

FILED

COA 313069

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

TED STILES, a married man,

Appellant

v.

DAVE MOLNAA, a married man; HANFORD ATOMIC
METAL TRADES COUNCIL; a labor organization;
ROBERT HAWKS, a married man; and
TEAMSTERS UNION LOCAL 839, a labor organization,

Respondent

APPELLANT'S OPENING BRIEF

Paul J. Burns
Paul J. Burns, P.S.
One Rock Pointe
1212 N. Washington, Suite 116
Spokane, WA 99201
(509) 327-2213
Attorney for Appellant

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I. INTRODUCTION

In February 2011, plaintiff/appellant, Ted Stiles applied for a labor relations manager position with Washington River Protection Systems (WRPS); an employer at the Hanford site in Richland, Washington. By letter dated March 9, 2011, WRPS offered Mr. Stiles the job, conditioned on “the credentials, drug screening, medical requirements . . .” and other routine background investigation information.

In his distant past, Mr. Stiles had been employed as a business agent for the Teamsters Union, Local 839. He worked for Local 839 from June 1998 to August 2002. Stiles worked under the supervision of defendant Robert Hawks, the secretary treasurer of the Local 839. He left that job in August 2002 (9 years prior to his application with WRPS) on excellent terms.

Mr. Dominic Sansotta interviewed Stiles in connection with his application for the WRPS labor relations position. After extending the conditional offer of employment to Stiles, Sansotta contacted defendants Bob Hawks and Dave Molnaa to inform them that WRPS was hiring Stiles. Both Hawks and Molnaa told Sansotta they could not trust Mr. Stiles impugning, his honesty and integrity. These statements were made with actual malice, i.e.,

with knowledge of their falsity and reckless disregard for the truth. As a result, WRPS withdrew its offer of employment to Mr. Stiles.

Plaintiff Stiles brought this lawsuit alleging claims of defamation and tortious interference with a business relationship against defendants Hawks and Molnaa, and their respective employers, Teamsters Union Local 839 and Hanford Atomic Metal Trades Council (HTMC). In October 2012, defendants moved for summary judgment seeking dismissal of all claims. Defendants advanced four arguments in their initial summary judgment motion. First, they contended plaintiff's claims were preempted by federal labor law. Second, they argued that Mr. Stiles had signed a "release" in his employment application with WRPS which precluded liability against the defendants. Third, defendants argued they were immune from liability under RCW 4.24.730. Finally, they contended the evidence was insufficient to establish the elements of a claim for tortious interference with a business relationship.

Plaintiff opposed the summary judgment motion and addressed each specific issue raised by the defendants. In their reply materials, defendants, for the first time, argued that the statements at issue (they could not trust Stiles) were insufficient to support a defamation claim. Further, in their reply materials,

defendants argued, for the first time, that plaintiff could not produce sufficient evidence of damages to support either of his claims.

Plaintiff moved to strike the arguments raised by the defendants for the first time in their reply materials. The trial court denied that motion. The trial court stated on the record that it granted defendants' motion based on all arguments they advanced.

The trial court erred. Under controlling Supreme Court precedent, plaintiff's defamation claim is not preempted by federal labor law. *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966). The exculpatory release language in Mr. Stiles' employment application with WRPS is not enforceable with respect to plaintiff's intentional tort claim of defamation. *Liberty Furniture Inc., v. Sonitrol of Spokane, Inc.*, 53 Wn.App. 879, 770 P.2d 1086 (1989); *McQuirk v. Donnelley*, 189 F.3d 793 (9th Cir. 1999). The evidence demonstrates factual questions which preclude summary judgment on the defamation claim. Finally, the trial court improperly considered arguments raised for the first time by defendants in their summary judgment reply materials. *See White v. Kent Medical Center*, 61 Wn. App. 163, 810 P.2d 4 (1991).

Plaintiff's claims are not preempted by federal labor law. The record demonstrates triable issues of fact. The trial court erred in granting defendant's motion for summary judgment. That order should be reversed and the case should be remanded to the trial court for trial on the merits.¹

II. ASSIGNMENTS OF ERROR

1. The trial court erred in considering arguments raised by defendants for the first time in reply materials submitted in support of their summary judgment motion.

