

No. 39263-1-II

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STATE OF WASHINGTON

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

WARREN YEAKEY,

Respondent,

v.

HEARST COMMUNICATIONS, INC., a Delaware corporation, and
TEXAS NEWSPAPER, INC., a Delaware corporation, as General partners
of HEARST NEWSPAPERS PARTNERSHIP, L.P., owner of and DBA
SEATTLE POST-INTELLIGENCER, and ANDREA JAMES and "JOHN
DOE" JAMES, a married couple, and JOHN IWASAKI and "JANE DOE"
IWASAKI, a married couple,

Petitioners.

PETITIONERS' OPENING BRIEF

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INTRODUCTION

This case raises an important issue of first impression in Washington law, albeit one informed by a rich body of state law and federal constitutional law directly at odds with the rulings below. The primary claim asserted by Respondent Warren Yeakey (“Yeakey”) is defamation by implication through the juxtaposition of *entirely truthful information* in a newspaper, a claim that has never been adjudicated in a Washington court. The claim is not only without precedent, it is incompatible with established Washington defamation law and the First Amendment. That is particularly so here, where Yeakey admits that the challenged publication is accurate in all respects, and the publication contains statements directly contradicting each of the defamatory implications alleged in the Complaint.

The trial court’s rulings denying Petitioners’ dispositive motions and permitting this unprecedented claim to go forward run counter to (1) the falsity requirement in defamation law, (2) Washington’s privilege for accurate reports of public record facts, (3) First Amendment protection for truthful statements on matters of public concern, particularly those based on public records, (4) fundamental principles of defamation law that an alleged factual implication is not actionable where, as here, the challenged publication expressly contradicts that implication, and (5) the First

Amendment bar on claims based on disagreement with a publisher's editorial choices. The Superior Court did not address any of these independent, dispositive legal grounds precluding Yeakey's defamation claim in denying Petitioners' motion to dismiss, or alternatively summary judgment, and motion for reconsideration.

The trial court's decision is obvious legal error which, left uncorrected, will prolong a case ripe for immediate dismissal, and render uncertain bedrock principles of state and federal law governing the protection of true speech about matters of public concern – legal principles that are of vital interest to all Washington publishers and the public they serve. The inevitable result of the trial court's ruling is self-censorship, for it leaves publishers to guess about the legality of their editorial choices in presenting entirely accurate information on matters of public import and concern. The impact, then, is not just a blow to settled constitutional rights, but a decrease in the amount and variety of accurate news available to Washington citizens.

Reversal here is particularly appropriate given the Supreme Court's repeated admonition that summary procedures are "essential" in First Amendment cases:

In the First Amendment area, summary procedures are ... essential. For the stake here, if harassment succeeds, is free debate. Unless persons, including newspapers, desiring to

exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open, for self-censorship affecting the whole public is “hardly less virulent for being privately administered.”

Mark v. Seattle Times, 96 Wn.2d 473, 484-85, 635 P.2d 1081, 1087 (1981) (citations omitted); *see also Mohr v. Grant*, 153 Wn.2d 812, 821, 108 P.3d 768, 773 (2005) (“Serious problems regarding the exercise of free speech and free press guaranteed by the First Amendment are raised if unwarranted lawsuits are allowed to proceed to trial. The chilling effect of the pendency of such litigation can itself be sufficient to curtail the exercise of these freedoms.”) (internal quotation marks omitted).

The trial court erroneously decided the pure legal questions raised here. Reversal is necessary before the uncertainty sown by its rulings becomes manifest in a diminishment of newsworthy information available to the public.

