



Leana Kinley <leana@ci.stevenson.wa.us>

My communications on the Muth/Knudsen issue

Pat Rice <easylivingpat@gmail.com>

Fri, Nov 6, 2020 at 9:59 PM

To: Leana Kinley <leana@ci.stevenson.wa.us>

Leana,

If possible please include in the next city council packet my emails and attachments that I sent to you, the mayor and the city council on Mr. Muth's threat to sue over alleged "defamatory" remarks made by Mr. Knudsen. This would include the email I sent on October 15th and 31st, along with your answer on November 2nd and my subsequent reply on November 5th.

I make this request because it is apparent to me that not all council members read their emails, but I am fairly confident they do read their council packets.

Thank you.

Pat Rice



Leana Kinley <leana@ci.stevenson.wa.us>

SUPPORT FOR KNUDSEN

Pat Rice <easylivingpat@gmail.com>

Sat, Oct 17, 2020 at 9:02 AM

To: staci patton <yayabear3@gmail.com>

Cc: Leana Kinley <leana@ci.stevenson.wa.us>, Scott Anderson <scott.anderson@ci.stevenson.wa.us>, Annie McHale <annie.mchale@ci.stevenson.wa.us>, Amy Weissfeld <amy.weissfeld@ci.stevenson.wa.us>, Matthew Knudsen <matthew.knudsen@ci.stevenson.wa.us>, Paul Hendricks <paul.hendricks@ci.stevenson.wa.us>, Robert Muth <robert.muth@ci.stevenson.wa.us>, Toby Nixon <president@washingtoncog.org>, "Mosbrucker, Rep. Gina" <gina.mosbrucker@leg.wa.gov>, Jeanette Foster <jfoster@gorge.net>, Mitch Patton <nwtsrinc@gmail.com>, Sheriff Dave Brown <daveb@co.skamania.wa.us>, Pat Bond <patb@co.skamania.wa.us>, Karen Rutledge <bakerkrn@gmail.com>

Ms. Patton,

From one citizen to another, I wanted to thank you for the points you made in this email trail that you copied me in on. I say this because I believe your points are valid, that being that here we have an apparent assault, and that didn't rise to the level of a lawsuit being filed. Yet when a council member (Knudsen) exercises his right to free speech on a topic being widely debated throughout our country, then another council member (Muth), who just happens to be an attorney, tries to muzzle the debate by threatening a lawsuit.

I myself researched the Muth/McSherry incident a while back because former Deputy Prosecuting Attorney Dan McGill told me that there were irregularities in how the Skamania County Prosecutor's office handled the case. According to Mr. McGill, it was not handled through ordinary channels and against his wishes taken out of his caseload. Mr. McGill was being critical of Adam Kick at the time, and did not intimate in any way that Muth or McSherry themselves did anything wrong in influencing how the case was handled.

I have attached to this email the Skamania County Sheriff's report of the Muth/McSherry incident because it does document the points you made in your email and thus is relevant to the discussion at hand.

Thank you Ms. Patton for including me in this email trail and allowing me the opportunity to weigh in.

Pat Rice

[Quoted text hidden]



McSherry - Muth sheriff dept incident report.pdf
2859K

07/18/19
15:08

Skamania County Sheriff's Office
CAD Master Call Table:

5026
Page: 1

Long-Term Call ID C14003529
Active Call Nature Assault IV Type 1e Priority 2
Address✓ 150 First Street City STE Stevenson
Zones + + + Determinant Alarm
Directions

Complainant+ 158092
Lst McSherry Fst John Mid M
Adr 6127 NE 29th Ave DOB [REDACTED]
Cty Portland ST OR Zip 97211 SSN [REDACTED]
Tel (509)427-7609 Race W Sex M Prev Calls+ 1Wants+ 0Adr+ 0
Alrt [REDACTED]

Contact Robert Muth Tel () -
Address Eagles Lodge
Info (See below)
License Plate State
Calls+25+Dupl+ 1 Names+ 0 w/Alrts+ 0 Wants+ 0 Prem+ 0 Adr+ 0
How Rcvd T Telephone Occurred between 23:50:16 05/10/14
Rcvd by Vigil, J and 23:50:16 05/10/14
Hld Until : : / / When Rptd 23:50:59 05/10/14

INVOLVEMENTS:

Type	Record #	Date	Description	Relationship
LW	14-03218	05/10/14	Assault Other	*Initiating Call
EM	14-0433	05/11/14	Assault IV	*Initiating Call
NM	158092	05/10/14	McSherry, John M	*Complainant

Call Taker Comments:

Rp states he was assaulted by a Robert Muth while at the Stevenson Eagles Lodge, about 10 minutes ago. Rp states he immediately left the area feeling fear for his life. He is now in Multnomah Co. Rp states he confronted Muth about the raffle of an AR-15 being auctioned off by the Fire Dept. Rp states Muth grabbed him by the shirt collar and Rp then threw several punches, claiming self defense.

11 will contact Rp.

Other half called 911 requesting deputy contact, advising he was assaulted by Mcsherry. Muth advised McSherry is driving by the Eagles Lodge in a red MG convertible now.

Dispatch advised 11 who was on the phone with McSherry. Per 11, McSherry states he is not in town, saying he is on his way to portland. McSherry refused to come back and talk to 11 in person. He was told to come fill out statement if he wished to. UTL in area.

Muth will be awaiting contact at the Eagles Lodge.

22 out with Muth.

00:15:38 05/11/2014 - Vigil, J - From: Lyle, Christian

22 requesting EMS be paged for a 50 year old male with laceration to face.

00:22:12 05/11/2014 - Vigil, J - From: unknown

M71 advising no EMS service needed.

00:48:13 05/11/2014 - Vigil, J - From: Manning, G

11 contacted Muth, he stated R/P was yelling in his face about the AR 15 auction because Muth is city council member and should not be allowing it to sell. Muth stated he did grab R/P shirt to get him out of his face, then was punched 2 times by R/P. Statement forms left for Muth and witnesses. RPT.

#14 conducted follow-up investigation. CAA.



Skamania County Sheriff's Office

Deputy Report for Incident 14-03218

Nature: Assault Other
Location: 21

Address: 150 First Street
Stevenson WA 98648

Offense Codes: ANAI

Received By: Vigil, J

How Received: T

Agency: SCSO

Responding Officers: Manning, G, Lyle, Christian

Responsible Officer: Manning, G

Disposition: CAA 05/11/14

When Reported: 23:50:59 05/10/14

Occurred Between: 23:50:16 05/10/14 and 23:50:16 05/10/14

Assigned To:

Detail:

Date Assigned: **/**/**

Status:

Status Date: **/**/**

Due Date: **/**/**

Complainant: 226975

Last: Muth

First: Robert

Mid: Curtis

DOB: [REDACTED]

Dr Lic: [REDACTED]

Address: 550 Frank Johns Rd NW

Race: W

Sex: M

Phone: (509)427-5057

City: Stevenson, WA 98648

Alert Codes:

[REDACTED]

Offense Codes

Reported: ASIM Assault, 4th

Observed: ANAI Assault No Weapon, Agg Injury

Additional Offense: ANAI Assault No Weapon, Agg Injury

Circumstances

Responding Officers:

Unit :

Manning, G

11

Lyle, Christian

22

Responsible Officer: Manning, G

Agency: SCSO

Received By: Vigil, J

Last Radio Log: **.*.*.* **/**/**

How Received: T Telephone

Clearance: RPT Report to be filed

When Reported: 23:50:59 05/10/14

Disposition: CAA **Date:** 05/11/14

Judicial Status:

Occurred between: 23:50:16 05/10/14

Misc Entry:

and: 23:50:16 05/10/14

Modus Operandi:

Description :

Method :

Involvements

Date	Type	Description
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Narrative

Narrative Report

Skamania County Sheriff's Office
POB 790
Stevenson, Wash. 98648

Case # 14-03218

Type of Incident:
Assault Second Degree

Suspect:
McSherry, John

Distribution:
Records
Prosecutor's Office

Charges Requested:
Assault in the Second Degree.

