Radio Broadcast.

On October 10, 2014, Respondent Caldier went on KIRO Radio, a local radio station broadcast throughout Western Washington, and made the following statement:

"I have been actually harassed and had people take pictures of

me; had my opponent take pictures of me. I would have to say that the Democrats have more of a war on women than the Republicans.”

See the transcript of the broadcast. CP 88, 89. The actual broadcast audio is in the record, CP 79, Exhibit C, a CD also sent to the court of appeals as an exhibit.

October 16, 2014 Campaign Mailer: “Photogate”

Respondent Caldier on October 16, 2014 , CP 79, used the same photo-shopped image, CP 93, on the back side of printed campaign literature mailed to the homes of thousands of voters in Pierce and Kitsap County, the photogate piece, being planned on September 15. CP 553. On the front side of the same campaign mailer, CP 94, is a new photoshopped image, CP 715, of a person peering with a camera into a car in which Respondent Caldier is seated, from the passenger side, within a few feet of the vehicle. The person holding the camera is a white male, like Appellant Seaquist, with Ms. Caldier on the focused viewing screen of the camera, and in the blurred background. The camera is so close to Respondent Caldier that only the interior of the car can be seen, with Ms. Caldier filling one third of the image on the camera screen. Please see the Declaration of Adam Berman as to how this image was taken by him, from the inside of her car. CP 743-745.

This image grossly misrepresents what Seaquist actually did. It has no resemblance at all to CP 699, 670, the images actually taken by Appellant

Seaquist on August 29, 2014 of the car, as was known to Ms. Caldier when the photo was taken, and as was conclusively known when she saw the true images in the Gardner blog on September 12, 2014. CP 564, 655, answer to interrogatory 36. The image, CP 715, is a gross distortion of the occurrence of August 29, 2014, intentionally created to give the appearance of stalking and harassment by Appellant Seaquist, to fit Ms. Caldier's false campaign narrative about Appellant Larry Seaquist.

On the front side of the campaign mailer, CP 94, is also an image of the police report filed August 29, 2014, along with a bold headline: CALDIER FILES POLICE REPORT AGAINST SEAQUIST, and in smaller print: Multiple Incidents Lead to Concern by Caldier.

To the left side of the front of this campaign mailer, a question is posed in contrasting colors in bold print:

“Why were Seaquist Campaign People Taking Pictures at Caldier Home?”

In legible but smaller print on the front of the campaign mailer are the words:

“It started with unwelcome strangers taking pictures of her home. Then the mailbox was tampered with leading to the likelihood of trespassing - a Federal offense. The final straw was an inappropriate intrusion by Larry Seaquist himself, sneakily taking pictures of Michelle while she was getting in to her car.

Enough is enough! Michelle filed a police report seen here to

communicate a message⁶ to Larry Seaquist and his campaign staff, that they had crossed the line. Friendly campaigning had turned into what felt like stalking and harassment to Ms. Caldier, so she took action.”

On the front of the campaign mailer in bold print is a statement:

LARRY SEAQUIST SHOULD BE ASHAMED.

Then in smaller, but very legible print:

“You would expect a higher level of integrity from a man with Larry Seaquist’s experience. Has the Seaquist team resorted to dirty tactics? IT APPEARS SO.”

On the front of the campaign mailer, next to a photograph of

Respondent Caldier is the following statement:

“I don’t think a female candidate is supposed to feel like I have felt in the privacy of my own home and car. This kind of behavior is concerning and possibly illegal.” –Michelle Caldier”

The campaign mailer includes a statement that this document was paid for by Michelle Caldier for State Representative.

Larryseaquistfacts.com

There also appeared a website: larryseaquistfacts.com in which these false statements and, again, this same falsified, photo-shopped image of Appellant Larry Seaquist, CP 93, 712, are disseminated. CP 125-129, CP 728-730. See also color exhibits, showing the color scheme of the site.

In addition to claiming to state facts (not opinions), inherent in the

⁶ Contrast Caldier telling police she did not want Seaquist contacted. CP 544

name of the site, the leading caption states:

[in bold] You should know the FACTS [capitalized, in larger font, and highlighted in yellow] about LARRY SEAQUIST.

Who is Larry Seaquist? After 8 years of being in the legislature, Larry Seaquist's failed leadership has left Washington families with higher taxes, more government waste, a broken ferry system, and a struggling public education system.

Here are the facts on what Larry Seaquist has done in the last 8 years...

The website is almost identical in content and even physical appearance to the campaign mailer referenced above. It contains the same image, CP 712, and an image reversed to place his wedding ring on his right hand, falsely giving him the appearance of a single person, and an image of the police report, CP 543. After the introduction detailed above, it contains almost all the same language, verbatim, as the Caldier's campaign mailer, including:

"Why was Larry Seaquist taking pictures of Michelle Caldier?"

"Why were Seaquist Campaign People Taking Pictures at Caldier Home? Caldier files police report against Seaquist"

"Multiple Incidents Lead to Concern by Caldier"

"It started with unwelcome strangers taking pictures of her home. Then the mailbox was tampered with leading to the likelihood of trespassing - a Federal offense. The final straw was an inappropriate intrusion by Larry Seaquist himself, sneakily taking pictures of Michelle while she was getting in to her car."

“Enough is enough! Michelle filed a police report seen here to communicate a message to Larry Seaquist and his campaign staff, that they had crossed the line. Friendly campaigning had turned into what felt like stalking and harassment to Ms. Caldier, so she took action.”

