

FILED

MAY 22 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

No. 308821-III

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

KEITH KNITTLE;

PLAINTIFF-APPELLANT

vs.

ALFRED TALL;

DEFENDANT-APPELLEE

**PLAINTIFF-APPELLANT'S OPENING BRIEF
(corrected on May 20, 2013)**

**J. J. Sandlin, WSBA #7392
Attorney for Plaintiff-Appellants**

**SANDLIN LAW FIRM
P. O. Box 1707
Prosser, Washington 99350
(509) 829-3111/fax: (888) 875-7712
Cell: (509) 594-8702
Sandlinlaw@msn.com**

FILED

MAY 22 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

No. 308821-III

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

KEITH KNITTLE;

PLAINTIFF-APPELLANT

vs.

ALFRED TALL;

DEFENDANT-APPELLEE

**PLAINTIFF-APPELLANT'S OPENING BRIEF
(corrected on May 20, 2013)**

**J. J. Sandlin, WSBA #7392
Attorney for Plaintiff-Appellants**

**SANDLIN LAW FIRM
P. O. Box 1707
Prosser, Washington 99350
(509) 829-3111/fax: (888) 875-7712
Cell: (509) 594-8702
Sandlinlaw@msn.com**

TABLE OF CONTENTS

| | Page |
|---------------------------|-------|
| 1. Table of contents | i-ii |
| 2. Introduction | 1 |
| 3. Assignment of error | 1 |
| 4. Issues | 1-2 |
| 5. Statement of the case | 2-4 |
| 6. Argument | 4-9 |
| 7. Conclusion | 10 |
| 8. Certificate of service | 10-11 |

TABLE OF AUTHORITIES

Cases:

| | |
|--|---|
| <i>Baldwin v. Sisters of Providence in Wash., Inc.</i> , 112 Wn.2d 127, 769 P.2d 298 (1989) | 6 |
| <i>Eastwood v. Cascade Broadcasting Co.</i> , 722 P.2d 1295 (Wash. 1986) | 9 |
| <i>Hash v. Children's Orthopedic Hosp. & Med. Ctr.</i> , 110 Wn.2d 912, 757 P.2d 507 (1988) | 6 |
| <i>Jones v. Allstate Ins. Co.</i> , 146 Wn.2d 291, 45 P.3d 1068 (2002) | 4 |
| <i>K-Mart Corp. v. Washington</i> , 109 Nev. 1180, 866 P.2d 274, (Nev. 1993) | 9 |
| <i>Lamon v. Butler</i> , 112 Wn.2d 193, 770 P.2d 1027 (1989) | 7 |

| | |
|--|-----|
| <i>Little v. Countrywood Homes, Inc.</i> , 132 Wn. App. 777, 133 P.3d 944 (2006) | 6 |
| <i>Lybbert v. Grant County</i> , 141 Wn.2d 29, 1 P.3d 1124 (2000) | 5 |
| <i>Michielli v. U.S. Mortgage Company</i> , 58 Wn.2d 221(1961) | 9 |
| <i>Owen v. Burlington N. Santa Fe R.R.</i> , 153 Wn.2d 780, 108 P.3d 1220 (2005) | 5 |
| <i>Pope v. Motel 6</i> , 114 P.3d 277 (Nev. 2005) | 9 |
| <i>Sheikh v. Choe</i> , 156 Wn.2d 441, 128 P.3d 574 (2006) | 4 |
| <i>Vallandigham v. Clover Park Sch. Dist. No. 400</i> , 154 Wn.2d 16, 109 P.3d 805 (2005) | 5-6 |
| <i>Young v. Key Pharm., Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989) | 5-6 |
| <u>Court Rule:</u> | |
| CR 56(c) | 5 |

I. Assignments of Error:

(a) The trial court committed error by failing to find that the appellant had presented sufficient evidence to prove his claim that the defendant-appellee had defamed the appellant.

II. Issues:

(a) Was it error to find the appellant had not been defamed when the defendant-appellee, Mr. Al Tall described Appellant Keith Knittle, in the presence of a third party, as being “a liar and a thief,” that he “didn’t know how to run a company,” that “Keith shouldn’t be in the DME business,” that “Keith has made a mess of the [DME] company,” that “Keith is running the company under?” *Index*, at p. 140.