2. The trial court erred in holding that exculpatory release language in plaintiff's employment application documents barred plaintiff's intentional tort claims against defendants.

3. The trial court erred in holding plaintiff's state law defamation claim was preempted by federal labor law.

4. The trial court erred in holding that RCW 4.24.730 immunized defendants from liability on plaintiff's claim of defamation.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in considering defendants' arguments regarding the sufficiency of the alleged

¹ Plaintiff has abandoned his tortious interference claim on appeal

defamatory statements and the plaintiff's damages raised for the first time in defendant's summary judgment reply materials?

(Assignment of Error No. 1)

2. Whether exculpatory release language in an employment application operates to bar plaintiff's intentional tort claims? (Assignment of Error No. 2)

3. Whether federal labor law preempts plaintiff's state law defamation claim? (Assignment of Error No. 3)

4. Whether the record demonstrates genuine issues of material fact concerning whether defendants made knowingly false or deliberately misleading statements about plaintiff to a prospective employer causing plaintiff to lose his employment opportunity? (Assignment of Error No. 5)

III. STATEMENT OF THE CASE

Plaintiff Ted Stiles was employed as a business agent for Teamsters Local 839 in Pasco, Washington from June 1998 through August 2, 2002. He worked under the supervision of defendant Robert Hawks, the secretary/treasurer of the Local 839. During his four year tenure with Local 839, he was never disciplined in any fashion. When Stiles gave Hawks notice that he was leaving Local 839 for another employment opportunity,

Hawks commented: "It's nice to know that we're going to have good people on the other side of the table and I'm surprised you lasted this long." (CP 305-306).

In February 2011, Stiles applied for a labor relations position with Washington River Protection Services (WRPS). He characterized this as a "dream job" for himself and his family. He interviewed with Mr. Dominic Sansotta, among others. On March 9, 2011, WRPS wrote to Stiles and offered him the position of Manager, Industrial Relations, reporting to Mr. Sansotta. This offer was conditioned on WRPS completing a routine review of the information he had provided in his employment application. (CP 306).

Several days later, Mr. Sansotta called Stiles and told him he had spoken with defendants Dave Molnaa of Hanford Atomic Metal Trades Council, and Robert Hawks of Teamsters Local 839. Sansotta told Stiles that both defendants Hawks and Molnaa told him they could not "trust" him. (CP 306).

Defendant Hawks confirmed that he told Sansotta he would "have a real trust issue with Ted (Stiles) if he's employed at WRPS." (CP 218). Defendant Molnaa also confirmed that he told Sansotta that he could not trust Stiles if Stiles went to work for WRPS. (CP 231-232).

Defendant Hawks testified that he based his statement about not “trusting” Stiles on the following prior experiences with him

- (1) Stiles spent an excessive amount of photocopies for an arbitration proceeding involving UPS (CP 211-212);
- (2) Hawks had to counsel Stiles for working on his own business on union time (CP 213);
- (3) Stiles’ conduct as a womanizer (CP 214);
- (4) Stiles’ behavior toward Hawks’ sister at Ruth Chris Steak House in Seattle (CP 215).

Defendant Molnaa based his statements about Stiles’ alleged lack of trustworthiness on the following prior experiences with him:

- (1) A conversation with Stiles at the Coast Hotel in Wenatchee where Stiles allegedly said he was tired of being a business agent, wanted to move up in the organization, and didn’t care who he had to step on to do it. (CP 223-224);
- (2) Stiles’ “womanizing behavior” in the presence of his wife at the lounge at the Coast Hotel. (CP 225-227);
- (3) Stiles’ allegedly rude behavior toward Molnaa in introducing him to union official John Rabine (CP 228-229); and
- (4) Stiles’ running up an excessive bar bill at Ruth Chris Steak House in Seattle (CP 229-230).

Mr. Stiles testified he was “shocked and appalled” when Mr. Sansotta told him what Hawks and Molnaa had said about him. Stiles testified there was no factual basis for either Molnaa or Hawks to say they could not trust him, or to in any way question or challenge his honesty, integrity, or trustworthiness. (CP 306). In his testimony, Stiles addressed each allegation made by Hawks and Molnaa as summarized above and testified the incidents described by the defendants never happened. Stiles testified repeatedly that the allegations made by Hawks and Molnaa to support their statements about his lack of trustworthiness were totally false and completely fabricated. (CP 307-310).