“LARRY SEAQUIST SHOULD BE ASHAMED”

“You would expect a higher level of integrity from a man with Larry Seaquist’s experience. Has the Seaquist team resorted to dirty tactics? IT APPEARS SO.”

Print and other broadcast media make reference to the larryseaquistfacts.com website so that others will visit the site. While it purports to be paid for by “The House Republican Organizational Committee,” it is identical in color scheme and almost identical in content to the campaign mailer referenced above, and contains verbatim allegations and misrepresentations, down to the punctuation, and the same photo-shopped images used by her campaign, indicating that this website is done by Respondent Caldier, or with her express directive, cooperation, and approval.

Respondent Caldier in her declaration of January simply states “I did not run the website, nor did I direct that any content be placed on the website.” CP 79. Discovery showed this was not true.

Mr. Adams, Ms. Caldier’s campaign manager, admitted he ran Larryseaquistfacts.com as part of the Caldier campaign, sending it to his graphic artist to create the site using the same images and text as was in the

“photogate” piece. CP 536, CP 537. Ms. Caldier paid for it all. CP 665.

Mr. Adams also confirmed that Campaigngrid, at his request, paid for by Ms. Caldier and her campaign, promoted the larryseaquistfacts.com site. CP 535, 539. Campaigngrid did this by placing banner ads in other websites, so that the viewers would be enticed to click and redirect the viewer to larryseaquistfacts.com. CP 535 (Adams Deposition pp 89-93). Ms. Caldier admitted that she alone wrote the checks to pay for the campaign, maintaining control of the account. CP 517 (Caldier Deposition, page 43). Per the public disclosure commission mandated campaign reporting, she spent \$15,000.00 in online advertising alone to Campaigngrid. CP 665. Her total expenditures in this campaign, were \$256,764.59. CP 665.

Campaigngrid banner ads are shown at CP 721, 733-740, 250,251-258. Appellant Carla Seaquist described being angered at encountering these pervasive banner ads even when looking at her own Christian Science Monitor article about the sex scandal of Strauss-Kahn. CP 272.

Allegation of Seaquist Campaign People taking pictures of Caldier Home

The allegation in the campaign brochure was the first time she had blamed Seaquist for this event, though it was mentioned to the police, CP 544, and to Gardner, CP 724, that people had taken photos of her home. Seaquist has no knowledge of anyone photographing her home. CP 687. No further explanation of the claimed event was given to the public at the time

these publications were broadcast, mailed and disseminated by the web. CP 94.

Only after suit was filed, in the initial motion to Strike under the Anti-SLAPP motion, was any detail or explanation given of who took the photo and that he stated a purpose, CP 78, claiming to be a real estate appraiser.

Mr. Seaquist then supplied a declaration of an expert real estate appraiser, Maureen Crawford, explaining that Caldier's home, being recently purchased on May 23, 2014, was a home which would be used to determine comparable sales values, necessary in the real estate industry. CP 278, 279. Further, she stated that lenders require exterior photographs of the comparable homes. See also Tibbs Declaration, CP 300, 301. This explanation of a real estate appraiser was never given to the public. Ms. Caldier, in her deposition, pp. 70,71, explained that this appraiser explanation would take too many words to present to the public, and she did not believe it anyway. CP 520.

Lack of Proof of Allegations of Mail Tampering and Photos at Home

When asked at deposition, page 70, whether she had any proof that Seaquist or his campaign people took photos of her home, she said she did not. CP 520. When asked at deposition, page 63 whether she had any proof that Seaquist or his campaign people tampered with her mail, she said she did

not. CP 519. Compare to the campaign mailer, CP 94, 191, and color exhibits, and compare the website, CP 126, 127, CP 28-731, and color exhibits, which express no doubts.

Ms. Caldier was successful and after the disparagement campaign described above, defeated Seaquist in the general election. CP 55.

II. Statement of Procedure

This case was filed initially on October 20, 2014. After additional publications were discovered, an Amended Complaint was filed on October 31. CP 3. A Special Motion to Strike the Complaint was filed under RCW 4.24.525, the anti-SLAPP statute, on January 14, 2015, with supporting declarations⁷. It was fully contested, with supporting declarations, but the court granted the motion and dismissed the case on February 19, 2015. CP 350. A timely appeal was filed seeking discretionary review by the Supreme Court. CP 355.

In *Davis v Cox*, 183 Wn.2d 269, 351 P.3d 862 (2015), the statute under which the dismissal occurred was declared unconstitutional, so the appeal was dismissed on joint motion, and on September 2, 2015, the case was remanded to Superior Court for further proceedings. CP 372. On

7 To understand the record, the subsequent Motions for summary judgment and opposition relied on many documents filed to support the earlier Anti-Slapp Motion. Respondent Caldier, in fact, filed no new evidentiary support for her motion.

contested motion, on September 18, 2015, the Superior Court vacated the prior dismissal and all findings based on the invalidated statute. CP 387.

Motions were heard relating to discovery on November 6, 2015, concluding at 4:23 p.m. CP 418. Defendant filed a Motion for Summary Judgment on November 6, 2016 at 4:39 p.m., CP 392-415, noting the hearing for December 4, 2015. CP 416. Note that the court's Order on discovery from November 6, 2015 was not entered until July 28, 2017⁸. CP 793.

