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HOLMQUIST & GARDINER, P.L.L.C.

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

**PAUL BRECHT,**

**APPELLANT,**

**v.**

**FISHER COMMUNICATIONS, INC., JOHN CARLSON and JANE  
DOE CARLSON, and KEN SCHRAM and JANE DOE SCHRAM,**

**RESPONDENTS,**

**MARK DOE and JANE DOE, CHRIS DOE and JANE DOE,  
and CHRIS MORGAN and JANE DOE MORGAN,**

**DEFENDANTS.**

**APPEAL FROM THE SUPERIOR  
COURT OF KING COUNTY**

**REPLY BRIEF OF APPELLANT**

**PAUL BRECHT  
APPELLANT PRO SE**

2010 SEP 16 AM 11:18  
COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION ONE

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## **A. INTRODUCTION**

Fishers' reply brief is largely inference and conjecture as to their version of why John Carlson and Ken Schram said what they said and why the show was structured as it was. The law requires that it is the inferences of Paul Brecht that are to be believed, and the evidence is to be viewed in a light most favorable to Mr. Brecht.

Again, the trial court erred in granting summary judgment by incorrectly applying the law: the court stated there was no actual malice because Mr. Brecht had 1) a prior conviction for violating a no contact order and 2) his then wife had accused him of assault. The correct application of the law is completely contrary to the court's findings in this matter. The distinctions are night and day. First, although Mr. Brecht did have a conviction for violating a no contact order – there were no allegations of physical violence – meeting someone in violation of a standing no contact order is entirely different from someone being convicted of actually physically assaulting someone. The false and defamatory attribution of an assault conviction in this case has resulted in a greater opprobrium and sting because Mr. Brecht had never assaulted anyone nor had he ever been convicted of assaulting anyone. Second, the allegations of an assault were made during a divorce. Mr. Carlson and Mr. Schram base their sole right to defame Mr. Brecht on the allegations of Mr. Brecht's then wife. No court ever convicted Mr. Brecht of physically harming his then wife – or anyone else for that matter. As contained in Mr. Brecht's dissolution record, the court absolved Mr. Brecht from any wrong

doing. (CP 324-325) Mr. Carlson and Mr. Schram misstate the dissolution court record which precludes them from any constitutional protection and is evidence of actual malice. They knowingly and falsely stated the court record and by doing so defamed Mr. Brecht with actual malice. As reported by the U.S. Supreme Court and confirmed by the Washington Supreme court, "For a publishers report to have been accurate, their allegations must have been based on a finding by the divorce court." and "The Supreme Court has held that inaccurate and defamatory reports of facts" drawn from judicial proceedings are not deserving of First Amendment protection" Time v. Firestone, 424 U.S. 448, 458, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976) and confirmed in Mark v. KING Broadcasting, 96 Wn.2d 473, 494, 635 P.2d 1081 (1981).

### **B. EVIDENCE OF A CIVIL CONSPIRACY**

To establish a civil conspiracy, All Star must prove by clear, cogent, and convincing evidence that (1) two or more people combined to accomplish an unlawful purpose, or combined to accomplish a lawful purpose by unlawful means; (2) the conspirators entered into an agreement to accomplish the conspiracy. Wilson v. State, 84 Wn. App. 332, 350-51, 929 P.2d 448 (1996), cert. denied, 522 U.S. 949, 139 L. Ed. 2d 286, 118 S. Ct. 368 (1997). "Mere suspicion or commonality of interests is insufficient to prove a conspiracy." Id. "[When] the facts and circumstances relied upon to establish a conspiracy are as consistent with a lawful or honest purpose as with an unlawful undertaking, they are insufficient." Lewis Pac. Dairymen's Ass'n v. Turner, 50 Wn.2d 762, 772, 314 P.2d 625 (1957).

All Star v. Bechard, 100 Wn. App. 732, 998 P.2d 367, 372 (2000).

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. 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. The liability of conspirators is joint and several. That is, each is liable for all acts committed by any of the other parties, either before or after their entrance, in furtherance of the common design.

Sterling v. Thorpe, 82 Wn. App. 446, 451, 918 P.2d 531, 533-535 (1996).

### **1. Conspiracy Evidence**

The Fisher Respondents contend that there is no evidence for a conspiracy. (Res. Brf., pp. 7 & 27) The actual malice, deception and skill used by Mr. Carlson, Mr. Schram and the other conspirators in orchestrating the defamation of Mr. Brecht might go unnoticed unless one views their actions under the magnifying glass of a civil conspiracy. These are actions taken by skilled broadcasters who purposely, recklessly and unlawfully acted with Brett Bader and two callers, 'Mark Doe' and Chris Morgan to defame Mr. Brecht. "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." Sterling, 82 Wn. App. at 451. Furthermore, the liability of conspirators is joint and several. That is, each is liable for all acts committed by any of the other parties, either before or after their entrance, in furtherance of the common design." Id.

When one examines the circumstantial facts, a picture of combination, agreement and actual malice is clearly seen. It has been

evidenced that Mr. Bader, campaign manager for Jane Hague in the 2007 King County Council race had “prepared a mailer” (CP 309) with the gist that Mr. Brecht was a “notorious wife beater with multiple assault convictions.” (CP 306) Directly below the defamatory statements on the mailer, Mr. Bader cited a “Washington Court Record Search” as the authority for the defamatory statements. Mr. Brecht filed a lawsuit against Bret Bader and other Hague defendants “a few days later” (CP 279) after receiving the mailer. The lawsuit was filed Monday afternoon, October 29<sup>th</sup>, 2007 just prior to the 4:30 p.m. court closing. The news of this filing was presented to the Seattle Times and the Seattle P-I at that time. That same day a P-I reporter called Richard Pope and Mr. Bader for statements concerning the lawsuit which would appear in the next morning’s October 30<sup>th</sup>, 2007 edition of the Seattle P-I. (CP 308-309) Mr. Bader at that point had constructive notice of the lawsuit. The article was published in the evening on-line and in the paper edition on the following morning with quotes from both Mr. Pope and Mr. Bader. (CP 308-309) This was the same morning of the defamatory Fisher KVI “The Commentators” radio show.

