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No. 65879-4-I

THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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KEITH BROWN, Appellant.

v.

CHRYSALIS SCHOOL, INC.,  
a Washington corporation, Respondent,

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APPELLANT'S OPENING BRIEF

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## **I. ASSIGNMENT OF ERROR**

Whether the trial court erred in granting summary judgment by failing to view all evidence and inferences from that evidence in the light most favorable to plaintiff, the non-moving party.

## **II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

ISSUE A WHETHER DEFENDANTS' STATEMENTS WERE DEFAMATORY *PER SE*, EXPOSING BROWN TO CONTEMPT, RIDICULE AND HUMILIATION, WHILE DEPRIVING HIM OF SOCIAL INTERACTION WITH HIS DAUGHTER?

ISSUE B WHETHER DEFENDANTS' FALSE DEFAMATORY STATEMENTS WERE A PROXIMATE CAUSE OF BROWN'S INJURIES?

ISSUE C WHETHER DEFENDANTS' FALSE AND MALICIOUS STATEMENTS PUBLISHED TO THE COURT APPOINTED PARENTING EVALUATOR, WERE INTENDED TO AND DID TORTIOUSLY INTERFERE IN THE RELATIONSHIP BETWEEN BROWN AND HIS DAUGHTER?

ISSUE D WHETHER DEFENDANTS' INTENTIONALLY FALSE STATEMENTS TO THE DETRIMENT OF A PARENT, PUBLISHED TO A COURT APPOINTED EVALUATOR IN THE CONTEXT OF A CHILD CUSTODY DISPUTE, WERE OUTRAGEOUS?

ISSUE E WHETHER, IN THE ALTERNATIVE, IF A JURY SOMEHOW FINDS DEFENDANTS' CONDUCT TO BE INADVERTENT, BROWN IS ENTITLED TO HAVE THAT JURY CONSIDER THE TORT OF NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS.

### III. STATEMENT OF CASE

In April 2004, Plaintiff/Appellant Keith Brown (hereinafter “Brown”) and his ex-wife (“Garth”) met with the staff of defendant Chrysalis School, Inc. (hereinafter “defendant” or the “School”) and enrolled their daughter, Ashley Brown. CP 825.

Since their divorce, Brown and Garth had shared child custody with equal rights under the parenting plan in place. *Id.* ¶3. At the time of Ashley’s enrollment, defendant school promised that both parents would have an equal opportunity to provide input into the educational process, and that both parents would be allowed to attend meetings and conferences. *Id.*, ¶4.

In April 2005, Shannon Murdoch, Ashley’s advisor at the school (hereinafter “Murdoch”), arranged a conference to discuss Ashley’s progress, but failed to invite Brown. Brown was not even informed of the meeting. CP 834, ¶7. At Ashley’s request, Brown contacted the school and asked that he be involved in the conference pursuant to the agreement that both parents would be equally involved. *Id.*

Murdoch refused, and told Brown that Garth was the school’s sole “contact parent”; Brown would have to obtain information about Ashley through Garth. CP 826, ¶6. After Brown asked to meet with school staff

to resolve this issue, the School reversed Murdoch's position and reassured Brown that both parents would be treated equally. *Id.*, ¶7.

In the middle of 2005, Brown and Garth agreed to hire Marsha Hedrick to assist with custody proceedings involving Ashley. *Id.* ¶8. On June 8, 2005, the court appointed Ms. Hedrick as parenting evaluator (PE), and ordered her to conduct an investigation. CP 241.

On January 23, 2006, Brown e-mailed Murdoch to request a meeting to discuss Ashley's college plans. CP 249. Murdoch agreed to schedule a meeting for February 6, 2006. Shortly thereafter, however, Murdoch cancelled this meeting. CP 826 ¶¶10-11. When Brown asked why, Murdoch accused him of putting the school in the middle of a custody battle and refused to communicate with him further. *Id.*

On February 13, 2006, Wanda Metcalfe, a school employee, e-mailed Brown informing him that Ms. Hedrick wished to speak with Murdoch about Ashley. *Id.* Metcalfe added, without explanation, that only Garth (and not Brown) would be permitted to have contact with Murdoch prior to this meeting. *Id.*

After seeing this e-mail, Brown contacted the School requesting a meeting to resolve any misunderstandings and to, yet again, reaffirm that both parents would be treated equally by the School. CP 826-827 ¶13.

