

72333-2

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No. 72333-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KELLY A. SPRATT,

Plaintiff/Respondent,

v.

BRADLEY TOFT and JILL TOFT,

Defendants/Appellants

OPENING BRIEF OF APPELLANTS

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I. INTRODUCTION

Four years ago, the Washington Legislature unanimously acted to encourage citizen participation in government by discouraging lawsuits that could chill the exercise of the constitutional right of free speech. Laws of 2010 at 921, ch.118, § 1(1)(a)-(c); *see* RCW 4.24.525. Such lawsuits are often called “Strategic Lawsuits Against Public Participation” or “SLAPPs.” Thus, RCW 4.24.525 is known as the “anti-SLAPP” statute. *U.S. Mission Corp. v. KIRO TV, Inc.*, 172 Wn. App. 767, 782, 292 P.3d 137 (2013). By passing this law, the Legislature emphatically chose to restrict the use of the legal process in cases involving political campaigns and political speech.

The strategic lawsuit at issue in this case was brought by respondent/plaintiff Kelly Spratt against appellants/defendants Brad Toft and his wife, Jill. Mr. Toft had been Ms. Spratt’s manager at Quadrant Home Loans until 2005. They had no contact with each other from 2005 to 2011.

In 2011 Mr. Toft decided to run for the Washington State Senate against an entrenched, incumbent Republican Senator. Upon learning of his political campaign, Ms. Spratt launched a shocking personal and public vendetta against the Tofts. She started by sending Mr. Toft an abusive, threatening, and venomous message. She then took her hate-campaign public by attacking Mr. Toft in a letter to a Republican Party official. Ms. Spratt then showed up at multiple campaign events to attack Mr. Toft. It was

in this context that Ms. Spratt claims Mr. Toft made allegedly defamatory statements (that he once “fired” Ms. Spratt). Ms. Spratt also alleges that the Tofts wrote an anonymous letter about her. Ms. Spratt then took her most aggressive step: filing this defamation lawsuit one month before the election.

The anti-SLAPP statute establishes a two-step judicial procedure (a “special motion to strike”) designed to quickly weed out all but clear and convincing legal claims when those claims implicate political speech. This Court has already determine that the defamation claims in this appeal involve an issue of public concern, i.e., a political campaign and a political candidate’s qualifications for public office. *Spratt v. Toft*, 180 Wn. App. 620, 624, 324 P.3d 707 (2014) (“Campaigning and speech connected to a political campaign and candidate clearly involve free speech and clearly are matters of public concern.”); CP at 704; *see* RCW 4.24.525(2)(e).

On remand, the trial court erred in its application of the second step of RCW 4.24.525 when it concluded that Ms. Spratt met her burden of coming forward with clear and convincing evidence to support her claims. The Tofts respectfully request that this Court reverse the trial court’s order and remand with direction that the trial court strike Ms. Spratt’s lawsuit.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied the Tofts’ special motion to strike brought pursuant to RCW 4.24.525. Clerk’s Papers (“CP”) at 784.

2. The trial court erred when it denied the Tofts' Motion for Reconsideration to separately dismiss Ms. Spratt's claim based on the anonymous letter. CP at 827-28.

3. The trial court erred when it failed to rule on the Tofts' objections to evidence that Ms. Spratt introduced in her opposition to the Tofts' special motion to strike brought pursuant to RCW 4.24.525. CP at 398-99, 782-84. *But see* CP at 827.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err when it concluded that Ms. Spratt came forward with clear and convincing evidence to support her claims of defamation? (Assignment of Error Nos. 1, 2, 3).

IV. STATEMENT OF THE CASE

A. Chronology of Events.

The following summary of the alleged events is provided in chronological order for ease of reference.¹ There are five allegedly defamatory "events". *See* CP at 128-30; *see also* CP at 822. Although all of Ms. Spratt's claims should be dismissed, each allegedly defamatory statement can be separately considered and dismissed under RCW 4.24.525. *See infra* Part V.B.2.ii.a.

¹ The Tofts objected to significant portions of Ms. Spratt's evidence. CP at 239 n.1, 342-79, 591. Although those objections are renewed here, Ms. Spratt's claims fail even if every objection were to be resolved against the Tofts. *See infra* Part V.

November 2004: As Ms. Spratt's manager at Quadrant Home Loans, Mr. Toft documented problems with her behavior and initiated an informal plan for correcting the documented issues.² CP at 384-85.

December 2005: On December 13, 2005, Mr. Toft confronted Ms. Spratt about communicating confidential Quadrant Home Loan information to an outside company. CP at 383; *see* CP at 146 (¶ 10). After this confrontation, Ms. Spratt went to Mr. Toft and "tendered [her] resignation, to be effective in two weeks." CP at 147 (¶ 13). Mr. Toft, unsatisfied with a delayed departure, told Ms. Spratt that her "resignation was going to be effective immediately and [she] should leave the building at once." CP at 147 (¶ 13). The employee termination report states that she resigned as a result of the confrontation. CP at 383. Ms. Spratt herself states that she resigned soon after Mr. Toft confronted her about "unethical conduct." *See* CP at 146-47 (¶¶ 10-13).

December 2011: Fully six years later, Ms. Spratt read an article that Mr. Toft was running for state political office. CP at 147-48 (¶ 15). Obviously motivated by a six-year-old work-related dispute, Ms. Spratt began her vendetta against the Tofts with this message on Facebook:

Are you fucking kidding me? YOU running for Senate? Surely you must have missed the meds your Doctor prescribed! Are you delusional Brad? Do you not remember

² These materials come from Ms. Spratt's employment file. CP at 381-82.

the massive mountain of collateral damage you created by getting OFF on making MEN in the office CRY? Do you not remember the battery of lies and deceit? Do you not remember the ENTIRE office catching you in your affair with Kelly? You are Satan. In fact, you are such a disgusting piece of crap that you make Satan look GOOD. Your lies, your flawed character, you were FIRED for being nothing but a cheating piece of crap. YOU running for Senate? Thank you. Thank you for the best piece of humor I've seen in YEARS! How do you not think your time at Quadrant Home Loans will NOT catch up with you? I'm almost embarrassed for you. What an ego you have! Brad for Senate. Good one!!!

HAHAHAHAHAHAHAHAHAHAHAHAHAHAHAHA!

CP at 21; *see* CP at 147-48 (¶ 15). Mr. Toft ignored this. CP at 19 (¶ 5).

December 2011 to early 2012: Ms. Spratt continued her sensational attack on Mr. Toft in a letter to the Republican Chair of the 5th District. CP at 148 (¶ 16). Because of this letter, Ms. Spratt was contacted by Jolie Imperatori, a 40-year Republican political activist who was advocating for Cheryl Pflug, the incumbent Republican State Senator. CP at 180 (¶¶ 3-4); *see* CP at 185-86. With Ms. Imperatori's help, Ms. Spratt sought other ways to continue her one-sided conflict with Mr. Toft. CP at 179-80 (¶¶ 2, 4-5); *see* CP at 148 (¶ 17). Specifically, Ms. Imperatori "encouraged her to research where [Mr. Toft] was appearing in his campaign, and then confront him with her issues." CP at 180 (¶ 4).

March 16, 2012: Ms. Spratt attended Mr. Toft's public campaign event at a Maple Valley firehouse with Ms. Imperatori. CP at 148-49 (¶

18), 180 (¶ 5). Before the event, Ms. Imperatori told Mr. Toft: ““We are going to bury you. We have a former employee who’s not too happy with you.”” CP at 210. Mr. Toft then allegedly told Ramzy Boutros, the vice-chair of the 5th District Republican Party, that Ms. Spratt was in the room, she was likely to make a disturbance, and he had fired her years earlier. CP at 187 (¶ 2), 189 (¶ 9). This is the first allegedly defamatory statement.

Once the event began, Ms. Spratt stood in front of the group and described her version of Mr. Toft’s alleged treatment of her and former co-workers at Quadrant six years earlier. CP at 149 (¶ 22). Ms. Spratt “then restated that [she] didn’t think he was fit for public office and [she] sat down.” CP at 150 (¶ 22). Mr. Toft did not respond publicly at that time. CP at 150 (¶ 22). Shortly after the meeting, Mr. Toft sought to defend against and explain Ms. Spratt’s attacks in an email to Mr. Boutros and a supporter. CP at 185-86. In that email Mr. Toft said that Ms. Spratt had been fired “for the very behavior she exhibited tonight.”³ CP at 186. This is the second allegedly defamatory statement.