Mr. Bader was close friends with Fisher Defendant John Carlson since their college days in 1980. (CP 284-286) There is a substantial history of the two working together on causes where they had to overcome political opponents. (CP 294) When questioned during deposition of a conversation with Mr. Carlson before the October 30<sup>th</sup> 2007 Fisher KVI radio show, Mr. Bader stated he “did not recall.” (CP 286) Mr. Carlson

stated that he did have a pre-show conversation with Mr. Bader but stated he told Mr. Bader he would not help [the] campaign. (CP 291)

Mr. Pope was invited on the show early Tuesday Morning. (CP 257) Ms. Hague was also invited, but according to Mr. Carlson declined to appear. (CP 257) Sometime during the 15 hours between Mr. Bader's notice of the lawsuit by the Seattle P-I reporter on Monday afternoon and Mr. Pope's invitation on the show early Tuesday morning, Mr. Bader contacted his friend Mr. Carlson for the purpose setting up Mr. Pope and defaming Mr. Brecht. Based upon the circumstantial evidence on a common design, intention and purpose (as contained below), this is a reasonable inference. It is also a reasonable inference that Mr. Bader transferred information about Mr. Brecht to Mr. Carlson during this timeframe to further their conspiratorial purpose. The evidence of this contact is the alleged "late notice" invitation of Ms. Hague to the show (CP 257) and Mr. Carlson's declaration where he admits to a pre-show conversation with Mr. Bader. (CP 291) The theory is Ms. Hague was never actually invited because it would have detracted from the theme of the show: to get Mr. Pope and Mr. Brecht in the same process. This is further evidenced by Ms. Hague listening to the show at the campaign headquarters with Brett Bader, Chris Morgan (caller 2) and others. (CP 286).

Mr. Bader combined and entered into an agreement with Mr. Carlson, Mr. Schram, Caller 1 (Mark Doe) and Caller 2 (Chris Morgan) to defame Mr. Brecht. The purpose or object of Mr. Bader's mailer (CP 306)

was to make what was written therein about Mr. Brecht factual and believable and to ruin Mr. Brecht by unlawfully broadcasting false and defamatory statements about him throughout the Puget Sound area. The gist of the defamatory statements against Mr. Brecht were that he was a notorious wife beater with multiple assault convictions. Mr. Carlson's and Mr. Schram's actions accomplished three things: 1) to defame Mr. Brecht, 2) to provide agreement with Mr. Bader's mailer language so that defamatory statements by Mark Doe and Chris Morgan would be received as factual and 3) to provide a platform for "Mark Doe" and Chris Morgan to defame Mr. Brecht. Again,

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.

Sterling, 82 Wn. App. at 451.

The combination and agreement is plainly manifest:

## **2. Common Design**

Evidencing a common design, (Design: a plan or protocol for carrying out or accomplishing something - Merriam Webster's Collegiate Dictionary, 10<sup>th</sup> edition)

1. Mr. Bader prepared (CP 309) the campaign mailer (CP 306) that contained 3 common design elements about Mr. Brecht, that he: 1. was on top of law enforcement lists (implying notoriety) 2. He had multiple domestic violence arrests and 3. He had at least one assault conviction (implying

that there was probably more than one). Mr. Bader also created a fourth common design element when he stated in the Seattle P-I article the morning of the show that Mr. Brecht's lawsuit was 'frivolous.' (CP 309) There is also a fifth common design element concerning omission of key facts evidenced in paragraph number 9 below.

2. Mr. Carlson rebroadcasts – without privilege – Mr. Bader's defamatory mailer language about Mr. Brecht. This statement agrees directly with the all three elements of Mr. Bader's common design and evidences combination and agreement.
3. By stating "so now who's this guy you're representing..." (CP 250), Mr. Schram opens the door to begin discussing Mr. Brecht as a part of his conspiratorial role. He begins with questions surrounding why Mr. Brecht filed the suit and why Mr. Pope is representing him. These are inferences by Mr. Schram that the lawsuit was frivolous. The inference was that if the suit had merit, Mr. Brecht could have got another attorney to represent him. Since Mr. Pope is representing Mr. Brecht just before the election infers that Mr. Brecht and Mr. Pope are only doing it for political gain and there is no merit to it. This evidences Mr. Schram's combination and agreement with both Mr. Bader's fourth common design element and with the first caller Mark Doe as stated in paragraph number 7 below.
4. Mr. Schram and Mr. Carlson make numerous statements concerning Mr. Brecht's name change (CP 251-253). By asking which name his dissolution records were under, they imply that Mr. Brecht is so notorious that he changed his name to escape connection to his court record. These

statements agree with the first element of Mr. Bader's common design and evidences combination and agreement. The fact that both Mr. Carlson and Mr. Schram evidence that all they knew of the Brecht v. Hague case was what was written in the Seattle P-I article the morning of the show (CP 289, 290, 297, 298) belies the fact they knew so much of Mr. Brecht's court record including his name change therein – none of which was contained in the Seattle P-I article. (CP 308-309)

5. Mr. Carlson makes a statement of fact, juxtaposing it with the defamatory mailer he had just broadcast. The purpose of this statement of fact was to reinforce the validity of Mr. Brecht's arrest and assault conviction record according to what was in Mr. Bader's mailer: "He has been arrested for domestic violence, but I guess it's questionable whether he has a conviction." (CP 252) By stating that it was questionable, Mr. Carlson introduces the probability that an assault conviction does exist. It was absolutely false the Mr. Brecht had an assault conviction. This statement agrees with the second and third elements of Mr. Bader's common design and evidences combination and agreement. For more explanation on Carlson's statement of fact, see the section 'Actual Malice' sub-sections: 'Mr. Carlson's statement of fact' and 'Mr. Carlson's juxtaposition'
6. Caller one, Mark Doe made statements referring to Mr. Brecht juxtaposing: "domestic violence conviction" and "men who beat their wives" and "wife beater." (CP 257-260) Together, these statements imply that Mr. Brecht was convicted of assault. These statements agree directly

with the third element of Mr. Bader's common design and evidences combination and agreement.

7. Caller one, Mark Doe states "And when -- it seems like when the shoe is on the other foot and it starts to pinch, he gets angry and files another frivolous lawsuit." (CP 258) This is evidence of a combination and agreement with Mr. Bader's 4<sup>th</sup> common design element and with Mr. Schram's statements.
8. Caller two, Chris Morgan stated that Mr. Brecht was a "woman beater" (CP 264-265) which agrees with the third element of Mr. Bader's common design. Mr. Morgan further stated that he was "not very upstanding" which agrees with the common tenor of all 3 elements of Mr. Bader's common design. Both of these statements evidence combination and agreement.
9. All the conspirators evidence their combination and agreement in the fifth common design element in that: 1) all of the co-conspirators omitted the facts that the "domestic violence conviction" involved a violation of a no contact order in a public place where there were no allegations of physical violence. 2) All of the co-conspirators omitted the facts that any allegations of violence came from official records where it was never so adjudicated that Mr. Brecht had been found guilty of any of those allegations. (*See omission in Mohr v. Grant*) Both Mr. Carlson and Mr. Schram knew of the distinction of Mr. Brecht's offenses because the evidence shows they investigated his court record. All of them implied the sting of the defamatory mailer as fact: that Mr. Brecht was indeed the

notorious wife beater with multiple assault convictions as claimed by them.

