

FILED

MAY 24 2013

CLERK OF COURT  
STATE OF WASHINGTON  
By \_\_\_\_\_

COURT OF APPEALS DIVISION III OF THE STATE OF  
WASHINGTON

TED STILES, a married man,

Plaintiff,

v.

DAVE MOLNAA, a married man;  
HANFORD ATOMIC METAL  
TRADES COUNCIL, a labor  
organization; ROBERT HAWKS, a  
married man; and TEAMSTERS  
LOCAL UNION NO. 839 BUILDING  
ASSOCIATION, a labor organization,

Defendants.

Benton County Superior  
Court  
No. 11-2-01306-2

Appeal No. 31306-9-III

BRIEF OF  
RESPONDENTS

Michael R. McCarthy  
David W. Ballew  
Reid, Pedersen, McCarthy & Ballew, L.L.P.  
100 West Harrison Street, North Tower #300  
Seattle, Washington 98119-4143  
Telephone: 206-285-3610; Fax 206-285-8925  
[mike@rpmb.com](mailto:mike@rpmb.com) / [david@rpmb.com](mailto:david@rpmb.com)

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[mike@rpmb.com](mailto:mike@rpmb.com) / [david@rpmb.com](mailto:david@rpmb.com)

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## **INTRODUCTION**

This is the very kind of case the Legislature had in mind when it enacted RCW 4.24.730, which insulates employers from liability for disclosing to prospective employers information about a former employee's ability to perform his/her job. Stiles was employed at Teamsters Local 839 when Defendant Hawks was the Local's chief executive officer and Defendant Molnaa served on its seven-member governing board. When Stiles applied for a labor relations job at Washington River Protections Solutions, Stiles trumpeted his experience at Local 839. WRPS therefore contacted Hawks and Molnaa and solicited their opinions of Stiles. Based entirely upon their experience with Stiles at Local 839, both gentlemen expressed less-than-positive personal opinions about Stiles's ability to perform labor relations duties. WRPS then decided not to hire Stiles. In short order, Stiles sued.

The clear intent behind RCW 4.24.730 was to prevent lawsuits like this one. Indeed, permitting lawsuits like this one to go forward directly threatens the policies and salutary practices sought to be protected and furthered by the statute. If the statute cannot be relied upon in circumstances such as ours, former employers will simply refuse to talk to prospective employers, with the result that unsuitable employees will be

hired and employer-after-employer will be forced to discharge an employee who never should have been hired in the first place.

In addition, Stiles has not come forward with any evidence from which a reasonable factfinder could infer that he has proven the elements of a defamation claim. Washington courts unfailingly require that the plaintiff prove misrepresentation of an “objective fact.” Yet, the core of Stiles’s complaint is that Hawks and Molnaa said they could not trust him. On its face, this is the expression of a personal opinion, not an objective fact.

Finally, as detailed within, United States Supreme Court authority teaches that Stiles’s complaint is preempted by federal labor law, and Stiles signed a release of liability in favor of defendants which he should not now be permitted to repudiate.

### **COUNTER-ASSIGNMENTS OF ERROR**

The trial court committed no error. In addition, as detailed below, respondents did not make arguments for the first time in their reply materials, except to the extent they were genuinely in reply to plaintiff’s/appellant’s arguments in response to defendants’/respondents’ summary judgment motion.

### **COUNTER-ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Respondents object to the implication in appellant's Issue No. 1 that they raised new arguments in their reply brief. Issue No. 1 should therefore be rephrased as follows:

1. Whether the trial court erred in considering all of defendants' arguments, including the insufficiency of the alleged defamatory statements and the total absence of evidence of damages.
  - a. Whether plaintiff/appellant waived or should be estopped to raise the above issue, because he declined defendants'/respondents' offer of additional time to respond to any arguments in respondents' reply brief he believed were out of order.

#### **SUPPLEMENTAL STATEMENT OF FACTS**

##### **Defendants**

Defendant Teamsters Local Union No. 839 ("Local 839") is a labor organization with principal offices in Pasco, Washington. Defendant Robert Hawks is the Secretary-Treasurer of Local 839. Among other bargaining units Local 839 represents drivers at the Hanford Nuclear Reservation.

Defendant Hanford Atomic Metal Trades Council ("HAMTC") is the exclusive collective bargaining representative for virtually all of the unionized workers on the Hanford Nuclear Reservation. It consists of 14 affiliated local unions, including Local 839. The affiliates represent a variety of crafts, from truck drivers to carpenters to nuclear chemical

operators. HAMTC's principal office is in Richland, Washington. Defendant Dave Molnaa is HAMTC's President.

**Stiles's Employment at Local 839 Under Hawks and Molnaa**

Hawks hired Stiles to come to work for Local 839 as a Business Agent in June, 1998. Prior to that Stiles had been working as a truck driver on the Hanford Site, where he also served as one of Local 839's shop stewards. CP 127-28 (Stiles dep.).

Throughout Stiles's time at Local 839, Hawks was the local's Secretary-Treasurer and Molnaa sat on its seven-member Executive Board. As such, both men were "employer[s]" within the meaning of RCW 4.24.730.<sup>1</sup>

The Secretary-Treasurer and Executive Board of Local 839 are comparable to a chief executive officer and board of directors at a corporation. Under Local 839's Bylaws, the Secretary-Treasurer is the "principal executive officer," having "in general" supervision and control over the Local's day-to-day operations and employees. CP 150 (Local 839's Bylaws, Art. 9, sections A and B). The Executive Board is "authorized and empowered to conduct and manage the affairs" of the Local, including setting the salaries and expenses of all officers and business agents and "transact[ing] all business and manag[ing] and

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<sup>1</sup> Stiles does not contend otherwise on appeal.

direct[ing] the affairs of the local union” between membership meetings and except as otherwise provided in the Bylaws. CP 153-54 (Bylaws, Article 13, sections A, A2 and A7). The Secretary-Treasurer and the Executive Board are both empowered to assign duties to business agents; business agents, like Stiles, “shall perform such duties as given to them by the Secretary-Treasurer and/or Local Executive Board . . .” CP 152-53 (Bylaws, Article 12, section A).

#### **Stiles’s Jobs After Leaving Local 839**

In mid-2002 Stiles resigned his position at Local 839, telling Hawks he had accepted a labor relations position with Sysco Foods in Houston, Texas. Stiles worked for Sysco till about November, 2006, when he took a position in labor relations at the Conoco Phillips Refinery in Ferndale, Washington.<sup>2</sup> Stiles stayed in Ferndale until May, 2012, when he moved to Houston to take a labor relations position at Phillips 66’s so-called “Center of Excellence” in Houston. *See*, CP 109-110 (Stiles dep.).

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<sup>2</sup> Stiles’s occupational history is taken from his job application to Washington River Protection Solutions, CP 131.

### **Stiles's Application to WRPS Trumpeting His Experience at Local 839**

Stiles applied online for the WRPS labor relations job on February 12, 2011, and completed and signed a WRPS Employment Application on February 25, 2011. CP 111 (Stiles dep.), 130 (Application). At page 2 of the Application (CP 131), Stiles recited his job experience, including his four years at Local 839. He made clear that his job duties at Local 839 were similar to those he would be expected to perform at WRPS: "Managed 20 labor agreements; private, public, and HAMTC. Negotiate, arbitrate, grievances resolution, mediation." On the last page of the Application (CP 133), Stiles expressly agreed to a number of terms and conditions as part of the Application process, including the following, at numbered paragraph 1:

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.**

CP 133 (emphasis added).

