

68025-1

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NO. 68025-1-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

THOMAS OSTHELLER
Appellant,

v.

CITY OF BURLINGTON,
Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable John M. Meyer, Judge

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. ASSIGNMENTS OF ERROR	1
III. STATEMENT OF THE CASE.....	2
IV. SUMMARY OF ARGUMENT.....	11
V. ARGUMENT	12
1. THE COURT IMPROPERLY APPLIED THE SUMMARY JUDGMENT STANDARD, FAILING TO INTERPRET THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE NONMOVING PARTY.	12
2. THE RECORD CONTAINED AT LEAST TWO ISSUES OF MATERIAL FACT CONCERNING THE DEFAMATION CLAIM.	14
3. THERE WAS AN ISSUE OF MATERIAL FACT CONCERNING THE CLAIM OF INTENTIONAL INTERFERENCE WITH A BUSINESS EXPECTATION -- CAVANAUGH'S STATE OF MIND AND INTENT IN MAKING FALSE STATEMENTS TO THE COUNTY DURING THE COUNTY'S DISCIPLINARY INVESTIGATION OF OSTHELLER.....	25
VI. CONCLUSION.....	33

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<u>ALCOA v. Aetna</u> , 140 Wn.2d 517, 998 P.2d 856 (2000)	14
<u>Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.</u> , 115 Wash.2d 506, 799 P.2d 250 (1990)	13
<u>Burke v. Pepsi-Cola Bottling Co. of Yakima</u> , 64 Wn.2d 244, 391 P.2d 194 (1964)	14
<u>Commodore v. Univ. Mech. Contractors, Inc.</u> , 120 Wn.2d 120, 839 P.2d 314 (1992)	25
<u>Dickinson v. Edwards</u> , 105 Wn.2d 457, 716 P.2d 814 (1986)	15
<u>Folsom v. Burger King</u> , 135 Wash.2d 658, 958 P.2d 301 (1998)	13
<u>Frisino v. Seattle School Dist. No. 1</u> , 160 Wn. App. 765, 249 P.3d 1044 (Div. I 2011)	13
<u>Goodman v. Goodman</u> , 128 Wash.2d 366, 907 P.2d 290 (1995)	14
<u>Hontz v. State</u> , 105 Wn.2d 302, 714 P.2d 1176 (1986)	12
<u>Kanzalarich v. Yarborough</u> , 105 Wn.App. 632, 20 P.3d 946 (Div. II 2001)	16
<u>Osborn v. Mason County</u> , 157 Wash.2d 18, 134 P.3d 197 (2006)	13
<u>Pleas v. City of Seattle</u> , 112 Wn.2d 794, 774 P.2d 1158 (1989)	26, 30
<u>Pritchett v. City of Seattle</u> , 53 Wash.2d 521, 335 P.2d 31 (1959)	14
<u>Purvis v. Bremer's Inc.</u> , 54 Wn.2d 743, 344 P.2d 705 (1959)	16
<u>Right Price Recreation v. Connells Prairie Council</u> , 146 Wn.2d 370, 46 P.3d 789 (2002)	15
<u>Scott v. P. W. Mountain Resort</u> , 119 Wash.2d 484, 834 P.2d 6 (1992)	13
<u>Spangler v. Glover</u> , 50 Wn.2d 473 (1957)	15
<u>Taskett v. King Broadcasting</u> , 86 Wn.2d 439, 546 P.2d 81 (1976)	15
<u>Thompson v. St. Regis Paper</u> , 102 Wn.2d 219, 685 P.2d 1081 (1984)	27
<u>Wash. Fed'n of State Emps., Council 28 v. Office of Fin. Mgmt.</u> , 121 Wash.2d 152, 849 P.2d 1201 (1993)	13
<u>Woody v. Stapp</u> , 146 Wn. App. 16, 189 P.3d 807 (2008)	25
<u>Statutes</u>	
RCW 9A.76.175	30

I. INTRODUCTION

Thomas Ostheller, the Plaintiff below, hereby seeks review of the decision of the Honorable John Meyer, Superior Court Judge of Skagit County, dismissing his claims against the City of Burlington on summary judgment, and contemporaneously denying his own application for partial summary judgment against the City of Burlington. The decision from which appeal is taken was filed by Judge Meyer on November 2, 2011.

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in granting summary judgment to the defense.
2. The trial court erred in denying partial summary judgment to the Plaintiff.

Issues Pertaining to Assignments of Error

1. Whether the making of a deliberately false factual statement by a non-employer party to an employer conducting an internal disciplinary investigation, which statement is specifically used by the employer to test the truthfulness of the employee relating to the event, and which statement is used as a justification for terminating the employment relationship, constitutes defamation and/or intentional interference with a business expectancy?

