

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ARGUMENT IN REPLY	2
A. The Application of the Fair Reporting Privilege is a Threshold Issue That Must be Addressed by this Court.	2
B. A Close Review of the Washington Cases Demonstrates that the Fair Reporting Privilege has not been Extended to Unconfirmed, Uncorroborated Claims Against a Private Individual such as the Ones Alleged by the Plaintiff’s Disgruntled Employee.....	3
C. A Fair Consideration of the Article Demonstrates Why it was Not “Fair and Accurate”	8
D. Olympic View’s Citations to a Request for Attorney Fees Must Be Rejected	10
III. CONCLUSION	12

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Herron v. King Broadcasting Co.</i> , 112 Wn.2d 762, 776 P.2d 98 (1989)	8, 9
<i>Herron v. Tribune Publishing Co.</i> , 108 Wn.2d 162, 736 P.2d 249 (1987)	6, 7
<i>In re Parentage of M.S.</i> , 128 Wn. App. 408, 115 P.3d 405 (2005), <i>reconsideration denied</i> (Sept. 1, 2005)	3
<i>Mark v. Seattle Times</i> , 96 Wn.2d 473, 635 P.2d 1081, <i>cert. denied</i> , 457 U.S. 1124, 102 S.Ct. 2942, 73 L.Ed.2d 1339 (1982)	5, 6
<i>Mohr v. Grant</i> , 153 Wn.2d. 812, 108 P.3d 768 (2005)	9, 10
<i>O'Brien v. Tribune Publishing Co.</i> , 7 Wn. App. 107, 499 P.2d 24 (1972)	4, 5
<i>Right-Price Recreation, LLC v. Connells Prairie Community Council</i> , 146 Wn.2d 370, 46 P.3d 789 (2002)	11
<i>Roberson v. Perez</i> , 156 Wn.2d 33, 123 P.3d 844 (2005)	3
<i>Tiffany Family Trust Corp. v. City of Kent</i> , 155 Wn.2d 225, 119 P.3d 325 (2005)	11
Rules	
RAP 2.2	11
RAP 2.5(a)	2, 3
RAP 18.9	11

I. INTRODUCTION

This matter involves a ruling by the Superior Court to dismiss a complaint for defamation filed by plaintiff Stephen Clapp and Sequim Valley Ranch (hereinafter collectively referred to as “Clapp”) against the defendant newspaper Olympic View Publishing Co., LLC (hereinafter “Olympic View”), publisher of the Sequim *Gazette*. The Superior Court erroneously allowed a privilege to apply to the newspaper’s publication of allegations of a disgruntled employee filed against a private individual, even when the defendant newspaper failed to quote properly a key sentence attributed to the plaintiff. The sentence in question read, “You needn’t concern yourself that what you say may not be accurate or even that it might subsequently be proven false; you are asked only to testify to what you believe to the best of your knowledge is true.” CP 53 (emphasis added). The portion after the semi-colon (as underlined) was omitted, completely reversing the meaning of the sentence. CP 34. The article therefore not only misquoted the underlying materials but by doing so, the newspaper article lent credence to the employee’s allegations which were otherwise unsupported. The “fair reporting” privilege should not be applicable in this case, both because of the uncorroborated allegations utilized and because the newspaper failed to provide an “accurate and fair” summary of those allegations.

II. ARGUMENT IN REPLY

A. The Application of the Fair Reporting Privilege is a Threshold Issue That Must be Addressed by this Court.

Olympic View suggests that this Court should decline to consider whether the fair reporting privilege applies to the article at issue in this case. *See* Respondent's Br. at 6. The only authority cited by Olympic View is RAP 2.5(a), which provides that "[t]he appellate court may refuse to review any claim of error which was not raised in the trial court."

Olympic View's argument must be rejected for two reasons.

First, the Superior Court dismissed the defamation cause of action on the basis that the fair reporting privilege shielded Olympic View from liability. CP 8, 10. Inherent in this ruling is the Superior Court's threshold determination that the fair reporting privilege actually applies to the newspaper article at issue. Although the arguments the parties made to the Superior Court focused on whether the article was a substantially accurate and fair abridgement, the Superior Court had to ascertain initially whether the fair reporting privilege applied at all. Only because the Superior Court concluded as a necessary precondition that the privilege did apply was it even able to consider the subsequent analysis pertaining to the accuracy and fairness of the article. It would be impossible for this Court to conduct a *de novo* review of the Superior Court's dismissal of

Clapp's defamation cause of action without first addressing whether the fair reporting privilege applies.

