No. 89914-2

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

GREGORY R. HART,

Respondent/Cross-Appellant,

vs.

CITY OF LAKEWOOD, a municipal corporation

Appellant/Cross-Respondent

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

Defendants

APPEAL FROM DIVISION II
OF THE COURT OF APPEALS
#43304-4-II

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Gregory R. Hart, respondent/cross-appellant respectfully requests that this court accept review of the Court of Appeals decision in case number 43304-4-II terminating review designated in Part II of this petition.

II. COURT OF APPEALS DECISION

Mr. Hart respectfully requests that this court review the Court of Appeals decision, affirming the trial court's decision granting summary judgment dismissing Mr. Hart's malicious prosecution and intentional infliction of emotional distress claims and reversing the trial court's denial of the City's summary judgment motion regarding Mr. Hart's defamation claim.

A copy of the decision from the Court of Appeals, Division II, terminating review which was filed on January 14, 2014 is attached as Exhibit "A".

III. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in affirming the trial court's decision dismissing Mr. Hart's malicious prosecution claim?

2. Did the Court of Appeals err in affirming the trial court's decision dismissing Mr. Hart's intentional infliction of emotional distress claim?

3. Did the Court of Appeals err in reversing the trial court's decision denying the City's summary judgment motion to dismiss Mr. Hart's defamation claim?

IV. STATEMENT OF THE CASE

A. *Procedural History*

On or about May 25, 2011, Mr. Hart filed a complaint for damages for malicious prosecution, defamation and intentional and/or negligent infliction of emotional distress for events that occurred on May 21, 2007. CP 219-230. Mr. Hart's complaint surrounded his arrest by Lakewood police officers for alleged theft and malicious mischief of a dismantled gate Mr. Hart found along the side of the road. Id.

On January 25, 2012, the City filed a motion for summary judgment to dismiss all claims. CP 20-33. On March 2, 2012, the court granted defendants' summary judgment motion with respect to the malicious prosecution and intentional infliction of emotional distress claims and negligent infliction of emotional distress claims. On March 5, 2012, the defense moved the court to reconsider its denial of its motion to dismiss the defamation claim, CP 190-200, which the court denied. CP 206-207. On April 19, 2012, the trial court ordered certification for discretionary review of the court's summary judgment orders and stayed further trial court proceedings pending this Court's review. CP 441-444.

On January 14, 2014, the Court of Appeals affirmed the trial court's summary judgment orders dismissing the malicious prosecution and intentional infliction of emotional distress claims, but reversed the

trial court's denial of the City's summary judgment motion to dismiss the defamation claim and dismissed that claim. This petition follows.

B. ***Facts***

Gregory R. Hart, Respondent herein, is an entrepreneur, businessman and inventor who, for the past 40 years, has been involved in a variety of businesses inventing products that have been used worldwide. RP 345.

On or about May 21, 2007 at mid-morning Mr. Hart picked up an abandoned piece of gate lying along a road bordering Wards Lake Park in Lakewood, Washington. At that time, Mr. Hart had been a volunteer steward of Wards Lake Park for many years. On various occasions Mr. Hart noticed the gate improperly placed across an access road leading to the park as well as discarded in several areas around and in the park. Other individuals who also frequented the park witnessed the gate in various locations in and around the park. RP 346.

On May 21, 2007, Mr. Hart learned that the gate was outside the park. He removed the gate because it was a hazard and he didn't want any person or animal to be injured if they happened to walk into the gate that lay obscured by the roadside grass. Mr. Hart placed the gate in the back of his utility trailer and drove it to Dianna Kilponen's home, which was a short distance down the road. Mr. Hart subsequently removed the gate and placed it alongside the shed inside of Ms. Kilponen's fenced yard. RP 346.

Sometime later, at about 12:30 p.m. that same day, Mr. Hart was awakened by Lakewood Police officers who were yelling and pounding on Ms. Kilponen's front door. When Mr. Hart opened the door, he was questioned about the gate. When he did not respond to the Lakewood Police officers' questions, they threatened to obtain a search warrant to search Ms. Kilponen's home. RP 346.

A short time later, the Lakewood Police officers re-contacted Mr. Hart, arrested him, handcuffed him, read him his Miranda rights, and thereafter questioned him. Mr. Hart explained to the officers why he moved the abandoned gate and that he planned on disposing of it. Mr. Hart then gave permission to Detective Dennis McCrillis, formerly of the Lakewood Police Department, to remove the gate from behind the residence, and the gate was taken into police custody as evidence. RP 347.

Mr. Hart was then booked into the Pierce County Jail on one count of felony theft and one count of felony malicious mischief. After Mr. Hart was bailed out of jail, he learned that the Pierce County Prosecutor's Office declined to file any criminal charges against him. RP 347.