Mr. Boutros forwarded Mr. Toft’s email to others involved in the Republican Party, including Ms. Imperatori. CP at 181 (¶ 13), 184. After receiving a copy of the email from Ms. Imperatori, Ms. Spratt sent an

³ All testimony was that Ms. Spratt’s behavior at the meeting was completely normal. CP at 149-50 (¶¶ 20-22), 181 (¶¶ 9, 12), 183 (¶ 22), 190-91 (¶ 18).

aggressive and threatening message directly to Mr. Toft. CP at 19 (¶ 5);
see CP at 26. When Mr. Toft did not respond, she sent it to his wife, Jill:

You have certainly stepped in it now, Brad. Continuing to lie about me, thinking that it will not get back to me, proves my case against you: You are unethical, malicious, and ruthless to your very core. You can be certain I saved every document from QHL. **While I regret not suing you when I quit, I certainly look forward to experiencing you weave even bigger maliciousness, if only to renew the statute of limitations. You are begging me to defend myself and air your dirty laundry in a court of law. For that, THANK YOU.**

If you think I am not connected in this community, if you think you MADE ME just like the other young, non-college educated people you hired, if you think continuing to exercise poor judgement [sic] by lying about me repeatedly is the right thing to do: You are sadly mistaken. I'll say it again, Brad: Your ego is out of control. You have now implicated the Board of Directors with Wells Fargo and Quadrant Homes in addition to attacking me. Nice work!

Last Friday was nothing - it was truly closure for me to move past that chapter of my life you desecrated. Then you go and kick the hornet nest? Really?

I am the very least of your worries. YOU HAVE DONE THIS TO YOURSELF AND HAVE ONLY YOURSELF TO BLAME. I believe it's called Karma.

Again, nice work!
Kelly

CP at 26 (bold added).

May 10, 2012: Ms. Spratt then showed up at another campaign event, this time a meeting with Republican Precinct Committee Officers at the Issaquah Police Station. CP at 151 (¶ 27), 190 (¶ 15). Before the meeting, Mr. Toft allegedly told Republican Party officials that he had

fired Ms. Spratt. CP at 181-82 (¶ 14). This is the third allegedly defamatory statement. Ms. Spratt stood up during that event and again described Mr. Toft’s alleged actions when he was her supervisor six years earlier. CP at 151 (¶ 28). She also discussed Mr. Toft’s statements that he had fired her.⁴ CP at 151-52 (¶¶ 28-29). During that Issaquah event, Mr. Toft allegedly stated that Ms. Spratt was forced to resign. CP at 183 (¶ 20). This is the fourth allegedly defamatory statement.

June to August 2012: Ms. Spratt spent her summer publishing bizarre “tweets” and posts attacking Mr. Toft. Many of these were copied to the Seattle PI, the Issaquah Press, and other media. CP at 174-78, 217.

August 2012: The Tofts brought a District Court action requesting that Ms. Spratt not directly contact them. CP at 206-11. The Tofts did not seek to prevent Ms. Spratt’s public commentary. CP at 211.

October 2012: An anonymous letter about Ms. Spratt was mailed to “at least six other people.” CP at 153 (¶ 34). This anonymous letter is the fifth and final allegedly defamatory statement. *See* CP at 171; *see also* CP at 128-30. Mr. Toft denies writing the letter. CP at 19 (¶ 7). Ms. Spratt alleges he did.⁵ CP at 153-54 (¶ 34). Among other things, the letter

⁴ Thus, Ms. Spratt herself publicized to a larger audience the very allegedly defamatory statements that she now complains of in this lawsuit. *See* CP at 151 (¶ 28).

⁵ Ms. Spratt never established the letter’s authorship—this Court astutely observed that she was “in the process of proving that the letter was, in fact, written by Toft.” *Spratt*,

addresses Mr. Toft's Senate race and Ms. Spratt's allegations against Mr. Toft. CP at 158-65; *see* CP at 27-28, 169-78. It also attaches some of Ms. Spratt's bizarre written attacks on Mr. Toft. CP at 172-78.

October 12, 2012: True to her threats, Ms. Spratt filed this lawsuit alleging defamation by the Tofts a month before the election. CP at 1-3.

B. Procedural History.

The Tofts answered Ms. Spratt's Complaint, identifying qualified privilege and RCW 4.24.525 as bases for affirmative defenses to her defamation claims. CP at 5. The Tofts later filed a special motion to strike Ms. Spratt's claims pursuant to RCW 4.24.525.⁶ CP at 7-13.

The trial court denied the Tofts' special motion to strike. CP at 398-99; *see* Report of Proceedings ("RP") at 28 (June 7, 2013). The trial court also awarded attorney fees, costs, and statutory damages to Ms. Spratt pursuant to RCW 4.24.525(6)(b). CP at 399; *see* CP at 509-10. The Tofts moved for reconsideration and then appealed the trial court's order. CP at 411, 417-28. The trial court denied the Tofts' motion for reconsideration and entered an award in Ms. Spratt's favor. CP at 507-10.

180 Wn. App. at 627; CP at 708. But on remand, she took no further steps to establish the letter's authorship or to lift the stay on discovery so that she could try to do so. *See* CP at 727-45.

⁶ Ms. Spratt moved to strike the Tofts' special motion. *See* CP at 33-74 (Ms. Spratt's unsuccessful motion); CP at 75-97 (the Tofts' response); CP at 98-108 (Ms. Spratt's reply). The trial court denied Ms. Spratt's motion. CP at 109-10. Ms. Spratt then opposed the Tofts' special motion to strike, and the Tofts replied. CP at 111-36; CP at 238-42.

This Court heard the Tofts' expedited appeal with oral argument occurring on November 12, 2013. *See* CP at 752 (¶ 2); 758-79. The Tofts briefed both steps of RCW 4.24.525, arguing that the anti-SLAPP statute applied and Ms. Spratt had not carried her burden of coming forward with clear and convincing evidence to support all of the elements of her defamation claims. *See* CP at 581-608, 674-94. In an Opinion issued on April 21, 2014, this Court reversed the trial court and found that the anti-SLAPP statute applied to Ms. Spratt's lawsuit. *Spratt*, 180 Wn. App. at 632-33; CP at 714. This Court remanded for the trial court to determine the second step: whether Ms. Spratt came forward with clear and convincing evidence to support her claim. *Spratt*, 180 Wn. App. at 632-33; CP at 714; *see also* CP at 723-24 (denying the Tofts' motion for reconsideration).

The day this Court's mandate issued, the Tofts renewed their special motion to strike on the second step with a hearing before the trial court scheduled for August 1, 2014. CP at 510-36; *see* CP at 703. Ms. Spratt opposed the Tofts' renewed motion to strike and again requested attorney fees and sanctions pursuant to RCW 4.24.525(6)(b), which the Tofts opposed. CP at 740-45, 746-50. The trial court heard the renewed motion and orally ruled as follows:

The court here believes that with respect to the first element, the falsity, there is an issue of fact that was raised, and considered in light in favor of the nonmoving party I think there is a clear and

convincing evidence that could be asserted that the sting was really on the word fired as opposed to any other words that he used.

I think . . . that being told that someone was fired as opposed to resigned, even resigned that day, does make a difference.

With respect to the privilege issue, the court believes that there was a common interest between the person who uttered the words, Mr. Toft, and the person who heard those words. And again, on the third and the fourth element, malice and reckless disregard, I think those have been met under the standards that I have pronounced earlier.

RP at 38:7-25 (Aug. 1, 2014).

The trial court denied the Tofts' renewed motion. CP at 784. In its order, the trial court also denied Ms. Spratt's request for attorney fees and sanctions pursuant to RCW 4.24.525(6)(b). CP at 784. The Tofts moved for limited reconsideration of the trial court's August 1, 2014, Order as to the anonymous letter only, which was denied after being fully briefed. CP at 788-97, 810, 811-15, 821-25, 827-28. The Tofts appealed pursuant to RCW 4.24.525(5)(d): "Every party has a right of expedited appeal from a trial court order on the special motion" CP at 800-06.

V. ARGUMENT

Washington provides a statutory remedy to defendants, like the Tofts, who face legal claims that target political conduct in connection with the exercise of free speech. The anti-SLAPP statute, RCW 4.24.525 (hereinafter the "Statute"), provides a procedural tool for subjecting claims that implicate "public participation" to a searching inquiry. RCW

4.24.525(2). The Statute must “be applied and construed liberally to . . . protect[] participants in public controversies from an abusive use of the courts.” Laws of 2010 at 924, ch.118, § 3. Legislative hearings made it clear that the Statute would apply to defamation lawsuits brought against politicians who make statements at meetings and on the campaign trail—the very embodiment of free speech.⁷ See CP at 587-88.

To invoke the Statute’s procedural process, the target of such a claim files “a special motion to strike.” RCW 4.24.525(4)(a). The moving party “has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition.” RCW 4.24.525(4)(b). This Court has already determined that the Tofts carried their burden of establishing that the Statute applies. *Spratt*, 180 Wn. App. at 632. The burden then shifted to Ms. Spratt to “establish by clear and convincing evidence a probability of prevailing on [her] claim.” RCW 4.24.525(4)(b). Ms. Spratt has not met this high burden, as discussed, *infra*, and her claims must therefore be dismissed.

A. Standard of Review.

Denial of a special motion to strike is a legal issue this Court decides de novo. *Dillon v. Seattle Deposition Reporters, LLC*, 179 Wn.

⁷ Work Session Before the Senate Judiciary Comm., Minute 7:20 to 9:26 (Wash. Dec. 4, 2009) (http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2009121020).