In addition, RAP 2.5(a) uses the term "may," *i.e.*, a term that is discretionary and not mandatory. *Roberson v. Perez*, 156 Wn.2d 33, 39, 123 P.3d 844 (2005). Indeed, this Court has deemed it appropriate to exercise that discretion to address an issue that was not focused upon in the proceedings below where that issue affected a party's ability to maintain a cause of action. *In re Parentage of M.S.*, 128 Wn. App. 408, 412, 115 P.3d 405 (2005), *reconsideration denied* (Sept. 1, 2005).

Similarly, in this case, the issue of whether the fair reporting privilege applies affects Clapp's ability to maintain the defamation cause of action. Therefore, even if this Court were to determine that the issue of whether the fair reporting privilege applies was not sufficiently focused upon below, it is nonetheless appropriate for this Court to exercise its discretion to review this critical threshold issue. The issue is a pure question of law, an appropriate concern for this Court.

B. A Close Review of the Washington Cases Demonstrates that the Fair Reporting Privilege has not been Extended to Unconfirmed, Uncorroborated Claims Against a Private Individual such as the Ones Alleged by the Plaintiff's Disgruntled Employee.

There are several Washington cases which have considered defamation actions against media companies which have based their

reports on information filed in the public record. Contrary to the urgings of Olympic View, not a single one of the Washington cases addresses the use of charges as nakedly uncorroborated as the ones at issue here, against a private individual. About the time she quit her employment, Marie Barnett filed paperwork at the courthouse, claiming a variety of nasty actions on the part of Steve Clapp as a basis for obtaining a restraining order, the granting of which was ultimately reversed. CP 22. At the time the charges were repeated in the Sequim *Gazette*, no Judge had considered them nor had there been any contrary evidence. This status is fundamentally different from the situations in the other cases in which the Washington courts have considered the fair reporting privilege.

In *O'Brien v. Tribune Publishing Co.*, 7 Wn. App. 107, 499 P.2d 24 (1972), a Congressman's former assistant sued a newspaper for publishing a campaign ad for the Congressman's election opponent. Unlike Clapp, the plaintiff in *O'Brien* was deemed to be a public figure, a consideration which is the focus of the first half of the opinion. The political activity in question is specifically noted to be "a legitimate public concern." *O'Brien*, 7 Wn. App. at 117. Olympic View is correct that the Court of Appeal's opinion makes the blanket statement allowing a qualified privilege to attach to mere pleadings, but the Court did so within

the context of the “legitimate public concern” balanced against the rights of the public figure plaintiff. *Id.*

In *Mark v. Seattle Times*, 96 Wn.2d 473, 635 P.2d 1081, *cert. denied*, 457 U.S. 1124, 102 S.Ct. 2942, 73 L.Ed.2d 1339 (1982), a pharmacist filed defamation cases against a newspaper and television stations following reports of the activities of the deputy prosecutor, who distributed documents including an affidavit of probable cause and a suspect information report. The deputy prosecutor was quoted as saying that the information to be filed alleged the “largest Medicaid fraud case ever filed in the state.” *Mark*, 96 Wn.2d at 489. At trial six months later, plaintiff Mark was found guilty on the larceny and some of the forgery charges but the state established invalid claims totaling only about \$2,500. *Id.* at 490. The Court, in upholding the application of privilege to the affidavit of probable cause and the statements of the deputy prosecutor and the DSHS investigator, stated:

The court concluded in each of the cases below that while an affidavit is not technically a pleading, the distinction is not relevant in this instance because both the affidavit and the information are (1) instrumental in the commencement of a criminal prosecution, (2) matters of public record, and (3) verified by the prosecutor. [citation omitted] The court also implied that a liberal interpretation must be given to the concept of judicial proceedings because of the strong public interest involved in the privilege. [citation omitted]

We agree with the Court of Appeals that for purposes of the privilege there is no persuasive difference between the information and the affidavit of probable cause and the suspect information report, both of which support the allegations contained in the information and which were required by local court rule. All are officially filed court documents open to public inspection. Any information reported by respondents, therefore, that reiterated material of record in the proceedings was privileged.

Id. at 488.