Approximately one month later, on or about June 19, 2007, the City of Lakewood charged him with one count of malicious mischief in the third degree and one count of theft in the third degree for the events that occurred on or about May 21, 2007. The City alleged that Mr. Hart knocked the gate down and removed it from its location. The Lakewood

Police officers had no evidence, however, that Mr. Hart had damaged the gate or that he was in the area when the gate was damaged. RP 347.

Mr. Hart denied the allegations for both charges. RP 347. Further, the City had no evidence as to who owned the gate in question, and the City did not own the gate. RP 347-48.

Significantly, at the time of trial, the City of Lakewood claimed that the gate section was City property, yet provided no evidence that it purchased the gate or placed the gate within its inventory of City property. Rather, the City of Lakewood, through its employee, Mary Dodsworth, asserted that because the City claimed it as their property, the gate section became City property. RP 348.

On March 19, 2008, Mr. Hart went to trial on the two criminal charges. On March 26, 2008, a jury found Mr. Hart not guilty of the malicious mischief in the third degree charge, but guilty on the third degree theft charge. RP 348.

On appeal, Mr. Hart's conviction was reversed because the Lakewood Municipal Court judge failed to properly instruct the jury. Pierce County Superior Court Judge Lisa Worswick reversed Mr. Hart's third degree theft conviction and remanded his case for a new trial. RP 349.

Rather than dismiss the third degree theft charge because it had no evidence that the City owned the property at issue, the City proceeded with another trial against Mr. Hart. As such, Mr. Hart returned to trial on

March 22, 2010 to address the third degree theft charge. The jury acquitted Mr. Hart of the third degree theft charge on March 23, 2010. RP 349.

Even though the City of Lakewood had knowledge of its lack of evidence of ownership of the gate, it still went forward, vindictively and maliciously, with Mr. Hart's prosecution when, in good faith, it had no evidence to support the prosecution. As such, the City's allegations that Mr. Hart maliciously damaged the gate in question and then subsequently stole said gate were false, without merit, and frivolous. RP 349.

The City's malicious prosecution of Mr. Hart caused him mental and emotional pain and suffering and his relationship with his domestic partner, Dianna Kilponen, was also damaged by the City's conduct. Furthermore, Mr. Hart's business activities were damaged as a result of the conduct of the employees of defendants City of Lakewood, the Lakewood Police Department and the Lakewood Parks Department. RP 349-50.

During the pendency of the above-referenced prosecution, defendants transmitted a photograph of Mr. Hart to other law enforcement officers and sent statements stating that he was extremely dangerous and likely to cause harm to law enforcement officers. Police also disseminated "Officer Safety Info" about Mr. Hart – accusing him of having a history of "assaultive behavior" and "hostility towards law enforcement" as well as being "very aggressive and irrational." See BOA at 5-6. Importantly, it is clear from this memo that the author, Sgt. John Unfred had had personal

contact with Mr. Hart and appeared to not appreciate that Mr. Hart legally armed himself or that he would film the actions of police officers. Id.

As stated above, Mr. Hart was informed of the actions of police by his domestic partner, Dianna Kilponen, who worked for the Fife Police Department at the time. RP 350. In her declaration – that was included in Mr. Hart's response to Appellant's motion for summary judgment, Ms. Kilponen discussed the reaction by police in Fife upon receiving the memo – specifically how the "nutcase" who lives on her street was causing problems in Lakewood. See CP at 147. She also noted that Sgt. Unfred's memo "was not sent in the usual format for officer notes and information, of which she [is/was] familiar."

The dissemination of the false and defamatory statements caused harm to Mr. Hart's professional reputation. See CP at 6-7. Specifically, Mr. Hart's longtime friend, mentor and business advisor, Bill Gates Sr., cut-ties with Mr. Hart out of fear that his name – and his son's – could be damaged if associated with Mr. Hart's. Id. This action also caused Mr. Hart economic damages - in addition to pain and suffering - and also injured his relationship with his domestic partner. RP 350-51.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Mr. Hart respectfully requests that this Court accept review of this case as it involves an issue of substantial public interest that should be determined by the Supreme Court. Importantly, the Court of Appeal's decision improperly expanded this Court's decision in Hanson v. City of

Snohomish, 121 Wn.2d 552, 852 P.2d 295 (1993). The Court of Appeals held that once the municipal court determined probable cause existed, no further inquiry is allowed. Hansen does not support such holding. Significantly, Mr. Hart's case presents the scenario where the municipal court found probable cause based upon an assumption, rather than fact. Once the facts were revealed, probable cause no longer existed. As such, this Court should accept review.

VI. ARGUMENT

This court is familiar with the summary judgment standards and they won't be repeated here. Importantly, however, when deciding summary judgment motions, a trial court is required to view all evidence, draw all reasonable inferences in favor of the nonmoving party, and deny the motion if the evidence and inferences create any question of material fact. DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 140, 960 P.2d 919 (1998); Scott v. Pacific West Mountain Resort, 119 Wn.2d 484, 487, 834 P.2d 6 (1992).

