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**COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION III**

**LIFE DESIGNS RANCH, INC., a Washington Corporation,
VINCENT BARRANCO, an individual, and BOBBIE BARRANCO,
an individual,**

Appellant,

v.

MICHAEL SOMMER,

Respondent.

**APPEALED FROM PEND OREILLE COUNTY SUPERIOR COURT
CAUSE NO. 13-2-00051-9**

**BRIEF OF APPELLANTS LIFE DESIGNS RANCH, INC.
AND THE BARRANCOS**

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I. INTRODUCTION

This appeal arises out of Defendant Michael Sommer's ("Mr. Sommer") malicious publication on the internet of a website containing false and defamatory factual assertions about Defendant Life Designs, Inc. ("Life Designs"), a young adult program that is operated by Defendants Vincent and Bobbie Barranco (the "Barrancos")¹ in the scenic Pend Oreille River Valley and in Spokane, Washington. (CP 52, 248-257). Mr. Sommer's son was a client at Life Designs. (CP 48). Following a contract dispute, Mr. Sommer sent Mr. Barranco an email threatening to take legal or extrajudicial action to destroy Life Designs' reputation in the close-knit community of the recovery world. (CP 48, 257).

Mr. Sommer chose to go the extrajudicial route. Acting on his threat, he obtained a domain name similar to that of Life Designs' legitimate website. (CP 48, 60, 253-55). He created a website that took on the appearance of Life Designs' actual website, a type of website that is colloquially referred to as a "spoof website." (CP 54-60, 248, 251). He loaded a host of false and defamatory

¹ Unless stated otherwise, the term "Life Designs" refers collectively to Life Designs and the Barrancos.

² Life Designs filed with the Court the Declaration of Clay Garrett in opposition to Defendant's Motion for Summary Judgment, not in

statements to this website concerning, without limitation, Life Designs' therapeutic environment and the education, experience, and compassion of its staff. (Id.). But he did not stop there. He also contacted a referral source, Chad Balagna, and instructed him not to send Life Designs any more referrals. (CP 202-203, 241-43).

Mr. Sommer achieved his objective: destroying Life Designs' reputation and business and casting the Barrancos in a false light. (CP 48-49, 200-203). As a result of Mr. Sommer's tortious conduct, Life Designs' referral and client enrollment rates drastically plummeted. (Id.). Life Designs has struggled to regain the reputation it once had and to increase its enrollment. (CP 49).

Life Designs filed a lawsuit in Pend Oreille County Superior Court, asserting claims for defamation, tortious interference with business expectancy, and invasion of privacy. (CP 11-19). The trial court denied Life Designs' Motion for Partial Summary Judgment Regarding Defamation Per Se and dismissed all of Life Designs' claims on two subsequent Motions for Summary Judgment advanced by Mr. Sommer. (CP 88-92, 297-98, 343-46, 348-351). The trial court erred when it made these rulings. Therefore, this Court should reverse and remand for further proceedings below.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error.

1. The trial court erred when it denied Life Designs' Motion for Partial Summary Judgment Re: Liability for Defamation Per Se;
2. The trial court erred when it granted Mr. Sommer's Motion for Summary Judgment and dismissed Life Designs' defamation claim;
3. The trial court erred when it granted Mr. Sommer's Motion for Summary Judgment and dismissed Life Designs' tortious interference with business expectancy claim; and
4. The trial court erred when it granted Mr. Sommer's Motion for Summary Judgment and dismissed Life Designs' false light invasion of privacy claim.

B. Issues Presented.

1. Whether Mr. Sommer is liable as a matter of law for defamation per se where he exposed Life Designs to hatred, contempt, ridicule, and obloquy, deprived

them of public confidence and injured them in their business; or, alternatively, whether genuine issues of material fact exist regarding whether Mr. Sommer is liable for defamation per se;

2. Whether the false statements that Mr. Sommer published to his website are actionable;
3. Whether genuine issues of material fact exist that the content that Mr. Sommer published to his website is false;
4. Whether genuine issues of material fact exist that Mr. Sommer published false statements on his website including, but not limited to, republication by linking;
5. Whether genuine issues of material fact exist that Mr. Sommer published defamatory statements with fault;
6. Whether Mr. Sommer is not privileged to publish false and defamatory content to the internet;
7. Whether genuine issues of material fact exist that Life Designs had valid business expectancy, that Mr. Sommer knew of such expectancy, and intentionally interfered with it causing Life Designs to lose

business;

8. Whether genuine issues of material fact exist that Mr. Sommer intentionally interfered with Life Designs' business expectancy for an improper purpose or improper means;
9. Whether Mr. Sommer's tortious conduct caused Life Designs' damages; and
10. Whether genuine issues of material fact exist that Mr. Sommer placed the Barrancos in a false light where his website was highly offensive to a reasonable person and Mr. Sommer knew or recklessly disregarded the falsity of the publication and the false light in which the Barrancos would be placed.

III. STATEMENT OF THE CASE

A. Factual Background.

Life Designs Ranch and Its Clients

Life Designs offers programs for young adults struggling with addiction and other destructive behavioral patterns. (CP 12, 47). It operates two treatment facilities, one in Cusick, Washington and the other in Spokane, Washington. (CP 47). At the Cusick

facility, Life Designs provides therapeutic learning and training to its clients. (Id.). This facility is located on the International Selkirk Loop in the Pend Oreille River Valley of Eastern Washington. (CP 12, 48, 52). This outdoor setting boasts commanding views of surrounding mountains, the scenic Pend Oreille River, and an abundance of plant and animal life. (Id.).

The therapeutic environment that Life Designs offers is an important component to the program's success. (CP 47-48). Generally, the six-month Cusick, Washington program operates at a maximum occupancy of twelve students. (CP 48). This program costs \$52,200 per client. (Id.). In addition, clients are charged \$1,200 for an initial interview.

