

67274-6

67274-6

No. 67274-6-1

COURT OF APPEALS,  
DIVISION I  
OF THE STATE OF WASHINGTON

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Donald Canfield, Appellant

v.

Michelle Clark & Seattle Public Schools, a municipal corporation,  
Defendants.

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REPLY BRIEF OF APPELLANT

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COURT OF APPEALS  
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## I. SUPPLEMENTAL STATEMENT OF THE CASE

### A. **There is evidence Plaintiff Canfield raised the issue of prevailing wages to the Defendant SPS.**

After a trial, a jury found that Defendant SPS retaliated against Plaintiff Canfield for making complaints that Defendant SPS failed to pay prevailing wages. CP 1066-1067. The jury's factual findings and/or evidence supporting those findings are not challenged by Defendant SPS. See Stipulation filed by parties in Court file dated 2/10/2011. Plaintiff Canfield did lodge complaints of failure to pay wages with Defendant SPS as stated in his declaration. CP CP 237-238, ¶ 7. *See also* CP 316-320, 169:4-170:16; 176:2-182:24; 185:20-189:20.. This is also evidenced as contained in Mr. Good's email to Mr. Canfield responding that his crew would be paid prevailing wages. CP 264. This had been an ongoing issue as acknowledged by Mr. Dan Bryant, Plaintiff Canfield's supervisor. CP 333-335, 40:17-46:23; CP 339-340, 123:18-125:12.

In their Response, Defendant SPS claims there was "only infinitesimal evidence" that Canfield raised the issue of prevailing wages. Resp. Brief at 21, fn. 3. As indicated above, that was not the case.

### B. **Defendant Michelle Clark makes defamatory statements knowing they are false.**

According to Mr. Auki Piffath, the complaints made by Defendant Michelle Clark to him were not made to him as a representative of the business

trades but were just made in conversation during the commute to and from work. CP 689-690, 39:19-40:7. In summary, Defendant Clark relayed the following about Plaintiff Canfield having a gun - Clark and Canfield met during working hours at a school that they were doing fire alarm testing on before Clark was hired but while she was working as an outside contractor. 42:8-44:25. Mr. Piffath was unclear as to what specifically they were doing but was told only that they were working on the fire alarm system. *Id.* They met, completed the work and then were leaving to go to lunch or “whatever.” *Id.* As they left the school, they were walking out and there were a few men or boys across the street. *Id.* Don said to wait and then reached into his pants and grabbed a gun. *Id.*

Further, Ms. Bliss testified there were two instances in which Defendant Clark indicated Plaintiff had a gun. CP 416-417, 48:10-49:24; CP 438 (exhibit referred to in testimony). The first instance was some two years prior to her working at the school district wherein she claimed she was having lunch with Plaintiff, they were walking across the street from the school district, and he showed her his gun. *Id.* Ms. Bliss is a bit vague on this report as she does not recall specifically but indicated that was contained in her notes. *Id.* In describing the second incident, Ms. Bliss stated with certainty that Defendant Clark reported that when she was first hired with the district, in late

August, that she, “. . . asked him if he still had a gun on him; and he said, yes, it was in his pants.” CP 417, 49:6-24. Ms. Bliss testified that she recalled specifically that Defendant Clark reported that to her. *Id.* Again, in her testimony, Defendant Clark was vague claiming she did not recall when asked about a number of the statements but did indicate that she never saw Plaintiff Canfield with a gun on school property. CP 395-398, 89:25-102:7; 102:8-103:6.

Finally, Jesse Logan, a maintenance electrician, indicated in part,

She [Michelle Clark] started talking to one of the teachers at an elementary school we went to about Don carrying a gun and having such a terrible temper. When I overhead this I asked Michelle, “Did you say that this guy, ‘Don’, was carrying a gun on the school district’s property?” She told me that he carried a gun and never took it off his body. I asked her if she ever actually SAW the gun on him at the school district shop and she told me, “Yes, I was in the electrical shop one day when he was there. I saw it on him . . . .”

CP 291 (290-292 entire document). Ms. Logan was just an electrician, not a manager, supervisor or union representative and there is no evidence that she had anything to do with the investigation into Defendant Clark’s complaints, and had in fact never met Plaintiff Canfield prior to working with Defendant Clark. *Id.* Ms. Logan met Mr. Canfield only after he returned from administrative leave. CP 290-292.

