

72333-2

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No. 72333-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KELLY A. SPRATT,

Plaintiff/Respondent,

v.

BRADLEY TOFT and JILL TOFT,

Defendants/Appellants

REPLY BRIEF OF APPELLANTS

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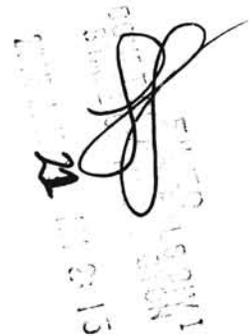


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I. INTRODUCTION

In 2012, Mr. Toft ran for the Washington State Senate as a candidate from the 5th District. CP at 19 (¶ 5). When Ms. Spratt, a former co-worker, discovered that Mr. Toft was running for public office she launched her personal vendetta against him and his wife. *See* CP at 148. Her vendetta included bizarre, malicious, and profanity-laced messages directed to the Tofts or published on Facebook, on Twitter, and in other public fora. CP at 157, 159, 161-65. She also wrote a letter to the local Republican Party chairman and spoke at several public campaign events, attacking Mr. Toft. *See* CP at 148-52. In response, Mr. Toft explained to others that he worked with Ms. Spratt years before and that she was fired. *See* CP at 186. Ms. Spratt disputed this characterization, threatened Mr. Toft with a lawsuit, and continued her vendetta. CP at 157, 161-65. Then, just one month before the election, Ms. Spratt filed a defamation lawsuit against the Tofts. CP at 1-3. The Tofts have invoked RCW 4.24.525, the “anti-SLAPP” statute, to dismiss this lawsuit.

II. MS. SPRATT’S REQUEST FOR TERMS AND SANCTIONS.

Once again, Ms. Spratt asks this Court to award her legal fees and other sanctions, this time for responding to this appeal. Resp. Br. at 22-25. This is the eighth time that Ms. Spratt has demanded sanctions be imposed on the Tofts. *See* Appendix A. Ms. Spratt’s latest request for sanctions is

based almost entirely on assertions that (1) this appeal is frivolous¹ or “untenable”; (2) this appeal was brought to cause delay; and (3) the Tofts have otherwise caused delay. Resp. Br. at 22-25; *see id.* at 5-7. She contends that the Tofts have brought “unwarranted and ‘creative motions’” in order to “cause unnecessary delay.” *Id.* at 24. None of this is true. The Tofts must again waste time and pages recounting the procedural history in detail to show that Ms. Spratt’s latest sanctions request and assertions about delay are without merit.

As is their right, the Tofts brought a special motion to strike Ms. Spratt’s claims pursuant to RCW 4.24.525(4)(a).² CP at 7-13. The trial court denied this motion in an order entered on June 13, 2013, concluding that the Statute did not apply. CP at 399.³ Six days later, the Tofts sought an “expedited appeal” of the denial of the motion to strike as provided by RCW 4.24.525(5)(d). CP at 411-15. The Tofts asked this Court to resolve

¹ The trial court rejected Ms. Spratt’s claims that the Tofts’ special motion to strike was frivolous. CP at 718, 784. She has not appealed the trial court’s denial of her request for attorney fees or her failed contention that the special motion to strike was frivolous. *See* CP at 784-828. As for Ms. Spratt’s appellate briefing, it barely responds to the Tofts’ arguments that defeat her claims. As set forth in greater detail *infra*, she has not come forward with sufficient evidence to support even a single element of her defamation claims.

² Although the initial motion to strike was filed more than 60 days after the lawsuit was served, CP at 7, the trial court allowed it to be heard over Ms. Spratt’s objection. CP at 109-10. Ms. Spratt proceeded with discovery in the meantime. CP at 193 (¶¶ 3-4); *see* CP at 65-67, 70-71, 195-98, 200-05, 383-85, 388-89.

³ The Tofts’ motion for reconsideration of the trial court’s decision did not delay the first appeal. *See* CP at 417-28.

both steps of RCW 4.24.525(4)(b). CP at 567, 577, 596.

This Court's decision in the first appeal, issued on April 21, 2014, was in favor of the Tofts, concluding that the Statute did apply.⁴ *Spratt v. Toft*, 180 Wn. App. 620, 632, 637, 324 P.3d 707 (2014). However, this Court elected to resolve only the first step of RCW 4.24.525(4)(b). *Spratt*, 180 Wn. App. at 632-33. The case was remanded to the trial court for resolution of the second step of the RCW 4.24.525(4)(b) process: whether Ms. Spratt came forward with clear and convincing evidence to support all elements of her claims. *Spratt*, 180 Wn. App at 637.

This Court's mandate issued on July 3, 2014. CP at 703. The Tofts filed their renewed motion (addressing the second step) on July 9—the day this Court's mandate was filed in the trial court. CP at 513, 703. The Tofts' renewed motion was heard on August 1, less than 28 days later. *See* Report of Proceedings ("RP") at 1 (Aug. 1, 2014). The Tofts filed this appeal 10 days after denial of the renewed motion.⁵ CP at 800-06.

As these facts demonstrate, the Tofts have appropriately exercised

⁴ The Tofts moved for reconsideration of that decision. *See Spratt v. Toft*, No. 70505-9-I, Mot. for Recon. (May 9, 2014). That motion was denied 10 days later. CP at 723-24. Ms. Spratt did not seek sanctions regarding that motion for reconsideration at the time. *See Spratt v. Toft*, No. 70505-9-I, Objection (May 13, 2014). It is far too late to raise that issue now and such an argument is meritless, as discussed *infra*.

⁵ Simultaneously, the Tofts moved for reconsideration, requesting separate dismissal of Ms. Spratt's claim connected to the anonymous letter. CP at 788-98. The trial court ordered further briefing but ultimately denied the motion for reconsideration. CP at 810, 827-28. This motion for reconsideration did not delay this appeal in any way.

their rights to seek dismissal of Ms. Spratt's claims pursuant to RCW 4.24.525(4)(a) and appeal the trial court's decisions on an expedited basis as provided by RCW 4.24.525(5)(d). All motions and appeals filed by the Tofts have been reasonable, appropriate, timely, and, in some instances, expedited. Further, in order to avoid delay, the Tofts specifically requested in the initial appeal that both steps of the RCW 4.24.525(4)(b) process be resolved at one time. CP at 567, 596-97, 608. This Court understandably decided to initially address only the first step. *See Spratt*, 180 Wn App. at 637. Moreover, the trial court has now determined that Ms. Spratt was not entitled to her attorney fees incurred in responding to the special motion to strike. CP at 782-84.

Ms. Spratt specifically calls for sanctions because, **over six month ago**, the Tofts moved for reconsideration of this Court's decision in the first appeal (a meritless position, but one she should have asserted at the time). Response at 22. The Tofts moved to reconsider the decision in the first appeal because there were factual matters and legal aspects that the Tofts believed merited correction. *Spratt v. Toft*, No. 70505-9-I, Mot. for Recon. (May 9, 2014). The Rule authorizes such a motion. RAP 12.4(c); *see Richert v. Tacoma Power Util.*, No. 43825-9-II, Orders Granting Mot. for Recon. & Amending Op. (May 13, 2014) (attached as Appendix B). A motion for reconsideration can be used for "correcting misstatements of

fact, correcting misquoted statutes, correcting misspelled names, or the like.” 3 KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE RAP 12.4 at 172 (8th ed. 2014). “[M]odification of the opinion that does not change the result but that instead corrects factual errors in the opinion or clarifies the court’s legal reasoning” is the most common form of relief granted when a motion for reconsideration is filed. 2 WASHINGTON APPELLATE PRACTICE DESKBOOK § 24.5(13), at 24-15 (Catherine Wright Smith & Howard M. Goodfriend, eds., 3d ed. 2005).

The Tofts are not delaying justice, they are seeking justice by invoking their rights under RCW 4.24.525. Ms. Spratt’s repeated and baseless demands for sanctions and fees are themselves abusive.

III. REPLY TO ISSUES ON APPEAL

Ms. Spratt contends that the only issue on appeal is whether “she voluntarily left her employment.” Resp. Br. at 1; *see* CP at 157; *see also* RP at 25:24 to 26:2 (Aug. 1, 2014). She could not be more wrong. The issue on appeal is whether Ms. Spratt can proceed with a politically strategic defamation case. As the Tofts have stated, this appeal addresses all elements of Ms. Spratt’s lawsuit: “Did the trial court err when it concluded that Ms. Spratt came forward with clear and convincing evidence to support her claims of defamation.” Op. Br. at 3.

IV. ARGUMENT

A. Standard of Review.

The parties agree that due to the political nature of Ms. Spratt's lawsuit, she is required to come forward with clear and convincing evidence to support all of the elements of defamation and that this Court sits in the same position as the trial court—resolving these issues de novo. *See* Op. Br. at 12-14; Resp. Br. at 7-8.