An Amended Summary Judgment Motion was filed May 19, 2016, CP 419, relying on the declarations and proof submitted earlier. Plaintiff filed a response on June 15, 2016, CP 445, with supporting declarations. Cross motions to strike were filed. A hearing was held on July 1, 2016, and the court took the matter under advisement. CP 788.

On July 22, 2016 the court issued an order granting the summary judgment motion in part and denying it in part. CP 789-791. The trial court granted summary judgment on Defamation and False Light as to portions of the publications, including the photoshopped images, and denied summary judgment as to portions of the publications. It struck entirely the publication on Facebook of September 2, 2104. CP 790. The judge explained that the portions struck were opinion. CP 873, line 6.

⁸ There were a number of hearings relating to discovery, not designated as clerks papers as not germane to this appeal, as encouraged by RAP 9.6.

Both parties filed motions to reconsider. CP 798, 806. Both motions were denied. CP 818, CP 820. The judge certified a question for appeal, CP 822, as she felt there was reliance on the theory of defamation by implication, and that there was a split of authority as to viability of that theory.

Both parties sought an interlocutory appeal by discretionary review. CP 831, CP 840. Court Commissioner Aurora Bearnse denied interlocutory review to both parties. CP 847-859. The Seaquists filed a motion to revise the commissioner's ruling, which was denied. CP 860.

In the trial court, Caldier filed a motion for entry of judgment, CP 861, based on the Seaquists disavowal of the theory of defamation by implication in the court of appeals. The Seaquists expressed that this theory was not supported by the facts, nor needed to support the case which was based on the false statements and false opinions of Caldier. The trial court was invited to perform legal analysis of false statements and false opinion under the law, which had not yet occurred. CP 920. CP 928-930. The court granted the defense motion, dismissing the Seaquist's complaint for Defamation and False Light. CP 931.

A timely appeal was filed. CP 934.

D. ARGUMENT & AUTHORITIES

I. Summary Judgment Standards & Presumptions

i. *Summary Judgment at the Trial Court*

There is a strong presumption that juries, not judges, will decide issues of fact, as the right to jury trial, even in civil cases, is established in the Washington State Constitution, Article 1 § 21:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

The Washington State Supreme Court reaffirmed that principle on May 28, 2015 in *Davis, et al. v. Cox, et al*, 183 Wn.2d 269, 351 P.3d 862 (2015), when they declared unconstitutional RCW 4.24.525, as it required trial courts to weigh evidence in deciding an anti-SLAPP motion to dismiss.

Despite the right to jury trial, summary judgment decisions by a trial judge are constitutionally permissible “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *LaMon v. Butler*, 112 Wn. 2d 193, 199, 770 P.2d 1027 (1989) (“When there is no genuine issue of material fact, as in the instant case, summary judgment proceedings do not infringe upon a litigant's constitutional right to a jury trial.”) (citing *Nave v. Seattle*, 68 Wn.2d 721, 725, 415 P.2d 93 (1966)); *Sanders v. City of Seattle*, 160 Wn.2d 198, 207, 156 P.3d 874 (2007).

While, generally, issues of fact are for trial, *Petersen v. State*, 100 Wn.2d 421, 436, 671 P.2d 230 (1983), a court may determine an issue of fact if reasonable minds could not differ on the outcome, and could reach but one conclusion. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 153 P.3d 846 (2007); *Dutton v. Washington Physicians*, 87 Wn.App. 614, 943 P.2d 298 (1997); *Balise v. Underwood*, 62 Wn.2d 195, 381 P.2d 966 (1963). If, however, reasonable minds could differ, then summary judgment is not appropriate. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 486, 78 P.3d 1274 (2003).

Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to prevail as a matter of law. CR 56(c); *Public Employees Mutual Ins. Co. v. Fitzgerald*, 65 Wn.App. 307, 828 P.2d 63 (1992). In determining if summary judgment is appropriate, the court must consider all evidence and inferences in a light most favorable to the non-moving party. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 153 P.3d 846 (2007), *Davis v. Niagara Mach. Co.*, 90 Wn.2d 342, 581 P.2d 1344 (1978).

ii. *Summary Judgment On Appellate Review*

Review of a grant of summary judgment is de novo. *Bank of Am. v. David W. Hubert, P.C.*, 153 Wn.2d 102, 111, 101 P.3d 409 (2004). The reviewing court is to engage in the same inquiry as the trial court and viewing

the facts and all reasonable inferences in the light most favorable to the nonmoving party. *State v. Kaiser*, 161 Wn. App. 705, 718, 254 P.3d 850, 857 (2011), *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 501, 115 P.3d 262 (2005). No deference is to be given to the trial court's findings and determinations. *Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 586 P.2d 860 (1978). Trial court findings are superfluous and need not to be considered on appeal. *Hubbard v. Spokane County*, 146 Wn.2d 699, n 14, 50 P.3d 602 (2002). Accordingly, there are no verities on appeal. Still, it is helpful to understand that those statements stricken by the trial court were considered mere opinion, though there was no analysis given of the law as to defamatory opinion.

iii. *Summary Judgment in Defamation Claims*

In all but extreme cases the jury should determine whether the article was libelous per se.” *Caruso v. Local Union No. 690*, 100 Wn.2d 343, at 353, 670 P.2d 240 at 354, (citing *Miller v. Argus Pub'g Co.*, 79 Wn.2d 816, 820 n. 3, 821 n. 4, 490 P.2d 101 (1971); *Amsbury v. Cowles Pub'g Co.*, 76 Wn.2d 733 at 740, 458 P.2d 882 (1969), *Maison de France, Ltd. v. Mais Oui!, Inc.*, 126 Wn.App. 34, 43, 108 P.3d 787, 793 (2005). The court is to determine if the publication was capable of defamatory meaning, and, if so, the jury is then to determine whether the publication did, in fact, defame the plaintiff. *Schmalenberg v. Tacoma News*, 87 Wn.App. 579, 943 P.2d 350 (1997),

Purvis v. Bremer's Inc., 54 Wn.2d 743, 344 P.2d 705 (1959).