Plaintiff filed this lawsuit on May 25, 2011 alleging state law claims of defamation and tortious interference with a business relationship against defendants Hawks and Molnaa, and their respective employers, defendants Teamsters Union Local 839 and Hanford Atomic Metal Trades Council. (CP 1-7). On October 11, 2007, defendants moved for summary judgment seeking dismissal of all of plaintiff’s claims. (CP 36-62). In their initial moving papers, defendants set forth four arguments:

- (1) Plaintiff’s claims were preempted by federal labor law. (CP 50-56);
- (2) Plaintiff’s claims were barred by exculpatory release language in his

application for employment with WRPS (CP 57-58);

- (3) Plaintiff's claims were barred by the immunity provisions of RCW 4.24.730 (CP 58-60); and
- (4) Plaintiff's tortious interference claims fail for lack of evidence of dishonesty or bad faith on the part of defendants. (CP 60-62).

Defendants advanced no arguments in this initial motion relating to the nature of the alleged defamatory statements at issue, or the nature and extent of plaintiff's damages. (See CP 36-62).

Plaintiff responded to defendants' summary judgment motion and addressed all issues raised in that initial motion. (CP 159-172). Defendants then filed reply materials pursuant to CR 56(c). (CP 235-276). In their reply materials, defendants raised, for the first time, issues relating to whether the statements at issue were actionable as defamatory, and whether plaintiff produced sufficient evidence of damages to support his defamation claim. (Id.)

Plaintiff moved to strike arguments raised by defendants for the first time in their summary judgment reply materials. (CP 312-316). The trial court denied that motion. On November 16, 2012, the trial court entered an order granting defendants' motion for summary judgment and dismissing plaintiff's claims. (CP 327-329).

This appeal timely followed. (CP 330-334).

IV. ARGUMENT

A. The trial court erred in considering arguments raised for the first time by defendants in their summary judgment reply materials.

It is well established that a party moving for summary judgment may not raise issues for the first time in reply materials. *R.D. Merrill Co. v. Pollution Board*, 137 Wn.2d 118, 147, 969 P.2d 458 (1999); *Owen v. Burlington Northern Santa Fe*, 114 Wn. App. 227, 56 P.3d 1026 (2002), *affd.*, 153 Wn.2d 780, 108 P.3d 1220 (2005). In *R.D. Merrill*, the Supreme Court observed: “. . . nothing in CR 56(c) allows the raising of additional issues other than in the motion and memorandum in support of the motion.” 137 Wn.2d at 147. In *White v. Kent Medical Center*, 61 Wn. App. 163, 168-169 (1991), the Court of Appeals explained:

It is the responsibility of the moving party to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment. Allowing the moving party to raise new issues in its rebuttal materials is improper because the nonmoving party has no opportunity to respond. It is for this reason, in the analogous area of appellate review, the rule is well settled that the court will not consider issues raised for the first time in a reply brief. [Citations omitted]

Moreover, nothing in CR 56(c), which governs proceedings on a motion for summary judgment, permits the party seeking summary judgment to raise issues at any time other than in its motion and opening memorandum. The rule sets out the timetable for filing and serving the motion and supporting evidence and for the nonmoving party to file its opposing memoranda, affidavits, and other documentation. After the nonmoving party has filed its materials, the rule allows the moving party to “file and serve any rebuttal documents not later than 5 calendar days prior to the hearing.” (Emphasis added) CR 56(c). Rebuttal documents are limited to documents which explain, disprove, or contradict the adverse party’s evidence. [Citations omitted]

In the instant case, defendants raised issues concerning (1) whether the statements at issue were actionable as defamatory, and (2) whether plaintiff produced sufficient evidence of damage to support his defamation claim for the first time in their summary judgment reply materials. Plaintiff properly moved to strike those arguments. The trial court denied the motion to strike, considered defendants’ untimely arguments, and granted the motion for summary judgment dismissing plaintiff’s claim. That was error requiring reversal. *Owen v. Burlington Northern Santa Fe*, 114 Wn. App. 227, 240-241 (2002).

B. The trial court erred in ruling that exculpatory release language in plaintiff’s employment application barred his claims.

