

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PAUL BRECHT,)	No. 65058-1-I
)	
Appellant,)	DIVISION ONE
)	
v.)	
)	
NORTH CREEK LAW FIRM,)	UNPUBLISHED
MARK LAMB and JANE DOE LAMB,)	
)	FILED: <u>August 1, 2011</u>
Respondents.)	
)	

Spearman, J. — Paul Brecht, who publicly endorsed a King County Council candidate, filed a complaint for defamation against Mark Lamb and North Creek Law Firm (collectively Lamb), after Lamb told the media the basis for an opposing candidate’s claim that Brecht had been convicted of domestic violence. Arguing that the remarks were true, Lamb successfully moved to dismiss, under CR 12(b) (6), for failure to state a cognizable claim. Brecht appeals the dismissal of his claim and the court’s exclusion of documents he filed in response to Lamb’s motion. But published remarks that are substantially true are insufficient to establish a prima facie case of defamation, and any error in excluding Brecht’s documents was harmless. We affirm.

FACTS

During the 2007 King County Council election, Brecht publicly endorsed candidate Richard Pope, who was running against incumbent Jane Hague. Before the

election, Hague's campaign sent out a mailer to constituents in her district, claiming that Brecht had multiple domestic violence arrests and at least one assault conviction. Brecht filed a defamation claim against Hague and the campaign consultants who created the mailer. The lawsuit received publicity and was reported in a local newspaper.

Lamb, a Hague campaign attorney, thereafter spoke to a Seattle newspaper and television station about the mailer. Based on Lamb's remarks in those media interviews, Brecht filed the defamation complaint at issue in the instant appeal. According to Brecht's complaint, Lamb's remarks to the newspaper were reported as follows:

[Lamb] said . . . the allegation of an assault conviction was based on a Renton police report that said Brecht was convicted of violating a no-contact order[.]

...

Lamb said Hague campaign staffers were "going on the information they had" when they wrote that Brecht was convicted of assault. "I suppose you could make an argument it would be more accurate to say he was convicted of domestic violence" Lamb said, referring to [Brecht's] violation of a no-contact order. "The campaign felt that was too inflammatory to include in the thing."

...

Lamb said he doesn't believe Hague owes Brecht an apology. "It appears that Mr. Pope's complaint was that the piece didn't say that Mr. Brecht was convicted of domestic violence. That's an odd complaint."

Lamb told the television station: "Mr. Brecht said last night that [he does] not have a domestic violence conviction, that's not true."

Brecht did not dispute that his former spouse reported to police officers that he

assaulted her. Nor did he dispute that he violated a no-contact order protecting her, and was convicted for violating that order. Brecht's complaint detailed the facts of his arrest and conviction as follows:

In 2001, Mr. Brecht's then-wife phoned police and claimed that Mr. Brecht had assaulted her. This occurred on the same evening that Mr. Brecht informed his wife that he would like a divorce, before leaving to go to his office. Mr. Brecht was later arrested at his office and a no-contact order was entered against him solely on the basis of his wife's claims against him. The no-contact order required that Mr. Brecht have no contact or communication with his estranged wife.

...

About one month later after his wife phoned the police, Mr. Brecht violated the no-contact order when he met his estranged wife and their child in a public place in broad daylight, and gave her money she said she needed. There was no violence, nor any allegation of violence. Afterwards the wife contacted police and reported that her husband had violated the no-contact order. [Brecht] was found guilty of a misdemeanor charge of violating a no-contact order.

Lamb filed his answer to Brecht's complaint, asserting that his remarks to the media were true. On November 30, 2009, Lamb moved to dismiss Brecht's complaint for failing to state a claim upon which relief could be granted, pursuant to CR 12(b)(6). On January 4, 2010, two days before the scheduled hearing date, Brecht filed a response brief with attached exhibits and a declaration. The exhibits included a partial transcript from the earlier trial on Brecht's defamation claim against Hague and her campaign consultants, a verdict form from that trial, and a copy of the Hague campaign's mailer. Lamb moved to strike Brecht's documents because they contained

matters outside the pleadings, “[u]nsworn evidence,” and inadmissible hearsay, and were not filed in a timely manner.¹

After hearing oral argument, the trial court granted Lamb’s motion to strike Brecht’s responsive pleadings on the ground that they were untimely. The court also granted Lamb’s CR 12(b)(6) motion, dismissing Brecht’s claim. The court denied Brecht’s subsequent motion for reconsideration of both rulings.