II. Importance of Reputation.

The law of defamation embodies the public policy that individuals should be free to enjoy their reputations unimpaired by false and defamatory attacks. *Maressa v. New Jersey Monthly*, 89 N.J. 176, 445 A.2d 376, 383 (1982); *Campos v. Oldsmobile Div., Gen. Motors Corp.*, 71 Mich.App. 23, 246 N.W.2d 352, 354 (1976); 50 Am. Jur. 2d Libel and Slander § 2 (2015). Decisions of the United States Supreme Court recognize the important societal interest in the protection of individual reputations, despite First Amendment protections for free speech. The individual's interest in his reputation is a basic concern. *Herbert v. Lando*, 441 U.S. 153, 169, 99 S. Ct. 1635, 1645, 60 L. Ed. 2d 115 (1979); *N.Y. Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Defamation is an impairment of a relational interest; it denigrates the opinion which others in the community have of the plaintiff and invades the plaintiff's interest in his or her reputation and good name. *Lumbermen's Mut. Cas. Co. v. United Services Auto Ass'n*, 218 N.J.Super. 492, 528 A.2d 64, 67 (App.Div.1987); 50 Am. Jur. 2d Libel and Slander § 2 (2015), *Life Designs Ranch, Inc. v. Sommer*, 191 Wn.App. 320, 341–42, 364 P.3d 129, 140 (dissenting opinion)(2015), review denied, 185 Wn.2d 1022, 369 P.3d 500 (2016).

Defamation during a political campaign damages not just the

reputation of the affected candidate, but democracy itself. Defamatory statements, made with actual malice, damage the integrity of elections by distorting the electoral process. Such defamatory statements also lower the quality of campaign discourse and debate, and lead or add to voter alienation by fostering voter cynicism and distrust of the political process. Legislative findings following RCW 42.17A.335. Effective Democracy depends on good people running for office. If defamation is the price of running for office, good candidates will not run, and our society suffers.

III. Constitutional Guarantees of Free Speech

Freedom of Speech is guaranteed by the First Amendment to the United States Constitution, which states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Freedom of speech is also guaranteed by Article 1, §5 of the Constitution of the State of Washington, which states:

FREEDOM OF SPEECH. Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right. [emphasis added]

The State guarantee expressly recognizes limitations on the right to free speech, and that there is to be responsibility for abuse. The Federal guarantee also has limitations on unfettered free speech. True threats, while

speech, are not protected, as the harm done by them outweighs any minimal value contained therein. *Virginia v. Black*, 538 U.S. 343, 123 S.Ct 153, 155 L.Ed.2d 535 (2002) (addressing cross burning to intimidate). Likewise fighting words, inciting imminent violence, are not protected, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572, 86 L. Ed. 1031, 62 S. Ct. 766 (1942).

As that court stated, starting at page 571:

[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." [emphasis added]

In *Time, Inc. v. Hill*, 385 U.S. 374, 390 (U.S. 1967), the United States Supreme Court reaffirmed the limits of free speech:

What we said in *Garrison v. Louisiana*, [379 U.S. 64, 74, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964)] supra, at 75, is equally applicable:

"The use of calculated falsehood . . . would put a different cast on the constitutional

question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published . . . should enjoy a like immunity. . . . For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .' *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." [emphasis added].

IV. Defamation History and Definition

The tort of defamation is an ancient one, preceding either of our Constitutions, and was well established at the time of their creation. In The History and Theory of the Law of Defamation, by Van Vechten Veeder, Columbia Law Review, Vol. 3, No. 8 (Dec., 1903), pp. 546-573, the author recognizes that Defamation principles precede English law all the way back to Roman law, and was well established in the middle ages. Starting at Page 546, the author states:

Early in the middle ages reputation was amply protected in England by the combined secular and spiritual authorities. In the course of nationalization of justice by the king's judges

the jurisdiction of the seignorial courts fell into decay; and, after a long and bitter struggle, the jurisdiction of the ecclesiastical courts was also absorbed by the royal tribunals. When, however, the king's courts acquired jurisdiction over defamation, during the latter half of the sixteenth century, various social and political conditions combined to contract the actionable right or remedy.

An action for defamation can be either based on oral statements, known as slander, or written and broadcast statements, known as libel. The law of defamation in Washington State was recently summarized in *Duc Tan v. Le*, 177 Wn.2d 649, 662, 300 P.3d 356 (2013), cert denied in *Le v. Duc Tan*, 134 S. Ct. 941, 187 L. Ed. 2d 784 (2014):

A defamation action consists of four elements: (1) a false statement, (2) publication, (3) fault, and (4) damages. *Herron v. KING Broad. Co.*, 112 Wash.2d 762, 768, 776 P.2d 98 (1989). Actual malice must be shown in cases involving both public figures and public officials. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967) (plurality opinion). Rhetorical hyperbole and statements that cannot reasonably be interpreted as stating actual facts are protected under the First Amendment. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990).