On 5/12/14 I was assigned to conduct additional follow-up into this investigation. I located a written statement completed by Stevenson City Councilman Robert Muth. In the statement Muth describes that on the evening of 5/10/14 he was assaulted by John McSherry while at the Stevenson Eagles Lodge. I was provided the names of two people who witnessed the entire incident, Bartender Erica Clarke and patron Steven Emond. I was also advised that Jeremy Leonard had assisted in stopping the assault on Muth.

I learned the following additional information involving John McSherry. On 5/9/14 Mr. McSherry contacted the manager of the Skamania County Chamber of Commerce, Casey Roeder. He was angry because he believed Ms. Roeder was in a partnership with the Fire Department in the raffling of a rifle as a fundraiser. Mr. McSherry has a strong belief that these guns "kill children" and feels the Fire Department raffle must be stopped immediately. After the initial contact, Mr. McSherry sent an email to the Stevenson City Council and various members of the community stating that he would be working hard to get Ms. Roeder fired from her position.

As a result of that email, Paul Perce called Mr. McSherry and left a voice mail expressing his anger toward his threats. In that voicemail Mr. Pearce tells Mr. McSherry that Ms. Roeder has nothing to do with the raffle and states, "The City of Stevenson Fire Department, and in case you are not aware of it, it is in fact a Department of the City, is selling the rifle." The information Mr. Pearce provided is not entirely correct, however it appears this could have been to catalyst which turned Mr. McSherry's anger toward the Stevenson City Council. This information was not known to Councilman Muth until after the assault against him occurred.

Statement of Jeremy Leonard:

On 5/12/14 at about 1342 hrs I spoke with Jeremy Leonard by telephone. He advised that he had been upstairs at the Eagles Lodge. When he came downstairs he observed Mr. McSherry and Councilman Muth standing and holding each other by the shirts. Mr. Leonard ran over and pulled Councilman Muth away from Mr. McSherry, while another patron held Mr. McSherry away from Councilman Muth. Mr. Leonard noticed Councilman Muth was bleeding from the lip. Councilman Muth and

Mr. Leonard went into the restroom to care for the Councilman's injury. While in the rest room Mr. Leonard asked what had caused the incident. Councilman Muth stated that Mr. McSherry was angry about something he had done as a Councilman for the City of Stevenson. Mr. Leonard advised that he has not spoke with either Councilman Muth or Mr. McSherry since the night of the incident. See recorded interview.

Statement of Councilman Robert Muth:

On 5/12/14 at about 1511 hrs I spoke with Councilman Muth by telephone. Councilman Muth advised that on 5/10/14, after the Trailblazer basketball game was over, he went to the Eagle's Lodge for a beer. About five minutes after he sat at the bar, John McSherry approached him, leaned into Councilman Muth and very angrily asked, "What kind of city council raffles off an assault rifle?" Councilman Muth stated he was not sure what Mr. McSherry was talking about. He was aware the Fire District Two Association was raffling off a rifle as a fundraiser, but that had nothing to do with the City of Stevenson. Mr. McSherry was demanding to know why the City Council would support and approve the raffle of a rifle that "kills kids." Councilman Muth described Mr. McSherry's speech as "Aggressive and incoherent at the same time" but eventually Councilman Muth figured out that Mr. McSherry thought the City Council had approved and were responsible for the raffle of the rifle. Councilman Muth tried to explain that the City Council was not involved at any level in the decision to have the raffle. Mr. McSherry then moved directly behind Councilman Muth and continued to berate him because of his approval of the raffle. As Mr. McSherry continued to angrily confront Councilman Muth about the raffle, he again leaned into Councilman Muth, so close that spit was hitting him in the face as Mr. McSherry spoke. At that point Councilman Muth told Mr. McSherry to "Get out of my face." Councilman Muth described Mr. McSherry continued to "attack" him by telling him the decision to have the raffle was wrong. At that time Councilman Muth grabbed Mr. McSherry by the shirt and pushed him backward, while at the same time telling him to leave. The bartender and a couple of the patrons stepped in and separated the two. Before they could get them apart Mr. McSherry punched him in the mouth twice with a closed fist. Councilman Muth stated that immediately after he was hit Mr. McSherry fled.

Councilman Muth went into the restroom to check his injuries and found that his lip was cut and one of his front teeth was fractured. After treating his injuries, Councilman Muth called 911 to report the incident. After meeting with the deputy, Councilman Muth paid his bill and went home. The next morning Councilman Muth checked his email and found there were several emails from Councilwoman Thomas and Mr. McSherry about the rifle being auctioned off. One of the emails had an attached voicemail which Paul Pearce had left for Mr. McSherry. Until that time Councilman Muth was not aware of the controversy over the raffle. See recorded interview.

Statement of Erica Clarke:

On 5/12/14 at about 1535 hrs I spoke with Bartender Erica Clarke by telephone. Ms. Clarke advised that she was working at the Eagles Lodge on 5/10/14 and was assigned to the downstairs bar. She recalls that just prior to midnight Councilman Muth came in and sat at the bar. Another patron, Steve Emond sat next to him and the two started talking. A short time later, John McSherry came down from the upstairs bar and approached Councilman Muth. Mr. McSherry was talking to Councilman Muth in a manor she described as, "It kind of was getting a little heated." Ms. Clark stated she didn't really hear what was being said because she tries not to listen to other peoples conversations, but it was enough that she had to caution them to calm down. Her statement did not do anything to calm the situation so she told Mr. Emond that he might have to move if she had to spray

them with the water hose. Mr. Emond told her they would be fine and they were "just talking."

Ms. Clarke described that Councilman Muth was still sitting at the bar and Mr. McSherry was standing next to him, about 12 inches away. Ms. Clarke described it as Mr. McSherry being "in his face talking." Ms. Clarke remembers Councilman Muth stating "I don't know what this is all about" and "I don't really want to talk about this right now." I asked if Councilman Muth was instigating the incident in any way. Ms. Clarke stated, "Not at all. John McSherry sought Robert out." Eventually Councilman Muth yelled at Mr. McSherry to, "Get out of my fucking face!" Mr. McSherry did not move away and again said something to Councilman Muth. At that point Councilman Muth stood up and grabbed Mr. McSherry by the shirt and yelled, "Get away from me!" Up to that point the only witnesses were Ms. Clarke and Steve Emond. The other patrons were not close and could not see or hear what was occurring. Once Councilman Muth stood up and started yelling, patrons Brian Lunde, Tom Sacura, Jeremy Leonard and she jumped in to separate the two. Before they could separate them Mr. McSherry punched Councilman Muth two times in the face. Ms. Clarke stated that Councilman Muth made no attempt to assault Mr. McSherry, other than to try to push him away. Once the two were separated Mr. McSherry left without paying his tab, and Councilman Muth treated his injury and then called the Sheriff's Office.