Defamation requires “a false and defamatory statement concerning another, an unprivileged communication to a third party, fault amounting at least to negligence on the publisher's part, and either actionability of the statement or special harm caused by the publication.” *Eastwood v. Cascade Broad. Co.*, 106 Wn.2d 466, 470, 722 P.2d 1295 (1986). Ms. Spratt has not established any of these elements with clear and convincing evidence. Her claims should be dismissed.

B. Statements About Ms. Spratt's Termination Were Not Defamatory, Even if False.

To support a defamation claim, a statement cannot merely be false—it must also be defamatory. *Sisley v. Seattle Pub. Sch.*, 180 Wn. App. 83, 86, 321 P.3d 276 (2014). Saying someone was fired is not defamatory absent an assertion of wrongful conduct by the employee. Op. Br. at 15-21. The trial court specifically raised this issue at oral argument and in its ruling. RP at 10:10 to 12:5, 14:11-17, 38:14-18 (Aug. 1, 2014).

Ms. Spratt tacitly concedes that incorrectly stating that someone

was “fired” is not, in itself, defamatory—she does not take a contrary position and cites no authority that would support such a position. *See* Resp. Br. at 8-11. Instead, Ms. Spratt’s only evidence that Mr. Toft said something defamatory is the statement by Mr. Toft that she was fired “for the very behavior she exhibited tonight,” claiming that this means she was fired “for cause.” Resp. Br. at 10. Ms. Spratt’s analysis ignores the context of that statement and what the recipient of the statement—Ramzy Boutros—says about her behavior that night.

On the evening of March 16, 2012, after viciously attacking Mr. Toft in an email, Ms. Spratt attended a candidate meet-and-greet where Mr. Toft was to be vetted by Mr. Boutros, the 5th District Republican Party vice-chair. CP at 187-88 (¶¶ 2-3); *see* CP at 148 (¶ 18). At this meeting, Ms. Spratt attacked Mr. Toft and re-hashed her seven-year-old employment grudges. CP at 149-50 (¶ 22). After the meeting—that very evening—Mr. Toft sent an email to Mr. Boutros explaining that Ms. Spratt had been fired “for the very behavior she exhibited tonight” and again asked for Mr. Boutros’ political support. CP at 186.

The context of the statement—as understood by Mr. Boutros and described in his declaration—shows that the statement did not imply wrongful conduct by Ms. Spratt. In fact, it implied just the opposite. Mr. Boutros described Ms. Spratt’s behavior and demeanor that night as “not

disruptive or inappropriate at any time,” not “malicious or angry,” “genuinely sincere,” and “nervous.” CP at 189-91 (¶¶ 12-13, 18). Jolie Imperatori echoed Mr. Boutros’ positive observations of Ms. Spratt’s behavior. CP at 180-81 (¶¶ 8-12). And Ms. Spratt’s declaration is consistent with those of both Mr. Boutros and Ms. Imperatori. *See* CP at 149-50 (¶¶ 20-22). Ms. Spratt has introduced no evidence, let alone clear and convincing evidence, to show that Mr. Boutros or anyone else concluded or could have concluded that Ms. Spratt’s termination was prompted by wrongful conduct on her part.

Thus, the only statement Ms. Spratt identifies as supporting a defamation claim related to her termination was not, in fact, defamatory. Ms. Spratt fails to meet her burden on this threshold element of her case with clear and convincing evidence, and, therefore, her termination-related defamation claims should be dismissed.

C. Ms. Spratt Has Not Proven Falsity.

Even a potentially defamatory statement must still be proven false. *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005). Here, Ms. Spratt fails to establish falsity by clear and convincing evidence.

1. Ms. Spratt Has Not Proven That the Statements Related to Her Termination Are False.

Instead of addressing the Tofts’ arguments that she cannot establish the falsity of the statements and that the gist or sting of the

statements is the same as a full recounting of Ms. Spratt's termination, Ms. Spratt focuses on immaterial issues: there is no "PIP" activity in her file, a different entity rehired her, she voluntarily gave two-week's notice, and she believes Mr. Toft's charge of unethical behavior was not justified. *See* Resp. Br. at 8-9.

But Ms. Spratt agrees that, because of the charge of unethical behavior, she tendered her resignation to Mr. Toft to be effective in two weeks. CP at 146 (¶ 10). Nor does she dispute that other behavior problems were documented in her employment file or the letter in her file documenting a plan to improve her behavior in 2004.⁶ *See* CP at 384-85 (noting "rude, intimidating and unprofessional" behavior involving "[n]o less than 7 people"). Nor does Ms. Spratt dispute that her file reflects that "[o]n Tuesday, December 13th Kelly was found to be sharing specific information about a previous employee with another company (Merriman Capital, her husband's employer) via email. She was confronted about the behavior and as a result resigned." CP at 383. She admits that she told Mr. Toft's supervisors that she "would be tendering [her] resignation to Mr. Toft the next morning" but that, when she "tendered [her] resignation,

⁶ Ms. Spratt says the Tofts ignore part of the record where she "denies ever having been reprimanded." Response Br. at 1-2 & n.1. The Tofts do address this portion of the record. *See* Op. Br. at 23-24. In fact, Ms. Spratt mischaracterizes her own declaration when she claims to have denied ever having been reprimanded. *See* CP at 145 (¶ 7).

to be effective in two weeks” to Mr. Toft, he “told [Ms. Spratt that her] resignation was going to be effective immediately and [she] should leave the building at once – which [she] did.” CP at 146-47 (¶¶ 12-13).

An employee’s termination is often subject to different perceptions. *See Becker v. Cmty. Health Sys., Inc.*, 182 Wn. App. 935, 940, 952, 953-54, 332 P.3d 1085 (2014). Mr. Toft’s actions caused Ms. Spratt to stop working for him. And when Ms. Spratt said she would leave in two weeks, Mr. Toft made her departure effective immediately. Thus, Mr. Toft had a good faith basis for believing he fired Ms. Spratt.

Ms. Spratt’s defamation claims related to her termination must also be dismissed because she has not established falsity.

2. Claims Related to the Anonymous Letter Can and Should Be Separately Dismissed.

In trying to come to grips with the morass of Ms. Spratt’s attack, the Tofts have distilled her case down to five separate allegedly defamatory statements—four statements regarding termination and the anonymous letter. Analytically, the anonymous letter should be examined independently to ascertain whether it contains a statement or statements that provide clear and convincing evidence of defamation. Ms. Spratt resists analyzing her claims on a statement by statement basis, preferring to throw all of her “mud” at the wall at once to see if she can get anything

to stick. Therefore, Ms. Spratt contends that she is asserting only one “claim,”⁷ disputing that each statement, including the anonymous letter, can and should be treated separately under RCW 4.24.525. Resp. Br. at 20-22; *see id.* at 24. But the anonymous letter should be separately considered and her claims based on that letter should be dismissed even if Ms. Spratt’s claims related to her termination were to somehow survive.

Ms. Spratt says that she filed a lawsuit “for a single cause of action: a pattern of defamatory statements,” contending that her Complaint only alleges “a claim.” Resp. Br. at 5, 21. Yet Ms. Spratt has repeatedly referred to her multiple “claims” in court submissions and has maintained that the anonymous letter supports a separate claim, as this example (just one of many) shows: “The actions which gave rise to **Ms. Spratt’s claims for defamation** did not occur in a place ‘open to the public’ or ‘in connection with an issue of public concern’ (refer Footnote 4), excepting possibly the PCO meeting, **which is just one of the four events**” that included “[t]he **‘anonymous’ letter.**” CP at 128-30 (bold and emphasis added); *see* CP at 124, 135, 630, 641, 649, 664, 744; RP at 31:4 (Aug. 1, 2014). This Court also characterized Ms. Spratt’s lawsuit as involving “claims” (plural). *Spratt*, 180 Wn. App. at 628.

⁷ Ms. Spratt’s sole citation to a 35-year-old dictionary does not change the analysis and actually supports the Tofts’ position because each “cause of action” is a separate “claim.”

Where, as here, a plaintiff alleges multiple defamatory statements, there is no other way for the Court to determine whether all elements of a statement have been proven except by considering each statement independently. The plain language of the Statute also supports the idea that each separate instance of defamation asserted by a plaintiff should be considered separately. RCW 4.24.525(6)(a) (authorizing courts to award costs, fees, and statutory damages to “a moving party who prevails, in whole or in part, on a special motion to strike” (emphasis added)).

This common sense approach is fully supported by Washington case law that Ms. Spratt has repeatedly cited, which treats each allegedly defamatory statement as a separate cause of action: “In this case, Bharti has essentially made the same statement two different times Bharti may be liable for both as separate causes of action.” *Momah v. Bharti*, 144 Wn. App. 731, 753, 182 P.3d 455 (2008); *see* Resp. Br. at 15; CP at 133, 653, 742 (Ms. Spratt citing *Momah* repeatedly). As explained in *Momah*, each alleged defamatory statement creates a separate cause of action and, by Ms. Spratt’s own view, every cause of action is a “claim.” *See* Resp. Br. at 20; CP at 812. Under RCW 4.24.525(1)(a), each statement stands alone as a “Claim” that can and should be stricken if unsupported by sufficient evidence.