Mr. Stiles' application for employment with WRPS

contained the following exculpatory release language:

I hereby voluntarily give the company the right to conduct a background investigation and agree to cooperate in such investigation and release from all liability or responsibility all persons, companies or organizations supplying such information.

Without citation to any authority, defendants argue plaintiff's claims are barred by this release language. This is incorrect. Exculpatory release claims are unenforceable with respect to intentional tort claims like defamation and tortious interference with business relationships. *Liberty Furniture Inc., v. Sonitrol of Spokane, Inc*, 53 Wn.App. 879 (1989); *McQuirk v. Donnelley*, 189 F.3d 793 (9th Cir. 1999).

Exculpatory release claims are enforceable unless (1) they violate public policy, or (2) the negligent act falls greatly below the standard established by law for protection of others, or (3) they are inconspicuous. *Vodopest v. MacGregor*, 128 Wn.2d 840, 848, 913 P.2d 779 (1996); *Eelbode v. Chec Medical Center*, 97 Wn.App. 462, 984 P.2d 436 (1999). The release clause in the WRPS employment application is in fine print and therefore inconspicuous. It should be held unenforceable on that basis. However, independent of whether the clause is inconspicuous, exculpatory language of this nature is not enforceable with respect

to intentional torts. *Liberty Furniture, Inc.*, 53 Wn. App., at 880-881. In *Liberty Furniture* the court held that exculpatory release language could not be enforced to protect a defendant from liability for conduct that rose to the level of gross negligence. This is consistent with the principle that clauses of this nature are not enforceable when “the negligent act falls greatly below the standard established by law for protection of others.” *Vodopest*, 128 Wn.2d, at 848. In the instant case Mr. Stiles alleges an intentional tort claim of defamation. The exculpatory release language in the WRPS employment application may not be enforced with respect to this intentional tort claim. See, *McQuirk*, 189 F.3d 793 (9th Cir. 1999) (applying California law in a case with identical facts to those in the instant case and holding that release language in employment applications is unenforceable with respect to intentional tort claims of defamation and tortious interference with a business relationship). The trial court erred in granting Defendants’ Motion for Summary Judgment based on the exculpatory release language in plaintiff’s employment application.

C. The trial court erred in holding that federal labor law preempted plaintiff’s defamation claim.

In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244, 79 S.Ct. 773, 3L.3d2d 775 (1959), the Supreme Court broadly defined the scope of federal preemption under the National Labor Relations Act:

When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield...when an activity is arguably subject to §7 or §8 of the Act, the states as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

However, the court has also recognized exceptions to federal preemption in appropriate classes of cases. The court refuses to apply the preemption doctrine “to activity that otherwise would fall within the scope of *Garmon* if that activity was a mere peripheral concern of the Labor Management Relations Act ... (or) touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that congress had deprived the states of the power to act.” *Farmer v. United Brotherhood of Carpenters*, 97 S. Ct., at 1061; citing *Linn v. Plant Guard Workers*, 86 S.Ct., 657.

In *Linn*, the court considered the precise question at issue in the case at bar. An official of an employer subject to the NLRA

filed a civil action under state law seeking damages for defamatory statements published during a union organizing campaign by the union and its officers. The trial and federal appellate courts held that the defamation claim was pre-empted by federal labor law. The Supreme Court reversed. First, the court observed that, while the NLRB “tolerated intentional, abusive and inaccurate statements made...during attempts to organize employees, it does not interpret the Act as giving either party license to injure the other intentionally by circulating defamatory or insulting material known to be false.” 86 S.Ct., at 662. The court explained:

In the light of these considerations it appears that the exercise of state jurisdiction here would be a “merely peripheral concern of the Labor Management Relations Act” provided it is limited to redressing libel issues with knowledge of its falsity, or with reckless disregard of whether it was true or false. Moreover, we believe that an “overriding state interest” in protecting its residents from malicious libels should be recognized in these circumstances.

Id. The court noted further: “We similarly conclude that a state’s concern with redressing malicious libel is “so deeply rooted in local feeling and responsibility” that it fits within the exception specifically carved out by *Garmon*.” *Id.*, at 663.