(b) Was it error to find the appellant had not been defamed when the defendant-appellee, Mr. Al Tall described Appellant Keith Knittle, in the presence of a third party, by saying things like “Keith Knittle is a

thief and a liar,” that “Keith Knittle is not to be trusted,” and “now that Keith Knittle is out of this business things shall be fine?” *Index* at p. 141.

(c) Was it error to find the appellant had not been defamed when the defendant-appellee, Mr. Al Tall described Appellant Keith Knittle, in the presence of a third party, by describing him as “someone who shouldn’t be in the DME business,” telling a third party that “you’re lucky to have me here to pick up the pieces, because Keith didn’t know what he was doing,” and that “Keith mismanaged the business,” and that Mr. Knittle was “a thief,” “a liar” and “couldn’t be trusted?” *Index* at p. 141.

III. **Statement of the Case:**

Appellant Keith Knittle developed sleep labs and arranged for the acquisition of CPAP machines for patients who suffered from sleep disorders, including sleep apnea, which is a

very dangerous malady that can injure a patient's heart, and eventually lead to brain damage and death. *Index* at p.87.

Mr. Knittle is a qualified respiratory therapist, a businessman, and a developer of sleep labs. The potential for future income in these areas is limitless, but Mr. Al Tall described the appellant as a sex pervert, a "thief" a "liar" and "someone who cannot be trusted." *Index* at p. 87.

Appellant Keith Knittle had sold his business to Appellee Al Tall. The business was centered in Spokane, Washington and also Coeur d'Alene, Idaho, and involved selling sleep apnea breathing equipment, and sleep clinic services. A non-compete agreement was entered, but there was also a transition period where Keith Knittle was to provide services to Al Tall, where Mr. Tall could take advantage of the Knittle book of business and develop his own professional reputation in the Spokane-Coeur d'Alene medical communities. *See also, Index*, at pp. 6-7.

The relationship between Tall and Knittle deteriorated. Keith Knittle left the local area and began working in a locale where the no-compete prohibition would not interfere with his profession. But Mr. Knittle intended upon returning to the Spokane-Coeur d'Alene area when his five-year no-compete prohibition had expired. *Index* at pp. 87-88.

Mr. Knittle learned through third parties that his professional reputation was being destroyed by Al Tall's repeated publications of defamatory remarks designed to place Mr. Knittle in a false light and to bring disrepute upon him with his prior contacts in the medical communities of Spokane and Coeur d'Alene. *Index* at pp. 88-89.

IV. **Argument:**

Summary judgment is improper here.

An appellate court reviews summary judgment orders *de novo*, performing the same inquiry as the trial court. *Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006) (quoting *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068

(2002)). Summary judgment is proper if no genuine issues of material fact remain and the moving party is entitled to judgment as a matter of law. CR 56(c). "A material fact is one that affects the outcome of the litigation." *Owen v. Burlington N. Santa Fe R.R.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). When considering a summary judgment motion, the court must construe all facts and reasonable inferences in the light most favorable to the nonmoving party. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). The motion should be granted if, from all the evidence, reasonable persons could reach but one conclusion. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

"The moving party bears the initial burden of showing the absence of an issue of material fact." *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the moving party is a defendant, it may meet this initial burden by showing that there is an absence of evidence to support the plaintiff's case. *Id.* at 225 n.1. If the defendant meets this initial burden,

then the inquiry shifts to the plaintiff. See *Young*, 112 Wn.2d at 225; *Vallandigham*, 154 Wn.2d at 26; *Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988) ("Only after the moving party has met its burden . . . does the burden shift to the nonmoving party.").

The plaintiff-appellant as the nonmoving party under these circumstances then bears the burden of showing sufficient facts to establish the existence of every essential case element required at trial. *Young*, 112 Wn.2d at 225. In making this responsive showing, the plaintiff-appellant cannot rely on mere allegations, speculation, or argumentative assertions, but must set forth specific facts showing a genuine issue. *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 780, 133 P.3d 944 (2006); *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989). Here, Mr. Knittle has established good cause for denying the defendant's motion for summary judgment. The declarations opposing summary judgment illustrate the nature of Mr. Tall's misconduct, and

clearly this appellant has substantiated the need to go forward to trial on the merits of his claims.

The law of defamation supports the appellant's claims against Appellee Al Tall.

The four elements of a defamation claim are (1) falsity, (2) unprivileged communication, (3) fault and (4) damages.

Lamon v. Butler, 112 Wn.2d 193, 197, 770 P.2d 1027 (1989).