**C. Other evidence of Defendant Clark’s malice toward Plaintiff**

**Canfield.**

Defendant Clark's intent to harm Plaintiff Canfield is also evidenced by her conduct after her defamatory statements and his removal. *See* CP 664-666; CP 443 & 427-428, 87:17-91:7 (Bliss testimony); CP 403 - 404, 126:1-131:25, CP 405, 149:1-151:22 (Clark testimony). Just after his return in August 2008 when SPS allowed Plaintiff Canfield to return as an electrician, Defendant Clark began again complaining about Plaintiff Canfield. *Id.*, CP 443 & 427-428, 87:17-91:7. As explained by Mr. Pflueger in an email to Ms. Bliss,

Michelle responded that Don Canfield was harassing her and she wanted to report the harassment and wanted it to stop immediately. As I probed Michelle for facts, she informed me that Don was doing things to irritate her like the following issues; 1) Michelle stated that Don had walked into a room (Shop Office) where Michelle was, I asked her if Don had done something or had said something to her. Michelle told me that Don had said nothing or did anything other than just be in the same room. 2) Michelle had found her name tag on the floor, and she just knew that Don had done this. When I asked her if she saw him do this, she responded that she had not, but she knew it must have been him. She also stated that other people's name tags were on the floor as well, but Don did not have a name tag on the door so it must have been Don that did this. 3) Michelle stated that she had seen Don in the supply room where Michelle's Fire Alarm supplies were located and that after Don had left the room she inspected the area and found nothing out of place. Later that day she found some wires on the floor in that same area so figured that it must have been Don that was in the room again.

*Id.* As set out above, these complaints were petty, unsubstantiated and ongoing. *Id.*

**D. Supplement to Clerk's Papers.**

As outlined in Appellant's initial brief, there was a problem with the trial court record in that two declarations previously filed by Plaintiffs contained at CP 235-242, Declaration of Donald Canfield, and CP 293, Declaration of Counsel Chellie Hammack, were not complete. Plaintiffs have filed Praecipes with the trial court to correct the issue and supplemented the record as follows: Declaration of Donald Canfield, CP 1051-1061 to replace CP 235-242; Declaration of Counsel, Chellie Hammack, CP 1062-1065 to replace CP 293.

Plaintiff also designated as additional Clerk's Papers the Special Verdict Form signed by the Jury, CP 1066-1067; and the Court's Instructions to the Jury CP 1068-1088.

**II. ARGUMENT**

**A. A CR 50(a) motion is not the proper avenue to remedy a perceived error in ruling once the jury instructions have been submitted to the jury and have become the law of the case.**

Defendant SPS argues that, "[t]he CR 50 motion required the trial court to apply the law to undisputed facts concerning Mr. Canfield's employment situation." Resp. Brief at 22. Contrary to Defendant SPS's assertion, the facts

of the case have always been in dispute. What is not disputed is that the ruling by Judge Heller was based upon the law and not the facts.<sup>1</sup> The parties have stipulated that review of the issues raised by Plaintiff Canfield did not require submission of the trial transcript as Judge Heller's ruling was a ruling based upon the law and not the facts. *See* Stipulation in Court of Appeals record filed February 10, 2012 (a copy is attached). As agreed to by the parties,

1. After receipt of the commissioner's ruling of January 25, 2012, the parties have agreed to clarify what record is necessary on appeal for resolution of those issues which Canfield seeks to have reviewed by the Court of Appeals. This stipulation is . . . intended to ensure money is not wasted on an unnecessary transcript of the trial.
2. The parties agree that the issues before the Court of Appeals raised by Canfield in his appeal against Seattle Public Schools do not require a transcript of the trial that occurred below. In particular, the issues resolved by Judge Heller in granting Defendant's Motion as a Matter of Law (CR 50) involve the resolution of strictly legal arguments and the factual predicates articulated by Judge Heller on the record in deciding the CR 50 motion as a matter of law were undisputed. The parties agree that resolution of these issues will not depend upon the evidence presented at trial and the evidence presented at trial are not necessary to resolution of these issues.

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1. In reviewing the cite provided by Defendant SPS, it appears that Judge Heller was setting out his reasoning in finding that he could rule as a matter of law that Plaintiff did not have a claim under CR50. As an example, he referenced a case in which the facts at summary judgment were disputed but after hearing them at trial, a judge could determine that they were undisputed. However, that is not the case here as Judge Heller's ruling has nothing to do with the facts presented at trial. In this case, what Judge Heller ruled is the claim presented by Plaintiff Canfield does not exist under Washington law.

Stipulation filed February 10, 2012, Court file and attached. While it is true that as to his ruling there was no dispute regarding the facts, it is also true that the facts presented at trial had no bearing on his ruling. This is further evidenced by the instructions provided to the jury.