Statement of Steven Emond:

On 5/12/14 at about 1745 hrs I met with Steven Emond at his Stevenson home. Mr. Emond consented to the interview being recorded.

Mr. Emond stated that he was at the Eagles Lodge on the night of 5/10/14. He was sitting at the bar next to Councilman Muth and Erica Clarke was bartending. At some point John McSherry approached Councilman Muth and "Immediately got in a really heated discussion." Mr. Emond stated he really didn't hear what the discussion was about, but didn't think it would go further than just the discussion. He described the discussion as quickly escalating. Eventually Councilman Muth grabbed Mr. McSherry's shirt, and Mr. McSherry punched Councilman Muth. The two were separated by some patrons and Mr. McSherry "took off right then."

I asked if there was anyone else who witnessed what happened. Mr. Emond stated that only he and the bartender were close enough to hear and see what happened before they stood up. I asked if he had talked to Mr. McSherry or Councilman Muth since the incident. He stated he has spoke with Mr. McSherry "a few times". He said he has known them both but he and Mr. McSherry are better friends. Mr. McSherry called him earlier that morning to "warn" him that the Sheriff's Office might be calling. Mr. McSherry also told Mr. Emond that it was self defense because he (McSherry) felt threatened. See recorded statement.
John McSherry's Call to the Sheriff's Office

On 5/10/14 at about 2344 hrs the Skamania County Emergency Dispatcher received a call on the Business line from Mr. McSherry. Mr. McSherry was reporting he had been assaulted by Councilman Muth while at the Eagles Lodge. He stated he wanted to file a complaint however would not make himself available to meet with a deputy. The dispatcher asked him to explain what happened. Mr. McSherry stated "Well, he grabbed me by my shirt collar with both hands and uh, he threatened me, and uh, a bunch of people intervened, and I punched him in the face in self defense to get him off of me, and uh, he is an attorney, and uh, I don't appreciate that he instigated the whole thing, and I need to be proactive about it. Plus, you know, there is a big controversy over things I pointed out, uh, involving this, uh, the sale of an AR, uh, 15 by this, uh, Fire Department,

which he is in charge of." Mr. McSherry went on to inform the dispatcher that Councilman Muth assaulted him because he (McSherry) is complaining about this rifle being raffled. When the dispatcher asked if he would meet with a deputy, Mr. McSherry stated, "I'm not , I'm not gonna go, I'm not going back there. What, are you crazy? In Skamania County? Selling an AR-15? No thank you." The dispatcher advised Mr. McSherry that a deputy would call him back, and the call was ended.

Second Statement of Councilman Robert Muth:

On 5/13/14 at about 1339 hrs I again spoke to Councilman Muth by telephone. I asked Councilman Muth if he felt threatened by Mr. McSherry prior to his being assaulted. Councilman Muth paused and then stated he didn't feel threatened, but did feel intimidated by Mr. McSherry's presence and demeanor. Councilman Muth added that Mr. McSherry is bigger than he is. I asked why Mr. McSherry singled him out, rather than Steve Emond, who was sitting next to him. Councilman Muth stated, "Because Steve's not on City Council." Councilman Muth stated, "He was trying to intimidate me to take a position that would agree with him on whatever that topic was." He went on to describe the topic as, "He (McSherry) took the position that the City Council was sanctioning and allowing that raffle to go forward, and the sale of that gun kills kids, and therefore I'm killing kids."

End of Report.

M. Buettner

Det. Sgt.

Responsible LEO:

Approved by:

Date

Supplement

Supplemental Report

Skamania County Sheriff's Office
POB 790
Stevenson, Wash. 98648

Case # 14-03218

Below List:

Type of Incident	Distribution Date	Date of Supplemental Report
Charges Requested/Filed		Date of Original Narrative
Suspect		Reporting Officer

Type of Incident:

-Assault

Date of Supplemental:

-05/26/14

Date of Original:

-05/10/14

Suspect:

-See main report

Distribution:

-Records

-Prosecutor's Office

Charges Requested:

-See main report

Narrative:

On 05/10/14 at about 2350 hours, Skamania County Dispatch advised of a reported assault that occurred at the Stevenson Eagles Lodge located at 150 First Street in Stevenson, Skamania County, WA. They advised the reporting person, John McSherry, reported he was assaulted by Robert Muth about 10 minutes prior. They also advised McSherry had already departed and was on I-84 in Oregon enroute to Portland, OR. McSherry reported to Skamania County Dispatch he had confronted Muth about a pending raffle of an AR-15 rifle by the Stevenson Fire Department, as Muth is a Stevenson City Councilman. He reported Muth grabbed him by the shirt collar, so McSherry punched him several times. Skamania County Dispatch advised McSherry was requesting phone contact.

I called McSherry at the phone number provided. He answered and I asked him what had occurred. McSherry stated he was at the Eagles Lodge and confronted Muth about the auction of the rifle. McSherry stated he does not believe it is right for the fire department to be auctioning off the rifle because it is a city entity. He stated Muth grabbed him by the shirt collar. McSherry stated others in the establishment came running over and tried to grab him. He stated he punched Muth a couple of times, claiming self defense. McSherry ranted on about different conspiracy's involving the City of Stevenson, the auction, and of former Skamania County Commissioners. I was unable to clarify what he was referring to as he would not allow me to speak and kept interrupting when I tried to talk. I asked McSherry where he was currently located. He stated he was pulled over on I-84 and was enroute to Portland, OR (McSherry resides in

Portland). I advised him if he was reporting he was assaulted, it was important for me to speak with him in person. He stated he would not be returning to speak with me tonight. I advised him I needed to get a statement from him and would like to speak with him in person tonight so the incident could be dealt with now. He adamantly refused to come back and speak with me. I tried several times to get him to return to speak with me and he continued ranting on his previous conspiracies. I advised him if he wished to provide a statement he could come by the Sheriff's Office later. He stated he would provide a statement later and he would be getting the FBI and State Police involved. He hung up the phone.

Towards the end of the conversation with McSherry, Skamania County Dispatch advised Muth had called the Sheriff's Office reporting he was assaulted by McSherry and was requesting contact at the Eagles Lodge. Deputy Lyle responded first and made contact with Muth. I overheard Deputy Lyle request Skamania County EMS be paged to respond to check on Muth.

I arrived at the Eagles Lodge and Skamania County EMS had arrived on scene with Muth and Deputy Lyle. EMS was just completing their evaluation and Muth denied further medical service.

I spoke with Muth and observed he had a large laceration to the middle of his upper lip of his mouth. The wound appeared to be a cut to either side of the middle of his upper lip with a small portion of skin holding a section of his lip in place. It appeared stitches would be required to close the wound. Skamania County EMS had also advised Muth he should seek medical attention and stitches.