App. 41, 70, 316 P.3d 1119 (2014), *petition for rev. granted* 89961-4 (April 29, 2014). This Court has clarified how the second step of RCW 4.24.525(4)(b) is applied:

The role of the trial court in determining whether the plaintiff has met his or her burden under the second step of the anti-SLAPP motion to dismiss analysis is akin to the trial court's role in deciding a motion for summary judgment. Thus, the trial court may not find facts or make determinations of credibility. Instead, the court shall consider pleadings and supporting and opposing affidavits stating the facts. In analyzing whether the plaintiff has shown, by clear and convincing evidence, a probability of prevailing on the merits the trial court must view the facts and all reasonable inferences therefrom in the light most favorable to the plaintiff.

Davis v. Cox, 180 Wn. App. 514, 533, 325 P.3d 255 (2014) (internal citations, editorial marks, and quotation marks omitted), *petition for rev. granted* 90233-0 (Oct. 10, 2014). In this context, this Court explained:

Clear, cogent and convincing evidence is evidence which is weightier and more convincing than a preponderance of the evidence, but which need not reach the level of "beyond a reasonable doubt." It is the quantum of evidence sufficient to convince the fact finder that the fact in issue is "highly probable." This standard places a higher procedural burden on the plaintiff than is required to survive a motion for summary judgment.

Dillon, 179 Wn. App. at 86-87 (internal citations and quotation marks omitted). This Court has also noted that the second step of the process is not focused solely on the complaint but must include any defenses raised by the moving party: "The clear-and-convincing standard mandated by

the anti-SLAPP statute’ looks not only to whether the plaintiff has demonstrated a prima facie claim, but ‘also requires consideration of the defenses raised by’ the moving party.” *Dillon*, 179 Wn. App. at 88 (quoting *Nexus v. Swift*, 785 N.W.2d 771, 783 (Minn. App. 2010)).

Washington case law from outside the anti-SLAPP context has explained that the “clear and convincing evidence” standard requires more than mere uncorroborated testimony. *Gudmundson v. Commercial Bank & Trust Co.*, 138 Wash. 355, 357, 362-63, 244 P. 676 (1926) (concluding that a plaintiff’s “unsupported statement cannot be said to be that clear and convincing evidence necessary to establish fraud”); *Rolph v. McGowan*, 20 Wn. App. 251, 256, 579 P.2d 1011 (1978). Thus, a party’s own self-serving declaration does not meet the standard of proving an element of a claim by clear and convincing evidence. *See In re Marriage of Janovich*, 30 Wn. App. 169, 171, 632 P.2d 889 (1981); *see also Berol v. Berol*, 37 Wn.2d 380, 382, 223 P.2d 1055 (1950) (“The requirement of clear and satisfactory evidence is not met by the mere self-serving declaration of the spouse claiming the property in question that he acquired it from separate funds and a showing that separate funds were available for that purpose.”).

B. Ms. Spratt Has Not Established Her Defamation Claims by Clear and Convincing Evidence.

Ms. Spratt has the burden of showing with convincing clarity that

she will probably prevail on all elements of her defamation claims against the Tofts. *See Camer v. Seattle Post-Intelligencer*, 45 Wn. App. 29, 36 & n.1, 723 P.2d 1195 (1986). “To establish liability for defamation there must be a false and defamatory statement concerning another, an unprivileged communication to a third party, fault amounting at least to negligence on the publisher’s part, and either actionability of the statement or special harm caused by the publication.” *Eastwood v. Cascade Broad. Co.*, 106 Wn.2d 466, 470, 722 P.2d 1295 (1986). Thus, for statements to be actionable they cannot merely be false statements—they must also be defamatory. *Sisley v. Seattle Pub. Sch.*, 180 Wn. App. 83, 86, 321 P.3d 276 (2014). And any ambiguities in allegedly defamatory statements are not resolved in favor of finding defamation. *Sisley*, 180 Wn. App. at 86.

The Tofts’ special motion to strike should be granted because Ms. Spratt did not meet her burden on even one of the elements of defamation. This Court should reverse the trial court and remand for the trial court to strike and dismiss all of Ms. Spratt’s claims.

1. Statements That Someone Was “Fired,” “Dismissed,” or “Terminated” Are Not Per Se Defamatory.

To prevail in a defamation action, “[t]he defamatory character of the language must be apparent from the words themselves.” *U.S. Mission Corp.*, 172 Wn. App. at 782. “[N]ot every misstatement of fact is actionable.

Rather, it must be apparent that the false statement . . . presents a substantial danger to the plaintiff's personal or business reputation."⁸ *Ernst Home Ctr., Inc. v. United Food & Commercial Workers Int'l Union, AFL-CIO, Local 1001*, 77 Wn. App. 33, 44, 888 P.2d 1196 (1995) (citation omitted) (“Accordingly, the court must initially decide, as a matter of law, whether the statement . . . is capable of a defamatory meaning.”).

As an at-will state, Washington generally allows employers to terminate an employee “for any or no reason.” *Cole v. Red Lion*, 92 Wn. App. 743, 750, 969 P.2d 481 (1998). Even the mere fact that a person is described as a failure in his profession does not constitute defamation per se. *See Bass v. Matthews*, 69 Wash. 214, 216, 124 P. 384 (1912). In *Bass*, a pastor at the Lake Union Presbyterian Church sued for alleged libel because of statements in a church report that he characterized as calling him “a failure in the ministry of the church.” 69 Wash. at 216 (during the pastor's stay, membership declined in five of six congregations). The trial court dismissed the pastor's action on demurrer. *Bass*, 69 Wash. at 214. The Washington Supreme affirmed on grounds of privilege but noted, “We think the report is not libelous per se.” *Bass*, 69 Wash. at 216. Other states have reached a similar conclusion: Merely stating that an employee

⁸ Moreover, where public policy promotes “free and full debate,” “statements or communications that we might normally regard as defamatory on their face are subject to closer scrutiny when made in this context.” *Ernst Home Ctr., Inc.*, 77 Wn. App at 45.

was terminated—even if false—does not rise to actionable defamation.

Maine’s Supreme Court has concluded that it is not defamation *per se* for a defendant to erroneously state that an employee was “fired”. *See Picard v. Brennan*, 307 A.2d 833, 836 (Me. 1973). In *Picard*, the plaintiff brought a defamation claim because he disputed his former employer’s characterization that he was “fired,” whereas he maintained that he left voluntarily. 307 A.2d at 834. The defendant employer had stated that “the plaintiff had been dismissed from his former employ rather than voluntarily resigning, as the plaintiff had inferred to his customer.” *Picard*, 307 A.2d at 834 (internal quotation marks omitted). “It was not disputed that the plaintiff resigned and was not dismissed from his employment by [the defendant] so the statement with respect to dismissal was false.” *Picard*, 307 A.2d at 834. The trial court determined the statement was “slanderous *per se*.” *Picard*, 307 A.2d at 834.

The issue before the Maine Supreme Court was “whether or not a false charge that an employee was ‘dismissed’ or ‘fired’ from his employment, without more, is defamatory.” *Picard*, 307 A.2d at 835.

That court concluded that such a statement is not, on its own, defamatory:

Thus tested, **a false charge that an employee was discharged is not slanderous *per se***. An employee may be discharged for any one of a multitude of reasons unrelated to his honesty, integrity or occupational skill, or indeed for no reason at all. Many examples come readily to mind.

Discharge may stem from financial difficulties of the employer, from lack of work or from a clash of personalities between employer and employee. . . .

Picard, 307 A.2d at 835 (bold added). The court in *Picard* then noted that the “slanderous sting lies in the reason charged for dismissal and not in the mere fact of discharge.” *Picard*, 307 A.2d at 837.

New York’s highest court has reached a similar conclusion.

Nichols v. Item Publishers, Inc., 309 N.Y. 596, 602, 132 N.E.2d 860 (1956). The plaintiff in *Nichols* argued that he was defamed because there was an article “referring to him as the ‘former pastor,’ stat[ing] that, ‘In finding for the defendants, the jury also declared the Rev. Mr. Nichols was not pastor of the church’ and that he ‘was removed as pastor of the Church by the congregation in 1947.’” 309 N.Y. at 599. Nichols did not allege any special damages, claiming only that he was injured “in his capacity as pastor, causing ‘great damage to his good name, reputation and professional standing as a pastor and preacher in the community’.” *Nichols*, 309 N.Y. at 600. The intermediate appellate court concluded that such a claim was not actionable per se and, without special damages, such a claim could not be maintained. *Nichols*, 309 N.Y. at 600. New York’s highest court affirmed, concluding that the statements were not actionable per se without some imputation of wrongful conduct causing the discharge and that the claim must be dismissed without proof of damages:

[O]n the basis of any reasonable reading of the publication before us, it is impossible to conclude that it says or implies anything that could subject either of the plaintiffs to contempt or aversion, induce any unsavory opinion of them or reflect adversely upon plaintiff Nichols' work or upon him as pastor of the church or as cleric generally.

That the Reverend Nichols was, in fact, pastor, contrary to the article's report, only demonstrates its falsity, not its defamatory character. . . . Nothing in the article reflects in any way on his personal or professional integrity or ability. **It assigns no reason for his removal or for the opposition to him by the 22 defendants, such as incompetency, misconduct or any other behavior** that could be said to disparage him personally or in his profession as a clergyman.