**1. The instruction of law as set out to the jury is the law of the case.**

The instruction to the jury regarding Plaintiff Canfield's retaliation claim is as follows:

Instruction No. 6

It is unlawful for an employer to retaliate against an employee because such employee has complained to his employer that he has not been paid prevailing wages.

To establish a claim of unlawful retaliation by defendant, plaintiff has the burden of proving each of the following elements by a preponderance of the evidence:

- (1) That plaintiff made complaints that defendant failed to pay prevailing wages; and
- (2) That defendant took some adverse employment action against plaintiff; and
- (3) That a substantial factor in the adverse employment action against plaintiff was plaintiff's complaints about failure of pay prevailing wages.

If you find from your consideration of all the evidence that each of these elements has been proved, then your verdict should be for plaintiff on this claim. On the other hand, if any one of these elements has not been proved, your verdict should be for defendant.

It is the law as set out in the jury instruction that the trial court found is not supported under Washington law. The trial court did not rule that the evidence

presented at trial did not support a finding of retaliation based upon this jury instruction and the parties have stipulated to this. *See* Stipulation. Further, Defendant SPS has not appealed any decision in relation to adoption of this jury instruction. *See* Resp. Brief at 48-49.<sup>2</sup>

**2. *Washburn* supports a finding that the trial court’s dismissal of Plaintiff Canfield’s retaliation claim pursuant to a CR 50(a) motion was in error.**

Further, *Washburn et al v. The City of Federal Way*, 2012 Wash. App. Lexis 1736 (Div. 1, 2012) does not support Defendant SPS’s position. As set out in *Washburn*, “[u]nchallenged jury instructions become the law of the case.” *Id.* at 2. The central issue on appeal in *Washburn* was the City’s failure to object to the substance of the trial court’s instruction as to the City’s duty of care and failure to assign error to the instruction or argue on appeal that the instruction was improper. *Id.* at 13. The Court explained that the instruction constituted the law of the case and “. . . the only question on appeal is whether there is sufficient evidence to sustain the verdict under the instructions given.” *Id.* citing *State v. Hickman*, 135 Wn.2d 97, 101-103 (1998) (*citing*

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2. There are two Notices of Cross Appeal filed by Defendant SPS in the trial court record but both were filed before trial in response to Plaintiff’s initial Notice of Appeal and relate to Judge Craighead’s Summary Judgment ruling. Defendant SPS did serve Plaintiff’s counsel with another Notice of Cross Appeal the end of January 2012, but it was well after any deadlines to file an appeal of the trial court’s rulings and it appears it was not filed with the trial court.

*Tonkovich v. Dep't of Labor & Indus.*, 31 Wn.2d 220, 225 (1948); *See also Noland v. Dep't of Labor & Indus.*, 43 Wn.2d 588, 590 (1953) (“no assignments of error being directed to any of the instructions, they became the law of the case on this appeal and the sufficiency of the evidence to sustain the verdict is to be determined by the application of the instructions and rules of law laid down in the charge.”); *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 917 (2001) (“Instructions to which no exceptions are taken become the law of the case.” (citing *Ralls v. Bonney*, 56 Wn.2d 342, 343 (1960))); *Chelan County Deputy Sherriffs/ Ass'n*, 109 Wn.2d 282, 300 n. 10 (1987). Further, in addressing whether or not the City properly objected to the jury instruction at issue pursuant to CR 51(f), the Court held it did not have to resolve that finding, “[b]oth the supreme court and this court have consistently held that under these circumstances the failure to appeal an allegedly erroneous instruction makes that instruction the law of the case. *Id.* at 22, citing *Chelan*, 109 Wn.2d at 300 n. 10 (failure to assign error to an instruction makes the instruction the law of the case); *State v. Lake*, 7 Wn. App. 322, 327 (1972) (failure to assign error on appeal to an instruction challenged below makes that instruction the law of the case); *See Detonics “.45” Assocs., v. Bank of Cal.*, 97 Wn.2d 351, 353 (1982) (failure to appeal the trial court’s legal ruling on

preemption makes the ruling the law of the case).<sup>3</sup> The *Washburn* Court goes on to discuss its reasoning and evaluate the evidence to determine if there was substantial evidence to support the jury verdict. *Id.* at 13 - 27.

Next the *Washburn* Court addressed the issue of the City's appeal of the trial court's denial of the summary judgment motion. *Id.* at 28-31. The Court explained, "[s]uch an order is subject to review 'if the parties dispute no issues of fact and the decision on summary judgment turned solely on a substantive issue of law.'" *Id.* at 28, citing *Univ. Vill. Ltd. Partners v. King County*, 106 Wn.2d 321, 324 (2001); *Kaplan v. Nw. Mut. Life Ins. Co.*, 115 Wn. App. At 791, 799-800 (2003) *review denied*, 151 Wn.2d 1037 (2004). The Court stated, "[w]e may not review a denial of summary judgment following a trial if the denial was based upon a determination that material facts were in dispute and had to be resolved by the fact finder." *Id.* at 30 .