On or about February 22, 2006, Brown met with school Assistant Principal Colleen Holder and Ms. Metcalfe. CP 827 ¶14. At that meeting, the School informed Brown that it had allowed Murdoch to speak with Hedrick despite the fact that Brown had revoked his permission. *Id.* ¶15. The School assured Brown that the conversation was only about Ashley because it was against School policy to share observations about parents. *Id.*

Brown first saw Ms. Hedrick's parenting evaluation on March 3, 2006. *Id.*, §16. This evaluation recounted Murdoch's various negative statements about Brown and his relationship with his daughter:

- a. "Keith wanted to bring in personal things." CP 902.
- b. "(Keith) calls all the time and e-mails constantly." *Id.*
- c. "(Keith) really wants to find out exactly what his wife has been saying." *Id.*
- d. "The front desk told me that (Ashley) was not excited, she was ambivalent about (the present her father had left for her). CP 903
- e. "At the end (Ashley) pushed in her chair and asked if she needed to be involved in the meeting." (Ashley said) "I'd really rather not be there, I haven't seen my dad for awhile and I don't want to be there."

CP 903

These statements formed a basis for Ms. Hedrick's recommendation that Brown should lose joint decision-making authority

and residential time with his children. CP 827, 909 ¶17. At her deposition Ms. Hedrick, testified that her investigation at Chrysalis was highly significant in her decision to recommend to the court that Brown be excluded from all decisions regarding Ashley's education at the school. CP 879.

Ms. Hedrick's report referenced interviews with nine collateral contacts (apart from the parties, Ed Garth, Ms. Garth's then current husband, and their children). Nearly a full page of that report was devoted to Chrysalis, far more than any other such contact. CP 902-903. No other collateral contact was cited in Ms. Hedrick's conclusions to her report. CP 907-909. At trial, Ms. Hedrick testified that she included in her report all evidence that was important to her conclusions. CP 920.

Ms. Hedrick relied on school employees in preparing her report, stating that the School's testimony provided a "microcosm" of Brown's general behavior patterns, and concluded that Brown should be barred from involvement in his daughter's education. CP 909.

At that time Brown assumed that the statements attributed to his daughter in Ms. Hedrick's report were an accurate description of what Ashley had told Murdoch. CP 828, ¶19. Brown was shocked and surprised at the negative statements made about him by the school staff,

particularly in light of his limited interactions with them (CP 828, ¶19), and their repeated assurances that it was against school policy to report observations of parents. *Id.*, ¶20.

In June 2006, trial was held regarding the respective parental rights and responsibilities of Brown and Garth.<sup>1</sup> Ultimately, the court denied Brown custody and decision-making authority. Moreover, the trial court explicitly prohibited Brown from participating in his daughter's education or having any contact with her school. *Id.*, ¶22. The trial court accepted and its' order implemented all of the recommendations and conclusions contained in Ms. Hedrick's report.

In May of 2007, Ashley having reached her majority, Brown asked her about the statements made by Murdoch to the parental evaluator. CP 833-834, ¶5. Because Ashley, as a child, had been kept unaware of this evaluation during the custody proceedings, she had not previously read the evaluation. CP 829, ¶24. When Ashley learned of the statements that Murdoch had attributed to her, she told Brown that the statements were false. CP 829, ¶25; CP 833-834, ¶5.

Ashley unequivocally stated that she: (1) never told Murdoch that she did not want her father to attend a school conference; (2) never

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<sup>1</sup> King County Superior Court Case No. 98-3-00150-3 SEA.

provided any negative comments about her father to Murdoch; and (3) never told Murdoch that she did not like a gift her father had left for her at the School. CP 834, ¶¶5-6.