There is yet another, more powerful, reason for this Court to treat

the anonymous letter as distinct and separate from Ms. Spratt's other allegations of defamation in the context of the special motion to strike.

Ms. Spratt maintains that Mrs. Toft—not Mr. Toft—drafted the letter:

This matter was commenced by Kelly Spratt to recover damages for defamatory statements made about her by Bradley and Jill Toft. Those statements include the repeated false allegation that Mr. Toft had fired Ms. Spratt some years earlier, as well as a wide range of defamatory allegations concerning Ms. Spratt that were distributed in an “anonymous letter”. That letter included materials proven to be uniquely available to Mrs. Toft.

CP at 621 (emphasis added); Resp. Br. at 5 (referring to “a pattern of defamatory statements made about her by . . . Jill Toft”). Ms. Spratt further characterized “Mr. and Mrs. Toft’s defamation” as ending “with an unsigned letter from Mrs. Toft.” CP at 622. Thus, the letter is logically and legally distinct from all other allegations in this lawsuit, which only involve statements by Mr. Toft about firing Ms. Spratt. The letter—which has nothing to do with Ms. Spratt’s employment or termination from employment—contains the only alleged statements that could support a direct claim against Mrs. Toft. In such circumstances, Ms. Spratt cannot seriously argue that the claims against Mrs. Toft based on the letter may not be addressed separately by the Court and independently stricken.

The anonymous letter must be addressed as a distinct issue in this appeal, and, for the reasons set forth below, Ms. Spratt’s claims based on

the anonymous letter should be stricken.

i. The Letter's Authorship Has Not Been Established.

Ms. Spratt says that the Tofts have ignored the “uncontroverted” testimony of her expert regarding who wrote the anonymous letter. Resp. Br. at 23. The Tofts did not ignore the expert; instead, they showed that his opinion is far from clear and convincing. Op. Br. at 27. Ms. Spratt’s expert says that the Tofts must have written the letter because it included attachments (Ms. Spratt’s bizarre personal attacks) that only the Tofts had access to. CP at 232 (¶ 8). But it is undisputed that this expert’s premise is wrong, thereby rendering his testimony meaningless. *See* Resp. Br. at 23. The evidence is undisputed that Mr. Toft forwarded copies of Ms. Spratt’s bizarre attacks to other people:

Attached hereto as Exhibit E is a true and correct copy of my response to interrogatory #18 in which I explain that at various times I forwarded screen shots of Ms. Spratt’s comments about me to others as a way of demonstrating the “mean and personal nature of the plaintiff’s statements”. . . . I forwarded screen shots of Ms. Spratt’s comments as they appeared in both Twitter and Facebook. This explains how someone other than me or my wife could have and obviously did attach screenshots of Ms. Spratt’s digital comments that were not exact copies of the screenshots that were attached to the anti-harassment action.

CP at 386-87 (¶ 2); *see* CP at 241. This Court acknowledged that Ms. Spratt was only “in the process of proving” the letter’s authorship. *Spratt*, 180 Wn. App. at 627. On remand, Ms. Spratt introduced no additional

evidence to establish the authorship of the letter. *See* CP at 721-45.

Ms. Spratt has not met her burden of showing with clear and convincing evidence that the Tofts wrote the anonymous letter.

ii. Ms. Spratt Has Never Introduced Any Evidence That Anything in the Letter Is False, That Any Undisclosed Facts Were False, or That Anyone Even Believed It Implied Undisclosed Facts.

Ms. Spratt only indirectly attempts to confront (in her fact section of all places) the argument that she has never proven that anything related to the anonymous letter is false. *See* Resp. Br. at 5. All Ms. Spratt says is that the letter “insinuated facts that are untrue, for instance referencing that Ms. Spratt is ‘the type of person’ that may harm people.” Resp. Br. at 5. Ms. Spratt’s characterization of the letter is (1) inaccurate; (2) unsupported by any evidence; and (3) contrary to her own words and acts.

The referenced portion of the anonymous letter actually says that “Kelly is the type of individual that will personally threaten me if she knows my identity, I must remain anonymous for my family.” CP at 171. It does not state or imply that she will “harm people”. *See* CP at 143-237. Without citing the record, Ms. Spratt states in her brief that the letter “insinuated facts that are untrue.” Resp. Br. at 5. There is no such evidence in the record: she introduced no evidence that any of the “six other people” who received the letter interpreted it as implying any

undisclosed facts or even what the recipients assumed. CP at 153 (¶ 34); *see* CP at 169-70 (authenticating the letter). And Ms. Spratt never stated in her declaration that anything in or related to the letter was false. *See* CP at 153-54 (¶¶ 34, 36).

More importantly, the statement that Ms. Spratt “is the type of individual that will personally threaten me if she knows my identity” is pure opinion. It is also accurate and supported by Ms. Spratt’s own messages attached to the letter. Ms. Spratt threatened Mr. Toft in her first message to him, stating “How do you not think your time at Quadrant Home Loans will NOT catch up with you?” CP at 159. Later, Ms. Spratt again threatened Mr. Toft: “You are begging me to defend myself and air your dirty laundry in a court of law.” CP at 157. She carried out her threat, filing this lawsuit just before the election. CP at 1-3.

Even if there was clear and convincing evidence that Mrs. Toft wrote the letter, which there is not, Ms. Spratt has failed to meet her burden of showing that anything related to the letter is false, much less defamatory. Claims based on the anonymous letter should be dismissed.

D. The Alleged Statements Were Privileged.

Even if Ms. Spratt’s defamation case survives the fatal flaws described above, the statements at issue are covered by two separate privileges, such that Ms. Spratt would also need to come forward with

clear and convincing proof of actual malice, which she has not done.

1. Ms. Spratt Was a Limited Public Figure.

Ms. Spratt's argument that she was not a limited public figure fails. *See* Resp. Br. at 11-15. Ms. Spratt cannot deny that she voluntarily injected herself into a public, political campaign. *See Grass v. News Grp. Pubs., Inc.*, 570 F. Supp. 178, 183-85 (S.D.N.Y. 1983); *see also Tilton v. Cowles Publ'g Co.*, 76 Wn.2d 707, 716-17, 459 P.2d 8 (1969). Her attacks at campaign events heightened her participation. *See Cabrera v. Alam*, 197 Cal. App. 4th 1077, 1092-93, 129 Cal. Rptr. 3d 74 (2011). Ms. Spratt even attended a second meeting and publicly repeated statements about her termination that she contends are defamatory. CP at 151 (¶ 28).

Contrary to Ms. Spratt's contention that her posts required intentional access to her private social media sites by recipients, she repeatedly "tweeted" at Mr. Toft and media outlets. CP at 162-63, 175-76, 217-19; *see* Resp. Br. at 14. And a case predating social media has already concluded an employee was a public figure "as a result of his participation in a public debate, namely the qualification of two candidates seeking the office of Superintendent of Public Works." *Madarassy v. Gannett Satellite Info. Network Inc.*, 23 Med. L. Rptr. 1363, 1366 (N.Y. Sup. Ct. Saratoga Cnty. Jan. 24, 1995); CP 464.

Because Ms. Spratt was a limited public figure, she must prove

that Mr. Toft acted with actual malice, which she cannot do.

2. The Common Interest Privilege Applies.

The common interest privilege also applies here. *See* Resp. Br. at 16-18. For a common interest privilege to attach, the parties need not be “allied” because “the focus belongs on the declarant’s and recipient’s relationship to the subject matter, not to each other.” *Moe v. Wise*, 97 Wn. App. 950, 959, 989 P.2d 1148 (1999). Thus, the privilege “applies when the declarant and the recipient have a common interest in the subject matter of the communication.” *See Moe*, 97 Wn. App. at 957-58. Here, every statement at issue is covered by the common interest privilege.

Mr. Boutros, the 5th District Republican Party vice-chair, attended the March 2012 event “for the express purpose of interviewing [Mr. Toft] one-on-one before the meeting and making a decision as to whether I would support him.” CP at 188 (¶ 3). After Ms. Imperatori arrived with Ms. Spratt in tow, Mr. Toft allegedly told Mr. Boutros that Ms. Spratt was in the room, she was likely to make a disturbance, and he had fired her years earlier. CP at 189 (¶ 9). Mr. Toft asked Mr. Boutros’ advice about how to address this situation. CP at 189 (¶ 9). These communications meet the test for application of the common interest privilege.

After the meeting, Mr. Toft emailed Mr. Boutros about the “vetting process” and asked for his support. CP at 185-86. Mr. Boutros told Mr.

Toft he could not give his support, in part because of Ms. Spratt's allegations. CP at 184. Mr. Boutros then forwarded the message to the 5th District's Republican Party Chair who forwarded it to Ms. Imperatori, Senator Pflug's supporter, who forwarded it to Ms. Spratt. CP at 184.