2. Whether the expectation of progressive discipline, based upon written and fully published personnel policies and procedures is cognizable as an interest protected by traditional tort principles related to "business expectancies"?
3. Whether the deliberate and intentional corruption of the progressive discipline process in an at will employment setting should be cognizable as intentional interference with a business expectancy?
4. Whether the trial court erred in concluding there was no issue of material fact as to whether the false statements made by employees of the city of Burlington caused the termination of Ostheller's job with Skagit County?
5. Whether the trial court erred in concluding there was no issue of material fact as to whether the false statements about Ostheller made by the city Burlington during the county's disciplinary investigation of Ostheller's interfered with Ostheller's reasonable expectation of progressive discipline as an employee of Skagit County according to Skagit county's personnel policies?
6. Whether the trial court erred in concluding that there was no issue of material fact as to the *mens rea* of city employee Cavanaugh when providing false information to Skagit County officials during their investigation of alleged misconduct of Ostheller?

III. STATEMENT OF THE CASE

The Plaintiff Thomas Ostheller was employed by Skagit County in its Senior Services department as a Food Services Supervisor. CP 183-86; 228-233. He was a cook at a communal kitchen located on property located in Maiben Park, a city park in the city of Burlington. Id. As cook, Mr. Ostheller was responsible for

preparing meals for senior citizens both on and off the premises; the off the premises meals were provided through the "Meals on Wheels" program. Id. His responsibilities also included managing the kitchen area of the facility to ensure compliance with all aspects of fire safety. CP 185; 233.

The county and city had an interlocal agreement which defined the respective rights and responsibilities of the County and city with regard to these activities. See generally CP 229-33. The city relinquished most of its property rights to the county with respect to the management of the kitchen, presumably because of the attendant liability from the County's occupation and use of the kitchen space. While the county had significant rights, by virtue of the agreement, to use and occupy the kitchen area for the meal preparation process, the city maintained the building.¹

After Ostheller was hired, he had a discussion with a maintenance worker for the city, a Mr. Tingley, about the replacement of some light bulbs in the kitchen. CP 191, 237. Ostheller gestured to the light fixture with a knife in his hand. Id. Well after the fact and as part of this litigation, Tingley claimed that Ostheller had "assaulted

¹ As shown elsewhere, Cavanaugh called the document a lease; in some respects it functioned as one but certainly did not have that title. On a day-to-day level, over

him" with a knife, "although [he] was not fearful that he would hurt [him] at the time". CP 164-67; CP 328-30. According to Tingley, he reported this at the time to Cavanaugh, the city's director of Parks and Recreation, although he did not wish or ask that the matter be pursued any further whatsoever. Id.

The precipitating event for this case occurred on November 5, 2008. On that date, Ostheller was working in the kitchen when a Burlington employee, Simeon Brown, decided to test the building fire alarm system by activating it. CP 186-90; 238-48. After the fact he claimed he had provided some form of notification to the people inside the building. By all accounts, however, he did not inform Ostheller, who was working in the kitchen. CP 238-39, 242-43.

Ostheller was alarmed, naturally, believing there was some form of an emergency. CP 187, 245. He shortly realized that some form of test was occurring and that Brown was responsible for it at some level. Id. Upset, he approached Brown and admonished him, unfortunately including the phrase "stupid shit" or "dumb shit"² for failing to notify Ostheller – in the kitchen – before setting the alarm off. CP 187. Brown reacted aggressively, announcing that he had

time. the city effectively stopped actively maintaining the kitchen area, leaving such functions, and the related costs, to Mr. Ostheller and the County. CP 186-88.

² Mr. Ostheller has never denied using this crude, albeit arguably accurate, phrase.

told everyone who needed to be told about the alarm test. CP 242-43. Both initial witness statements indicate that Brown aggressively defended his apparent decision not to inform Ostheller; he managed to bring the event back into the kitchen from a common area of the building. CP 238-40.

Immediately, after the altercation with Ostheller, Brown immediately reported the event to Cavanaugh. CP 244. Cavanaugh responded directly and immediately to the facility, where he interviewed Brown. As this was occurring Ostheller approached the two and offered an apology for being upset. Cavanaugh informed him that he was expelled from the building and that he should not return until he received approval from the county commissioners. Ostheller obeyed the command and left. CP 188, 244, 246.

After getting a report from Brown about the incident, Cavanaugh contacted the city of Burlington police. Id. An officer responded and took a report from Cavanaugh; Cavanaugh reported to the officer that this was the "2nd time in a year that Tom the cook assaulted an employee and that the employee did not want to press charges so nothing was done before" and "since this was the 2nd time, it has proven that Tom has an anger management problem and needs to be dealt with". CP 244. The officer additionally spoke

directly with Brown, who decided that he did not want to press any charges. CP 243-44; 262-63. Cavanaugh also told the officer that he did not want Ostheller back at the facility. CP 263, line 10-12.

In addition, Cavanaugh contacted officials at Skagit County who were responsible for supervising Ostheller and overseeing the interlocal agreement between the city and the county and repeated the same information. CP 241, lines 1-15; 245; 263. During this phone conversation Cavanaugh announced unilaterally that Ostheller would no longer be permitted on the premises, meaning the entire facility in the city park. The effect of this was to cause county officials to order that Ostheller be placed on immediate paid administrative pending its investigation of the situation. CP 188; 241 line 15.

