

**ORIGINAL**

**FILED**  
DEC. 02 2016  
WASHINGTON STATE  
SUPREME COURT

Case No. 938849

IN THE SUPREME COURT OF  
THE STATE OF WASHINGTON

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Donald Canfield, Petitioner/Plaintiff

v.

Michelle Clark, Defendant.

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PETITION FOR REVIEW

DIVISION ONE,  
WASHINGTON COURT OF APPEALS  
CASE NO. 72869-5-1

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COURT OF APPEALS DIVISION 1  
SEATTLE WASHINGTON

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## **IDENTITY OF PETITIONER**

The petitioner/plaintiff is Donald Canfield.

## **COURT OF APPEALS DECISION**

Mr. Canfield seeks review of the Court of Appeals' published opinion, *Canfield v. Clark*, no. 72869-5-1 (August 22, 2016) (Appendix (App.) A), published by Order dated October 17, 2016 (App. B) which affirmed the King County Superior Court's order adopting a Special Verdict form requiring Canfield to prove damages for defamation per se and denying Canfield's motion for a directed verdict.

## **ISSUES PRESENTED FOR REVIEW**

Whether a statement that a party has a gun on school district property, a criminal act, is defamation per se and does not require a party to produce evidence of actual damage but allows damages to be presumed.

## **STATEMENT OF THE CASE**

### **A. BRIEF EARLY PROCEDURAL HISTORY OF THE CASE**

Based upon the events described below, Plaintiff Donald Canfield filed two lawsuits, one against his former employer Seattle Public Schools ("SPS") and one against an employee Defendant Michelle Clark. CP 1-5 & 486. This case against Defendant Michelle Clark ("Defendant Clark") was filed in December 2009, and raised claims against Defendant Clark for defamation for

statements made to fellow employees and Defendant SPS' HR personnel, Jeanette Bliss. CP486. The second case against Seattle Public Schools ("SPS") raised claims of violations of Washington's Prevailing Wage Act/Wage Payment Act, including retaliation. *See Canfield v. Clark and Seattle Public Schools*, 2013 Wash. App. Lexis 1280, 3-4(2013). On motion of Defendants, the Court consolidated the cases. The facts surrounding the outcome of the case filed against SPS are described below. This case addresses the defamation claims brought against Defendant Clark.

**B. FACTS THAT GIVE RISE TO PLAINTIFF'S DEFAMATION CLAIMS.**

**1. HISTORY OF EMPLOYMENT AND COMPLAINTS OF UNLAWFUL CONDUCT AT SEATTLE PUBLIC SCHOOLS.**

**a. Promoted to foreman, no history of discipline.**

Plaintiff first began working as a journeyman electrician, in 1981, after completing a 4 year apprenticeship program. CP 615 (23:10-12). He has held his EL01, journeyman electricians commercial wiring license since that time. CP 616 (28:16-20). During the years he has been an electrician, he has been an active member of his union, IBEW Local 46. *Id.* He began working for Defendant Seattle Public Schools as a maintenance electrician in or about 1992. CP 615(26:1-10). He became the foreman of the electrical department in or around 2000. CP 619 (41:24-4). His duties as foreman of

the electrical shop include assigning work and managing the other electricians. CP 759-760. Although he can discipline employees under him, he does not have the authority to terminate an employee. *Id.* During the time he has worked with Defendant SPS up until December 2007, Plaintiff Canfield had never had any disciplinary action taken against him. *Id.*

**b. Problems with funding for purchase of safety equipment, allow unskilled workers to perform electricians work, and participation in supporting a strong Union.**

During the time Plaintiff Canfield has worked for Defendant SPS, he has been active in his union and has worked with the union to ensure electricians were treated fairly. CP 760. Over the years there had been problems with funding to purchase necessary safety equipment including aluminum ladders (using metal ladders is unsafe), flash protection (to protect electrician's in the event of an catastrophic electrical event), earthquake proof shelving, adequate heat in the office, safe trucks (including installation of the safety shield that protects drivers in the event of hard braking). CP 622-623 (81:21-85:18). There were always problems with funding and/or having money to purchase safety equipment. *Id.* Defendant SPS consists of two divisions, the maintenance division and the capitol division. CP 760. The capitol division has three separate divisions: Building Excellence ("BEX"),



responsible for organizing new construction projects; Building Technologies Academics (“BTA”), responsible for remodel work, and Small Works, responsible for minority/small business contracts. *Id.*

- c. **Complaints regarding failure of Defendant SPS to pay his employees what he believed were appropriate wages - payment of prevailing wage and problems with Small Works, “Summit Meeting” just days before being escorted off school property by police.**

During 2007, Plaintiff Canfield had made complaints that he believed his employees were not being paid correctly when they were used to perform work along side contractors on capitol projects. CP 761-762, ¶ 7, *See also* CP 628 (169:4-170:16); CP 629 (176:2-182:24); CP 631 (185:20-189:20). Close in time to Defendant Clark’s hire, the maintenance electricians were called to work on a BEX, or Capitol Works project involving the installation of cubicles. *Id.* Plaintiff Canfield had complained that he believed the maintenance electricians should be paid prevailing wage because they were doing work that was under contract, along side contractors, work that was not within the scope of their maintenance work. *Id.* Plaintiff Canfield had complained to the then new Senior Facilities Manager, Lynn Good. *Id.* Mr. Good had responded indicating Plaintiff Canfield and his employees would be paid the prevailing wage for the work completed. CP 761-762 & 779-780.

During his deposition, Dan Bryant the Senior Shop Foreman acknowledged that payment of prevailing wages to maintenance employees had been a continuing issue. CP 636-638 (40:17-46:23); CP 642-643 (123:18-125:12).