A. The Court of Appeal's Decision Failed to Consider the Facts Surrounding the Municipal Court's Probable Cause Determination.

To prove a prima facie case of malicious prosecution, a plaintiff must show the following:

> (1) That the prosecution claimed to have been malicious was instituted or continued by the defendant; (2) that there was want of probable cause for the institution or continuation of the prosecution; (3) that the proceedings were instituted or continued through malice; (4) that the proceedings terminated on the merits in favor of the plaintiff, or were abandoned; and

(5) that the plaintiff suffered injury or damage as a result of the prosecution.

Hanson v. City of Snohomish, 121 Wn.2d 552, 558, 852 P.2d 295 (1993).

Want of probable cause is the heart of a malicious prosecution claim as the existence of probable cause relieves a defendant from liability for malicious prosecution. McBride v. Walla Walla County, 95 Wn.App. 33, 975 P.2d 1029 (1999). Probable cause is measured by an objective standard, and not by the subjective determination of a prosecutor. Bender v. Seattle, 99 Wn.2d 582, 664 P.2d 492 (1983). A prima facie case of want of probable cause is established by proof that the criminal proceedings were dismissed or terminated in favor of the party bringing the malicious prosecution action. Peasley v. Puget Sound Tug & Barge Co., 13 Wn.2d 485, 125 P.2d 681 (1942).

A conviction of the plaintiff conclusively establishes the existence of probable cause and defeats an action for malicious prosecution unless the conviction was obtained by fraud, perjury or other corrupt means. Brin v. Stutzman, 89 Wn.App. 809, 951 P.2d 291 (1998). A conviction, even though later reversed, is conclusive evidence of probable cause unless the ground for reversal was absence of probable cause. Fondren v. Klickitat County, 79 Wn.App. 850, 905 P.2d 928 (1995); Hanson v. City of Snohomish, 121 Wn.2d 552, 852 P.2d 295 (1993).

When the facts are not disputed, the question as to whether there was probable cause is a question of law for the judge. Restatement (Second) of Torts § 673, comments on clauses (b) and (c). However, "[a]

corollary to this rule is that if any issue of fact exists, under all the evidence, as to whether or not the prosecuting witness did fully and truthfully communicate to the prosecuting attorney, or to his own legal counsel, all the facts and circumstances within his knowledge, then such issue of fact must be submitted to the jury with proper instructions from the court as to what will constitute probable cause, and the existence or nonexistence of probable cause must then be determined by the jury. Id. at 501.

Here, the trial court erred by granting the City's summary judgment motion in two primary areas. First, the City presented no evidence that Mr. Hart was not subjected to malicious prosecution relating to the malicious mischief charge for which he was acquitted in the first trial. Because he was found not guilty of the malicious mischief charge, he may still proceed in this case based upon the malicious prosecution of that frivolous charge. As such, because the City prosecuted Mr. Hart for malicious mischief for "destroying" the gate without any evidence of such action, the malicious prosecution claim for that criminal charge should be allowed to succeed.

Second and even more fundamental, material issues of fact exist regarding the ownership of the gate or whether it was a discarded piece of trash. In discovery requests submitted to the City, Plaintiff sought "copies of all documents that establish the City of Lakewood's ownership of the gate sections that Plaintiff is accused of maliciously damaging and

stealing." RP 310, 312, 314. The City of Lakewood admitted that "No documents establishing the City's ownership of the subject gate are available." RP 314. Subsequently, the City of Lakewood supplemented its response by providing a copy of invoice for installation of a gate. RP 315, 318. The City, however, never produced any evidence that it had any legal ownership of the gate before the City of Lakewood filed the criminal complaint against Mr. Hart. In order to support a finding of probable cause, it would be a requirement that the City could establish ownership of the item it alleged Mr. Hart damaged and stole. Because it had no evidence to suggest such a finding, probable cause is lacking.

Mr. Hart alleged that the City prosecuted him without any evidence it owned the property it alleged was damaged and stolen, and that such allegations were false. CP 1-12. As such, the City's charge against Mr. Hart was based on fraud or other corrupt means. See Brin, supra.

The Court of Appeal's decision summarily dismisses Mr. Hart's malicious prosecution claim because it assumed, without any factual support, that the municipal court found probable cause based upon facts. COA dec. at 9. No facts, however, support such finding. Simply stated, the municipal court's probable cause finding was based on assumptions of ownership, not facts. Once facts are considered, probable cause doesn't exist.

Because the entirety of the defendants' prosecution of Mr. Hart was based on its alleged ownership of a gate it had no legal ownership of, significant issues of material fact exist and the trial court erred by granting the City's summary judgment motion of the malicious prosecution claim.