In Brown's May 2007 conversation with Ashley, she disclosed that Murdoch had developed a close personal friendship with Garth, Brown's ex-wife. CP 829, ¶26; CP 834-835, ¶¶8-10. Ashley further stated her belief that the friendship between Murdoch and her mother (Garth) centered on a mutual dislike for Brown, that Murdoch's, opinions about Brown were based on her interactions with Garth, and that these opinions were further colored by Murdoch's radical personal and political philosophies: Murdoch claimed she was a victim of male abuse, a "witch", and a "radical" feminist, who believed that the U.S. government was behind the September 11<sup>th</sup> World Trade Center attacks. CP 833-834, ¶¶8-10. Ashley believes that all of this contributed to Murdoch's false statements to the parental evaluator. *Id.*

#### **IV. STANDARD ON REVIEW**

When reviewing a trial court's order of summary judgment an appellate court engages in the same inquiry as the trial court: All facts and reasonable inferences from those facts are viewed in the light most favorable to the nonmoving party, and all questions of law are reviewed *de*

*novo. Mountain Park Homeowners Assoc. v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994).

## V. SUMMARY OF ARGUMENT

If, as is proper on a motion for summary judgment, the evidence and reasonable inferences from that evidence are viewed in the light most favorable to Brown, the nonmoving party, then defendants' false and malicious statements to the parenting evaluator, taking place in the context of the custody dispute between Brown and Garth, were tortious. These false statements about Brown as a parent, his relationship with his daughter, and her alleged attitude toward him caused Brown: (1) to be exposed to contempt and ridicule; (2) to lose social interaction with his daughter, (3) to suffer emotional distress and humiliation; and (4) to harm the father-daughter relationship.

The evidence in the record along with the reasonable inferences from that evidence, establish the necessary elements of Brown's claims for defamation, tortious interference with familial relationships, and tortious infliction of emotional distress.

## VI. ARGUMENT

ISSUE A: WHETHER DEFENDANTS' STATEMENTS WERE DEFAMATORY *PER SE*, EXPOSING BROWN TO CONTEMPT, RIDICULE AND HUMILIATION, WHILE DEPRIVING HIM OF SOCIAL INTERACTION WITH HIS

DAUGHTER AND CAUSING HARM TO THE FATHER-  
DAUGHTER RELATIONSHIP?

This is one of the central issues presented in this appeal. The question of whether these statements proximately caused Brown's injuries is addressed separately and in more detail in Issue B, *infra*.

There are two meanings of the words *per se* when used in defamation actions. These words may signify either (1) that the article is libelous on its face or (2) that it is actionable without proof of special damages.

A defamatory publication is libelous *per se* (actionable without proof of special damages) if it (1) exposes a living person to hatred, contempt, ridicule or obloquy, to deprive him of the benefit of public confidence or social intercourse, or (2) injures him in his business, trade, profession or office.

*Caruso v. Local 690*, 100 Wn.2d 343, 353, 670 P.2d 240 (1983), citations omitted.

Generally, though a public figure must prove actual malice, a private individual may recover actual damages upon proof of negligent publication. *Taskett v. King Broadcasting*, 86 Wn.2d 439, 445-449, 546 P.2d 81 (1976). The adoption of a negligence criteria "reasserts" the legitimate state interest in providing a realistic remedy to those injured by defamatory falsehood. *Id.*, at 449.

The interest protected is the reputation of the one defamed.

*Ward v. Painter' Local Union No. 300*, 41 Wn.2d 859, 864, 252 P.2d 253 (1953).

[C]ustomary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation and mental anguish and suffering.

*Rasor v. Retail Credit Co.*, 87 Wn.2d 516, 529, 554 P.2d 1041 (1976).

However, in the absence of actual (special) damages, a plaintiff, though a private individual, must prove that the statements in question were defamatory on their face (*per se*). *Purvis v. Bremer's Inc.*, 54 Wn.2d 743, 747, 344 P.2d 705 (1959).