### **3. Common Intention**

‘Intention’ is defined as a determination to act in a certain way (Merriam Webster’s Collegiate Dictionary, 10<sup>th</sup> edition) All five conspirators showed a common intention to defame Mr. Brecht:

1. Mr. Bader published the defamatory campaign mailer (CP 306) for which there was no evidence to support. This mailer was already found by a jury in Brecht v. Hague to be defamatory. (CP 349)
2. Mr. Carlson’s rebroadcasting of the defamatory mailer language, his statement of fact about a domestic violence arrest and an assault conviction, his statement about Mr. Brecht’s name change (CP 251-253) and his stated agreement with and allowing both Mark Doe and Chris Morgan to defame Mr. Brecht on air, (CP 257–260, 264-265) evidences his common intention to republish and repeat Mr. Bader’s defamation against Mr. Brecht. This common intention is further supported by Mr. Carlson’s and Mr. Bader’s close personal and professional relationship dating back to 1980.
3. Mr. Schram’s statements about Mr. Brecht’s name change (CP 250-253) and his stated agreement with and allowing both Mark Doe and Chris Morgan to defame Mr. Brecht on air (CP 257 – 260) (CP 264-265), evidences his common intention to republish and repeat Mr. Bader’s defamation against Mr. Brecht.

4. Mark Doe's statements and defamatory juxtaposition (CP 257 -260) about Mr. Brecht evidences his common intention to republish and repeat Mr. Bader's defamation against Mr. Brecht. Although Mark Doe has not been identified, his statements are at least equal to those made by Mr. Morgan and therefore a jury could reasonably conclude Mark Doe was involved with Mr. Bader and/or the campaign just as Mr. Morgan was. Furthermore, the on-air dialogue between 'Mark Doe' and Mr. Carlson, regarding Mr. Pope's prior attack on Mr. Carlson, also suggested familiarity between the two men, if not friendship.
5. Mr. Morgan was a campaign worker for Mr. Bader. His statements of "woman beater" and "he's not very upstanding" evidence his common intention to republish and repeat Mr. Bader's defamation against Mr. Brecht. (CP 264-265) The identity of caller two was learned after filing of the Fisher lawsuit. There was little surprise from Mr. Brecht that Chris Morgan was a worker for the Hague Campaign. It is a fact that while Mr. Morgan was making his defamatory comments live on air, he was doing so in the at the Hague campaign headquarters and in the midst of the Hague campaign hierarchy that included Mr. Bader and others that had huddled around a radio to listen to the show. (CP 286)

#### **4. Common Purpose**

'Purpose' is defined as something set up as an object or an end to be obtained (Merriam Webster's Collegiate Dictionary, 10<sup>th</sup> edition). The object set up by Mr. Bader and followed by each of the other co-conspirators was to make Mr. Brecht appear as a 'notorious wife beater

with multiple assault convictions.’ Statements made and actions taken to broadcast the callers’ defamation against Mr. Brecht evidence that each of the co-conspirators acted with each other to obtain the object originally set up by Mr. Bader.

### **5. Summary of Mr. Carlson’s Conspiratorial Involvement**

With respect to Mr. Carlson’s role in the alleged conspiracy, the above evidence shows there was a combination or agreement to act together according to a preconceived plan. The above evidence also shows his agreement through common design element number one, two, three and five, with the other conspirators upon a common course of action or purpose to be accomplished.

Mr. Carlson did seek to accomplish an unlawful purpose and did engage in unlawful acts or use of unlawful means to accomplish a lawful purpose:

- 1) Mr. Carlson read verbatim Mr. Bader’s defamatory campaign mailer for which there was no privilege. (CP 252)
- 2) Mr. Carlson juxtaposed statements of fact to create false and defamatory implications against Mr. Brecht. (CP 252)
- 3) Mr. Carlson accomplished an unlawful purpose, acts or means by allowing and broadcasting the false and defamatory statements of Mark Doe (CP 257-260) and Chris Morgan (CP 264-265). Restatement of Torts Second 1977: 568a, 581 cmt. g, & 580a. See *Auvil v. CBS*, 800 F. Supp. 928 (E.D. Wa. 1992).

## **6. Summary of Mr. Schram's Conspiratorial Involvement**

With respect to Mr. Schram's role in the alleged conspiracy, the above evidence shows there was a combination or agreement to act together according to a preconceived plan. The above evidence also shows his agreement through common design element number one, four and five with the other conspirators upon a common course of action or purpose to be accomplished.

Mr. Schram did seek to accomplish an unlawful purpose and did engage in unlawful acts or use of unlawful means to accomplish a lawful purpose:

- 1) Mr. Schram accomplished an unlawful purpose, acts or means by allowing and broadcasting the false and defamatory statements of Mr. Carlson, Mark Doe (CP 257-260) and Chris Morgan (CP 264-265). Restatement of Torts Second: § 568A, § 577, § 581 & § 580A (1977); See *Auvil v. CBS*, 800 F. Supp. 928 (E.D. Wa. 1992).
- 2) Mr. Schram accomplished an unlawful purpose, acts or means by making statements about Mr. Brecht's name change, which when juxtaposed with the false and defamatory statements of Mr. Carlson, Mark Doe and Chris Morgan, add to the implication of the first common design element that Mr. Brecht was notorious (CP 250-253) and of the fourth common design element that Mr. Brecht's lawsuit was frivolous. (CP 250-253)

## **7. Trial Court Finds Agreement**

The trial court admits there was evidence of an agreement between the co-conspirators (RP 42), but because of its mis-application of

the law, it failed to make this finding. Mr. Brecht contends that had the trial court correctly applied the law in this instance, it could have decided that there was sufficient evidence for actual malice and an agreement for conspiracy on behalf of Fisher.

#### **8. Knowledge of all participants not a requirement**

Fisher contends in several areas that Mr. Carlson and Mr. Schram did not know the callers. One may be a member of a conspiracy without knowing the identities of all the members. Blumenthal v United States, 332 U.S. 539, 557 (1947), and United States v. Lee, 695 F.2d 515 (11<sup>th</sup> Cir. 1983). Furthermore, the evidence required to prove a civil conspiracy is laid out in cases such as Allstar and Sterling. All of these cases specify what is required and knowledge of all participants is not one of them.

#### **9. Mr. Carlson's and Mr. Schram's Motivation**

Fisher contends Mr. Carlson and Mr. Schram had no motivation to defame Mr. Brecht. The circumstances and action taken by Mr. Carlson and Mr. Schram evidence their motives to defame Mr. Brecht: 1) Mr. Carlson and Mr. Bader are friends since 1980. (CP 294). 2) They also previously worked together on campaigns and initiatives where they had to overcome common opponents. (CP 294) 3) 'Mark Doe' made reference to Mr. Carlson's past run-ins that are a potential for hostility against Mr. Pope. Since Mr. Brecht was endorsing Mr. Pope that hostility was passed on to him. (CP 258). 4) That Ms. Hague would prevail in the election and/or that Mr. Pope would lose. Even though Mr. Carlson stated in his deposition that he would not endorse Ms. Hague, his actions during the

show reveal that he had a far greater motivation to see Mr. Pope lose. 5) Mr. Carlson's and Mr. Schram's conspiratorial actions during the show - as evidenced above - reveal that they were motivated to unlawfully broadcast defamatory statements against Mr. Brecht for which they knew were false. 6) Mr. Schram's professional and personal relationship with Mr. Carlson demonstrates a great affinity for him to aid Mr. Carlson and the other conspirators.