Finally, The Washburn Court addressed the City's argument that the trial court erred in denying its CR 50(a) motion. *Id.* at 32-41. While it is true that this Court found a CR 50(a) motion must be renewed after trial, the Court explained,

We explained earlier in this opinion that instruction 12 established the law of the case regarding the City's duty. Thus,

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3. Given Defendant SPS has not timely appealed any ruling by the Trial Court regarding the jury instruction at issue, the record relating to that is not before the Court.

the question is whether there was sufficient evidence given the 'duty' definition established by instruction 12. Here, as we also explained earlier in this opinion, the evidence is sufficient to support the verdict.

*Id.* at 39. The Court explained that the City failed to lay a proper foundation for appeal. *Id.* at 40. Washburn is on point and the same is true in this case.

Defendant SPS has failed to appeal the trial court's instruction no. 6 regarding retaliation. That instruction became the law of the case when it was adopted by the trial court and submitted to the jury. The Court adopted that instruction and it is the law the jury applied in evaluating the evidence. The trial court's ruling dismissing the case pursuant to CR 50(a) had nothing to do with the evidence presented at trial. Once the trial court adopted Instruction no. 6, it set the law of the case. As indicated above, the parties have stipulated, and the record of the hearing on the motion supports, that the trial court's ruling was that Washington law did not provide for a claim of retaliation for complaints of failure to pay prevailing wages absent termination. The trial court found it was within its power under CR 50(a) to rule as a matter of law that Plaintiff Canfield had no claim regardless of the evidence presented. That was in error and again, once the jury instruction was adopted, it became the law of the case. CR 50(a) does not provide a means whereby a trial judge can decide after trial that the law as set out in an instruction provided to a jury is

erroneous.

The cases cited by Defendant SPS in support of its contention that a second judge is entitled to reconsider and overrule the order of a prior judge are not applicable in this case as most are not Washington cases and are not precedent, the facts are not similar and none address whether a trial judge can rule as a matter of law pursuant to a CR 50(a) motion that the law as presented to the jury through an instruction was not a legally cognizable claim under state law. *See Beck v. Int'l Harvester Co. of America*, 85 Wash. 413, 414-419 (1915) (finding no error when a trial judge granted a motion for judgment notwithstanding the verdict after the denial of a motion for nonsuit and challenge to the sufficiency of evidence); *Messinger v. Anderson*, 225 U.S. 436, (1912) (finding the Circuit Court of Appeals was not required to adhere to its prior ruling in a case interpreting a will when a recent state supreme court ruling construed the will differently); *Castner v. First Nat'l Bank of Anchorage*, 278 F.2d 376 (9<sup>th</sup> cir. 1960) (deciding that a second judge may overrule an order of a previous judge denying summary judgment before trial); *Teter v. Deck*, 174 Wn.2d 207 (2012) (finding that a grant of a new trial pursuant to CR 59 was not in error when the trial court found misconduct by opposing counsel prejudiced the jury and a ruling excluding evidence made by a prior judge was in error; abuse of discretion standard on appeal applied).

**B. As explained in *Washburn*, Defendant SPS appeal of the order denying summary judgment should be denied because Defendant SPS failed to establish it objected to Instruction no. 6.**

As set out above, this Court in *Washburn* explained, Court explained, “[a summary judgment] . . . order is subject to review ‘if the parties dispute no issues of fact and the decision on summary judgment turned solely on a substantive issue of law.’” *Id.* at 28, citing *Univ. Vill. Ltd. Partners v. King County*, 106 Wn.2d 321, 324 (2001); *Kaplan v. Nw. Mut. Life Ins. Co.*, 115 Wn. App. At 791, 799-800 (2003) *review denied*, 151 Wn.2d 1037 (2004). Although admittedly the order by Judge Craighead is not clear, what is clear is that in filing their summary judgment motion Defendant SPS argued that it did not retaliate against Plaintiff Canfield and that the evidence did not support a finding of retaliation. CP 23 (issue No. 3) & 25-28, Defendants’ Summary Judgment Motion; CP 456-458, Defendants Reply in Support of Summary Judgment. The record shows there were many factual disputes as Defendant SPS argued that Plaintiff Canfield did not suffer an adverse employment action and did not engage in statutorily protected activity that was a substantial factor in an adverse employment decision., that any discipline issued by Defendant was supported by the evidence presented by Defendant SPS. *Id.* These issues were those addressed at trial and found by the jury to be sufficient to render a verdict in favor of Plaintiff Canfield. Defendant SPS has failed to lay a proper

foundation for its appeal.