The mere fact of one's removal from office carries no imputation of dishonesty or lack of professional capacity. It is only when the publication contains an insinuation that the dismissal was for some misconduct that it becomes defamatory. The rule is no different for a clergyman, exalted and sensitive though his post may be. A charge against him, to be actionable, must still "be such as, if true, would tend to prove him unfit to continue his calling", such as, for example, that he used foul language in a courtroom or that he "juggled" moneys taken on the collection plate. The suggestion that the article may provoke "Idle, unfounded and baseless rumors" that plaintiff is "anything from 'thief' to 'imposter'", resting as it does entirely on sheer speculation, furnishes no basis for holding the writing defamatory.

Nichols, 309 N.Y. at 601-02 (citations omitted) (bold added).

Here, Mr. Toft's four statements regarding Ms. Spratt's discharge are exceedingly limited and are not defamatory, in and of themselves:

- "Mr. Toft informed me that the woman with Ms. Imperatori had worked with him a number of years before and that he'd fired her." CP at 189 (¶ 9).

- “With regard[]to Kelly Spratt, she was fired by me and two board members 7 years ago from the [Joint Venture] that I managed for the very behavior she exhibited tonight.” CP at 186.
- “I overheard Mr. Toft tell a group of PCO’s that he had fired Kelly Spratt” CP at 181-82 (¶ 14).
- “Mr. Toft then said that Ms. Spratt was forced to resign.” CP at 183 (¶ 20).

Only one of these statements could have implied wrongful conduct by Ms. Spratt: the statement in the email to Ramzy Boutros that Ms. Spratt was fired “for the very behavior she exhibited tonight.” CP at 186; *see* RP at 14:11-17 (Aug. 1, 2014). However, according to Ms. Spratt and her witnesses, there was nothing negative about her behavior that night.

Ramzy Boutros (the recipient of the allegedly defamatory email) stated that Ms. Spratt’s behavior that night was impeccable:

Ms. Spratt was not disruptive or inappropriate at any time in either the Maple Valley meeting in March 2012 or the PCO meeting in Issaquah in May 2012. She did not appear malicious or angry at any time, but instead appeared nervous and genuinely sincere in her desire to share her knowledge regarding Mr. Toft.

CP at 190-91 (¶ 18). Jolie Imperatori supported Mr. Boutros’ observation. *See* CP at 181 (¶¶ 9, 12), 183 (¶ 22). And Ms. Spratt has not disputed these characterizations. CP at 149-50 (¶¶ 20-22).

The mere fact Mr. Toft may have said Ms. Spratt was fired or forced to resign is not, in itself, defamatory; yet, these alone are the

statements Ms. Spratt maintains support her first four defamation claims. CP at 128, 132, 740-41; *see* CP at 144 (¶ 4), 150 (¶ 26), 151 (¶ 28), 152 (¶ 29), 154 (¶ 36). Mr. Toft’s statements about Ms. Spratt’s termination do not refer to or imply any wrongful conduct on her part. The claims based on statements that she was fired or forced to resign are not per se actionable. They should be dismissed on this ground alone.

2. Ms. Spratt Has Not Met Her Burden to Establish Falsity.

A plaintiff suing for defamation must prove with convincing clarity that a statement is a false assertion of fact or an opinion that implies the existence of a false fact.⁹ *Camer*, 45 Wn. App. at 38-39.

i. Statements That Ms. Spratt Was Fired or Forced to Resign Are True.

Ms. Spratt claims that Mr. Toft “defamed” her by saying that he “fired her.” However, Ms. Spratt’s evidence establishes that Mr. Toft caused the end of Ms. Spratt’s employment, whatever gloss Ms. Spratt wants to use to paint over these facts. Mr. Toft did fire Ms. Spratt because he made her resignation effective immediately. Alternately, Mr. Toft did, in essence, “fire” Ms. Spratt because he confronted her about “unethical conduct”, which caused her to tender a resignation that he then made

⁹ Once falsity is established, a defendant may either “show that the statement is substantially true or that the gist of the story, the portion that carries the ‘sting,’ is true.” *Mark v. Seattle Times*, 96 Wn.2d 473, 494, 635 P.2d 1081 (1981).

effective immediately. *See* CP at 146-47 (¶¶ 10-13). Ms. Spratt has not met her burden of coming forward with clear and convincing evidence of falsity. *See Mohr v. Grant*, 153 Wn.2d 812, 823, 825-27, 829-30, 108 P.3d 768 (2005) (concluding that the defendant prevails on falsity where a statement is substantially true or the gist is true).

a. The Statements That Ms. Spratt Was Fired or Forced to Resign Have Not Been Proven False.

Mr. Toft did, in fact, “fire” and force Ms. Spratt to resign. As the result of a confrontation with Mr. Toft in 2005, Ms. Spratt “tendered [her] resignation, to be effective in two weeks.” CP at 147 (¶ 13). Mr. Toft, unsatisfied with a delayed departure, told Ms. Spratt that her “resignation was going to be effective immediately and [she] should leave the building at once.” CP at 147 (¶ 13). In these circumstances, an employee can believe she voluntarily resigned while a manager can believe the employee was fired or forced to resign.

Whether someone resigned, was fired, or was forced to resign is not a simple black and white proposition—both statements can be simultaneously true. *See Becker v. Cmty. Health Sys., Inc.*, __ Wn. App. __, 332 P.3d 1085, 1087, 1094 (2014) (an employee could pursue a wrongful discharge claim where he threatened to resign over corporate misconduct and the employer made his resignation effective the next day).

Given the facts of this case, Ms. Spratt is entitled to believe she resigned and Mr. Toft is equally entitled to believe she was fired or forced to resign. Thus, her claims fail on the element of falsity because all of the statements are true or amount to opinion.

b. The Gist or Sting of the Statements That Ms. Spratt Was Fired or Forced to Resign Are the Same.

“What constitutes the gist or sting of a story is a question for the court.” *U.S. Mission Corp.*, 172 Wn. App. at 773 & n.14. “The ‘sting’ of a report is defined as the gist or substance of a report when considered as a whole.” *Herron v. KING Broad. Co.*, 112 Wn.2d 762, 769, 776 P.2d 98 (1989). “Where a report contains a mixture of true and false statements, a false statement (or statements) affects the ‘sting’ of a report only when ‘significantly greater opprobrium’ results from the report containing the falsehood than would result from the report without the falsehood.” *Herron*, 112 Wn.2d at 769.

Here, the contemporaneous personnel documents and Ms. Spratt’s own declaration show that she resigned in 2005 after being confronted about her behavior. CP at 146 (¶¶ 10-12), 383. The record also shows she was confronted in 2004 about behavior problems and a need to change. CP at 384. Ms. Spratt does not dispute that a year before her employment ended she received a written warning about her “rude, intimidating and

unprofessional” behavior involving “[n]o less than 7 people,” with multiple formal and informal conversations about her behavior. CP at 384-85. Nor does Ms. Spratt dispute that a formal letter was put in her file, setting out a plan for behavioral change—she contends only that she was not subject to a “PIP” or “Performance Improvement Plan.” *See* CP at 114, 145 (¶¶ 6-7); *see also* CP at 18 (“At one point during her employment Spratt was placed in an HR behavioral correction program because of personnel-related problems . . .”).

Ms. Spratt similarly does not dispute that, after these incidents, Mr. Toft again confronted her about her behavior and her conduct. CP at 146 (¶¶ 10-12); CP at 383. The employee termination report in Ms. Spratt’s employment file shows she resigned as a direct result of the confrontation. CP at 383. Ms. Spratt does not dispute she resigned after a confrontation about “unethical conduct.”¹⁰ *See* CP at 146 (¶¶ 10-13).

And Ms. Spratt acknowledged in her declaration that she “tendered [her] resignation, to be effective in two weeks” but that Mr. Toft told Ms. Spratt that her “resignation was going to be effective immediately and [she] should leave the building at once.” CP at 147 (¶ 13). There is no “significantly greater opprobrium” resulting from being fired than from

¹⁰ The record reflects that on December 13, 2005, Mr. Toft confronted Ms. Spratt about communicating confidential Quadrant Home Loan information to outsiders. CP at 383. Ms. Spratt only disputes the validity of Mr. Toft’s criticism. CP at 146 (¶ 10).

resigning immediately after being confronted by your manager about unethical behavior—the sting is the same. *See* CP at 383.