Fisher states that "the complaint states that 'Mark' and 'Chris' had no connection to the Hague campaign and acted independent of it" (Res. Brf., p. 28) and that since there was no connection to the campaign, Mr. Carlson and Mr. Schram would 'not be motivated to help them.' This is a false inference on their part. The complaint sites the Hague campaign's disavowal of any connection to Mark or Chris. It also cites facts based upon what the Hague campaign members stated in deposition and the liability ramifications of their beliefs. Mr. Brecht never adopted the Hague campaign's beliefs, but merely stated that it was their belief. This is fully manifest in Paragraph 3.33 of the Complaint (CP 11) where it stated:

... who were acting independent of the campaign, according to the campaign and its consultants. Their object, however, [in spite of that, never the less, yet] was an extension of the strategy already adopted by the campaign: to attack the plaintiff with false and defamatory claims begun by the Hague campaign, and to embellish and expand upon them in the final week before the election.

Viewing the evidence in the record in a light most favorable to Mr. Brecht, if 'Mark' and 'Chris were acting as an "extension of the strategy already adopted by the campaign" this demonstrates a sufficient belief on

the part of Mr. Brecht for a conspiratorial connection between the actions of 'Mark' and 'Chris' and the Hague campaign.

### **C. LIABILITY**

Fisher falsely contends that they "Cannot Be Held Liable For The Statements Of Anonymous Callers To A Public Interest Radio Talk Show As A Matter Of Law" (Res. Brf., p. 9) Fisher incorrectly tries to frame the issue as one only that they can not be liable for comments made by callers. There are two different liability issues here: 1) can a broadcaster without knowledge of falsity be liable for defamatory statements from anonymous callers and 2) can a broadcaster with knowledge of falsity be liable for statements from anonymous callers. In the first liability issue a Louisiana court (CP 228) held that broadcasters are liable and Utah and Wyoming courts (cited in the 3 cases next paragraph) have held that broadcasters are not. Sack on Defamation § 7:3.5(a)(2) cites this issue as "an interesting laboratory in which to examine republication problems." Only THREE states have addressed this issue and neither the U.S. Supreme court nor Washington Courts have addressed this issue. Where the first liability issue is questionable, the second has a plethora of Washington precedent: Broadcasters are absolutely liable for publishing caller's defamation if they have knowledge that what they are saying is defamatory. Of these two, this is the stronger liability issue before the court.

In the following cases cited by Fisher to support their position of no broadcaster liability, actual malice was either not present or not properly evidenced. Had the plaintiffs in these cases presented material

issues of fact concerning actual malice, the cases would have ended up entirely different. For example, in Adams v. Frontier Broadcasting, 555 P.2d 563 (Wyo. 1976), the plaintiff Adams concedes that the record “fails to show the defendant [Frontier] had actual knowledge of the falsity of the statements broadcast.” Similarly, in Denman v. Star, 497 P.2d 1379 (Utah 1972), the court stated “there is no evidence whatever to reflect any malice on the part of any of the station's officials.” In Weber v. Woods, 334 N.E.2d 863 (Ill. App. 1975), the court agreed with the broadcasting company that Weber produced no evidence of actual malice against the broadcaster, again this case is not relevant in this instance.

Regarding Gardner v. Martino, 563 F.3d 981 (9<sup>th</sup> Cir. 2009), Fisher mis-represents the case by saying, “the court found that a radio talk show host could not be liable for calling the plaintiff a liar, based upon “facts” provided by a caller.” In this private figure case, the court actually ruled that the broadcaster’s remarks were not allegations of fact, but rather were non-actionable opinion (Gardner, 563 F.3d at 985), making this case irrelevant in this instance.

Regarding Tait v. KING Broadcasting Co., 1 Wn. App. 250, 460 P.2d 307 (1969), Fisher again misrepresents the case stating that the court upheld another grant of summary judgment where a radio talk show host called the plaintiff “our leading American local fascist and Jew hater.” The actual statement was, “our leading American local fascist and Jew baiter.” The plaintiff offered no evidence of actual malice: “Tait's deposition indicated he had no knowledge or information Clark knew the statements

were false or made with reckless disregard of their truth or falsity.” (Tait, 1 Wn. App. at 311) In Gov't Employers, Inc. v. Central Broad. Co., 379 Mass. 220, 231, 396 N.E.2d 1002 (1979) the court cited “No genuine issue as to "knowledge of falsity" or "reckless disregard." In MacGuire v. Harriscope Broad. Co., 612 P.2d 830 (Wyo. 1980) the court found no evidence of actual malice.

Every case cited by Fisher in this area of liability states that in order for a broadcaster to be liable there must be evidence of actual malice. All they did was select cases where no evidence of actual malice was presented. None of the cases cited by Fisher established fault and therefore preclude any broadcaster liability for the callers’ statements. None of the cases cited by Fisher relate to the circumstances in this case, which involve a conspiracy to defame with the broadcasters’ prior knowledge of the defamation to be broadcast. Therefore all of their cases are irrelevant in this instance. Washington courts recognize liability for republishing or third party publishing defamation, however there must a showing of fault: “The Washington approach is thus consistent with the general rule that there is no ‘conduit liability’ in the absence of fault.” LaMon v. City of Westport, 44 Wn. App. 664, 668, 723 P.2d 473 (1986).

In Auvil v. CBS, 800 F. Supp. 928, 931 (E.D. Wash. 1992) ("60 Minutes") the court stated that "One who only delivers or transmits defamatory material published by a third person is subject to liability if, but only if, he knows or had reason to know of its defamatory character. Dworkin v. Hustler Magazine, Inc., 634 F. Supp. 727, 729 (D. Wyo. 1986)

*quoting* Restatement (Second) of Torts § 581.” The court further stating that “Any act by which the defamatory matter is intentionally or negligently communicated to a third party is a publication. Restatement § 577, comment a. LaMon v. City of Westport, 44 Wn. App. 664, 668, 723 P.2d 473 (1986).” The position of the court in these cases supports the assertion of broadcaster liability for republishing defamatory statements. In this instance, Fisher is liable for the 1) unprivileged rebroadcasting of the defamatory mailer, 2) Mr. Carlson’s juxtaposed statements of fact thereafter and 3) the defamatory statements made by the callers. The conspiracy and actual malice evidence herein indicate Mr. Carlson and Mr. Schram had foreknowledge of Mark Doe’s and Chris Morgan’s defamation.

