NO. 43304-4
~~43394-4-H~~

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.

REPLY BRIEF OF APPELLANT CITY OF LAKEWOOD

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I. REPLY

Defendant City of Lakewoood submits the following Reply in support of its Opening Brief and requests that the Court reverse the trial court's ruling and dismiss Mr. Hart's defamation claim with prejudice as a matter of law.

II. MATERIAL FACTS

In his response brief, Mr. Hart alleges that the City of Lakewood "transmitted photographs 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." (Responsive Brief of Respondent/Cross-Appellant, p. 10.) The only allegedly defamatory statement in this record is the officer safety memorandum prepared by Lakewood Sergeant John Unfred. (CP 78-79.) That officer safety memorandum attaches one photograph of Mr. Hart. (*Id.*) The memorandum does not described Mr. Hart as "extremely dangerous" or "likely to cause harm to law enforcement officers." (*Id.*)

Additionally, Mr. Hart argues that "it is clear from this memo" that Sergeant Unfred "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." (Responsive Brief of Respondent/Cross-Appellant, p. 10.) This is pure speculation. Mr. Hart did not take

Sergeant Unfred's deposition and did not create any record upon which to base these conclusions.

The entire text of Sergeant Unfred's officer safety memorandum is set forth in the City of Lakewood's Opening Brief. (Opening Brief, pp. 5-6.) Sergeant Unfred outlined Mr. Hart's criminal history, none of which is disputed, concluded that Mr. Hart has a strong dislike of law enforcement, and described Mr. Hart as "very aggressive and irrational." (*Id.*) He warned his fellow officers to "please use caution when contacting." (*Id.*) Whether Sergeant Unfred's officer safety memorandum was "sent in the usual format" recognized by Ms. Kilponen is completely immaterial.

III. ARGUMENT

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

Washington law is clear that statements of opinion, or statements that are not "provably false," cannot form the basis of a defamation claim. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 55, 59 P.3d 611 (2002); *Eubanks v. N. Cascades Broad.*, 115 Wn. App. 113, 120, 61 P.3d 368 (2003). It is also clear that, "[w]hether 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). 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).

Mr. Hart argues that, because the majority of Sergeant Unfred's officer safety memorandum contains facts about Mr. Hart's criminal history, that Sergeant Unfred's description of Mr. Hart as "very aggressive and irrational" must also be a factual statement. This argument is absurd. Sergeant Unfred can certainly outline a number of facts, and then use those facts to support his conclusion about Mr. Hart in the same memorandum. This conclusion is Sergeant Unfred's opinion. Additionally, Mr. Hart fails to acknowledge that the description of him as "very aggressive and irrational" is not provably false. These are subjective adjectives that cannot be conclusively established at trial.

Finally, Mr. Hart asks the Court to find, as a matter of law, that Sergeant Unfred intended his statements to be statements of fact. Mr. Hart did not depose Sergeant Unfred or develop any other evidence regarding Sergeant Unfred's intentions. The only evidence in the record is Sergeant Unfred's officer safety memorandum, and his characterization of Mr. Hart as "very aggressive and irrational" cannot be read as a statement of fact. Mr. Hart cannot meet his burden of proof here.

This case is similar to *Robel*, in that officers would expect other law enforcement officers to routinely make their own judgments about individuals and share those opinions with other law enforcement officers to help protect officer and public safety. To suggest that law enforcement officers be exposed to liability for defamation any time they share their opinions about an individual's potential safety risk is preposterous. The Court should dismiss plaintiff's defamation claim because it is based on non-actionable opinion.

B. Mr. Hart Cannot Establish Fault.

Mr. Hart must show that Sergeant Unfred knew, or in the exercise of reasonable care, should have known that some part of his memorandum was false or would have created a false impression in some material respect. *Mark v. Seattle Times*, 96 Wn.2d 473, 483, 635 P.2d 1081 (1981). Mr. Hart cannot just present evidence that someone else believes that Mr. Hart is not "very aggressive and irrational."[1] He has to show that **Sergeant Unfred** knew or should have known Mr. Hart was not "very aggressive and irrational." Mr. Hart does not dispute the criminal history outlined in Sergeant Unfred's officer safety memo, and that criminal history is sufficient for Sergeant Unfred to conclude that Mr. Hart is "very

[1] Mr. Hart argues there is no evidence that Mr. Hart was "dangerous or a threat to law enforcement." Sergeant Unfred never used these words to describe Mr. Hart, and they are immaterial to this analysis.

aggressive and irrational." The record is devoid of any indication that Sergeant Unfred was negligent, and therefore Mr. Hart cannot establish the fault element of his defamation claim. The Court should dismiss this claim with prejudice for this reason alone.

C. The Common Interest Qualified Privilege Bars Mr. Hart's Claims.

The common interest qualified privilege applies to law enforcement officers making statements or communications in the performance of their official duties. *Moe v. Wise*, 97 Wn. App. 950, 957-58, 989 P.2d 1148 (1999); *Bender v. Seattle*, 99 Wn.2d 582, 600-01, 664 P.2d 492 (1983). "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).

Again, there is absolutely 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. In fact, Sergeant Unfred's opinion that Mr. Hart is "very aggressive and irrational" is reasonable, based on the factual nature of Mr. Hart's criminal background

outlined in the officer safety memorandum.

Additionally, there no evidence regarding the extent of Sergeant Unfred's investigation before sending his officer safety memorandum, and therefore there is no basis for Mr. Hart's argument that any such investigation was unfair or impartial. Even if other individuals like Ms. Kilponen disagreed with Sergeant Unfred's opinion of Mr. Hart, Sergeant Unfred is a law enforcement officer and has to make his own decisions based upon officer and public safety.

Further, Mr. Hart suggests that Sergeant Unfred improperly disseminated his officer safety memorandum. There is no evidence that Sergeant Unfred did anything other than send his memorandum to the City of Fife Police Department, and there is no evidence upon which to determine how any other individual may have learned about the memorandum. There is no evidence that the form of the memorandum that Sergeant Unfred used was inappropriate under the circumstances, and Sergeant Unfred cannot be held responsible for the actions of any City of Fife police officers.

Finally, Washington's Supreme Court recognizes that "[a] simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is." *Dunlap*, 105 Wn.2d at 540, *citing* Restatement (Second) Torts, § 566, *comment c*. That

Mr. Hart is "very aggressive and irrational" is a simple opinion, based upon Mr. Hart's disclosed criminal history. There is absolutely no evidence of malice, and Sergeant Unfred's communication was privileged opinion. Mr. Hart 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

Mr. Hart's defamation claim fails for a number of reasons. It is based on inactionable opinion, he cannot prove the necessary fault, and Sergeant Unfred's statements are protected by the common interest qualified privilege. Mr. Hart has simply not developed a record that can support this claim. The Court should reverse the trial court's decision and dismiss Mr. Hart's defamation claim with prejudice as a matter of law.

Respectfully submitted this 20th day of November, 2012.

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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 REPLY BRIEF OF APPELLANT CITY OF LAKEWOOD to be delivered on November 20, 2012 to the following in the manner described:

ORIGINAL

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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 20th day of November, 2012.

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