I asked Muth what had occurred. He explained he is a Council Member for the City of Stevenson. The Stevenson Fire Department has a pending auction for an AR-15 rifle. He was at the Eagles Lodge and had sat at the end of the bar to have a beer. He stated McSherry came up to him and was walking around Muth complaining of the pending auction and he did not agree with it. Muth told him it was not a city related matter and he had nothing to do with the auction. He stated McSherry is the Port of Stevenson Director and they have known each other for some time. Muth stated McSherry kept persisting about the issue of the raffle and began raising his voice right in Muth's face. Muth stated he told McSherry to back off and leave him alone. McSherry continued and Muth yelled at him to, "Get the fuck out of my face". When McSherry did not comply, Muth stated he grabbed McSherry by the shirt collar and tried to get him back away from him. Muth stated McSherry punched him twice in the face / mouth area with a closed fist. Other patrons in the Eagles Lodge assisted with separating them. He stated McSherry left the establishment. Muth stated he was assaulted and wished to pursue charges and believed the assault had further intent because he was a council member.

I asked Muth if he would provide a written statement regarding the incident. He stated he would and requested a digital copy of a statement form be emailed to him. I later emailed a statement form to him. I took photos of the injury to Muth's lip. (See photos in digital vault). Muth also provided names of additional witnesses, though only the bar tender was still on scene. The witness names he provided were Jeremy Leonard, Steven Emond, and the bar tender Erica Clark.

I spoke with Erica Clark and asked her what she had observed. She stated she was tending the bar and Muth was sitting at the end of the bar talking with Steve Emond. McSherry went up to Muth and they were talking. She stated it became heated and Muth yelled at McSherry to, "Get out of my fucking face". She stated

McSherry said something else and Muth grabbed McSherry by the shirt collar with both hands and pushed him away from him. Clark stated she and the other patrons came over to break up the altercation and McSherry punched Muth in the face twice. They were able to break up the altercation and more words were exchanged between Muth and McSherry, then McSherry left. Clark stated she observed Muth's lip and it looked like a big hole with skin hanging off. She stated Muth had her take photographs of his injury and he called the Sheriff's Office to report the incident. I asked Clark if she would complete a written statement and she stated she would. I provided her with a blank statement form.

An unrelated call for service was broadcast by Skamania County Dispatch and I advised Muth and Clark I needed to depart. I advised them both I would be going on days off, but to turn in their statements at the Sheriff's Office and I would follow-up on the incident later.

I went on scheduled days off, to be followed by scheduled vacation days. A couple of days later I was contacted via phone at my residence by Detective Sergeant Buettner. He advised he had been assigned this case for follow-up investigation since I was on days off and scheduled vacation. I briefed him on the information I had been told by parties of the incident. He advised he would be handling the investigation. I was later advised McSherry had been arrested during the investigation conducted by Detective Sergeant Buettner and he advised me no further follow-up investigation was needed.

On 05/24/14, when I returned to work, I received the written statement Clark had completed on 05/11/14. It was consistent with what she had told me the night of the incident. (See statement in case file).

END OF SUPPLEMENTAL REPORT.

I certify (declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

G. Manning #11 05/26/14 Stevenson, WA.



Leana Kinley <leana@ci.stevenson.wa.us>

Muth's use of city attorney and tax dollars for private matter

Pat Rice <easylivingpat@gmail.com>

Sat, Oct 31, 2020 at 10:05 AM

To: Leana Kinley <leana@ci.stevenson.wa.us>, Scott Anderson <scott.anderson@ci.stevenson.wa.us>

Cc: City Council <citycouncil@ci.stevenson.wa.us>

Leana and Scott,

In reviewing the City of Stevenson attorney billing statement for October (see attached) I see an entry dated October 14, 2020 with the description "*Telephone conference with Robert re alleged defamatory statement from councilmember.*" This is the very day that Mr. Muth had hand delivered to Mr. Knudsen's home the attached letter threatening to file a lawsuit against him.

This is concerning to me and raises several questions:

- (1) Can any council member upset with another member consult with the city attorney at taxpayer expense regarding whatever their beef is?
- (2) And can Mr. Knudsen, who is on the receiving end of Mr. Muth's demands, also seek legal counsel from the city attorney?
- (3) My impression in reading Mr. Muth's demand letter was that he was acting to protect his personal reputation and was acting as a private citizen. Can any citizen, myself for example, simply call the city attorney at taxpayer expense and seek advice? As you know, I had to hire an attorney last year to resolve a simple boundary line adjustment. Could I have instead simply called the city attorney?
- (4) Does the city have any policies and procedures regarding access to the city attorney? If so, please email me a copy.
- (5) Can the city attorney, Mr. Woodrich, represent individual council members or does his only authority lie in representing the city council as a whole?

Thank you Leana and Scott for your help in clarifying these issues.

Pat Rice

2 attachments



City pays for Muth to get legal advice on suing Knudsen.pdf
133K



Muth threatens to sue Knudsen over race issue.pdf
803K

RECEIVED

OCT 20 2020

BY: _____

Kenneth B Woodrich PC1501 W 8th St., Suite 200
Vancouver, WA 98660

PHONE: 503-288-2480 FAX: 509-427-7618 ken@woodrich.com

ENTERED
mc**INVOICE**

City of Stevenson

INVOICE NUMBER: 12508

INVOICE DATE: OCTOBER 20, 2020

515.41.41.0000

DATE	PROJECT	DESCRIPTION	QTY	RATE	AMOUNT
SEP-23-20	General	Email from Leana; review and revise Wastewater moratorium findings and extension ordinance; draft response	0.70	\$180.00	\$126.00
OCT-07-20	General	Review email exchange between Ben and LeAnne Bremmer re short plat	0.20	\$180.00	\$36.00
OCT-08-20	General	Telephone conference with Leana re change order	0.20	\$180.00	\$36.00
OCT-12-20	General	Email from Ben re BLA question; review and draft response	0.30	\$180.00	\$54.00
OCT-13-20	General	Email from Leana re Hazardous Materials policy; review, research and draft response	0.40	\$180.00	\$72.00
OCT-14-20	General	Telephone conference with Robert re alleged defamatory statement from councilmember	0.30	\$180.00	\$54.00
OCT-15-20	General	Attend regular meeting	4.00	\$180.00	N/C
OCT-15-20	General	(Retainer 4 hours) Monthly retainer (up to four hours regular meeting included)	1.00	\$960.00	\$960.00
OCT-16-20	General	Email from Leana; review and sign documents from council meeting; draft response	0.80	\$180.00	\$144.00
OCT-16-20	General	Email from Leana re TAC funding and change of use; review SAO response; draft response	0.30	\$180.00	\$54.00
		Total All hours for this invoice	7.20		
		Total No Charge hours for this invoice	4.00		
		Total Billable hours for this invoice	3.20		
		Total amount of this invoice			\$1,536.00

KILMER, VOORHEES & LAURICK, P.C.