**C. Plaintiff Canfield does have a statutory claim for retaliation for raising a complaint of failure to pay prevailing wages pursuant to Washington wage statutes.**

Should the Court find the trial court's grant of the CR 50(a) motion was in error, the Court need not address this issue. However, Defendant SPS argues that the MWA is clear on its face and not susceptible to multiple interpretations. However, as set out in Plaintiff's argument, that is not the case and what happened below is evidence of that. Two different judges have come to differing conclusions regarding application of the wage statutes. When a statute is reasonably, "susceptible to multiple interpretations" the Court resorts to rules of statutory construction and legislative history. *City of Spokane, et al. v. The Dept. of Labor & Indus.*, 100 Wn. App. 805, 817 (2000), *citing Timberline Air Serv., Inc., v. Bell Helicopter-Textron, Inc.*, 125 Wn.2d 305, 312 (1994); *Kadoranian v. Bellingham Police Dep't*, 119 Wn. 2d 178, 185 (1992). Given Plaintiff addressed this in the original brief, Plaintiff need not do so again. However, a reading of the wage statutes together and the purpose of the statutes all support a holding that Plaintiff has a claim for retaliation. As the trial court noted, it makes little sense to allow a retaliation claim for only a small subsection of wage violations.

**D. Plaintiff Canfield's claim for failure to pay prevailing wages should be reinstated because he has a statutory right to pursue his**

**claim.**

Plaintiff does not contend that normally Plaintiff's work for Defendant SPS would fall within the exception as he is an employee of Defendant SPS and was hired to do maintenance work. However, Defendant SPS fails to account for the facts of this case and the entirety of our argument.

As set out in the facts, and testified to by Supervisor Dan Bryant, Defendant SPS was paying some workers prevailing wages CD CP 333-335, 40:17-46:23; CP 339-340, 123:18-125:12. As Plaintiff Canfield indicated, he requested payment of prevailing wages when he and his employees were asked to work on projects that were completed by contractors, along side of contractors. CP 1054-1055. This is work that is not covered by the parties Collective Bargaining Agreement as the work is outside of the scope of maintenance work and is work relating to new construction and/or substantial remodel. See CP 1054-1055. When work that is needed to be performed over a certain dollar amount, Defendant SPS is required to obtain bids for the work and hire outside contractors. See CP 175 (CBA, "[t]here shall be no restrictions on subcontracting any work . . . which is above the bid threshold established by law. . ."). As most citizens of Washington know, there was a problem with misuse of funds in Defendant SPS. What Plaintiff Canfield has complained of is that contractors who are to perform work and required to pay

employees prevailing wages were, with the help and support of Defendant SPS, using the maintenance workers to perform that work. CP 1054-1055. When Plaintiff Canfield complained and refused to send out worker's to the site, Mr. Lynn Good promised to pay him and his employees the prevailing wage rate for work performed on that site. *Id.* Plaintiff Canfield was never paid prevailing wages and to his knowledge, his employees were not as well. Unfortunately, before he could act on that he was escorted off the property by police based upon the ridiculous and false allegation that he had a gun on school district property. *Id.*

As set out in Plaintiff's brief, RCW 39.12.020 provides,

The hourly wages to be paid to laborers, workers, or mechanics, upon all public works and under all public building service maintenance contracts of the state or any county, municipality or political subdivision created by its laws, shall be not less than the prevailing rate of wage for an hour's work in the same trade or occupation in the locality within the state where such labor is performed . . .

This chapter shall not apply to workers or other persons regularly employed by the state, or any county, municipality, or political subdivision created by its laws.

As indicated above, normally the exception outlined would apply to Plaintiff Canfield's work with Defendant SPS. However, Plaintiff Canfield is regularly employed to complete maintenance work, not new construction or remodel work. He is an employee of Defendant SPS but the work performed is outside of the scope of his employment.

Further, the only opinion cited by Defendant SPS that provides support for it is 1971 Op. Att’y Gen. No. 1, Question 2. That opinion does appear to indicate that is the Attorney General’s position that a school district may use an employee to perform any work it chooses and be subject to the exemption. However, it is our position that this opinion is in error and cannot be reconciled with Defendant SPS mandate to obtain bids and hire contractors for work performed that is over a certain dollar amount in relation to new construction and/or remodel. *See* 1959 Op. Att’y Gen. No. 13 (describing the school board’s requirement to obtain bids on building improvements and repairs that exceed the sum of one thousand dollars); *See also* RCW 39.04.020 & RCW 35.23 et. seq., .