Under *Linn*, plaintiff’s defamation claims are not pre-empted by federal labor law. To prevail on his defamation claims, plaintiff must demonstrate that the defamatory statements were

made with actual malice, i.e., with knowledge of their falsity or reckless disregard for the truth. *Linn*, 86 S.Ct., at 664. As discussed below, the record demonstrates factual questions on the actual malice issue. Defendants' motion for summary judgment must be denied.

As a preliminary matter, the record demonstrates that the statements at issue – defendants' statement that "they did not trust" Stiles – are defamatory and actionable. This issue was not properly raised by defendants in the summary judgment proceedings below, as discussed above. Plaintiff addresses the issue now as preliminary to the issue of whether the statements were made with "actual malice," i.e., knowledge of falsity or reckless disregard for the truth. *Linn*, 86 S.Ct., at 664.

Both defendants Molnaa and Hawks told Dominic Sansotta, the representative of Stiles' prospective employer, that "they could not trust" Stiles. The issue is whether this statement is an actionable statement of defamatory fact or nonactionable opinion.² In *Dunlap v. Wayne*, 105 Wn.2d 529, 716 P.2d 842 (1986), the Washington court adopted Restatement (Second) of Torts, §566 (1977) which provides:

² This issue is not properly raised by defendants in the summary judgment proceeding below. Plaintiff addresses it now solely as a preliminary matter.

A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.

The *Dunlap* court then established a three part analysis to determine whether a statement of opinion is actionable or nonactionable. The court should consider (1) the medium and context in which the statement was published, (2) the audience to whom it was published, and (3) whether the statement implies undisclosed facts. 105 Wn.2d at 539.

With respect to “medium and context,” the *Dunlap* court observed:

First, the nature of the medium can affect whether a statement is received as “fact” or “opinion”: statements of opinion are expected to be found more often in certain contexts such as editorial pages or political debates. The court should consider the entire communications and note whether the speaker qualified the defamatory statement with cautionary terms of apparency. [citations omitted].

Id. Importantly, in the instant case, the statements at issue were not made in editorial pages or political debates where “opinions” would be expected. Defendants Hawks and Molnaa made the statements at issue in direct conversation with Mr. Sansotta. Further, neither Hawks nor Molnaa qualified their statements in terms of “apparency.” Neither used cautionary language such as “I

don't think I can trust him," or "I have concerns about whether I can trust him." Both Molnaa and Hawks made the bold, unqualified statement that they could not trust Stiles in direct conversation with Sansotta. The medium and context of these statements compel the conclusion that the statements were defamatory and actionable.

With respect to the nature of the audience, the *Dunlap* court observed:

Second, the nature of the audience is important. As one commentator writes: "Paramount are audience expectations. In the context of ongoing public debates, the audience is prepared for mischaracterizations and exaggerations, and is likely to view such representations with an awareness of the subjective biases of the speaker." [citations omitted]. The court should then consider whether the audience expected the speaker to use exaggeration, rhetoric or hyperbole.

105 Wn.2d, at 539. In the instant case there is no reason to believe that the "audience" to whom defendants made the defamatory statements expected them to use exaggeration, rhetoric or hyperbole. These statements were not made in the context of "ongoing public debate." They were not made in the context of legal advocacy or negotiations, as the statement at issue in *Dunlap*. The statements made by defendants Molnaa and Hawks about Mr. Stiles' lack of trustworthiness were made directly in face to face conversation with Mr. Sansotta. Mr. Sansotta had no reason to

expect defendants to use exaggeration, rhetoric or hyperbole. Again, this compels the conclusion that defendants' statements to Sansotta about Stiles' lack of trustworthiness were defamatory and actionable.

Finally, the *Dunlap* court stated that the third "and perhaps most crucial factor to consider is whether the statement of opinion implies that undisclosed facts support it." 105 Wn.2d at 539-540. The court quoted Restatement (Second) Torts 566, comment C:

A simple expression of opinion based on disclosed or assumed non-defamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is. But an expression of opinion that is not based on disclosed or assumed facts and therefore implies that there are undisclosed facts on which the opinion is based, is treated differently.

The statements at issue in the instant case clearly fall within the latter category. Defendants Hawks and Molnaa told Mr. Sansotta they did not trust Mr. Stiles. These statements impugned plaintiff's honesty and integrity. A person does not challenge or question another's trustworthiness on a "feeling" or a "hunch." Questions or challenges to another's trustworthiness are based on experience. Defendants' statements to Mr. Sansotta that they did not trust Mr. Stiles implied that undisclosed facts supported them.