Brecht appeals.

ANALYSIS

Brecht argues that the trial court erred by excluding his declaration, response brief, and exhibits, and by concluding that he failed to state a cognizable claim for defamation against Lamb. We conclude that the court did not err in excluding Brecht’s declaration and exhibits, any error in excluding his response brief was harmless, and his complaint failed to state a cognizable claim. Accordingly, we affirm the trial court’s order granting Lamb’s motion to dismiss.

Lamb’s Motion to Strike

Brecht contends that the trial court erred in excluding the materials he filed, including his response brief, declaration, and exhibits. We conclude that the trial court did not err in striking the declaration and exhibits, and that any error in striking the response brief was harmless.

¹ At the hearing on Lamb’s motion to dismiss, Lamb asserted that Brecht’s filings were “untimely and largely inadmissible” Lamb argued that if Brecht sought to convert the hearing into a one for summary judgment, he would have been required to file the response “not later than 11 calendar days before the hearing.”

An appellate court reviews a trial court's rulings on a motion to strike for an abuse of discretion. Tortes v. King County, 119 Wn. App. 1, 12, 84 P.3d 252 (2003); Stenger v. State, 104 Wn. App. 393, 407-08, 16 P.3d 655 (2001). A trial court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds. Mayer v. STO Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

The trial court was within its discretion to strike Brecht's declaration and exhibits, to the extent that they relied on factual matters outside the pleadings.² Because factual allegations extrinsic to the complaint are immaterial for purposes of the CR 12(b)(6) motion, the trial court's decision to exclude those materials was entirely reasonable.

Assuming without deciding that the exclusion of Brecht's response brief was error,³ it was nevertheless harmless. Brecht's trial court response brief is of record on this appeal. The legal arguments contained in the brief are substantially the same issues he raised in his oral argument below and in this appeal. There, as here, Brecht

² CR 12(b)(6) specifically provides that a court has discretion to exclude matters outside the pleadings, when considering a motion to dismiss for failure to state a claim upon which relief can be granted. Similarly, CR 12(f) provides that, upon motion made by a party within 20 days after the service of the pleading or upon the court's own initiative at any time, the court may order stricken "any redundant, [or] immaterial matter." Here, Lamb objected to and moved to strike Brecht's filings at the earliest opportunity.

³ When the trial court asked Brecht whether he was aware of any authority, such as a court rule, providing that his documents were filed in a timely manner, Brecht was unable to identify any such authority. The applicable King County Superior Court Local Civil Rule (KCLCR) 7(b)(4)(d) provides:

Any party opposing a motion shall file and serve the original responsive papers in opposition to a motion, serve copies on parties, and deliver working copies to the hearing judge ***no later than 12:00 noon two court days before the date the motion is to be considered.*** Working copies shall be submitted pursuant to the requirements in this rule.

(Emphasis added).

argued that Lamb's statements were "defamation by implication," relying primarily on Mohr v. Grant, 153 Wn.2d 812, 108 P.3d 768 (2005).⁴ Our review of Brecht's trial court response brief, considered both on its merits and in light of the trial court proceedings, reveals that the outcome below would have been no different had the trial court considered the brief. Any error in excluding the brief was harmless, and, therefore, does not entitle Brecht to relief on this appeal.

Failure to State a Claim

Brecht next asserts that the trial court erred in granting Lamb's CR 12(b)(6) motion. We disagree.

Whether dismissal was appropriate for failure to state a claim is a question of law that an appellate court reviews de novo. San Juan County v. No New Gas Tax, 160 Wn.2d 141, 164, 157 P.3d 831 (2007); CR 12(b)(6). The factual inquiry on a CR 12(b)(6) motion presumes the allegations set forth in the complaint to be true and asks whether any set of facts can be conceived which would support a valid claim. Holiday Resort Cmty Ass'n v. Echo Lake Assocs., 134 Wn. App. 210, 214 135 P.3d 499 (2006), Halvorson v. Dahl, 89 Wn.2d 673, 674-75, 574 P.2d 1190 (1978).