In addition, as indicated in the original brief, Plaintiff Canfield’s claim for failure to pay wages, is a wage claim that can be brought pursuant to RCW 49.52 et seq.. Even if this Court found that Defendant SPS is exempt, which it should not, Plaintiff Canfield still has a claim pursuant to RCW 49.52 et seq. as he was not paid what he was promised by his employer. However, as explained above, the work at issue was not maintenance work that Plaintiff Canfield was normally contracted to perform under the CBA. It was work outside the scope of his normal employment and he, along with the other employees, should have been paid what was promised and what was provided

for under the law.

Plaintiff Canfield was still in the process of discovery when this claim was dismissed. There was a Motion to Compel pending that had not yet been ruled on relating to Defendant SPS's failure to disclose information. Plaintiff Canfield requests Judge Craighead's ruling dismissing this claim be overturned and the matter remanded back to the trial court to allow for completion of discovery.

**E. Defendant Clark maliciously defamed Plaintiff Canfield - no privilege applies to a number of her statements and any privilege that may apply to statements made to Ms. Bliss is lost as Defendant Clark knew them to be false.**

Defendant SPS in much of its argument claims that there was no issue that Plaintiff Canfield had guns. Plaintiff Canfield has never claimed he does not own a gun and in fact has a right to own as many guns as he wants as long as he complies with laws allowing him to do so. However, there is a grave difference between a school district employee owning a gun and a school district employee bringing a gun to work.

The standard in determining a summary judgment motion applicable to a defamation claim is the same as in any other typical case, "[s]ummary judgment is proper if the evidence viewed in a light most favorable to the nonmoving party shows there is no genuine issue of material fact, and the moving party is entitled to judgment a a matter of law." *Mohr v. Grant*, 153

Wn.2d 812, 821 (2005), *citing* CR 56 ( c). It appears that Defendant SPS argues Plaintiff Canfield is held to the standard applied after trial but that is not the case. It appears what the Court was referring to in *Wood v. Battleground Sch. Dist.*, 107 Wn. App. 550, 567-68 (2001), was the “intent” standard applied at summary judgment, ie negligence, or actual malice. That standard was the same that was to be applied at trial, not the standard for determining whether a motion for summary judgement should be granted. Further, Plaintiff Canfield’s claim of defamation is brought against Defendant Clark, and not Defendant SPS. Defendants claim that the defamation claim will have a “chilling effect” upon school districts in investigating a gun allegation is misplaced.

**1. Statements made by Defendant Clark to Auki Piffath and Jesse Logan are not subject to privilege or immunity.**

The business privilege, or common interest privilege, is a qualified privilege. *John Doe v. Gonzaga University, et. al*, 143 Wn.2d 687, 701-704 (2001). A qualified privilege is lost if it is abused. *Bender v. City of Seattle*, 99 Wash. 2d 582, 600-601 (1983). A qualified privilege is abused if the defendant acts with malice. *Caruso v. Local Union No. 690*, 170 Wash. 2d 524, 530 (1987). The actual malice standard is subjective and focuses on the declarant’s belief in or attitude toward the truth of the statement at issue.

*Story v. Shelter Bay Co.*, 52 Wash. App. 334, 343 (1988). A speaker acts with malice when a false statement is made with either actual knowledge of its falsity or reckless disregard for its truth or falsity. *Herron v. King Broadcasting Co.*, 112 Wash. 2d 762, 775 (1989).

Generally, “the reviewing court first determines whether the defendant has shown that the challenged communication falls within the asserted privilege. *Alpine Industries Computers, Inc., et al v. Cowles Publ. Co.* 114, Wn. App. 371, 381 (2002) (citations omitted). If the conditional privilege applies, then the burden shifts to the plaintiff to show it was abused. *Id.* Abuse is normally a question for the jury. *Id.* Each defamatory statement must be addressed separately as each gives rise to a cause of action. See *Momah v. Bharti et al.*, 144 Wn. App. 731, 752-753 (2008) (acknowledging that Washington had adopted the single publication rule, providing for a separate cause of action for each publication of a defamatory statement).