Skagit County began investigating both of the alleged "assaults". CP 248 – 261. The investigation was conducted by Ms. Kingsley, the immediate supervisor of Mr. Ostheller, and the Human Resources Director, Ms. Kadrmas. The two collected information from both sides of the dispute. CP 248-49. On December 15, 2008, Ostheller met with Kadrmas, and provided a summary of his side of the events. CP 190. There was no mention of the incident with Mr. Tingley at that point in time, although there was inquiry as to whether Ostheller knew Tingley. CP 190-91. There was no mention of any

contact with the police department at the time of the Brown incident on November 5, 2008. CP 191, lines 19 – 20.

On January 5, 2009, Kingsley issued a letter to Ostheller indicating that she had made a preliminary decision to terminate his employment with the County based upon the investigation. CP 249 – 50. The letter did not reference the fact that the city of Burlington was effectively banishing Ostheller; it generally referenced Mr. Ostheller's use of profanity. Id. The letter did not make any reference to contact between Ostheller and the Burlington police during the Brown/fire alarm incident. Id. The letter called for a conference on January 13, 2009 in which Ostheller could try to convince them of whatever reasons might exist for him to retain his employment. Id.

On January 13 Ostheller and his wife met with Kingsley and Kadrmas. For the first time, Ostheller was asked to explain whether he had any direct contact with Burlington police officers. CP 192, lines 15-18; CP 200-201; CP 254, lines 1-7. He truthfully related that he did not. Id. The question was repeated; the answer was repeated by Ostheller. Id. Finally, Ostheller was generically asked whether he was being honest about the statements he was making to Skagit County during the investigation about the Burlington events. Id. He said that he was speaking the truth. Id.

Following the conference, Kingsley and Kadrmas continued their joint investigation with a conference with Cavanaugh on January 27, 2009. CP 254-258. The conversation started with the Tingley matter, with Cavanaugh reporting that Tingley “is a big, stout, proud guy” who didn’t want to report the incident as an assault. CP 256, lines 6-7. Kadrmas then issued a more general question, whether there were “any additional details left out, anything else that is not in the report that you recall?” CP 256. The reference to “details left out” was to the written statement Cavanaugh had prepared on the day of the incident, which had been supplied to the county. See CP 244.³To this overture Cavanaugh specified that Mr. Ostheller was present when the officer was present, that he was argumentative, and that the police had to escort him from the premises. CP 257.

Following that meeting, on February 10, 2009, Kingsley issued a final termination letter to Ostheller. CP 258-60. The letter made identical reference to the same provisions of the county personnel and policies manual which had been in the pre-termination letter. This time, however, the letter contained specific references to certain

³ In the pleadings and arguments below the defense asserted this original Cavanaugh written statement clearly reflected that Ostheller was not present wner. the Burlington police arrived, and that Kadrmas and Kingsley could somehow glean such “facts” from inspection of the statement. A careful reading of that statement

aspects of the incident with Simeon Brown. Id. The letter made two other direct references to reasons why the county was terminating Ostheller's employment. The first was that Burlington had kicked Mr. Ostheller off the Senior Center property. Id. The second was that Mr. Ostheller lied to Kadrmas and Kingsley during the January 13 meeting when he told them he did not "mention nor admit" to his contact with the Burlington police during the Brown/fire alarm incident; similarly, Kingsley further observed -- in a general reference to some form of dubious "denial" by Mr. Ostheller -- that he "repeatedly" said he did not understand why he was being disciplined.

The Plaintiff filed a lawsuit against the City of Burlington asserting two claims of relief, defamation and intentional interference with a business expectancy. CP 358-68. In answer to the complaint, the city admitted that Cavanaugh's statements to Kadrmas and Kingsley relating to the police contact were false. CP 265-66.

On August 22, 2011, the defense filed a motion for summary judgment seeking wholesale dismissal of the Plaintiff's claims. CP 22-52. On September 15, 2011 Plaintiff filed "Plaintiff's Statement of Facts Concerning Summary Judgment" which provided concise detail about the events creating the litigation. CP 228-68. The Plaintiff also

defies that claim; this question from Kadrmas to Cavanaugh, and his answer,

filed a series of declarations on or before that date, including one from Ostheller, CP 183-98; his wife, CP 199-201; a clinical psychologist, Dr. Comer LaRue, CP 202-219; and Plaintiff's counsel, CP 269-75. The statement of facts also cross referenced certain portions of the defense summary judgment declarations. Also on September 15, 2011 the Plaintiff filed a cross motion for summary judgment related to the impact of the false statement concerning the contact with the Burlington police officer made by Cavanaugh. CP 222-227; 276-300. The motion alleged that the false statement justified partial summary judgment for both defamation and intentional interference with Ostheller's reasonable business expectancy in fairly administered, untainted, progressive discipline. Id.

On October 31, 2011 Judge Meyer heard oral argument on the case for a single court session and took the matter under advisement. On November 2, 2011 he issued an order granting the summary judgment sought by the City. CP 355-57. He did not otherwise specifically rule on Ostheller's cross motion for partial summary judgment. Id.