The clients who enroll in the Cusick, Washington program are young adults struggling with responsibilities of adulthood and behavioral issues stemming from substance abuse or physical and emotional trauma. (CP 12). This program is based on an experiential model that focuses on life skills, therapy, recovery, outdoor adventure, passions, and wellness. (CP 12-13).

For instance, Life Designs' clients attend three weekly Narcotics Anonymous (NA)/Alcoholics Anonymous (AA) meetings with locations varying between the Eastern Washington

communities of Spokane, Washington, Sandpoint, Idaho, and Newport, Washington. (CP 13). Members of the local communities attend these meetings. (CP 13). The average age of the meeting participants is twenty-eight years old. (CP 13).

Thirty-eight percent of clients completing this program continue to the Spokane, Washington transitional program, known as the Kedlin house. (CP 48). This program costs \$12,000 per client. (Id.). Over the years, Life Designs has built success on its hard-earned reputation for offering stellar services. (Id.).

Life Designs' Staff

Life Designs' staff comes from a variety of backgrounds and experiences in training and healing young adults. (CP 13, 64-65, 190-204). Specifically, Kimberly Mlinarik (LHMC, CDP) has been part of Life Designs' staff since 2004. (CP 64). She is an onsite licensed mental health and addiction counselor with a Bachelor's Degree in Psychology and a Master's Degree in Marriage and Family Therapy. (Id.). She has been licensed as a mental health counselor for approximately fifteen years and as an addiction counselor for approximately thirteen years. (CP 64).

Life Designs' staff includes people who have had personal experience with addiction and recovery. For instance, Life Designs

employed Matt Donahue and Jonathan Gross, each of whom have had personal experience with addiction and each of whom are in recovery. (CP 190-195). These employees mentored Mr. Sommer's son while his son was a Life Designs client. (CP 191, 193).

Client Enrollment and New Business

To enroll new clients, Life Designs employed Clay Garrett as its Program/Admissions Director. (CP 197-98). Mr. Garrett worked with potential clients and their parents to make sure the program was a good fit for the young adult and that the young adult was a good fit for the program. (CP 198). He would also work with Educational Consultants. (CP 198-200). Educational Consultants are professionals hired by the parents of the potential client to guide the family in selecting an appropriate recovery program for the young adult. (CP 198-99).

Mr. Garrett attended annual conferences of Educational Consultants to develop referral sources. (CP 198). He reached out to these consultants on a regular basis and provided them with Life Designs' promotional materials. (CP 198-200). He worked to develop relationships with these consultants because he relied upon them to refer potential clients to Life Designs. (Id.).

Potential clients, their parents, and their Educational

Consultants use the internet to gather information about Life Designs and other recovery programs to assist them in selecting a recovery program. (CP 199-200). From many possible recovery programs, Educational Consultants typically narrow the potential clients' selection to three recommended programs. (CP 199). The potential client then selects which one he or she prefers. (Id.).

Mr. Garrett would send the Educational Consultants promotional materials and direct them and the potential clients to Life Designs' website. (CP 198-200). He would also provide website information to the potential clients' families and to therapists. (Id.). This online marketing effort drove Educational Consultants and potential clients to Life Designs' website and supplied factual information enabling them to choose Life Designs over available alternatives. (Id.).

Indeed, Educational Consultants would frequently call Mr. Garrett with client referrals. (CP 199). When Mr. Garrett received a referral, he would follow up with the Educational Consultant and inquire about the potential client. (Id.). He would then acquire certain testing, hold discussions with the potential clients, and speak with their families and therapists. (CP 199). Again, he provided them with Life Designs' website information to assist

them in their process of selecting a program. (CP 199-200).

Life Designs' online presence thus formed the bedrock of its new business development. (CP 198). Mr. Garrett was responsible for this website, which he built to be visually appealing and to highlight the benefits that the program offered. (CP 200). He also utilized social media to link to the website and provide a news feed to scientific papers about addiction. (CP 200). In this way, the website was an important marketing tool for receiving referrals and enrolling new clients. (CP 198-201).

In an effort to track the effectiveness of Life Designs' website and online presence, Mr. Garrett used Google Analytics and his own record keeping to monitor client inquiries and would then use Life Designs' records to measure his progress in enrolling clients. (CP 200). Mr. Garrett generally closed at a rate of 28%. (CP 200). In other words, for every 10 referrals, he averaged 2.8 new clients. (Id.). Life Designs' online marketing was essential to its referral and enrollment rate. (CP 198-201).

In late 2012 to early 2013, however, Mr. Garrett noticed that while Life Designs' website traffic was increasing, its referral and enrollment rates were decreasing. (CP 201). Meanwhile, Mr. Garrett learned the reason for this sudden drop in referrals and

enrollment: Mr. Sommer's defamatory website. (CP 201).

Mr. Sommer's Spoof Website

In 2012, Life Designs had a contract dispute with Mr. Sommer, the parent of a client. (CP 48). This dispute left Mr. Sommer infuriated with Life Designs. (CP 48). Fueled by revenge, on June 26, 2012, Mr. Sommer emailed Mr. Barranco, threatening to destroy Life Designs' reputation:

I would hope that the most important thing to you is your reputation. We all know how easily reputations can be destroyed without the legal system even getting involved. But I would go both routes if I have to.

(CP 48, 54, 257). This email was not an empty threat. Mr. Sommer contacted one of Life Designs' referral sources, Chad Balagna, then director of Red Cliff Assent Young Adult Program, and told him to not send any more referrals to Life Designs. (CP 202, 241-243).

On June 28, 2012, Mr. Sommer obtained the domain name www.lifedesignsranchinc.com. (CP 253-55). This domain name is nearly identical to that of Life Designs' actual domain name, www.lifedesignsinc.com, and to that of its prior domain name, www.lifedesignsranch.com. (CP 48, 248-255).