While the question of whether a statement is defamatory *per se* may, under some circumstances, be determined by the court as a matter of law,

[T]here seems to be an erroneous impression that, to be libelous *per se*, the statements in a publication must be so clearly defamatory that it ceases to be a question of fact for the jury, and is a matter concerning which there can be no difference of opinion among reasonable men, and becomes a question of law to be determined by the court. To this impression we have contributed with statements that whether a writing is libelous *per se* is a matter of law. See *Gaffney v. Scott Publishing Co.*, 1949, 35 Wash.2d 272, 212 P.2d 817...

Like most general statements, our statement that whether a writing is libelous *per se* is a matter of law to be determined by the court, is subject to exceptions. Where the definition of what is libelous *per se* goes far beyond the specifics of a charge of crime, or of unchastity in a woman, into the more nebulous area of what exposes a person to hatred, contempt, ridicule, or obloquy, or deprives him of public confidence or social intercourse, *the matter of what constitutes libel per se becomes, in many instances, a question of fact for the jury. This is particularly true where the*

*words relied on as libelous per se depend upon innuendo or upon extrinsic circumstances such as where they were published and who read them.*

*Purvis, supra*, at 752, emphasis added, citations omitted.

In many cases, words which are innocent. If considered alone, have held been to be defamatory by reason of extrinsic facts... Words which are harmless in themselves may be defamatory in light of surrounding circumstances.

*Pitts v. Spokane Chronicle Co.*, 63 Wn.2d 763, 767, 388 P.2d 976 (1964), citations omitted.

In the case *sub judice*, defendants' false and malicious statements clearly conveyed the impression that Brown was a lousy father, as well as a bit of a jerk, whose own daughter disliked him and wanted nothing to do with him. As such, these false statements exposed Brown to contempt and ridicule. These statements were knowingly made to a court appointed parenting evaluator with the intention of influencing that evaluator and thus, ultimately influencing the court against Brown in its determination of his parental rights.

The crucial importance of such parental rights has been recognized by the United States Supreme Court, which has referred to those rights as a "fundamental liberty interest of natural parents in the care, custody, and management of their children." *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). These rights are "precious" *Santosky*

*v. Kramer*, 455 U.S. 745, 756, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)

those precious rights, such as the union between a father and his daughter, should not be cavalierly undermined.

In this regard the question presented on appeal is whether reasonable people might understand defendants' false statements in a defamatory sense. *Id.*, at 770. On this record, that question is one of material fact for a jury and cannot be summarily dismissed.

**ISSUE A CONCLUSION: DEFENDANTS' STATEMENTS WERE DEFAMATORY *PER SE*, EXPOSING BROWN TO CONTEMPT, RIDICULE AND HUMILIATION, WHILE DEPRIVING HIM OF SOCIAL INTERACTION WITH HIS DAUGHTER.**

**ISSUE B: WHETHER DEFENDANTS' FALSE DEFAMATORY STATEMENTS WERE A PROXIMATE CAUSE OF BROWN'S INJURIES?**

The question of causation lies at the heart of the issues presented by all of Brown's claims:

Washington law recognizes two elements to proximate cause: cause in fact and legal causation. *Hartley v. State*, 103 Wash.2d 768, 698 P.2d 77 (1985).

In most instances the question of cause in fact is for the jury. It is only when the facts are undisputed and inferences therefrom are plain and incapable of reasonable doubt or difference of opinion that this court has held it becomes a question of law for the court.

*Daugert v. Pappas*, 104 Wn.2d 257, 262, 704 P.2d 600 (1985), citations omitted.

Legal causation turns on the question of foreseeability.

The legal causation prong of proximate cause involves policy considerations of how far the consequences of a defendant's acts should extend.

*Christen v. Lee*, 113 Wn.2d 479, 508, 780 P.2d 1307 (1989), citations omitted.

Foreseeability is normally an issue for the trier of fact and will be decided as a matter of law only where reasonable minds cannot differ,

*Schooley v. Pinch's Deli Market*, 134 Wn.2d 468, 477, 951 P.2d 749 (1998), citations omitted.