On December 1, 2011, Ostheller timely filed a notice of appeal from the entry of the summary judgment order. CP 384-90.

amplifies that fallacy.

IV. SUMMARY OF ARGUMENT

Thomas Ostheller was fired from his job with Skagit County because agents and employees of the city of Burlington 1) falsely reported to Skagit County that Ostheller had assaulted city employees; 2) falsely reported to Skagit County that he was a dangerous person to the general public, who needed “anger management”; 3) falsely reported to Skagit County that Ostheller rebuffed and disobeyed a direct command of an officer of the Burlington Police Department – face-to-face -- to leave city of Burlington property and had to be “escorted” off the premises; and 4) he “untruthfully” told Skagit County officials that he did not have contact with the Burlington police during Skagit County’s investigation of the Brown/fire alarm incident.

The court erroneously issued summary judgment against the Plaintiff here, in disregard of such facts, failing to, at a minimum, review the matter in the light most favorable to the non-moving party. Additionally, the court failed to award partial summary judgment to the Plaintiff on the defamation claim as to that portion of the claim

pertaining to the admitted false statements about Ostheller being ejected from the Burlington property by a Burlington police officer.

V. ARGUMENT

1. The court improperly applied the summary judgment standard, failing to interpret the evidence in the light most favorable to the nonmoving party.

A motion for summary judgment should not be granted unless the pleadings, depositions, and affidavits on file show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Hontz v. State, 105 Wn.2d 302, 311, 714 P.2d 1176 (1986). The appellate court engages in the same inquiry as the trial court, and all evidence and inferences are considered in the light most favorable to the nonmoving party. Id.

In such cases facts and all reasonable inferences therefrom must be considered in the light most favorable to the nonmoving party, and summary judgment should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. The burden is on the moving party to demonstrate that there is no issue as to a material fact, and the moving party is held to a strict standard. Since the plaintiff's evidence raised genuine issues of material fact with regard to whether the defendants acted negligently and

whether such negligence, if any, was a proximate cause of the injuries, these issues are not properly decided on summary judgment.

Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co., 115 Wash.2d 506, 516, 799 P.2d 250 (1990);
Osborn v. Mason County, 157 Wash.2d 18, 22, 134 P.3d 197 (2006).;
Folsom v. Burger King, 135 Wash.2d 658, 663, 958 P.2d 301 (1998).
Wash. Fed'n of State Emps., Council 28 v. Office of Fin. Mgmt., 121 Wash.2d 152, 163, 849 P.2d 1201 (1993).

The non-moving party is entitled to all reasonable inferences from the evidence before the court at summary judgment. Scott v. P. W. Mountain Resort, 119 Wash.2d 484, 487, 834 P.2d 6 (1992).
Compare Frisino v. Seattle School Dist. No. 1, 160 Wn. App. 765, 249 P.3d 1044 (Div. I 2011)(reversing summary judgment for dismissal of employment discrimination and retaliatory discharge claims for failure to properly evaluate reasonable inferences for non-moving party).

But judgment as a matter of law should "not be granted unless the court can say, as a matter of law, that there is neither evidence nor reasonable inference from the evidence sufficient to sustain the verdict."Pritchett v. City of Seattle, 53 Wash.2d 521, 522,

335 P.2d 31 (1959). Such a motion admits the truth of the opponent's evidence and all inferences that can be reasonably drawn therefrom, and requires the evidence be interpreted most strongly against the moving party and in the light most favorable to the opponent. ALCOA v. Aetna, 140 Wash.2d 517, 529, 998 P.2d 856 (2000); Goodman v. Goodman, 128 Wash.2d 366, 371, 907 P.2d 290 (1995). "The credibility of witnesses and the weight to be given to the evidence are matters which rest within the province of the jury; and, even if it were convinced that a wrong verdict had been rendered, this court would not substitute its judgment for that of the jury so long as there was evidence which, if believed, would support the verdict rendered." Burke v. Pepsi-Cola Bottling Co. of Yakima, 64 Wash.2d 244, 246, 391 P.2d 194 (1964). The judicial urge to take questions of fact from the jury must be resisted.

2. The record contained at least two issues of material fact concerning the defamation claim.

The trial court 's summary judgment ruling necessarily rejected the Plaintiff's defamation allegations that 1) Cavanaugh deliberately made false statements to county officials about Ostheller's contact with the police during the Brown/fire alarm incident and 2) that those

false statements caused Ostheller to be fired. Proper application of the summary judgment standards set forth above required the opposite result.