### **Stiles's Interview at WRPS, Where He Again Invokes His Relationships With Hawks and Molnaa**

Following a brief, preliminary telephone interview with three WRPS representatives, Stiles attended a face-to-face interview in Richland on or about March 2, 2011. CP 120 (Stiles dep.). Stiles recalls that "a lot

of people” attended the interview, including (most material for present purposes) WRPS Manager, Work Force Resources, Dominic Sansotta. CP 120 (Stiles dep.). Also present was Victor Serna, with whom Stiles had become acquainted when both were employed as Teamsters Business Representatives. CP 121 (Stiles dep.). At the interview, the participants discussed HAMTC, including Stiles’s understanding of “how HAMTC works, how the contracts work and . . . my general understanding of the process of working in the union environment within the HAMTC organization.” CP 121-122 (Stiles dep.). The WRPS interviewers asked Stiles if he had a previous acquaintance with Molnaa and Stiles told them he did indeed know Molnaa. CP 122 (Stiles dep.). Stiles was aware that “one of the main things [he was] being hired to do was to interact with [HAMTC]” and to bargain a collective bargaining agreement with HAMTC. CP 123 (Stiles dep.). When asked about Hawks, Stiles said, “I left on good terms and there was never any strife between Bob or myself or Dave.” CP 124-25 (Stiles dep.). Stiles went so far as to convey his recollection of the contents of his meeting with Hawks when he informed Hawks that he was leaving the Union to take a management-side position at Sysco Foods. CP 125-26 (Stiles dep.).

### **WRPS's Contingent Offer of Employment**

On March 9, 2011, WRPS sent Stiles a written confirmation of a verbal offer of employment (CP 135-36), which was expressly "contingent" upon a number of items, including:

Verification of your education and experience credentials, drug screening, medical requirements, Pre-Employment/Pre-Clearance Suitability Investigation, initial and continuing compliance with the enclosed General Conditions to Hire, ....

CP 135.

### **Stiles's Multiple Authorizations for Release of Information**

Three days later Stiles completed a "Pre-Employment/Pre-Clearance Suitability Investigation" form. CP 138-144. The very first line of the form states, in boldface and all capital letters:

**THIS APPLICATION SUPPLEMENT IS A  
LEGAL DOCUMENT AND IS USED AS  
AUTHORITY TO RELEASE  
INFORMATION.**

CP 138. On the last page of the form, Stiles completed and executed an "Authorization for Release of Information" in which he gave WRPS the authority to investigate him and authorized anyone WRPS contacted in the course of its investigation to provide all pertinent information to WRPS:

I authorize (name of company applying to)  
Washington River Protection Solutions  
[handwritten], Mission Support Alliance,  
LLC (MSA) or authorized contract

company to obtain consumer and/or investigative consumer reports and to investigate any statements made in the application and to investigate my background generally. I agree that if I have made any misrepresentation or the results of the investigation are not satisfactory for any reason, any offer of employment may be terminated without liability except for payment, at the rate agreed upon for services actually rendered. **I hereby authorize any person, credit agency (if applicable), educational institution, company or corporation to give any pertinent information to (name of company applying to) Washington River Protection Solutions [handwritten], MSA or authorized contract company.** I authorize information obtained through this investigation to be released to the United States Department of Energy (USDOE) for security clearance purposes. I understand that my employment may also be conditioned upon the granting of a security clearance by the USDOE and my passing a medical examination and such examinations subsequent to employment, as may be required by the employer.

CP 144 (emphasis added).

Thus, contrary to the allegation in his complaint that he had a “contract” of employment with WRPS, Stiles acknowledged in his deposition that he knew that WRPS’s offer was entirely “contingent” and that he “didn’t have the job until the contingencies had been met, . . . .”

CP 116-17 (Stiles dep.). Likewise, Stiles acknowledged that he “agreed

that WRPS could conduct background investigation,” and that among the items WRPS was entitled to verify was Stiles’s “experience credentials.” CP 112, 117 (Stiles dep.). Stiles confirmed that he had told WRPS in his application that he had “[done] work at Teamsters Local 839 relevant to WRPS’s consideration of [his] job application with WRPS,” that Bob Hawks was his former supervisor at Local 839, that Molnaa was on the Executive Board of Local 839 while Stiles worked there, that WRPS “could” talk to both of them and that “whom WRPS chose to talk to as part of a background investigation was its judgment, not [his].” CP 113-15 (Stiles dep.).

#### **Sansotta’s Conversations with Molnaa and Hawks**

On or about March 16, 2011 WRPS’s Sansotta spoke with Molnaa about Stiles. Sansotta came to Molnaa’s office to attend their regularly scheduled weekly meeting. CP 101-02 (Molnaa dep.). With a smile, Sansotta told Molnaa that WRPS had found a replacement for Victor Serna, its previous labor relations manager. CP 102 (Molnaa dep.). Sansotta said, “I think you know him.” *Id.* At first, Molnaa thought Sansotta might be talking about Frank Blowe, the former labor relations manager for Fluor Corporation, another Hanford Site contractor. Molnaa said, “Oh, no, it’s Frank Blowe,” and Sansotta and Molnaa both laughed. Then, Sansotta said, “It’s Ted Stiles,” to which Molnaa responded, “Are

you kidding?” When it became clear that Sansotta was not kidding,

Molnaa quit smiling and said:

Well, I said, you can hire who you want, but if you hire Ted Stiles, I would appreciate it if Ted didn't come down to my office. I would prefer to do business with either Don himself, or one of his other employees by the name of Mike Dickinson.

CP 102-03 (Molnaa dep.). Sansotta asked Molnaa why and Molnaa told him:

I had a personal history with Ted and that he had done some things in the past that would lead me to believe, to question – I told Dom I couldn't trust him, based on those events that happened in the past.

CP 103 (Molnaa dep.). Finally, Molnaa told Sansotta that he was not certain of the reasons Stiles left employment at Local 839, and Sansotta would have to contact Hawks for that information. CP 105 (Molnaa dep.).

Sansotta then spoke with Hawks on the telephone. In Hawks's recollection, Sansotta told Hawks that WRPS was considering Stiles for employment and asked Hawks what Hawks thought about Stiles. Hawks told Sansotta that “I'm going to have a real trust issue with Ted if he's employed at WRPS.” Sansotta asked Hawks why, and Hawks told Sansotta that “that was confidential stuff and I didn't feel comfortable

talking to him about specifics.” In Hawks’s recollection, nothing else material was said. CP 79-81 (Hawks dep.).

### **WRPS Rescinds Its Contingent Offer**

After his talks with Molnaa and Hawks, Sansotta called Stiles about his conversations with Molnaa and Hawks. Thereafter, Rosalyn Page, WRPS Manager of Human Resources, sent Stiles a letter rescinding WRPS’s contingent offer of employment. CP 147 (letter). About two months later, Stiles filed his Complaint.

