

No. 39263-1-II

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' REPLY BRIEF

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INTRODUCTION

The trial court's error below is made all the more obvious by Yeakey's response here.¹ Yeakey is explicit that his entire lawsuit is based on one sentence of *dicta* in *Mohr v. Grant*, 153 Wn.2d 812, 823, 108 P.3d 768, 774 (2005). He claims this changed the law and nullified this Court's decision in *Lee v. Columbian, Inc.*, 64 Wn. App. 534, 826 P.2d 217 (1991), a decision he candidly admits is a clear bar to his claim but for *Mohr's dicta*. This misplaced reliance on *Mohr* and disregard for *Lee* turn core principles of *stare decisis* on their head. It elevates non-binding *dicta* above established direct precedent affecting fundamental constitutional rights.

Yeakey's response is barren of sound reasoning. He is unable to explain how *dicta* can silently overrule or abrogate direct precedent consistent with principles of *stare decisis*. He is unable to explain how his defamation by implication claim can survive where the very implications he has alleged are expressly contradicted by the challenged publication. He is unable to explain how liability may be imposed on admittedly truthful speech on a matter of public concern consistent with the First Amendment and state law. Yeakey has much to say, but no answers to the fundamental questions raised on this appeal. His silence on those questions is the most telling of all.

It is now clearer than ever that the Superior Court committed legal error in permitting this lawsuit to continue beyond the pleadings stage. Yeakey admits once again that the challenged articles "did not contain false statements or

¹ All abbreviations are the same as those used in the Post-Intelligencer's Opening Brief unless otherwise stated. "Respondent's Opening Brief" is abbreviated as "Resp."

material omissions of fact.” (Resp. at 3) The parties agree that the case turns on purely legal questions and there is no dispute of material fact. (Resp. at 3-4; CP 76; RP 12-13, 50) Each and every state and federal precedent operates to bar Yeakey’s novel juxtaposition theory. On these facts, the trial court’s orders denying the Post-Intelligencer’s dispositive legal motions simply cannot be reconciled with the Supreme Court’s clear mandate that meritless claims targeting protected speech should be dismissed by summary procedures before trial. *Mark v. Seattle Times*, 96 Wn.2d 473, 484-85, 635 P.2d 1081, 1087 (1981); *Mohr*, 153 Wn.2d at 821.

Dismissal is particularly appropriate given that further proceedings would not simply perpetuate a meritless claim, they would perpetuate the legal uncertainty now facing all Washington publishers following the trial court’s rulings. Those rulings leave in their wake broad uncertainty regarding the First Amendment and Washington defamation law. They validate a cause of action never before applied by a Washington court, one directly at odds with established law, without providing any guidance. In effect, those orders leave publishers to guess what truthful information may or may not be published. For each of these reasons, and those set forth below, the orders below should be reversed.

I. As a Matter of Law, *Mohr v. Grant* Does Not Establish a Cause of Action for Defamation By Implication Through the Juxtaposition of Entirely Truthful Information, and the Controlling Law of *Lee v. Columbian* Prohibits the Claim

The single lifeline for this lawsuit is Yeakey’s contention that Washington recognizes defamation by implication through juxtaposition of entirely truthful information because of a sentence in *Mohr*, 153 Wn.2d at 823, in which the Court

quoted from a treatise. (Resp. at 7) Yeakey does not dispute that the *Mohr* Court did not address a claim for defamation by juxtaposition or that the *Mohr* Court did not apply or opine upon the viability of such a claim. (Resp. at 12) Further, Yeakey admits that prior to the 2005 *Mohr* decision, Washington courts did *not* recognize defamation by juxtaposition. (Resp. at 7, 10) Yeakey also does not dispute that since the *Mohr* opinion, no Washington court has applied a defamation by juxtaposition cause of action. In other words, Yeakey bases his entire lawsuit on one sentence of *dicta* that mentions defamation by juxtaposition as part of a quote from a treatise addressing an entirely different issue.