The two statements made to Jesse Logan and Auki Piffath are defamatory per se and no privilege applies. There was no common interest that Defendant Clark was seeking to protect and she was not making the statements as a means of communication to her employer. Carrying a gun on

school property is an illegal act pursuant to RCW 9.41.280(1)(a).<sup>4</sup> Mr. Piffath testified that the conversations he had with Defendant Clark did not occur and were not made to him in his capacity as a union representative, they were simply statements made by her in conversations about work. Further, Ms. Logan was a simple employee who had no knowledge of the issues that were going on and was not part of any “investigation.” Defendant SPS seems to argue that because the statements were made at the time Plaintiff Canfield was out on administrative leave, that they were somehow privileged. That is ridiculous. Further, the investigation into Defendant Clark’s complaint was completed the end of December 2007 and was not occurring at the time of Ms. Logan’s statements. The several statements made to these individuals are not subject to a privilege.

**2. Defendant Clark has lost any privilege because of abuse.**

This case is directly on point with *Lawson v. The Boeing Co., et al*, 58 Wn. App. 261, (1990). In *Lawson*, the Plaintiff brought suit after female employees reported complaints of sexual harassment to their employer Boeing. *Id.*, at 262. The employees complained that the Plaintiff, their

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4. RCW 9.41.280(1)(a) provides, “[i]t is unlawful for a person to carry onto, or to possess on, public or private elementary or secondary school premises, school provided transportation, or areas of facilities while being used exclusively by public or private schools: (a) a firearm; . . .”

supervisor, had made sexually explicit comments, had propositioned them and touched them inappropriately. *Id.* An investigation was completed by Boeing and it was found that Plaintiff's conduct was in violation of Company rules. *Id.* As a result, Plaintiff brought suit against the female employees, the investigators and Boeing alleging a number of causes of action including defamation. *Id.*, at 263. The trial court had dismissed all of Plaintiff's claims. *Id.*

In addressing the claims of defamation brought against the female employees who lodged the original complaints, the Court explained, "[c]onditional privilege is routinely applied to complaints as to sexual harassment." *Id.*, at 267. *citing Stockley v. AT&T Information Sys., Inc.*, 687 F. Supp. 764, 769 (E.D.N.Y. 1988). However, the Court noted that the issue was whether the privilege as a result of abuse. *Id.* Because the Plaintiff denied the statements, the Court explained that for purposes of summary judgment, the statements must be assumed to be false. *Id.* As to the complaining employees, the Court also explained, the statements were a matter of fact, not opinion. *Id.* "They spoke of their own personal knowledge. The events were recent. If their allegations were false, they were unquestionably knowingly false." *Id.* The Court concluded that in circumstances such as these, where the statements made were knowingly

false, proof of actual malice was not required. *Id.*, at 268. Relying on Restatement (Second) of Torts § 600 (1976),

Knowledge of Falsity or Reckless Disregard as to Truth  
Except as stated in § 602 one who upon an occasion giving  
rise to a conditional privilege publishes false and defamatory  
matter concerning another abuses the privilege if he  
(a) knows the matter to be false, or  
(b) acts in reckless disregard as to its truth or falsity.

*Id.* The Court found that the statements made by the female employees fell squarely within (a). As explained by the Court, “[i]f an employee knowingly makes a false accusation of sexual improprieties by a superior, it would be grossly unfair to deny the injured party the right to sue for defamation by allowing the maker of such accusation to hide behind the shield of conditional privilege. Conditional privilege does not protect knowingly false accusation.” *Id.* at 269.

This case is directly on point. Defendant Clark made false statements regarding Plaintiff Canfield. Plaintiff Canfield denies that he has ever had a gun on his person while on school district grounds. Her statements were not ones of opinion but of fact. It would be grossly unfair in these circumstances to take away Plaintiff Canfield’s rights to attempt to clear his name and his rights to hold Defendant Clark accountable for her conduct.

**3. Immunity does not apply.**

RCW 4.24.510 provides, “[a] person who communicates a complaint or information to any branch or agency of federal, state, or local government . . . is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization.” A prevailing party may be entitled to attorney fees and costs, and statutory damages if their conduct was not in bad faith. *Id.* “The immunity under the statute is with respect to ‘communications to a public officer who is authorized to act on the communication.’” *Saldivar v. Momah*, 145 Wn. App. 365, 387 (2008) (citations omitted).