B. Because Probable Cause was Lacking, Mr. Hart sets forth an Intentional Infliction of Emotional Distress Claim.

The evidence presented to the trial court sufficiently established a claim for intentional infliction of emotional distress.

To make a prima facie case of the intentional infliction of emotional distress, the plaintiff must show "(1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) severe emotional distress on the part of the plaintiff." Reid v. Pierce County, 136 Wn.2d 195, 202, 961 P.2d 333 (1998). The defendant's conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Id. at 202.

The City's conduct of charging Mr. Hart with two criminal charges, subjecting him to two trials, and never producing any evidence that it owned the gate, was outrageous. To suggest otherwise lacks credulity. The trial court should have determined that subjecting Mr. Hart to an unwarranted criminal prosecution was sufficiently extreme and outrageous to warrant a jury determination. The defendants' failure to acknowledge that the City did not own the property in question created the outrage cause of action. For a government defendant to suggest otherwise

is outrageous in and of itself. Our state and federal constitutions were constructed by leaders pledging a commitment to the principles of "limited government" and "separation of powers." Concluding that wrongful prosecutions grounded in malice do not rise to the level of "outrageous" is preposterous in the United States of America.

The Court of Appeal's decision affirming the trial court necessarily relies on a finding of probable cause by the municipal court judge. Given that material facts exist as to whether the City owned the property at issue, the municipal court's probable cause determination was improper.

Here, accusing a man of a crime he didn't commit, and then, in the absence of any proof of the major element of the charge, pursuing two criminal trials against him constitutes "extreme and outrageous conduct." As such, Mr. Hart established a prima facie case of intentional infliction of emotional distress.

C. The Court of Appeals Erred when it Reversed the Trial Court's Order Denying Dismissal of Petitioner's Defamation Claim.

To show a prima facie case of defamation, the plaintiff must show falsity, an unprivileged communication, fault, and damages. Mohr v. Grant, 153 Wn.2d 812, 822, 108 P.3d 768 (2005). The statement, in addition to being false, must also be defamatory, in that it must "harm the reputation of another as to lower him [or her] in the estimation of the community or to deter third persons from dealing with him [or her]." Right-Price Recreation LLC v. Connells Prairie Cnty. Council, 146 Wn.2d

370, 382, 46 P.3d 789 (2002). The element of "unprivileged communication" relates to communications between family members that are made without malice, in good faith, and in an honest belief of their truth upon reasonable grounds. Twelker v. Shannon & Wilson Inc., 88 Wn.2d 473, 478, 564 P.2d 1131 (1977). Negligence is the standard a private figure must establish to show fault. See Mark v. Seattle Times, 96 Wn.2d 473, 483, 635 P.2d 1081 (1981).

D. Material Issues of Facts Exist as to the Issue of Fault.

The appellate court's decision somehow equates arrests with convictions when it found support in Sgt. Unfred's characterization of Mr. Hart as "very aggressive and irrational." Had the City shown Mr. Hart had ever been convicted after any arrest for this supposed conduct, then the issue of fault might be established, but it can't.

Mr. Hart must only meet the nominal summary judgment threshold of showing any material fact(s) suggesting that the Appellant's conduct of Appellants was negligent. In Mr. Hart's declaration, he affirmatively stated that the statement that he "was dangerous and a threat to law enforcement was patently false." CP 134. As such, the Court of Appeal's determination that Mr. Hart didn't cite to any evidence of the falsity of Sgt. Unfred's claim is unfounded. COA dec. at 5. Mr. Hart's statement is entitled to the same weight as Sgt. Unfred's. Because material facts exist as to whether Sgt. Unfred's memo, or any of the other statements by the City of Lakewood was made negligently, summary judgment was appropriately denied.

E. Material Issues of Fact Exist Suggesting the Police Abused the Common Interest Privilege.

Whether a statement is privileged is a question of law to be decided by the court. Liberty Bank of Seattle, Inc. v. Henderson, 75 Wash.App. 546, 878 P.2d 1259 (1994). As it relates to qualified privileges, the speaker's purpose and manner of publication may be relevant to the exercise of the privilege. Wood v. Battle Ground School Dist., 107 Wash.App. 550, 27 P.3d 1208 (2001). A qualified or conditional privilege acts to defeat the initial presumption of liability raised by the publication of defamatory statements. Alpine Industries Computers, Inc. v. Cowles Pub. Co., 114 Wash.App. 371, 57 P.3d 1178 (2002).