A Professional Corporation
ATTORNEYS AT LAW

732 N.W. 19th AVENUE
PORTLAND, OREGON 97209

TELEPHONE (503) 224-0055
FAX (503) 222-5290

Robert C. Muth
rmuth@kilmerlaw.com
Admitted in Oregon and Washington

October 14, 2020

Via Hand Delivery

Matthew Daniel Knudsen
390 NW Chesser Road
Stevenson, WA 98648

Re: Retraction of Public Defamatory Statement

Dear Mr. Knudsen:

You have published a comment to the general public on the City of Stevenson's website link via You Tube of the September 17, 2020 City Council meeting. Your published comment is:

Robert's view that "I have a background in Black studies" has the appearance of "I see no color" or "I have a Black friend". Even if staff thus far have not had any negative interactions, it does not forecast the future. Additionally, even if the city government does not think there is an issue, the community has asked for this, and can be thought of "better safe than sorry"—it hurts nothing to undergo some further education, satisfy the public's concerns, and prepare for the future. This kind of uninterested attitude is just as dangerous as individuals who are overtly racist—as it can pave the way for silently consenting and allowing those situations in the future. The city government needs to be a leader of the community, and if someone like this is going to hold it back—the community needs to be willing to vote them out and support someone who in turn supports this community and its concerns.

First, your comment, published to a third party, is defamatory under Washington law. You have intimated I am a "racist". Since you cannot actually prove I am a "racist"; a subjective label, your comment is not protected speech. Furthermore, you have chosen to make the comment outside of a City Council meeting in a comment section of a YouTube link. As such, your comment is not protected speech under any applicable anti-SLAPP statute.

Second, if you do not delete the comment you published and issue a retraction in the comment section, I will commence legal action against you personally.

You have exactly 24-hours to delete the comment and to publish a retraction stating your comments were improper.

KILMER, VOORHEES & LAURICK, P.C.

Matthew Knudsen

October 14, 2020

Page 2

You should govern yourself accordingly.

Very truly yours,

/s/ Robert C. Muth

Robert C. Muth

RCM:cmo

cc: Scott Anderson, Mayor City of Stevenson via hand delivery

Ken Woodrich, Attorney for City of Stevenson via hand delivery

I:\9999\RCM\@Misc\Knudsen001 2020-1014 re Retraction of Statement.docx



Leana Kinley <leana@ci.stevenson.wa.us>

Muth's use of city attorney and tax dollars for private matter

Leana Kinley <leana@ci.stevenson.wa.us>

Mon, Nov 2, 2020 at 10:33 AM

To: Pat Rice <easylivingpat@gmail.com>

Cc: Scott Anderson <scott.anderson@ci.stevenson.wa.us>, citycouncil <citycouncil@ci.stevenson.wa.us>

Pat,

The answers to your questions are below in red with hyperlinks to documents or references.

Thanks,

Leana Kinley, EMPA, CMC

City Administrator
7121 E. Loop Rd/PO Box 371
Stevenson, WA 98648-0371
(509) 427-5970

On Sat, Oct 31, 2020 at 10:05 AM Pat Rice <easylivingpat@gmail.com> wrote:

Leana and Scott,

In reviewing the City of Stevenson attorney billing statement for October (see attached) I see an entry dated October 14, 2020 with the description "*Telephone conference with Robert re alleged defamatory statement from councilmember.*" This is the very day that Mr. Muth had hand delivered to Mr. Knudsen's home the attached letter threatening to file a lawsuit against him.

This is concerning to me and raises several questions:

- (1) Can any council member upset with another member consult with the city attorney at taxpayer expense regarding whatever their beef is? **As outlined on page 21 of the Mayor and Councilmember Handbook produced by MRSC, under Relationship with City Attorney, "...the city attorney's job is to advise all city officials."**
- (2) And can Mr. Knudsen, who is on the receiving end of Mr. Muth's demands, also seek legal counsel from the city attorney? **According to the above, council can seek legal counsel on matters that pertain to city business.**
- (3) My impression in reading Mr. Muth's demand letter was that he was acting to protect his personal reputation and was acting as a private citizen. **The call from councilmember Muth to attorney Woodrich was not about personal representation. It was informing attorney Woodrich of a potential city liability exposure as the statement was made on a city platform (the City's YouTube page).** Can any citizen, myself for example, simply call the city attorney at taxpayer expense and seek advice? **No.** As you know, I had to hire an attorney last year to resolve a simple boundary line adjustment. Could I have instead simply called the city attorney? **No.**
- (4) Does the city have any policies and procedures regarding access to the city attorney? If so, please email me a copy. **As a policy matter, the City has been liberal**

in regards to city attorney access regarding city-related matters. The current city policy addresses Council relations with City Staff and does not mention access to the city attorney.

(5) Can the city attorney, Mr. Woodrich, represent individual council members or does his only authority lie in representing the city council as a whole? According to MRSC, the city attorney represents the city as a whole, and not individuals.

[Quoted text hidden]



Leana Kinley <leana@ci.stevenson.wa.us>

Muth's use of city attorney and tax dollars for private matter

Pat Rice <easylivingpat@gmail.com>

Thu, Nov 5, 2020 at 11:40 AM

To: Leana Kinley <leana@ci.stevenson.wa.us>

Cc: Scott Anderson <scott.anderson@ci.stevenson.wa.us>, City Council <citycouncil@ci.stevenson.wa.us>

Thank you Leana for your answer to my email.

I realize that so far Mr. Muth has only caused the expenditure of \$54.00 in city funds because of his thin skin and ridiculous and outrageous claim that council member Knudsen's benign comment was somehow defamatory; however, I am troubled by ANY council member who would put the city at risk in ANY form or matter over something so utterly ridiculous and stupid. All council members, including Mr. Muth, should always put the city's best interest ahead of their own.

I have reread council member Knudsen's Youtube comment and there is absolutely nothing inappropriate in what he wrote. In fact, he was simply being supportive of Annie McHales admirable push to implement anti-racism training. A citizen does not lose their right to free speech and public comment simply because they assume the elected position of a city council member. In fact, some believe our elected officials have more of a duty and responsibility to speak out and be a leader on important issues facing the public.

I am not sure why it took Mr. Muth 18 minutes to, as you say, to *inform "...attorney Woodrich of a potential city liability exposure as the statement was made on a city platform (the City's YouTube page)."* Evidently, besides the irony of an attorney who sues people for a living having such a thin skin, he is also inefficient in his speech (*and evidently also fairly ignorant of our defamation laws in regards to public officials [see attached recent supreme court case]*).

Pat Rice

On Mon, Nov 2, 2020 at 10:33 AM Leana Kinley <leana@ci.stevenson.wa.us> wrote:

[Quoted text hidden]



Recent WA Supreme Court defamation case and higher standards for public officials.pdf


774K

FILE

IN CLERK'S OFFICE
SUPREME COURT, STATE OF WASHINGTON
OCTOBER 22, 2020


CHIEF JUSTICE

THIS OPINION WAS FILED
FOR RECORD AT 8 A.M. ON
OCTOBER 22, 2020


SUSAN L. CARLSON
SUPREME COURT CLERK

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CHRIS REYKDAL,

Respondent,

v.

MAIA ESPINOZA,

Appellant,

KIM WYMAN, Secretary of State,

Nominal Defendant.