Clearly the underlying rationale for the *Mark* Court's approval for the privilege hinged on the enhanced corroboration inherent in the criminal law process, leading up to verification by the prosecutor as a public official. If those bases were not integral to the rationale, why would the Court discuss them? In contrast, here there was no such public or official confirmation of the bare allegations of Clapp's disgruntled former employee against a private figure.

In the last of the three cases, *Herron v. Tribune Publishing Co.*, 108 Wn.2d 162, 736 P.2d 249 (1987), the Snohomish County Prosecuting Attorney (again, a public figure) sued a newspaper for reporting on a recall petition. The decision initially discussed the malice requirements of an action by a public figure. *Id.* at 169-73. The decision then proceeded to consider the applicability of extending the conditional privilege based on official reports to the recall process. The Court reasoned:

The process by which the public recalls its government officials from elected office is rooted in our state constitution and is a matter of the strongest public interest. [citation omitted] The process contemplates the general publication of charges that are filed against an official and a vote by the electorate on the charges. [citations omitted] Although the question of the falsity of recall charges arguable may be the subject of an ordinary defamation lawsuit decided in a court of law, the decision of whether to remove an official from office based on the charges is exclusively the province of the electorate, once the charges have been deemed legally sufficient. [citation omitted] With respect to the recall election, the public is the arbiter of truth. [citation omitted]

The public, however, cannot exercise its role of arbiter if it is inhibited from communicating the nature of recall charges. The mere spectre of liability may inhibit the discussion of petitions, particularly when the public is uncertain about a petition's accuracy. Thus a court's judgment or potential judgment that recall charges are false would effectively thwart the public's power to decide falsity. The right to free expression is not the only right being chilled; the constitutional right of recall is also chilled.

...

This court has held, in defamation cases involving private-figure plaintiffs, that a conditional privilege will not protect against liability unless the defamatory statements are published "after a fair and impartial investigation or upon reasonable grounds for belief."

Herron, 108 Wn.2d at 180-83.

If the legal principles were as clear and as rigid as proposed by Olympic View, why would the Court in *Herron v. Tribune Publishing Co.* still feel compelled to weigh the contrasting concerns of the individual's

rights against the public concerns—and why would the Court, even in a case involving a public figure, still be concerned with concerns such as whether the recall process provides sufficient corroboration and safeguards? In view of the considerations of these Washington cases, the situation here, in which the newspaper seeks to hide behind the bare allegations of a disgruntled employee simply because they have been filed in court, does not support a blanket application of the privilege, particularly in a case involving a private individual rather than a public figure.

C. **A Fair Consideration of the Article Demonstrates Why it was Not “Fair and Accurate”**.

Simply because Olympic View states repeatedly that it is “without question” that its article was “fair and accurate” does not make it so. A review of the article—particularly in view of the key sentence which is so mangled that its quotation in the article conveys the opposite meaning of the sentence in the original—shows that the newspaper piece was most certainly not “fair and accurate” under all the circumstances of this case.

Olympic View’s tactics in incorporating into its brief further quotes from Marie Barnett’s petition in an attempt to discredit the plaintiff (See Respondent’s Br. at 2-4) are reminiscent of *Herron v. King Broadcasting Co.*, 112 Wn.2d 762, 776 P.2d 98 (1989), in which the defendant newspaper attempted to excuse its error by further impugning

the character of the plaintiff County Prosecutor. The Court listed a number of damaging true statements in the story and King Broadcasting argued that “these true statements are so damaging to the plaintiff that the additional untrue statement does not change the sting of the story, even though it might constitute an additional negative innuendo.” *Id.* at 771. The Court rejected King’s position, stating that “the argument rests on the patently flawed premise that reporting true information harmful to a plaintiff’s reputation is somehow a license to report a damaging falsehood in addition.” *Id.*

Olympic View cites to *Mohr v. Grant*, 153 Wn.2d. 812, 108 P.3d 768 (2005), and other cases which stand for the proposition that the omission of favorable material is not a basis for a defamation case against a media company. *See* Respondent’s Br. at 30. Those cases highlight exactly why this situation is so different. In *Mohr*, a store owner filed a defamation case against a television station and news reporter. *Mohr*, 153 Wn.2d. at 819. The store owner was the complaining witness in a case brought by the County Prosecutor against a 40 year old man with Down’s syndrome following a series of encounters at the store. *Id.* The store owner, obviously embarrassed by the press coverage, filed suit but failed to establish a prima facie showing of falsity, the first element of any defamation case. *Id.* at 820, 830-31. The store owner sought a finding of

defamation by implication and argued that “his actions would be more understandable or sympathetic if omitted facts had been included.” *Id.* at 826. These “omitted facts” were the explanation of the store owner’s side of the story of his encounters with the individual. Here, not only did the *Sequim Gazette* fail to present other, more balanced information—but the crucial point is that the *Gazette* printed only half of a critical sentence and in failing to finish the sentence, it reversed its meaning. Even if the public record exception is applicable in this situation, the *Gazette* is nonetheless required to provide a fair and accurate summary to take advantage of the privilege. Particularly in view of the partially-quoted and altered sentence, the article failed to be fair and accurate.