The last two alleged defamatory statements were from a May 2012 meeting of Republican Precinct Committee Officers where "[a] number of candidates were in attendance to give short speeches and then answer questions from the audience." CP at 190 (¶ 15). The statements Mr. Toft is alleged to have made were made in the context of a meeting of these precinct committee officers with the party leadership present. CP at 181-83 (¶¶ 14-15, 19-21). The common interest privilege applies to all these communications because in all cases the declarant and the recipient had a common interest in the subject matter of the communication.

E. Ms. Spratt Has Not Established Actual Malice.

Again, even if the alleged statements are defamatory, false, and attributable to the Tofts, application of either of the privileges places the burden on Ms. Spratt to show, with convincing clarity, that the statements were made with "actual malice." *Camer v. Seattle Post-Intelligencer*, 45 Wn. App. 29, 41-43, 723 P.2d 1195 (1986).

To establish actual malice, Ms. Spratt must show the Tofts acted "with actual knowledge of its falsity or with reckless disregard for its truth

or falsity.” *Herron v. KING Broad. Co.*, 112 Wn.2d 762, 775, 776 P.2d 98 (1989); *see Parry v. George H. Brown & Assocs., Inc.*, 46 Wn. App. 193, 198, 730 P.2d 95 (1986) (“Proof of falsity alone cannot overcome the privilege.”). Ms. Spratt maintains that she has established “fault” because she says she resigned and she says she has established the authorship of the anonymous letter. *See* Resp. Br. at 18-19. Ms. Spratt’s arguments fail.

As was discussed in Part IV.C.1, *supra*, Ms. Spratt resigned after Mr. Toft raised the issue of her unethical behavior and, when she tendered her resignation effective in two weeks, he caused her employment to end immediately—the functional equivalent of being fired. Mr. Toft’s alleged defamatory statements were made years later. They were based on his own quite reasonable memory and perception of events. There is no evidence of “actual malice.”

Similarly, there is also no evidence of “actual malice” connected to the anonymous letter. First, as mentioned above, there is no evidence that any statement in the letter is anything but opinion, there is no evidence any recipient assumed the letter implied any facts, and there is no evidence that any implied fact is false—much less that the author wrote it “with actual knowledge of its falsity or with reckless disregard for its truth or falsity.” Part IV.C.2.ii. Indeed, the attachments to the letter—which contain some of Ms. Spratt’s vicious and bizarre personal attacks on Mr. Toft—prove

that the gist of the letter is true. CP at 159-65. And the statement that Ms. Spratt “is the type of person that will personally threaten” the author of the letter is certainly supported by Ms. Spratt’s own statements that were available to the letter’s recipients. CP at 159-60.

Ms. Spratt clearly has not come forward with clear and convincing evidence to establish that the Tofts ever acted with “actual malice.”

F. **Ms. Spratt Has Failed to Meet Her Burden of Presenting Clear and Convincing Evidence of Special Damages Proximately Caused by the Alleged Statements.**

Finally, even if Ms. Spratt cleared all of the hurdles described above, her case collapses for failing to submit evidence of special damages. Ms. Spratt agrees that she must come forward with clear and convincing evidence on damages but seemingly does not understand the requirement. *See* Resp. Br. at 8, 19-20. Because she does not allege defamation per se, she must establish “special damages.” *Davis v. Fred’s Appliance, Inc.*, 171 Wn. App. 348, 367, 287 P.3d 51 (2012); *see Velikanje v. Millichamp*, 67 Wash. 138, 140, 120 P. 876 (1912) (“The words charged, not being libelous per se, are not actionable unless a special damage is alleged to have resulted to appellant.”).

But “[d]efamation is concerned with compensating the injured party for damage to reputation.” *Grange Ins. Ass’n v. Roberts*, 179 Wn. App. 739, 767, 320 P.3d 77 (2013). Ms. Spratt offers no evidence of

damage to her reputation. *See* CP at 154 (¶ 36). And she does not allege any compensable economic harm, such as harm to employment. *Compare* Resp. Br. at 20-21, *with* Op. Br. at 44-46. Ms. Spratt has never stated that any recipient of any alleged defamatory statement has treated her differently—let alone believed such statements, causing actual, pecuniary loss. *See* RESTATEMENT (SECOND) OF TORTS § 575, cmt. b, at 198 (requiring that special damages result from acts of third persons who heard the defamatory statement, not from the conduct of the “defamer or the one defamed”); *see also* *Lind v. O’Reilly*, 636 P.2d 1319, 1321 (Colo. 1981); *Ward v. Zelikovsky*, 136 N.J. 516, 540, 542, 643 A.2d 972 (1994); *Hancock v. Variyam*, 400 S.W.3d 59, 71 (Tex. 2013).

For nearly 100 years, Washington courts have held that emotional distress and mental suffering are “general damages” and these damages do not satisfy the requirement of showing special damages. *Viss v. Calligan*, 91 Wash. 673, 677, 158 P. 1012 (1916); *Davis*, 171 Wn. App. at 367. It does not appear that any Washington defamation case has concluded that special damages are established solely by treatment of emotional distress or mental suffering. This approach is consistent with the Restatement:

b. Special Harm. Special harm, as the words are used in this Chapter, is the loss of something having economic or pecuniary value. . . .

c. Emotional distress. Under the traditional rule, the emotional distress caused to the plaintiff by his knowledge

that he has been defamed is not special harm; and this is true although the distress results in a serious illness. . . .

RESTATEMENT § 575, cmts. b & c, at 197-99; see *Schmalenberg v. Tacoma News, Inc.*, 87 Wn. App. 579, 600 n.56, 943 P.2d 350 (1997).

Washington's position is also consistent with other jurisdictions that have reached the same conclusion for over 150 years:

- An Illinois court concluded that special damages were not established where the plaintiff alleged that he “suffered extreme emotional distress,” “needed to take medication to treat the nervous distress,” “incurred medical expenses in relation to his nervous condition,” and was “unable to participate in normal activities.” *Schaffer v. Zekman*, 196 Ill. App. 3d 727, 733, 554 N.E.2d 988 (1990).
- The Seventh Circuit has concluded that diagnosis by a psychologist was not sufficient to support special damages. *Tacket v. Delco Remy Div. of Gen. Motors Corp.*, 937 F.2d 1201, 1203, 1206-07 (7th Cir. 1991).
- The Tenth Circuit has concluded that one visit to a physician and a prescription drug purchase were insufficient to support a defamation cause of action. *Zeran v. Diamond Broad., Inc.*, 293 F.3d 714, 718-19 (10th Cir. 2000).

See *Allsop v. Allsop*, 157 Eng. Rep. 1292, 1293-94 (1860); *Terwilliger v. Wands*, 17 N.Y. 54, 63 (1858); *Clark v. Morrison*, 80 Or. 240, 245 (1916).

If medical expenses constituted special damages for purposes of a defamation claim (which they do not), Ms. Spratt's evidence is inadequate to support an award of medical expenses.⁸ Ms. Spratt's self-serving

⁸ Ms. Spratt claims that the Tofts have not “question[ed] the amount of damages.” Resp. Br. at 19. Yet Ms. Spratt has never stated the amount of her damages so the Tofts could

declaration does not meet the standard of showing damages by clear and convincing evidence. *See* Op. Br. at 14, 46-49; *see, e.g.*, CP at 242, 534-36, 596, 607-08, 692-94; *see also In re Marriage of Janovich*, 30 Wn. App. 169, 171, 632 P.2d 889 (1981). She fails to recognize that a “prima facie case must consist of specific, material facts, rather than conclusory statements, that would allow a jury to find that each element of defamation exists.” *LaMon v. Butler*, 112 Wn.2d 193, 197, 770 P.2d 1027 (1989).

Ms. Spratt must supply actual proof of her medical expenses and their reasonableness. *Nelson v. Fairfield*, 40 Wn.2d 496, 500-01, 244 P.2d 244 (1952); *see* Op. Br. at 47-48. Ms. Spratt’s case is even weaker than the plaintiff’s case in *Nelson* as she does not even estimate her medical expenses.⁹ CP at 154 (¶ 36). And she has not presented any medical testimony causally connecting a need for treatment with any statements allegedly made by the Tofts. CP at 154 (¶ 36); *see* Op. Br. at 48.

Further, Ms. Spratt’s claim that she has even been “harmed” is belied by her own statements: “You are begging me to defend myself and air your dirty laundry in a court of law. For that, THANK YOU.” CP at

question it—let alone submitted her bills or any kind of medical testimony on causation or the reasonableness and necessity of the purported treatment. *See* CP at 154 (¶ 36).

⁹ In *Nelson*, the only support for the amount of damages was a plaintiff’s testimony that “he imagined the hospital bill was not over \$35 or \$40.” 40 Wn.2d at 501. Our Supreme Court concluded that such testimony “was not sufficient. Not only was the amount uncertain, but there was no proof of the reasonable value of the services rendered by the hospital. It was error to submit the question to the jury.” *Nelson*, 40 Wn.2d at 501.

157. Ms. Spratt was not damaged, she was grateful.

Ms. Spratt has failed to meet her burden of proving the damage element of her defamation claims with clear and convincing evidence.