Historically, defamatory communications were deemed actionable regardless of whether they took the form of opinion or fact. *Id.* at 11. However, due to concerns about stifling valuable public debate, the privilege of “fair comment” was incorporated into the common law as an affirmative defense to an action for defamation; it afforded “legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact.” *Id.* at 13 (quoting 1 Fowler V. Harper & Fleming James, Jr., *Law of Torts* § 5.28, at 456 (1956)). Generally, the privilege of fair comment applied only

to a statement of opinion and not to a false statement of fact, whether it was expressly stated or implied from an expression of opinion. Id. at 14 (citing Restatement (Second) of Torts § 566 cmt. a (1977)). “Thus under the common law, the privilege of ‘fair comment’ was the device employed to strike the appropriate balance between the need for vigorous public discourse and the need to redress injury to citizens wrought by invidious or irresponsible speech.” Id.

Even at common law, the privilege of fair comment did not extend to “a false statement of fact, whether it was expressly stated or implied from an expression of opinion.” Id. at 19 (quoting Restatement § 566 cmt. a). In *Milkovich*, the Supreme Court reiterated that a statement structured as an opinion may still be actionable if it implies the allegation of undisclosed defamatory facts as the basis for the opinion, because it may then contain a provably false factual connotation. Id. at 20 (citing *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986)); *Dunlap v. Wayne*, 105 Wash.2d 529, 540, 716 P.2d 842 (1986) (quoting Restatement § 566 cmt. c).

As the Supreme Court explained:

If a speaker says, “In my opinion John Jones is a liar,” he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact.

Milkovich, 497 U.S. at 18-19.

V. Definition of Actual Malice

As stated in *Duc Tan, supra*, actual malice must be shown to prove defamation of a public figure, like Larry Seaquist. Since *Gertz v. Robert*

Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), the United States Supreme Court has admonished courts not to take the phrase “actual malice” literally because the First Amendment does not require any actual ill will. In *Masson*, the Court explained:

Actual malice under the New York Times standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will. We have used the term actual malice as a shorthand to describe the First Amendment protections for speech injurious to reputation, and we continue to do so here. But the term can confuse as well as enlighten. In this respect, the phrase may be an unfortunate one. In place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity. [emphasis added].

Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 510-11, 111 S. Ct. 2419, 115 L. Ed. 2d 447 (1991).

As to public officials, the actual malice must be shown by clear and convincing evidence. As stated in *Duc Tan v. Le*, 177 Wn.2d 649, at 668-669, 300 P.3d 356 (2013), cert denied in *Le v. Duc Tan*, 134 S. Ct. 941, 187 L. Ed. 2d 784 (2014):

A public figure defamation plaintiff must prove with clear and convincing evidence that the defendant made the statements with “actual malice.” *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 510-11, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984). A defendant acts with malice when he knows the

statement is false or recklessly disregards its probable falsity.

VI. Elements of Defamation

Appellant Larry Seaquist must show: (1) a false statement, (2) publication, (3) fault, and (4) damages. *Duc Tan v. Le*, 177 Wn.2d 649, 662, 300 P.3d 356 (2013), cert denied in *Le v. Duc Tan*, 134 S. Ct. 941, 187 L. Ed. 2d 784 (2014). We submit that all have been proven to summary judgment standards. As Publication is a given on these facts, we focus on the other elements:

I. Elements: False Statement & Fault

1. First Lie: Facebook Post of September 2, 2014

Caldier's entire campaign of defamation was based on an initial lie, and then a concatenation of other lies. Her Facebook post stated:

I came out of a candidate interview and saw Rep. Larry Seaquist, my opponent, taking pictures of me as I got into my car. Wow.... I felt like I was being stalked!

Though her feelings are stated as an opinion, they are based on several false statements of fact: 1) that Seaquist took pictures of her, and 2) it was while she was getting into her car⁹. She knew that day that she had been seated in her car for at least 20 seconds, and that she could not be seen in the photo, as she saw him only in her rear view mirror.

⁹ Note that she told the police that the photograph was taken while getting out of the car. CP 544.

Further, she knew conclusively on September 12, 2014 that she cannot be seen in the photo, as she saw the actual photo in the Gardner Blog, and his reasons for taking it. Instead of being relieved, and issuing an apology to Seaquist for the false post on Facebook, she and her campaign doubled down, working up an attack theme based on that lie. She had received a positive response from her Facebook posting, which upset a number of people. She essentially used Facebook as a focus group, and knew that this false attack on Seaquist was a winner for her. The embellishment made the difference, and she got a number of people to be disgusted with Appellant Seaquist's stated behavior, establishing by those comments damage to Appellant Seaquist's reputation, and enhancing her odds of electoral success.

Context is everything. While she may have been upset that he took photo(s) of her car, on the city street, that is not the stated and published basis of her opinion of stalking. Had she said that Seaquist took a picture of her car on a city street in daylight, she would not have had the public outrage she sought. Instead of responsive comments that he was creepy, gross and weird, CP 508, 509, and that she was his "midnight fantasy," CP 513, and offers to be her bodyguard, CP 512, and suggestions that photos be taken of him "trying on those thongs I heard he likes to sleep in when he's 'little spoon,'" CP 512, 708, 709 and transmitted color exhibits, people might have

speculated that he was impressed with her car, which was the truth. People might also have questioned her level of paranoia over a routine occurrence.