Restatement (Second) of Torts § 581, comment g states that since radio broadcasters are publishers, “more nearly analogous to a newspaper”... they are “not to be regarded as engaged solely in the transmission of messages”... “radio stations are therefore subject to liability for the broadcast of defamatory matter in accordance with the provisions of Restatement (Second) of Torts § 580A” which states: “Defamation of Public Official or Public Figure - One who publishes a false and defamatory communication concerning a public official or public figure in regard to his conduct, fitness or role in that capacity is subject to liability, if, but only if, he (a) knows that the statement is false and that it defames the other person, or (b) acts in reckless disregard of these matters.” Since Mr. Brecht is a public figure in this matter and the

defamatory statements made by Mr. Carlson and the other conspirators (which they are all equally liable for each others defamation) were designed to attack his conduct, fitness or role in the capacity as endorser of a candidate. Fisher is therefore subject to liability because again, the evidence of the conspiracy and actual malice establishes that they knew the statements were false and defamatory towards Mr. Brecht or they acted in reckless disregard of these matters.

**The Fisher Defendants are liable for the:**

- 1) Unprivileged and defamatory statements by Mr. Carlson.
- 2) Defamatory statements of the callers because they acted with them as part of a conspiracy. - Sterling v. Thorpe, 82 Wn. App. at 451
- 3) Defamatory statements of the callers because both Mr. Carlson and Mr. Schram knew what they were going to say before they said it. Restatement of Torts Second: § 568A, § 577, § 581 & § 580A (1977)

**D. ACTUAL MALICE**

**1. Evidence of Actual Malice**

In their effort to dispute Mr. Brecht’s actual malice case law, Fisher relies on actual malice case law prefacing with ‘merely’ and ‘by itself’ which is code for, “if this is the only evidence you have for actual malice, you have not met the burden of proof.” The Washington State Supreme Court has stated that elements of evidence for actual malice are to be viewed cumulatively: “Individual factors that evidence actual malice are not generally sufficient to establish actual malice ... However, each of the above factors may be taken into account cumulatively as probative

evidence of actual malice.” Herron v. Tribune Pub'g Co., 108 Wn.2d 162, 172, 736 P.2d 249 (1987).

Fishers’ claim is that Mr. Brecht “Provided No Evidence That Carlson Or Schram Acted With Actual Malice At Any Time During Their Show.” (Res. Brf., p. 23) As for Mr. Carlson and Mr. Schram, their actual malice is seen in several different instances. In Herron II, 112 Wn.2d 762, 776 P.2d 98 (1989), The Washington State Supreme Court reviewed an earlier case of its own (Herron I, 109 Wn.2d 514, 746 P.2d 295 (1987)). One of the big reasons for this was the question of actual malice and knowledge of falsity. As a basis for measuring the actual malice in this instance, the Herron II court stated that actual malice was sufficiently evidenced in only two areas: 1) That there was no evidence for the outside origins of McGaffin’s false statement that Herron had collected half of his campaign contributions from bail bond companies and 2) that McGaffin had investigated Herron’s PDC record.

Although every case is different, there are sufficient similarities between Herron II and the one in this instance: a false and defamatory statement of fact was made and there was evidence the person that made it investigated official records and knew or had strong suspicions it was false. In this instance:

(1) The origins of the false information came from a questionable source: Mr. Bader, was the campaign manager of an opposing candidate Mr. Brecht was endorsing. Mr. Carlson and Mr. Schram relied on that

questionable source. (CP 306, 308, 309) Pep v. Newsweek, 553 F. Supp. 1002 (S.D.N.Y. 1983)

(2) Mr. Carlson stated he received the defamatory mailer some days before the show, which evidenced a ‘Washington Court Record Search’ and which shows they had ample time to research those records. (CP 248, 252) See Restatement Second of Torts. 580a cmt. d. (1977). The defamatory mailer evidenced a Washington court record search as the basis for the statements about Mr. Brecht therein. Therefore, he knew the allegations could be proved or disproved by performing a search on Mr. Brecht’s records. (CP 306) “Publication in the face of verifiable denials or without further investigation despite the seriousness of the allegations.” Curran v. Philadelphia Newspapers, Inc., 376 Pa. Super. 514, 546 A.2d 639 (1988) There is evidence that Mr. Carlson and Mr. Schram investigated Mr. Brecht’s court record: A) The Fisher MSJ states that excerpts from Mr. Brecht’s dissolution that they relied on. They erroneously state that this record was not available until November of 2007. (CP 198) The fact is these records were available since the end of Mr. Brecht’s dissolution in 2002 and completely exonerate Mr. Brecht of any physical violence towards his then wife. (CP 324, 325) B) Both Carlson and Schram evidence Mr. Brecht’s name change during the show which was clearly a part of Mr. Brecht’s court record. They even spoke of Mr. Brecht’s court record as if they had familiarity with it: Mr. Schram: “But were there not other court appearances under his former name?” (CP 252-253). The republishing of only the damning portions of Mr. Brecht’s

dissolution while omitting the court's final judgment and the exculpatory evidence is direct evidence that they knew the truth and chose to publish a lie. This is actual malice. Furthermore Mr. Carlson and Mr. Schram stated that they did not have any independent knowledge about Mr. Brecht, his lawsuit, nor did they know him (CP 289, 290, 297, 298). Yet they were certain he was guilty of being a wife beater! This is evidence of their reckless disregard to the truth or falsity of their statements

(3) The Seattle Post-Intelligencer article stated the correct facts of Mr. Brecht's record, yet they chose not to report those facts. (CP 308, 309) "Warning that the statement is not true thus creating serious doubts as to the truth or falsity requiring further investigation." O'Brien v. Tribune Publishing, 7 Wn. App. 107, 125, 499 P.2d 24 (1972)

(4) The P-I article announced Mr. Brecht's lawsuit and that the allegations against him were false. (CP 308, 309) In a Pennsylvania Supreme Court case, the same matter was addressed by the court:

after the lawsuit filed against him put him on notice that his grave accusation might be false, does inform the jury's inquiry by making it more probable that he either knew the information was false or that he acted recklessly with regard to the truth...

Weaver v. Lancaster Newspapers, 592 Pa. 458, 470, 926 A.2d 899 (2007); *see also* Restatement of Torts Second 580a. cmt d. 1977.

(5) The entire section on civil conspiracy as contained herein demonstrates the elaborate preconceived plan that both Mr. Carlson and Mr. Schram were in the very center of. This evidence of elements of Mr. Carlson's and Mr. Schram's actual malice as contained herein show proof

that they either knew or had strong suspicions that the allegations of Mr. Brecht's assault conviction were false. Therefore, the very moment when 'Mark Doe' and Chris Morgan began their defamatory statements against Mr. Brecht, Mr. Carlson and Mr. Schram knew what they were saying was false. Yet, they did not cut them off from the broadcast nor admonish them that these were allegations from Mr. Brecht's wife during a divorce proceeding and that the judge in that case had absolved Mr. Brecht from any wrong doing. Instead they signaled agreement with the caller's statements (CP 257-260, 264-265) and they continued to broadcast – not just one caller, but two callers' defamation – as if it were an absolute matter of fact!