ASSIGNMENTS OF ERROR AND ISSUES PRESENTED FOR REVIEW

Pierce County Superior Court Judge John A. McCarthy entered an order on April 7, 2009 denying the Motion to Dismiss, or Alternatively for Summary Judgment, of Petitioners *Seattle Post-Intelligencer*, Andrea James, “John Doe” James, John Iwasaki and “Jane Doe” Iwasaki

(collectively, the “Post-Intelligencer”), and further entered an order on May 7, 2009 denying Petitioners’ Motion for Reconsideration of the April 7, 2009 order. (CP 103; CP 249)¹ These rulings constituted clear legal error, and raise the following issues for review by this Court:

1. Whether Washington recognizes a cause of action for defamation by implication through the juxtaposition of *entirely truthful statements* based on public records, where the challenged publication is conceded to be accurate in all respects, to contain no omission of any material fact, and it directly and expressly contradicts the alleged defamatory implications.
2. Whether, as alternative grounds for dismissing the defamation claims, the challenged publication is protected by the fair reports privilege and/or protected statements of opinion.
3. Whether subsidiary claims for false light, infliction of emotional distress and outrage may be maintained, based on publication of entirely truthful information regarding a matter of great public concern.

STATEMENT OF THE CASE

1. Factual Background

On the evening of November 16, 2006, Respondent Warren

¹ References in this brief to “CP ___” are to the page number of the Clerk’s Papers, and “RP ___” are to the page number of the hearing on the motion to dismiss.

Yeakey was operating a large tower crane when it collapsed at a construction site in Bellevue, Washington. (CP 002) The collapse of the 210-foot crane caused significant destruction and killed one person, and its cause became the subject of a six-month investigation by the Washington State Department of Labor and Industries (“L&I”). (CP 002; CP 018-19) Immediately following the accident, at the outset of its investigation, L&I required Yeakey to undergo drug testing. (CP 003) The results of that testing would not be known until November 20, 2006, and the results of L&I’s investigation into the cause of the accident would not be known until May 11, 2007, the following year. (CP 007; CP 018-19)

On November 18, 2006, two days after the collapse and two days *before* Yeakey’s drug test results were known, the *Seattle Post-Intelligencer* devoted most of its front page and several interior pages to coverage of the crane accident and the investigation into its cause. (CP 011-16) One of the articles on the front page, titled “Man completed mandated rehab program after his last arrest in 2000” (the “Article”), included a discussion of Yeakey. The Article recounted the crane collapse, the destruction and loss of life it caused and reported investigators’ efforts to determine the accident’s cause. (CP 011-16) Reflecting the immediate uncertainty, the Article reported the various avenues of investigation cited by State officials, including operator error,

structural failure, or a combination of the two. (*Id.*) Expanding on this investigative focus, the Article reported Yeakey's employer's "zero tolerance" drug use policy and accurately reported Yeakey's extensive public record of drug use, including six drug convictions, and other irresponsible behavior.² (*Id.*) The Article noted that Yeakey's criminal background would be relevant only if operator error was deemed a cause of the collapse. (*Id.*)

Significantly, the Article reported that the cause of the collapse was not yet known at the time of publication, the results of Yeakey's drug testing were not yet known, it was not known whether Yeakey had inspected the crane on the day of the collapse or if any inspection had been performed improperly, and it was not known whether operator error was a factor in the collapse. (CP 011-16)

2. Procedural History

Yeakey brought this action on November 17, 2008, alleging that the November 18, 2006 edition of the *Seattle Post-Intelligencer* gave rise to claims for defamation, false light invasion of privacy, negligent infliction of emotional distress and outrage. (CP 001-19) Specifically,

² Aside from the drug convictions, Yeakey was convicted once for domestic violence, another time for soliciting a prostitute, and was acquitted for statutory rape after admitting he had sex with a 15 year-old, but claimed that he thought she was 18. (CP 011-16)

Yeakey alleged the “juxtaposition of [a series of statements from the Article] with the large photo of the damage and debris caused by the crane collapse, the photo of the deceased Mr. Ammon and the article relating to him, and the graphic and bullet points contending ‘*GAPS IN SAFETY CONTROLS*’ falsely implied that 1) drug use was a factor in the crane’s collapse which caused Mr. Ammon’s death; 2) operator error was a factor in the crane’s collapse and Mr. Ammon’s death; and/or 3) Mr. Yeakey’s failure to perform daily inspections or his faulty performance of the inspections was a factor in the crane’s collapse and Mr. Ammon’s death.” (CP 007)

The Post-Intelligencer moved for dismissal or, alternatively, summary judgment on all of Yeakey’s claims and the Superior Court heard oral argument on April 3, 2009. (RP 1-51) The Superior Court denied the motion by order dated April 7, 2009. (CP 103) The Post-Intelligencer filed a motion for reconsideration on April 20, 2009, and the Superior Court issued an order denying that motion on May 7, 2009. (CP 249) The trial court did not specify the basis for its rulings in its orders.