The “sting” of her statement is not the same as the sting of the truth. Where a report contains a mixture of true and false statements, a false statement affects 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 v. KING Broad. Co.*, 112 Wn.2d 762, 769, 776 P.2d 98, 102 (1989). Taking un-consented photos of another is a considerably more aggressive act than taking photos of a car on the city street. The Caldier Facebook post evokes images of aggressive paparazzi and invasive compromising photos of women while they are potentially exposed while getting into cars. Her focus group Facebook friends told her so. Understanding the difference is as simple as comparing the actual photo(s) taken by Seaquist with the two created images, CP 712 & 715, one of which was crafted from a photo actually taken from inside her car. CP 744.

The actual photograph(s), CP 699, 700 are the truth. They are the only photograph(s) taken by Plaintiff Larry Seaquist. He clicked once, but as often happens, he got two near identical images. CP 689. They are not photographs of Michelle Caldier, any more than a photo from distance of a crowd in a stadium in which she was seated would be a photograph of

Michelle Caldier. She cannot be identified by the photograph. Anyone looking at the photo(s) will know that they are neither photo(s) of 1) Michelle Caldier, nor 2) of Caldier while getting into her car. The question: “Who is this a photo of?” would be seen as a trick question, as it is not a photo of anyone.

By summary judgment standards, all that need be shown is that reasonable minds might differ on whether this is a photo of Michelle Caldier, getting into her car. The trial court necessarily found her statement to be true, and dismissed the claim as to this posting as opinion. That was error.

2. Second Lie: YouTube video and Broadcast of October 8

The broadcast video is deceptive and false in three things:

First, repeats the lie that the photos were of Respondent.

Second, it contains the offending image of Seaquist doctored to have a scandalous effect, CP 712, as they intended, with a more intense look on his face. He is hunched over, in a park, with his collar turned up. CP 570, CP 540. It does not reflect what he actually did.

Third, the referenced source as the police report will be read, as it was intended, by a person of common understanding to mean that there was a police criminal investigation of this allegation, which verified and even provided the information, that the action by Seaquist was secret or covert, and that he invaded her privacy, all of which are false. The video deceptively

claims the source of the information that he was “secretly” photographing Caldier, and “invading her privacy” was the police report. The published and broadcast messages do not reveal that Caldier herself was the sole source in the police report, or that the officer stated to her that there was no criminal behavior by Appellant Larry Seaquist, as that would negate the intended disparagement of Appellant Larry Seaquist.

Fourth, the statement “Secretly” and “Invading her privacy” are presented as facts, not opinion. Even if opinion, it implies additional facts on which the opinion is based, which are lacking. Just as in the example of a defamatory lie “In my opinion, John Jones is a liar” used in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 at 18-19, 20, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990), it implies that Seaquist took photos of Caldier when she was in a place where she had a right to privacy, such as a private residence, back yard, or changing room. It implies that she was not in public when they were taken. As *Milkovich* concluded, “if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact.”

It is well known that there is no right of privacy to what happens on a public street, in broad daylight. Even a police officer’s use of a flashlight to illuminate what would be visible during the day is not an unconstitutional intrusion into a citizen’s right to privacy. The occupant of a car does not

have the same expectation of privacy in a vehicle parked in a public place as he or she might have in a vehicle in a private location--he or she is visible and accessible to anyone approaching. *State v. O'Neill*, 148 Wn.2d 564, 579, 62 P.3d 489 (2003). Further, a public figure like defendant Caldier, has a reduced expectation of privacy, even of her image. As was stated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344, 94 S. Ct. 2997, 3009, 41 L. Ed. 2d 789 (1974):

An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case.

Further still, as stated in *Jeffers v. Seattle*, 23 Wn.App. 301, 312 (1979), a case involving privacy claims as to video surveillance of a police officer receiving a disability pension:

In determining the extent of the interest to be protected, we must take cognizance of the fact that appellant has made a claim for personal injuries. Although the so-called "public figure" limitation upon the right to privacy has generally been applied to such persons as actors, public officials, and other newsworthy persons, its rationale also applies to a person who makes a claim for personal injuries. It is not uncommon for defendants in accident cases to employ investigators to check on the validity of claims against them. Thus, by making a claim for personal injuries appellant must expect reasonable inquiry and investigation to be made of her claim and to this extent her interest in privacy is circumscribed. It should also be noted that all of the surveillances took place in the open on public thoroughfares where appellant's activities could be observed by passers-by. To this extent appellant has exposed herself to public observation and therefore is not entitled to

the same degree of privacy that she would enjoy within the confines of her own home. *Forster v. Manchester*, 410 Pa. 192, 189 A.2d 147 (1963) at 196-97.

When Respondent Caldier states that Mr. Seaquist invaded her privacy, persons of common intelligence will understand that to mean he intruded into a private space, not on Fifth Street, downtown Bremerton, in an open convertible, in daylight. Persons of common intelligence know that on a public street, there is no privacy. Any allegation that Seaquist violated the privacy of Caldier by taking the photos on the city street, CP 699, 700, is false as a matter of law. When Caldier states that Seaquist invaded or violated her privacy, as a matter of law, she made a false statement of fact. Even if her statement is seen as an opinion, and not a fact learned from the police report, it implies other facts which are not true.