During a summit meeting, just days before his being escorted off school grounds by police, Plaintiff Canfield again raised the issue of payment of prevailing wages in relation to a project occurring at Nathan Hale. CP 761-762, ¶ 7; CP 628 (169:4-170:16); CP 629(176:2-182:24); CP 6311 (85:20-189:20). There were several supervisors and managers at the meeting, including union representatives. *Id.* Plaintiff Canfield explained that Mr. Good had agreed to pay prevailing wages to the maintenance electricians on the BEX project and that he believed they should be paid the same on the Nathan Hale project. *Id.* It was obvious to Plaintiff Canfield that this did not sit well with at least one of his supervisors, Mark Walsh. *Id.* Within days Plaintiff Canfield was escorted off the school grounds by police in a very public and embarrassing manner. *Id.*

**2. DEFENDANT MICHELLE CLARK MAKES DEFAMATORY STATEMENTS WITH ACTUAL MALICE.**

- a. Plaintiff Canfield helps get a friend hired whom he believed was a good worker only to find that she refused to comply with the terms of her employment, refused to take direction and was a difficult employee.**

During his time with Defendant SPS, Plaintiff Canfield had also served as the firm alarm technician. CP 762-763, ¶ 8. He did this from 1997 to 2006. *Id.* Plaintiff Canfield was looking to hire a new maintenance electrician to fill the position during the summer of 2007. *Id.* He had known Defendant Clark for several years and knew that she had an ELO6 license and was a licensed fire alarm tech. *Id.* An ELO6 license is a low voltage electricians license. *Id.* The position he was looking to fill was an EL01 position with a certificate as a fire alarm tech. *Id.*, CP 781-785 (Ex D). He discussed the position with Defendant Clark explained the position would require that she attend class through the union to obtain her ELO1 license and become a union member. *Id.* Defendant Clark indicated she was interested in the position and Plaintiff Canfield set up a meeting with her, Nancy Mason and Janet Lewis, his union representatives, and Ed Heller, the Facilities Manager. *Id.* Mr. Heller left Defendant SPS shortly thereafter. *Id.* An agreement was reached and the terms were documents in a letter dated July 7, 2007 signed by Ed Heller. *Id.*, CP 786-787 (Ex E); CP 647-648 (51:18-55:17). The agreement required that Defendant Clark obtain her journeyman electricians license by attending school and working with the Union. CP 762-763 & 786-787 (Ex E); Unfortunately, it became clear to Plaintiff Canfield rather quickly that Defendant Clark had no intentions of obtaining her EL01

license, was a difficult employee to work with who refused to take direction or follow instructions. *Id.*

- b. Defamatory statements to Aki Piffath and Jeanette Bliss - “when [she] started working here, [at SPS in August 2007] she asked him if he still had a gun on him and he said, yes it was in his pants.”**

During the first few months of her employment, Plaintiff Canfield had ongoing problem with Defendant Clark. CP 763, ¶ 9. Defendant Clark refused to follow direction. *Id.* She began to take equipment off the truck she was assigned including a ladder and pipe benders, something that was necessary in doing work as an ELO1 electrician. *Id.* Plaintiff Canfield asked Defendant Clark to leave the equipment on the truck as she was to obtain her ELO1 license and that there were times when she might be in the field when that equipment was necessary for other employees to use. *Id.* Defendant Clark ignored the request. *Id.* She also had a habit of failing to return phone calls and Plaintiff Canfield had a difficult time locating her. *Id.* To resolve this, he asked her to frequently check in with him. *Id.* This angered Defendant Clark. *Id.* Defendant Clark also had a habit of taking extended lunches and/or lunches at a time that was inappropriate. *Id.* Frustrated, Plaintiff Canfield contacted her previous supervisor to see if he had similar problems. *Id.* Unfortunately he learned that Defendant Clark had a history

of failing to follow orders and other frustrating work conduct. *Id.*, CP 788-789.

Because of the issues the parties were having, a meeting was called by Lynn Good to discuss the problem. CP 763-764, ¶ 10. Plaintiff Canfield told Lynn Good that he wanted to write Defendant Clark up for failing to follow orders and failing to act to obtain her ELO1 license. *Id.* Her failure to obtain the licenses was causing difficulty in scheduling work for Plaintiff Clark as he would have to ensure an EL01 was present and able to assist Defendant Clark with certain of her work projects. *Id.* Lynn Good told Plaintiff Canfield to wait, that she was a new employee and he would deal with it. *Id.* The parties did meet with the union representative present, Nancy Mason. *Id.* Each side discussed their issues and Plaintiff Canfield was hopeful that a resolution could be reached. *Id.* Unfortunately that was not the case and the problems continued. *Id.*

At the end of the week when the Summit Meeting occurred, the one in which Plaintiff Canfield raised the prevailing wage issue again to his supervisors, Plaintiff Canfield had scheduled the Friday off. CP 764-765, ¶ 11. He left Defendant Clark and another employee with instructions that they were to complete certain work orders. *Id.* Instead, Defendant Clark spent a good part of the day arranging to have desks delivered to the maintenance

electrician's shop. *Id.* During the meeting with Lynn Good, the parties had discussed purchasing some desks for the shop. *Id.* With Mr. Good's approval, Plaintiff Canfield had planned on moving forward with picking some newer desks from the BEX warehouse. *Id.* While he was gone, Defendant Clark decided to move in some desks, used desks that she had located under the south stands of memorial stadium at the Seattle Center. *Id.*

Plaintiff Canfield had introduced Defendant Clark to Aki Piffath, a maintenance employee, not an electrician, that lived in Marysville as a possible car pool partner for Defendant Clark. CP 765, ¶ 12. The parties had been carpooling together. CP 656-660 (89:25-102:7). Apparently, after work that day, Defendant Clark complained to Mr. Piffath about Plaintiff Canfield. *Id.* In the process, she relayed to Mr. Piffath reports that Plaintiff Canfield carried a gun. *Id.* Plaintiff Clark testified that during that drive home, Mr. Piffath suggested that Defendant Clark talk with HR about her complaints. *Id.* It is unclear who first contacted HR, but Ms. Jeanette Bliss, Defendant SPS' HR representative contacted Defendant Clark to arrange a meeting a few days later. *Id.* During that meeting, Defendant Clark complained about Plaintiff Canfield, told Ms. Bliss she was afraid of Plaintiff Canfield and that he carried a gun. RP ,Vol 5, 405:8-408:24. Ms. Bliss took notes during the interview. *Id.* Ms. Bliss testified that Ms. Clark told her that Plaintiff