Ms. Spratt’s claims related to the statements that she was fired or forced to resign fail because (1) she cannot establish the falsity of the statements and (2) the gist or sting of the statements is the same.

ii. Any Claim Related to the Anonymous Letter Fails.

a. Defamation Claims Related to the Letter Can Be Independently Dismissed

Regardless of how other claims against Mr. Toft are resolved, the defamation claim related to the anonymous letter can and should be independently dismissed under RCW 4.24.525. The Statute contemplates that a moving party may partially prevail on a special motion to strike. RCW 4.24.525(6)(a) (“The court shall award to a moving party who prevails, in part or in whole, on a special motion to strike . . .”). Further, a moving party may seek the dismissal of “**any claim** that is based on an action involving public participation and petition.” RCW 4.24.525(4)(a) (bold and emphasis added); *see Bevan v. Meyers*, __ Wn. App. __, 334 P.3d 39, 41 (2014) (affirming dismissal of just one of three counterclaims). The statute defines “Claim” as including any “lawsuit, cause of action, [or] claim.” RCW 4.24.525(1)(a). And this Court has explicitly recognized that each allegedly defamatory statement is viewed as a separate cause of action. *Momah v. Bharti*, 144 Wn. App. 731, 753,

182 P.3d 455 (2008).

Treating each claim as separately subject to dismissal under RCW 4.24.525 is consistent with on-point California precedent applying that State’s anti-SLAPP statute, which requires a trial court to view causes of action separately and to strike some but not all claims—and even portions of a claim—when unsupported by sufficient evidence. *Taus v. Loftus*, 40 Cal. 4th 683, 708-10, 713, 740-43 54 Cal. Rptr. 3d 775, 151 P.3d 1185 (2007) (noting that “to avoid dismissal of each claim,” a plaintiff must bear “the burden of demonstrating a probability that she would prevail on the particular claim.”); *City of Colton v. Singletary*, 206 Cal. App. 4th 751, 769, 772-73, 142 Cal. Rptr. 3d 74 (2012) (“[A]llegations may be parsed from the causes of action and stricken . . .”).

Given the statutory language, California authority, and Washington defamation law, each statement can be analyzed and dismissed separately.

- b. Ms. Spratt Still Has Not Established Authorship of the Letter by Clear and Convincing Evidence, Despite this Court’s Invitation to Do So.

Ms. Spratt has not established the authorship of the anonymous letter—her claim that the “anonymous letter” was written by Mr. Toft or Mrs. Toft remains pure speculation. *See Rice v. Offshore Sys., Inc.*, 167 Wn. App. 77, 85-87, 272 P.3d 865 (2012). Mr. Toft denies that he wrote the letter. CP at 19. Ms. Spratt claims that only Mr. Toft could have

written the letter because it attached some of the vitriolic messages that she says she only sent to Mr. Toft personally. CP at 153-54 (¶ 34). Ms. Spratt has also argued that Mrs. Toft wrote the letter. CP at 622. It is undisputed, however, Mr. Toft that sent copies of Ms. Spratt’s bizarre direct personal attacks to others to help them understand who he was dealing with. CP at 386-87 (¶ 2). As those attachments were available to others, the fact that the anonymous letter included attachments of Ms. Spratt’s direct personal attacks proves nothing about the authorship of that letter.

Moreover, this Court recognized in its previous Opinion that Ms. Spratt “was in the process of proving that the letter was, in fact, written by Toft.” *Spratt*, 180 Wn. App.at 627; CP at 708. Despite noting that “Spratt is not precluded from obtaining discovery before the trial court rules on the motion, provided she can show good cause for such discovery,” Ms. Spratt submitted no additional evidence nor did she seek to take additional discovery for good cause. *Spratt*, 180 Wn. App. at 635-36; CP at 717; *see* CP at 730 n.1. Ms. Spratt falls short of her burden of presenting clear and convincing evidence that one of the Tofts wrote the anonymous letter. Her claim related to the anonymous letter fails for that reason alone.

- c. Ms. Spratt Has Never Argued to the Trial Court, Let Alone Established by Clear and Convincing Evidence, That Anything in the Anonymous Letter Was False or Any Implication Was False.

“Conclusory statements as to falsity are insufficient to create an issue of fact for the jury.” *Patterson v. Superintendent of Pub. Instruction*, 76 Wn. App. 666, 672, 887 P.2d 411 (1994). Here, Ms. Spratt has not even made conclusory statements that any aspect of the anonymous letter or any implied fact in the letter is false. *See* CP at 132, 740-41.

The anonymous letter attached two Facebook messages that Ms. Spratt has positively identified as her own statements. CP at 147-48 (¶ 15), 152 (¶ 32), 153 (¶ 34); *see* CP at 172-73; *see also* CP at 117, 120, 626, 629. Also attached were “tweets” and Facebook posts, all of which were authored by Ms. Spratt. CP at 153 (¶ 34) & n.2; *see* CP at 174-78; *see also*; CP at 121, 630. These attachments are communications made by Ms. Spratt; she cannot reasonably argue that her own statements are false.

As for the content of the letter itself, Ms. Spratt has merely stated in a declaration that she was harmed by the letter: “I have also been harmed by the Defendants’ subsequent dissemination of the anonymous letter (sent out on the eve of the general election).” CP at 154 (¶ 36). Yet Ms. Spratt never states or even alleges that anything in the letter, or any fact implied by the letter, is false. Even Ms. Ellul, who provided Ms.

Spratt with a declaration stating that she had received the letter, never states that the letter was false or implied a false fact. *See* CP at 169-70.

There is simply no evidence before this Court that any statement in the anonymous letter is false or that any fact implied by the letter is false. It was Ms. Spratt's burden to establish falsity. *Mohr*, 153 Wn.2d at 822. Ms. Spratt's defamation claim based on the anonymous letter must be stricken because Ms. Spratt has not met her burden of coming forward with clear and convincing evidence of falsity.

d. All of the Statements in the Anonymous Letter Are Nonactionable Opinion.

Moreover, all of the statements in the letter are opinion and therefore not actionable. Although the letter may contain statements Ms. Spratt finds derogatory—and the statements may have hurt her feelings—that does not provide a basis for an actionable defamation claim.

“Because ‘expressions of opinion are protected under the First Amendment,’ they ‘are not actionable.’” *Robel v. Roundup Corp.*, 148 Wn.2d 35, 55, 59 P.3d 611 (2002) (quoting *Camer*, 45 Wn. App. at 39). “The determination of whether a communication is one of fact or opinion is a question of law for the court.” *Benjamin v. Cowles Pub. Co.*, 37 Wn. App. 916, 922, 684 P.2d 739 (1984). Washington's Supreme Court has adopted a three-factor test: “To determine whether a statement is

nonactionable, a court should consider at least (1) the medium and context in which the statement was published, (2) the audience to whom it was published, and (3) whether the statement implies undisclosed facts.”

Dunlap, 105 Wn.2d at 539.

Washington’s Supreme Court has held that statements were not actionable even though they were far more derogatory and hurtful than any of the statements in the anonymous letter. *See Robel*, 148 Wn.2d at 40, 56. In *Robel*, the plaintiff’s co-workers mocked the plaintiff in front of customers and other co-workers for physical injuries she sustained. 148 Wn.2d at 40. The trial court also found that the co-workers had referred to her as “a ‘bitch,’ a ‘cunt,’ a ‘fucking bitch,’ a ‘fucking cunt,’ a ‘snitch,’ a ‘squealer,’ and/or a ‘liar’” in front of customers and other co-workers. *Robel*, 148 Wn.2d at 55. Division Three of this Court concluded that the vulgar names were nonactionable opinion but determined “that the remaining words—‘snitch,’ ‘squealer,’ ‘liar,’ and ‘idiot’—were arguably defamatory statements of fact but that Robel’s claim failed because the trial court had made no finding of damages arising from the defamation claim.” *Robel*, 148 Wn.2d at 55-56. The Washington Supreme Court affirmed reversal of the trial court, concluding, as a matter of law, that all of the statements were nonactionable opinion. *Robel*, 148 Wn.2d at 56-58.

This three-factor test reinforces the Tofts’ position that the

statements in the anonymous letter are nonactionable opinion. Courts must look at the “entire communication,” “cautionary ‘terms of apparenacy,’” and keep in mind that “statements of opinion are expected to be found more often in certain contexts, such as editorial pages or political debates.” *Dunlap*, 105 Wn.2d at 539. Here, the entire letter is broadly focused on a single person’s perceptions of Ms. Spratt. CP at 171. The letter talks about the election and Ms. Spratt’s participation; outlines the author’s thoughts about Ms. Spratt; discusses her messages, tweets, and Facebook posts; and outlines the author’s concerns about Ms. Spratt’s involvement in the PTSA and the author’s need for anonymity. CP at 171. Thus, the entire letter is a discussion of one person’s perception of Ms. Spratt in the context of a political campaign.

Second, the audience was made up of individuals in Washington’s 5th District receiving an anonymous letter. CP at 169-171; *see* CP at 153-54 (¶ 34). Courts must also consider “the nature of the audience” because in “ongoing public debates, the audience is prepared for mischaracterizations and exaggerations, and is likely to view such representations with an awareness of the subjective biases of the speaker.” *Dunlap*, 105 Wn.2d at 539. Recipients would expect the use of exaggeration, rhetoric, and hyperbole in an anonymous letter that “specifically referenced what a good candidate Toft made for the Senate”

and then attacked Ms. Spratt. *Spratt*, 180 Wn. App. at 627; CP at 708. Further, anonymous communications are given less credence by readers and militate against their substance being treated as fact. *See Sandals Resorts Int'l. Ltd. v. Google, Inc.*, 925 N.Y.S.2d 407, 416, 86 A.D.3d 32 (2011) (“Indeed, the anonymity of the e-mail makes it more likely that a reasonable reader would view its assertions with some skepticism and tend to treat its contents as opinion rather than as fact.”).