Under Summary Judgment standards, reasonable minds could at least differ as to these statements being false, so summary judgment dismissal of the case was error.

3. Third Lie: Radio Claim of Harassment

On October 10, Caldier went on the radio and stated she was harassed and her opponent had actually taken pictures of her (not of her car).

4. Fourth Lie: Campaign Mailer & Website "Photogate"

First, along with a deceptive recreation image, on the back side there is a question: Why was Larry Seaquist taking pictures of Michelle Caldier?

While posed as a question, it is both a statement of fact and a question. It is a statement of fact that Larry Seaquist was taking pictures of Michelle Caldier. It asks the question: Why? The only question is motive.

Second, the body of the brochure asks the question: Why Were Seaquist Campaign People Taking Pictures at Caldier Home? While posed as a question, it is both a statement of fact and a question. It is a statement of fact that Seaquist Campaign people were taking pictures of Michelle Caldier. It asks the question: Why? The only question is motive.

This is an unsupported, unsupportable allegation, for which Caldier admitted she had no proof. CP 520. While not directly applicable as this is not a perjury proceeding, RCW 9A.72.080 provides guidance as to the falsity or recklessness of such statements: "Every unqualified statement of that which one does not know to be true is equivalent to a statement of that which he or she knows to be false." If this principle is strong enough to result in criminal conviction, then it is also part of defamation analysis when considering whether malice is shown through reckless disregard as to truth.

If Caldier wanted to publicly debate the question of whether Seaquist campaign people were taking pictures at her home, so that voters could form their own opinions, her intentional omission, CP 520, of contradictory information as to the photographer stating he was a real estate appraiser invokes the *Milkovich* principles and creates a jury question as to defamatory

opinion. Compare with *Dunlap v. Wayne*, 105 Wn.2d 529, 716 P.2d 842 (1986) where all facts were revealed so that the readers could weigh the opinion for themselves. Under Summary Judgment standards, reasonable minds could at least differ as to these statements being false, so summary judgment dismissal of the case was error.

Third, as to the mailbox tampering, Caldier will claim she merely stated an opinion that there may have been a connection of Mr. Seaquist to the mailbox tampering, and the likelihood of trespassing -- A Federal Offense. This in the same mailer in which she stated that Seaquist should be ashamed, and that it appeared "the Seaquist team has resorted to dirty tactics to win," CP 94, and that "You would expect a higher level integrity from a man with Larry Seaquist's experience, and that "I don't think a female candidate is supposed to feel like I have felt in the privacy of my own home and car." Caldier admitted she had no proof that either Seaquist or his campaign were involved in tampering with her mail. CP 519. Again, see RCW 9A.72.080. Caldier's own statements about this event are inconsistent. She told Gardner that her neighbor "caught people going through her mailbox." CP 107. That is untrue. The neighbor merely found mail piled either in or in front of Caldier's carport. CP 741. If she wanted public discussion about whether Seaquist or his campaign were involved, she should have given all the facts. *Milkovich, Supra, Dunlap, Supra*. Attribution to

Seaquist and his campaign was done with reckless disregard to the truth, particularly as mail theft is a common problem. CP 645-662. Whether her connection of this event to Seaquist is defamatory is, at the least, a matter on which reasonable minds could differ, so summary judgment is inappropriate.

Fourth, the combination of the photoshopped false images, false allegations and clear attempts to lay unrelated matters on the shoulders of Larry Seaquist, shaming him, at the same time she claims as a woman, to be a victim, feeling unsafe in her own home on the whole intentionally creates a false impression of Larry Seaquist, putting him in a false light, and invading his privacy.

The court erred in resolving these issues instead of the jury. Summary Judgment should be reversed.

ii. Element: Damages

A written publication is libelous per se (actionable without proof of special damages) if it tends to expose a living person to hatred, contempt, ridicule, or obloquy, or to deprive him of the benefit of public confidence or social intercourse. *Caruso v. Local Union No. 690*, 100 Wn.2d 343, 353, 670 P.2d 240, 245 (1983); *Owens v. Scott Publishing Co.*, 46 Wn.2d 666, 284 P.2d 296 (1955); *Spangler v. Glover*, 50 Wn.2d 473, 313 P.2d 354 (1957); *Amsbury v. Cowles Pub. Co.*, 76 Wn. 2d 733, 737, 458 P.2d 882, 885 (1969). Imputation of a criminal offense involving moral turpitude is libel per se.

Ward v. Painters' Local Union No. 300, 41 Wn.2d 859, 252 P.2d 253 (1953).
Amsbury v. Cowles Pub. Co., 76 Wn. 2d 733, 738, 458 P.2d 882, 885 (1969).

In cases with Libel Per Se, damages are presumed, without additional proof, *Purvis v. Bremer's Inc.*, 54 Wn.2d 743, 344 P.2d 705 (1959) and are subject to being set at the jury's discretion. Libel Per Se alleviates the plaintiff from proving special damages, and permits general or presumptive damages, as defamation per se assumes damage by the nature of the defamation. *Davis v. Fred's Appliance, Inc.*, 171 Wn.App. 348, 287 P.3d 51 (2012); *Valdez-Zontek v. Eastmont Sch. Dist.*, 154 Wn.App. 147, 225 P.3d 339 (2010). In all but extreme cases the jury should determine whether the article was libelous per se. *Maison de France v. Mais Oui!*, 126 Wn. App. 34, 43, 108 P.3d 787 (2005); *Caruso v. Local Union No. 690*, 100 Wn.2d 343, 353, 670 P.2d 240 (1983).