The practical effect of selecting this domain name is as predictable as it was calculated to damage Life Designs' business.

When a potential new client searched the internet for Life Designs, Mr. Sommer's spoof website appeared next to the legitimate Life Designs website in the search results. (CP 221). Mr. Sommer intended this result in selecting this domain name. He aimed to redirect potential clients to his defamatory website. (CP 239-240).

On or about late August or early September of 2012, Mr. Sommer maliciously loaded a host of false and defamatory content to his spoof website. (CP 246). These webpages contained false statements about the education and experience of Life Designs' staff, the quality of its recovery programs, and the therapeutic environment offered to its clients, for instance:

What you get ... 2 or 3 twelve step meetings a week in a very small western Washington community where the only young adults in attendance are those from Life Designs ranch.

(CP 248). Meetings occurred, however, in Eastern Washington, not in Western Washington. (CP 58, 244).

This spoof webpage falsely described the therapeutic outdoor environment as follows:

A visual experience of pine trees, dead pine trees, falling down pine trees, disintegrated pine trees, and more pine trees. River, can't be seen. Mountains, can't be seen.

(CP 248). In fact, the therapeutic outdoor environment Life

Designs offered includes breathtaking views of the Pend Oreille River, mountains, and living pine trees. (CP 52).

Mr. Sommer maliciously published the following false, defamatory, and damaging statement to his spoof website:

Who should Go? You should go to Life Designs if: ... You believe that it takes no education or experience with substance abuse, or compassion for the young adult who is recovering from a substance addiction to help them become the person they want to be.

(CP 249). As Mr. Sommer later conceded, this statement is false.

(CP 245). In fact, Life Designs employed staff who were educated, who have had personal experience with addiction, and who are in recovery, including staff that mentored Mr. Sommer's son while his son was a client at Life Designs. (CP 64-65, 190-95).

Additionally, Mr. Sommer republished false and defamatory content to his website by providing a hyperlink and directing people to "click or cut and paste the link." (CP 249). This link was to "www.heal-online.org/lifedesigns.htm" ("HEAL Website"). (Id). The HEAL Website maliciously suggests that Life Designs' mental health counselor and therapist, Kimberly Mlinarik, worked at a youth facility named Wilderness Quest in 2007 and alleges that a young man passed away while he was enrolled there. (CP 65). However, Ms. Mlinarik did not work at Wilderness Quest in 2007

and never worked with the young man who was alleged to have passed away there. (Id.).

The website further described Life Designs as a prison and labor camp and falsely asserted that the Barrancos charge clients thousands of dollars for nothing more than food and shelter:

Life designs Ranch claims to help you pursue your life's passions. That is only true if your life passion fits into what the other 11 prisoners and their wardens consider their life passion.

Therapeutic environment??? Only for the staff and the owner, Vince Barranco, who finds that charging 12 young adults \$8000 to \$9000 a month for food and housing permits him to pursue his life passions since he really doesn't have to work and has free labor to increase the value of his property.

(CP 250). These malicious statements are patently false, cast the Barrancos in a false light, and caused substantial harm and damage.

Life Designs' Abrupt Decline in Enrollment

As a result of the false and defamatory content that Mr. Sommer published on his spoof website, Life Designs' reputation suffered tremendously. (CP 49). During the period when Mr. Sommer published his website, Life Designs' referral rate declined by a staggering 56%. (CP 201). This equates to 9-12 clients that, but for the website, would have enrolled as new clients. (Id.).

Mr. Sommer's website caused this decline. Prior to the time

Mr. Sommer published his spoof website, Life Designs received a constant number of referrals from referral sources. (CP 201). During the operational period of Mr. Sommer's spoof website, however, the number of referrals that Life Designs received drastically declined. (CP 201-202). Notably, nothing else changed during that timeframe. (CP 202). The only variable was Mr. Sommer's website and his communication with Mr. Balagna. (Id.).

This website negatively impacted Life Designs' opportunity to be among the three programs selected by Educational Consultants and, consequently, to be even considered by potential clients. As a direct result of this maliciously created website, Life Designs' business dropped dramatically. (CP 49, 201-202). To date, Life Designs has been unable to regain the average number of referrals and clients it received prior to Mr. Sommer's tortious conduct. (CP 49).

B. Procedural Posture.

On March 25, 2013, Life Designs filed this lawsuit. (CP 1-7). On July 11, 2013, they amended their Complaint, advancing claims for defamation, invasion of privacy, and tortious interference with business expectancy. (CP 11-19). On November 20, 2013, Life Designs moved for partial summary judgment regarding

defamation per se. (CP 28-30). The trial court denied this motion, concluding that Mr. Sommer's false statements were not defamatory per se as a matter of law and reasoning as follows:

These are not extreme instances of libel, rather they are in the "vague areas of public confidence, injury to business, etc." and as such, a jury should determine if they are libelous per se.

(CP 88-92).

The Court later dismissed the defamation claim on summary judgment, including defamation per se. (CP 297-98, 343-346). In dismissing this claim, the trial court erroneously reasoned that the record lacked evidence of causation and that Mr. Sommer's false statements were not actionable. (CP 297-298).

In ruling on Mr. Sommer's subsequent motion for summary judgment, the trial court dismissed Life Designs' invasion of privacy and tortious interference claims. (CP 348-351). The trial court inaccurately reasoned that the record lacked evidence of causation and that the record lacked evidence as to business expectancy and resulting loss. (*Id.*). Life Designs timely appealed.

IV. ARGUMENT

A. Standard Of Review.

"The standard of review on appeal of a summary judgment order is de novo." Herron v. Tribune Publ'g. Co., Inc., 108 Wn.2d

162, 169, 255, 736 P.2d 249 (1987). Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56. “*A material fact is one upon which the outcome of litigation depends.*” Tran v. State Farm Fire & Cas. Co., 136 Wn.2d 214, 223, 961 P.2d 358 (1998). “*The facts and reasonable inferences therefrom are construed most favorably to the nonmoving party.*” Korslund v. Dyncorp Tri-Cities Serv’s, Inc., 156 Wn.2d 168, 177, 125 P.3d 119 (2005).