The definition of defamation, for purposes of this case is not complicated. Liability exists so long as the plaintiff demonstrates that the statements complained of were 1) false, 2) defamatory and 3) published. Taskett v. King Broadcasting, 86 Wn.2d 439, 458, 546 P.2d 81 (1976). A defamation plaintiff must first prove that the statement sued upon is defamatory, meaning a false assumption of fact or opinion that implies the existence of a false fact subjecting the plaintiff to hatred, contempt, ridicule or obloquy. Spangler v. Glover, 50 Wn.2d 473 (1957); see also Dickinson v. Edwards, 105 Wn.2d 457, 716 P.2d 814 (1986). A statement is defamatory if it tends to harm the reputation of another to the extent of lowering him in the estimation of the community or to deter third persons from associating or dealing with him. Right Price Recreation v. Connells Prairie Council, 146 Wn.2d 370, 382, 46 P.3d 789, 795-96 (2002). Defamatory words spoken of a person which in themselves , prejudice him in his profession, trade, vocation, or office, are slanderous *per se* unless they are either

true or privileged. Spangler, 50 Wn. 2d at 478. Defamatory statements expose a person to hatred, contempt, ridicule or obloquy, or deprive a person of public confidence or social intercourse. Purvis v. Bremer's Inc., 54 Wn.2d 743, 344 P.2d 705 (1959). Even if a qualified privilege is available, of any type, it may be abused when the party making statements had knowledge of the falsity *or* made statements in reckless disregard of the falsity of the statement. Kanzalarich v. Yarborough, 105 Wn.App. 632, 20 P.3d 946 (Div. II 2001).

The deliberate nature of the Cavanaugh statements.

The city was forced to concede and admit that its agent, Cavanaugh, had actually made false statements to Kingsley and Kadrmas during their conference on January 27, 2009 concerning Ostheller's supposed contact with the Burlington police. The official position of the city in this litigation, however, was that Cavanaugh had accidentally offered such information, that he was confused because the events had occurred on November 5, 2008. The Plaintiff took great exception to that characterization then, as it does now. As argued there and herein, that characterization

ignores the undisputed truth of the record, the notes and transcriptions of that meeting, in which Cavanaugh does not preface or qualify any of his statements by saying he doesn't then remember, or perhaps similarly, that he had to think about his recollection for a minute. The contemporaneous notes show that he volunteered the information after hearing a general "is there anything else" type question. Moreover, the detail provided in his words illustrates the dubious nature of the "poor memory" claim in this litigation.

The proper characterization of this statement, and corresponding state of mind of Cavanaugh, is apparently an issue of importance here. It was so important that the defense took it upon itself to offer up, in the answer and later in declaration from Cavanaugh, that the statements were some kind of an accident, an innocuous and innocent mistake. As otherwise argued at the trial court and here, that issue is certainly not conceded. Besides the character of the disclosures themselves, and the circumstances under which they occurred during the meeting, there were a series of reasons and motives for Cavanaugh to inject the false information. Under such circumstances, at a minimum, Ostheller

was entitled to present his case to a fact finder. The state of mind of Cavanaugh at the time he made the statements is therefore a disputed issue of material fact.

By issuing summary judgment Judge Meyer accepted this view of the evidence. He summarily concluded, necessarily, that the innocent explanation was accurate. He resolved this very real conflict in the evidence against Ostheller, the nonmoving party.

The false statements caused the dismissal.

Scrutiny of the record further reveals that the false statements caused the county to fire Ostheller. The city maintained, of course, that they did not, because the county had already issued a pretermination letter. But after all, it was a pretermination letter, and the county was continuing to assess the options available to it. The issue of material fact presented by this aspect of the case is whether, absent the additional information provided by Cavanaugh Ostheller would have been fired. What can certainly be said without any dispute is that the false statements made by Cavanaugh polluted the entire review process, unquestionably allowing for the possibility that other outcomes were possible. In

this sense, the veritable genie cannot be put back in the bottle because the county expressly referenced those false statements in the February termination letter.

Perhaps more fundamentally, simple review of the chronology reveals the importance of those statements in the final analysis for the county. First, the record clearly reveals that Kadrmas and Kingsley had not determined whether they were going to dismiss Ostheller at the end of the meeting with Cavanaugh on January 27, 2009. They would not tell or otherwise confirm to Cavanaugh that Ostheller was going to be fired at the end of the meeting. This is demonstrated by Kadrmas' statement to him:

We are going to have to wait until this is finished before we bring in another employee. The County intended to have this complete before now, but there have been some glitches with Mr. Ostheller. We think he is going to pursue this as far as he can, so we want to be sure that the County is prepared and be sure of all the facts.

CP 258, lines 10-11. This vagary drew the ire of Cavanaugh, who clearly was not getting the answer that he wanted or expected.

Well, the City of Burlington does not have to let someone in their facility that is a problem. It is in the lease agreement between the County and the City. The County personnel do not have the right of a City employee.

Id., lines 12-13. To end the meeting, in response to that outburst, Kadrmas told Cavanaugh that he would be contacted "as the status changes" and that that they would "keep [him] in the loop".

Second, the record unambiguously reflects that the decision to fire Ostheller came *after* that meeting, when the termination letter was issued some two weeks later, on February 10, 2009.