As explained by the Court in *Valdez-Zontek v. Eastmont School District*, 154 Wn. App. 147, 167 (2010), “[t]he statute ‘grants immunity from civil liability for those who complain to their government regarding issues of public interest or social significance.’” *quoting Skimming v. Boxer*, 119 Wn. App. 748, 758 (2004). “The statute protects solely communications of reasonable concern to the agency. *Gontmakher v. City of Bellevue*, 120 Wn. App. 365, 372 (2004). Thus, the statute does not provide immunity for other acts that are not based upon the communications. *Id.*” *Id.* The *Vadez-Zontek* Court found the Defendants argument without merit because “district officials broadcast nonprivileged and provably false statements about the alleged affair to numerous individuals.” *Id.*

In this case, the parties were involved in a work place dispute. The report was not made for the purpose of reporting something of concern to a government agency, but was made to report what Defendant Clark would allege is complaints regarding her supervisor. It is not similar in any manner to the reports lodged in *Bailey v. State*. Further, it is more similar to the complaint lodged in *Valdez-Zontek*. Defendant Clark broadcasted nonprivileged and provably false statements to numerous individuals, who were not public officials. The only person that could possibly be characterized as a public official would be Ms. Bliss. The statements to Aki Piffath and others are not statements to a government agency or report to a public official.

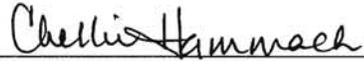
Judge Craighead in her original ruling did not find immunity applied as there was no award of fees or costs. Further, Defendant SPS did not appeal this issue. Plaintiff is addressing it in the event the Court finds review of it is proper.

### **III. CONCLUSION**

For the reasons stated above, Plaintiff requests the Court grant the relief requested as set out in his original brief.

Dated this \_\_\_\_ day of September, 2012

Respectfully submitted,



Chellie M. Hammack  
Attorney for Appellant  
WSBA #31796

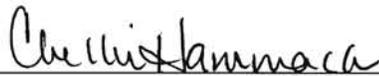
**Certificate of Service**

I, Chellie Hammack, attorney for Appellant certify that on September 19, 2012, I placed a true and correct copy of the Appellant's Brief and this Certificate of Service for hand delivery via legal messenger service to:

Emma Gillespie, Mark O'Donnell & Earl Sutherland  
Attorneys for Defendants  
Preg O'Donnell & Gillett, PLLC  
1800 Ninth Avenue, Suite 1500  
Seattle, WA 98101

DATED this 19<sup>th</sup> day of September, 2012

**ORIGINAL**



Chellie M. Hammack, WSBA #31796  
Attorney for Appellant, Donald Canfield

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2012 FEB 10 PM 1:19

DONALD CANFIELD,  
Appellant  
v.  
MICHELLE CLARK, "JOHN DOE1" and  
"JANE DOE1", and their marital community,  
and "JOHN DOE2" and "JANE DOE2", and  
their marital community,  
Respondents.

Appellate Case No. 67274-6-1  
Trial Case No. 09-2-44040-9

**STIPULATION OF PARTIES AS TO  
NECESSARY RECORD ON APPEAL**

DONALD CANFIELD,  
Appellant,  
v.  
SEATTLE PUBLIC SCHOOLS, a municipal  
corporation,  
Respondent.

The parties, through their attorneys of record, Chellie Hammack on behalf of Appellant and Earl Sutherland on behalf of Respondent, stipulate as follows:

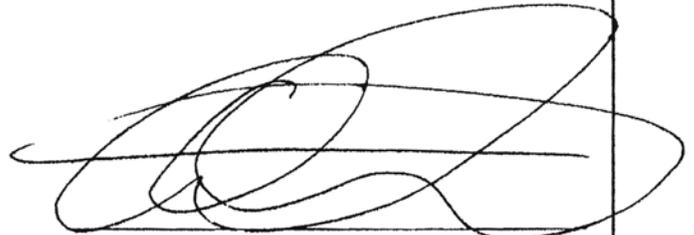
1. After receipt of the commissioner's ruling of January 25, 2012, the parties have agreed to clarify what record is necessary on appeal for resolution of those issues which Canfield seeks to have reviewed by the Court of Appeals. This stipulation is in lieu of any additional record designated by appellant Canfield, due on February 10, 2012 per the letter ruling, and is intended to ensure money is not wasted on an unnecessary transcript of the trial.
2. The parties agree that the issues before the Court of Appeals raised by Canfield in his appeal against Seattle Public Schools do not require a transcript of the trial that

1 occurred below. In particular, the issues resolved by Judge Heller in granting Seattle  
2 Public School's Motion as a Matter of Law (CR 50) involve the resolution of strictly  
3 legal arguments, and the factual predicates articulated by Judge Heller on the record  
4 in deciding the CR 50 motion as a matter of law were undisputed. The parties agree  
5 that resolution of these issues will not depend upon the evidence presented at trial,  
6 and the evidence presented at trial is not necessary to resolution of these issues.

7 DATED this 10<sup>th</sup> day of February, 2012

8  
9 Chellie M. Hammack

10 Chellie M. Hammack, WSBA #31796  
11 Attorney for Appellant, Donald Canfield



Earl Sutherland, WSBA# 23928  
Attorney for Respondent, SPS