Again, this compels the conclusion that the statements were defamatory and actionable.

Under the standard adopted by the U.S. Supreme court in *Linn v. United Plant Guard Workers of America*, 86 S.Ct. 657, plaintiff must demonstrate that the defamatory statements were made with actual malice, i.e., knowledge of their falsity or reckless disregard for the truth. This is a factual question for jury determination. *Richmond v. Thompson*, 130 Wn.2d 368, 922 1343 (1996) (upholding jury finding of actual malice in defamation claim brought by state trooper against private citizen); *Herron v. King Broadcasting*, 112 Wn.2d 762, 776 P.2d 98 (1989) (holding evidence demonstrated triable issue of fact on issue of actual malice in defamation case brought by county prosecutor against broadcasting company). In the instant case, the evidence demonstrates a genuine issue of material fact concerning whether defendants made the defamatory statements about Mr. Stiles' lack of trustworthiness with actual malice.

As explained above, defendants' statements about Stiles' lack of trustworthiness implied undisclosed facts on which those statements were based. When questioned about the facts on which he based his statement that he could not trust Stiles, defendant Hawks identified four prior experiences: (1) Stiles spent an

excessive amount on photocopies for an arbitration proceeding involving UPS; (2) Hawks had to counsel Stiles for working on his own business on union time; (3) Stiles' conduct as a "womanizer"; (4) Stiles' behavior toward Hawks' sister at Ruth Chris Steak House in Seattle.

With respect to the UPS photocopying expense issue, Stiles testified that Hawks expressly approved those expenses. (CP 307). This supports a finding that Hawks knew his statement was false. Stiles testified that he never worked on personal business during union time and Hawks never counseled him for doing so. (CP 307). This supports a finding that Hawks knew this statement was false. Stiles expressly denied that he ever engaged in "womanizing" conduct or discussed any such behavior with Hawks. (CP 307). He further expressly denied that he ever engaged in any inappropriate behavior toward Hawks' sister at Ruth Chris Steak House or any place else. (CP 308). This supports a finding that Hawks knew these allegations were false.

The same analysis applies with respect to the statements made by defendant Molnaa. Molnaa also told Sansotta that he did not trust Stiles. Molnaa based this statement on (1) a conversation with Stiles at the Coast Hotel in Wenatchee where Stiles allegedly said he was tired of being a business agent, wanted to move up in

the organization, and didn't care who he had to step on to do it; (2) Stiles' "womanizing behavior" in the presence of his wife in the lounge at the Coast Hotel; (3) Stiles' allegedly rude behavior toward Molnaa in introducing him to union official John Rabine; and (4) Stiles' running up an excessive bar bill at Ruth Chris Steak House in Seattle.

Mr. Stiles testified he never discussed his professional aspirations with Mr. Molnaa and never told him he wanted to move up and didn't care who he had to step on. (CP 308). This supports a finding that Molnaa knew this statement was false. Stiles testified he never behaved in the fashion described by Molnaa in front of his wife at the Coast Hotel in Wenatchee. (CP 308-309). He further testified that she was never even present at the Coast Hotel on the evening described by Molnaa. (Id.) This testimony supports findings that Molina's statements were false and fabricated. Stiles also testified he never introduced Molnaa to John Rabine and certainly never snubbed or demeaned him. (CP 309). This supports a finding that Molnaa's description of this event was fabricated. Finally, Stiles expressly denied Molnaa's allegation that he ran up an excessive bill at Ruth Chris Steak House in Seattle. He further testified that since Mr. Hawks was present on the evening described by Molnaa, Hawks, as the senior

union representative, directed the payment of the bill. (CP 309-310). This testimony supports a finding that Molnaa fabricated these allegations, i.e., he knew they were false.

The court must construe this evidence in the light most favorable to Mr. Stiles as the non-moving party in the summary judgment proceeding below. *Herron v. King Broadcasting Co.*, 112 Wn.2d 762, 776. This means the court must presume that Mr. Stiles' testimony was true. Stiles' testimony is more than sufficient to demonstrate triable issues of fact concerning whether defendants made their statements about his lack of trustworthiness with knowledge of their falsity or reckless disregard of the truth. The record demonstrates genuine issues of material fact concerning whether defendants made false, defamatory statements to Mr. Sansotta about Mr. Stiles' lack of trustworthiness with actual malice. In light of those factual questions, the trial court's order granting defendant's motion for summary judgment was in error and should be reversed.