Canfield had guns in his home. *Id.* Ms. Clark went on to describe an event that occurred several years ago where she met Plaintiff Canfield on a weekend to help her load a pot into her car she was purchasing at a pottery store. CP 657-658 (90:14-93:22). She indicated he instructed her to park on school property, across the street from the store, and they walked across the street. *Id.* During the walk across the street, Defendant Clark claims that Plaintiff Canfield took out a gun and carried it in his hand. *Id.* After crossing the street, he put the gun back in his pocket. *Id.* However, that is the only statement Defendant Clark testified that she recalled making. *See* CP 656-660 (89:25-102:7). Ms. Bliss testified that Defendant Clark stated further that after she began work in August 2007, she asked Plaintiff Canfield if he still had a gun and he said, yes it is in my pants. RP ,Vol 5, 405:8-408:24. Mr. Piffath was present during this meeting as well. *Id.*

Ms. Bliss testified that Mr. Canfield was escorted off the property that day due to the gun allegation. CP 680 (57:4-59:25) & RP Vol. V, 413:14-414:15. Plaintiff Canfield was contacted and brought to the security office. CP 765, ¶ 13. When Plaintiff Canfield entered the office, the door was locked behind him. *Id.* He was told that he was being placed on administrative leave and that there was an allegation that he was carrying a gun. *Id.* Shocked, he stated he was not carrying a gun, had never carried a

gun on school property and offered to be searched, offered his keys to his personal truck, the company truck and keys to his desk and file cabinets. *Id.* No one from the school district searched him or his things and the police did not search him. *Id.* When he was escorted off the property, he again offered to be searched but was told no. *Id.*

Plaintiff Canfield was placed on administrative leave beginning that day, December 5, 2007. CP 680 (57:4-59:25). Ms. Bliss completed the investigation into Defendant Clark's complaints by the end of December 2007. *Id.* Plaintiff Canfield was left on leave through July 2008. *Id.* Defendant SPS imposed discipline including a demotion, allowing Plaintiff Canfield to return to work but as a maintenance electrician, not as a foreman. *Id.*

**C. ERRORS OCCURRING AT TRIAL.**

**1. THE COURT ADOPTS DEFENDANT'S SPECIAL VERDICT FORM WITH QUESTION NO. 3 THAT IS MISLEADING AND DOES NOT ACCOUNT FOR A POSSIBLE FINDING BY THE JURY THAT STATEMENTS WERE DEFAMATORY PER SE.**

At trial the Court adopted jury instructions setting out the definition of defamation, CP 1611 (Instruction No. 4), elements of the cause of action CP 1612 (Instruction No. 5), and the definition of defamation per se, CP 1616



(Instruction No. 9). *See also* CP 885-921; 960-996; 1639-1668 (Pl's proposed instruction). Given the issues with admission of reputation evidence and Defendant's anticipated argument that Plaintiff would have to prove damage to reputation, Plaintiff objected to the Court's adoption of Instruction No. 4, the definition of a defamatory statement in that Plaintiff requested the trial court include language that clarified damage to reputation was not a requirement. RP, Vol. X 1134:13-1136:12. Plaintiff also objected to Instruction No. 4 and the Special Verdict Form, Question No. 3 based upon the concern that the jury would be confused and be misled into believing that Plaintiff had to show damage and/or damage to reputation even if the statements were found to be defamatory per se. RP, Vol. X, 1138:14-1142:18; 1144:3-1146:14.

Although the jury in the case found Defendant Clark made defamatory statements with malice, in answer to Question No. 3, the jury answered no, finding the statements did not cause damage to Plaintiff. CP 1639-1668.

**2. DEFENSE COUNSEL MISTATES THE LAW DURING CLOSING ARGUMENT STATING PLAINTIFF MUST SHOW DAMAGE TO REPUTATION TO PREVAIL ON HIS CLAIM.**

Using the information contained in the exhibits outlined above and SPS employee testimony, Defense counsel argued that Plaintiff did not produce any evidence of damages at trial. RP, Vol. X, 1183:2-1184:17 & 1199:11-1200:4.

In summary, during closing argument Defense counsel used the definition of a defamatory statement to argue that Plaintiff must establish that his reputation was damaged to prevail on his claim. *Id.*

Plaintiff objected to these statements as an incorrect statement of law, pointing out that Plaintiff does not have to prove damage to reputation to recover damages. *Id.* The Court over ruled Plaintiff's objection allowed the comments to stand. *Id.*

**3. THE COURT DENIES PLAINTIFF'S MOTION FOR A NEW TRIAL AND/OR DIRECTED VERDICT.**

At trial, Plaintiff introduced evidence of the statements made by Defendant Clark to Auki Piffath and Jeanette Bliss as outlined above. RP Vol. IV, 367:9-374:1; RP, Vol VI 580:13-583:13. Both sets of statements included the allegation that Plaintiff Canfield had a gun on him while working at the school district on district property. *Id.*

Contrary to her prior deposition testimony, during trial Defendant Clark admitted making the statement but claimed the remark she attributed to Plaintiff, that he had a gun in his pants, was a sexual innuendo. RP, Vol. VII, 641:4-645:22.. When asked if that were the case why she did not report it as sexual harassment, Defendant Clark had no explanation. RP, Vol. VII, 650:20-653:17. Plaintiff explained to the jury that carrying a gun on school property during work hours was a violation of the law and described the events that

occurred after the report by Defendant Clark, that he was escorted from school property by police in a public manner, that it was embarrassing and humiliating. RP, Vol. III, 214:9-216:18.

