NO. 43394-4-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

GREGORY R. HART,

Respondent,

v.

CITY OF LAKEWOOD, a municipal corporation; CITY OF LAKEWOOD POLICE DEPARTMENT, a municipal corporation; and CITY OF LAKEWOOD PARKS DEPARTMENT, a municipal corporation,

Appellants.

BRIEF OF APPELLANT CITY OF LAKEWOOD

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I. INTRODUCTION

This appeal arises from the Pierce County Superior Court's denial of appellant City of Lakewood's ("the City") motion for summary judgment dismissal of plaintiff Gregory Hart's defamation claim. On or about May 21, 2007, Mr. Hart picked up a City-owned gate from the area adjoining Wards Lake Park in Lakewood, Washington and took it to his home. Lakewood Police subsequently located the gate on plaintiff's property and arrested him for theft. After a full trial, a jury convicted plaintiff of theft in the third degree. Plaintiff appealed this conviction to the Pierce County Superior Court, which vacated his conviction and ordered a new trial.

On retrial, plaintiff was acquitted of the theft charge. Plaintiff then commenced this lawsuit, alleging: (1) malicious prosecution, (2) defamation, (3) intentional infliction of emotional distress, and (4) negligent infliction of emotional distress. After hearing arguments on the City's Motion for Summary Judgment, the trial court dismissed plaintiff's claims for malicious prosecution, intentional infliction of emotional distress and negligent infliction of emotional distress. However, the trial court found a genuine issue of material fact with respect to Mr. Hart's defamation claim, because of a statement made by Lakewood Police

Sergeant John Unfred that was sent to the Fife Police Department. The City moved for reconsideration, but the trial court denied that motion, holding that a genuine issue of material fact existed as to whether Sergeant Unfred's statement was non-actionable opinion or fact. Whether a statement is opinion or fact is a legal issue the court must decide.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by denying the City's Motion for Summary Judgment and subsequent Motion for Reconsideration and allowing plaintiff's defamation claim to proceed to trial. The first issue presented is whether the trial court's holding that there was a genuine issue of material fact on an issue of law was erroneous, where Sergeant Unfred's allegedly defamatory statement is non-actionable opinion.

2. The trial court erred by denying the City's motion for Summary Judgment and subsequent Motion for Reconsideration and allowing plaintiff's defamation claim to proceed to trial. The second issue presented is whether the trial court's holding that there was a genuine issue of material fact supporting plaintiff's defamation claim, where plaintiff did not present any evidence to show that Sergeant Unfred knew, or in the exercise of reasonable care, should have known that his statement was false or would have created a false impression in some material respect, was erroneous.

3. The trial court also erred by denying the City's motions, because the common interest qualified privilege applies and bars plaintiff's defamation claim. The second issue on appeal is whether the trial court erred by denying the City's motions when there is no evidence that Sergeant Unfred knew his statement to be false and recklessly disregarded that knowledge.

III. STATEMENT OF THE CASE

A. Plaintiff's Criminal Prosecution.

On May 21, 2007, plaintiff Gregory Hart physically removed and took possession of a City-owned gate from the area adjoining Wards Lake Park in Lakewood, Washington. (CP 171.) Neighbors observed plaintiff doing this. (CP 174-175; CP 181-182.) The gate was used to block access to a road adjacent to the park. (*Id.*)

A City employee called 911 to report that plaintiff was damaging and dismantling the gate. (CP 174-175.) Lakewood Police Officers Richards and McCrillis responded to the call and, with the assistance of Sergeant Shadow and Officer Sievers, arrested plaintiff for malicious mischief and theft. (CP 170-175.) Plaintiff admitted that he took the gate, and the officers retrieved it from a shed where plaintiff had placed it. (CP 174-175.) A neighbor also reported that plaintiff had been bragging that he broke the gate himself and was planning to take it. (CP 174-175; CP

181-182.)

The City charged plaintiff with one count of malicious mischief in the third degree and one count of theft in the third degree. (CP 159.) On July 3, 2007, the City of Lakewood Municipal Court determined that there was probable cause to support the charges against plaintiff. (*Id.*) During the criminal proceedings, plaintiff moved to dismiss the charges, based, in part, on his assertion that the City possessed insufficient evidence of its ownership of the gate to support its prosecution. (CP 49-63.) The criminal court denied plaintiff's motion and the case proceeded to jury trial. (CP 65-66.) The jury found plaintiff not guilty of malicious mischief in the third degree, but guilty of theft in the third degree. (*Id.*)

Plaintiff appealed his conviction, and the Pierce County Superior Court found that the criminal court erred in not giving a "claim of title" jury instruction. (CP 68-69.) The matter was remanded for trial, and on retrial, plaintiff was acquitted. (CP 7, ¶ 2.24.)