Mr. Carlson's statement, "This campaign is a nasty one. This campaign is a beat down" was a set-up for what the statements the callers one and two were getting ready to make. It is an indication that he knew in advance what they were going to say. Mr. Carlson and Mr. Schram then unlawfully created a platform for multiple callers to defame Mr. Brecht. Restatement of Torts (Second) § 568A, § 577, § 581 & § 580A (1977) Mr. Carlson's and Mr. Schram's agreement with the callers 'Mark' and 'Chris' defamation and the fact there was no distancing from or admonition of the callers defamation, all point to Mr. Carlson's and Mr. Schram's part in the preconceived plan to get Mr. Brecht and that they seriously doubted the false and defamatory allegations about Mr. Brecht. "Indications that the publisher has a preconceived plan 'to get' the plaintiff and purposeful

avoidance of the truth.” Stevens v. Sun Publishing Co., 270 S.C. 65, 240 S.E.2d 812 (1978)

(6) The most obvious source would have been the court record itself since it was referred to on the mailer as the basis for the false and defamatory allegations. Other obvious sources included Mr. Brecht’s then wife and Mr. Brecht himself, none of whom were consulted. “Failure to seek corroboration from the most obvious source.” Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 688, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989).

(7) As the original publisher of the defamatory campaign mailer, Mr. Bader was attempting to win an election at the expense of Mr. Brecht’s reputation, and when confronted by the lawsuit and the newspaper reporter’s questions, he did not recant. As for Mr. Carlson and Mr. Schram, the nature and tone of their statements against Mr. Brecht signify their hostility against him. Coupled with their actions towards Mr. Brecht by: rebroadcasting the defamatory mailer; (CP 252) immediately broadcasting Mr. Carlson’s false and defamatory statement of facts thereafter; (CP 252) and broadcasting the callers defamatory statements – all with knowledge of falsity – further evidences their hostility. (CP 257-260, 264-265) “Indications that the publisher was hostile.” Arroyo v. Rosen, 102 Md. App. 101, 113, 648 A.2d 1074 (1994).

(8) There was no evidence - other than what was written on Mr. Carlson’s friend’s (Mr. Bader’s) mailer (CP 306) – that Mr. Brecht was ever convicted of assault, yet Mr. Carlson rebroadcast the defamatory

mailer without privilege and created a false statement of fact alluding to it's probability and factuality. (CP 252) "Unexplained distortion or the absence of any factual basis to support the statement." Curran v. Philadelphia Newspapers, 376 Pa. Super. 514, 546 A.2d 639 (1988).

(9) Mr. Carlson and Mr. Schram in combination and agreement with the other conspirators, misstated the evidence (CP 257-259, 264, 265) contained in Mr. Brecht's court record (CP 347, 324-326) to make it seem more convincing or condemnatory than it is. "Intentional misstatement of a charge to make it seem more convincing or condemnatory than it is." Westmoreland v. CBS, 596 F. Supp. 1170, 1174 (S.D.N.Y. 1984)

(10) It is simply improbable that evidence of an assault conviction could be obtained from court records where no such conviction ever existed. Yet the evidence shows Mr. Carlson and Mr. Schram investigated Mr. Brecht's record and reported an assault conviction for Mr. Brecht. (CP 252, 257-259, 264, 265) "Inherent improbability of the information being conveyed." Herron v. King, 109 Wn.2d 514, 524, 746 P.2d 295 (1987)

(11) Mr. Carlson rebroadcast the defamatory mailer and then juxtaposed statements of fact inferring that the mailer language was probably true. His statement of fact - even though he phrased part of it as a question (CP 252) - was considered to be factual by the listeners. *See section on 'Rebuttal' below.* Mr. Carlson and Mr. Schram reported Mr. Brecht's name change as if to infer he was notorious. (CP 250 -252) Mr. Schram inferred Mr. Brecht's lawsuit was frivolous. All of this innuendo or 'walking around the truth' is a result of their knowledge that Mr. Brecht

was not guilty of assault. Yet they continued with the innuendo as their part of the common design of the overall conspiracy. Innuendo. Herron v. King, 109 Wn.2d 514, 525, 746 P.2d 295 (1987)

## **2. Mr. Carlson's Statement of Fact**

Mr. Carlson delivers his second actionable statement by broadcasting "he has been arrested for domestic violence, but I guess it's questionable whether he's got the conviction, is that it?" (CP 252) Mr. Carlson knew that it was not questionable whether Mr. Brecht had an assault conviction. First, the same Seattle Post-Intelligencer article he read that morning stated the true facts of Mr. Brecht's record. (CP 308, 309) Second, Mr. Carlson had a copy of the defamatory mailer for at least several days prior to the show (CP 248, 306) which stated that the facts of Mr. Brecht's record as reported therein, were from a "Washington Court Record Search." Mr. Carlson and Mr. Schram already knew facts from Mr. Brecht's court record as evidenced by their knowledge of his name change (CP 250-253) and their knowledge of his dissolution record (CP 198). Therefore it is evident Mr. Carlson knew the true facts of Mr. Brecht's court record in advance of the show but instead chose a path consistent with the common design of the conspiracy. Mr. Pope's response to Mr. Carlson's statement of fact was "no" because it was a false statement of fact. In Sims v Hagel, 42 Wn. App. 675, 713 P.2d 736 (1986), the appellate court affirmed that the "ruling that Hagel's statements were not protected opinions but rather false statements of fact which ... have no constitutional value" and that "accusations of criminal activity,

are not constitutionally protected opinions.” Sims, 42 Wn. App. at 683. *Also see Sack on Defamation*, 4<sup>th</sup> ed. Section 4:3.6 “Charges of criminal conduct even when phrased as opinion have been held to be actionable.” Again, Mr. Carlson’s intention is to combine and agree with Mr. Bader’s and the other conspirators’ common design, intention and purpose.

Mr. Carlson’s statement of fact accomplishes two purposes. First, it is a false statement of fact – *see Dunlop v Wayne*, 105 Wn.2d 529, 716 P.2d 842 (1986) test below. Second, when juxtaposed with the statements of the other conspirators, Mr. Carlson’s statement of fact adds weight and increases the defamatory sting of the show’s defamation as a whole. It also adds to the argument against privilege.