Plaintiff also offered other evidence of damage including his testimony. RP, Vol. IV, 286:17-290:9. Other SPS employees testified that they had heard about the gun allegation and that Plaintiff was known for it, that is Plaintiff was identified as the guy that had been escorted off the school grounds based upon a gun allegation. RP, Vol. VII, 716:21-717:15 & 731:8-13.

After trial, Plaintiff renewed its motion for a directed verdict made at the close of evidence, requesting the Court enter as a matter of law a finding that the statements made by Defendant Clark were defamatory per se. RP Vol. IX, 1125:17-1126:10; 1147:1-1148:7; CP 1669-1684. The Court denied Plaintiff's motion. *Id.* Plaintiff also requested a new trial based upon the errors outlined in this brief. CP 1669-1684. The Court also denied that motion. CP1708-1713.

## **ARGUMENT**

**A. Requiring a plaintiff to prove that a defamatory per se statement caused damage is contrary to Washington law.**

**1. Elements of Defamation and Defamation Per Se.**

“In Washington, a defamation plaintiff must show four essential elements: falsity, an unprivileged communication, fault and damages.” *John Doe v. Gonzaga University, et. al*, 143 Wn.2d 687, 701 (2001) (reversed on other grounds, *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002)), quoting *Commodore v. Univer. Mech. Contractors, Inc.*, 120 Wn.2d, 133 (1992).

When the Plaintiff is a private individual, a negligence standard applies. *Vern Sims Ford, Inc., et. al., v. Hagel*, 42 Wn.App. 675, 678 (1986), citing *Caruso v. Local 690, Int’l Bhd. Of Teamsters*, 100 Wn.2d 343, 352 (1983). A Plaintiff is a public figure or public official must show, “‘actual malice’ - that is knowledge of the falsity or reckless disregard of the truth or falsity of the allegedly defamatory statements. *Id.* (citations omitted). Public figures are, “. . .those who ‘occupy positions of such persuasive power and influence that they are deemed public figures for all purposes’, or those who become public figures with response to a particular public controversy because they have ‘thrust themselves to the forefront . . . in order to influence the resolution of the issues involved.’” *Id.* at 679 citing *Hutchinson v. Proxmire*, 443 U.S. 111, 134-35 (1979). “Actual malice is knowledge of the falsity or reckless disregard of the truth or falsity of the statement.” *Id.* at 681 (citation omitted). Actual malice can be inferred from facts, evidence of negligence, motive and intent. *Id.* (citations omitted).

Slanderous statements that affect a person in his business or trade are defamatory per se. *A.F. Grein v. Nugent LaPoma et. al.*, 54 Wn.2d 844, 848 (1959). “Where a defamation is actionable per se, and neither truth nor privilege is established as a defense, the defamed person is entitled to substantial damages without proving actual damages.” *Michielli et al.. U.S. Mortgage Co.*, 58 Wn.2d 221, 227 (1961), citing *Cf. Arnold v. National Union of Marine Cooks & Stewards*, 44 Wn. (2d) 183 (1954).

The statements made by Defendant Clark were defamatory per se, and Plaintiff Canfield was not required to prove actual damages. RCW 9.41.280 provides, “[i]t is unlawful for a person to carry onto, or to possess on, public or private elementary or secondary school premises, school-provided transportation, or areas of facilities while being used exclusively by public or private schools: (a) Any firearm; . . .”. Plaintiff Canfield presented undisputed facts that meet both requirements establishing defamation per se. In this case the jury found that the statements made by Defendant Clark were defamatory and uttered with actual malice, that is they were false and not subject to a privilege. In that event, Plaintiff is not required to prove actual damages and damages are presumed. Plaintiff was entitled to an award of presumed damages even if the award is for nominal damages. *See Maison de France v. Mais Oui!*, 126 Wn.App. 34, 53-54 (2005).

other without proof of special harm if the offense imputed is of a type which, if committed in the place of publication, would be (a) punishable by imprisonment in a state or federal institution, or (b) regarded by public opinion as involving moral turpitude.” Restatement 2<sup>nd</sup> of Torts § 571 (2<sup>nd</sup> 1979). “One who is liable for a slander actionable per se or for a libel is liable for at least nominal damages.” Restatement 2<sup>nd</sup> of Torts, § 620 (2<sup>nd</sup> 1979). Violation of RCW 9.41.280(1) is a gross misdemeanor. RCW 9.41.280(2). A gross misdemeanor can include imprisonment in a county jail. RCW 9.92.020.

In *Maison De France v Mais Oui!*, 126 Wn. App. 34,43-49 (2005), in part the Court addressed two letters containing statements. As to both letters, the trial court found the statements were not defamatory per se and they were substantially true in their stinging points. *Id.* In reviewing the decision, the Court determined that the first letter included allegations of criminal conduct and held, “[u]nder *Caruso* and *Ward*, the accusations of fraud contained in the September 8<sup>th</sup> letter were defamatory per se because they falsely imputed criminal conduct to the appellants.” *Id.* at 47, referring to *Caruso v. Local Union No. 690 of Int’l Brotherhood of Teamsters*, 100 Wn.2d 343 (1983) & *Ward v. Painters’ Local 300*, 41 Wn.2d 859 (1953). As to the second letter, the Court found the trial court properly concluded that the statements contained in that letter were not defamatory and that the Defendant had a reasonable

belief that they were true at the time. *Id.* at 49.