Third, the record unambiguously reflects that the final decision integrated the content of the January 27, 2009 meeting with Cavanaugh, and expressly adopted the account of Cavanaugh insofar as he reported – unambiguously and in precise detail – the supposed though now admittedly false contact with the Burlington Police officer. CP 259. Without realizing it, Ostheller was going into the gauntlet of a swearing contest with Cavanaugh and the city of Burlington. The issue of what had happened with the police that day emerged front and center for the county in its investigation, *after* Cavanaugh took the liberty of adding the false and embellished statements to the investigation fodder. Kadrmas and Kingsley repeatedly questioned Ostheller about this issue during their January 13, 2009 meeting . Ultimately, the February

10, 2009 termination letter expressly referenced this apparent contradiction and proclaimed that "additional information was provided regarding the role of law enforcement in the incident of November 5, 2008; [i]nformation that you had contact with Officer Moser . . . when in your previous interview you did not mention nor admit to any contact with law enforcement". CP 259. Ironically, it would appear if Ostheller "admitted" or otherwise "mentioned" during his meeting with Kingsley and Kadrmas that he *did* have contact with the police, a case may have been made for some other result than termination. If he had lied he may have kept his job; he was doomed by telling the truth.

Fourth, the record unambiguously demonstrates, that the fallout from that false report from Cavanaugh was that Kadrmas and Kingsley concluded not only that Ostheller had contact with the Burlington police, but also that Ostheller was falsely claiming he did not have contact with the officer – he was lying to his employer during the disciplinary process. As pointed out above, the termination letter expressly references this turn of events and the subjective decisions and conclusions Kadrmas and Kingsley were compelled to consider about the relative credibility of Ostheller and

the credibility of Cavanaugh.⁴ Cavanaugh's addition of these false details into the mix crystallized the credibility issue.

Overlaying all of this, of course, was the dynamic of the city-county arrangement for the Senior Services program. The effect of the false statement was to directly ostracize Ostheller, converting him into a pariah, even a lightning rod, with respect to the ability of the city and county to continue functioning together. Not only was he "trouble" – he was a liar. The net effect for the county, especially in light of the politics occurring, was that Ostheller became the scapegoat and the sacrificial lamb; the finding of dishonesty against him by the county provided a convenient avenue for his disposal.

Notwithstanding all of these uncontroverted facts, Judge Meyer issued summary judgment against Ostheller on the defamation claim.⁵ To get to that point he had to ignore these

⁴ Incidentally, there is no evidence in the record suggesting that Kadmas or Kingsley took any affirmative steps to verify the report of Cavanaugh with regard to the supposed police contact. The narrative report of the officer, in which he clearly reveals no contact with Ostheller, was procured by Ostheller during discovery in this case, by way of a series of public records requests. CP 261-264.

⁵ Inspection of the trial court briefing from Ostheller on the defamation claim will reveal that he alleged a series of statements by the city were false (assault, need for anger management etc.). CP 276-300. Ostheller continues to maintain these too were defamatory. For purposes of the discussion in this appeal, however, as the

facts altogether. It is perhaps again instructive to note here that Cavanaugh's comments during the meeting were not just passing or vague. He told Kadrmas and Kingsley that Officer Moser was "in uniform", that Ostheller was argumentative, and that Officer Moser had to ask Ostheller to leave, essentially escorting him out of the building.⁶ CP 256-257. But the exact opposite was true. Ostheller had gone back to Brown and apologized and then left the building after Cavanaugh asked him to leave, and well before the officer arrived. CP 188, lines 3-7.

Ironically, by telling the truth during the disciplinary investigation, Ostheller sealed his own fate. Working from the false information provided by Cavanaugh's statements, Kadrmas and Kingsley mistakenly concluded that Ostheller was being something less than truthful. Most importantly, this dishonesty, according to their perception at the time, was occurring to their face during the

city has admitted making the false "police contact" statement to the county during the county disciplinary investigation, and as the county specifically cited such statement in its termination letter to Ostheller, this brief is being academically limited to it. It is the most graphic and salient of the falsities lobbed at Ostheller.

⁶ According to the amended answer to the complaint, Cavanaugh made these embellishments as a result of some accidental memory lapse, as the events had occurred "several months after the incident occurred". CP 266. As argued to the trial court, that assertion is illogical and unfathomable under the circumstances, when Cavanaugh is expressly arguing, at the same time, no matter what the county decided Ostheller could not come back to the Senior Center.

disciplinary process. It is humbly suggested to this court that it was the certain kiss of death. In the atmosphere that existed, where Ostheller was denying involvement in assaultive and aggressive behavior in the first place, the idea that he would lie to the investigators lent great credence to those very same more than dubious allegations.

From an appellate perspective, as suggested above, the critical inquiry should be whether any reasonable trier of fact could agree with this view of the evidence, that it was the perceived dishonesty that pushed the decision over the edge and against Ostheller. Could a reasonable trier of fact conclude that the ultimate cause of Ostheller's termination was not the altercation between him and Brown, or the Tingley incident, but the belief formed by the Skagit County authorities, after all was said and done, that Ostheller was no longer trustworthy. In context, such a fundamental finding contaminated any other statements or accounts that Ostheller was providing about the incident, making his own confusion about what was happening, to Kingsley and Kadrmas, some nefarious denial or cover-up. At its core, though, that finding was premised upon the now admittedly false

information provided by Cavanaugh and the city. For this reason, the summary judgment dismissal must be reversed.

