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COURT OF APPEALS
STATE OF WASHINGTON

No. 75117-4-1

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

LANE ELLEN TOLLEFSEN, a Washington resident,

Appellant,

v.

GREGORY L. JANTZ and LaFON JANTZ, husband and wife, and their marital community; MICHAEL GURIAN and "JANE DOE" GURIAN, husband and wife, and their marital community; ANN McMURRAY and "JOHN DOE" McMURRAY, husband and wife, and their marital community; RANDOM HOUSE LLC, a Delaware limited liability company; and CARRIE ABBOTT and "JOHN DOE" ABBOTT, husband and wife, and their marital community,

Respondents.

ANSWERING BRIEF OF RESPONDENTS

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I. INTRODUCTION

This defamation lawsuit arises from a single paragraph in a book about society's inattention to the different ways boys and girls learn and the resulting harm to boys. In an introductory chapter, Respondent and co-author Gregory Jantz, a psychologist, relays that his young son once told him his classmates take a pill each day in front of the teacher to treat what Dr. Jantz assumed were attention disorders. The excerpt does not say the teacher did anything wrong or reveal the teacher's name, gender, or school. Rather, as Appellant Lane Tollefsen admits, Dr. Jantz simply "want[ed] his audience to know that a large number of boys are being medicated for 'attention issues[,] and including a personal story ... was the vehicle to do that.'" CP 50.

Nonetheless, Ms. Tollefsen, a teacher, claims the statement—in the book, as well as a similar statement made by Dr. Jantz in a radio interview and a clarification designed to address her concerns—defamed her by accusing her of criminal activity. The law does not permit a libel claim to survive in such circumstances.

First, the statements are not capable of defamatory meaning, a threshold question of law. Dr. Jantz's statements in the book and broadcast do not disparage the (unnamed) teacher, nor imply the teacher illegally distributed controlled substances to her students. To the contrary,

they suggest the teacher was monitoring students as they took prescribed pills, a perfectly lawful act. Ms. Tollefsen's hypersensitive interpretation is insufficient, as a matter of law, to state a defamation claim.

Nor does the clarification have defamatory meaning. To the contrary, the clarification dispels any such meaning, stating neither Dr. Jantz nor his co-authors "intended to imply that any teacher had engaged in any criminal activity whatsoever" and they instead "believed, and expected readers and listeners to believe, that the medication was legally prescribed and parents had authorized this conduct in school."

Second, Ms. Tollefsen failed to plead or provide evidence to support another *prima facie* element of a libel claim: falsity. She has provided no evidence the statement Dr. Jantz actually made—that his son told him this anecdote—is false. Nor does she dispute that the substance of the book's statement—many boys in the school receive medication—is true. Rather, she says students take their pills in a school office, not in class. Under the substantial truth doctrine, a libel claim cannot be based on a minor inaccuracy, where, as here, the gist of the statement is accurate.

Third, Ms. Tollefsen has not satisfied a third *prima facie* element, that the allegedly defamatory statement be "of and concerning" the plaintiff. Here, none of the accused statements identifies the teacher, the

teacher's gender, the school, or even the year the referenced incident took place. They are not "of and concerning" Ms. Tollefsen.

Fourth, Ms. Tollefsen's claims for infliction of emotional distress fail for the same reasons as her defamation claims. The First Amendment protections limiting defamation actions apply to all claims, regardless of the label, that are based on the alleged injurious falsehood of speech. Ms. Tollefsen's emotional distress claims also are deficient because the evidence does not establish the required elements of a *prima facie* case.

Early resolution of defamation cases is "essential," and summary judgment is favored, because unwarranted defamation claims pose a threat to free debate and the exercise of First Amendment rights. *Mark v. Seattle Times*, 96 Wn.2d 473, 484-85, 487, 635 P.2d 1081 (1981). The Superior Court, recognizing this, properly dismissed the claims with prejudice.

II. ISSUES PRESENTED

1. Whether the Superior Court erred by granting summary judgment on a libel claim brought by a teacher alleging that a statement that boys take pills in front of a teacher in school for attention issues accused her of committing a felony, where the statement does not identify the teacher, student, school, or year, is made in the context of a book about the differences between boys and girls, including misdiagnosis of boys with attention disorders, and makes no assertions about criminal conduct.

2. Whether the Superior Court erred by granting summary judgment on a defamation claim brought by the same teacher alleging that a clarification that expressly dispels any intent to accuse her of a crime defames her.

3. Whether the Superior Court erred by granting summary judgment on claims for infliction of emotional distress based on the same facts.

III. STATEMENT OF THE CASE

A. Defendants' Book Includes An Anecdote About An Unnamed Teacher.

This case concerns *Raising Boys by Design: What the Bible and Brain Science Reveal about What Your Son Needs to Thrive*, a 228-page book co-authored by Dr. Jantz and Defendant Michael Gurian. CP 333 ¶ 20. Dr. Jantz is a Christian author and speaker and a nationally certified psychologist. He has written 26 books, writes a regular column for *Huffington Post*, and is featured on CNN and in other news media. CP 150 ¶ 2. He has counseled many parents about their sons' struggles in school and otherwise. *Id.* ¶ 3. Mr. Gurian is a certified mental health counselor. He too has authored 26 books and been featured in news media such as the *New York Times* and *Wall Street Journal*. CP 157-158 ¶ 2. Mr. Gurian's work focuses mainly on gender differences and how boys and girls learn and develop differently. *Id.*

The two men met in 2009 when Dr. Jantz attended the Gurian Institute, which trains professionals in gender-based differences in learning and development. CP 158 ¶ 3; CP 151 ¶ 4. During this visit, Dr. Jantz and Mr. Gurian developed the idea to co-write a book for Christian parents. Although there were numerous books on the subject of gender differences—including Gurian’s own *The Wonder of Boys*—none appeared to approach the subject from a scientific and Christian view. CP 151 ¶ 4 & Ex. 2 at 209-225 (copy of *Raising Boys by Design*); CP 158 ¶ 3. As fathers, both men cared deeply about this issue. CP 158 ¶ 3; CP 151 ¶ 4. Dr. Jantz’s agent contacted WaterBrook Multnomah, a division of Respondent Random House LLC, which agreed to publish the book. *See* CP 330 ¶ 8. The two men wrote the book with the assistance of Respondent Ann McMurray, who helped with editing and writing. CP 158 ¶ 3; CP 151 ¶ 4.