The Court of Appeals then went on to discuss evidence of damage concluding that no actual damages were shown by statements contained in either letter. *Id.* 50-53. However, the Court adopted *Dunn & Bradstreet, Inc., v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) and held that presumed damages are available in defamation per se cases to a private person without proof of actual malice. *Id.* at 54. In this case, actual malice was shown and found by a jury. The Court went on to explain, “. . . while the trial court has found no economic or other actual damages, a finding we do not disturb, it must address the question of presumed damages.” In this case, Plaintiff Canfield is not required to prove actual damages and is entitled to a presumption of damage. Defense counsel’s closing argument along with adoption of the Special Verdict form Question No. 3 was misleading and took that opportunity away from the jury.

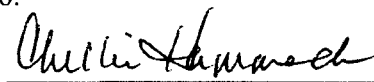
The allegations in this case include statements that Plaintiff Canfield engaged in criminal conduct. The allegations are on point with the September 8<sup>th</sup> letter this Court found contained defamatory per se statements in *Maison De France*. The Court of Appeals decision that the statements were not defamatory per se and even if they were, Plaintiff was required to show the statements caused damaged, is contrary to Washington law and its own prior decisions.

**CONCLUSION**

For the reasons stated above, Plaintiff requests the Washington Supreme Court grant this petition for review.

Dated this 16<sup>th</sup> day of November, 2016.

Respectfully submitted,



Chellie M. Hammack, WSBA #31796  
Attorney for Petitioner

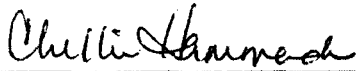


**Certificate of Service**

I, Chellie Hammack, attorney for Petitioners certify that on November 16, 2016, I placed a true and correct copy of this Petition for Review and this Certificate of Service for hand delivery via legal messenger to:

Mark O'Donnell, WSBA#13606  
Amber Gundlach, WSBA#41283  
Attorneys for Defendant Clark/Respondent  
901 Fifth Ave., Suite 3400  
Seattle, WA 98164

DATED this 16<sup>th</sup> day of November, 2016

  
\_\_\_\_\_  
Chellie M. Hammack, WSBA #31796  
Attorney for Petitioners

# Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DONALD CANFIELD, )  
 ) No. 72869-5-1  
 Appellant, )  
 ) DIVISION ONE  
 v. )  
 )  
 MICHELLE CLARK, )  
 )  
 Respondent, ) PUBLISHED OPINION  
 )  
 "JOHN DOE1" and "JANE DOE1," and ) FILED: August 22, 2016  
 their marital community, and )  
 "JOHN DOE2" and "JANE DOE2," and )  
 their marital community, )  
 )  
 Defendants. )

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COURT OF APPEALS DIV 1  
STATE OF WASHINGTON

BECKER, J. — The verdict form used in this defamation case did not hinder the plaintiff's presentation of his theory of defamation per se. The trial court did not err in refusing to order a new trial when the jury returned a verdict of zero damages. We affirm.

This is appellant Donald Canfield's second appeal. As the result of his first appeal, he was allowed to bring to trial a defamation claim against Michelle Clark.<sup>1</sup> Canfield supervised Clark when both were employed in the electrical shop of the Seattle Public Schools. Clark reported that Canfield carried a gun

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<sup>1</sup> Canfield v. Clark, noted at 175 Wn. App. 1003 (2013).

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while on school property. Carrying a gun on school property is a crime, and Clark's statements prompted an investigation of Canfield. The investigation led to Canfield being demoted, but not for carrying a gun on school property. That allegation was never substantiated. The demotion was for harassing other shop employees and creating a hostile work environment. Through a grievance arbitration, Canfield was reinstated, won back wages, and had the discipline reduced to an oral reprimand.

Canfield believed that Clark's accusation had damaged his health, financial condition, and reputation. He sued her for defamation. The case went to trial in October 2014. The jury found on a special verdict form that Clark (1) made defamatory statements against Canfield and (2) did so with actual malice, but (3) did not cause damage to Canfield. Canfield appeals.

#### DENIAL OF SUMMARY JUDGMENT

We first address Canfield's claim that the trial court erred by denying his motion for summary judgment. The trial court determined that summary judgment was precluded by the following factual issues: (1) whether Clark's statements about Canfield were false and (2) whether Clark's statements injured Canfield.

"A summary judgment denial cannot be appealed following a trial if the denial was based upon a determination that material facts are disputed and must be resolved by the fact finder." Brothers v. Pub. Sch. Emps. of Wash., 88 Wn. App. 398, 409, 945 P.2d 208 (1997). Because the trial court found there were disputed issues of fact, this assignment of error is unreviewable.

## VERDICT FORM AND DEFAMATION PER SE

Canfield's primary assignment of error concerns the form of the verdict. He contends that improper wording prevented the jury from considering his theory of defamation per se and giving him at least a nominal award of damages.

Although Canfield does not assign error to the instructions, a review of the instructional framework for the defamation claim helps to put the argument about the verdict form in context.

Instruction 4 defined "defamatory statement."

A statement is defamatory if it tends so to harm the reputation of another so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.

Instruction 5 summarized Canfield's defamation claim and correctly stated the elements, including the element of proximate cause. Schmalenberg v. Tacoma News, Inc., 87 Wn. App. 579, 601-02, 943 P.2d 350 (1997), review denied, 134 Wn.2d 1013 (1998).

In this case, the Plaintiff claims that the Defendant made a defamatory statement that Plaintiff had a gun on school district property to Mr. Auki Piffath and Ms. Jeanette Bliss and that the Plaintiff suffered damages as a result.

For the Plaintiff to recover on his claims for defamation, you must decide by a preponderance of the evidence that each of the following elements are met:

- (1) that the Defendant communicated the statement, either orally or in writing, to a person other than the Plaintiff;
- (2) that the statement was false;
- (3) that the statement was not privileged, and;
- (4) that the statement was a "proximate cause" of damage to Plaintiff. "Proximate cause" is explained in instruction No. 8. Damages are explained in instruction No. 10.

Instruction 6 required Canfield to prove that Clark made the defamatory statements with actual malice.