Here all elements are present, as substantiated by the declarations of record:

1. Falsity: Mr. Knittle denies he is a thief, denies he is a liar, denies he cannot be trusted, denies he “made a mess” of the sleep tech business, and denies spreading porn all over Mr. Tall’s computer. His denials are corroborated.
2. Unprivileged communication: Mr. Tall published his defamatory remarks to third parties in the sleep tech/medical communities of Spokane and Coeur d’Alene. He did not limit his remarks to some protected venue such as a court room, administrative agency, regulatory agency, or to private counsel.

There was no privilege for the published defamation or the false light in which he placed Mr. Knittle.

3. Fault: Mr. Tall owed Mr. Knittle the duty to exercise ordinary care, to avoid harm to Mr. Knittle. He should not have defamed Mr. Knittle nor should Mr. Knittle have been placed in a false light in the local medical communities of Spokane and Coeur d'Alene. Mr. Tall breached his duty to Mr. Knittle and Mr. Knittle was harmed.

4. Damages: Witness Chad Wetham and Appellant Knittle agree that Mr. Knittle's personal and professional reputations in the Spokane-Coeur d'Alene sleep tech/medical communities are destroyed. These reputations may never be repaired. Also, the nature of the defamatory statements published by Mr. Tall are so onerous that they must be deemed malicious, or published with reckless disregard for the truth or falsity of the statements

made, and therefore significant damages may be presumed¹.

Michielli v. U.S. Mortgage Company, 58 Wn.2d 221(1961).

The tort of false light is a tort that amply fits the facts of this action.

It is unclear whether or not our Supreme Court has adopted the tort of false light or whether the tort is unavailable in Washington, because of its similarity to the tort of defamation. *Eastwood v. Cascade Broadcasting Co.*, 722 P.2d 1295, 1298-99 (Wash. 1986). In this case, the actions of the appellee clearly have placed Mr. Knittle in a false light among his colleagues, and even if his defamation claims were to fail his false light claim should proceed. There was no evidence proving he is a thief or a liar², nor that he mismanaged his business or could not be trusted. The record was devoid of any competent evidence supporting these reckless claims.

¹ Here damages are presumed and no proof of actual harm to reputation is required. *K-Mart Corp. v. Washington*, 109 Nev. 1180, 866 P.2d 274, 284 (Nev. 1993) (receded from on other grounds), *Pope v. Motel 6*, 114 P.3d 277 (Nev. 2005).

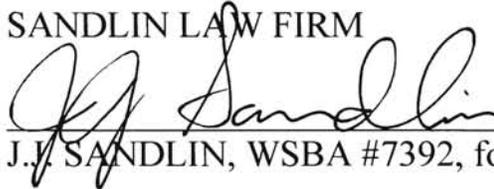
² Mr. Knittle denied he was the “Idaho Ass Man.”

V. Conclusion:

Mr. Al Tall published defamatory statements about Appellant Keith Knittle, he did this with reckless disregard for the truth or falsity of the statements he made, and the statements were made after the Idaho lawsuit had been dismissed. The clarifying declaration by Wetham provided the trial court the specific evidence the trial court needed to deny the summary judgment motion. The trial court's decision to grant summary judgment should be reversed and this action should proceed to trial.

Respectfully submitted this 20th day of May, 2013.

SANDLIN LAW FIRM



J.J. SANDLIN, WSBA #7392, for Appellant Knittle

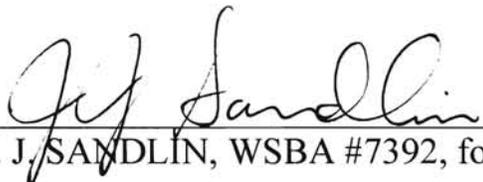
Certificate of Service

I declare under penalty of perjury that a true copy of this Opening Brief of Appellant Knittle was mailed, via U.S. Mail, May 20, 2013, to opposing counsel, Michael Johns, Esq.,

ROBERTS, JOHNS & HEMPHILL, PLLC, 7525 Pioneer
Way, Suite 202, Gig Harbor, WA 98335 [telephone (253) 858-
8606 and fax (253-858-8646)]; and the original plus one copy
was mailed to the Clerk of the Court of Appeals, Division III, at
500 N. Cedar Street, Spokane, Washington 99201.

Dated this 20th day of May, 2013.

SANDLIN LAW FIRM



J. J. SANDLIN, WSBA #7392, for Appellant Knittle