Qualified or conditional privileges may be lost if the plaintiff can show that the privilege has been abused. Id. In such case, the defendant must show the challenged communication falls within the scope of the privilege and then the burden shifts to the plaintiff to prove any abuse of that privilege. Id. A person alleging abuse of a qualified or conditional privilege must show actual malice by clear and convincing evidence. Right-Price Recreation, L.L.C v. Connells Prairie Community Council, 146 Wash. 2d 370, 46 P.3d 789 (2002), *cert. denied*, 540 U.S. 1149, 124 S.Ct. 1147 (2004). A plaintiff can show actual malice by showing the declarant's knowledge of the falsity, the declarant's reckless disregard as to the falsity of the statement, or that the declarant in fact entertained serious doubts as to the statement's truth. Wood v. Battle Ground School Dist., 107 Wash.App. 550, 27 P.3d 1208 (2001).

Finally, an abuse of a qualified privilege can occur if the defendant acted without fair and impartial investigation or without reasonable grounds for believing in the truth of the defamatory statement. Dunlap v. Wayne, 105 Wash.2d 529, 716 P.2d 842 (1986); Turngren v. King County, 104 Wash.2d 293, 705 P.2d 258 (1985).

A review of Sgt. Unfred's memo labeling Mr. Hart as "very aggressive and irrational" suggests it went far beyond the scope of what constitutes reasonable police conduct. First, it drew factual conclusions about Mr. Hart's temperament that were not supported by any evidence. Simply put, the memo cited arrests of Mr. Hart, but was silent as to whether Mr. Hart had ever been convicted of any crimes. Moreover, the memo suggested a personal animus toward Mr. Hart for being a citizen who (a) exercised his Second Amendment rights by legally arming himself and, (b) exercised his First Amendment rights by "documenting scenes with cameras." As set forth in Dunlap and Turngren, a defendant abuses and subsequently loses his/her qualified privilege when acting without engaging in fair and impartial investigation. The unique circumstances in this case suggest that is exactly what happened to Mr. Hart.

Second, where the memo was improperly disseminated such that non-police personnel such as Ms. Kilponen and even Mr. Hart's business partner, Bill Gates Sr. became aware of the allegations, the privilege was abused and lost. As noted above, the manner in which the communication is published is relevant to whether the privilege is lost. Appellants in this

case should not be permitted to argue that the memo was necessary for police protection when it was recklessly disseminated.

Third, as Ms. Kilponen pointed out in her declaration, the memo "was not sent in the usual format for officer notes and information, of which she [was/is] familiar." The inference from this statement is that the memo was not sent in the course of routine police-work but part of a personal attack on Mr. Hart. This is supported by statements by Fife Police officers – made after reading the memo – that Mr. Hart was/is a "nutcase." See CP at 147-148. As such, it is clear that the Sgt. Unfred's memo set forth gratuitous statements with the clear intent of disparaging Mr. Hart's character. Accordingly, this court should affirm the trial court's denial of summary judgment.

VII. CONCLUSION

Based upon the aforementioned, Mr. Hart urges this Court to grant his petition for review as he raises issues of substantial public interest that should be reviewed by the Supreme Court.

DATED this 13th day of February, 2014.

HESTER LAW GROUP, INC. P.S.
Attorneys for Respondent/Cross-Appellant Hart

BRETT A. PURTZER
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CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the petition for review to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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Signed at Tacoma, Washington, this 13th day of February, 2014.

LEE ANN MATHEWS

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GREGORY R. HART, Respondent/Cross-Appellant, v. CITY OF LAKEWOOD, a municipal corporation, Appellant/Cross-Respondent, CITY OF LAKEWOOD POLICE DEPARTMENT, a municipal corporation; and CITY OF LAKEWOOD PARKS DEPARTMENT, a municipal corporation, Defendants.	No. 43304-4-II UNPUBLISHED OPINION

JOHANSON, A.C.J. — The city of Lakewood (City) appeals from the trial court's order denying summary judgment on Gregory R. Hart's defamation claim against the City. Hart cross appeals, claiming that the trial court erred in granting summary judgment to the City on Hart's malicious prosecution and intentional infliction of emotional distress claims against the City. We reverse the trial court's denial of summary judgment on the defamation claim because Hart failed to establish a prima facie defamation case against the City. We affirm the trial court's dismissal of Hart's malicious prosecution and intentional infliction of emotional distress claims because Hart also failed to establish prima facie cases on those claims.

FACTS

In May 2007, Hart removed and took possession of a City-owned gate from an area near a Lakewood park. After a City employee reported that Hart was damaging and dismantling the gate, Lakewood police officers responded and arrested Hart for malicious mischief and theft.

The City charged Hart with one count of third degree malicious mischief and one count of third degree theft. Lakewood Municipal Court determined that the City produced sufficient evidence of probable cause to support the charges. A jury found Hart not guilty of third degree malicious mischief and guilty of third degree theft. Hart appealed his conviction to the superior court, which found that the municipal trial court had erred in not offering a "claim of title" jury instruction relating to the gate's ownership. Clerk's Papers (CP) at 69. Accordingly, the superior court remanded the matter to the municipal court for retrial, which resulted in a jury acquitting Hart of the third degree theft.