The obvious error of the rulings below is revealed by Yeakey’s Complaint, his briefs, and oral argument, in which he made fatal admissions and failed to cite any precedent supporting his novel theories. Specifically, Yeakey admits that (1) the Article does *not* include any false

statements and that the publication of his criminal history, which is a matter of public record, could not form the basis of a defamation claim (CP 077; CP 081; RP 18-19; RP 22; CP 225-26); (2) there are no omissions of fact in the Article, and he is not relying on that theory for his implication claim (RP 26-27; CP 225-26); (3) the Article reported on a matter of great public concern (CP 002); (4) his defamation claim does not rest on any particular statements but on a message purportedly conveyed by the *entire newspaper* (RP 17; RP 21); and (5) his subsidiary claims for false light, negligent infliction of emotional distress and outrage cannot survive independent of his defamation claim (CP 084).

In addition, Yeakey does not dispute that the Article contains statements that *directly contradict* the alleged false implications that are the basis for his claims. (CP 084)

The parties agree that the material facts are not in dispute and the issues raised here are pure questions of law dispositive of this case that should be decided at the earliest opportunity. (CP 076; RP 12-13; RP 50)

Following the trial court's rulings, the Post-Intelligencer timely moved this Court for discretionary review, which was granted on July 8, 2009. In the Ruling Granting Review, Court Commissioner Eric B. Schmidt concluded that the "trial court appears to have committed obvious error in denying the PI's motion to dismiss" (Ruling p.9), an "error that

renders future proceedings useless.” (*Id.* at 2) Commissioner Schmidt concluded that “[t]he law in Washington does not recognize a claim for defamation by implication based on the juxtaposition of true statements.” (*Id.* at 9) He further concluded that “the trial court appears to have committed obvious error in refusing to dismiss Yeakey’s additional claims.” (*Id.* at 10) This review followed that ruling.

ARGUMENT

I. The Superior Court’s Decision is in Direct Conflict with Several Fundamental Principles of First Amendment and State Law Governing Defamation Claims

The heart of this case is the pure legal question of whether a claim for defamation by implication through juxtaposition of truthful information is actionable in Washington, and if it is, whether such an action can be maintained where, as here, the alleged implication is expressly contradicted by the challenged publication. It is undisputed that this claim has never before been applied, let alone upheld, by any Washington court. It is also clear that this claim is in direct conflict with established state and federal authority safeguarding the press’ right to publish accurate information of public concern derived from public records, and editors’ independence in choosing how best to present that information. The trial court’s contrary ruling is clear legal error that casts doubt on the validity of fundamental common law and constitutional

guarantees protecting free speech, and leaves publishers with no guidance on how to proceed, leading inevitably to confusion and self-censorship.

A. Controlling Precedent is Clear that a False Implication Claim Cannot be Based on True Statements, Especially Where the Publication Expressly Contradicts the Alleged Implications

1. Defamation by Implication Cannot Lie in the Absence of a False Statement of Fact, or Material Omission of Fact, Both Conceded to be Lacking Here

State law is unambiguous that one cannot state a claim for defamation by implication unless the implication arises from (1) a false statement of fact, or (2) a material omission of fact. Yeakey admits that neither is present here, conceding the legal deficiency of his claim.

The governing legal principles are clear. It is Yeakey's burden to establish falsity, an essential element of any defamation claim. *See, e.g., Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768, 773 (2005). The First Amendment independently requires him to identify and prove a specific false statement of fact when challenging an article regarding a matter of public concern.³ *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986).

Washington law is explicit that a defamation claim resting entirely

³ Yeakey admits in the Complaint that the crane collapse about which the Article reported was a matter of great public concern widely covered by the media. (CP 002)

on true statements – like Yeakey’s claim here – fails as a matter of law.