### **The Essence of Stiles’s Complaint**

Stiles alleges that he had an “employment contract” with WRPS and that Molnaa and Hawks interfered in the contract. CP 3 (Complaint ¶4.2). Specifically, Stiles alleges that when Sansotta spoke with Molnaa, Molnaa questioned Stiles’s “character” and told Sansotta that Stiles was “untrustworthy.” CP 3 (Complaint, ¶4.3). Stiles alleges that these statements were “false and defamatory, unprivileged, and made intentionally, or with reckless disregard for the truth.” CP 3 (Complaint, ¶4.4). With respect to Hawks, Stiles alleges that when Sansotta spoke with Hawks, Hawks “would not deny the comments Molnaa had made about plaintiff’s character and trustworthiness” and that Hawks told Sansotta he “would never be able to trust plaintiff because of his

character.” CP 5 (Complaint, ¶ 6.3). As with Molnaa, Stiles alleges that Hawks’s statements were intentionally untruthful. CP 6 (Complaint, ¶6.4).

**Defendants’ Reply Brief and Plaintiff’s “Motion” to Strike**

Defendants filed a Motion for Summary Judgment, noting it for oral argument on Friday, November 16, 2012. After defendants filed their reply brief, plaintiff filed a “Motion to Strike” on November 13, 2012, three days before the date noted for the summary judgment oral argument. The “motion” was unaccompanied by the note for motion docket required under Benton County Local Court Rule 7(b)(7) or a motion to shorten time under LCR 7(b)(5).

Defendants filed an Opposition to the Motion on November 15, 2012. CP 317. Although the Opposition vigorously contested the substance of the Motion, it began with a Preface in which defendants/respondents offered to reschedule the summary judgment hearing, in order to give plaintiff/appellant more time to address arguments in defendants’ reply brief:

As detailed below, defendants vigorously oppose the Motion; they nonetheless express a willingness to reschedule the summary judgment hearing to a date that would permit the plaintiff to submit supplemental briefing on the issues he contends (wrongly, in defendants’ view) were improperly raised in defendants’ reply brief.

CP 319.

At oral argument on November 16, 2012, counsel for defendants, Michael McCarthy, recounted a November 14 telephone conversation with counsel for plaintiff, Paul Burns, in which McCarthy volunteered to postpone the summary judgment hearing in order to give plaintiff the time necessary to address arguments in the reply brief:

We did reach out on Wednesday to Mr. Burns and volunteered to postpone this summary judgment hearing in order to give plaintiff's counsel the time necessary to deal with anything in the reply brief that plaintiff's counsel felt needed and that offer was declined.

*See*, VRP Tr. p. 5, l. 14-19.<sup>3</sup> McCarthy argued that the primary problem with raising new arguments in a reply brief was that it deprived the non-moving party of the opportunity to respond. Plaintiff's refusal to take this opportunity, McCarthy argued, strongly implied that there wasn't anything more to be said:

When Your Honor finally sees the motion to strike I want them [sic] to be aware of that [sic] the main reason that one is not allowed to raise new issues in reply, which we don't think we did, is because it doesn't give the non-moving party

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<sup>3</sup> Citations to the verbatim report of proceedings of the November 16, 2012 oral argument on summary judgment will designate page and lines in one of the two following forms:

VRP Tr. p. [page number]: l. [line number] – [line number]

OR

(where the passage starts and ends on different pages)

VRP Tr. p. [page number]: l. [line number] to p. [page number]: l. [line number].

an opportunity to respond. So we thought we would reach out and grant that opportunity. In our view the fact it was declined indicates there wasn't anything more to be said on the issues claimed [sic] to have been raised late.

*See*, VRP Tr. p. 5, l. 19 to p. 6, l. 2.

Although Burns subsequently argued in support of plaintiff's Motion to Strike, he significantly failed to disagree with McCarthy's presentation about the contents of their telephone conversation or its implications. *See*, VRP Tr. p. 14, l. 9 to p. 15, l. 15 (arguing inappropriate arguments in reply brief, but not contesting earlier representation of the contents of the phone call between counsel). He likewise failed again to seek additional time or accept the offer of it.

## ARGUMENT

### I.

#### **UNDISPUTED FACTS ESTABLISH THAT STILES CANNOT PROVE THE ELEMENTS OF A DEFAMATION CLAIM, NOR EVADE THE "LIABILITY IMMUNITY" FOR FORMER EMPLOYERS FOUND IN RCW 4.24.730.**

As Stiles's Opening Brief makes clear, the core of his Complaint is that "Hawks and Molnaa told Dominic Sansotta,...that 'they could not trust' Stiles" and that those statements were "defamatory and actionable." *See*, Appellant's Opening Brief, p. 16. For the reasons detailed below, this allegation, even if proven, cannot support a defamation claim, nor is it sufficient to evade the application of RCW 4.24.730, which insulates

former employers from liability for responding to requests for information from prospective employers.

**A. The Only Evidence Of The Content Of Sansotta's Conversations With Molnaa And Hawks Are In The Molnaa And Hawks Deposition Transcripts; Stiles's Testimony About What Sansotta Said To Him About Those Conversations Is Inadmissible Hearsay.**

Stiles's Complaint is based entirely upon the content of conversations between WRPS's Manager of Work Force Resources, Dominic Sansotta, and defendants Hawks and Molnaa. Yet, Stiles neither deposed Sansotta nor provided an affidavit from him.

As a consequence, the only evidence regarding the content of conversations with Sansotta is to be found in the Hawks and Molnaa deposition transcripts. Respondents therefore request that, in conducting its analysis, the Court not permit Appellant to expand the purported content of the Sansotta conversations beyond that reflected in the Hawks and Molnaa deposition transcripts. In particular, Stiles's portrayal of what Sansotta told him about those conversations is inadmissible hearsay with respect to their contents. *See, Dunlap v. Wayne*, 105 Wash. 2d 529, 535-36 (1986) (on summary judgment, excluding as inadmissible hearsay plaintiff's recollection of what the bank president told plaintiff about

defendant's conversation with the bank president for the truth of the content of the conversation between the bank president and the defendant).

**B. Defamation Requires Misrepresentation Of An Objective Fact, Yet Molnaa And Hawks Were Clearly Expressing Personal Feelings And Opinions, Not Facts.**

In order to make out a defamation claim, Stiles “must prove that the words constituted a statement of fact, not an opinion.” *See, Robel v. Roundup Corporation*, 148 Wash. 2d 35, 55 (2002). In addition, “[w]hether the allegedly defamatory words were intended as a statement of fact or an expression of opinion is a threshold question of law for the court.” *Id.*, at 55. Thus, the *Robel* Court found that calling the plaintiff a “bitch,” a “c\_\_t,” a “f\_\_\_\_\_g bitch,” a “f\_\_\_\_\_g c\_\_t,” a “snitch,” a “squealer,” and a “liar” were not “facts” sufficient to support a defamation action. Most instructive for present purposes, the vulgar epithets required no legal analysis before concluding that they were on their face “non-actionable opinions,” rather than facts. *Id.*, at 55.

With respect to the remaining words – “snitch,” “squealer,” and “liar” – the Court considered three factors in determining whether they constituted actionable facts or non-actionable opinions:

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.