Following his acquittal, Hart sued the City in superior court, claiming (1) malicious prosecution, (2) defamation, and (3) intentional and negligent infliction of emotional distress. Hart asserted that as a result of his prosecution related to the gate incident, he suffered harm to his professional reputation and his relationship with his domestic partner, Dianna Kilponen.

Hart based his defamation claim on an undated "Officer Safety Info" memorandum about Hart that Lakewood Police Sergeant John Unfred circulated to the Fife Police Department's Investigations Division sometime after Hart's gate incident. CP at 78. Kilponen worked for the Fife Police Department and read the memo. It detailed Hart's substantial criminal history and his interactions with law enforcement personnel. The one-page memo concluded,

> 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 [o]fficers into something or just paranoid, but please use caution when contacting.

CP at 78. While Hart did not dispute the criminal history that Sergeant Unfred chronicled in the memo, he claimed the phrase "very aggressive and irrational" was defamatory.

The City moved to dismiss Hart's claims on summary judgment. Hart conceded that he had no claim for negligent infliction of emotional distress, but he opposed the City's motion relating to the remaining claims. The trial court granted the City's motion in part, dismissing Hart's malicious prosecution, and intentional and negligent infliction of emotional distress claims as a matter of law, but it denied the City's motion to dismiss the defamation claim.

The City then asked the trial court to reconsider its order regarding Hart's defamation claim. The trial court denied the reconsideration motion, declining to rule as a matter of law whether Sergeant Unfred's characterization of Hart as "very aggressive and irrational" was a factual statement or opinion.

Following these proceedings at the trial court, the parties stipulated to stay their litigation pending outcome of their appeals. The City appeals the trial court's denial of its summary judgment and reconsideration motions that would have dismissed Hart's defamation claim. Hart cross appeals, claiming that the trial court erred in granting summary judgment to the City on his malicious prosecution and intentional infliction of emotional distress claims. We granted discretionary review.

ANALYSIS

We review summary judgment orders de novo, viewing the facts in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). Trial courts properly grant summary judgment where the pleadings

and affidavits show no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). When reviewing an order on summary judgment, we consider solely the issues and evidence the parties called to the trial court's attention on the summary judgment motion. RAP 9.12.

DEFAMATION

The City claims that the trial court erred when it did not grant summary judgment to dismiss Hart's defamation claim. Even assuming, without deciding, that Sergeant Unfred's words constituted an actionable factual statement and not an opinion, Hart failed to establish that the City knew the alleged defamatory statement was false; and the common interest qualified privilege applies to bar Hart's defamation claim.[1]

A defamation plaintiff must establish four essential elements to recover for a defamation claim: (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).

A. FAULT

The City asserts that the trial court should have dismissed Hart's defamation claim on summary judgment because he failed to establish the City's fault by presenting evidence that Sergeant Unfred knew or should have known the alleged defamatory statement was false. The City is correct. 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), *cert. denied*, 457 U.S. 1124 (1982). Thus, a plaintiff must show that the person making a defamatory statement knew, or in

[1] Because we conclude that Hart fails to establish fault or that the common interest qualified privilege does not apply, we decline to address whether Sergeant Unfred's communication was a statement of fact or opinion, or whether the communication was false.

the exercise of reasonable care, should have known that the statement was false or would have created a false impression in some material respect. *Mark*, 96 Wn.2d at 483 (quoting *Taskett v. KING Broadcasting Corp.*, 86 Wn.2d 439, 445, 546 P.2d 81 (1976)).

Here, the City claims that "the record is devoid of any evidence" to show that Sergeant Unfred knew or should have known that his characterization of Hart as "very aggressive and irrational" was false or created a false impression. Br. of Appellant at 15. To rebut this argument, Hart states that he "has cited numerous facts and statements within the record showing that there is simply no evidence that he is dangerous or a threat to law enforcement."[2] Br. of Resp't/Cross-Appellant at 20. But in his brief, Hart does not cite any facts or statements to support his argument or demonstrate that he was not "very aggressive and irrational."

The record is devoid of any evidence that would have advised Sergeant Unfred or anyone else that characterizing Hart as "very aggressive and irrational" was false. To the contrary, the uncontested facts that Sergeant Unfred cites in his memo prior to characterizing Hart as "very aggressive and irrational" appear consistent with his characterization. For example, Sergeant Unfred describes Hart's prior arrest for pointing a handgun at a motorist during a road rage incident, as well as an arrest for shooting motorbike riders with steel ball bearings from a sling shot. The memo also recounts Hart's arrest relating to prostitution; at the time of arrest, he was carrying a firearm and knife, and within an hour of his arrest, he bailed out and returned in his van, driving back and forth in the area where police were continuing to conduct a prostitution sting operation. Six months after his prostitution-related arrest, Hart sent police a video of him confronting a prostitute and client, and the video showed Hart complaining about law

[2] Hart does not claim that the City defamed him by saying he is dangerous or a threat to law enforcement.

enforcement's lack of focus on prostitution. Finally, Sergeant Unfred's memo detailed that during a more recent arrest, Hart took pictures of officers as they contacted him and that on the afternoon that Sergeant Unfred wrote the memo, officers observed Hart flipping them off and photographing them as they patrolled.