NO. 98731-9

EN BANC

Filed: October 22, 2020

STEPHENS, C.J.—Incumbent Superintendent of Public Instruction Chris Reykdal sued to have the Thurston County Superior Court order the removal of one allegedly defamatory line in the voters' guide pamphlet from challenger Maia Espinoza's candidate statement. The superior court agreed that there was a substantial likelihood Reykdal could succeed in a defamation suit based on Espinoza's statement. Using a supervisory power conferred by RCW

29A.32.090(3)(b), the superior court ordered the secretary of state to edit out the offending line. Espinoza sought accelerated direct review, which this court granted.

Because Reykdal is a public figure, he must show “actual malice” to succeed in a defamation suit. The superior court made no findings regarding actual malice, and thus granted Reykdal’s request in error. Because there is no likelihood that Reykdal could succeed in a defamation suit, the superior court erred in its application of the statute.¹

FACTS

The legislature passed a law—by request of Reykdal—requiring every public school to provide age-appropriate “comprehensive sexual health education” to each student at all grade levels by the 2022-23 school year. LAWS OF 2020, ch. 188, § 1. The law tasks the superintendent and the Department of Health with making the appropriate learning standards and guidelines available to school districts and teachers on their websites. *Id.* § 1(3). The law also requires that the superintendent develop and publish a list of curricula as a resource for schools, teachers, and other

¹ Espinoza also argues that the statute is unconstitutional as applied here because the court’s prior restraint of political speech violates free speech principles. But our decision rests on the proper application of the statute, and thus there is no need to consider the constitutionality of the statute at this time. *See Tunstall v. Bergeson*, 141 Wn.2d 201, 210, 5 P.3d 691 (2000) (“Where an issue may be resolved on statutory grounds, the court will avoid deciding the issue on constitutional grounds.”).

organizations. *Id.* § 1(4). Schools are encouraged to review the curricula and choose a curriculum from the provided list of resources. *Id.* § 1(6)(a).

Consistent with the law, the superintendent’s website provides a list of sexual health education resources. One of the resources listed includes a fourth grade curriculum from Advocates for Youth. *See RIGHTS, RESPECT, RESPONSIBILITY: A K-12 Sexuality Education Curriculum*, ADVOCATES FOR YOUTH, <https://3rs.org/3rs-curriculum> (3Rs Curriculum). This particular curriculum includes a handout for parents and guardians that refers users to additional resources, including the book *It’s Perfectly Normal: Changing Bodies, Growing Up, Sex, and Sexual Health*, by Robie H. Harris. The handout referencing the book states, “These resources all provide important, age-appropriate information about puberty and how our bodies change during this time. Please review these before sharing with your child so you feel ready to answer any questions they may have.” 3Rs Curriculum, 4th Grade Lesson 1, *Making Sense of Puberty*, at 32; Clerk’s Papers (CP) at 96. The book includes various illustrations of sexual health education material, including two pages with depictions of a couple having sexual intercourse in different positions.

Espinoza is one of six candidates who entered the 2020 primary for the superintendent of public instruction position. The secretary of state publishes a voters’ guide pamphlet for all elections involving statewide offices. RCW

29A.32.010. Candidates for the superintendent position may submit a candidate statement and photograph for publication in the pamphlet. *Id.* at .031. The statements may not exceed 200 words. *Id.* at .121. The published voters' guide pamphlets include a disclaimer on every page stating that candidate statements are printed as submitted and not edited for factual or grammatical accuracy.

Espinoza submitted a candidate statement that includes the sentence, "*The incumbent ignored parents and educators by championing a policy that teaches sexual positions to 4th graders!*" Candidate Statement of Maia Espinoza, Office of the Secretary of State: 2020 Primary Voters' Guide (Aug. 2020), <https://voter.votewa.gov/genericvoterguide.aspx?e=865&c=99#/candidates/57367/70643>; *see also* CP at 20. The secretary of state notified Reykdal of Espinoza's candidate statement, and Reykdal filed a petition in Thurston County Superior Court to bar Espinoza and the secretary of state from publishing this sentence pursuant to RCW 29A.32.090.² Reykdal included a declaration stating that while he supported the new comprehensive sexual health education law, he had never advocated for the teaching of sexual positions to fourth graders. Espinoza responded, explaining that

² The secretary of state is only a nominal party in this lawsuit. RCW 29A.32.090(3)(d).

her statement was based on the curriculum handout's reference to two pages in the *It's Perfectly Normal* book.

The court held that the sentence in Espinoza's candidate statement is untrue, in part because of its specificity, and that there is a very substantial likelihood that Reykdal would prevail in a defamation action based on this sentence. The court granted Reykdal's petition and ordered the sentence deleted from all voters' guide pamphlets. Espinoza sought direct expedited review, which this court granted. Because of the deadlines for timely publishing the general election voters' guide pamphlets, the court considered the matter without oral argument and issued an order with this decision to follow.

ANALYSIS

At issue here is the application of RCW 29A.32.090. This law allows a person to petition the court for a judicial determination that a candidate statement "may be rejected for publication or edited to delete the defamatory statement." RCW 29A.32.090(3)(a). The court may edit a candidate statement only when "it concludes that the statement is untrue and that the petitioner has a very substantial likelihood of prevailing in a defamation action." *Id.* at (3)(b).³ Here, the superior court erred

³ The legislature added this defamation requirement to the statute following this court's decision in *Rickert v. Pub. Disclosure Comm'n*, 161 Wn.2d 843, 168 P.3d 826 (2007). See LAWS OF 2009, ch. 222, § 1.

because there is little possibility that a public figure like Reykdal could prevail in a defamation action against Espinoza. Our review of the statutory language is de novo, *Castro v. Stanwood Sch. Dist. No. 401*, 151 Wn.2d 221, 224, 86 P.3d 1166 (2004), and review of the trial court's decision is also de novo as it is the equivalent of a summary judgment. *Troxell v. Rainier Pub. Sch. Dist. No. 307*, 154 Wn.2d 345, 350, 111 P.3d 1173 (2005). In a general defamation claim, the plaintiff must establish (1) falsity, (2) an unprivileged communication, (3) fault, and (4) damages. *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005) (plurality opinion). Here, Reykdal cannot establish either falsity or damages.

I. ESPINOZA'S STATEMENT IS NOT DEMONSTRABLY FALSE

There is no substantial likelihood that Reykdal could meet his burden to demonstrate that Espinoza's statement is false. *See Mohr*, 153 Wn.2d at 822-23. Reykdal argues that it is ridiculous to suggest he would support teaching sexual positions to fourth graders and that the handout is not specifically listed as part of the teaching curriculum. Neither argument is availing.

Reykdal's first argument is flawed because he mistakenly assumes the word "teaches" in the candidate statement means that some form of classroom instruction by a school teacher is required for the statement to be true. Instead, the handout encourages parents and guardians to review the materials before sharing them with

children to be ready to answer any questions their children may have. Thus, the handout clearly implies that the parent or guardian reviewing the material should share it with children after appropriate preparation. This indicates that the 3Rs Curriculum intends that fourth graders view and learn from the *It's Perfectly Normal* book with their parents or guardians as a supplement to classroom instruction. Indeed, the handout encourages it. And while the record does not show that Reykdal personally intended to teach sexual positions to fourth graders, Espinoza's candidate statement criticized Reykdal's policy and its results, not his personal teaching.