As a matter of law, *Mohr*'s passing reference to defamation by juxtaposition is not controlling precedent. *See, e.g., In re Burton*, 80 Wn. App. 573, 582, 910 P.2d 1295, 1303 (1996) (appellate court found that a Supreme Court case was not controlling because, “[w]here the literal words of a court opinion appear to control an issue but the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without violating *stare decisis* in the same court or an intermediate appellate court’s duty to accept the ruling of the Supreme Court”); *Kish v. Insurance Co. of N. Am.*, 125 Wn.2d 164, 172, 883 P.2d 308, 312 (1994) (holding that the Court is not bound by a passing reference in an earlier case when the issue was not addressed or considered directly); *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 541, 869 P.2d 1045, 1052 (1994) (“[w]e do not rely on cases that fail to specifically raise or

decide [any] issue;” *stare decisis* does not apply to language which is unnecessary to the conclusion reached).² Without *Mohr*, Yeakey presents no legal basis on which to ground his claim.

The claim in fact is expressly prohibited by Washington law. This Court’s decision in *Lee v. Columbian, Inc.*, 64 Wn. App. at 538, makes clear that defamation claims based solely on truthful information cannot stand. Unable to distinguish this binding precedent, Yeakey contends that the *dicta* in *Mohr* mentioning defamation by juxtaposition abrogated the law of *Lee*. (Resp. at 7) (claiming that *Mohr* “was a direct departure from the defamation analysis announced in previous cases such as *Lee* and *Auvil*”) However, the holding of *Lee*, which Yeakey admits prohibits his claim for defamation by juxtaposition (Resp. at 7), was not even mentioned in *Mohr* and remains controlling. See, e.g., *In re Burton*, 80 Wn. App. at 581-82 (finding that the Supreme Court did not intend to overrule prior precedent when it did not allude to, acknowledge or appear to consider that precedent); *Washington v. Fernandez-Medina*, 141 Wn.2d 448, 460, 6 P.3d 1150, 1156 (2000) (finding that a decision was still good law

² The Supreme Court has similarly held that prior precedent should be narrowly interpreted in light of constitutional considerations. *Washington v. Frost*, 160 Wn.2d 765, 775-76, 161 P.3d 361, 367 (2007).

because it was not specifically overruled).³ *Lee* dictates that Yeakey's defamation claim, based solely on true statements, must be dismissed. *Lee*, 64 Wn. App. at 538 ("Defamatory meaning may not be imputed to true statements.").

As a matter of law, *Mohr* is not binding precedent regarding a cause of action for defamation by juxtaposition and does nothing to overrule or abrogate the law articulated in *Lee*. Because the decisions below are in direct conflict with controlling Washington law, they should be reversed.

II. Yeakey's Defamation Claim is Precluded as a Matter of Law by the Statements in the Article Contradicting Each Alleged Implication

Even assuming that *Mohr* created a viable claim for defamation by implication through juxtaposition of truthful information and that *Lee* was overruled, Yeakey's claim fails because the Article directly contradicts his alleged implications. *Mohr*, 153 Wn.2d at 828-29; *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). Yeakey does not even attempt to refute the law requiring dismissal

³ With no precedent to support his juxtaposition theory, Yeakey spends pages of his response describing three cases cited by the *Mohr* Court. (Resp. at 8-10) However, he then also correctly concedes that each of those cases is distinguishable from both *Mohr* and his own claim (Resp. at 10), lending no support to his juxtaposition theory. They are distinguishable in two respects. First, none of the three cases included contradictory statements negating the alleged implication, as was the case in *Mohr* and is the case here. Furthermore, as Yeakey frankly conceded in earlier briefing, each of three cases cited by *Mohr* involved one of the two defamation by implication claims that have been upheld in Washington and not defamation by juxtaposition of true facts. (Respondents' Opposition to Motion for Discretionary Review, at 10) ("It is true that each of the cited cases contained some omission or provably false statement.") The fact remains that neither *Mohr* nor any of the cases it cited ever upheld, analyzed, addressed or endorsed a claim for defamation through juxtaposition of true facts. Accordingly, the cases cited by the *Mohr* Court are irrelevant for Yeakey's juxtaposition claim.

of defamation claims for which the allegedly defamatory material is contradicted by the publication.⁴

Yeakey tries to avoid this dispositive law by contending that the finder of fact must be permitted to review the publication at issue. (Resp. at 16) This is incorrect. Indeed, *Mohr*, the single case cited by Yeakey for this contention, states that 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. 153 Wn.2d at 825-26; *see also Sims v. KIRO, Inc.*, 20 Wn. App. 229, 234, 580 P.2d 642, 645 (1978). In fact, *Mohr* demonstrated this point by applying the law regarding contradictory statements and dismissing the defamation claim on a motion for summary judgment. *Mohr*, 153 Wn.2d at 828-29.