The Court has determined that Plaintiff is a "public figure" for purposes of his defamation claim. Consequently, Plaintiff must prove a higher degree of fault by Defendant.

For the Plaintiff to recover on his claims of defamation, you must also decide by a standard of clear and convincing evidence that Defendant made the alleged defamatory statements to Auki Piffath and Jeanette Bliss with actual malice, meaning knowing the statement was false or with reckless disregard for the truth or falsity of the statement.

"Reckless disregard" means (1) a high degree of awareness of probable falsity or (2) the defendant in fact entertained serious doubts about the truth of the statement.

Instruction 7 explained that the alleged statements were subject to a qualified privilege that Clark could lose if Canfield showed that she abused it.

The Court has determined as a matter of law that the alleged defamatory statements made by Defendant were subject to a qualified privilege. A qualified privilege exists between parties who have a common interest such as communications between employees in a corporation or business.

The privilege may be lost if Plaintiff can show it was abused. The defendant abuses a qualified privilege if any one of the following applies:

- 1) She knows the statement to be false or makes the allegedly defamatory statements in reckless disregard for the truth or falsity of the statement; or
- 2) She does not act for the purpose of protecting the interest that is the reason for the existence of the privilege; or
- 3) She knowingly publishes the matter to a person to whom its publication is not otherwise privileged; or
- 4) She does not reasonably believe the matter to be necessary to accomplish the purpose for which the privilege is given.

Instruction 8 was a standard definition of proximate cause.

The term "proximate cause" means a cause which in a direct sequence produces the injury complained of and without which such injury would not have happened.

Instruction 9 instructed the jury on the law of defamation per se.

Generally, a plaintiff may recover only the actual damages caused by defamation. However, a plaintiff is not required to prove actual damages if a communication is "defamatory per se." A defamatory statement is defamatory per se if it exposes a person to hatred, contempt, ridicule or obloquy, to deprive him of the benefit of public confidence or social intercourse, or injures him in his business, trade, profession or office.

Instruction 10 stated the measure of damages.

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff, Donald Canfield, then you must determine the amount of money that will reasonably and fairly compensate the plaintiff for such damages as you find were proximately caused by Defendant Clark's defamatory statements.

If you find for the plaintiff, you should consider the following elements:

- (1) The physical harm to the plaintiff;
- (2) The emotional harm to the plaintiff caused by the defendant's defamatory statements, including emotional distress, loss of enjoyment of life, humiliation, pain and suffering, personal indignity, embarrassment, fear, anxiety, loss of reputation and/or anguish experienced and with reasonable probability has been experienced by plaintiff in the past, the present and in the future.

The burden of proving damages rests upon the party claiming them, and it is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Any award of damages must be based upon evidence and not upon speculation, guess, or conjecture. The law has not furnished us with any fixed standards by which to measure emotional distress, loss of enjoyment of life, humiliation, pain and suffering, personal indignity, embarrassment, fear, anxiety, and/or anguish. With reference to these matters you must be governed by your own judgment, by evidence in the case, and by these instructions.

The verdict form posed four questions to the jury.

We, the jury answer the questions submitted by the court as follows:

**QUESTION NO. 1: Do you find that the Defendant Clark made defamatory statements about Plaintiff Canfield?**

**ANSWER:**                      **Yes**                      **No**

*(DIRECTION: if you answered "no" to Question 1, STOP and sign and date this verdict form. If you answered "yes," answer Question No. 2).*

**QUESTION NO. 2: Do you find that Defendant Clark made the defamatory statements with actual malice, knowledge of the statements' falsity or reckless disregard for the truth?**

**ANSWER:**                      **Yes**                      **No**

*(DIRECTION: if you answered "no" to Question 2, STOP, sign this verdict form. If you answered "yes" to Question 2, answer Question No. 3).*

**QUESTION NO. 3: Do you find that the defamatory statement made by Ms. Clark was a proximate cause of damages to Mr. Canfield?**

**ANSWER:**                      **Yes**                      **No**

*(DIRECTION: if you answered "no" to Question 3, STOP and sign and date this verdict form. If you answered "yes," answer Question No. 4).*

**QUESTION NO. 4: What do you find to be Mr. Canfield's total amount of damages proximately caused by the defamatory statements made by Defendant Clark?**

**ANSWER:** \$ \_\_\_\_\_

*(DIRECTION: STOP and sign and date this verdict form.)*

The jury answered yes to the first two questions, finding that Clark made defamatory statements about Canfield with actual malice. The jury answered no to question 3, finding that the defamatory statement did not proximately cause damage to Canfield. Accordingly, the jury did not answer question 4 about the amount of damages.

Canfield contends question 3 was misleading and legally erroneous because the question prevented the jury from presuming damages as permitted by the doctrine of defamation per se. His argument is consistent with the



objection he raised to the verdict form during the final instructions colloquy.<sup>2</sup> We will regard the issue as preserved even though Canfield does not argue that it would have been acceptable to substitute any of the versions of the verdict form he proposed to the trial court.<sup>3</sup> See Crossen v. Skagit County, 100 Wn.2d 355, 358-61, 669 P.2d 1244 (1983). The court had several extensive discussions with the parties regarding the instructions, and the court was aware of Canfield's position that question 3 should have stated that damages are presumed if the plaintiff proves defamation per se. The trial court reasoned, however, that the wording of the verdict form "flows naturally given the general instructions we've given."

We review a trial court's decision regarding a special verdict form under the same standard we apply to decisions regarding jury instructions. State v. Fehr, 185 Wn. App. 505, 514, 341 P.3d 363 (2015). Jury instructions are not erroneous if they permit each party to argue their theory of the case, are not misleading, and when read as a whole, properly inform the trier of fact of the

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<sup>2</sup> Compare Verbatim Report of Proceedings (Nov. 5, 2014) at 1145-46 with Brief of Appellant at 34.