Reykdal's argument that the handout is not part of the curriculum is also flawed. While it is true that the handout's book reference is not specifically listed in the curriculum, this does not break the logical chain of Espinoza's statement: the policy requires the superintendent to recommend curricula, the 3Rs Curriculum includes the informative handout, the handout encourages parents and guardians to read and share the book with their children, and the book includes depictions of a couple having intercourse in two different positions. It is unlikely but truthful that the policy could result in unintentionally exposing fourth graders to depictions of, and thus "teaching" them, different sexual positions.

Defamation can also occur by implication when "the defendant juxtaposes a series of facts so as to imply a defamatory connection between them, or creates a

defamatory implication by omitting facts.” PROSSER AND KEETON ON THE LAW OF TORTS § 116, at 117 (W. Page Keeton ed., 5th ed. 1984) (footnote omitted). But Reykdal does not argue the defamation allegedly caused by Espinoza’s statement is merely implied—to the contrary, he argues the statement is so obviously defamatory that it rises to the level of defamation per se. Accordingly, we express no opinion as to whether Espinoza’s statement carried a defamatory implication.

Because the reference materials included in the 3Rs Curriculum provided on the superintendent’s website could inform fourth graders of different sexual positions, Reykdal has failed to meet his threshold burden of proving Espinoza’s statement is false.

II. REYKDAL HAS NOT DEMONSTRATED THE ACTUAL MALICE REQUIRED TO SUCCEED IN A DEFAMATION ACTION

Reykdal’s invocation of RCW 29A.32.090 also fails because he is a public official and therefore less likely to prevail in any defamation action. The First Amendment to the United States Constitution is more protective of speech criticizing public officials because such speech is essential to citizens’ ability to thoughtfully engage in public debate and the democratic process. The public good that arises from sharp criticism and examination of public officials’ records requires laws and policies that will not chill such speech. Accordingly, to succeed in any defamation

action, a public official must establish something the average defamation plaintiff need not establish: “actual malice.” *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). As a public official, Reykdal may not recover damages “for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” *Id.* A “reckless disregard” means either that there was a high degree of awareness of probable falsity or that the defendant in fact entertained serious doubts about the truth of the statement. *Herron v. KING Broad. Co.*, 109 Wn.2d 514, 523, 746 P.2d 295 (1987), *adhered to on reh’g*, 112 Wn.2d 762, 776 P.2d 98 (1989).

The standard of proof for such a defamation claim is also higher in cases involving a public official. To succeed, Reykdal must show “clear and convincing evidence” that Espinoza made the statement with actual malice. *Duc Tan v. Le*, 177 Wn.2d 649, 300 P.3d 356 (2013). The more lenient “preponderance of the evidence” standard from most civil tort litigation does not apply. *Id.*

Here, the superior court made no findings of actual malice. And there is nothing in the record to suggest that Espinoza made her statement knowing it was false or with a “reckless disregard” of its veracity. As discussed above, the statement is not demonstrably false, and Espinoza could have reasonably relied on the logical

chain of events arising from the policy leading to children viewing the *It's Perfectly Normal* book and learning about sexual positions. Whether Espinoza's critique is fair—and whether Reykdal's policy is sound—is for the voters to decide. Espinoza's statement is inflammatory, but it does not defame Reykdal under the *New York Times* standard.

It is of no help to Reykdal that the statute contains a reference to defamation per se. RCW 29A.32.090(2) (the statement is “‘libel or defamation per se’ if [it] tends to expose the candidate to hatred, contempt, ridicule, or obloquy, or to deprive him or her of the benefit of public confidence or social intercourse, or to injure him or her in his or her business or occupation”). This language arises from defamation law concerning the proof of damages.

Generally, a plaintiff must prove and may recover only the “actual damages” caused by defamation. *Haueter v. Cowles Publ'g Co.*, 61 Wn. App. 572, 578, 811 P.2d 231 (1991). But when the communication is “defamatory per se,” there is no requirement to prove “actual damages.” *Id.* Nothing in this “per se” exception to the general rule, however, affects the applicability of the *New York Times* standard requiring public officials to prove actual malice. That standard is grounded in First Amendment principles that do not evaporate simply because the speech subjects the public official to particularly heinous ridicule. Indeed, presumptive damages for the

alleged defamation of public officials is specifically barred by *New York Times*. 376 U.S. at 283-84 (“Such a presumption is inconsistent with the federal rule.”). Reykdal does not—and indeed cannot—meet his burden to show actual malice (which is an element not present in normal defamation cases) by proving defamation per se (which satisfies the damages element in normal defamation cases). Reykdal has therefore not shown he is likely to succeed in a defamation suit as required by RCW 29A.32.090.

CONCLUSION

Because Reykdal is a public official, he cannot succeed in a defamation action without proving actual malice. The superior court did not find actual malice, and this record does not support such a finding. Accordingly, the superior court order barring publication of Espinoza’s statement is reversed. The secretary of state shall publish Espinoza’s original statement in the voters’ guide pamphlet.

Stephens, C.J.
Stephens, C.J.

WE CONCUR:

Johnson J.
Johnson, J.

Gordon McCloud, J.
Gordon McCloud, J.

Madsen, J.
Madsen, J.

Owens, J.
Owens, J.

Whitener J.
Whitener, J.

No. 98731-9

GONZÁLEZ, J. (dissenting) — A government of the people depends on regular, free, and fair elections. To be fair, voters must have access to truthful information about the candidates for office. In Washington State, every household and every public library receives a voters’ pamphlet that contains the candidates’ own statements about why a voter should trust them with a vote. RCW 29A.32.010, .031. The voters’ pamphlet is a state-funded, limited public forum and the people, through their legislature, have the power to impose reasonable, viewpoint neutral rules on the candidates’ statements. *See Cogswell v. City of Seattle*, 347 F.3d 809, 814 (9th Cir. 2003). The people of our state have imposed the modest requirement that candidates not use the voters’ pamphlet as a vehicle to make false or misleading statements about their opponents. RCW 29A.32.090(2).

To protect the free speech rights of candidates, the law imposes a heavy burden on anyone seeking to remove language from the voters’ pamphlet. RCW

Reykdal v. Espinoza, No. 98731-9 (González, J., dissenting)

29A.32.090. Relevantly, a court must “conclude[] that the statement is untrue and that the petitioner has a very substantial likelihood of prevailing in a defamation action.” RCW 29A.32.090(3)(b). In this case, Superintendent Chris Reykdal has challenged his opponent’s assertion that he “*ignored parents and educators by championing a policy that teaches sexual positions to 4th graders!*” Clerk’s Papers (CP) at 20. Because I agree with the trial judge that Reykdal has made the requisite showing, I respectfully dissent.