3. There was an issue of material fact concerning the claim of intentional interference with a business expectancy - Cavanaugh's state of mind and intent in making false statements to the county during the county's disciplinary investigation of Ostheller

Judge Meyer summarily rejected Ostheller's claim of intentional interference with a reasonable business expectancy (hereafter IIBE). The analysis here mirrors that set above. Judge Meyer necessarily ruled that Cavanaugh's state of mind was innocent. In the context of the IIBE claim, that conclusion is flawed and should be reversed.

The elements of IIBE are(1) the existence of a valid contractual relationship or business expectancy; (2) that defendant had knowledge of that relationship; (3) that defendant engaged in intentional interference inducing or causing breach or termination of the relationship or expectancy; (4) that defendant interfered for an improper purpose or used improper means; and (5) that plaintiff suffered resulting damages. Woody v. Stapp, 146 Wn. App. 16, 23, 189 P.3d 807 (2008); Commodore v. Univ. Mech. Contractors, Inc., 120 Wn.2d 120, 138, 839 P.2d 314 (1992). "[A] cause of action for

tortious interference arises from either the defendant's pursuit of an improper objective of harming the plaintiff or the use of wrongful means that in fact cause injury to plaintiffs contractual or business relationships." Pleas v. City of Seattle, 112 Wn.2d 794, 804, 774 P.2d 1158 (1989). Such a claim is established: "when interference resulting in injury to another is wrongful by some measure beyond the fact of the interference itself." Id. The desire to interfere need not be the primary, or only, motivation for the defendant. Id. at 805.

Ostheller had a series of reasonable business expectancies vis-à-vis his employment with Skagit County. These were embodied in the Skagit County personnel rules. Those expectancies included explicitly general principles of fairness – perhaps even due process – with regard to employee relations, and particularly in disciplinary settings.⁷ With regard to discipline, he had an expectation of progressive discipline, coupled with the classification of certain categories of employment violations or offenses. Further, so long as he abided by the general terms of the personnel policies, he reasonably expected that he would be allowed to remain as an

⁷ There apparently is no issue of material fact about this aspect of the case, including the progressive disciplinary policies existence and their application to this

employee. In the event of some violation, he expected he would be progressively disciplined, absent some very egregious violation.⁸ The progressive discipline would include some warning about behavior, or some form of corrective action, short of termination. This notion of expectation of some form of fair treatment has long been recognized in Washington law. Thompson v. St. Regis Paper, 102 Wn.2d 219, 685 P.2d 1081 (1984). Of note, here, of course, is that Ostheller never before was subjected to any form of discipline while working for Skagit County. This was a “first offense” scenario.

There can be no question in this case that the city, through its agent Cavanaugh,⁹ knew of the relationship and, more importantly, *the disciplinary process*. Cavanaugh was participating in the disciplinary process as a prospective witness; thus the meeting with Kadrmas and Kingsley. Moreover, he fully realized it was a progressive discipline system, as evinced by his closing comments to Kadrmas and Kingsley at that meeting, where he insists that no what happened, Ostheller was not going to be allowed to go back to the Senior Center.

case. The official letters to Ostheller were couched by specific reference to them. CP 250-51, 259.

⁸ In this regard, the violations found to exist for Mr. Ostheller were not of the most egregious category, Class III.

⁹ As well as through its Mayor, who is not mentioned here for the sake of brevity.

A trier of fact could easily conclude that Cavanaugh purposefully embellished the account of the Brown incident vis-à-vis the purported police contact to induce or cause a severance of the employment relationship or otherwise contaminate the disciplinary investigation process. In other words, a reasonable trier of fact could believe that Cavanaugh was purposefully trying to make the case sound worse than it actually was by alleging that police had to escort Ostheller from the property, for any one of a number of reasons: 1) Cavanaugh had made his own mind up that day and was dead set against reversing his own decision; 2) Cavanaugh had lobbied various officials to support that decision; 3) Cavanaugh perceived himself as acting as the champion of the other city employees who had made dubious claims about Ostheller; and 4) Cavanaugh recognized that liability could be lurking.¹⁰ Here again, the particularity of those comments when made and recorded should be considered. There was no evidence suggesting in even the slightest way at the time from any of the parties present that Cavanaugh was suffering from some memory lapse. CP 256-567. The evidence supports a much stronger inference that the exact opposite was occurring, that Cavanaugh was using the forum to ensure that

¹⁰ None of this is to say, however, that Cavanaugh necessarily fully realized that

Ostheller would never come back to Burlington by making sure he would be fired. The detail about the police contact from Cavanaugh came after a relatively open ended question, whether there was "anything else that is not in the report that you recall?" For purposes of summary judgment, a trier of fact could easily find, based on the animosity, that Cavanaugh was intentionally trying to sabotage Ostheller's chances of returning to work with the county; if he could not return to work with the county, he would not be returning to the Burlington Senior Center.