*Id.*, at 56, citing *Dunlap, supra*, at 539. Regarding medium and context, the Court noted that the statements “were oral statements made in circumstances and places that invited exaggeration and personal opinion.” *Id.*, at 56. Regarding the last factor, the Court emphasized that the statement must contain “implicit *facts*” (emphasis added), as opposed to further implicit opinions. *Id.*, at 57.

In our case, similar to the *Robel* Court’s handling of the vulgar epithets, there is no need to conduct the 3-prong analysis, because defendants’ statements about Stiles were clearly expressions of personal feeling or opinion, not objective facts. Indeed, one person’s statement that he lacks trust in another person constitutes an archetypical example of a personal opinion. Unlike objective facts, this opinion is not subject to verification via investigation and analysis. One person’s opinion of another person is inherently “true;” one person’s opinion of another, however misguided, remains that person’s “true” opinion.

In any event, even under the 3-prong *Robel* analysis, one can only conclude that defendants’ statements are not actionable. With respect to the “medium and context” of the conversations, a prospective employer representative, Sansotta, initiated contact with former employers, Hawks and Molnaa, and solicited their personal opinion regarding Stiles. To

borrow the words of the *Robel* Court, defendants' statements "were oral statements made in circumstances and places that invited . . . personal opinion." *Robel, supra*, at 56. With respect to the audience, Sansotta was a sophisticated labor relations professional seeking information relevant to Stiles's ability to work productively with the labor union leaders with whom he would be required to negotiate collective bargaining agreements. As such, Sansotta wanted to know Hawks's and Molnaa's opinions of Stiles; any underlying factual basis for those opinions was not particularly material. With respect to whether defendants' statements "implied undisclosed facts," they clearly did not. Indeed, when someone says he does not trust another person, it does not imply any particular facts. The "factual" source of that opinion, if any, could spring from *anything*. The opinion does not imply any particular objectively verifiable interaction between the person issuing the opinion and the person who is the subject of the opinion. Indeed, defendants' statements are more clearly opinions than many statements the courts have previously found to be non-actionable opinions, rather than actionable facts. *See, e.g., Robel, supra* ("snitch," "squealer," "liar"); *Dunlap, supra* ("solicitation of kick-backs"); *Davis v. Fred's Appliance, Inc.*, 171 Wash. App. 348 (Division III, October 23, 2012)("Big Gay Al").

Significantly, Appellant does not directly contend that Hawks's and Molnaa's statements of mistrust were "facts." He thereby implicitly concedes that they were not.

For these reasons, Stiles's defamation claim must fail. Defendants' statements to Sansotta about Stiles were clearly personal opinions, not objective facts.

**C. There Is No Basis For A Finding That Hawks And Molnaa Spoke With Malice Or That The Information They Disclosed To Sansotta "Was Knowingly False, Deliberately Misleading, Or Made With Reckless Disregard For The Truth" Within The Meaning Of RCW 4.24.730(3).**

RCW 4.24.730(1) states that former employers who disclose information about a former employee to a prospective employer are presumed to be acting in good faith and are immune from civil liability:

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.

The presumption can be rebutted only 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.” RCW 4.24.730(3).

Appellant implicitly concedes that, as a prima facie matter, the RCW’s presumption of good faith and immunity from civil liability applies in this case. He does not argue that Hawks and Molnaa are not “employers” within the meaning of the RCW or that its first paragraph is otherwise inapplicable. Instead, he contends that there is an issue of fact with respect to whether there is clear and convincing evidence that defendants knew the statements were false when they made them.

However, as explained above, one person’s personal opinion of another is not a “fact” that can be “knowingly false” or “deliberately misleading.” For this reason alone, Stiles has not provided the “clear and convincing” evidence necessary under RCW 4.24.730(3) to merit an exception to the general rule of immunity from liability.

Furthermore, Stiles’s argument that defendants lied defies common sense. He strangely contends that Hawks and Molnaa said that they didn’t trust him, when they actually did. Stiles does not explain why Hawks and Molnaa would say they didn’t trust him when they did, nor does he present

evidence of a motive to do so. This omission is not surprising, because, if Hawks and Molnaa actually trusted Stiles, they would enthusiastically have told Sansotta as much; after all, the prospect of ensuring a trustworthy management representative on the other side of the bargaining table would have been a welcome development for both Union leaders. Stiles's claim that both leaders purposely dodged this positive development in order to defame him turns the world on its head.

For these reasons, respondents request that the Court deny Stiles's appeal of the dismissal of his defamation claim. Pursuant to RCW 4.24.730(3), Stiles must provide "clear and convincing" evidence that, when defendants gave their opinions, they knew them to be false, or they were deliberately misleading Sansotta, or the opinions were provided with reckless disregard for the truth. Because Stiles has not, and cannot, provide any such evidence, RCW 4.24.730 insulates all defendants from liability.

**D. Stiles's Declaration Purporting to Rebut Defendants' Perceptions of His Work Performance Appears To Be Based Upon A Mistaken Analytical Assumption.**

In disputing defendants' perceptions of his conduct while employed at Local 839, Appellant relies exclusively upon a single Declaration submitted to the trial court. CP 305; Appellant's Opening

Brief, p. 21 et seq (citing exclusively to Declaration). However, the Declaration is insufficient to establish clear and convincing evidence that the defendants spoke with legal malice.

To begin, the Declaration is a study in stonewalling. In the course of six pages, Stiles uses the term “fabrication” no fewer than eighteen times, accompanied by a variety of shrill adjectives: “total,” “complete,” “disgusting.” According to Stiles, *none* of the incidents to which Hawks and Molnaa testified in their depositions ever happened.

Furthermore, for at least additional two reasons, Stiles’s blank denials are insufficient to raise an issue of fact with respect to the elements of a defamation claim or the application of RCW 4.24.730.

First, Stiles’s Declaration is based upon a flawed analytical assumption. Hawks and Molnaa stated a non-actionable opinion to Sansotta; that Stiles disagrees with Hawks’s and Molnaa’s perceptions of certain incidents that occurred while Stiles was employed at Teamsters Local 839 is simply not relevant. Perhaps more important, it would transgress *Robel* and other Washington Supreme Court authority if a defamation claimant could transform every non-actionable opinion into an actionable misrepresentation of fact simply by denying the observations, incidents and events that contributed to the defendants’ formation of the non-actionable opinion.

Second, Washington law is clear that, in order to defeat a motion for summary judgment, a defamation claimant must come forward with “affirmative factual evidence;” the claimant “must present contradictory evidence or otherwise impeach the evidence of the non-moving party.” See, *Dunlap v. Wayne*, 105 Wash. 2d 529, 536 (1986). It is insufficient that the plaintiff simply ask that the Court “disregard the testimony” of other witnesses, as Stiles has done here. *Id.*<sup>4</sup>

For all of these reasons, defendants request that the Court affirm the trial court’s dismissal of Stiles’s claims. Stiles cannot provide evidence sufficient to make out a *prima facie* defamation case and, in any event, he cannot provide “clear and convincing” evidence that the defendants are not insulated from liability pursuant to RCW 4.24.730.