B. The Factual Basis For Plaintiff's Defamation Claim.

On May 25, 2011, plaintiff filed the instant civil lawsuit. His Amended Complaint, filed July 5, 2011, asserts the following causes of action against the City of Lakewood: (1) malicious prosecution; (2) defamation; and (3) intentional and (4) negligent infliction of emotional distress. (CP 1-16.)

Plaintiff's defamation claim is based exclusively upon an officer safety memorandum prepared by Lakewood Sergeant John Unfred. (CP 89-90; CP 203-205; March 2, 2012 RP, pp. 11-12; March 16, 2012 RP, pp. 11-14.) The contents of that memorandum read as follows:

> Subject: Officer Safety Info
>
> I have put a note in the patrol log and submitted a Premise History card to LESA for this individual.
>
> The subject is a Gregory Reuben Hart, W/M, 04/25/48 (photo attached) who lives with his girlfriend at 8802 Gayle. He has a lengthy history of assaultive behavior in general and hostility towards law enforcement. He has a prior arrest for pointing a handgun at a fellow motorist during a road rage incident, and assault 2nd arrest for shooting motorbike riders with steel ball bearings from a sling shot, and most recently was arrested for destroying a metal gate to the Korean Church in the 2500 blk of 88th St. (He apparently is upset at the church for blocking access to Ward's Lake park).
>
> In 2005, he was arrested in a John Op by Special Ops. At the time, he was armed with a handgun (he has a valid CCW) and a knife. Within an hour of his arrest, he bailed out, got his van out of impound and proceeded to drive up and down the area we were working from until we convinced him to leave the area. Sometime later, he sent Ops a video of him confronting a John and prostitute coming out of Ward's Lake park on 88th after completing their

> "Transaction." On the tape, he was complaining about the lack of law enforcement focus on prostitution (6 months after he, himself, was arrested for prostitution).
>
> During his arrest in May, he was taking pictures of the Officers as they contacted him and ultimately arrested him. The most recent contact was this afternoon, when Officers Weekes and Lofland were leaving the Ward's Lake park area and observed Hart flipping them off while he was taking pictures of them in their patrol car.
>
> The bottom line is that Mr. Hart has a strong dislike of law enforcement, ***is very aggressive and irrational***, and is known to carry weapons. He also enjoys documenting scenes with cameras. I don't know if he's trying to bait Officers into something or just paranoid, but please use caution when contacting.
>
> John
>
> Sgt. John Unfred
> Patrol Response Unit

(CP 78) (emphasis added). Plaintiff's defamation claim is based solely on Sergeant Unfred's use of the phrase "***very aggressive and irrational***" in that officer safety memorandum. (CP 71-79; CP 80-94; CP 149-155; CP 401-416.) Plaintiff does not dispute the criminal history outlined in that memorandum. (*Id.*)

In response to the City's motion for summary judgment, plaintiff

presented evidence that Sergeant Unfred forwarded this officer safety memorandum to the City of Fife Police Department, and that plaintiff's domestic partner believes that any suggestion that plaintiff is a danger or threat to law enforcement officers is false. (CP 362-363.) Plaintiff did not provide the trial court with any record upon which to determine when Sergeant Unfred sent the memorandum, why Sergeant Unfred sent the memorandum, or whether Sergeant Unfred had knowledge of the alleged falsity of any of the statements made in the memorandum. Other than the memorandum itself, plaintiff did not create a record demonstrating what, if anything, Sergeant Unfred knew about plaintiff's May 21, 2007 arrest, or Sergeant Unfred's intentions in sending the memorandum.