The trial court erred when it denied Life Designs’ Motion for Partial Summary Judgment Regarding Defamation Per Se and when it dismissed Life Designs’ claims on summary judgment.

B. The Trial Court Erred When it Denied Life Designs’ Motion for Partial Summary Judgment Regarding Defamation Per Se.

A publication is defamatory per se:

[I]f it (1) exposes a living person to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social intercourse, or (2) injures him in his business, trade, profession or office.

Caruso v. Local Union No. 690 of Int’l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., 100 Wn.2d 343, 353, 670 P.2d 240 (1983). In “*extreme cases*,” the issue of whether a publication is defamatory per se is a question of law. Id. at 246,

670 P.2d 240. Generally, the determination is one of fact. Id. See Amsbury v. Cowles Pub'g Co., 76 Wn.2d 733, 738, 458 P.2d 882 (1969) (explaining that the trial court determines whether a publication is capable of defamatory meaning and the jury determines whether the publication is in fact defamatory). However, a court may conclude that a statement is defamatory per se as a matter of law where “*reasonable persons could reach but one conclusion.*” Ernst Home Ctr., Inc. v. United Food & Commercial Workers Intern. Union, 77 Wn. App. 33, 40, 888 P.2d 1196 (1995).

If a publication is defamatory per se, it is actionable absent proof of actual damages because general damages are presumed. Maison de France, Ltd. v. Mais Oui!, Inc., 126 Wn. App. 34, 44, 53-54, 108 P.3d 787 (2005); see, e.g., Waechter v. Carnation Co., 5 Wn. App. 121, 485 P.2d 1000 (1971) (affirming judgment in action where false statements concerning the plaintiffs’ milk delivery business constituted defamation per se absent proof of special damages).

Furthermore, “*where no matters of public concern are involved, presumed damages to a private plaintiff for defamation without proof of actual malice may be available.*” Mais Oui!, Inc., 126 Wn. App. 34, 108 P.3d 787 (2005) (adopting Dun & Bradstreet,

Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (concluding that permitting a private plaintiff to recover presumed damages in a defamation case does not offend the First Amendment where the statements do not involve matters of public concern)). The foundation for presumed damages has been succinctly stated:

The rationale of the common-law rules has been the experience and judgment of history that “proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and circumstances of publication, it is all but certain that serious harm has resulted in fact.”

Dun & Bradstreet, Inc., 472 U.S. at 760 (quoting W. Prosser, Law of Torts § 112, p. 765). Where the plaintiff is a private figure, the applicable standard of fault is negligence. Valdez-Zontek v. Eastmont Sch. Dist., 154 Wn. App. 147, 159, 225 P.3d 339 (2010).

This case involves an extreme instance of defamation sufficient for the Court to conclude as a matter of law that the false publications are defamatory per se. This website is a direct attack on Life Designs’ business with respect to such critical aspects of a recovery program as its therapeutic environment and the education, experience, and compassion of its staff. (CP 248-51). It is particularly extreme in that it adopts and republishes the content of the HEAL Website, falsely suggesting that Life Designs’ mental health counselor worked at Wilderness Quest and counseled a

fifteen-year-old boy who the HEAL Website alleges to have passed away there. (CP 64-64, 249).

Furthermore, reasonable minds cannot differ that the false content posted to Mr. Sommer's website exposed Life Designs to hatred, contempt, ridicule, and obloquy, deprived them of public confidence and injured them in their business. (CP 248-51). Before Mr. Sommer posted his website, Life Designs had a stellar reputation and received numerous referrals, recommendations, and new clients. (CP 48-49, 200-202). After he posted his website, however, Life Designs suddenly suffered extreme hardship and loss to its reputation. (CP 49, 200-202). This harm was Mr. Sommer's aim from the outset. (CP 257). Mr. Sommer got his revenge.

Once Mr. Sommer disparaged Life Designs' reputation, it received far fewer referrals and new clients enrolling in the program. Specifically, before Mr. Sommer posted his defamatory website, Life Designs averaged 17 referrals and 4.6 clients per quarter; after he posted this website, Life Designs averaged 6.25 referrals and 1.75 new clients per quarter. (CP 49). Thus, Life Designs' referral rate declined by approximately 56%. (CP 201). Indeed, Clay Garrett, Life Designs' Program and Admissions Director, opined that Mr. Sommer's website reduced the number of

referrals and, consequently, the number of new clients that enrolled with Life Designs². (CP 196- 227). Furthermore, Mr. Sommer acted not only with negligence but also with malice in publishing his defamatory website containing false statements of private, not public, concern. See infra at IV.C.3.

As a matter of law, Life Designs is entitled to general damages presumed under a theory of defamation per se. The trial court erred when it denied Life Designs' Motion for Partial Summary Judgment on this issue and, again, when it dismissed this claim outright. At a minimum, evidence is sufficient to create genuine issues of material fact for the jury with respect to whether Mr. Sommer is liable under a theory of defamation per se.

C. The Trial Court Erred When it Granted Mr. Sommer's Motion for Summary Judgment and Dismissed Life Designs' Defamation Claim.

A statement is defamatory if it tends to harm the reputation of another to the extent of lowering the person in the esteem of the community or to deter persons from associating or dealing with the person. Right-Price Recreation, LLC v. Connells Prairie Cmty. Council, 146 Wn.2d 370, 382, 46, P.3d 789 (2002). A defamation

² Life Designs filed with the Court the Declaration of Clay Garrett in opposition to Defendant's Motion for Summary Judgment, not in support of its Motion for Partial Summary Judgment Re: Defamation Per Se.

claim has four elements: “(1) a false statement, (2) publication, (3) fault, and (4) damages.” Duc Tan v. Le, 177 Wn. 2d 649, 662, 300 P.3d 356 (2013). “A defamation claim implicates highly complex issues” Alpine Indus., Computers, Inc. v. Cowles Publ’g Co., 114 Wn. App. 371, 378, 57 P.3d 1178 (2002).