Third, as discussed, *supra*, none of the statements in the letter were challenged by Ms. Spratt as false or implying false facts. Courts specifically consider “whether the statement of opinion implies that undisclosed facts support it.” *Dunlap*, 105 Wn.2d at 539-40. Here, the trial court cited *Dunlap* but did not acknowledge that the statement must imply a fact that is indeed false—mere innuendo is not sufficient to support a defamation claim. CP at 827-28; *see Duc Tan v. Le*, 177 Wn.2d 649, 666, 300 P.3d 356 (2013) (“These statements imply undisclosed defamatory facts regarding plaintiffs’ connection to the unpopular Viet Cong government. These statements carried a provably false factual connotation.”); *U.S. Mission Corp.*, 172 Wn. App. at 782 (“In a defamation by implication case, the plaintiff must show that the statement at issue is provably false, either because it is a false statement or because it leaves a false impression.”); *see also Mohr*, 153 Wn.2d at 823 n.9. Here, there is

not and never has been any assertion by Ms. Spratt that any statement or implication in the letter is false, let alone clear and convincing evidence to establish falsity. *See* CP at 132, 740-41; *see also* CP at 153-54 (¶¶ 34, 36).

3. Privileges Apply to the Allegedly Defamatory Statements.

The publication of defamatory statements may be absolutely or qualifiedly privileged. If so, the plaintiff has the burden of proving that a privilege is lost. *Mark*, 96 Wn.2d at 482, 491-92. Here, two privileges apply: Ms. Spratt was a limited public figure and the statements at issue fall within the common interest privilege.

i. Ms. Spratt Was a Limited Public Figure.

Ms. Spratt became a “limited public figure” when she voluntarily thrust herself into Mr. Toft’s political campaign. *See Camer*, 45 Wn. App. at 42 (“To be considered a public figure, courts usually require the plaintiff to voluntarily seek to influence the resolution of public issues.”); *see also Clardy v Cowles Publ’g Co.*, 81 Wn. App. 53, 62-65, 912 P.2d 1078 (1996).

Ms. Spratt voluntarily brought herself to Mr. Toft’s political campaign after first sending him a hateful message. CP at 21. She sent a letter about Mr. Toft to Republican Party officials who made sure it ended up in the hands of Jolie Imperatori, a supporter of the incumbent Republican Senator, Cheryl Pflug—Mr. Toft’s initial primary opponent.

CP at 148 (¶ 16), 180 (¶¶ 3-4); *see* CP at 185-86. Ms. Spratt was then “encouraged” by Ms. Imperatori “to research where [Mr. Toft] was appearing in his campaign, and then confront him with her issues.” CP at 180 (¶ 4). Ms. Spratt appeared with Ms. Imperatori at Mr. Toft’s first public event, where Ms. Imperatori told Mr. Toft, ““We are going to bury you. We have a former employee who’s not too happy with you.”” CP at 210; *see* CP at 19 (¶ 6).

Ms. Spratt spoke at the March campaign event. CP at 149 (¶ 22). As Mr. Toft did not respond publicly, Ms. Imperatori “interjected at that point and pressed Mr. Toft to answer.” CP at 150 (¶ 23). After sending the Tofts another disturbing, vitriolic message, CP at 26; Ms. Spratt showed up at an event in May—a meeting of Republican Precinct Committee Officers—where she again challenged Mr. Toft and purposefully publicized the very “defamatory” statements that she now complains of in this lawsuit. *See* CP at 151 (¶ 28). Ms. Spratt next put statements on her Facebook account and posted “tweets” attacking Mr. Toft, some of which were copied to the Seattle PI, the Issaquah Press, and other media outlets.¹¹ CP at 161-65; *see* CP at 217-22.

The Washington Supreme Court has held that a policeman and

¹¹ Ms. Spratt posted statements in a manner that made them seem to be attributed to Mr. Toft. Mr. Toft did not make these statements.

fireman who were leaders of an organization became public figures because they had “thrust their organization and themselves into a very ‘hot’ political campaign” to change the Spokane city charter. *Tilton v. Cowles Publ’g Co.*, 76 Wn.2d 707, 708-09, 717, 459 P.2d 8 (1969). The plaintiffs in *Tilton* “had affirmatively abandoned their public anonymity and thrust themselves into the ‘vortex’ of an important public controversy” by not only assuming leadership positions, but also by their “subsequent activities,” which included a vote to contribute money to “a group actively working for the charter change.” 76 Wn.2d at 709, 717.

California’s courts reached a similar conclusion while applying its anti-SLAPP statute on a far less public stage than a State Senate race: an election to a homeowners association board. *See Cabrera v. Alam*, 197 Cal. App. 4th 1077, 1082, 1092-93, 129 Cal. Rptr. 3d 74 (2011); *see Rosenaur v. Scherer*, 88 Cal. App. 4th 260, 269-71, 274-75, 105 Cal. Rptr. 2d 674 (2001) (a landowner sued a city council candidate for defamation related to statements made during an initiative campaign related to land development). The plaintiff in *Cabrera* prepared materials opposing the defendant’s candidacy for the board, attended the homeowners association meeting where the election was discussed, remained at the meeting at the prompting of the defendant’s opponent, and “engaged in voluntary acts through which she hoped to influence the outcome of the election.” 197

Cal. App. 4th at 1083-84, 1092-93. At the meeting, the plaintiff in *Cabrera* verbally attacked the defendant candidate. 197 Cal. App. 4th at 1083-84, 1093. The defendant responded by saying that the plaintiff had engaged in wrongdoing. *Cabrera*, 197 Cal. App. 4th at 1084. California's Court of Appeals noted that the plaintiff, like Ms. Spratt, "thrust herself into the controversy surrounding the election." *Cabrera*, 197 Cal. App. 4th at 1082. The court concluded that "she became a limited purpose public figure who was required to show defendant made the allegedly defamatory statements with malice." *Cabrera*, 197 Cal. App. 4th at 1082.

Even without the benefit of Washington and California's broad anti-SLAPP protections and heightened evidentiary burdens, a New York trial court confronted with similar facts still dismissed a plaintiff's claims of defamation. See *Madarassy v. Gannett Satellite Info. Network Inc.*, 23 Med. L. Rptr. 1363, 1366 (N.Y. Sup. Ct. Saratoga Cnty. Jan. 24, 1995).¹² *Madarassy*, a service manager in a city public works department, supported the electoral opponent of McTygue, a sitting commissioner. *Madarassy*, 23 Med. L. Rptr. at 1364. McTygue stated in a telephone call that "Madarassy has an alcohol problem" and gave a published statement that Madarassy had "an alcohol problem and a high absentee rate."

¹² A copy of the *Madarassy* case appears in the Clerk's Papers at pages 461-64.

Madarassy, 23 Med. L. Rptr. at 1364-65. The validity of these statements were disputed by Madarassy, who called McTygue a “liar” and explained that he had “spent all of his personal and vacation days visiting his wife in the Albany Medical Center after she suffered a massive heart attack.”

Madarassy, 23 Med. L. Rptr. at 1365. The court in *Madarassy* concluded that Madarassy became a public figure “as a result of his participation in a public debate, namely the qualifications of two candidates seeking the office of Superintendent of Public Works”. The court dismissed Madarassy’s defamation claims. *Madarassy*, 23 Med. L. Rptr. at 1366.

Ms. Spratt—like the fireman and policeman from *Tilton*, the former board member from *Cabrera*, and the employee from *Madarassy*—voluntarily injected herself into an election. CP at 26, 148-52 (¶¶ 16-18, 21-22, 26-29). The campaign did not come to Ms. Spratt; instead, Ms. Spratt took her issues to the campaign trail and aggressively brought on the conflict she desired. After learning that Mr. Toft was challenging the incumbent Republican Senator, she confronted Mr. Toft by email, contacted Republic Party officials, was contacted by the incumbent’s supporter, and attended Mr. Toft’s campaign events where she publicly spoke out against him with the obvious goal of influencing the election and defeating his candidacy. CP at 21, 148-52 (¶¶ 16-18, 21-22, 26-29); see *Grass v. News Grp. Pubs., Inc.*, 570 F. Supp. 178, 184-85

(S.D.N.Y. 1983) (ruling that a C.E.O. who approved a corporate letter-writing campaign became a limited public figure).¹³

Ms. Spratt had already begun to challenge Mr. Toft's qualifications to hold public office and had initiated the controversy before she ever spoke publicly. CP at 21, 148-49 (¶¶ 16-19), 185, 210; *see Clardy*, 81 Wn. App. at 64-65 (prior existence of controversy). Mr. Toft's response was directly related to Ms. Spratt's motives and credibility and her reasons for attacking him. CP at 186; *see Clardy*, 81 Wn. App. at 64 (statements germane to controversy). Ms. Spratt never shied away from the controversy she created; in fact, she more broadly publicized Mr. Toft's supposedly "defamatory" statements herself in a subsequent campaign event as a means of further attacking Mr. Toft. CP at 151 (¶ 28); *see Clardy*, 81 Wn. App. at 62-65 (voluntariness and nature of role; plaintiff retained public-figure status at the time of the alleged defamation). And she continued to communicate her attacks on Mr. Toft publicly on social

¹³ In *Grass*, a candidate for governor emphasized "his responsibility for building Rite Aid, Inc. into the third largest chain of drugstores in the country." 570 F. Supp. at 179. In response, Alex Grass (the C.E.O. and a founder of Rite Aid) approved a corporate letter-writing campaign to correct statements made in news outlets about the candidate's former relationship with Rite Aid. *Grass*, 570 F. Supp. at 180-81. An article was then written about this letter-writing campaign, and Grass alleged that statements made in the article defamed him. *Grass*, 570 F. Supp. at 181. Before trial, the court ruled that Grass was a limited public figure, concluding that when Grass had Rite Aid clarify through the letter-writing campaign Grass's position, the candidate's former positions with the company, and that the candidate no longer worked for the company, "a reasonable person would view Grass as having thrust his own reputation into the public eye, at least with respect to the specific issues prompted by those letters." *Grass*, 570 F. Supp. at 184.

media sites, while copying the media. CP at 161-65; *see Clardy*, 81 Wn. App. at 62 (access to media); *see also* CP at 28, 174-78, 217-22, 237.