The United States Supreme Court recognized this aspect to defamation in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). At page 349-50, it said:

The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred.

Here Caldier has falsely accused Seaquist of behavior which includes

stalking, mail tampering, harassment, taking photos of her home and children, and of making her feel unsafe in the privacy of her own home. She accuses him and those under his charge of dirty campaign tactics, and openly states that he should be ashamed for these behaviors. This defamation campaign was designed to expose him to hatred, contempt, ridicule, or obloquy, and to deprive him of the benefit of public confidence or social intercourse in the contemplation of *Caruso v. Local Union No. 690*, 100 Wn.2d 343, 353, 670 P.2d 240, 245 (1983). It hit the mark. There is no need for other proof of damages here, particularly under Summary Judgment standards. “In all but extreme cases the jury should determine whether the article was libelous per se.” *Maison de France, Ltd. v. Mais Oui!, Inc.*, 126 Wn.App. 34, 43, 108 P.3d 787, 793 (2005).

VII. Consideration of the Publication as a Whole.

In determining whether a publication can be defamatory, it must be construed in the sense in which it would ordinarily be understood by its readers. *Purvis v. Bremer's Inc.*, 54 Wn.2d 743, 751, 344 P.2d 705 (1959). *Amsbury v. Cowles Pub. Co.*, 76 Wn.2d 733, 738, 458 P.2d 882, 885 (1969). *Farrar v. Tribune Pub. Co.*, 57 Wn.2d 549, 358 P.2d 792 (1961). *Owens v. Scott Pub. Co.*, 46 Wn.2d 666, 284 P.2d 296, certiorari denied, 350 U.S. 968, 76 S.Ct. 437, 100 L.Ed. 840; *Carey v. Hearst Publications, Inc.*, 19 Wn.2d 655, 143 P.2d 857 (1943). The ultimate test is the sense in which it would

ordinarily and reasonably be understood by the readers. *Farrar, supra*.

Moreover, the defamation must be viewed as a whole, not broken down into its distinguishable parts. *Purvis, supra*, at page 754. Stated another way, it is to be viewed as the big picture, not just the individual brush strokes. A broadcast must be considered as a complete picture and not by isolated segments. *Gaffney v. Scott Publishing Co.*, 35 Wn.2d 272, 277, 212 P.2d 817 (1949) Each element, seen individually, may be, to a degree, less damning to plaintiff than when considered as a whole in combination, but the law has long required that the entire publication be looked at as a whole to determine how it would be perceived. As stated in *Carey v. Hearst Publications, Inc.*, 19 Wn.2d 655, 143 P.2d 857 (1943):

In determining whether or not an article is libelous, we must take it by its four corners and read it as a whole, and we must construe it in the sense it would ordinarily be understood by persons reading it. *Graham v. Star Pub. Co.*, 133 Wash. 387, 233 Pac. 625 [1925]; *Miles v. Louis Wasmer, Inc.*, 172 Wash. 466, 20 P.2d 847 [1933]; *Wells v. Times Printing Co.*, 77 Wash. 171, 137 Pac. 457 [1913].

Here, there were four primary publications included in the complaint.

First was the Facebook post of September 2, 2014. We have the advantage of actual feedback from about fifty responses in Facebook, which showed the devastation to Seaquist's good name and reputation. CP 508-513, CP 708,709.

Second was the Youtube video alleging Seaquist secretly

photographed Caldier, invading her privacy, and citing the police report as the source of information.

Third was the radio broadcast, in which Caldier stated as fact she has been harassed “had my opponent take pictures of me,” as part of a war on women.

Fourth was the campaign brochure “Photogate,” which had a witch’s brew of misrepresentations, allegations and accusations, and false images, combining and drawing connection between three random events, two of which Seaquist had no involvement in, and the third completely misrepresented in an express attempt to shame Appellant Seaquist.

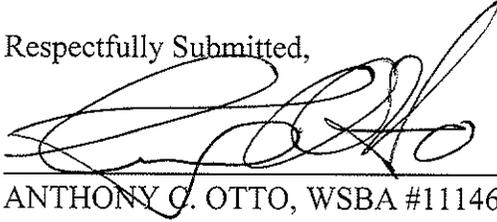
Each publication must be viewed in a way the average reader would see it, by the four corners. The court below erred by granting summary judgment as to portions of defamatory publications, essentially editing the mailer and video.

E. CONCLUSION

This was plain disparagement and false light, without truth behind it, which has no first amendment protection, and for which there must be a remedy. As there are a multitude of factual questions for a jury to decide, dismissal on summary judgment was error. We request the court reverse the trial court below, and remand for trial of these issues.

DATED THIS 18th day of December, 2017.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'A. C. Otto', written over a horizontal line.

ANTHONY C. OTTO, WSBA #11146
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LAW OFFICES OF ANTHONY C. OTTO

December 18, 2017 - 5:10 PM

Transmittal Information

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Appellate Court Case Title: Larry Seaquist, et al., Appellants v. Michelle Caldier, Respondent
Superior Court Case Number: 14-2-02034-3

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