D. RCW 4.24.730 does not provide immunity to defendants on plaintiff's defamation claim.

RCW 4.24.730 provides in relevant part:

- (1) An employer who discloses information about a former or current employee to a prospective employer, or employment agency as defined by RCW 49.60.040, at the

specific request of that individual employer or employment agency, is presumed to be acting in good faith and is immune from civil and criminal liability for such disclosure or its consequences if the disclosed information relates to: (a) the employee's ability to perform his or her job; (b) the diligence, skill, or reliability with which the employee carried out the duties of his or her job; or (c) any illegal or wrongful act committed by the employee when related to the duties of his or her job.

. . .

- (3) For the purposes of this section, the presumption of good faith may only be rebutted upon a showing by clear and convincing evidence that the information disclosed by the employer was knowingly false, deliberately misleading, or made with reckless disregard for the truth.

The trial court held that defendants were immune from liability under this statute. The court held plaintiff failed to provide admissible evidence from which a reasonable fact finder could conclude that defendants spoke with legal malice. (CP 328). The trial court erred on both counts.

First, the record does not support a finding that defendants were immune from liability under RCW 4.24.730. The statute provides a qualified immunity to a prior employer who discloses information to a prospective employer if the disclosed information relates to (a) the employee's ability to perform his job; (b) the

diligence, skill or reliability with which the employee carried out the duties of his job; or (c) any illegal or wrongful act committed by the employee when related to the duties of his job. Mr. Sansotta did not ask either Hawks or Molnaa about any of these three issues. Mr. Hawks testified that Sansotta did not ask him any questions about Mr. Stiles other than, generally, what he thought of him. (CP 79-81). Mr. Molnaa testified that Sansotta told him WRPS had decided to hire Stiles. Sansotta did not ask Molnaa any questions about the three issues identified in RCW 4.24.730. (CP 101-105). The three issues identified in this statute were simply not presented to either defendant Hawks or Molnaa. The statute simply does not apply.

Even if the court determines the statute applies, it provides only a qualified immunity to a former employer who provides information to a prospective employer. The immunity does not apply if the prior employer provides information that is knowingly false, deliberately misleading, or made with reckless disregard for the truth. This is the actual malice standard discussed above. As explained above, the record demonstrates triable issues of fact concerning whether defendant Hawks or Molnaa made defamatory statements about Mr. Stiles' alleged absence of trustworthiness with actual malice, i.e., knowing those statements were false or

with reckless disregard for the truth. Therefore, the trial court erred in holding that defendants were immune from liability under RCW 4.24.730. The trial court erred in dismissing plaintiff's claim on summary judgment.

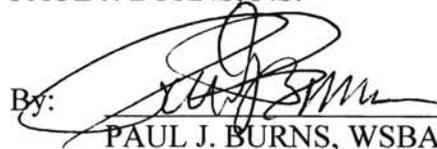
CONCLUSION

For the reasons set forth above, plaintiff respectfully requests the court to reverse the trial court order granting defendant's motion for summary judgment on plaintiff's defamation claim, and remand this case to the Benton County Superior court for trial on the merits.

RESPECTFULLY SUBMITTED this 29 day of March, 2013.

PAUL J. BURNS, P.S.

By:



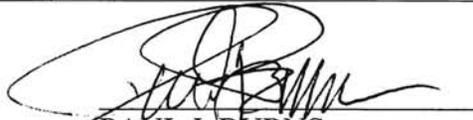
PAUL J. BURNS, WSBA #13320
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the 1 day of ~~March~~ ^{April}, 2013, at Spokane, Washington, the forgoing was caused to be served on the following person(s) in the manner indicated:

PS

Michael R. McCarthy David M. Ballew Reid, Pedersen, McCarthy & Ballew, LLP 100 West Harrison Street North Tower, Suite 300 Seattle, WA 98119	<input checked="" type="checkbox"/> Regular Mail <input type="checkbox"/> Certified Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail
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PAUL J. BURNS