This Court explained this controlling principle of law in *Lee v. Columbian, Inc.*, 64 Wash. App. 534, 826 P.2d 217 (Div. II 1991):

Remarkably, Lee argues that the May 6, 1988 headline and lead sentence were false and capable of defamatory meaning, even while conceding that the two statements were true on their face. He contends that “using irony and innuendo, the headline and lead sentence both strongly implied that Plaintiff was using a tax loophole to improperly reduce his taxes.” Lee’s argument is without merit. ***Defamatory meaning may not be imputed to true statements. The defamatory character of the language must be apparent from the words themselves.*** Washington courts are bound to invest words with their natural and obvious meaning and may not extend language by innuendo or by the conclusions of the pleader. Even if language is ambiguous, resolution in favor of a disparaging connotation is not justified.

Id. at 538 (emphasis added, internal citations omitted).

Lee dictates that Yeakey’s defamation claim, based solely on true statements, must be dismissed. That was the outcome in *Auvil v. CBS “60 Minutes”*, 67 F.3d 816 (9th Cir. 1995), where the court applied *Lee* to reject a claim much like Yeakey’s here. Plaintiff there argued that a “60 Minutes” broadcast, which was admitted to be accurate in all its particulars, nevertheless implied a false message when viewed in its entirety. *Id.* at 822. The court held that plaintiffs’ “attempt to derive a specific, implied message from the broadcast as a whole and to prove the falsity of that overall *message* is unprecedented and inconsistent with

Washington law. No Washington court has held that the analysis of falsity proceeds from an implied, disparaging message. It is the statements themselves that are of primary concern.” *Id.* (emphasis in original). The court explained the important policy at stake:

Because a broadcast could be interpreted in numerous, nuanced ways, a great deal of uncertainty would arise as to the message conveyed by the broadcast. Such uncertainty would make it difficult for broadcasters to predict whether their work would subject them to tort liability. Furthermore, such uncertainty raises the specter of a chilling effect on speech.

Id.; see also *Paterson v. Little, Brown and Co.*, 502 F. Supp. 2d 1124, 1133 (W.D. Wash. 2007) (citing *Lee* for proposition that defamatory meaning may not be imputed to true statements).

Unable to point to any false statement or material omission in the *Seattle Post-Intelligencer*, Yeakey contends that false implications about him nevertheless arise from the entirety of the newspaper. (See RP 17; RP 21) However, *Lee*’s clear rule bars Yeakey’s claim here just as it barred plaintiffs’ claim in *Auvil* based on the entirety of an accurate broadcast.

Consistent with *Lee*, Washington courts have upheld the validity of a defamation by implication claim in only two instances: first, where the implication arises from a false statement of fact, or, second, where it arises from an omission of material fact necessary to negate the false implication. See, e.g., *Herron v. KING Broad. Co.*, 112 Wn.2d 762, 772,

776 P.2d 98, 103 (1989) (false statement of fact created false implication); *Mohr*, 153 Wn.2d at 820-21, 827 (defamation by omission claim requires proof of a false implication that would be contradicted by the inclusion of omitted facts).

In contrast, no Washington court has *ever* addressed or upheld the validity of a claim for defamation by implication based solely on the juxtaposition of *true statements*. Yeakey's novel theory bears no resemblance to the two recognized implication claims based on false statements or material omissions, for it does not ground its allegation of falsity anywhere in the challenged publication's text.

The only basis cited by Yeakey for his theory of defamation through the juxtaposition of true information is some passing *dictum* in *Mohr v. Grant*, 153 Wn.2d at 823, which was unrelated to the single issue in that case. In one sentence, the *Mohr* Court quoted a treatise that mentioned defamation by implication through juxtaposition along with defamation by implication through omission (the latter of which was the sole issue addressed by the Court). *Id.* Yeakey does not dispute that defamation through juxtaposition was not at issue in *Mohr*, or that the *Mohr* Court did not address, analyze or opine upon the viability of such a claim. *Mohr* does not stand for the proposition Yeakey cites it for.

Because the decision below is in direct conflict with *Lee* and

numerous other cases defining the falsity requirement in defamation cases, the trial court's orders should be reversed and the case dismissed.