G. The Tofts Are Entitled to Their Attorney Fees and Costs.

Ms. Spratt does not dispute the Tofts' right to recover attorney fees, costs, and statutory damages should they prevail on this appeal.

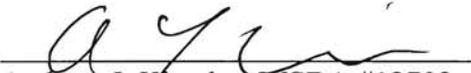
V. CONCLUSION

As we have shown, Ms. Spratt has failed to carry her burden of establishing any element of this lawsuit by clear and convincing evidence. RCW 4.24.525(4)(b). This is not a close case but, even if it were, the Legislature intended for the Statute to be applied "liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts." Laws of 2010 at 924, ch. 118, § 3.

The Tofts respectfully request that the trial court's orders be reversed and this case be remanded to the trial court with directions to enter a new order granting the special motion to strike and awarding attorney fees, costs, and statutory damages to the Tofts.

Respectfully submitted this 21st day of Jan., 2015.

HELSELL FETTERMAN LLP



Andrew J. Kinstler, WSBA #12703
David Gross, WSBA #11053

APPENDIX A

(Instances in which Ms. Spratt requested attorney fees/sanctions)

Motion to Strike the Tofts' Motion to Strike (CP at 38-39, 104-05)

- **Denied**. CP at 110.

Ms. Spratt's Motion to Compel (Cause No. 12-2-33503-6, Dkt. # 53)¹

- **Denied**. Cause No. 12-2-33503-6, Dkt. # 65A.¹

Ms. Spratt's Request on the Tofts' Motion to Strike (CP at 135)

- Initially granted. CP at 399.
- Remanded for further determination. CP at 718.
- **Denied**. CP at 784. Ms. Spratt did not cross-appeal this decision.²

Ms. Spratt's Request on the Tofts' First Appeal (CP at 664)

- Remanded for further determination. CP at 718.
- **Denied**. CP at 784. Ms. Spratt did not cross-appeal this decision.²

Ms. Spratt's Request on the Tofts' Renewed Motion (CP at 744-45)

- **Denied**. CP at 784. Ms. Spratt did not cross-appeal this decision.²

Ms. Spratt's Request on the Tofts' Motion for Reconsideration (CP at 815)

- **Denied**. CP at 828. Ms. Spratt did not appeal this decision.²

Ms. Spratt's Motion on the Merits in this Appeal (Case No. 72333-2-I)

- **Placed in the file without action**. Notation Ruling (Nov. 21, 2014).

¹ The Tofts can make these documents part of the formal record, should the Court so desire. However, these materials were previously submitted to this Court as part of a motion in Case No. 70505-9-I. They were attached as Exhibits D and J to the Declaration of Matthew V. Pierce in Support of Appellants' Motion for a Protective Order, Stay of Discovery, and Stay of Other Trial Court Proceedings, filed in this Court on June 24, 2013.

² Ms. Spratt did not petition for review of this Court's decision in the first appeal and has never appealed or cross-appealed any aspect of any order denying her attorney fees, including the trial court's denial of her requests for attorney fees on the renewed special motion to strike or on the motion for reconsideration. CP at 782-84, 827-28; see Docket in King County Cause No. 12-2-33503-6; see also CP at 782-828.

Appendix B

Richert v. Tacoma Power Util., No. 43825-9-II, Order Granting Motion for Reconsideration & Order Amending Opinion (May 13, 2014).

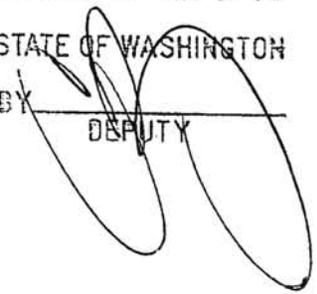
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COURT OF APPEALS
DIVISION II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

2014 MAY 13 AM 9:13

DIVISION II

STATE OF WASHINGTON

No. 43825-9-II BY  DEPUTY

GERALD G. RICHERT, on behalf of SKOKOMISH FARMS INC., a Washington corporation; GERALD F. RICHERT and SHIRLEY RICHERT, husband and wife, and the marital community thereof; THE ESTATE OF JOSEPH W. BOURGAULT; NORMA BOURGAULT, a single woman; ARVID HALDANE JOHNSON, on behalf of OLYMPIC EVERGREEN, LLC, a Washington limited liability company; ARVID HALDANE JOHNSON and PATRICIA JOHNSON, husband and wife, and the marital community thereof; SHAWN JOHNSON and SHELOOY JOHNSON, husband and wife, and the marital community thereof; JAMES M. HUNTER, on behalf of the HUNTER FAMILY FARMS LIMITED PARTNERSHIP, a Washington partnership; JAMES M. HUNTER and JOAN HUNTER, husband and wife, and the marital community thereof; JAMES C. HUNTER and SANDRA HUNTER, husband and wife, and the marital community thereof; GREGORY HUNTER and TAMARA HUNTER, husband and wife, and the marital community thereof; DAVID KAMIN and JAYNI KAMIN, husband and wife, and the marital community thereof; WILLIAM O. HUNTER, on behalf of HUNTER BROTHERS STORE, a Washington partnership; PAUL B. HUNTER, on behalf of HUNTER BROTHERS, LLC, a Washington limited liability company; WILLIAM O. HUNTER and CAROL HUNTER, husband and wife, and the marital community thereof; PAUL B. HUNTER and LESLIE HUNTER, husband and wife, and the marital community thereof; WILLIAM O. HUNTER, JR. and LUAYNE HUNTER, husband and wife, and the marital community thereof; DOUGLAS RICHERT, a single man; EVAN TOZIER, on behalf of RIVERSIDE FARM, a Washington

partnership; ARTHUR TOZIER, a single man;
MAXINE TOZIER, in her individual capacity;
and EVAN TOZIER, a single man,

Respondents,

v.

TACOMA POWER UTILITY, a Washington
Utility, and the CITY OF TACOMA, a
Washington municipality,

Appellants.

ORDER GRANTING
MOTION FOR RECONSIDERATION

APPELLANT, City of Tacoma, has moved for reconsideration of the published opinion filed in this case. After due consideration, the court grants the motion and amends the March 4, 2014 opinion with the attached Order Amending Opinion.

IT IS SO ORDERED.

Dated this 13TH day of MAY, 2014.

PANEL: Jj. Worswick, Hunt, Penoyar

FOR THE COURT:

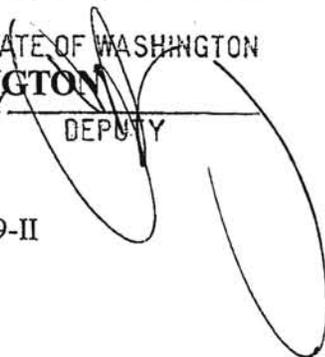

CHIEF JUDGE

FILED
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DIVISION II

2014 MAY 13 AM 9:13

STATE OF WASHINGTON

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BY  DEPUTY

DIVISION II

No. 43825-9-II

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WILLIAM O. HUNTER, JR. and LUAYNE HUNTER, husband and wife, and the marital community thereof; DOUGLAS RICHERT, a single man; EVAN TOZIER, on behalf of RIVERSIDE FARM, a Washington partnership; ARTHUR TOZIER, a single man; MAXINE TOZIER, in her individual capacity; and EVAN TOZIER, a single man,

Respondents,

v.

TACOMA POWER UTILITY, a Washington Utility, and the CITY OF TACOMA, a Washington municipality,

Appellants.

ORDER AMENDING OPINION

It is hereby ORDERED that this court's opinion filed on March 4, 2014 is amended as follows:

On page 2, paragraph 1, the following text shall be deleted:

In this class action lawsuit for property damage caused by increased water flow, the City of Tacoma makes an interlocutory appeal of the superior court's two rulings on cross summary judgment motions. The first ruling granted a motion for partial summary judgment that served to strike one of Tacoma's affirmative defenses against the claims of Gerald Richert and the members of his class involved in this appeal (the Richerts).

The following language shall be inserted in its place:

In this lawsuit for property damage caused by increased water flow, the City of Tacoma makes an interlocutory appeal of the superior court's two rulings on cross summary judgment motions. The first ruling granted a motion for partial summary judgment that served to strike one of Tacoma's affirmative defenses against the claims of Gerald Richert and the other plaintiffs involved in this appeal (the Richerts).

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TACOMA, WASHINGTON
MAY 15 2014 10:00 AM

No. 43825-9-II

And on page 3, immediately following the "S" in the heading "FACTS," the following text shall be added in a footnote:

Because both of the superior court orders on review concerned whether the Richerts' claims were precluded as a matter of law, we write the facts in the light most favorable to the Richerts. See *Witt v. Young*, 168 Wn. App. 211, 213, 275 P.3d 1218, review denied, 175 Wn.2d 1026, 291 P.3d 254 (2012).

And on page 7, paragraph 1, the following text shall be deleted:

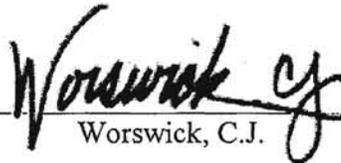
Gerald Richert and the members of his class involved in this appeal are owners of 88 of the Type Two parcels, whose riparian and water rights, but not land rights, were condemned by Tacoma in *Funk*.