Applying the five-part test of *Clardy*, Ms. Spratt voluntarily became and remained a limited public figure during the period when the allegedly defamatory statements were made. *See* 81 Wn. App. at 62-65. Thus, she must prove that Mr. Toft acted with actual malice. *See infra* Part V.B.4. She has not.

ii. Mr. Toft's Alleged Statements Were Also Subject to the Common Interest Privilege.

“There is a qualified privilege to make an otherwise defamatory statement under numerous circumstances,” including where there is a “common interest,” which “applies when the declarant and the recipient have a common interest in the subject matter of the communication.” *Moe v. Wise*, 97 Wn. App. 950, 957-58, 989 P.2d 1148 (1999).

Communications made privately are subject to the common interest privilege when the communications are made within an organization (i.e., a political party). *See Moe*, 97 Wn. App. at 954, 957-58, 961-62.

The declarant and recipient need not be “allied.” *Moe*, 97 Wn. App. at 959-60. Instead, “the focus belongs on the declarant’s and recipient’s relationship to the subject matter, not to each other.” *Moe*, 97 Wn. App. at 959. And “the privilege applies even if the communication’s

purpose is not to protect a commonly held interest.” *Moe*, 97 Wn. App. at 958. Whether Ms. Spratt had already spoken publicly or was a limited public figure would not affect application of the common interest privilege to Mr. Toft’s private communications. *See Moe*, 97 Wn. App. at 957-58.

Washington courts have broadly applied the common interest privilege to a number of analogous private communications, including communications among “officers of an unincorporated, nonprofit association about their members and officers’ qualifications and their participation in association activities” and between “partners about partnership litigation to recover money owed to the partnership.” *Moe*, 97 Wn. App. at 958. Further, the court in *Moe* favorably cited application of the privilege to people “involved in the same organizations, partnerships, associations, or enterprises who are communicating on matters of common interest.” 97 Wn. App. at 958.

Washington courts have also applied the privilege in a number of other contexts, including communications among union members, between friends and stockholders, and from a school administrator to a parent. *See Ward v. Painters’ Local Union No. 300*, 41 Wn.2d 859, 865-66, 252 P.2d 253 (1953); *Chambers v. Leiser*, 43 Wash. 285, 286-87, 289, 86 P. 627 (1906); *Hitter v. Bellevue Sch. Dist. No. 405*, 66 Wn. App. 391, 400-01, 832 P.2d 130 (1992). Finally, the Washington Supreme Court has

specifically held that there is a qualified privilege for a church to communicate about a pastor's shortcomings and termination in the context of group meetings and by mail. *Bass*, 69 Wash. at 215-16.

Thus, Mr. Toft's communications to Ramzy Boutros, vice-chair of the Washington State 5th District Republican Party and other Republican Party officials and functionaries are covered by this privilege. CP at 187-88 (¶¶ 2-3); *see* CP at 184-86. Mr. Boutros says he attended Mr. Toft's campaign event in March "for the express purpose of interviewing him one-on-one before the meeting and making a decision as to whether I would support him." CP at 188 (¶ 3); *see* CP at 187 (¶ 2). Mr. Boutros interviewed Mr. Toft in the presence of "Ferin Lauve, a mutual acquaintance in the Republican party." CP at 188 (¶¶ 5, 6). Mr. Toft later allegedly explained to Mr. Boutros that Ms. Spratt was in the room, that she was likely to make a disturbance, and that he had fired her a number of years earlier. CP at 189 (¶ 9). Mr. Toft asked Mr. Boutros' advice about how to address this situation. CP at 189 (¶ 10). These communications meet the test for application of the common interest privilege.

After the meeting, Mr. Toft emailed Mr. Boutros about the "vetting process" and asked for his support. CP at 185-86. Mr. Boutros told Mr. Toft he could not give his support, in part because of Ms. Spratt's allegations. CP at 184. Mr. Boutros then forwarded the message to the

5th District's Republican Party Chair who forwarded it to Ms. Imperatori, Senator Pflug's supporter, who forwarded it to Ms. Spratt. CP at 184. The interview, the conference, and the email between Mr. Toft and Mr. Boutros that followed the March 16 meeting were part of a vetting process, made apparent by the chain of emails, which included Bob Brunjes, the 5th District's Republican Party Chair, and Jolie Imperatori, who was "very active in Republican politics in the 5th District for more than four decades." CP at 180 (¶ 3), 184-86; *see* CP at 187-88 (¶¶ 2-3).

The last two allegedly defamatory statements were from the May 2012 meeting of Republican Precinct Committee Officers where "[a] number of candidates were in attendance to give short speeches and then answer questions from the audience." CP at 190 (¶ 15). The alleged statements by Mr. Toft were made in the context of a meeting of Republican Precinct Committee Officers with the party leadership present. CP at 181-83 (¶¶ 14-15, 19-21). Again, the common interest privilege applies to these communications to party functionaries.

Given the nature and context of the various communications, the alleged statements by Mr. Toft are covered by the common interest privilege as communications to members, functionaries, and officials of the Republican Party. Ms. Spratt must show actual malice.

4. Ms. Spratt Did Not Establish that the Alleged Statements Were Made with Actual Malice.

Even assuming the alleged statements are false and are attributable to the Tofts, the application of either of these two privileges places the burden on Ms. Spratt to show, with convincing clarity, that they were made with actual malice. *Camer*, 45 Wn. App. at 41-43. To establish actual malice, Ms. Spratt must show that Mr. Toft acted “with actual knowledge of its falsity or with reckless disregard for its truth or falsity.” *Herron*, 112 Wn.2d at 775. Ms. Spratt has failed to show actual malice.

Employment records show that Mr. Toft confronted Ms. Spratt about her inappropriate behavior in 2004 and had a plan in place to address the concerns. CP at 384-85. Employment records show Ms. Spratt resigned after being confronted about her behavior. CP at 383. Ms. Spratt states she resigned after being accused by Mr. Toft “of unethical conduct.” CP at 146 (¶¶ 10-12). And Ms. Spratt confirms that when she gave Mr. Toft two weeks’ notice of her resignation, Mr. Toft told her the “resignation was going to be effective immediately and [she] should leave the building at once.” CP at 147 (¶ 13).

Six years after Ms. Spratt left Quadrant Home Loans under this cloud, Mr. Toft made statements that conveyed his recollection (i.e., Ms. Spratt was “fired”). These statements are consistent with the documentary

evidence: there is little difference between being fired and resigning after being confronted with work-related problems, especially if the manager tells the resigning employee that she must leave immediately. *See* CP at 383; *see also supra* Part V.B.2.i. Moreover, Mr. Toft did not relay the reason for the firing—he only stated in an email that she was fired “for the very behavior she exhibited tonight.” CP at 186. Ms. Spratt and witnesses confirm that her behavior at the March 2012 meeting was normal. CP at 149-50 (¶¶ 20-22), 181 (¶¶ 9, 12), 183 (¶ 22), 190-91 (¶ 18).

Ms. Spratt simply has not come forward with clear and convincing evidence to establish that Mr. Toft acted with actual malice. *See, e.g., Tilton*, 76 Wn.2d at 727-28 (Rosellini, J., dissenting) (describing the evidence that the majority determined still did not establish actual malice).

5. Ms. Spratt Has Failed to Meet Her Burden of Presenting Clear and Convincing Evidence of Special Damages Proximately Caused by the Alleged Statements.

In defamation cases, a plaintiff must come forward with proof of special damages or establish defamation per se. *Davis v. Fred's Appliance, Inc.*, 171 Wn. App. 348, 367, 287 P.3d 51 (2012).

“[D]efamation per se generally requires imputation of a crime or communicable disease.” *Davis*, 171 Wn. App. at 367. Therefore, Ms. Spratt was required to present clear and convincing evidence of special damages, which she has failed to do.