Based on this evidence of Hart's road rage aggression and his confrontational attitude, coupled with his criticism of police for not targeting prostitution just months after he was arrested in a prostitution-related matter, one may reasonably conclude that Hart is "very aggressive and irrational." Because Hart cites to no evidence in the record that rebuts this characterization, he does not 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. Thus, Hart failed to establish a prima facie defamation case, and the trial court erred in not dismissing this claim on summary judgment. *See Mark*, 96 Wn.2d at 483.

B. QUALIFIED PRIVILEGE

The City also asserts that the common interest qualified privilege bars Hart's defamation claim. Again, the City is correct.

The common interest qualified privilege applies when the declarant and recipient have a common interest in the communication's subject matter. *Moe v. Wise*, 97 Wn. App. 950, 957-58, 989 P.2d 1148 (1999), *review denied*, 140 Wn.2d 1025 (2000). The qualified privilege is available for persons involved in the same organizations, partnerships, associations or enterprises who are communicating on matters of common interest. *Moe*, 97 Wn. App. at 958. And when a qualified privilege applies, a plaintiff cannot establish a prima facie defamation case unless the plaintiff clearly and convincingly shows that the declarant knew of the statement's falsity and

recklessly disregarded the knowledge. *Woody v. Stapp*, 146 Wn. App. 16, 21, 189 P.3d 807 (2008).

Here, Lakewood Police Sergeant Unfred sent a safety memo to the Fife Police Department to advise it of safety concerns relating to Hart. Because this document was sent between nearby police departments on a matter of common interest, officer safety relating to a local citizen, Sergeant Unfred's memo falls within the scope of the common interest qualified privilege. *See Moe*, 97 Wn. App. at 957-58. And as analyzed in the preceding section, Hart does not demonstrate that Sergeant Unfred made a false statement. Accordingly, Hart does not establish a prima facie defamation case. *See Woody*, 146 Wn. App. at 21.

Hart contends that Sergeant Unfred's statement characterizing Hart as "very aggressive and irrational" went "beyond the scope of what constitutes reasonable police conduct" because it drew unsupported factual conclusions about Hart and suggested personal animus toward Hart for exercising his Second Amendment rights to carry firearms and First Amendment rights to document scenes with cameras. Br. of Resp't/Cross-Appellant at 21. But as outlined above, Hart does not show that the record does not support Sergeant Unfred's characterization of Hart. And advising fellow police officers of Hart's propensity to carry and brandish firearms and use video cameras does not demonstrate a personal animus against Hart, but rather provides officers with information to help them better prepare themselves to safely perform their duties.

Hart next contends that the qualified privilege does not apply because the memo was improperly disseminated such that nonpolice entities, including Kilponen and Hart's business associate, Bill Gates, Sr., became aware of the allegations and consequently discontinued their relationships with Hart. Here, the record demonstrates that Kilponen learned of the memo in her capacity as a Fife Police Department employee. Because Kilponen learned of the memo as a

member of a police organization and not as a member of the public, the qualified privilege still applies. *See Moe*, 97 Wn. App. at 957-58. And the record does not demonstrate that Gates received a copy of the memo and, consequently, discontinued his relationship with Hart. According to Hart's own declaration, Gates no longer assisted him with business ventures "because of the City of Lakewood's conduct of prosecuting [Hart] for unfounded criminal misconduct." CP at 134. Thus, Hart admits that Sergeant Unfred's memo had nothing to do with Gates severing his business relationship with Hart.

Finally, Hart cites Kilponen's declaration in which she stated that Sergeant Unfred's memo "was not sent in the usual format for officer notes and information, of which [she was/is] familiar." CP at 148. Thus, Hart asserts that we must infer that the memo was not sent in the regular course of business but as part of a personal attack on Hart. Hart, however, does not establish how Sergeant Unfred submitted this safety memo to the Fife Police Department such that the common interest qualified privilege would not apply. And he offers no evidence to demonstrate that Sergeant Unfred held a personal animus against Hart. Again, Hart does not demonstrate that the common interest qualified privilege does not apply.

We hold that there are no questions of fact regarding Sergeant Unfred's absence of fault and the application of the qualified privilege. Accordingly, we hold that the trial court erred in failing to grant the City's summary judgment motion on Hart's defamation claim.