<sup>3</sup> See Clerk's Papers at 920, 995, 1667-68 (plaintiffs' proposed special verdict forms). The special verdict form in Canfield's third set of proposed instructions read as follows:

**QUESTION 1:** Do you find that the defendant defamed plaintiff?

ANSWER:                                 Yes                         No

If you answer no, please sign the verdict form.

**QUESTION 2:** If you find that defendant defamed plaintiff, what do you find to be plaintiff's damages?

ANSWER: \$ \_\_\_\_\_

Clerk's Papers at 1667-68.

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applicable law. Caruso v. Local Union No. 690, 107 Wn.2d 524, 529, 730 P.2d 1299, cert. denied, 484 U.S. 815 (1987).

When a statement is defamatory per se, “damage to the plaintiff is said to be “presumed,” and the jury, without any further data, is at liberty to assess substantial damages, upon the assumption that the plaintiff’s reputation has been injured and his feelings wounded.” Arnold v. Nat’l Union of Marine Cooks & Stewards, 44 Wn.2d 183, 187, 265 P.3d 1051 (1954), quoting CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 423, § 116 (1935). Consistent with that statement of law, instruction 9 properly informed the jury that a plaintiff who can prove defamation per se does not need to put on proof of “actual damages.”

According to Canfield, the defamatory statement that he carried a gun on school grounds was necessarily defamatory per se because that conduct is criminal. Yet the jury failed to assess any damages at all, and in Canfield’s opinion that failure must have occurred because of the wording of question 3.

“Where a defamation is actionable per se, and neither truth nor privilege is established as a defense, the defamed person is entitled to substantial damages . . . .”

Special Verdict Form, Question No. 3 is misleading in that it could lead the jury to conclude that it was required to find Plaintiff was damaged even if the jury were to find the statements made by Defendant Clark to be defamatory per se.

Appellant’s Brief, at 34 (citations omitted). Canfield argues that question 3 required him “to prove damages even if the statements made were defamatory per se.” Appellant’s Brief, at 35. “Question No. 3 forced the jury to find actual

damages and if it did not find damages, the inquiry ended.” Appellant's Reply Brief, at 12.

We disagree. The jury was not obliged to find defamation per se. Instruction 9 required Canfield to prove that a defamatory statement *exposed* him to a set of circumstances from which damages may be presumed: “A defamatory statement is defamatory per se if it exposes a person to hatred, contempt, ridicule or obloquy, to deprive him of the benefit of public confidence or social intercourse, or injures him in his business, trade, profession or office.” The jury may have found that Clark's statement, while defamatory, did not have the effect of exposing him to ridicule, depriving him of public confidence, or injuring him in his job and therefore did not cause him any damage.

If the jury did find that Clark's statement about the gun was defamatory per se, question 3 did not force the jury to find actual damages. The jury knew from instruction 9, the instruction on defamation per se, that Canfield was not required to prove actual damages if the communication was defamatory per se.<sup>4</sup> When read as a whole with the instructions, the special verdict form properly informed the jury of the applicable law.

Nor did the verdict form prevent Canfield from arguing his theory of the case. Canfield was able to, and did, argue his theory of defamation per se under instruction 9. He argued to the jurors that if Clark's statements amounted to

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<sup>4</sup> Instruction 9, to which Canfield does not assign error, is consistent with the somewhat wordier instruction approved in Miller v. Argus Publ'g Co., 79 Wn.2d 816, 820-21 n.3, 490 P.2d 101 (1971), overruled on other grounds by Taskett v. KING Broad. Co., 86 Wn.2d 439, 546 P.2d 81 (1976).

defamation per se, damages could be presumed so long as they were the proximate result of Clark's statements.

So in this case, defamation per se is a principle that says that if somebody says something within—that covers a particular context, something that tends to harm somebody in their business, for example—that's what applies in this case most directly—then you can automatically—we don't have to prove actual damages. You can presume damages. And what you do is you presume damages that would naturally flow from that type of statement. So you need to keep this in mind when you're determining the damage portion as well. They still need to be damages that would be proximately caused by the statement, but you can presume that they exist. It's a form of what they call strict liability. It applies because statements such as the defamatory statements made by Ms. Clark are statements such that they cause particular harm to a party.

So in this case, a defamatory statement is defamatory per se if it exposes a person to hatred, contempt, ridicule or—I can't say that word [obloquy]—to deprive him of the benefit of public confidence or social intercourse or injures him in his business, trade, or profession. I don't believe that there is any doubt that a statement that an employee has a gun on them at a school district would injure them in their business. So I believe both of the statements made clearly fall under defamation per se, and that's the way that you should treat the evidence in this case.

And in rebuttal, Canfield argued again, "if we show defamatory per se, you can presume damages."

In related assignments of error, Canfield contends Clark's defamatory statement that she saw Canfield carrying a gun on school grounds was defamatory per se as a matter of law. He claims no reasonable juror could have found otherwise and therefore contends that the trial court erred by denying his motion for a directed verdict and his motion for judgment as a matter of law. Canfield also alleges that he was prejudiced when counsel for Clark was allowed to argue, over objection, that the plaintiff's case failed for lack of proof that the statements caused harm.

These arguments, like Canfield's challenge to the verdict form, assume an award of damages is obligatory once it is proved that the defendant made a defamatory statement—one that, in the words of instruction 4, "tends" to harm reputation. For damages to be presumed under instruction 9, it is not enough merely to prove a statement that "tends" to harm reputation. Clark's defense theory was that her statement, even if defamatory, was not a "but for" factual cause of damage to Canfield. Clark submitted evidence that Canfield had a poor reputation in the electrical shop before her statements, that his reputation remained equally poor thereafter, and that to the extent he was injured in his career by the investigation, he caused it himself by creating a hostile work environment. Clark's closing argument focused on the theme that "there has been no evidence from any witness that the alleged statement made by my client caused any harm to Mr. Canfield, to his reputation, or deterred any third persons from dealing with him." Clark's argument continued, "You know, there was not any harm to Mr. Canfield's reputation. He has not produced, as I mentioned, a witness that has come in and said: Because of the alleged statement, I treated Don differently. There hasn't been a single witness that has said: Because of the alleged statement, I avoided him."