## II.

### **UNITED STATES SUPREME COURT AUTHORITIES REQUIRE A FINDING THAT APPELLANT’S CLAIMS ARE PREEMPTED BY FEDERAL LABOR LAW.**

The United States Supreme Court has repeatedly held that state law causes of action are preempted, and must be dismissed, if they arise out of

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<sup>4</sup> Stiles’s stonewalling is understandable, given the nature of defendants’ observations of Stiles’s behavior while at Local 839. Still, it strains credulity. Molnaa and Hawks both testified to multiple observations that implied similar character flaws. Yet, there is no evidence that they ever colluded with respect to Stiles. Indeed, it is undisputed that, when Sansotta spoke with Molnaa and Hawks about Stiles, they had not spoken to each other.

alleged conduct that is actually or arguably protected or prohibited by the National Labor Relations Act (“NLRA”). In the seminal United States Supreme Court case, *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 3 L.Ed. 2<sup>nd</sup> 775 (1959) the Court held that the determination of the permissibility of such conduct rested within the exclusive jurisdiction of the National Labor Relations Board:

When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by Section 7 of the National Labor Relations Act, or constitute an unfair labor practice under Section 8, due regard for the federal enactment requires that State jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by State law.

*Garmon, supra*, at 244; *see also, I.U.O.E. Local 296 v. Jones*, 460 US 669, 676 (1983). (“if the conduct at issue is arguably prohibited or protected otherwise applicable state law and procedures are ordinarily preempted”) citing *Farmer v. Carpenters*, 430 U.S. 290, 296 (1977).

The Washington Supreme Court recognizes the *Garmon* preemption doctrine: “Thus, when it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 or are prohibited by § 8, regard for the federal scheme requires that State jurisdiction must yield.” *Hume v. American Disposal Company*, 124

Wn.2d 656, 663 (1994) (citing *Garmon*). For example, in *Beaman v. Yakima Valley Disposal, Inc.* 116 Wn.2d 697 (1991), the Court relied upon *Garmon* in finding that a state law contract claim was preempted. The Court emphasized that preemption is designed to avoid conflicts between federal and state law, but that the conflict needn't be "actual:"

Thus, *Garmon* stands for the principle that potential, rather than actual, conflict [with state law] is enough to warrant preemption.

116 Wash. 2d at 704.

**A. Appellant Does Not Dispute, As He Cannot, That His Complaint Alleges Conduct Arguably Prohibited By Federal Labor Law.**

Stiles alleges conduct by defendants that is expressly prohibited by the National Labor Relations Act (NLRA). Specifically, Section 8(b)(1)(B) provides:

It shall be an unfair labor practice for a labor organization or its agents --

(1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or adjustment of grievances .

. . .

29 USC §158(b)(1)(B).

In his deposition, Stiles economically summarized his Complaint as alleging that the Defendants interfered in WRPS's selection of a labor relations representative, the very thing prohibited by the NLRA:

Q. So you were going to be a labor relations rep for WRPS?

A. Correct.

Q. And part of that was expected to be representing the company in collective bargaining with the labor unions?

A. Correct.

Q. And part of that was adjusting grievances under union contracts, correct?

A. That was my understanding.

\* \* \*

Q. And in your view, fair to say that you believe it's your contention that the defendants interfered with WRPS' selection of a labor representative, namely you?

Mr. Burns: You can answer the question. Go ahead.

The witness:

A. For that position, yes.

By Mr. McCarthy:

Q. WRPS interfered in – excuse me, the defendants interfered in WRPS's selection of a labor rep, fair?

Mr. Burns: Object to the form, but answer as best you can.

The witness:

A. No. I – the decision had been made. The offer had been made; the start date had been given. The interference came from the discussion between Mr. Sansotta and the defendants.

By Mr. McCarthy:

Q. And in your view, the defendants interfered?

A. Absolutely.

CP 118-19 (Stiles dep., p. 61: l. 11 to p. 62: l. 21).

By claiming that:

1. He was “going to be a labor relations rep for WRPS”;
2. He would be “representing the company in collective bargaining with labor unions”;
3. “Part of that was adjusting grievances under union contracts”; and
4. “The defendants interfered with WRPS’s selection of a labor representative, namely you.”

Stiles is alleging a straightforward violation of Section 8(b) of the National Labor Relations Act, the adjudication of which rests within the exclusive jurisdiction of the National Labor Relations Board.

The U.S. Supreme Court has made precisely this holding in a highly analogous case, *I.U.O.E. Local 296 v. Jones*, 460 U.S. 669 (1983). There, Jones held a supervisory position with the company. When the

company discharged him, Jones sued the Operating Engineers local union alleging that the union's business agent had interfered with his contractual relationship with his employer by persuading the company to fire him. *See, Jones, supra*, at 672. The Court held that Jones's State law claims were pre-empted by the NLRA, in substantial reliance upon *Ironworkers v. Perko*, 373 U.S. 701 (1963). In particular, the Court found that the union's alleged conduct was arguably prohibited by § 8(b)(1)(B), because, as a supervisor, Jones "would be authorized or expected to deal with grievances arising under the collective bargaining agreement." *See, Jones, supra*, at 679.

**B. Undisputed Evidence Compels A Finding That Stiles Cannot Establish The Elements Necessary To Merit An Exception To *Garmon* Preemption For His Defamation Claim.**

The U.S. Supreme Court and Ninth Circuit Court of Appeals have made clear that a defamation claimant must establish at least the following elements in order to merit an exception to *Garmon* preemption:

1. The defendant explicitly or implicitly misrepresented an "objective fact;"
2. The misrepresentation was made with "malice," i.e., with knowledge of its falsity or with reckless disregard of whether it was true or false; **and**
3. Actual damages.

These elements are expressly set forth in *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53 (1966) and *Steam Press Holdings Inc. v. Hawaii Teamsters and Allied Workers Union, Local 996*, 302 F.2d 998 (9<sup>th</sup> Cir., 2002). The Ninth Circuit, in *Steam Press Holdings*, relying upon *Linn* and other Supreme Court authority, explained that a defamation plaintiff must prove “that the allegedly defamatory statement asserts a fact or ‘impl[ies] an assertion of objective fact’.” See, *Steam Press Holdings, supra*, at 1004, citing, *inter alia*, *Milkovich v. Lorain Journal Company*, 497 U.S. 1, 18 (1990). If the defendants’ allegedly defamatory statements “do not imply assertions of objective fact, then the statements are protected under federal labor law.” *Id.*, at 1006, citing *National Association of Letter Carriers v. Austin*, 418 U.S. 264, 286-87 (1974). The *Linn* Court carved out an exception to *Garmon* preemption for defamation “if the complainant pleads and proves that the statements were made with malice and injured him.” *Id.*, at 55. Malice requires a showing that the defendant made the statements “with knowledge of its falsity, or with reckless disregard of whether it was true or false.” *Id.*, at 61. Further, some states’ presumption of damages in defamation cases is insufficient to merit an exception to *Garmon* preemption; the plaintiff must prove that the allegedly defamatory statements “caused him damage.” *Id.*, at 65.

**1. Stiles does not allege that defendants misrepresented an “objective fact.”**

As explained above, Stiles does not allege that the defendants misrepresented an objective fact. As a consequence, Stiles does not merit an exception to *Garmon* preemption, and his claims must be dismissed.

**2. Stiles cannot prove malice.**

As likewise detailed above, Stiles has no evidence that Molnaa and Hawks acted with malice, i.e., with knowledge of the falsity of their statements or with reckless disregard of truth or falsity. The claims are therefore preempted and must be dismissed.