C. The City's Motions for Summary Judgment Dismissal.

On January 25, 2012, the City moved to dismiss all of plaintiff's claims. (CP 20-33.) Plaintiff opposed the City's motion, but conceded that he did not have a claim for negligent infliction of emotional distress. (CP 94.) Judge John R. Hickman of the Pierce County Superior Court heard oral argument on March 2, 2012, and granted the City's motion in part. (CP 188-189.) Judge Hickman dismissed plaintiff's malicious prosecution and intentional and/or negligent emotional distress claims as a matter of law. (*Id.*) But, Judge Hickman denied the City's motion to dismiss plaintiff's defamation claim. (*Id.*)

On March 5, 2012, the City filed a motion for reconsideration, requesting that the court reconsider its order and grant the City's motion to dismiss plaintiff's defamation claim. (CP 401-411.) The trial court denied the City's motion, refusing to rule as a matter of law whether Sergeant Unfred's allegedly defamatory statements were statements of fact or opinion, and denying application of the common interest qualified privilege. (CP 417-418.) In making his oral ruling, Judge Hickman held, in part:

> The Court: ... So I think that there is a material issue of fact as to whether or not that is opinion ... I just think that the way it was stated, the context of this particular case, I can't say that the officer was stating an opinion as a matter of law. I do recognize that this is close case, but I'm going on the verbiage that was used in the document.
> Ms. Philip: Your Honor, if I may ask a question.
> The Court: I don't promise to answer it, Counsel.
> Ms. Philip: With all due respect, I do believe that the determination as to whether it's opinion as opposed to fact is a question of law to be decided by the Court.
> The Court: Surely.
> Ms. Philip: Is it then your ruling that this is a statement of fact as opposed to a statement of opinion or is it your ruling that the jury is to determine whether it's opinion versus fact?
> The Court: It is my opinion that there is a material issue of fact as to whether or not

that is a statement and/or opinion.

(March 16, 2012 RP, pp. 14-16.) The City now appeals this decision.

D. The Parties' Stipulation Regarding Discretionary Review.

On April 19, 2012, the parties filed a stipulation with the trial court stating that, pursuant to RAP 2.3(b)(4), the portion of the Court's March 2, 2012 Order denying the City's motion for summary judgment dismissal of the defamation claim and the Court's March 16, 2012 Order Denying Defendant's Motion for Reconsideration of that decision involve controlling questions of law as to which there is substantial ground for a difference of opinion and that immediate review of these orders may materially advance the ultimate termination of this litigation. (CP 441-444.) The trial court signed that stipulated order on April 19, 2012, certifying these issues for discretionary review under RAP 2.3(b)(4). (*Id.*) This Court granted discretionary review on April 30, 2012.

IV. ARGUMENT

A. Standards of Review.

Review is appropriate when the decision on summary judgment turned solely on a substantive issue of law. *Univ. Vill. Partners v. King County*, 106 Wn. App. 321, 324, 23 P.3d 1090 (2001); *McGovern v. Smith*, 59 Wn. App. 721, 734-35, n.3., 801 P.2d 250 (1990). Summary judgment is reviewed *de novo*. *Braaten v. Saberhagen Holdings*, 165

Wn.2d 373, 383, 198 P.3d 493 (2008); *Osborn v. Mason County*, 157 Wn.2d 18, 22, 134 P.3d 197 (2006).

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact that the moving party is entitled to judgment as a matter of law." CR 56(c). In a summary judgment proceeding, the moving party bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). "[A] party moving for summary judgment can meet its burden by pointing out to the trial court that the non-moving party lacks sufficient evidence to support its case." *Guile v. Ballard Community Hospital*, 70 Wn. App. 18, 21, 851 P.2d 689 (1993).

Once the movant's initial burden has been met, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. *Rathvon v. Columbia Pac. Airlines*, 30 Wn. App. 193, 201, 633 P.2d 122 (1981). The non-moving party "may not rely on the allegations in the pleadings but must set forth specific facts by affidavit or otherwise that show a genuine issue exists." *Las v. Yellow Front Stores*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992). "Additionally, any such affidavit must be based on personal knowledge admissible at trial

and not merely on conclusory allegations, speculative statements or argumentative assertions." *Id.* Here, plaintiff has not presented any evidence to preclude dismissal of his defamation claim.

B. The Court Should Dismiss Plaintiff's Defamation Claim

In order to establish a claim of defamation, plaintiff must prove that the defendant made a statement that satisfies four essential elements, namely (1) falsity, (2) an unprivileged communication to a third party, (3) fault, and (4) damages. *Bender v. City of Seattle*, 99 Wn.2d 582, 599, 664 P.2d 492 (1983); *see also Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005).