1. The Content That Mr. Sommer Published on His Website Is Actionable, and Genuine Issues of Material Fact Exist That They Are False.

Whether a statement is capable of defamatory meaning is a question of law. Wood v. Battle Ground Sch. Dist., 107 Wn. App. 550, 572, 27 P.3d 1208 (2001). Whether a statement is in fact defamatory is a question of fact. Id. Of course, “*the line between fact and opinion is sometimes blurry.*” Davis v. Fred’s Appliance, Inc., 171 Wn. App. 348, 365, 287 P.3d 51 (2012). Here, however, the trial court blurred this line and erred in doing so. (CP 297-98).

“*Falsity can be express or implied.*” Schmalenberg v. Tacoma News, Inc., 87 Wn. App. 579, 590, 943 P.2d 350 (1997). A statement is actionable where “*it express or implies provable facts, regardless of whether the statement is, in form, a statement of fact or a statement of opinion.*” Valdez-Zontek, 154 Wn. App. 147, 157, 225 P.3d 339 (2010). Courts consider the following factors to determine whether a publication is one of fact or opinion:

(1) the medium and context in which the statement was published, (2) the audience to whom it was published, and (3) whether the statement implies undisclosed facts.

Dunlap v. Wayne, 105 Wn.2d 529, 539, 716 P.2d 842 (1986).

As a preliminary matter, foreign jurisdictions have recognized the defamatory nature of spoof websites. See, e.g., Taylor Bldg. Corp. of Am. v. Benfield, 507 F. Supp. 2d 832, 840 (S.D. Ohio 2007) (concluding that statements that were injurious to the plaintiff's reputation as a builder were defamatory per se where such statements imputed to the plaintiff lack of skill and reluctance to address consumer concerns). Winer v. Senior Living Guide, Inc., No. 12-934, 2013 WL 1217582 (W.D. Pa. Jan. 17, 2013) (unpublished) (denying a motion to dismiss a defamation claim based on allegations that a spoof website that siphoned business away from the plaintiff contained false and misleading statements).

A proper understanding of what spoof websites are, a publisher's objective in creating them, the response of the audience, and the impact that the website has on the publisher's target is necessary to applying the common law of defamation in the age of posting content to the internet. While some spoof websites may be intended as parody or for comic effect, many spoof websites are, conversely, designed to deceive the audience as a malicious attack

on the intended victim's reputation.

The context of the content that Mr. Sommer loaded to the internet confirms that his spoof website was one of the latter ilk, intended not for comical effect but, rather, to attack Life Designs' excellent reputation in the recovery community. (CP 248-55). This audience accessed the spoof website looking for factual content about Life Designs in order to determine the particular program in whose care the young adult would be placed.

The response of the audience, here, was clear, as indicated by the abrupt drop in referrals and client enrollment: young adults struggling with addiction and other behavioral issues, their parents, and their Educational Consultants, after seeing the false content on the spoof website, chose to look elsewhere for treatment programs. (CP 200-202). This spoof website significantly damaged Life Designs' reputation. (CP 49, 200-202). Such a website should not be tolerated under the black letter law of defamation of this state.

Furthermore, Mr. Sommer's false statements are actionable, as all three Dunlap factors weigh heavily in Life Designs' favor. They were posted to the internet and, consequently, published to the world in the medium and context of a spoof website. (CP 248-251). He designed his website to mislead his audience into

believing that the website was created by Life Designs and to supply to Life Designs' potential clients and referral sources false information about its natural setting and staff. (CP 248-251).

As Mr. Sommer testified in his deposition, he selected the domain name www.lifedesignsranchinc.com to trick the audience into believing that the link lead to Life Designs' actual webpage, thereby diverting potential clients to Mr. Sommer's defamatory website that contained false and defamatory content:

Q: Why didn't you register a different name? Why did you choose lifedesignsranchinc.com?

A: Because I wanted people to see it when they were searching for Life Designs Ranch.

(CP 239-240). Mr. Sommer's strategy worked. When a potential client searched for Life Designs on the internet, Mr. Sommer's website appeared next to the legitimate Life Designs website in the search results. (CP 221).

Moreover, under Dunlap, the nature and expectation of the audience is paramount. 105 Wn.2d at 539, 716 P.2d 842. Notably, here, the defamatory statements were not made on an interactive internet forum facilitating the exchange of ideas and debate where a reader may expect competing expressions of opinion and even inflammatory language. This website was not a blog. It was not Twitter, nor was it a review website where opinions are encouraged

and expected. It had no interactive feature inviting online dialogue.

Rather, it was a website taking on the appearance of Life Designs' legitimate website. It was published both to the world and to a target audience of young adults, their parents, and their Educational Consultants whom accessed the website expecting to find factual information concerning Life Designs for the purpose of assessing the program's suitability for the young adult on his or her path to recovery.

The third Dunlap factor, whether the statement implies false facts, is "*perhaps the most crucial factor to consider.*" Id. The content of Mr. Sommer's website is provably false, as follows.

Twelve Step Meeting

What you get ... 2 or 3 twelve step meetings a week in a very small western Washington community where the only young adults in attendance are those from Life Designs ranch.

(CP 248). This direct statement of fact is false. Life Designs is located in Eastern Washington, in the Pend Oreille River Valley, and situated directly on the Selkirk International scenic loop. (CP 52). Mr. Sommer admitted that his statement was false:

Q: And my question is: That statement is false, correct?

...