The following language shall be inserted in its place:

Gerald Richert and the other plaintiffs in this appeal are owners of 88 of the Type Two parcels, whose riparian and water rights, but not land rights, were condemned by Tacoma in *Funk*.

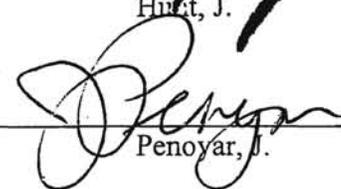
The footnote that follows the sentence ending in "condemned by Tacoma in *Funk*" shall remain.

DATED this 13TH day of MAY, 2014.


Worswick, C.J.

I concur:


Hunt, J.


Penoyar, J.

FILED
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DIVISION II

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STATE OF WASHINGTON

BY: 
DEPUTY

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

GERALD G. RICHERT, on behalf of SKOKOMISH FARMS INC., a Washington corporation; GERALD F. RICHERT and SHIRLEY RICHERT, husband and wife, and the marital community thereof; THE ESTATE OF JOSEPH W. BOURGAULT; NORMA BOURGAULT, a single woman; ARVID HALDANE JOHNSON, on behalf of OLYMPIC EVERGREEN, LLC, a Washington limited liability company; ARVID HALDANE JOHNSON and PATRICIA JOHNSON, husband and wife, and the marital community thereof; SHAWN JOHNSON and SHELLOY JOHNSON, husband and wife, and the marital community thereof; JAMES M. HUNTER, on behalf of the HUNTER FAMILY FARMS LIMITED PARTNERSHIP, a Washington partnership; JAMES M. HUNTER and JOAN HUNTER, husband and wife, and the marital community thereof; JAMES C. HUNTER and SANDRA HUNTER, husband and wife, and the marital community thereof; GREGORY HUNTER and TAMARA HUNTER, husband and wife, and the marital community thereof; DAVID KAMIN and JAYNI KAMIN, husband and wife, and the marital community thereof; WILLIAM O. HUNTER, on behalf of HUNTER BROTHERS STORE, a Washington partnership; PAUL B. HUNTER, on behalf of HUNTER BROTHERS, LLC, a Washington limited liability company;

No. 43825-9-II

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WILLIAM O. HUNTER and CAROL HUNTER, husband and wife, and the marital community thereof; PAUL B. HUNTER and LESLIE HUNTER, husband and wife, and the marital community thereof; WILLIAM O. HUNTER, JR. and LUAYNE HUNTER, husband and wife, and the marital community thereof; DOUGLAS RICHERT, a single man; EVAN TOZIER, on behalf of RIVERSIDE FARM, a Washington partnership; ARTHUR TOZIER, a single man; MAXINE TOZIER, in her individual capacity; and EVAN TOZIER, a single man,

Respondents,

v.

TACOMA POWER UTILITY, a Washington Utility, and the CITY OF TACOMA, a Washington municipality,

Appellants.

PUBLISHED OPINION

WORSWICK, C.J. — In this class action lawsuit for property damage caused by increased water flow, the City of Tacoma makes an interlocutory appeal of the superior court's two rulings on cross summary judgment motions. The first ruling granted a motion for partial summary judgment that served to strike one of Tacoma's affirmative defenses against the claims of Gerald Richert and the members of his class involved in this appeal (the Richerts). The second ruling denied Tacoma's motion for summary judgment for dismissal of the Richerts' claims. The superior court's two rulings summarily determined one limited legal issue in favor of the Richerts: *City of Tacoma v. Funk*, No. 1651 (Mason County Super. Ct., Sept. 11, 1920)—a 1920 condemnation action in which Tacoma condemned the Richerts' riparian and water rights so as

to allow Tacoma to build two dams on the Skokomish River—did not preclude the Richerts' claims for flood and groundwater damage as a matter of law. In this interlocutory appeal, Tacoma argues that *Funk* precludes the Richerts' claims as res judicata. We affirm the superior court, because Tacoma has failed to meet its burden of proving that the Richerts' claims have a concurrence of identity with *Funk*'s final judgment.

FACTS

A. *Background*

The Skokomish River's main stem is fed by three tributaries: the North Fork, the South Fork, and Vance Creek. Water flows through the main stem and into the Hood Canal.

Tacoma has operated two dams on the North Fork of the Skokomish River since 1926. These dams today operate under Federal Energy Regulatory Commission (FERC) licenses. Tacoma's dams prevent most of the North Fork's water from flowing to the main stem. Prior to the existence of Tacoma's dams, the North Fork contributed 800 cubic feet per second (cfs) of water to the main stem, which was one third of the main stem's water.

B. *Funk Condemnation*

In 1923, Tacoma condemned the property rights that the dams' construction and operation would damage in *Funk*. The *Funk* condemnation action condemned the property rights of over 80 parcels of real property. In *Funk*, Tacoma condemned the property rights of two different parcel types, depending on how much damage the dams would cause the parcels.

First, Tacoma condemned in their entirety those parcels on the North Fork that the dams' construction and operation would either occupy or overflow with water (Type One parcels). The Type One parcels constituted a combined total of 730 acres.

Second, Tacoma condemned the riparian and water rights, but not the land rights, of those parcels located below the dam, primarily on the main stem (Type Two parcels). Tacoma condemned only the riparian and water rights of the Type Two parcels because the dams' construction and operation took water away from these parcels but did not occupy or overflow them. In its condemnation petition, Tacoma stated the following as to its reason for condemning the Type Two parcels' water rights:

That with the construction of [the dams] . . . a portion of the waters of [the North Fork] will be diverted from the present channel thereof and used by [Tacoma] . . . and the volume of water in said river below said dam will be diminished and by reason thereof it is and will be necessary and convenient for said City of Tacoma to take and acquire . . . the water rights, riparian rights, easements, privileges and other facilities upon said river below said dam, necessary and adequate for the proper development, construction, operation and maintenance of said power plant.

Clerk's Papers (CP) at 1382 (emphasis added).

In *Funk*, Tacoma paid compensation for the entire Type One parcels and the riparian and water rights of the Type Two parcels. The *Funk* court determined these compensation awards individually for each owner. Many parcel owners received their individualized compensation awards by jury verdict, while other parcel owners received their compensation awards under stipulation agreements.

The Type One parcel owners received a combined total of \$90,200, in approximately 7 individual compensation awards, for their 730 acres of parcels, averaging \$123.56 per acre. The

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Type Two parcel owners received a combined total of \$50,670.30, in approximately 40 individual compensation awards, for their riparian and water rights (which were attached to 6,360.6 acres), averaging \$7.95 per acre. After Tacoma paid these compensation awards, the *Funk* superior court entered two separate decrees condemning the land rights of the parcels.

The decree condemning the land rights of the Type One parcels for Tacoma's use stated:

[I]t is hereby ORDERED AND DECREED that there is hereby appropriated and granted to and vested in fee simple in [Tacoma] . . . for the construction, operation and maintenance of an hydro-electric power plant on and along the North Fork of the Skokomish River and on and along Lake Cushman in Mason County, Washington, as set forth in the petition herein on file, the lands, real estate, premises, water rights, easements, privileges and property, including the right to divert the North Fork of the Skokomish River located in Mason County, Washington, hereinafter described, of the [Type One parcels].

CP at 3660.

On the same day, the *Funk* superior court entered a decree condemning the riparian and water rights of the Type Two parcels stating:

[I]t is hereby ORDERED AND DECREED that there is hereby appropriated and granted to and vested in fee simple in [Tacoma] . . . for the construction, operation and maintenance of an hydro electric power plant on and along the North Fork of the Skokomish river and on and along Lake Cushman in Mason County, Washington, as set forth in the petition herein on file, the waters, water rights, riparian rights, easements and privileges, including the right to divert the waters of the North Fork of the Skokomish River located in Mason County, Washington, appertaining and appurtenant to the [Type Two parcels].

....

[I]t is further ORDERED AND DECREED that [Tacoma] . . . is hereby granted the right, at any time hereafter, to take possession of, appropriate and use all of the waters, water rights, riparian rights, easements and privileges appertaining and appurtenant to the lands, real estate and premises hereinabove described, together with the right to divert the waters of the North Fork of the Skokomish River, and the same is hereby appropriated and granted unto, and the title shall vest in fee

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simple in [Tacoma] as of the 11th day of September, 1920, and its successors forever; the same being for a public use.^[1]

CP at 3650, 3656.

C. *Tacoma's Increase in Water Flow*

From 1926 until 1988, Tacoma's dams diverted most of the North Fork's water flow out of the river, resulting in an average of only 10 cfs released from the North Fork and into the main stem.