Similarly, the element of IIED that there be an improper purpose or improper means in place is satisfied.

We believe that the right balance has been struck by our colleagues on the Oregon Supreme Court. Rejecting the *prima facie* tort approach of the first Restatement and declining to adopt in toto the implication of the second Restatement that a plaintiff prove that the interference was "improper" under the factors listed in § 767, that court, in an opinion by Justice Linde, redefined the tort as "wrongful interference with the economic relationships". *Top Serv. Body Shop, Inc. v. Allstate Ins. Co.*, 283 Or. 201, 582 P.2d 1365, 1368 (1978). Thus, a cause of action for tortious interference arises from either the defendant's pursuit of an improper objective of harming the plaintiff or the use of wrongful means that in fact cause injury to plaintiff's contractual or business relationships. *Top Serv.*, 582 P.2d at 1368. A claim for tortious interference is established when interference resulting in injury to another is wrongful by

such statements would put him at odds with what Ostheller had told Kingsley.

some measure beyond the fact of the interference itself. Defendant's liability may arise from improper motives or from the use of improper means. No question of privilege arises unless the interference would be wrongful but for the privilege. Even a recognized privilege [however] may be overcome when the means used by defendant are not justified by the reason for recognizing the privilege. *Top Serv.*, 582 P.2d at 1371. Interference can be "wrongful" by reason of a statute or other regulation, or a recognized rule of common law, or an established standard of trade or profession. Therefore, plaintiff must show not only that the defendant intentionally interfered with his business relationship, but also that the defendant had a "duty of non-interference; i.e., that he interfered for an improper purpose ... or ... used improper means ..." *Straube v. Larson*, 287 Or. 357, 361, 600 P.2d 371 (1979).

Pleas, 112 Wn.2d at 804.

With respect to improper means, as argued above, it is illegal to defame other human beings. Cavanaugh resorted to reporting specific false information to reach the goal of getting rid of Ostheller. Furthermore, as pointed out in the briefing below, the false statement was made during an official proceeding conducted by a public servant; in argument at least, that false statement is a crime under RCW 9A.76.175.

A person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor. "Material statement" means a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.

Kadrmass and Kingsley were acting in their official capacities on behalf of Skagit County. They were discharging their official powers and duties, to investigate the complaints levied against their county employee, Ostheller. Cavanaugh well knew this, and he fully realized the information he was providing would be used to gauge the potential response to the complaints levied at Ostheller. As pointed out above, he did not prevaricate or pause or equivocate and change his statements after he made them. The records supports the argument that his assertions were strident and forceful and adamant. That the statements were material cannot be contested, as they were important enough for Cavanaugh to put into the mix at that time, without any suggestion from Kadrmass or Kingsley, and as they ultimately found their way into the final termination letter as "additional information".¹¹

Finally, in terms of the elements of IIBE, there can be no question whatsoever that Ostheller suffered damage here. He lost his job along with the income and employee benefits that went along with it. CP 194.

¹¹ The termination letter did not disclose that Cavanaugh was the source of the information; it came to light only through discovery.

Judge Meyer should be reversed on the IIBE claim because his ruling implicitly adopts the official viewpoint and argument of the defense here, that Cavanaugh simply forgot what happened when he spoke to Kingsley and Kadrmas. As with the defamation claim the characterization of Cavanaugh's state of mind is, at a minimum, an issue of fact to be resolved outside the context of summary judgment. The defense argues mistake and bad memory; Ostheller argues the precise opposite. The defense argument is not supported in the record. Nonetheless the court's ruling elevates it to gospel truth, just the opposite of what is required by principles of law in a summary judgment setting. Judge Meyer resolved this doubt against the nonmoving party. That particular viewpoint falls beyond all reason, as Cavanaugh was the *force majeure* of the entire situation, the person who unilaterally declared from day one that Ostheller was to be banished from the site, who falsely asserted that Ostheller was the perpetrator of two assaults – one "with a knife"; who up to that critical point waged a campaign to ensure that Ostheller would not be able to return to the Senior Center, no matter what.

VI. CONCLUSION

Granting the defense motion for summary judgment was error, as to both claims. The court improperly applied the summary judgment standard. At minimum, this court should reverse the decision and remand the case for trial on the disputed issues of fact. Alternatively, and more appropriately, as the evidence conclusively establishes the elements of the two claims, this court should consider a wholesale reversal of the trial court decision, granting partial summary judgment to Ostheller as sought in the trial court, with instructions to the court and parties to conduct further proceedings on the issue of damages.

DATED this 31st day of May, 2012.

By: Thomas E. Seguin
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DECLARATION OF DELIVERY

I, Thomas E. Seguire, declare as follows:

I sent for delivery by; [X] United States Postal Service; [] ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to:

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

Executed at Mount Vernon, Washington this 31st day of May, 2012.



Thomas E. Seguire, Declarant