### **3. Mr. Carlson’s Juxtaposition**

Mr. Carlson juxtaposes false statements of fact to support that Mr. Brecht is indeed the notorious wife beater with multiple assault convictions that was stated in the mailer. (CP 252) First, Mr. Carlson rebroadcasts the defamatory mailer. Then he states that Mr. Brecht “has been arrested for domestic violence”. This is a false statement of fact, because juxtaposed with the defamatory mailer he just read, the mentioning of the phrase ‘domestic violence’ indicates that there was physical violence. This was a calculated juxtaposition so that the term ‘domestic violence’ would take on the implication of an actual assault. It was a common design theme among Mr. Bader’s mailer and the statements made by Mark Doe, (CP 257-260) Chris Morgan (CP 264-260) and Mr. Carlson (CP 252). The statement leaves a false impression that is

contradicted by the inclusion of omitted facts. *See Mohr v Grant*, 153 Wn.2d 812, 827, 108 P.3d 768 (2005). Then he stated “but I guess it’s questionable whether he’s got the conviction, is that it?” It was absolutely not questionable whether Mr. Brecht had an assault conviction! There was no evidence for this other than Mr. Bader’s defamatory mailer which had been proven in *Brecht v Hague* to be defamatory! (CP 349) The evidence shows Mr. Carlson researched Mr. Brecht’s court record. (CP 198, 250-253) The Seattle Post-Intelligencer article he stated that he read (CP 290, 291, 308, 309) that same morning stated the true facts – Mr. Carlson knew the facts. This statement of fact – through the form of a question – falsely implied that the allegations of an assault record may be factual. This was not only defamatory on its face, but was also designed as part of the conspiracy to open the door for the first two callers so that their comments of Mr. Brecht being a “wife beater” would be more believable in the minds of the audience. This was in combination and agreement with the common design of the conspiracy. Anything stated by Mr. Pope in rebuttal to this question would not hold weight. (See the section on ‘Rebuttal’ below.)

The conspirators were on notice from the lawsuit that there was no evidence in a ‘Washington Court Record Search’ (CP 306) of an assault conviction, so they devised an alternative accusation that would carry a similar weight and effect: They juxtaposed statements that Mr. Brecht had been “convicted of domestic violence” and that he was a wife beater. The problem with this alternative was that it was still unlawful in that they

created a false implication through juxtaposition that Mr. Brecht was a convicted wife beater. They omitted true facts about Mr. Brecht's no contact order conviction, that it was for an offense where no physical violence was alleged, and they relied on statements from the wife that never resulted in an adjudication of guilt. Time v. Firestone, 424 U.S. 448, 458, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976) and confirmed in Mark v. KING Broadcasting, 96 Wn.2d 473, 494; 635 P.2d 1081 (1981). This alternative accusation is a smoking gun for actual malice in that Mr. Carlson knew that his carefully crafted statements against Mr. Brecht were designed to maintain the sting of an assault conviction.

Mr. Carlson's statement of fact immediately after his rebroadcast of the defamatory mailer includes "the allegation of undisclosed defamatory facts for its basis and is therefore actionable." Dunlop v Wayne, 105 Wn.2d 529, 534, 716 P.2d 842 (1986). The three part test in Dunlop requires: "1. Nature of the medium": the statement was made on a radio broadcast as part of a conspiratorial effort to defame Mr. Brecht. "2. Nature of the audience": the audience was listening to Mr. Carlson discussing the legal record of Mr. Brecht and was therefore in full expectation to hear true statements of fact. "3. Does the statement disclose underlying facts that support it": a) Mr. Carlson's statement disclosed underlying facts that support it. b) Mr. Carlson's statement was in the form of a question. Questions are actionable: Henderson v Pennwalt, 41 Wn. App. 547, 704 P.2d 1256 (1985) discloses underlying facts that support it. "Liability results if the audience does not know the facts underlying an

opinion and if the opinion implies that undisclosed defamatory facts support it.” Henderson, 41 Wn. App. at 557.

Fisher contends that the “Trial Court Correctly Found That Brecht Could Not Meet His Legal Burden Of Proof On Summary Judgment.” (Res. Brf., p. 12) The facts are that the trial court incorrectly determined that there was no actual malice therefore ruling in favor of the defendants.

Fisher contends that “Neither Carlson Nor Schram Could Have Acted With Actual Malice By Allowing Chris And Mark To Speak.” (Res. Brf., p. 20) Here, Fisher confuses the issue of liability with the issue of fault. Both of these issues are dealt with in their respective sections on ‘Actual Malice’ and ‘Liability’.

Fisher contends that, “Brecht provided no proof that Carlson or Schram knew or should have known that the statements of "Mark" or "Chris" were false.” (Res. Brf., p. 20) The evidence shows Carlson and Schram researched Mr. Brecht’s court records. (CP 198, 250-253) and from the facts printed in the Seattle Post-Intelligencer article. (CP 308, 309) They were therefore in possession of the facts that Mr. Brecht was not guilty of assaulting his wife. This, along with the other clear and convincing evidence as thoroughly vetted in this section evidence Mr. Carlson’s and Mr. Schram’s actual malice.

#### **E. PRIVATE OR PUBLIC FIGURE STATUS**

Whether the plaintiff is a public official or a public figure is a question of law. Clawson v. Longview Publishing Co., 91 Wn.2d 408, 413, 589 P.2d 1223 (1979); *see also* Restatement (Second) of Torts, §

580A cmt. c at 217. Eubanks v North Cascades Broadcasting, 115 Wn. App. 113, 122, 61 P.3d 368 (2003). Appellate courts are required to review all matters of law de novo. Mr. Brecht presented an argument against his public figure status. (CP 217-220) Mr. Brecht is confident in the evidence for actual malice in this case. However, there is a looming question of precedent this case may bring. Should any endorser of a candidate be subject to public figure status? Would it produce a chilling effect on the political process with respect to candidate endorsements if every private figure endorser rose to the level of a public figure status just because of their endorsement for a candidate?

#### **F. RADIO STATIONS “ARE WHAT THEY ARE”**

It appears that the trial court relies on Fishers’ quote from Adams v. Frontier Broadcasting Co., 555 P.2d 556, 565 (Wyo. 1976):

Commitment to 'uninhibited, robust and wide-open' public debate must, in the balance, outweigh the common law right of an individual who is a public official or public figure to be free from defamatory remarks.

(Res. Brf., p. 17)

This quote, by itself portrays the false appearance that talk radio shows enjoy some special constitutional rights above the actual malice standard. In fact, the Adams court rules elsewhere that actual malice is required for recovery of damages. This signifies a greater weight for actual malice over the common right for a public figure to be free from defamatory remarks. In Adams, the plaintiff admitted that the defendant in his case acted without actual malice.

Fisher used this same quote both in their motion for summary judgment and in their respondent's reply brief. (CP 190) and (Res. Brf., p. 17) The inference is that they received so much benefit from it the first time that they decided to use it again. The trial court in this instance incorrectly interpreted the Adams court's position (as quoted by Fisher) when it said that that radio stations "are what they are" and "it's clearly part of the free speech we enjoy in this country." (RP 41) The evidence is that the trial court used Fisher's quote of the Adams court as one of the reasons to deny Mr. Brecht's case from proceeding. The fact is actual malice must outweigh the right to broadcast defamatory language, especially accusations of criminality for which there are no constitutional protections for, Sims, 42 Wn. App. at 683. This is the current position of U.S. Supreme Court and the Washington State Supreme Court with regards to the constitutionalized definition of actual malice in relation to first amendment rights and the rights of reputation.