**3. Stiles has no evidence that he has suffered actual damage.**

In interrogatories and deposition, Stiles has been unable to point to any evidence of any economic losses; to the contrary, for all that appears, Stiles is presently making more money than he would have made in the WRPS job. Plaintiff provided the following answers in response to Interrogatory 6 and Request for Production D of Defendants’ First Set of Interrogatories and Requests for Production:

6. Please itemize all damages you allege are recoverable in this lawsuit.

Answer: Economic loss, general damages, mental anguish, emotional distress, loss of enjoyment of life, loss of opportunity,

humiliation, embarrassment, and reputational harm.

Request for Production D: Produce all documents that reflect, corroborate or relate to the itemization in the previous interrogatory. These documents should include but not be limited to wage stubs, benefit statements, medical bills, etc.

Response: Investigation and discovery continuing.

CP 284. In response to other interrogatories, plaintiff disclosed that his salary at his previous job at Conoco Phillips Refinery in Ferndale, Washington was \$132,000.00 per year in early 2011, when he applied for the WRPS job. CP 281-82. At the time of Stiles's deposition in 2012, his salary was \$136,000.00 with Phillips 66 in Houston, Texas. CP 290 (Stiles dep.). Stiles likewise testified that he receives an annual bonus with Phillips 66, which he estimates will be approximately \$31,000.00 in calendar year 2012. CP 290-91 (Stiles dep. p. 38, l. 16 to p. 39, l. 4). Thus, Stiles's salary plus bonus in his current job will total approximately \$165,000.00 in the calendar year 2012. CP 291 (Stiles dep. p. 39, lines 5-7). Yet, in response to interrogatories, Stiles claimed that his expected salary at WRPS would be only \$140,000.00 per year, and, in deposition, he conceded that he had no idea how much WRPS paid in bonuses. CP

291 (Stiles dep. p. 39, lines 8-20). To date, Stiles has not provided any information, let alone evidence, to support a claim for economic damages.<sup>5</sup>

There is likewise no evidentiary basis for awarding damages for loss of reputation, mental anguish, etc. With respect to Stiles's reputation, he has not provided any evidence that it has been diminished in any way. To the contrary, his current wage and benefit package in Houston suggests that he has landed on his feet. Indeed, only two weeks before Stiles applied for the WRPS job, he informed his employer, Conoco Phillips, in writing that it was his "**career aspiration**[ ] . . . to secure a labor position in Houston with the IR/ER Center of Excellence." CP 299, 303 (Stiles's "2010 Performance Agreement," with Conoco Phillips, p. 5 of 6)(emphasis added). This is the very position he now holds.<sup>6</sup>

Stiles has no evidence to support a claim of general damages, such as emotional distress, etc. He has never supplemented the above-quoted Interrogatory and Request for Production with material intended to support a claim for general damages. CP 278 (McCarthy Declaration, ¶ 5). At his deposition, Stiles forthrightly conceded that he has not consulted with any

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<sup>5</sup> Counsel for appellant diligently provided Stiles's tax returns. However, neither party took discovery from WRPS or any of Stiles's employers. As a consequence, respondents' counsel is unaware of any information, let alone evidence, that provides a basis for a detailed comparison of Stiles's wage and benefit package at WRPS versus that package at his current employer.

<sup>6</sup> See, CP 288 (Stiles dep. p. 21, l. 20 to p. 22, l. 17) (Stiles works at the Phillips 66 Center for Excellence in Houston); CP 292-94 (Stiles dep. p. 40, l. 6 to p. 42, l. 8) (Stiles agreed to the content of the Performance Evaluation and "stands behind what [he] wrote there.").

doctors or psychiatrists related to WRPS's withdrawal of its contingent job offer, nor has he taken any medications associated with the withdrawal. *See*, CP 295 (Stiles dep. p. 127, l. 3-12).<sup>7</sup>

For all of these reasons, respondents request that the Court affirm the trial court's holding that Stiles's claims are preempted by the National Labor Relations Act, in compliance with *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). Stiles has essentially admitted that he is alleging a violation of the NLRA, which is therefore preempted under the *Garmon* case. Stiles has not come forward with evidence sufficient to raise an issue of material fact with respect to whether his claims qualify for an exception to *Garmon* preemption. In particular, he has no evidence that the defendants misrepresented "objective facts," nor that defendants acted with actual malice, nor that he suffered actual damages.

### III.

#### **STILES'S RELEASES OF LIABILITY SHOULD BE ENFORCED.**

RCW 4.22.060(2) states, in pertinent part:

A release, covenant not to sue, . . . entered into by a claimant and a person liable discharges that person from all liability for contribution, but does not

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<sup>7</sup> Counsel for plaintiff/appellant forthrightly stated for the record that plaintiff was not making a claim for mental distress or other damages potentially experienced by Stiles's wife, Deborah, or his children. CP 297-98 (Stiles dep. p. 131, l. 14 to p. 132, l. 5).

discharge any other person's liable upon the same claim *unless it so provides*.

(Emphasis added).<sup>8</sup>

Stiles's application to WRPS does indeed provide that third parties giving information to WRPS are released from liability, even going so far as to identify Teamsters Local 839 by name. In his job application to WRPS, Stiles identified Teamsters Local 839 as a former employer at which he acquired relevant experience. CP 131 (Employment Application, p. 2). In that same Application, Stiles signed the following release:

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.

CP 133. Clearly, having identified Teamsters Local 839, then granting WRPS the ability to conduct a "background investigation," Stiles was essentially identifying Teamsters Local 839 as one of the persons WRPS could contact, and from which he was releasing liability.<sup>9</sup>

The Court should reject appellant's claim that the release was inconspicuous. The above-quoted release is paragraph no. 1 in the

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<sup>8</sup> WRPS is a "person liable" within the meaning of RCW 4.22.060(2). At the time Stiles released WRPS (as well as third parties), WRPS was foreclosing potential liability for prying into Stiles's arguably private affairs. In addition, Stiles's original Complaint in this matter named WRPS as a defendant.

<sup>9</sup> Stiles was further on notice that WRPS would contact former employers. At page 2 of his Application, he expressly told WRPS that it was not free to contact his "current" employer, thereby implying that former employers were fair game. CP 131 (*See*, "no" box at top of page).

statement signed by Stiles, which appears on the last page of his Employment Application. CP 133. Further, Stiles completed an Application Supplement the first line of which reflects the following content, in boldface, all capital letters:

**THIS APPLICATION SUPPLEMENT IS A  
LEGAL DOCUMENT AND IS USED AS  
AUTHORITY TO RELEASE INFORMATION.**

CP 138. On the last page of that same document, under the title “Authorization for Release of Information,” Stiles signed a statement permitting WRPS “to investigate any statements made in the Application and to investigate my background generally.” CP 144. Given Stiles’s repeated execution of releases, he simply cannot credibly argue that the release was inconspicuous.