Yeakey argues that contradictory “statements alone” are not sufficient to negate a defamatory implication, concluding without more that “[s]uch is not the law.” (Resp. at 15-16) But *Mohr* reached the exact opposite conclusion. The Court’s dismissal of the plaintiff’s implication-by-omission claim was premised entirely on the inclusion of contradictory statements in two of the three challenged broadcasts, statements which negated the defamatory implications alleged to arise

⁴ Instead, he claims incorrectly that the Post-Intelligencer cited no authority for this point, disregarding its citation to *Mohr* and *Herron* as Washington authority for this basic point of defamation law (and common sense), *i.e.*, that defamatory meaning cannot be derived from a publication that includes express statements at odds with the alleged meaning.

from those broadcasts. *Mohr*, 153 Wn.2d at 828-29.⁵

Yeakey also contends, without authority, that because the contradictory statements “do not appear together in the article,” they cannot negate “any possible defamatory implication.” (Resp. at 15) As an initial matter, the statements do not need to negate “any” defamatory implication; the statements need only negate the specific implications alleged by Yeakey. (CP 41-42) Furthermore, there is no legal or practical basis for his claim that contradictory statements must appear together in a publication.⁶

Finally, Yeakey makes the absurd argument that the Article’s contradictory statements tend to support the false implications he has alleged. (Resp. at 16-17) This argument simply makes no sense. The Article’s statement that the results of Yeakey’s drug test were not known, that his role in inspecting the crane (if any) was not known, and that the cause of the crane collapse was not known, in no way tends to support the alleged implications that Yeakey had in fact used drugs, had failed to conduct a proper inspection, and was responsible for the crane collapse. The Article’s express statements directly contradict Yeakey’s alleged implications. One does not support the other. They are at war.

The Superior Court committed clear legal error by failing to dismiss

⁵ The Court held that a third challenged newscast was also incapable of supporting a defamation claim because the information omitted from that newscast was not material, as it would not have negated the alleged false impression if it had been included. *Id.* at 827.

⁶ Yeakey himself seems to admit this by contending that the alleged defamatory communication must be considered as a whole. (Resp. at 16)

Yeakey's defamation claim, which is premised entirely on alleged implications that are directly contradicted by the text of the Article.

III. The Fair Report Privilege and First Amendment Immunize True Speech on Matters of Public Record and Concern, and Yeakey Presents No Legal Argument as to why this Immunity Does Not Apply

Yeakey agrees that the First Amendment and Washington fair report privilege protect against claims based on publication of public record information. (Resp. at 20-21) Yeakey also admits that all the information on which he bases his claims is a matter of public record. (*See, e.g.*, Resp. at 21) Nonetheless, Yeakey argues that the First Amendment and fair report privilege do not apply here because he framed his allegations as unstated implications rather than direct statements. (Resp. at 21-22) Of course, Yeakey cites no law holding that an alleged unstated implication can deprive a publisher of Washington's fair report privilege and First Amendment protections for truthful speech. And there is no such law. The bottom line is that Yeakey's claim is based on entirely truthful reporting of matters in the public record and of public concern. This reporting is protected from defamation suits by both Washington law and the First Amendment. *See, e.g., Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Mark v. Seattle Times*, 96 Wn.2d 473, 488, 635 P.2d 1081, 1089 (1981).

Yeakey cannot escape application of the First Amendment or fair report privilege by claiming that the false implications alleged in his Complaint are so ephemeral they cannot be tied to any specific part of the Article. Claims are not

ghosts. Constitutional and statutory free speech protections cannot be felled by gossamer allegations. Every actionable implication must have an identifiable source. Without such mooring, circumvention of First Amendment and other legal protections for speech would become routine. The reality here is that the alleged false implications can all be traced back to the Post-Intelligencer's recital of Yeakey's long criminal record. Absent that, he would have no implication claim at all. Because the Article's accurate recitation of that history is a matter of public record and privileged, the trial court erred in failing to dismiss the Complaint on the alternative ground of the fair report privilege.