The requirement to prove damages is well illustrated by a case involving allegations of defamation based on ownership of food products declared unfit for human consumption. See *General Market Co. v. Post-Intelligencer Co.*, 96 Wash. 575, 165 P. 482 (1917). General Market owned and operated a public market, and the Post-Intelligencer stated that 600 pounds of cheese owned by General Market were condemned as unfit for human consumption, seized, and destroyed. *General Market*, 96 Wash. at 576. The court noted that publication of this information was not “actionable per se.” *General Market Co.*, 96 Wash. at 580. Yet General Market could seek compensation if it proved special damages:

This is not to deny that injury may follow such a publication; it is but to deny that injury naturally or necessarily follows it. If injury does follow the publication, the injured party is not without remedy; he has but to allege and prove actual damage in order to recover.

General Market, 96 Wash. at 580; see *Rickert v. Pub. Disclosure Comm'n*, 129 Wn. App. 450, 461, 119 P.3d 379 (2005) (“[T]here must be an element of injury before the speech is undeserving of First Amendment protection.”); see, e.g., *Denney v. Nw. Credit Ass'n*, 55 Wash. 331, 332, 335-36, 104 P. 769 (1909) (William Denney sued a credit agency for listing him as a “C” credit rating, which was less than “Good, somewhat slow” and meant “[i]nquire at office”—the trial court dismissed the claim

and the Washington Supreme Court affirmed because the statement was not actionable per se and could not be pursued without special damages).

It is not enough for defamation plaintiffs to simply contend that a statement “exposed them to contempt and ridicule and deprived them of public confidence.” *Camer*, 45 Wn. App. at 44. A plaintiff must prove something more. Here, Ms. Spratt has failed to meet this burden of proof. She has not come forward with evidence or even asserted that her employment has been affected or that she has experienced employment related damages—by choice, she has not been employed. *See* CP at 147 (¶ 14); *see also* *Ditmar v. Needham, Harper, Worldwide Inc.*, No. C86-662, 14 Med. L. Rptr. 1281, 1283 (N.D. Ohio June 25, 1987) (a retired baseball player was not defamed where he had no evidence of special damages and he was not currently engaged in any “office or calling at the time the words complained of were published”).¹⁴

Ms. Spratt’s only allegation of special damage comes from her own self-serving declaration in which she states that she needed counseling. But she has provided no medical records, no medical bills, and no medical testimony. *See* CP at 154 (¶ 36). A “prima facie case must consist of specific, material facts, rather than conclusory statements,

¹⁴ A copy of the *Ditmar* case appears in the Clerk’s Papers at pages 699-702.

that would allow a jury to find that each element of defamation exists.”

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

Spratt’s bare declaration is not sufficient to prove special damages and causation, even by the more lenient preponderance standard.¹⁵

The reasonableness of medical bills cannot be passed upon without evidence of those expenses. *Nelson v. Fairfield*, 40 Wn.2d 496, 500-01, 244 P.2d 244 (1952). In *Nelson*, the plaintiff’s testimony was the only support for the amount of damages and he testified that “he imagined the hospital bill was not over \$35 or \$40.” 40 Wn.2d at 501. The Washington Supreme Court concluded that this testimony “was not sufficient. Not only was the amount uncertain, but there was no proof of the reasonable value of the services rendered by the hospital. It was error to submit the question to the jury.” *Nelson*, 40 Wn.2d at 501. Ms. Spratt’s case is even weaker than the plaintiff’s case in *Nelson*: She has not even estimated the amount of her medical expenses. CP at 154 (¶ 36). And even when there is competent evidence presented as to the amount of medical expenses, the plaintiff must still offer evidence that the value of services was reasonable.

¹⁵ When arguing before the trial court, Ms. Spratt did not respond to this issue but, instead, stated that there was discovery she did not complete. RP at 31:9 to 32:1 (Aug. 1, 2014). Ms. Spratt did not need discovery to obtain her own medical records and bills or to establish the reasonableness and necessity of treatment from her own counselor. Second, Ms. Spratt never even attempted to obtain discovery for good cause through a CR 56(f) procedure. See *Spratt*, 180 Wn. App. at 635; CP at 717; see also CP at 730 n.1.

Torgeson v. Hanford, 79 Wash. 56, 58-60, 139 P. 648 (1914).

Further, no medical provider causally connects any alleged need for psychological treatment to the alleged defamatory statements. *See* CP at 154 (¶ 36). Without evidence causally connecting her “treatment” to the allegedly defamatory statements with a reasonable degree of medical certainty, her damages claim fails. *O’Donoghue v. Riggs*, 73 Wn.2d 814, 824-25, 440 P.2d 823 (1968); *see Carlton v. Vancouver Care LLC*, 155 Wn. App. 151, 167, 231 P.3d 1241 (2010); *Xieng v. Peoples Nat. Bank of Wash.*, 63 Wn. App. 572, 582-83, 821 P.2d 520 (1991). Expenses not causally connected to alleged tortious conduct are not a proper element of damages. *Shipman v. Foisy*, 49 Wn.2d 406, 409, 302 P.2d 480 (1956); *see Kennett v. Yates*, 45 Wn.2d 35, 39, 272 P.2d 122 (1954).

Finally, Ms. Spratt’s contention that she has even been “harmed” is belied by her own statements, in which she emphasized how happy she was to have the opportunity to further attack and sue Mr. Toft over their dispute:

While I regret not suing you when I quit, I certainly look forward to experiencing you weave even bigger maliciousness, if only to renew the statute of limitations. You are begging me to defend myself and air your dirty laundry in a court of law. For that, THANK YOU.

CP at 26; *see* CP at 157, 160, 173, 213, 235-36. Despite Ms. Spratt’s claims of emotional damage, this message shows just the opposite. There

is simply no competent evidence of damage. Without clear and convincing proof of this necessary element of her case, Ms. Spratt fails to carry her burden of proving that the Tofts proximately caused any damage to her. *See Camer*, 45 Wn. App. at 43-44. Her claims should also be dismissed for that reason.

In summary, Ms. Spratt has not established by clear and convincing evidence (1) an actionable defamatory statement; (2) falsity; (3) an unprivileged communication; (4) actual malice; and (5) proximately caused damages. Therefore her defamation claims fail.

C. On Appeal, the Tofts Request an Award of Fees and Costs.

The Tofts request that this Court award their attorney fees and costs on appeal pursuant to RCW 4.24.525(6)(a). *See* RAP 18.1(a); *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 423, 161 P.3d 406 (2007) (“[W]here a prevailing party is entitled to attorney fees below, they are entitled to attorney fees if they prevail on appeal.”).

VI. CONCLUSION

We now know that, in 2011, Ms. Spratt was holding a grudge against Mr. Toft for some slight—real or imagined—that must have happened at least six years earlier, if it happened at all. When she heard that Mr. Toft was running for political office, Ms. Spratt seized on his campaign as a pretext to personally and publically retaliate against him for

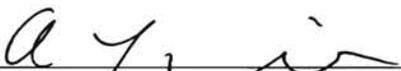
this grudge. She continued her vendetta by suing the Tofts a month before the election. This is just the kind of abuse of the legal system that the Legislature specifically foresaw. Candidates for public office should not be saddled with a requirement to parse words on the campaign trail, for fear of a lawsuit by someone with a six-year-old grudge. The Statute must “be applied and construed liberally to . . . protect[] participants in public controversies from an abusive use of the courts.” Laws of 2010 at 924, ch.118, § 3.

As we have shown, Ms. Spratt has failed to carry her burden under RCW 4.24.525(4)(b) of establishing “by clear and convincing evidence a probability of prevailing on the claim.” Indeed, Ms. Spratt has not met her burden of proof on any element of this lawsuit.

The Tofts respectfully request that this Court vacate the trial court’s orders and reverse and remand with directions to grant the motion and award the Tofts’ fees, costs, and statutory damages.

Respectfully submitted this 30th day of Oct., 2014.

HELSELL FETTERMAN LLP



Andrew J. Kinstler, WSBA #12703
David Gross, WSBA #11053

CERTIFICATE OF SERVICE

I, Kyna Gonzalez, hereby declare and state as follows:

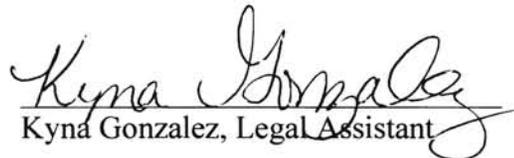
1. I am over the age of majority, competent to testify and make the following statements based upon my own personal knowledge and belief.

2. I am now and at all times herein mentioned employed by the offices of Helsell Fetterman, LLP, 1001 4th Avenue, Suite 4200, Seattle, WA 98154.

3. In the appellate matter of Spratt v. Toft I did on the date listed below, (1) cause to be filed with this Court a Opening Brief of Appellants; and (2) to be delivered via ABC Legal Services to Janet A. Irons, Law Offices of Janet A. Irons, 1400 – 112th Avenue SE, Ste. 100, Bellevue, WA, who is counsel of record for Respondent Kelly A. Spratt.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED: October 30, 2014


Kyna Gonzalez, Legal Assistant