Brown produced evidence showing that defendants' statements were an important consideration in Ms. Hedrick's report and the recommendations contained therein, and that the trial court in the underlying custody dispute between Brown and Garth accepted those recommendations in their entirety. (See pp. 4-6, *infra*)

Defendant's admit that they were aware of this custody dispute when they made these false statements to Ms. Hedrick, who they knew to be a court appointed parenting evaluator. The obvious and eminently reasonable inference from these facts is that defendants could foresee that their false negative statements to Ms. Hedrick could adversely affect her report to the trial court, that court's decision, and Brown's parental rights. For purposes of summary judgment, this inference must be drawn in

Brown's favor, which precludes summary judgment on the issue of legal causation.

As regards causation, the primary question raised on this appeal is cause in fact, not legal causation.

Generally, cause in fact is determined on the basis of a "but-for" test. There are however, instances in which our courts reject the but-for test in favor of what is known as the substantial factor test. This case presents one such instance.

In this case there were doubtless many factors involved in both Ms. Hedrick's report and the trial court's decision regarding child custody. It is flatly impossible to say what would have happened "but for" defendants' false statements.

As noted by Dean Prosser, the substantial factor test aids in the disposition of three types of cases. First, *the test is used where either one of two causes would have produced the identical harm, thus making it impossible for plaintiff to prove the but for test*. In such cases, it is quite clear that each cause has played so important a part in producing the result that responsibility should be imposed on it. Second, *the test is used where a similar, but not identical, result would have followed without the defendant's act*. Third, the test is used where one defendant has made a clearly proven but quite insignificant contribution to the result, as where he throws a lighted match into a forest fire. W. Prosser & W. Keeton, Torts § 41 (5th ed. 1984).

*Daugert v. Pappas*, 104 Wn.2d 254, 262, 704 P.2d 600 (1985), emphasis added.

Though declining to apply the substantial factor test to the case before it, the *Daugert* court discussed in detail the application of this test. Such a change in the test for cause in fact is normally justified only when a plaintiff is unable to show that one event alone was the cause of the injury. That is exactly the situation obtaining herein: Ms. Hedrick attempted to assess the relationship of the parties and their children from all perspectives. While it's clear from the extent to which defendants' statements are emphasized in Ms. Hedrick's report that these false statements played an important role in her conclusions, it's impossible for anyone to show that these statements alone caused Brown's injuries.

The substantial factor test has been applied in a number of circumstances in Washington. A version of this test is set out for a jury's application in WPI 15.02:

The term "proximate cause" means a cause that was a substantial factor in bringing about the [injury] [event] even if the result would have occurred without it.

6 WA. Prac. WPI 15.02 (5th ed.)

The commentary to WPI 15.02 informs us that the substantial factor test has been adopted by Washington courts in cases involving discrimination or unfair employment practices. E.g., *Donahue v. Central Washington University*, 140 Wn.App. 17, 163 P.3d 801 (2007) (retaliation

for constitutionally protected speech); *Robel v. Roundup Corp.*, 148 Wn.2d 35, 59 P.3d 611 (2002) (disability discrimination); *Wilmot v. Kaiser Aluminum and Chemical Corp.*, 118 Wn.2d 46, 69–70, 821 P.2d 18 (1991) (retaliation for filing workers’ compensation claim); *City of Federal Way v. Public Employment Relations Com’n*, 93 Wn.App. 509, 513–14, 970 P.2d 752 (1998) (retaliation for union organizing activity); *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 898 P.2d 284 (1995) (gender discrimination); *Allison v. Housing Authority of City of Seattle*, 118 Wn.2d 79, 93–95, 821 P.2d 34 (1991) (age discrimination); and *Fell v. Spokane Transit Authority*, 128 Wn.2d 618, 911 P.2d 1319 (1996) (handicap discrimination in public accommodations).

The Washington Supreme Court also adopted the substantial factor test to determine the status of “seller” under the Securities Act of Washington. *Haberman v. WPPSS*, 109 Wn.2d 107, 744 P.2d 1032 (1987). The court retained the test for such cases even after federal courts abandoned a similar interpretation of federal securities law. See *Hoffer v. State*, 113 Wn.2d 148, 776 P.2d 963 (1989), and *Hines v. Data Line Systems, Inc.*, 114 Wn.2d 127, 787 P.2d 8 (1990).