However, "[b]efore the truth or falsity of an allegedly defamatory statement can be assessed, a plaintiff must prove that the words constituted a statement of fact, not an opinion." *Robel v. Roundup Corp.*, 148 Wn.2d 35, 55, 59 P.3d 611 (2002). "Because 'expressions of opinion are not protected under the First Amendment,' they 'are not actionable.'" *Id.*, *citing Camer v. Seattle Post-Intelligencer*, 45 Wn. App. 29, 39, 723 P.2d 1195 (1986) (*citing Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339, 94 S. Ct. 2997 (1974) (observing that "[u]nder the First Amendment there is no such thing as a false idea")). Stated another way, to establish a defamation claim, a plaintiff must initially prove that the offensive statement is "provably false." *Eubanks v. N. Cascades Broad.*, 115 Wn. App. 113,

120, 61 P.3d 368 (2003).

"Whether the allegedly defamatory words were intended as a statement of fact or an expression of opinion is a threshold ***question of law for the court.***" *Robel*, 148 Wn.2d at 55 (emphasis added).[1] In determining whether statements are non-actionable opinion, courts look to the totality of the circumstances and should consider "'(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.'" *Robel*, 148 Wn.2d at 56, *citing Dunlap v. Wayne*, 105 Wn.2d 529, 539, 716 P.2d 842 (1986).

1. Sergeant Unfred's Statements Are Non-Actionable Opinion.

Plaintiff claims that Sergeant Unfred's characterization of him as "very aggressive and irrational" is defamatory. The words "very," "aggressive," and "irrational" are all adjectives that necessarily convey Sergeant Unfred's opinion of plaintiff. They are not "provably false." The subjective, conclusory nature of these words is demonstrated when one considers the proof that would be offered at a trial on such a claim. Plaintiff

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[1] Judge Hickman erred by ruling that there was a material issue of *fact* as to whether Sergeant Unfred's statement was one of fact or opinion. Under *Robel* and *Benjamin v. Cowles Pub'g Co.*, 37 Wn. App. 916, 922, 684 P.2d 739 (1984), the court, not the jury, must decide the threshold legal issue of whether a communication is one of fact or opinion.

would have to present testimony to prove, by a preponderance of the evidence, that he is not aggressive or irrational. The determination of these issues will depend upon the juror's subjective ***opinions*** of plaintiff after hearing all the evidence. There is no factual component to such a determination.

Additionally, looking to the medium and context in which the statement is published, as well as the audience to whom the information was published, it is undisputed that Sergeant Unfred was informing other law enforcement officers of his own subjective opinion of plaintiff for purposes of officer safety. While officers may assume that the statements reciting plaintiff's criminal history are intended to convey the truth, those officers would also know that Sergeant Unfred's characterizations of plaintiff as "aggressive" and "irrational" are Sergeant Unfred's own opinion of plaintiff based upon the information relayed. Indeed, plaintiff has not presented any evidence that any other portion of Sergeant Unfred's communication is inaccurate or false.

Law enforcement officers routinely make their own judgments about individuals when interacting with the public. The recipients of the memorandum would know that Sergeant Unfred was offering his own opinion in this context. Finally, Sergeant Unfred's opinion statement does not imply undisclosed defamatory facts. To the contrary, Sergeant Unfred

disclosed the facts upon which he based his conclusion, and each individual law enforcement officer could have reached his or her own conclusion on the same or any additional information.

In *Robel*, the plaintiff filed an L&I claim with her employer after sustaining a workplace injury. *Robel*, 148 Wn.2d at 40. She was assigned to light duty, and fellow employees called her, among other things, a "snitch," "squealer," "liar," and "idiot." *Id.* at 55. The court concluded that those words could not carry defamatory meaning, because they were not intended to be taken literally as statements of fact. *Id.* at 56. Similarly, in *Dunlap*, the court concluded that a letter containing opposing counsel's statement to the plaintiff's attorney that the plaintiff had been soliciting a kickback was also non-actionable opinion. *Dunlap*, 105 Wn.2d at 540-41. Statements of opinion and exaggeration would be expected in the context of attorney-to-attorney communications, those receiving the letter would have expected opinion statements, and the statement was published in circumstances in which the audience knew of the facts underlying the opinion. *Id.* at 541. As in *Dunlap*, Sergeant Unfred's subjective description of plaintiff is simply his opinion and cannot, by definition, be defamatory. The Court should dismiss plaintiff's defamation claim because it is based on non-actionable opinion.