2. An Alleged Factual Implication is Not Actionable Where, as Here, the Challenged Publication Expressly Contradicts that Implication

Even assuming defamation by implication through juxtaposition of truthful information were a valid claim that could pass constitutional muster, Yeakey's claim still fails because the Article here *directly contradicts* his alleged implications. It is black-letter law that a challenged publication is not reasonably capable of sustaining an alleged defamatory implication where its express text contradicts the implication.

Courts are required to make a threshold determination as to whether the publication, when considered as a whole, is reasonably susceptible to the alleged implications. *See, e.g., Mohr v. Grant*, 153 Wn.2d 812, 825-26, 108 P.3d 768, 775 (2005); *Sims v. KIRO, Inc.*, 20 Wash. App. 229, 234, 580 P.2d 642, 645 (1978). The threshold determination regarding whether the Article as a whole is capable of sustaining the alleged defamatory meaning is appropriately decided on a motion to dismiss, or, in the alternative, for summary judgment. *Id.*

The Article clearly stated that an investigation into the cause of the collapse was pending and the cause was not known. It stated that the results of Yeakey's drug test were not yet known, and that it was not

.. ..

known whether Yeakey was responsible for inspecting the crane on the day of the collapse. Given these statements, no reasonable reader would read the Article as a whole to say that Yeakey had in fact used drugs or failed to inspect the crane on the day of the accident, much less to say that he bore responsibility for the accident. As a matter of law, the Article is incapable of supporting the defamatory meaning alleged in the Complaint.

Mohr is illustrative on this point. There, the Court held that two of the three challenged newscasts could not support a defamation claim precisely because they contained information that “negated any [alleged false] impression.” *Mohr*, 153 Wn.2d at 828-29; *see also id.* at 827 (finding that the third newscast also could not support the defamation claim because the information omitted from that newscast was not material, as it would not have negated the alleged false impression if included); *Herron v. KING Broad. Co.*, 112 Wn.2d 762, 772, 776 P.2d 98, 103 (1989) (true statements in a report can mitigate a falsehood). Here, too, the Article contradicts each of the implications alleged in the Complaint. Thus, even if *Mohr* had recognized the validity of Yeakey’s unprecedented claim as a general matter – which it did not – its holding would still bar Yeakey’s claim here given the Article’s express statements negating the implications alleged in the Complaint.

.. ..

3. The Superior Court's Decision Violates Important First Amendment Principles Which Inform Washington Defamation Law

Washington's clear law barring Yeakey's defamation claim exists for important reasons. It reinforces fundamental First Amendment protections for truthful reporting and editorial decision-making that the Superior Court's decision now calls into question. In an unbroken line of cases starting with *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), and repeatedly followed by Washington courts,⁴ the U.S. Supreme Court has held that "[o]nce true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it." *Id.* at 496. The Court reasoned that it was "reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man. Such a rule would make it very difficult for the media to inform citizens about the public business and yet stay within the law." *Id.* That is precisely the consequence of the trial court's decision

⁴ The Washington Supreme Court recognized *Cox* as establishing a constitutional rule that "states may not impose sanctions on the accurate reporting of material from judicial proceedings open to the public." *Mark v. Seattle Times*, 96 Wn.2d 473, 487, 635 P.2d 1081, 1089 (1981); *id.* at 493. Similarly, the Court of Appeals affirmed the conclusion, based on *Cox*, that "no liability for defamation exists based solely on the accurate reporting of the materials from judicial proceedings open to the public for inspection." *Maison de France, Ltd. v. Mais Oui!, Inc.*, 126 Wash. App. 34, 51, 108 P.3d 787, 797 (2005).

.. ..

here.

At its core, Yeakey's suit is nothing more than a thinly veiled assault on constitutionally protected editorial decision-making. His challenge is limited to the way photographs, a graphic and an article concerning the victim were positioned on the page, and his view that information about his criminal record was not relevant to the crane collapse coverage. (*See, e.g.*, CP 007; RP 20; RP 25; RP 27)⁵ These editorial choices, including the layout of a newspaper and decisions regarding what news is relevant to a particular newspaper, are fully protected by the First Amendment. *See, e.g., Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). The Superior Court's decision to allow Yeakey's claim to proceed will embolden plaintiffs and expose publishers to unpredictable and unforeseen litigation based solely on constitutionally protected editorial choices involving entirely accurate reporting, while providing no guidance on how to avoid liability. This is repugnant to Washington law and the First Amendment and warrants reversal.