The Witness: It's false only in that it was not a

Western Washington community it was an Eastern Washington community.

(CP 244). This statement is provably false.

Mr. Sommer also published on his website the following provably false statement:

Therapeutic Environment

What you get

...
A visual experience of pine trees, dead pine trees, falling down pine trees, disintegrated pine trees, and more pine trees. River, can't be seen. Mountains, can't be seen. Civilization, can't be seen. But there are pine trees !!!!!

(CP 248).

The statement that neither the river nor mountains can be seen is a statement of fact that is patently false. The Pend Oreille River is directly in front of the property and is easily visible. (CP 48, 52). Life Designs is surrounded by living pine trees and offers breathtaking views of the surrounding mountains and an abundance of plant and animal life. (Id.).

Staff Qualifications

Perhaps the most damaging defamatory factual statement that Mr. Sommer's published on his website falsely expresses and implies that Life Designs' staff lacked education, experience, and compassion for young adults recovering from substance addiction:

Who should Go? *You should go to Life Designs if: ... You believe that it takes no education or experience with substance abuse, or compassion for the young adult who is recovering from a substance addiction to help them become the person they want to be.*

(CP 249). This statement is demonstrably false.

When questioned about it, Mr. Sommer admitted that if Life Designs had an employee with substance abuse education or a person with substance abuse experience, then the content he published on his defamatory website would be false:

Q: So if there was staff members who had experience with substance abuse on staff with Life Designs, then that statement would be false?

A: Correct.

Q: And if there was a person on staff for Life Designs that had specific education with substance abuse, that statement will be false?

A: Correct.

(CP 245). At the time Mr. Sommer's son attended Life Designs, Matt Donahue and Jonathan Gross were on staff at Life Designs and mentored Mr. Sommer's son. (CP 190-195). They have had personal experience with addiction and are in recovery. (*Id.*). Moreover, Ms. Kimberly Mlinarik has specific education with substance abuse and was employed full time by Life Designs. (CP 64). This posting contains provably false factual statements.

HEAL Website

Mr. Sommer republished false and defamatory content originally published on the Human Earth Animal Liberation (HEAL) Website by posting on his website this defamatory link: www.heal-online.org/lifedesigns.htm. (CP 249). The link leads to a webpage that falsely suggests that Life Designs' mental health counselor and therapist, Kimberly Mlinarik, worked at a youth facility named Wilderness Quest in 2007 where, the website alleged, a fifteen-year old passed away while a client there. (CP 65). Ms. Mlinarik, however, did not work at Wilderness Quest in 2007 and did not counsel or interact with the fifteen-year-old individual that is the subject of that website. (CP 65).

Mr. Sommer's website is littered with provably false facts that are, as a matter of law, capable of defamatory meaning.

2. Mr. Sommer Published False Statements to the World Including, but Not Limited to, Republication by the Act of Linking.

A statement is published when it is "*communicated to someone other than the person defamed.*" Doe v. Gonzaga Univ., 143 Wn.2d 687, 701, 24 P.3d 390 (2001), reversed on other grounds by Gonzaga University v. Doe, 536 U.S. 273 (2002). Posting defamatory communications on a public website, including

linking to a website, constitutes publication to a third party. See Momah v. Bharti, 144 Wn. App. 731, 752-753 (2008); see, e.g., In re Perry, 423 B.R. 215, 269-270 (Bankr. S.D. Tex 2010) (hyperlink to a blog constituted publication). Here, Mr. Sommer published malicious and defamatory statements about Life Designs when posting his website to the public. Furthermore, Mr. Sommer republished the defamatory statements contained on the HEAL Website by the act of posting a link thereto.

3. Mr. Sommer Published Defamatory Statements under any Standard of Fault.

The applicable standard of fault turns on the plaintiff's status as either a public or a private figure. Caruso, 100 Wn.2d at 352, 670 P.2d 240. This determination is a question of law for the court. Valdez-Zontek, 154 Wn. App. at 159, 225 P.3d 339 (2010). Life Designs is a private, not public, figure. See Momah, 144 Wn. App. at 741 n.6, 182 P.3d 455 (“*A public figure is one who willingly enters the public sphere either by occupying positions of persuasive power and influence or by thrusting themselves to the forefront of a particular controversy.*”).

The standard of fault is negligence for a private figure. Valdez-Zontek, 154 Wn. App. at 159, 225 P.3d 339. “*The negligence standard is that the defendant knew or, in the exercise of*

reasonable care, should have known that the statement was false or would create a false impression in some material respect.” Mais Oui!, Inc., 126 Wn. App. at 44, 108 P.3d 787 (quoting Vern Sims Ford, Inc. v. Hagel, 42 Wn. App. 675, 680, 713 P.2d 736 (1986)). The standard of proof is a preponderance of evidence. Valdez-Zontek, 154 Wn. App. at 157, 225 P.3d 339.

Where a qualified privilege applies, however, a private plaintiff must prove malice to show that the privilege was abused. Story v. Shelter Bay Co., 52 Wn. App. 334, 341-42, 760 P.2d 368 (1988). *“To prove actual malice a party must establish that the speaker knew the statement was false, or acted with a high degree of awareness of its probable falsity, or in fact entertained serious doubts as to the statement’s truth.”* Id. The standard of proof is clear and convincing evidence. Id.

Here, the record is replete with evidence satisfying even the heightened malice standard of fault. Mr. Sommer acted with animus and intent to destroy Life Designs’ reputation and business. Motivated by animus stemming from a contract dispute with Life Designs, Mr. Sommer emailed Mr. Barranco a threat that he would destroy Life Designs’ reputation:

I hope that the most important thing to you is your reputation. We all know how easily reputations can

be destroyed, without the legal system even getting involved. But I would go both routes if I have to.