2. Plaintiff Cannot Establish Fault.

Additionally, plaintiff cannot satisfy the requisite fault element of

his defamation claim. The degree of fault required by private figures alleging defamation is negligence. *Mark v. Seattle Times*, 96 Wn.2d 473, 483, 635 P.2d 1081 (1981). Therefore, plaintiff must show that Sergeant Unfred knew, or in the exercise of reasonable care, should have known that the statement was false or would have created a false impression in some material respect. *Id.* For the reasons described above, the record is devoid of any evidence to support such an allegation. Dismissal is therefore appropriate due to the lack of this required showing.

3. The Common Interest Qualified Privilege Bars Plaintiff's Claims.

Moving past plaintiff's inability to satisfy the requisite elements of a defamation claim, dismissal is also appropriate under the "common interest qualified privilege." The common interest qualified privilege 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). Its purpose is to allow people to share information and learn from associates what is being done, even if the recipient is not personally concerned with the information. *Id.* Under the Restatement (Second) of Torts, this qualified privilege is available for persons involved in the same organizations, partnerships, associations or enterprises who are communicating on matters of common interest. *Id.* at

958. "When a qualified privilege applies, a plaintiff cannot establish a prima facie case of defamation ***unless*** the plaintiff can show by clear and convincing evidence the declarant had knowledge of the statement's falsity ***and*** he or she ***recklessly disregarded*** this knowledge." *Woody v. Stapp*, 146 Wn. App. 16, 21, 189 P.3d 807 (2008) (emphasis added).

Officer Unfred's communications are protected by the common interest qualified privilege, which applies to police officers making statements or communications in the performance of their official duties. *Bender*, 99 Wn.2d at 600-01. Therefore, plaintiff's defamation claim fails, because there is no evidence in the record upon which a reasonable juror could conclude that Sergeant Unfred (1) knew his statement was false and (2) recklessly disregarded this knowledge. The only evidence in the record bearing on plaintiff's defamation claim is a copy of Sergeant Unfred's safety memorandum and Ms. Kilponen's testimony that it was sent to the City of Fife Police Department. There is no evidence to support plaintiff's self-serving allegation that Sergeant Unfred was being untruthful.

Moreover, public policy supports application of the common interest qualified privilege. The ability to exchange information about members of the public is not only central to effective law enforcement, but is an integral component of securing officer safety. Law enforcement officers cannot be subject to civil liability when they coordinate in good faith to protect

themselves and the public. Officer Unfred's communications fall squarely within the ambit of this privilege. Plaintiff has not presented any evidence to overcome the common interest qualified privilege, and the Court should therefore dismiss his claim with prejudice as a matter of law.

V. CONCLUSION

Plaintiff has failed to produce any evidence to support his defamation claim. There is no evidence of any specific statements that are provably false. The only statements at issue here are Sergeant Unfred's opinions, which are not actionable. Further, plaintiff has not met the required element of fault, as there is no evidence that Sergeant Unfred knew or should have known the falsity of any of the information he provided to the Fife Police Department.

Additionally, the common interest qualified privilege applies and bars plaintiff's defamation claim. Sergeant Unfred provided officer safety information to the Fife Police Department in the course of his duties as a police officer. His actions therefore fall under the umbrella of the privilege. There is no evidence that Sergeant Unfred's opinion was false, much less that he knew it was false. Accordingly, plaintiff does not meet his burden of proof. The Court should dismiss plaintiff's defamation claim with prejudice as a matter of law.

Respectfully submitted this 10th day of September, 2012.

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By 

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COURT OF APPEALS
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DIVISION II

GREGORY R. HART, Respondent/Cross-Appellant, v. CITY OF LAKEWOOD, a municipal corporation; CITY OF LAKEWOOD POLICE DEPARTMENT, a municipal corporation; and CITY OF LAKEWOOD PARKS DEPARTMENT, a municipal corporation, Appellants/Cross-Respondents.	No. 43304-4-II Superior Court No. 11-2-09538-5 DECLARATION OF SERVICE

I, MAUREEN E. PATTSNER, hereby declare:

That I am a citizen of the United States and the State of Washington, living and residing in King County in said State; that I am over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness therein; that I caused a copy of the BRIEF OF APPELLANT CITY OF LAKEWOOD to be delivered on September 10, 2012 to the following in the manner described:

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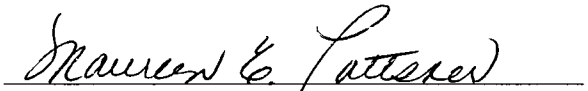
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington this 10th day of September, 2012.



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