IV. Even if Yeakey's Claim were a Viable Cause of Action, the Implications He Alleges would be Non-Actionable Opinion

Yeakey attempts to avoid the law regarding non-actionable opinion by misstating the test articulated by the Supreme Court in *Dunlap v. Wayne*, 105 Wn.2d 529, 716 P.2d 842 (1986). Yeakey recasts the test to say that two of the three prongs must be applied first in order to determine whether a statement is fact or opinion. (Resp. at 18) However, the *Dunlap* test requires consideration of all three factors to determine whether the challenged communication – here, the three alleged implications – is actionable. *Dunlap*, 105 Wn.2d at 539. In fact, rather than cast the first two factors as dispositive preliminary requirements, as Yeakey contends, the *Dunlap* Court stated that the third factor – whether the statement implies undisclosed facts – is the “most crucial.” *Id.* at 539-40.

Significantly, Yeakey failed to identify, much less address, this “crucial” third factor. Here, the Article fully disclosed that nothing was yet known about the results of Yeakey’s drug test, the circumstances of any inspection, and the cause of the crane collapse, all of which remained a mystery. The third *Dunlap* factor thus makes clear that any suggestion or “implication” that might be gleaned from the newspaper contrary to these fully disclosed facts – to the effect that Yeakey was the cause – could only be viewed as non-actionable deductive opinion, not a communication of fact.

The first two factors favor a finding of opinion as well. Yeakey gets so caught up in his argument that the Article was factual in nature, he seems to forget that the applicable standard requires analysis of whether the challenged communication – here, the three alleged implications – were opinion or fact. While the medium may be relevant, it is not dispositive. The Op-Ed page is not the exclusive province of opinion. Statements in news articles and other settings customarily viewed as “factual” are routinely held to be non-actionable opinion. *See, e.g., Camer v. Seattle Post-Intelligencer*, 45 Wn. App. 29, 40-41, 723 P.2d 1195, 1202 (1986) (alleged conclusion of news article held to be non-actionable opinion); *Haueter v. Cowles Publ’g Co.*, 61 Wn. App. 572, 586, 811 P.2d 231, 239 (1991) (statements in news article held to be non-actionable opinion).

Indeed, Plaintiff fails to acknowledge that *Dunlap v. Wayne*, 105 Wn.2d 529, 716 P.2d 842 (1986), did not involve the “Op-Ed section” or “some ongoing

public debate or political topic,” as Plaintiff suggests is necessary for a communication to be held opinion. It involved a letter written by defendant’s attorney to plaintiff’s attorney, characterizing the requests of plaintiff, a bank officer, to be compensated for various services as solicitation for a kickback in return for procuring a loan for defendant’s business. The letter was then shared with plaintiff’s superiors at the bank, resulting in his termination. Surely a lawyer’s direct accusation that a bank officer was soliciting a kickback, communicated to bank officials and resulting in the officer’s termination, is as factual a context as one might expect. Yet the claim in *Dunlap* was dismissed on opinion grounds based on the third and “most crucial factor” – full disclosure. In *Dunlap*, like here, the “audience members kn[e]w the facts underlying an assertion,” in which case “[a]rguments for actionability disappear.” *Dunlap*, 105 Wn.2d at 539-40.

In the event this Court recognizes the viability of Yeakey’s claim, finds that his claim is not negated by the Article’s contradictory statements, and the fair reports privilege does not apply, this case should be dismissed on the alternative ground that it is protected opinion pursuant to *Dunlap*.

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

Rather than present *any* argument in opposition to the Post-Intelligencer’s motion to dismiss his subsidiary claims, Yeakey simply states that the Post-

Intelligencer did not present defenses with respect to these causes of action. (Resp. at 22) This is untrue. The Post-Intelligencer directly addressed the merits of the subsidiary claims and moved for their dismissal. (*See, e.g.*, CP 44-47) Moreover, Yeakey conceded that dismissal of his defamation claim would necessitate dismissal of his other claims. (Resp. at 22) The arguments presented by the Post-Intelligencer for dismissal of these parasitic claims, Yeakey's failure to present even one argument in defense of those claims, and his concession that they must be dismissed if his defamation claim is dismissed all point to the obvious legal error in permitting those claims to proceed.

CONCLUSION

Accordingly, and for the reasons in the Post-Intelligencer's Opening Brief, this Court should reverse the trial court's orders and grant the Post-Intelligencer's motion to dismiss or for summary judgment.

DATED this 20th day of November, 2009.

Respectfully submitted,

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I certify that on November 20, 2009, I caused a true and correct copy of the attached **PETITIONERS' REPLY BRIEF** to be personally served via legal messenger on counsel of record in this matter at the following location:

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