D. Olympic View’s Citations to a Request for Attorney Fees Must Be Rejected

Relying upon nothing more than one conclusory statement and a paragraph of string cites, Olympic View has the audacity to characterize Clapp’s appeal as “frivolous” and on this basis request an award of attorney fees for defending this appeal. Respondent’s Br. at 32. Clapp’s position is not only not frivolous but in fact it is correct; nevertheless the issue will be addressed herein. As Olympic View has not and cannot establish any reasonable basis for its request, this Court must flatly deny that request.

As this Court is well aware, the standard for establishing a right to attorney fees on appeal under RAP 18.9 is satisfied only in rare cases. The Washington Supreme Court has set forth the following stringent criteria to be used when considering a request for fees:

In determining whether an appeal is frivolous and was, therefore, brought for the purpose of delay, justifying the imposition of terms and compensatory damages, we are guided by the following considerations: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

Tiffany Family Trust Corp. v. City of Kent, 155 Wn.2d 225, 119 P.3d 325, 334 (2005) (citations omitted). The Washington Supreme Court has made clear that attorney fees should not be awarded in an appeal involving a tenable issue. *Right-Price Recreation, LLC v. Connells Prairie Community Council*, 146 Wn.2d 370, 384-85, 46 P.3d 789 (2002).

It is significant that Olympic View felt compelled to submit thirty-two full pages of substantive briefing on the issues raised by Clapp. Considering the record as a whole and resolving all doubts in favor of Clapp, this Court must conclude that Clapp has raised tenable and debatable issues to be resolved on appeal. Under these circumstances, it is

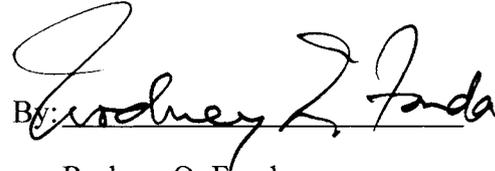
improper for Olympic View to even suggest that Clapp should be penalized for properly exercising its right to appeal. Olympic View's request for fees must be denied—and counsel should be admonished for even raising the issue.

III. CONCLUSION

The facts of this case show why it would be improper to allow the newspaper a privilege which allows it to take materials simply filed by a disgruntled employee, to mangle a key sentence so it totally reverses its meaning, and to provide its readers with deceptive support for the disgruntled employee's charges because through the use of misrepresentation the impression is left that the plaintiff's own words support the allegation that he was attempting to suborn perjury when in fact his actual words told the employee not to commit perjury but to tell the truth. Dismissal of the complaint at this preliminary level was improper because the Superior Court allowed an excessively broad use of a privilege; furthermore, the newspaper failed to provide a fair and accurate summary of the allegations in any event. The dismissal should be reversed and remanded.

DATED: July 26, 2006

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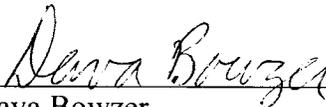
DECLARATION OF SERVICE

Dava Bowzer states:

I am a resident of the State of Washington, I am over the age of 21 years, I am not a party to this action, and I am competent to be a witness herein.

On this 26th day of July, 2006, I caused to be filed with the Court of Appeals of the State of Washington, Division II, the foregoing **REPLY BRIEF OF PLAINTIFFS-APPELLANTS**, STEPHEN CLAPP and SEQUIM VALLEY RANCH. I also served copies of said document on the following parties as indicated below:

Parties Served	Manner of Service
<i>Counsel for Defendant-Respondent:</i> Bruce E. H. Johnson Davis Wright Tremaine 2600 Centennial Square 1501 4th Ave Seattle, WA 98101-1664	() Via Legal Messenger () Via Overnight Courier () Via Facsimile (X) Via U.S. Mail



 Dava Bowzer

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