In his attempts to evade his release on the basis of a claim that he is alleging an intentional tort, Stiles begs every material question. As explained earlier, Stiles may have *alleged* an intentional tort, but he has not come forth with any evidence from which a factfinder could conclude that one has actually occurred. As a consequence, his reliance on *Liberty Furniture Inc. v. Sonatrol of Spokane Inc.*, 53 Wash. App. 879 (1989) and *McQuirk v. Donnelly*, 189 F.3d 793 (9<sup>th</sup> Cir., 1999) is misplaced.<sup>10</sup>

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<sup>10</sup> *McQuirk* is doubly inapplicable for additional reasons. Contrary to plaintiff’s mischaracterization, *McQuirk* says nothing about Washington law; it was decided entirely on the basis of the interpretation and application of a California statute having no

Finally, Stiles should be estopped to repudiate his signed releases at this late date. WRPS's employment materials make plain that, if Stiles had not signed the releases, his application would not have been processed. His signing of the releases was therefore an essential predicate to WRPS's contingent job offer. As such, Stiles's release of third parties from liability is the "but for" cause of his entire lawsuit, for without the releases there would have been no job offer and without the job offer there would be no cause of action. Similarly, the releases led directly to Sansotta's conversations with Molnaa and Hawks; without the releases, Sansotta never would have contacted Hawks and Molnaa. For multiple reasons, then, it would be inappropriate and unfair to permit Stiles now to extract his signed releases from the chain of causation.

For all of these reasons, respondents request that the Court affirm the trial court's holding that Stiles's release of liability is enforceable against him.

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analogue in Washington. In addition, unlike here, the defendant/former employer in *McQuirk* initiated contact with the prospective employer and conveyed numerous objective facts that implicated the plaintiff in everything from theft to perjury, rather than conveying a brief personal opinion, as Molnaa and Hawks did here. *See, McQuirk, supra*, at 795.

#### IV.

##### **APPELLANT'S PROCEDURAL OBJECTION TO RESPONDENTS' REPLY BRIEF IS UNAVAILING.**

For the reasons detailed below, respondents respectfully request that the Court reject appellant's claim of a procedural defect related to respondents' reply brief.

##### **A. When Plaintiff Declined the Offer of Additional Time to Submit Supplemental Briefing, He Waived His Procedural Objection, Or Should Be Estopped to Interpose It.**

Defendants strongly disagree with plaintiff's objection to their reply brief.

Nonetheless, upon reading plaintiff's Motion to Strike below, defendants'/respondents' counsel contacted plaintiff's/appellant's counsel and offered to postpone the summary judgment hearing, in order to give plaintiff the time he claimed he needed to respond to arguments in the reply brief. Respondents made this offer in writing at page 1 of their Opposition to the Motion to Strike. CP 319. Defendants' counsel also contacted plaintiff's counsel on the telephone and made the identical offer. Plaintiff declined the offer. At oral argument below, defendants' counsel informed the Court of the telephone call and its contents, and plaintiff's counsel did not disagree with defendants' counsel's portrayal. Perhaps

more important, again at oral argument plaintiff's counsel failed to seek additional time or accept the offer of it.

Respondents therefore request that the Court find that appellant waived his procedural objection to defendants' reply brief, or should be estopped to raise it. Washington courts uniformly explain that the primary reason why summary judgment movants should not raise a new basis for decision in the reply brief is "because the non-moving party has no opportunity to respond." See, *White v. Kent Medical Center*, 61 Wash. App. 163, 168 (1991). See also, *R.D. Merrill Company v. Pollution Control Hearings Board*, 137 Wash.2d 118, 148 (1999) (favorably citing *White* for the identical principle); *Owen v. Burlington Northern Santa Fe Railroad*, 114 Wash. App. 227, 240 (2002) (quoting the identical language from *White*).<sup>11</sup> Thus, defendants' offer to plaintiff of sufficient time to respond remedied the procedural problem recognized by the Washington courts, even assuming the problem existed (which it didn't). When plaintiff declined the offer of a full procedural remedy, plaintiff gave up the right to raise the underlying procedural problem. Further, one can only conclude that plaintiff declined the opportunity to respond to the reply brief because he had no persuasive response.

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<sup>11</sup> These are the three cases relied upon in Appellant's Opening Brief.

The plaintiff's waiver, in and of itself, justifies rejection of his procedural objection to defendants' reply brief.

**B. The Arguments and Evidence in Defendants' Reply Directly Rebutted the Claim in Plaintiff's Responsive Brief That He Was Entitled To An Exception To *Garmon* Preemption.**

As plaintiff concedes, defendants argued in their initial Motion below that "[p]laintiff's claims are preempted by federal labor law." *See*, CP 313 (Plaintiff's Motion to Strike, 11/13/12, p. 2, line 13). In response, Stiles argued that he was entitled to an exception to the preemption rule. *See*, CP 161-164 (Plaintiff's Memorandum in Opposition, 11/5/12, pp. 3-6).

It was therefore perfectly appropriate that, in rebuttal, defendants argued that Stiles is not, in fact, entitled to an exception to *Garmon* preemption. As detailed above, governing Supreme Court and Ninth Circuit authority hold that a defamation plaintiff is not entitled to the preemption exception unless he can establish that defendants misrepresented an "objective fact," acted with malice and suffered actual damages. *See also*, CP 246-247 (Defendants' Reply, 11/9/12, Section II, B, pp. 9-10). It was therefore entirely appropriate that defendants analyzed in their reply defendants' expression of a personal opinion (as opposed to the misrepresentation of an objective fact), the absence of legal malice and the absence of evidence of actual damages.

For these additional reasons, respondents request that the Court reject appellant's appeal based upon respondents' reply brief below. The aspects of the analysis to which appellant objects were appropriately raised in reply to plaintiff's claim that he was entitled to an exception to *Garmon* preemption.

**C. Contrary To Appellant's Argument, The "Nature of the Alleged Defamatory Statements" Was Properly At Issue On Summary Judgment.**

Stiles argues that "defendants advanced no arguments in [their] initial motion related to the nature of the alleged defamatory statements at issue, . . ." *See*, Appellant's Opening Brief, p. 9. Appellant then argues that it was error for the trial court to rely upon certain arguments in defendants' reply brief, including that Stiles had failed to allege misrepresentation of an "objective fact" and that he had no evidence of actual damage. For the reasons detailed below, appellant is mistaken.

**1. Appellant Misperceives the Parties' Respective Burdens on Summary Judgment.**

The Washington Supreme Court has adopted the summary judgment standards set forth in the United States Supreme Court decision, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). *See, Young v. Key Pharmaceuticals Inc.*, 112 Wash.2d 216, 225 (1989); *see also, Guile v. Ballard Community Hospital*, 70 Wash. App. 18, 22 (1993) ("the

[Supreme Court] adopted the *Celotex* standard, . . .”). Under *Celotex*, defendant has two options on summary judgment: (1) it “can set out its version of the facts and allege that there is no genuine issue as to the facts as set out,” or (2) “alternatively, a party moving for summary judgment can meet its burden by pointing out to the trial court that the nonmoving party lacks sufficient evidence to support its case.” *Guile, supra*, at 21-22 citing *Young, supra*, and *Celotex, supra*. “In the latter situation,” the moving party needn’t provide affidavits, so long as it “identif[ies] those portions of the record, together with the affidavits, if any, which he or she believes demonstrate the absence of a genuine issue of material fact.” *See, Guile, supra*, at 22, citing *White v. Kent Medical Center Inc.*, 61 Wash. App. 163, 170 (1991) and *Celotex*. After the defendant has cited portions of the record that establish the absence of a genuine issue of material fact, the burden shifts to the plaintiff to establish an issue of fact with respect to every element of its claims:

In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an essential element to that party’s case, and on which that party will bear the burden of proof at trial. In such a situation, there can be ‘no genuine issue as to any material fact,’ since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial. The moving party is ‘entitled to a judgment

as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

*See, Celotex, supra*, 477 U.S. at 322-323.