Under instruction 9, the jury could have found that Clark's statements were defamatory per se, but the jury was not obligated to make that finding. Reasonable jurors could have adopted Clark's view of the evidence. Clark's closing argument was consistent with the instructions and not improper.

In summary, question three on the verdict form did not misstate the law, it was not misleading, and it did not prevent the jury from considering Canfield's theory of defamation per se. The trial court did not err in refusing to find defamation per se as a matter of law and did not err in overruling Canfield's objection to closing argument.

#### ADMISSION OF DEFENSE EXHIBITS

Canfield contends certain defense exhibits should have been excluded because they contained inadmissible hearsay.

The exhibits in question are handwritten notes taken by the school district employee whose investigation led to Canfield's demotion. The notes include unflattering comments made about Canfield by his coworkers, including assertions that he discriminated against employees who were not white males. The trial court admitted the notes as a business record over Canfield's hearsay objection. The investigator summarized that she had found a pattern of "harassment, bullying, [and] intimidating" behavior that she thought warranted termination. Canfield contends the notes were "highly prejudicial" and should have been excluded under ER 403.

Assuming the notes should have been excluded as hearsay, we nevertheless do not find reversible error. The unflattering statements about Canfield contained in the notes came into evidence in various other ways. Canfield's own testimony and testimony he elicited from other witnesses brought up the fact that he had been accused of creating a hostile work environment. Most significantly, Canfield himself moved to admit exhibit 63, the arbitrator's

opinion and award. The award was favorable to Canfield in that it supported the view that the entire investigation was a trumped up affair caused by Clark's unsubstantiated allegation that Canfield carried a gun on school property. But the award also quoted in full a district letter describing Canfield's alleged misconduct. The letter quoted virtually everything that was said in the investigator's notes. Under these circumstances, we conclude any error in admitting the notes was harmless.

#### EXCLUSION OF LETTER

Canfield assigns error to the trial court's refusal to admit plaintiff's exhibit 75, a letter authored by Jessie Logan. Logan was one of three people (the other two were the district's investigator and one of Clark's coworkers) who heard Clark say she saw Canfield carrying a gun at school. Canfield thought Logan would testify at trial, but Logan apparently was not subpoenaed and was not present. Canfield tried to get the substance of her testimony before the jury by way of the letter. Logan's letter states that Clark told her Canfield always carried a gun even in the electrical shop. The letter says: "From the way she was talking about him, I really believed he was a potential mass killer."

Logan allegedly sent the letter to Canfield's union representative, Nancy Mason. Mason testified that she found the letter in her file. Canfield moved to have it admitted as a business record of the union. The court denied the motion. Mason was allowed to testify that Logan came to see her about Clark and that Mason interviewed Logan in connection with the allegations raised against Canfield. But when Canfield asked Mason what Logan said, the court sustained

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Clark's hearsay objection and rejected Canfield's argument that the question went to "Mason's state of mind and her evaluation of the case."

On appeal, Canfield argues that the letter was admissible under ER 803(a)(3) as a statement of Jessie Logan's state of mind. Under that rule, a statement of "the declarant's then existing state of mind" is not excluded by the prohibition against hearsay. This is not the issue Canfield raised at trial, where the only discussion of the state of mind exception pertained to Mason's state of mind, not Logan's. And in any event, the trial court properly rejected Canfield's attempt to have Mason testify about what Logan said in the letter. Canfield cites no authority that would permit Logan's letter to be admitted as evidence of her state of mind. The court correctly described the letter and Mason's testimony about its contents as classic hearsay.

#### EXCLUSION OF EVIDENCE OF BIAS

The trial court granted Clark's motion in limine to exclude evidence that the school district was paying for Clark's attorney fees. The judge said, "I mean, the school district is not a defendant in the case." Canfield contends the court's ruling improperly prevented him from presenting evidence that witnesses employed by the school district were biased in favor of Clark.

Canfield raised this issue in his motion for a new trial. The trial court's ruling on that motion explains: "The Court rejected such evidence because it was not relevant to the specific subject matter of this case, and was potentially confusing the issues the jury was to resolve."



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A trial court's exclusion of evidence based on its potential to confuse the jury is entitled to great deference. Degroot v. Berkley Const., Inc., 83 Wn. App. 125, 128, 920 P.2d 619 (1996). Canfield does not persuasively explain how the district's payment of Clark's attorney fees would demonstrate that school employee witnesses were motivated to give testimony unfavorable to Canfield. We conclude the court acted within its discretion.

Affirmed.

WE CONCUR:

Speelman, J.

Becker, J.

Appelwick, J.

# Appendix B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

DONALD CANFIELD, )  
 ) No. 72869-5-1  
 Appellant, )  
 ) ORDER GRANTING  
 v. ) MOTION TO PUBLISH  
 ) OPINION  
 MICHELLE CLARK, )  
 )  
 Respondent, )  
 )  
 "JOHN DOE1" and "JANE DOE1," and )  
 their marital community, and )  
 "JOHN DOE2" and "JANE DOE2," and )  
 their marital community, )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

Respondent, Michelle Clark, has filed a motion to publish the opinion filed on August 22, 2016. Appellant, Donald Canfield, has filed a response to respondent's motion to publish the opinion. The court has determined that respondent's motion to publish the opinion is granted. Now, therefore, it is hereby

ORDERED that the written opinion filed on August 22, 2016, shall be published and printed in the Washington Appellate Reports.

DATED this 17<sup>th</sup> day of October, 2016.

FOR THE COURT:

Becker, J.  
Judge

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COURT OF APPELLATE JURY  
STATE OF WASHINGTON