CROSS APPEAL

MALICIOUS PROSECUTION

Hart claims that the trial court erred in dismissing his malicious prosecution claim because the City had no evidence to support its malicious mischief charge against Hart and because a material issue of fact existed regarding the City-owned gate that the City accused Hart

of damaging and stealing. But the City is entitled to immunity in initiating prosecutions, and it had probable cause to prosecute Hart, thus barring Hart's malicious prosecution claim.

To maintain a malicious prosecution claim, a plaintiff must plead and establish that (1) the defendant instituted or continued the prosecution, (2) there was want of probable cause for the institution or continuation of the prosecution; (3) the defendant instituted or continued the prosecution through malice, (4) the proceedings terminated on the merits in favor of the plaintiff or were abandoned, and (5) the plaintiff suffered injury or damage as a result of the prosecution. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 558, 852 P.2d 295 (1993).

A prosecuting attorney, acting in a quasi-judicial capacity, is, as a matter of public policy, immune from liability for acts done in her or his official capacity. *Creelman v. Svenning*, 67 Wn.2d 882, 884, 410 P.2d 606 (1966). "The public policy which requires immunity for the prosecuting attorney, also requires immunity for both the state and the county for acts of judicial and quasi-judicial officers in the performance of the duties which rest upon them." *Creelman*, 67 Wn.2d at 885. Here, because the City prosecutor charged Hart with malicious mischief within its official capacity in its performance of its duties, the City enjoys immunity from Hart's malicious prosecution claim. *See Creelman*, 67 Wn.2d at 884.

Moreover, before trial, the municipal trial court found probable cause to allow the case to be tried. Evidence supports this finding. Specifically, Lakewood police received a 911 call reporting "vandalism in progress" that involved "damaging" and "dismantling" a gate leading onto City property. CP at 174. A witness told police that Hart had bragged to neighbors about breaking the gate and taking part of it, and Hart told another witness that he had pulled down the gate. Officers then found and recovered the gate from Hart's property after he admitted taking it. Finally, evidence shows that the City maintained the gate at that location. Given this evidence,

the trial court reasonably found that the City established probable cause that Hart committed third degree malicious mischief.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Finally, Hart asserts that the trial court erred when it dismissed his intentional infliction of emotional distress claim. But the trial court properly denied this claim because Hart failed to establish a prima facie case.

To recover for intentional infliction of emotional distress, a plaintiff must prove (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual severe emotional distress on the plaintiff's part. *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 242, 35 P.3d 1158 (2001) (quoting *Birklid v. The Boeing Co.*, 127 Wn.2d 853, 867, 904 P.2d 278 (1995)). Liability for intentional infliction of emotional distress exists when conduct is so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975). Whether the conduct complained of is sufficiently extreme to result in liability is a preliminary question for the trial court before a claim may go to the jury. *Pettis v. State*, 98 Wn. App. 553, 563, 990 P.2d 453 (1999).

To determine whether conduct is sufficiently extreme, courts consider the following: (a) the position occupied by the defendant; (b) whether the plaintiff was peculiarly susceptible to emotional distress, and if the defendant knew this fact; (c) whether the defendant's conduct may have been privileged under the circumstances; (d) the degree of emotional distress caused by a party must be severe as opposed to a mere annoyance, inconvenience, or embarrassment which normally occurs in a confrontation of the parties; and (e) the actor must be aware that there is a

high probability that his conduct will cause severe emotional distress and he must proceed in a conscious disregard of it. *Birklid*, 127 Wn.2d at 867 (quoting *Phillips v. Hardwick*, 29 Wn. App. 382, 388, 628 P.2d 506 (1981)).

Here, Hart asserts that the City's outrageous conduct consisted of charging and trying Hart on misdemeanor theft and malicious mischief counts when it lacked any evidence to sustain the charges. This logic fails to consider that, as analyzed above, the City's evidence sufficiently established probable cause that Hart committed these crimes. Therefore, because the City had probable cause to pursue these criminal charges, it was not conducting itself extremely or outrageously. Absent a showing of extreme or outrageous conduct, Hart's intentional infliction of emotional distress claim fails. Accordingly, we affirm the trial court's dismissal of this claim.

We reverse the trial court's denial of summary judgment on Hart's defamation claim because Hart failed to establish a prima facie defamation case. We affirm the trial court's dismissal of Hart's malicious prosecution and intentional infliction of emotional distress claims because Hart failed to establish prima facie cases on those claims.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, A.C.J.
JOHANSON, A.C.J.

We concur:

Bjorgen, J.
BJORGEN, J.

Maxa, J.
MAXA, J.

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Petition for Review of Gregory R. Hart

Case Name: Hart v. City of Lakewood
Case Number:

Name of Person filing: Brett A. Purtzer
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Thank you.

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