I offer some background for context. Since 2008, Washington State has required that public schools providing sexual health education ensure that the information is medically and scientifically accurate and age appropriate. LAWS OF 2007, ch. 265, § 2, *codified as* RCW 28A.300.475. Recently, the legislature heard testimony that only a little more than half of the state’s school districts were providing comprehensive sexual health education. Hr’g on Engrossed Substitute S.B. 5395 Before the H. Education Comm., 66th Leg., Reg. Sess. (Wash. Feb. 20, 2020), *video recording by* TVW, Washington State’s Public Affairs Network, <http://www.tvw.org/watch/?eventID=2020021250>. This year, the legislature passed an update to RCW 28A.300.475, Engrossed Substitute Senate Bill 5395 (ESSB 5395), at the request of the Office of the Superintendent of Public

Instruction (OSPI). *See* LAWS OF 2020, ch. 188; CP at 28-33.¹ Under ESSB 5395, schools would be required to offer medically and scientifically accurate, age appropriate sexual health education that includes material on affirmative consent and bystander training. ESSB 5395, § 1, *codified at* RCW 28A.300.475(1). OSPI is tasked with developing “a list of sexual health education curricula that are consistent with the 2005 guidelines for sexual health information and disease prevention.” RCW 28A.300.475(4). This list is intended to be a resource for local school districts and teachers. *Id.* OSPI makes it clear that it does not, however, approve or recommend curricula or instructional materials and that school districts are encouraged to do their own independent review. “Inclusion of a title in a review does not constitute ‘approval’ for district use.” CP at 136. School districts are not limited to the curricula on the list. RCW 28A.300.475(5).

One of the curricula that OSPI found consistent with the 2005 guidelines is called “Rights, Respect, Responsibility: A K-12 Sexuality Education Curriculum.” CP at 91-100. This curriculum was created by the organization Advocates for Youth, an outside organization not associated with OSPI. Nine other curricula were found consistent with the guidelines for grades 4-5. As part of its packet of materials in a lesson for fourth graders, the curriculum includes a handout designed

¹ The bill has not gone into effect because a referendum has been filed and will be before the voters this November. <https://www.sos.wa.gov/elections/initiatives/referendum.aspx?y=2020>.

for parents and other caregivers. The supplemental handout for parents references a book titled *It's Perfectly Normal*. CP at 51-52. The book contains cartoon images of couples engaged in intercourse. This book is not part of the teaching curriculum, and this record is bereft of any hint OSPI is recommending teachers use it to teach. This is the basis for Maia Espinoza's claim that Reykdal is "*championing a policy that teaches sexual positions to 4th graders!*" CP at 20.

Espinoza herself acknowledges that this is a "trail of bread crumbs" that led her to conclude Reykdal champions teaching sexual positions to fourth graders. CP at 43. It is also simply not a reasonable or even plausible interpretation of the facts. The fact that an outside organization reviewed this book, found that it was age appropriate, and recommended it to parents as one of many resources that they might find helpful in talking to their own children about puberty simply does not amount to Reykdal championing teaching sexual positions to fourth graders. The trail of bread crumbs is just too faint. Accordingly, I respectfully disagree with the majority that the trial court erred in finding the statement was false.

Because Reykdal is a public official, he must also show that there is actual malice or that the defendant knows the statement was false or "[was made] with reckless disregard of whether it was false or not." *Duc Tan v. Le*, 177 Wn.2d 649, 681, 300 P.3d 356 (2013) (Johnson, J., dissenting) (alteration in original) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280, 84 S. Ct. 710, 11 L. Ed. 2d 686

Reykdal v. Espinoza, No. 98731-9 (González, J., dissenting)

(1964)). I recognize that the trial judge's two page order does not make a specific finding of malice. Nor does it make a finding of an unprivileged communication or fault which are also elements of a defamation claim. *See Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005) (plurality opinion); *see also N.Y. Times*, 376 U.S. at 279-80. Such findings are necessarily subsumed in its conclusion that Reykdal has met his burden.

In my view, Reykdal has met this burden by showing that the “allegations are so inherently improbable that actual malice may be inferred from the act of putting such extreme statements in circulation.” *Duc Tan*, 177 Wn.2d at 669 (citing *Margoles v. Hubbart*, 111 Wn.2d 195, 201, 760 P.2d 324 (1988)). The allegation that a public official would champion a policy teaching sexual positions to fourth graders, based on a faint trail of bread crumbs reaches the level of improbability to establish actual malice.

Reykdal is not required to show actual damages under the statute because the statement is defamatory per se under RCW 29A.32.090(2). The statute provides that

a false or misleading statement shall be considered “libel or defamation per se” if the statement tends to expose the candidate to hatred, contempt, ridicule, or obloquy, or to deprive him or her of the benefit of public confidence or social intercourse, or to injure him or her in his or her business occupation.

Reykdal v. Espinoza, No. 98731-9 (González, J., dissenting)

RCW 29A.32.090(2). Comments on the *Seattle Times* article contained in the record demonstrate that Espinoza's statement has already deprived him of at least some of the public's confidence. This is sufficient to meet the standard set forth in RCW 29A.32.090(2). I respectfully disagree with the majority that Reykdal has not met his statutory burden.

I also find no constitutional infirmity in this statute. First, I would join those courts that have held voters' pamphlets are limited public forums. *See Cogswell*, 347 F.3d at 814 (citing *Kaplan v. County of Los Angeles*, 894 F.2d 1076, 1080 (9th Cir. 1990)). Only by the intentional action of "opening a nontraditional forum for public discourse" can a government entity create a designated forum, not by "inaction or by permitting limited discourse." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985). The State has not taken any intentional action to create a public forum via the voters' pamphlet and, in fact, has set limitations on what speech may be included.

Since the voters' pamphlet is a limited public forum, the government may establish "any reasonable restriction to ensure that the forum will be reserved for its intended purpose." *Sprague v. Spokane Valley Fire Dep't*, 189 Wn.2d 858, 879, 409 P.3d 160 (2018) (citing *City of Seattle v. Mighty Movers, Inc.*, 152 Wn.2d 343, 361, 96 P.3d 979 (2004)). The restrictions "must only be viewpoint neutral and 'reasonable in light of the purposes served by the forum.'" *City of Lakewood v.*

Reykdal v. Espinoza, No. 98731-9 (González, J., dissenting)

Willis, 186 Wn.2d 210, 217-18, 375 P.3d 1056 (2016) (plurality opinion) (internal quotation marks omitted) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995)). The restriction on false and defamatory speech gives candidates the opportunity to introduce themselves to voters while creating a mechanism to avoid exposing the secretary of state to legal liability for publishing actionable defamation. *See Cogswell*, 347 F.3d at 811; RCW 29A.32.090(3)(d). The restriction applies equally to all candidates whose statements are challenged as false and defamatory under the statute, and is therefore viewpoint neutral. *See Cogswell*, 347 F.3d at 816 (holding that restrictions on candidate statements in the voters' pamphlet are viewpoint neutral because they are "equally applicable to all candidates"). Because the restrictions are reasonable and viewpoint neutral, it does not constitute an unconstitutional infringement on speech.

The voters' pamphlet provides a vital, government-sponsored service: a neutral source for voter information. The citizens of Washington have expressed a strong public interest in not allowing the voters' pamphlet be a forum for false or misleading statements about a candidate's opponent. *See* RCW 29A.32.090(2). Espinoza's statement was false and misleading, and Reykdal met the heavy burden established by the statute to have that statement removed.

I respectfully dissent.

González, J.

Gonzalez, J.

Yu, J.

Yu, J.

Montoya-Lewis, J.

Montoya-Lewis, J.