In 1988, FERC required Tacoma to increase the flows to 30 cfs as part of its water quality certification for the project. In 1998 FERC began requiring Tacoma to release even more water through the dams, for the purpose of preserving fish and the environment. Litigation with FERC regarding minimum water flow required Tacoma to increase the flow to 60 cfs in 1999 and to 240 cfs in 2008. In 2010, an amendment to Tacoma's 1998 FERC license created a schedule for releasing different amounts of water at different times throughout the year. However, the 2010 amendments to the license required Tacoma to maintain an average flow that was significantly higher than the 10 cfs released by the dams through most of their history.

Since 1988, Tacoma increased water flow to and through the main stem, increasing the amount of water that flowed alongside the Richerts' parcels. This increase of water is the subject of the Richerts' lawsuit against Tacoma.

¹ Tacoma limits its appeal to the riparian and water rights granted by *Funk*, and explicitly states that it makes no claims on appeal related to the easements that Tacoma condemned in *Funk*.

D. *The Richerts' Lawsuit*

Gerald Richert and the members of his class involved in this appeal are owners of 88 of the Type Two parcels, whose riparian and water rights, but not land rights, were condemned by Tacoma in *Funk*.² The Richerts' parcels are located below the dams and primarily on the main stem.

The Richerts sued Tacoma, alleging that the increased amount of water that Tacoma's dams released overflowed the main stem, causing the water to invade and damage the Richerts' parcels.

The dams' diversion of water away from the main stem, from 1926 until 2008, prevented the water from naturally washing accumulating gravel out of the main stem. The Richerts claimed that over the decades this failure to wash out the gravel caused aggradation: the slow building up of gravel in a river bed that greatly reduces the amount of water that a river can contain.

The Richerts alleged that by 2008, the main stem had suffered aggradation to the point that it could not contain Tacoma's sudden increase of water flow into the main stem, which caused the main stem to overflow. The Richerts claim that the increased water flow overflowed the banks of the main stem and additionally has caused a continuing rise in the groundwater table.

² Twenty-two additional parcels are included in the superior court case, but are not included in the eighty-eight Type Two parcels relevant to this appeal, because the twenty-two parcels were not involved in *Funk*.

E. *Procedural History*

The Richerts sued Tacoma for (1) violation of riparian rights, (2) failure to provide a proper outflow for channeled surface waters, (3) violation of RCW 4.24.630 (liability for damage to land and property), (4) trespass and continuing trespass, (5) nuisance and continuing nuisance, (6) negligence, (7) inverse condemnation by flooding, and (8) inverse condemnation by groundwater. Tacoma asserted as an affirmative defense that *Funk*'s decrees constitute a final judgment barring the Richerts' claims as res judicata.

The Richerts filed a motion for partial summary judgment, asking the superior court to dismiss Tacoma's affirmative defense related to *Funk*. Tacoma also filed a motion for summary judgment, asking the superior court to dismiss the Richerts' claims in their entirety.

The superior court granted the Richerts' motion for partial summary judgment, dismissing Tacoma's affirmative defense. The superior court determined that the Richerts' claims were "not within the contemplation of the *Funk* litigants or the *Funk* court." Verbatim Report of Proceedings (June 8, 2012) at 8. The superior court denied Tacoma's motion for summary judgment.

The superior court entered a very limited final judgment to facilitate our interlocutory review under CR 54(b), RAP 2.2(d), and RAP 2.3(b)(4). The superior court limited its final judgment to the issue of whether the *Funk* condemnation action precluded the Richerts' ability to pursue their claims. The superior court stated that its final judgment "does not apply to any of the other issues adjudicated on summary judgment." CP at 63. Tacoma appeals the superior

court's partial summary judgment, arguing that *Funk*'s final judgment precludes the Richerts' claims as res judicata.

ANALYSIS

Tacoma argues that res judicata bars the Richerts' claims because these claims share a concurrence of identity with *Funk*'s final judgment. We disagree.

We review summary judgments de novo. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794, 64 P.3d 22 (2003). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). In this case, the parties agree that no genuine issue of material fact exists on the limited issue of the effect of the *Funk* judgment on the Richerts' ability to pursue their claims.

I. RIPARIAN RIGHTS

The ownership of a parcel adjacent to a watercourse gave that parcel owner riparian rights in the watercourse. *Dep't of Ecology v. Abbott*, 103 Wn.2d 686, 689, 694 P.2d 1071 (1985). Washington State abolished riparian rights in 1917, but maintained those riparian rights existing prior to 1917. *Abbott*, 103 Wn.2d at 692. These rights existing before 1917 can still be condemned under eminent domain. See Former RCW 90.03.040 (1917); *Lummi Indian Nation v. State*, 170 Wn.2d 247, 253, 241 P.3d 1220 (2010). The State abolished all preexisting but unused riparian rights in 1932. *Abbott*, 103 Wn.2d at 695-96.

Where riparian rights still exist, the riparian owner has the right "(1) to have the stream flow past his property in its natural condition . . . (generally speaking, the owner above cannot divert or pollute the stream and the owner below cannot raise the level of the water by dams or

other obstructions); (2) to such use of the water as it flows past his land as he can make without materially interfering with the common right of other riparian owners; (3) to whatever the water produces, such as ice.” *DeRuwe v. Morrison*, 28 Wn.2d 797, 805, 184 P.2d 273 (1947). A riparian owner may not divert water in a natural watercourse without facing liability for damages caused to other riparian owners. See *Fitzpatrick v. Okanogan County*, 169 Wn.2d 598, 608, 238 P.3d 1129 (2010). Riparian owners have a right to not have their water levels raised or lowered. *DeRuwe*, 28 Wn.2d at 808.

Rights to water use can be condemned by eminent domain. Former RCW 90.03.040; *Lummi Indian Nation*, 170 Wn.2d at 253. However, where one has a right to use water, one still may not overflow the river and flood parcels without compensation. See RCW 90.03.030 (person with right to use river water may not increase water in river above ordinary high-water mark); see also *Thompson v. Dep’t of Ecology*, 136 Wn. App. 580, 586, 150 P.3d 1144 (2007) (ordinary high-water mark “represent[s] the point at which the water prevents the growth of terrestrial vegetation.”³).

II. RES JUDICATA

Whether res judicata bars a party from pursuing an action is a matter of law reviewed de novo. *Martin v. Wilbert*, 162 Wn. App. 90, 94, 253 P.3d 108 (2011). Res judicata’s purpose is to prevent parties from relitigating claims. *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995). Res judicata bars the relitigation of claims that were litigated to a final

³ Quoting Frank E. Maloney, *The Ordinary High Water Mark: Attempts at Settling an Unsettled Boundary Line*, 13 LAND & WATER L. REV. 465, 470 (1978).

judgment or could have been litigated to a final judgment in a prior action. *Loveridge*, 125 Wn.2d at 763; *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 865, 93 P.3d 108 (2004). However, when considering whether res judicata precludes a party from litigating a claim, we are careful to not “deny the litigant his or her day in court.” *Hisle*, 151 Wn.2d at 865 (quoting *Schoeman v. N.Y. Life Ins. Co.*, 106 Wn.2d 855, 860, 726 P.2d 1 (1986)). Res judicata applies not just to those claims that a prior case’s final judgment actually resolved, but also to claims that were not resolved but that reasonably diligent parties should have raised in that prior litigation. *Hisle*, 151 Wn.2d at 865.

For res judicata to preclude a party from litigating a claim, a prior final judgment must have a concurrence of identity with that claim in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) quality of the persons for or against whom the claim is made. *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005); *Loveridge*, 125 Wn.2d at 763. The party asserting res judicata, in this case Tacoma, bears the burden of proof. *Hisle*, 151 Wn.2d at 865.

Regarding the second element of this four-part res judicata test, to determine whether two causes of action are the same, we consider whether “(1) prosecution of the later action would impair the rights established in the earlier action, (2) the evidence in both actions is substantially the same, (3) infringement of the same right is alleged in both actions, and (4) the actions arise out of the same nucleus of facts.” *Civil Service Comm’n v. City of Kelso*, 137 Wn.2d 166, 171, 969 P.2d 474 (1999).

III. APPLICATION OF RES JUDICATA IN THE CONTEXT OF RIPARIAN RIGHTS

Tacoma argues that *Funk*'s final judgment bars the Richerts' claims as res judicata. We disagree, because Tacoma has failed to prove that *Funk*'s final judgment shares a concurrence of identity with the Richerts' claims or that reasonably diligent parties should have thought to petition the *Funk* court to resolve the Richerts' claims in *Funk*'s final judgment.⁴

A. *Funk*'s Final Judgment and the Richerts' Claims

Tacoma argues that the Richerts' claims are precluded by res judicata, because these claims share a concurrence of identity with *Funk*'s final judgment. We disagree.

In *Funk*, Tacoma condemned the right to take away the use of the Type Two parcels' water, but it did not condemn the right to invade the Richerts' parcels with water. This is evidenced by Tacoma's petition for condemnation in *Funk*.

Although the decrees constitute *Funk*'s final judgment, Tacoma's petition reveals the scope of *Funk*'s subject matter (i.e., the scope of what rights Tacoma was condemning) and its cause of action (i.e., the scope of what Tacoma was asking the court to decide). Thus, Tacoma's petition helps explain the scope of the action below, which allows this court to compare *Funk* with the Richerts' claims to determine if they share a concurrence of identity of subject matter or cause of action.