⁵ Of course, Yeakey's drug history could not be more relevant given that the State had just required him, the crane's sole operator, to undergo a drug test as the first step in its investigation.

B. The Superior Court's Decision is in Direct Conflict With Washington's Privilege for Fair and Accurate Reports of Public Records

Washington also recognizes a privilege for fair and accurate reports on matters of public record, which is an independent basis to dismiss all of Yeakey's claims. No matter how he paints his claims, they are all based on accurate reporting of information from his criminal record. Publication of this information is privileged as a "fair report" and cannot form the basis of a lawsuit. *See, e.g., Mark v. Seattle Times*, 96 Wn.2d 473, 488, 635 P.2d 1081, 1089 (1981); *Alpine Indus., Computers, Inc. v. Cowles Publ'g Co.*, 114 Wash. App. 371, 384, 57 P.3d 1178, 1186 (2002). The Article's references to Yeakey's criminal history are properly attributed to official court records and are accurate accounts of those records. Yeakey repeatedly concedes as much. (*See, e.g., CP 081*) On this basis alone, all of Yeakey's claims should have been dismissed. *See, e.g., Clapp v. Olympic View Publ'g Co.*, 137 Wash. App. 470, 479, 154 P.3d 230, 235 (2007) ("The news media should not have to worry about how a court would rewrite or edit the article in search of a perfect balance between the litigants. Our role in applying the fair reporting privilege is simply to ask whether the article in general fairly summarizes the court documents.").

C. Even if Washington Law Permitted Respondent's Claim, the Implications He Alleges Would Be Non-Actionable Opinion at Most

Finally, it is black-letter law that only assertions of fact are actionable. Here, even if one were to assume that Yeakey could overcome all of the constitutional and common law hurdles blocking his claim, it would still fail as a matter of law because the alleged false implications could never be considered *factual* assertions. That is because even if a reasonable reader could somehow read the Article as a whole to convey the alleged false implications, the Article's express contradictory statements could not be disregarded, consistent with the law discussed in Section I.A.2., *supra*, and would not permit the alleged implications to be viewed as assertions of fact. *See Dunlap v. Wayne*, 105 Wn.2d 529, 540, 716 P.2d 842, 848-49 (1986) (deductions based on fully disclosed facts are not assertions of fact, rather non-actionable deductive opinions).

At most, the alleged implications about Yeakey's role in the collapse could only be viewed as deductions as to the likely or probable cause of the collapse informed by Yeakey's past criminal history, not as assertions of fact about the actual known cause of the collapse. The cause, the Article told readers, was not known, nor was the result of Yeakey's drug test. Those fully disclosed, contradictory facts do not permit a reasonable reader to view the Article as saying that Yeakey's drug use or

conduct was the actual, known cause of the collapse *as a matter of fact*.

Id. (“Arguments for actionability disappear when the audience members know the facts underlying an assertion and can judge the truthfulness of the allegedly defamatory statement themselves.”).

II. The Trial Court’s Decision Permitting Yeakey’s Subsidiary Claims for False Light, Infliction of Emotional Distress and Outrage to Proceed is Clear Legal Error

Yeakey presented absolutely no argument in opposition to the Post-Intelligencer’s motion to dismiss his subsidiary claims before the trial court. Moreover, he conceded that dismissal of his defamation claim would necessitate dismissal of his other claims. (CP 084) These parasitic claims are all based on the Post-Intelligencer’s truthful publication, have no merit, and should be dismissed along with the defamation claim.

A. Yeakey Cannot State a Claim for False Light Invasion of Privacy

The Washington Supreme Court has declined to recognize the tort of false light, *Eastwood v. Cascade Broad. Co.*, 106 Wn.2d 466, 473-74, 722 P.2d 1295, 1299 (1986), and we are not aware of any lower Washington court that has found a defendant liable for a false light claim. A leading authority on defamation and media law, Judge Sack of the United States Court of Appeals for the Second Circuit, explains why this should come as no surprise: “[B]ecause it is largely duplicative of defamation, serving mostly as an avenue for plaintiffs to attempt to

circumvent well-established constitutional, statutory, and common-law limitations on recoveries for libel and slander, false light is the least recognized of the privacy torts.” 1 Robert D. Sack, *Sack on Defamation* § 12.3, at 12-15 (3d ed. Practising Law Institute 2008).