(CP 257). Mr. Sommer understood that the success of any recovery program depended upon maintaining its reputation in the “*close-knit community*” of “*the recovery world*” to generate referrals for client enrollment. (CP 257, 237-38). Mr. Sommer’s testimony confirms his aim to devastate Life Designs’ reputation:

A. That the recovery world is a very small, close-knit community.

Q. Okay. Anything else?

A. People rely on referrals from other people and if so-and-so knows so-and-so who knows so-and-so who knows so-and-so, things become a problem rapidly.

(CP 237-238).

Having made his threat, Mr. Sommer pursued a course of conduct consistent with his stated objective to destroy Life Designs’ reputation. He acquired a domain name similar to that of Life Designs, sat at his computer, loaded whatever false and defamatory factual statements came to mind, and published the same to be viewed by potential clients, their parents, and Educational Consultants. (CP 246, 248-255).

Mr. Sommer knew that the content he loaded to this website was false because his own son was a client of Life Designs and he visited his son at the Cusick, Washington facility. (CP 240). Nor

did he conduct any meaningful investigation into the truth or accuracy of his statements including the statements he republished from the HEAL Website by virtue of a link. (CP 240, 245). Mr. Sommer aimed to create a false impression as to the education, experience, and compassion of Life Designs' staff and the therapeutic outdoor experience that Life Designs offers. In doing so, he devastated Life Designs' reputation.

4. Mr. Sommer Is Not Privileged To Publish False and Defamatory Information.

After the plaintiff establishes a prima facie defamation case, the burden shifts to the defendant to establish that a privilege applies. Valdez-Zontek, 154 Wn. App. at 162, 225 P.3d 339. See Demopolis v. Peoples Nat. Bank of Wash., 59 Wn. App. 105, 114-15, 796 P.2d 426 (1990) (listing limited situations where a qualified privilege may apply (citing The Restatement (Second) of Torts (1977)). If the defendant establishes that the privilege applies, the burden shifts to the plaintiff to demonstrate that the privilege was abused by proving that the defendant acted with actual malice Valdez-Zontek, 154 at 162, 225 P.3d 339.

Here, no privilege applies and, in any event, Mr. Sommer abused any privilege by acting with malice. See supra at IV.C.3

D. The Trial Court Erred When It Dismissed Life Designs' Tortious Interference With A Business Expectancy Claim.

Genuine issues of material fact exist with respect to each of the following elements of Life Designs' tortious interference claim:

(1) the existence of a valid contractual relationship or business expectancy; (2) that defendants had knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that defendants interfere for an improper purpose or used improper means; and (5) resultant damage.

Pac Nw. Shooting Park Ass'n v. City of Sequim, 158 Wn.2d 342, 351, 144 P.3d 276 (2006) (quoting Leingang v. Pierce Cnty. Med. Bureau, Inc., 131 Wn.2d 133, 157, 930 P.2d 288 (1997)).

- 1. Genuine Issues of Material Fact Exist That Life Designs Had A Valid Business Expectancy, That Mr. Sommer Had Knowledge of Such Business Expectancy, And That He Interfered With This Expectancy Which Caused Life Designs to Lose Business.**

Life Designs had valid business expectancy in receiving referrals and enrolling clients. (CP 48-49, 196-203). This business expectancy is based upon historical data regarding referrals and client enrollment, previously successful promotional efforts, and relationships that Life Designs formed with client referral sources. (Id.). Mr. Sommer had actual knowledge that Life Designs had valid business expectancy in receiving referrals and obtaining new

clients to maintain Life Designs' ongoing business operations and profitability. (CP 48-49, 198-201, 237-238, 241-43, 257). He knew that Life Designs' success depended on receiving referrals and, ultimately, maintaining its untarnished reputation in the "*small, close-knit community*" of the "*recovery world*." (*Id.*). Accordingly, he threatened to destroy Life Designs' reputation. (CP 257).

Following through with his threat, Mr. Sommer intentionally interfered with Life Designs' business expectancy. (CP 201-203, 239-245, 248-255). He acquired a domain name similar to that of Life Designs' true website and he loaded to it demonstrably false and damaging information concerning the outdoor experience that Life Designs offered and the education, experience, compassion, and background of its staff. (CP 248-55). He supplied this false information to the world, generally, and to the "*recovery world*," specifically. (CP 238, 248-55). As a result, Life Designs' referral rate and number of incoming clients plummeted suddenly and drastically. (CP 49, 200-203).

2. Genuine Issues of Material Fact Exist That Mr. Sommer Intentionally Interfered with Life Designs' Business Expectancy for an Improper Purpose or Improper Means.

A plaintiff may demonstrate that interference was wrongful by showing that the defendant acted with either an improper

purpose or an improper means. Leingang, 131 Wn.2d 133, 157, 930 P.2d 288 (1997). Improper purpose is shown by evidence of “*an improper objective of harming the plaintiff.*” Pleas v. City of Seattle, 112 Wn.2d 794, 803, 806, 774 P.2d 1158 (1989). Additionally, “[i]nterference can be ‘wrongful’ by reason of a statute or other regulation, or a recognized rule of common law, or an established standard of trade or profession.” Id. at 804, 774 P.2d 1158.

Mr. Sommer’s intentional interference with Life Designs’ business expectancy was wrongful because he acted with an improper objective of destroying Life Designs’ reputation and its business. Mr. Sommer made his objective clear from the outset by his threat that he sent via email to Mr. Barranco in which he confirms that he would take any steps necessary to destroy Life Designs’ reputation. (CP 237-38, 257). Mr. Sommer confirmed at his deposition that he intended to ruin Life Designs’ reputation by taking extrajudicial action. (CP 237-238).

Mr. Sommer then proceeded with a course of conduct consistent with his threat. Not only did he publish false and defamatory content to his website but he also instructed a known referral source of Life Designs to not send Life Designs referrals.

(CP 202-203). Mr. Sommer acted with an improper purpose.