#### **G. PRIVILEGE**

Fisher does not address Mr. Brecht's issue of privilege with regards to (1) whether the report is attributable to an official proceeding; and (2) whether the report is accurate or a fair abridgement. Restatement (Second) of Torts § 611 cmts. d, e, f.; Alpine v. Cowles, 114 Wn. App. 371, 385, 57 P.3d 1178 (2002). Nor do they address all of the other reasons a privilege does not apply as listed in the Appellants initial brief. (see App. Brf., pp. 18-23) In effect they concede there was no privilege to rebroadcast the defamatory mailer. The fact is the fair reporting privilege

does not apply because there is no existing official proceeding, along with all the other reasons as stated in the appellant's initial brief.

#### **H. REBUTTAL**

Fisher contends that Mr. Pope, because of his answers or non-answers is to blame for the defamation (Res. Brf., pp. 11, 15, 21, 23, 30, 31). Where the conspirators had advance opportunity to script the show much like a play, Mr. Pope was an unwilling actor. Mr. Carlson and Mr. Schram controlled the show, the questioning, the format and who they would allow on as callers. Nothing Mr. Pope said could effectively rebut or negate their pre-planned attacks by the conspirators upon Mr. Brecht. Mr. Pope's credibility was seriously diminished in the minds of the listeners with comments from Mr. Carlson and Mr. Schram such as "you're a nut" and "you don't like women", etc. (CP 248) The show was designed by Mr. Carlson and Mr. Schram such that there was an appearance that two hosts and two callers were acting independently of each other. In reality they were acting in combination and agreement according to a common design, intention and purpose, Sterling v Thorpe, *Id.* The conspirators attacked both Mr. Pope and Mr. Brecht in a way so that the audience would not only find them without credibility but that they would actually come to loathe them. This is perhaps best shown by the third and final caller "Keith" who said he had previously voted for Mr. Pope. The inference is that after listening to the show, Keith had totally changed his opinion of Mr. Pope. (CP 269, 270) This conspiratorial tactic employed by Mr. Carlson and Mr. Schram rendered any potentially

mitigating effect of rebuttal utterly useless. The courts have a similar view on rebuttal:

“An opportunity for rebuttal seldom suffices to undo harmful defamatory falsehood. Indeed the law of defamation is rooted in our experience that the truth rarely catches up with a lie.” Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 n. 9, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974)

State v. ACLU, 135 Wn.2d 618, 957 P.2d 691 (1998).

Furthermore, as broadcasters, Mr. Carlson and Mr. Schram enjoy a platform “that many people tend automatically to accept as conveying truth” thus, rendering rebuttal effectively useless. As stated in Restatement Second of Torts § 568a (1977):

The wide dissemination that results from broadcasting over radio and television, together with the prestige and potential effect upon the public mind of a standardized means of publication that many people tend automatically to accept as conveying truth, are such as to put the broadcaster upon the same footing as the publisher of a newspaper.

Acknowledged in Eubanks v. North Cascades Broadcasting, 115 Wn. App. 113, 120, 61 P.3d 368, 372 (2003).

### **I. BURDEN OF PROOF**

Fisher failed to prove that there were no genuine issues of material fact:

Initially the burden is on the party moving for summary judgement to prove by uncontroverted facts that there is no genuine issue of material fact. If the moving party does not sustain that burden, summary judgement should not be entered, irrespective of whether the nonmoving party has submitted affidavits or other materials.

Hope v. Larry’s Markets, 108 Wn. App. 185, 192, 29 P.3d 1268 (2001)

## **J. SUMMARY JUDGMENT IMPROPER**

Numerous Washington Appellate Courts have ruled that summary judgment is not warranted in cases involving major issues such as actual malice and conspiracy. “Where intent is unclear”, Washington Hydroculture v. Payne, 96 Wn.2d 322, 635 P.2d 138, 142 (1981), and “where different inferences may be drawn there from as to the ultimate facts such as intent, knowledge, good faith, negligence, et cetera, Preston v Duncan, 44 Wn.2d 678, 349 P.2d 605, 607 (1960) summary judgment is improper. The United States Supreme Court defined actual malice as “a matter of the defendant's subjective mental state.” Bose Corp. v. Consumers Union of United States, 692 F.2d 189, 196 (1<sup>st</sup> Cir. 1982), aff'd, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) Clearly: intent, knowledge, good faith, negligence, et cetera are a matter of one’s mental state. The trial court in this case stated, “When you look at the give and take in the dialogue, I suppose it could go either way. You could probably argue to a jury that they were sort of agreeing with that and republishing that.” The court evidencing its struggle with trying to determine the intent of Mr. Carlson’s rebroadcasting of both the defamatory campaign mailer and the defamatory statements from Mark Doe and Chris Morgan. Of course then deciding against Mr. Brecht because of the mis-application of the law which is subject to its error in this case.

Furthermore, Washington Appellate Courts have stated, “when material facts are particularly within the knowledge of the moving party, 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.” Riley v Andres, 107 Wn. App. 391, 27 P.3d 618, 620 (2001) This is on point with the United Supreme Court when it stated that “[Proof of actual malice is subject to]...facts usually within the defendant's knowledge and control, and rarely is admitted.” Bose Corp. v. Consumers Union of United States, 692 F.2d 189, 196 (1<sup>st</sup> Cir. 1982), aff'd, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984). And also on point the Washington Court of Appeals stated, “Since direct evidence of a conspiracy is ordinarily in the possession and control of the alleged conspirators and is seldom attainable...” Sterling v. Thorpe, *supra*.

Finally, Summary judgment should not be granted when credibility of material witness is at issue, Gingrich v Unigard, 57 Wn. App. 94, 995 P.2d 1096, 1099 (1990). Considering all of the actual malice evidenced against Mr. Carlson and Mr. Schram in this case, their credibility as chief material witnesses is definitely at issue and for all reasons herein the case should be remanded to trial.

#### **K. CONCLUSION**

“Facts and all reasonable inferences therefrom must be considered in the light most favorable to the nonmoving party, and summary judgment should be granted only if a reasonable person would reach but ONE conclusion.” International Ass’n of Firefighters v. Spokane Airports, 146 Wn.2d 207, 45 P.3d 186, 194 (2002). The trial court’s granting of summary judgment was error because it assigned special rights for the

radio show to defame which do not exist. It failed to hold the Defendants accountable to established legal standards under U.S. and Washington defamation law. Mr. Brecht respectfully requests the Court of Appeals to reverse the Trial Court's December 29, 2009 summary judgment order and remand this case for trial.

Respectfully submitted this 16<sup>th</sup> day of September 2010.



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PAUL BRECHT  
Appellant Pro Se

**DECLARATION OF SERVICE**

I declare under penalty of perjury, according to the laws of Washington State, that on the date written below, I delivered a true and correct copy of this Reply Brief of Appellant to the offices of the Attorneys for the Respondents and Defendants as addressed below:

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