In *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn.App. 22, 32, 935 P.2d 684 (1997), the Court of Appeals concluded that the substantial

factor test should be used in multi-supplier asbestos-injury cases when expert testimony establishes that

“all of the plaintiff’s exposure probably played a role in causing the injury and that it was not possible to determine which exposures were, in fact, the cause of the condition.”

*Id.*, at 32.

The *Mavroudis* court reasoned that

“[T]his is exactly the kind of situation that calls for application of the substantial factor test, in order that no supplier enjoy a causation defense solely on the ground that the plaintiff probably would have suffered the same disease from inhaling fibers originating from the products of other suppliers.”

*Id.*

Similarly here, the school should not be permitted to enjoy immunity from liability by claiming that Brown would have suffered the same injuries even in the absence of defendants’ false statements.

In another toxic tort case, *Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 896 P.2d 682 (1995), the Supreme Court approved application of the substantial factor test to a claim for damages from the drift of a chemical cloud where the claim was brought against the manufacturer, the applicator, and numerous upwind wheat growers who had used the chemical at various times. The court required the plaintiff to prove only

that an individual defendant used the pesticide, that it became part of the drifting cloud, and that the cloud caused damage to the plaintiff.

Similarly, here defendant's false and defamatory statements were part of the drifting cloud of information, misinformation, and opinions in Ms. Hedrick's report to the court. The question is not whether the report as a whole caused Brown's injuries, or whether these injuries would have occurred even absent defendant's statements. Rather, the question presented is whether defendant's false statements were a substantial factor among others in causing Brown's injuries.

In *Mavroudis, supra*, the court quoted with approval to *Prosser & Keaton on Torts*, §41, at 268 (5th ed. 1984). In §41 Professors Prosser and Keaton comment on the substantial factor test as follows:

If the defendant's conduct was a substantial factor in causing the plaintiff's injury, it follows that he will not be absolved of liability merely because other causes have contributed to the result, since such causes, innumerable, are always present.

*Prosser & Keaton on Torts*, §41, at 268 (5th ed. 1984).

The fact of causation is incapable of mathematical proof, since no one can say with absolute certainty what would have occurred if the defendant had acted otherwise. Proof of what we call the relation of cause and effect, that of necessary antecedent and inevitable consequence, can be nothing more than "the projection of our habit of expecting certain consequences to follow certain antecedents merely because we had observed these sequences on previous occasions". If as a matter of ordinary experience a particular act or omission might be expected, under the

circumstances, to produce a particular result, and that result in fact has followed, the conclusion may be permissible that the casual relation exists.

Circumstantial evidence, expert testimony, or common knowledge may provide a basis from which the causal sequence may be inferred... Such questions are peculiarly for the jury...

*Prosser & Keaton on Torts*, §41, at 269-270 (5th ed. 1984).

Under the circumstances obtaining in the case *sub judice* where, in the midst of a child custody dispute, defendants were approached by a court appointed parenting evaluator to provide information, common knowledge provides a more than adequate basis for a reasonable inference that defendants false statements regarding Ashley's relationship with Brown adversely affected Ms. Hedrick's evaluation and, in turn, adversely affected the court's assessment of Brown and his role in parenting his daughter. The fact that Ms. Hedrick's report leaned so heavily on defendants' statements, and the court accepted Ms. Hedrick's recommendations *in toto*, solidifies this inference.

In the context of defendants' false, malicious and defamatory statements, resulting damages may include injury to plaintiff's reputation and his wounded feelings or humiliation, as well as injuries suffered in his business or occupation. *Rasor, supra*, at 529.

It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is

such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.

*Lavender v. Kurn*, 327 U.S. 645, 653, 66 S.Ct. 740, 90 L.Ed. 916 (1946), quoted with approval in *Herskovits v. Group Health Coop.*, 99 Wn.2d 609, 617, 664 P.2d 474 (1983).

ISSUE B CONCLUSION: DEFENDANTS' FALSE DEFAMATORY STATEMENTS WERE A PROXIMATE CAUSE OF BROWN INJURIES.