Additionally, he acted with an improper means. Specifically, his conduct was wrongful in relation to the law of defamation and the Barrancos' right of privacy. Mr. Sommer supplied false and defamatory content to the recovery community to deter them from becoming Life Designs' clients and to Educational Consultants to discourage them from referring clients to Life Designs. (CP 248-255). In doing so, he defamed Life Designs and cast the Barrancos in a false light. This interference was wrongful.

E. Admissible Evidence Creates Genuine Issues of Material Fact That Mr. Sommer's Tortious Conduct Was a Cause In Fact Of Life Designs' Damages.

Proximate cause is comprised of two prongs: "*cause in fact and legal causation.*" Christen v. Lee, 113 Wn.2d 479, 507, 780 P.2d 1307 (1989). Here, Mr. Sommer's tortious conduct was the legal cause of Life Designs' damages due to the close connection between the harm to Life Designs' business and reputation and Mr. Sommer's conduct. See Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d 468, 478-79, 134 Wn.2d 468 (1998) (explaining that legal causation focuses on whether "*as a matter of policy, the connection between the ultimate result and the act of the defendant is to remote or insubstantial to impose liability.*").

To satisfy the cause in fact prong of the proximate causation analysis, a plaintiff “*need only show [] ‘a chain of circumstances from which the ultimate fact required is reasonable and naturally inferable.’*” Conrad ex rel. Conrad v. Alderwood Manor, 119 Wn. App. 275, 281, 78 P.3d 177 (2003) (quoting Attwood v. Albertson’s Food Ctr’s., Inc., 92 Wn. App. 326, 331, 966 P.2d 282 (1998)). As such, a “*plaintiff need not establish causation by direct and positive evidence.*” Id. Whether conduct is the but for cause of injury is generally a factual question for a jury. Hartley v. State, 103 Wn. 2d 768, 778, 698 P.2d 77 (1985).

Here, Mr. Sommer’s tortious conduct was the “but for” cause of Life Designs’ damages. As a preliminary matter, the fact of damages is clear. During the time Mr. Sommer posted his spoof website, Life Designs’ referral rate plummeted by 56%. (CP 201). Instead of receiving its average of 17 referrals and 4.6 clients per quarter, once Mr. Sommer published his spoof website, Life Designs received a drastically decreased average of 6.25 referrals and 1.75 clients per quarter. (CP 49). Mr. Sommer succeeded in destroying Life Designs’ hard earned reputation. (CP 48-49).

Notably, prior to the time Mr. Sommer published his website, the number of referrals from Educational Consultants was constant.

(CP 201). Those referrals, however, drastically declined once Mr. Sommer created his defamatory website. (CP 201-202). Nothing else changed during this time frame, the only variable being the website itself and Mr. Sommer's directive to Mr. Balagna. (CP 202). This website impacted Life Designs' ability to be one of the three programs that potential clients even *considered*. (CP 201).

Furthermore, based upon Mr. Garrett's experience and expertise in the role of Admissions Director and Program Director of an after-care program like Life Designs and his experience in other roles in this field, and after completing the analysis of Mr. Sommer's spoof website on Life Designs' client enrollment, he provided the expert conclusion that the website caused Life Designs to lose referrals and, consequently, 9-12 students. (CP 202).

F. The Trial Court Erred When It Dismissed Life Designs' False Light Invasion Of Privacy Claim.

False light is one of four categories of invasion of privacy. Mark v. Seattle Times, 96 Wn.2d 473, 497, 635 P.2d 1081 (1981). A false light claim exists:

[W]hen someone publicizes a matter that places another in a false light [i]f (a) the false light would be highly offensive to a reasonable person and (b) the actor knew of or recklessly disregarded the falsity of the publication and the false light in which the other would be placed.

Eastwood v. Cascade Broad. Co., 106 Wn.2d 466, 470-71, 722 P.2d 1295 (1986). “A plaintiff need not be defamed to bring a false light action.” Id. at 471, 722 P.2d 1295.

Here, Mr. Sommer publicized content on his website that cast the Barrancos in a false light. The website falsely equates clients’ experience at Life Designs with prison:

. . . . Life Designs Ranch claims to help you pursue your life’s passions. That is only true if your life passion fits into what the other 11 prisoners and their wardens consider their life passion. . . .

Therapeutic environment??? Only for the staff and the owner, Vince Barranco, who finds that charging 12 young adults \$8000 to \$9000 a month for food and housing permits him to pursue his life passions since he really doesn’t have to work and has free labor to increase the value of his property.

(CP 250). It further depicts the Barrancos as employing staff that lacks education, experience, and compassion and as operating a recovery program that lacks an outdoor therapeutic experience.

(CP 248-255). Such content is highly offensive to a reasonable person. Mr. Sommer knew the content he loaded on his website was false because he visited the Cusick, Washington facility when his son was a client of Life Designs. (CP 240).

Furthermore, Mr. Sommer recklessly disregarded the falsity of the content he published. He was not concerned with the facts.

Indeed, the tone of Mr. Sommer's email to Mr. Barranco confirms that he was focused not on the facts but on taking whatever steps were necessary to ruin the Barrancos' reputation. (CP 257). He simply sat down at his computer and, "*without any thought*," started typing whatever false content came to mind. (CP 246). This conduct caused substantial damages. (CP 47-49).

V. CONCLUSION

The trial court erred when it dismissed Life Designs' claims for defamation, tortious interference with business expectancy, and invasion of privacy and when it denied Life Designs' Motion for Partial Summary Judgment Regarding Defamation Per Se. Life Designs respectfully requests that this Court reverse the trial court's summary judgment rulings and remand to the trial court for further proceedings.

DATED this 11th day of March, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of March, 2015, a true and correct copy of the foregoing document was served by the method indicated below to the following parties:

<input checked="" type="checkbox"/>	HAND DELIVERY	Scott C. Cifrese
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