To establish a prima facie claim for defamation, Brecht was required to demonstrate that: (1) Lamb's statements were false; (2) the statements were unprivileged; (3) Lamb was at fault; and (4) that the statements proximately caused

⁴ In his response brief, Brecht also attempted to argue that Lamb was involved in the creation of the Hague campaign mailer. Because that argument is extrinsic to the facts alleged in his complaint, which Brecht never sought to amend, the trial court was well within its discretion in striking that portion of the response brief.

damage. Wood v. Battle Ground Sch. Dist., 107 Wn. App. 550, 567-68, 27 P.3d 1208 (2001) (citing Mark v. Seattle Times, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981)). A CR 12(b)(6) motion to dismiss is appropriate in defamation cases where a plaintiff's complaint fails to demonstrate the existence of one of the four elements of defamation. See Clapp v. Olympic View Publ'g Co., LLC, 137 Wn. App. 470, 154 P.3d 230 (2007).

Lamb asserts that his statements that Brecht was convicted of domestic violence were true. A statement must be considered as a whole to determine whether it is true or false. Clardy v. Cowles Publ'g Co., 81 Wn. App. 53, 912 P.2d 1078 (1996). Statements are not false if they are substantially true. Mark, 96 Wn.2d at 494. To defeat a defamation claim, “[a] defendant need only show that the statement is substantially true or that the gist of the story, the portion that carries the ‘sting,’ is true.” Mark, 96 Wn.2d at 494. The “sting” of a report is defined as the gist or substance of a report, when considered as a whole. Mohr v. Grant, 153 Wn.2d 812, 825, 108 P.3d 768 (2005). The “sting” is a question of law to be decided by the court. See Mohr, 153 Wn.2d at 826.

Brecht contends the gist of Lamb's statements to the press is that “Brecht was convicted of something WORSE than an assault.” We disagree. The gist of Lamb's statements is that Brecht “was convicted of domestic violence.” And it is indisputable that Lamb's statements to this effect are true or substantially true. Under Washington law, specifically RCW 10.99.020(5)(r), “domestic violence” includes the crime of violation of a no-contact order:

(5) "**Domestic violence**" includes but is not limited to any

of the following crimes when committed by one family or household member against another:

· · ·

(r) **Violation of the provisions of a restraining order, no-contact order, or protection order** restraining or enjoining the person or restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location

(Emphasis added, internal citations omitted). Brecht's complaint, by acknowledging his arrest for an alleged assault against his wife and his conviction for violating the ensuing no-contact order, demonstrates that Lamb's remarks, that Brecht had been "convicted of domestic violence," were substantially true. Accordingly, his claim of defamation fails and the trial court did not err in granting Lamb's CR 12(b)(6) motion.⁵

Brecht's Motion to Strike

Finally, Brecht moved to strike portions of Lamb's appellate response brief. The motion was referred to the panel as ordered by the Commissioner's ruling on October 28, 2010. Brecht correctly points out that Lamb's brief improperly cited to an unpublished portion of Citizen v. Clark County Bd. of Commr's, 127 Wn. App. 846, 113 P.3d 501 (2005). We grant Brecht's motion to strike Lamb's reference to, and argument based upon, that case. Kitsap County v. Allstate Ins. Co., 136 Wn.2d 567, 577 n.10, 964 P.2d 1173 (1998) ("Unpublished opinions have no precedential value and, therefore, we have not considered them." (Citing State v. Bays, 90 Wn. App. 731,

⁵ Brecht relies on Mohr to argue that Lamb's remarks constituted "defamation by implication." The argument is unpersuasive because, as we have said, the implication that Brecht was convicted of domestic violence is substantially true. Moreover, Lamb's statements, even when taken together, cannot be reasonably read to imply, as Brecht suggests, that he was convicted of something worse than an assault.

954 P.2d 301 (1998)).

Brecht also claims Lamb's briefing to this court misrepresented the trial court record, included new evidence not before the trial court, and responded to non-existent arguments. Because those portions of Lamb's briefing are neither relevant nor necessary to our resolution of this appeal, we decline to grant the motion to strike. We have only considered material that is properly before us in deciding this case, and determine whether the record supports the parties' contentions.

We affirm the trial court's order dismissing Brecht's defamation claim pursuant to CR 12(b)(6).

Spencer, J.

WE CONCUR:

Edenborn, J.

Cox, J.