ISSUE C: WHETHER DEFENDANTS' FALSE AND MALICIOUS STATEMENTS PUBLISHED TO THE COURT APPOINTED PARENTING EVALUATOR, WERE INTENDED TO AND DID WRONGFULLY INTERFERE IN THE RELATIONSHIP BETWEEN BROWN AND HIS DAUGHTER?

In *Strode v. Gleason*, 9 Wn. App. 13, 510 P.2d 250 (1973) the court recognized a parent's cause of action against a third party who alienates the affections of a minor child, and set forth the elements of that claim. *Id.*, at 20. Those elements, as set forth by the trial court are:

1. An existing family relationship;
2. A wrongful interference with the relationship by a third person;

3. An intention on the part of the third person that such wrongful interference results in a loss of affection or family association;

4. A causal connection between the third parties' conduct and the loss of affection; and

5. That such conduct resulted in damages.

*Id.*, at 14.

Recovery for mental anguish and distress is permitted in cases which involve malice or wrongful intent even though there has not been an actual invasion of the person of the plaintiff.

*Id.*, at 19, citations omitted.

In *Strode* the court noted that a successful plaintiff could also recover "expenses incurred in vindicating the parent's rights." *Id.*, at 18-19, citations omitted.

For purposes of summary judgment, it suffices that a jury could reasonably conclude on the basis of the evidence in this record that defendants' statements are false and malicious and, because published to a court appointed parenting evaluator, were intended to and did tortiously interfere in the relationship between Brown and his daughter.

**ISSUE C CONCLUSION: DEFENDANTS' FALSE AND MALICIOUS STATEMENTS PUBLISHED TO THE COURT APPOINTED PARENTING EVALUATOR WERE INTENDED TO, AND DID, WRONGFULLY INTERFERE IN THE RELATIONSHIP BETWEEN BROWN AND HIS DAUGHTER.**

ISSUE D: WHETHER DEFENDANTS' INTENTIONALLY FALSE STATEMENTS TO THE DETRIMENT OF A PARENT, PUBLISHED TO A COURT APPOINTED EVALUATOR IN THE CONTEXT OF A CHILD CUSTODY DISPUTE, WERE OUTRAGEOUS?

The tort of intentionally inflicting emotional distress by outrageous conduct was first recognized in Washington in the case of *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975). In that case, the Supreme Court adopted Restatement (Second) of Torts §46 (1965), and quoted that section to the effect that the tort of outrage lies:

“only where the conduct has been 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, supra*, 85 Wash.2d at 59.

In *Phillips v. Hardwick*, 29 Wn. App. 382, 386, 628 P.2d 506 (1981), the sellers of a house refused to deliver possession of the premises on the agreed upon date and prevented the buyers from moving in after that date, even though the house had been vacated. The court held that reasonable minds could differ as to whether the sellers actions were “outrageous” and that the question was properly for the jury. *Id.*, at 389.

Though the trial court may, in the first instance, decide on the question,

The question of whether certain conduct is sufficiently outrageous is ordinarily a question for a jury.

*Phillips v. Hardwick, supra*, at 386, citations omitted.

By granting summary judgment in the instant case, the trial court concluded as a matter of law that a jury could not reasonably find defendants' malicious falsehoods published to a court appointed parenting evaluator, in the midst of child custody dispute were outrageous. Yet, taking plaintiff's evidence as true, defendants' false statements were an attempt to influence the evaluator, and ultimately the court against Brown, to the clear detriment of his "precious" parental rights. *Santosky, supra*, 455 U.S. at 756. The trial court's grant of summary judgment usurped the proper function of the jury.

Every parent can only hope this court will intervene to reverse the trial court's conclusion, and remand this issue to be decided by a jury of ordinary citizens who presumably will understand the importance of the rights Brown lost as a result of defendants' outrageous conduct.