Judged by these standards, the burden on summary judgment was on the plaintiff/appellant to establish every element of his claim, including those elements related to “the nature of the alleged defamatory statements.” In their Motion for Summary Judgment, defendants identified in remarkable detail “those portions of the record, . . . , which [they] believe[] demonstrate the absence of a genuine issue of material fact.” *See, Guile, supra*, 70 Wash. App. at 22. Specifically, defendants included a separate Section titled “Sansotta’s Conversations with Molnaa and Hawks” in which defendants detailed the precise contents of the conversations in which Stiles alleges defamatory statements were made. CP 46-48. The Section’s contents were supported by an attachment containing multiple pages of the Hawks and Molnaa deposition transcripts. CP 66-105.

Defendants concluded their Summary Judgment Motion by requesting that the Court “grant this motion for summary judgment and enter an order dismissing Stiles’s complaint in its entirety.” CP 62.

Under the authority cited above, this was all that was necessary to shift the burden to plaintiff to establish every element of his claims. It was therefore entirely appropriate for the defendants to point out in their reply brief the elements plaintiff had failed to establish, including those related to the nature of the allegedly defamatory statements.

For these reasons, respondents request that the Court reject appellant's procedural appeal. Defendants' initial Motion laid out the contents and nature of the allegedly defamatory statements in detail, establishing that there was no genuine issue of material fact with respect to their contents. The burden then shifted to plaintiff to come forward with evidence sufficient to establish every element of his claims at trial. It was therefore entirely appropriate for the defendants to detail in their reply the precise areas where plaintiff had failed to meet his burden.

**2. In Addition, Plaintiff's Motion Overlooks That Defendants Did Indeed Expressly Argue In Their Initial Motion That the "Nature of the Allegedly Defamatory Statements" Could Not Support Plaintiff's Claims.**

Contrary to appellant's portrayal, defendants expressly argued in their Motion for Summary Judgment that the "nature of the alleged defamatory statements" was insufficient to support plaintiff's claims. Defendants repeatedly argued that plaintiffs must establish that the defamatory statements were made with legal "malice," and that the

defendants' statements to Sansotta simply could not support this finding. CP 55-55, 60-61. In particular, defendants said the following regarding Stiles's claim that defendants defamed him when they told Sansotta that Stiles was not "trustworthy:"

Stiles, then, must show specific facts that establish both Hawks and Molnaa did find him "trustworthy" but dishonestly represented that they did not find him "trustworthy" in order to ensure that Stiles would not be that [sic] bargaining representative for the employer . . .

CP 61 (Defendants' Motion for Summary Judgment, 11/12/12, p. 26, lines 19-23).

**D. Under the Circumstances Then Prevailing in the Trial Court, Granting Appellant's Appeal Would Be Unfair to Respondents.**

Appellant unfairly ignores the procedural and substantive reality with which defendants were confronted below. At the time they filed their summary judgment motion, defendants simply did not know the precise contents of the conversations between Sansotta and defendants Stiles claimed were defamatory. Defendants likewise had no idea what evidence Stiles might point to in his response to their summary judgment motion. This uncertainty is understandable, given that Stiles's Complaint relies entirely upon opinions expressed to Sansotta, never mentioning objective facts. Further, although defendants knew that Stiles never deposed Sansotta, they did not and could not know whether plaintiff might submit

affidavits or other materials he had been able to extract from Sansotta outside the discovery process.

In this setting, defendants had little choice but to lay out the (as yet) undisputed factual record, file a *Celotex*-type SJ motion, and learn what evidence plaintiff would rely upon to establish every element of his claims. Only after learning that plaintiff lacked any additional evidence of the contents of the core conversations was the insufficiency of those contents ripe for discussion.

**E. The *White* Case, Quoted By Appellant, Does Not Amend the *Celotex* Summary Judgment Standards and Is, In Any Event, Distinguishable.**

Appellant's reliance upon *White v. Kent Medical Center Inc.*, 61 Wash. App. 163 (1991) is misplaced. To begin, *White* neither states, suggests nor implies that it is amending the above-described *Celotex* summary judgment standards and procedures. To the contrary, the *White* Court language quoted in Appellant's Opening Brief arises out of the *White* defendants' *failure* to comply with the *Celotex* standards, in contrast to the defendants here. Here, in compliance with *Celotex* and its Washington State progeny, defendants in their initial Motion pointed plaintiff to the portions of the record that established the absence of an issue of material fact with respect to the nature and content of the allegedly defamatory statements. This is apparently the very thing the

*White* defendant failed to do. In its summary judgment motion, the *White* defendant “argued that *White*’s complaint should be dismissed because she lacked any admissible expert testimony regarding the standard of care,” never pointing to those portions of the record that established that there was no genuine issue of material fact with respect to proximate causation. It was this omission, not present here, that prompted the Court of Appeals to prohibit the defendant from referring to those portions of the record in its reply materials. Because defendants here directed plaintiff to the material portions of the record in their initial Motion, *White* is inapplicable.<sup>12</sup>

### CONCLUSION

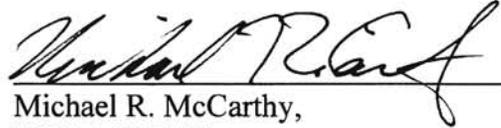
For all of these reasons, respondents respectfully request that the Court reject all of appellant’s bases for appeal and affirm the trial court’s decision in its entirety.

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<sup>12</sup> Indeed, in discussing the “nature of the alleged defamatory statements” in their reply brief, defendants did not point to any portions of the record not already brought to plaintiff’s attention in defendants’ initial Motion.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of May, 2013.

REID, PEDERSEN,  
McCARTHY & BALLEW,  
L.L.P.

A handwritten signature in black ink, appearing to read "Michael R. McCarthy", is written over a horizontal line.

Michael R. McCarthy,  
WSBA #17880  
David W. Ballew  
WSBA #17961  
Attorney for Defendants,  
Hanford Atomic Metal  
Trades Council, Teamsters  
Local 839, David Molnaa,  
and Robert Hawks

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 22<sup>nd</sup> day of May, 2013, she caused the Brief of Respondents, to be filed with the Court of Appeals, Division III, via First Class Mail, postage prepaid, postmarked MAY 22 2013, and addressed to:

Court of Appeals, Division III  
500 North Cedar Street  
Spokane, WA 99201-1905

with true and correct copies served by electronic mail, and by First Class Mail, postage prepaid, addressed to:

Paul J. Burns  
Paul J. Burns, P.S.  
421 West Riverside, Suite 610  
Spokane, WA 99201  
[paulburns@omnicast.net](mailto:paulburns@omnicast.net)

DATED this 22<sup>nd</sup> day of May, 2013.

  
Ellen M. Beck