To the extent false light is recognized at all by Washington courts, Yeakey has failed to state a claim. His concession that the Article contains no false statement and no omission of material fact is fatal to his claim. The claim requires that “(a) the false light would be highly offensive to a reasonable person and (b) the actor knew of or recklessly disregarded the falsity of the publication and the false light in which the other would be placed.” *Eastwood*, 106 Wn.2d at 470-71 (emphasis added). As the standard states, a claim for false light must include an allegation of falsity. *Id.*; see also *McCoy v. Kretschmar*, 890 F.2d 420 (9th Cir. 1989) (false light claim failed because plaintiff did not show that the diagnosis at issue was false) (applying Washington law). “The term ‘false light’ is an unfortunate one insofar as it may suggest that proof of a specific false statement of fact is unnecessary for liability to attach; it is required.” Sack, *supra* § 12.3.1, at 12-18. Yeakey does not allege that *any* statement in the Article is false. This alone compels dismissal of his claim.

While not clear from the Complaint, Yeakey may be attempting to

rely on his claim of false implications in order to satisfy the falsity element of false light. No Washington court has ever recognized a false light claim based on false implications. Even if one had, Yeakey's claim fails for the same reasons his defamation by implication claim fails. *See supra* Section I.

B. Yeakey's Emotional Distress and Outrage Claims Fail as Matters of Law

Because Yeakey cannot establish claims for defamation or false light, his subsidiary claims for negligent infliction of emotional distress and outrage (CP 008-009) fail as a matter of law and must be dismissed as well. *See, e.g., Hoppe v. Hearst Corp.*, 53 Wash. App. 668, 677, 770 P.2d 203, 208 (1989); *Hitter v. Bellevue Sch. Dist.*, 66 Wash. App. 391, 401-02, 832 P.2d 130, 136 (1992).

Even if Yeakey could state a claim for defamation or false light, his emotional distress and outrage claims still fail.⁶ Reasonable minds could not differ that publication of the Article was not negligent, let alone outrageous. It is conceded that there is not *any* false statement in the Article. In fact, the accurate statements regarding Yeakey's criminal history are a matter of public record, and their publication is privileged.

⁶ Outrage is the equivalent of intentional infliction of emotional distress. *See, e.g., Kloepfel v. Bokor*, 149 Wn.2d 192, 193 n.1, 66 P.3d 630, 631 n.1 (2003).

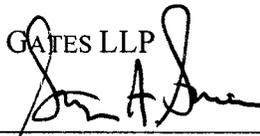
See, e.g., Mark v. Seattle Times, 96 Wn.2d 473, 487-88, 635 P.2d 1081, 1089 (1981). Further, as the Complaint correctly describes, the crane collapse was deadly and destructive, and covered widely by the news media. (CP 002) The Article reported on a newsworthy event of great public interest and concern. A component of this coverage was the potential cause of the collapse, and the Article accurately reported that the cause was unknown, that L&I was investigating the possibility of operator error but had made no determinations, that the results of Plaintiff's drug test were unknown and that it was not known who inspected the crane on the day of the collapse. In short, the Article presented the best available information known at that time accurately and without drawing conclusions. There is nothing negligent or outrageous about this reporting and these claims should be dismissed. *See, e.g., Keenan v. Allan*, 889 F. Supp. 1320, 1389 (E.D. Wash. 1995) ("Liability [for outrage] exists 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.").

CONCLUSION

Accordingly, the Superior Court's Orders of April 7, 2009 and May 7, 2009 should be reversed and the case dismissed, or alternatively, summary judgment entered for the Post-Intelligencer.

DATED this 21st day of September, 2009.

Respectfully submitted,

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Certificate of Service

I certify that on September 21, 2009, I caused a true and correct copy of the attached **PETITIONERS' OPENING BRIEF** to be personally served via legal messenger on counsel of record in this matter at the following location:

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Stephen A. Smith

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