⁴ Tacoma argues on policy grounds that if we do not hold that res judicata precludes the Richerts' claims, every dam will, in the future, face potential lawsuits from plaintiffs whose property rights were previously condemned. But Tacoma's policy argument does not overcome long standing res judicata law.

Tacoma's petition in *Funk* requested condemnation of the Type Two parcels because "the volume of water in said river below said dam will be diminished." CP at 1382. This shows that Tacoma sought only the right to deprive the Type Two parcels below the dam of their use of the main stem's water, not the right to overwhelm the Type Two parcels with the main stem's water. Thus, *Funk*'s decrees condemned only the right to the Richerts' parcels' use of the main stem's water that Tacoma actually requested in *Funk*.

The Richerts make claims for (1) violation of riparian rights; (2) failure to provide a proper outflow for channeled surface waters, (3) violation of RCW 4.24.630 (liability for damage to land and property), (4) trespass, (5) nuisance, (6) negligence, (7) inverse condemnation by flooding, and (8) inverse condemnation by groundwater. More important than the names of the Richerts' claims is what they concern. All of the Richerts' claims concern the recent flooding and a rise in the groundwater table on the Richerts' parcels, allegedly caused by Tacoma's release of too much water into the main stem.⁵

1. *Concurrence of Identity with Subject Matter*

Regarding the first element of res judicata's test, concurrence of identity of subject matter, the Richerts' alleged invasion of water onto their parcels does not have the same subject matter with the claims litigated to a final judgment in *Funk*. This is because *Funk*'s final judgment dealt with only deprivation of the parcels' water use, rather than flood or groundwater

⁵ Tacoma argues that *Funk* precludes the Richerts' claims as res judicata because *some*, but not all, of the Richerts' predecessors in interest filed various individual motions in *Funk* stating broad requests for any and all damages that Tacoma's dams would cause. But the final judgment controls, and random filings from various predecessors in interest cannot illuminate the scope of those decrees.

damage to the parcels themselves.⁶ See RCW 90.03.030; see also *Austin v. City of Bellingham*, 69 Wash. 677, 679, 126 P. 59 (1912).

2. *Concurrence of Identity with Cause of Action*

Regarding the second element, concurrence of identity with cause of action, Tacoma has failed to meet its burden of proving that the Richerts' claims constitute the same cause of action as *Funk*. This is because in *Funk*, Tacoma condemned only the right to deprive the parcel owners of their ability to use water, as revealed by Tacoma's petition. The Richerts now claim that their parcels are being damaged by floods and high water tables, with some land taken in its entirety. Thus *Funk*'s final judgment and this case do not (1) impair the same rights (right to water use vs. right to land use), (2) deal with the same evidence (loss of water use vs. flooding, groundwater tables, and aggradation), (3) allege an infringement of the same rights (right to use water vs. right to use land), or (4) arise out of the same nucleus of facts as the prior action (deprivation of water use vs. deprivation of land use).⁷

⁶ Tacoma argues that the Richerts concede that they limited their claims to riparian rights violations, citing CP at 4018-19, 4023; Br. of Appellant at 20. However the cited pages in the record contain no such concession.

⁷ Even beyond this, *Funk*'s final judgment was limited to condemnation, and the Richerts make a series of claims that have nothing to do with condemnation: (1) failure to provide a proper outflow for channeled surface waters, (2) violation of RCW 4.24.630 (liability for damage to land and property), (3) trespass, (4) nuisance, and (5) negligence. Thus, these five claims, on their face, do not constitute the same "cause of action" as litigated in *Funk*. This is because none of these causes of action were considered by the *Funk* court, as *Funk* was limited to the cause of action of condemnation.

Tacoma has failed to prove that the Richerts' claims for invasion of water share a concurrence of identity with *Funk*'s final judgment in terms of subject matter or cause of action. *See Loveridge*, 125 Wn.2d at 763. For res judicata to preclude the Richerts' claims, Tacoma must prove that the Richerts' claims meet all four elements of res judicata. Because Tacoma cannot prove that the Richerts' claims for invasion of water share a concurrence of identity with *Funk*'s final judgment in terms of subject matter or cause of action, Tacoma cannot prove either of the first two elements of res judicata. *See Loveridge*, 125 Wn.2d at 763. Thus, we need not consider elements three and four of res judicata.⁸

B. *The Claims that Reasonably Diligent Parties Should Have Raised in Funk.*

Tacoma argues that the Richerts' claims are precluded by res judicata, even if they were not raised in *Funk*, because reasonable parties should have raised them in *Funk*. We disagree.

Res judicata applies to claims that were not resolved in a prior litigation's final judgment, where reasonably diligent parties should have raised those unresolved claims in the prior litigation. *Hisle*, 151 Wn.2d at 865-66. However, in this case, the *Funk* litigants could not have reasonably brought the Richerts' claims at the time of *Funk* for three reasons.

First, the Richerts based their claims on alleged aggradation that occurred over the past eight decades, which reduced the amount of water that the main stem could handle. The *Funk* litigants could not have reasonably predicted such aggradation over eight decades and, thus,

⁸ As a part of its res judicata argument, Tacoma argues that because it acquired the Richerts' riparian rights in *Funk*, that this gave Tacoma the right to raise the water level up to its natural flow, even if it flows over the Richerts' parcels. We disagree, because as discussed above, Tacoma condemned only the Richerts' parcels' use of water, not the right to cause flood or groundwater damage to their land. *See* RCW 90.03.030; *see also Austin*, 69 Wash. at 679.

reasonable litigants could not have predicted such a phenomenon would combine with the dams to cause water to overflow and damage the Richerts' parcels.

Second, the dams' increased water flow resulted from requirements imposed on Tacoma by FERC litigation for the purpose of water quality and environmental protection, starting in 1988. No reasonable litigant in the 1920's could have predicted the rise of modern environmental protection, nor could a reasonable party have predicted that starting in 1988, a federal agency would require Tacoma to increase the water flow through its dams for water quality and preservation of fish and the environment.

Third, Tacoma explicitly stated in its *Funk* petition that it needed to condemn the *Funk* litigant's riparian rights because "the volume of water in said river below said dam will be diminished." CP at 1382. Thus, Tacoma's petition put the parties on notice only that their parcels would lose the ability to use the river's water, not that their parcels would suffer flood and groundwater damage from an overabundance of water. For these reasons, the *Funk* litigants could not have reasonably predicted that Tacoma would overwhelm the main stem with water and cause water damage to their parcels eight decades after *Funk*. We hold that Tacoma has

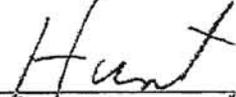
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failed to prove that *Funk* bars the Richerts' claims as res judicata.⁹ See *Loveridge*, 125 Wn.2d at 763.

Affirmed.


Worswick, C.J.

We concur:


Hunt, J.


Penoyer, J.P.T.

⁹ The Richerts argue that Tacoma should be estopped from arguing that the *Funk* litigants could have predicted aggradation because Tacoma argued the opposite in an unpublished case. See *Indemnity Ins. Co. of N. Am. v. City of Tacoma*, noted at 158 Wn. App. 1022, 2010 WL 4290648, at *3-*4 (2010). We do not address this issue because the superior court did not resolve this issue in its final judgment and, thus, the issue is outside the scope of this appeal of that final judgment.

Tacoma argues alternatively that even if res judicata did not preclude the Richerts' claims, Tacoma has no duty to maintain its dams' artificial diversion of water away from the main stem and, thus, it cannot face liability for merely decreasing the amount of water that its dams divert away from the main stem. We do not address this issue because it concerns Tacoma's general duty to maintain its artificial diversion of water from the main stem. This does not relate to the effect of *Funk* on the Richerts' claims, and is thus outside this appeal's limited scope.

Finally, we do not decide all "issues with regard to *Tacoma v. Funk*" as requested by the superior court's final judgment, because that would constitute an impermissible advisory opinion. CP at 63-64; see *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 416-17, 27 P.3d 1149 (2001).

CERTIFICATE OF SERVICE

I, Kyna Gonzalez, hereby declare and state as follows:

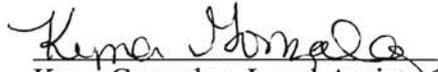
1. I am over the age of majority, competent to testify and make the following statements based upon my own personal knowledge and belief.

2. I am now and at all times herein mentioned employed by the offices of Helsell Fetterman, LLP, 1001 4th Avenue, Suite 4200, Seattle, WA 98154.

3. In the appellate matter of Spratt v. Toft I did on the date listed below, (1) cause to be filed with this Court a Reply Brief of Appellants; and (2) to be delivered via Washington Legal to Janet A. Irons, Law Offices of Janet A. Irons, 1400 – 112th Avenue SE, Ste. 100, Bellevue, WA, who is counsel of record for Respondent Kelly A. Spratt.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED: January 21, 2015


Kyna Gonzalez, Legal Assistant


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