**ISSUE D CONCLUSION: DEFENDANTS' INTENTIONALLY FALSE STATEMENTS TO THE DETRIMENT OF A PARENT, PUBLISHED TO A COURT APPOINTED EVALUATOR IN THE CONTEXT OF A CHILD CUSTODY DISPUTE, WERE OUTRAGEOUS.**

ISSUE E: WHETHER, IN THE ALTERNATIVE, IF A JURY SOMEHOW FINDS DEFENDANTS' CONDUCT TO BE INADVERTENT, BROWN IS ENTITLED TO HAVE THAT JURY CONSIDER THE TORT OF NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

This case comes up on plaintiff's appeal from the trial court's grant of defendants' motion for summary judgment. For purposes of a summary judgment motion, this court, like the trial court, must assume that defendants' statements were false and intentionally made to cause injury to plaintiff.

However, at trial, the question of defendants' intent will be resolved by a jury and such a jury might, for whatever reason, conclude that defendants' false statements were inadvertent. If that eventuality were to come to pass, the jury should be afforded the opportunity to rule on Brown's claim for negligent infliction of emotional distress.

In *Corrigal v. Ball and Dodd Funeral Home*, 89 Wn.2d 959, 577 P.2d 580 (1978) the Supreme court concluded:

Appellant has stated a cause of action for negligent infliction of mental distress under *Hunsley v. Giard*, 87 Wash.2d 424, 553 P.2d 1096 (1976). In *Hunsley* we said that a plaintiff who undergoes mental suffering has a cause of action; that is, the defendant has a duty to avoid the negligent infliction of such distress. *Physical impact or threat of an immediate invasion of the plaintiff's personal security is no longer required to be alleged or proven.* *Hunsley v. Giard*, supra at 435, 553 P.2d 1096. Rather, the confines of a defendant's liability are now measured by the strictures imposed by negligence theory, i.e., foreseeable risk,

threatened danger, and unreasonable conduct measured in light of the danger.

*Corrigal, supra*, at 962, emphasis added.

In *Corrigal* appellant alleged respondent agreed to cremate the body of her son, place his remains in an urn, and deliver the urn to her, but that respondent failed to provide the urn and failed to disclose the absence of the urn when she claimed her son's remains. These derelictions were alleged to have caused appellant to handsift through what appellant thought was "packing material," resulting in her mental suffering when she discovered that the material was in fact the cremated remains of her son.

Not granting, but merely assuming for the sake of argument that defendants' statements were negligently made, the trial court's grant of summary judgment against this claim should be reversed in order to give a jury the opportunity to evaluate this claim should they conclude defendants' statements were inadvertent.

ISSUE E CONCLUSION: IF A JURY SOMEHOW FINDS DEFENDANTS' CONDUCT TO BE INADVERTENT, BROWN IS ENTITLED TO HAVE THAT JURY CONSIDER THE TORT OF NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

## VII. CONCLUSION

Taking plaintiff's evidence as true, defendants' lies (there really is no reason to mince words) were an attempt to influence the evaluator and ultimately the court against Brown to the clear detriment of his "precious" parental rights. *Santosky, supra*, 455 U.S. at 756.

In interpreting Article I, §21 of the Washington State Constitution, our Supreme Court has noted that the determination of whether a person is at fault, and whether that fault is a proximate cause of plaintiff's injuries are factual questions within the scope of the constitutional right to a jury. *Edgar v. Tacoma*, 129 Wn.2d 621, 627, 919 P.2d 1236 (1996).

The trial court's grant of summary judgment should be reversed and the matter remanded for trial on the merits.

DATED this 29<sup>th</sup> day of November 2010.

Respectfully Submitted,

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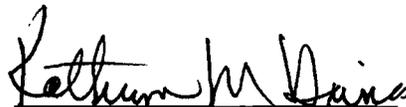
**DECLARATION OF SERVICE**

I, Kathryn M. Daines, declare under penalty of perjury under the law of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over eighteen years of age, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the 29<sup>th</sup> day of November, 2010, I delivered via ABC Legal Messenger Service, Inc. a true and correct copy of the foregoing “Appellant’s Opening Brief” to

John P. Hayes  
William C. Gibson  
Forsberg & Umlauf, P.S.  
901 Fifth Avenue, Suite 1400  
Seattle, Washington 98164

Dated this 29<sup>th</sup> day of November, 2010, at Seattle, Washington.

  
Kathryn M. Daines

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