Raising Boys by Design aims to help parents by discussing the different ways boys develop and learn, and society’s failure to recognize these differences. Ex. 2. Chapter 9 focuses on schooling, and notes that increasingly, boys are falling behind in school. *See id.* at 141-42. Dr. Jantz notes he has counseled “increasing numbers of parents who wonder whether they should put their sons on medication just to get them through school.” *Id.* Mr. Gurian writes he has “met with hundreds of

parents in the same boat.” *Id.* The authors state “[i]t is worth remembering that most teachers ... have not been trained in the ways boys learn and develop differently than girls and may, therefore, make profound mistakes without realizing it”; and that “[t]he vast majority of teachers are good people who want their students to succeed” and are “often delighted to learn that help is available.” *Id.* at 147.

The authors also discuss schooling in Chapter 1. They state “[a]round one million boys are being medicated for brain disorders earlier than there can be certainty of diagnosis.” *Id.* at 13. To personalize this statistic, Mr. Gurian recounts his own experience taking Ritalin as a child for supposed attention issues. *Id.* at 11. Dr. Jantz offers anecdotes from his childhood and that of his older son, Gregg Jr. Dr. Jantz felt bored in school, and teachers would comment that he was “disruptive” and “not working up to his potential.” *Id.* at 8. He continues:

As I established my career, I thought I had put all of that early anxiety and struggle behind me. Imagine my surprise when many of those feelings came flooding back as my sons began their schooling. Through my sons’ eyes, I realized that not much had changed since I’d been in school. The tipping point toward looking at the design of boys for the sake of my sons came soon after my oldest—my namesake, Gregg—started sixth grade at a new school. One day he reported a weird thing that had caught his attention. At the start of each day, a line of boys paraded up to the teacher’s desk and took some sort of pill. When

he relayed this oddity, my heart sank. The only conclusion I could draw was these boys were being medicated, probably with Ritalin or a similar drug, probably for ADD or ADHD.

Id. Shortly thereafter, the book recounts, school administrators advised Dr. Jantz and his wife, Respondent LaFon Jantz, to “consider putting our son on medication as well.” *Id.* He continues: “some children absolutely need medication to cope with very real issues,” but “medication is being overprescribed” because “far too many social systems today, while being truly devoted to helping children succeed, simply do not understand the way boys are designed.” *Id.* at 9.

WaterBrook Press published the book in the fall of 2013. As of September 2014, it had sold over 8,000 copies net of returns. CP 163 ¶ 3.

B. Dr. Jantz Appears On A Radio Broadcast.

To promote the book and awareness of the public issues it raises, Dr. Jantz appeared for an interview on the October 16, 2013, broadcast of “Legacy Out Loud,” a radio show on KCIS-AM hosted by Respondent Carrie Abbott, president of the non-profit Legacy Institute. CP 152 ¶ 5; *see also* Ex. 1 (audio recording), CP 196-197 (transcript excerpt).

During the broadcast, Dr. Jantz recounted the same anecdote contained in the book—that one of Gregg Jr.’s sixth-grade teachers told him Gregg Jr. might have “some kind of attention issues.” CP 196.

Dr. Jantz stated Gregg Jr. told him six to eight boys “go forward each day and they have to take their pill in front of the teacher. The pill’s for ‘attention issues.’” *Id.* Dr. Jantz stated he believed his son did not have attention issues and “[i]t had more to do with relationship and teaching and teachability,” noting “92 percent of the boys get the Ds and Fs. That alone tells us we have a problem.” CP 196-197. In response to Ms. Abbott’s comment “the onus on teaching is the teachers,” he responded, “[a]nd this is not for me picking on a teacher, or anything at all.... How can we do the very best for our sons in the classroom understanding there are brain differences?” CP 197. The program continued for another 18 minutes.

C. Ms. Tollefsen Claims Respondents Libeled Her, And Respondents Air A Clarification, Which She Also Claims Is Defamatory.

Neither the book nor the interview mentions the name of any of Gregg Jr.’s sixth-grade teachers, the school’s name, the year in which he relayed the anecdote, or any other identifying details about Gregg Jr.’s experiences. At the time Dr. Jantz wrote the book, he did not know which of Gregg Jr.’s teachers his son was describing. CP 152 ¶ 4.

In fact, Gregg Jr. was a sixth-grader at Kings Elementary School during the 2010-2011 school year. Ms. Tollefsen was one of his teachers. CP 150 ¶ 3. In November 2010, Ms. Tollefsen recommended that Gregg

Jr. be screened for attention issues. *Id.* The Jantzes had Gregg Jr. evaluated by a specialist and were told he did not have any attention disorder. *Id.* They believed Ms. Tollefsen was not the right fit for their son. *Id.* Later in the year, the Jantzes met with the school principal and inquired into their options, after which the principal switched Gregg Jr. to a different teacher's class. *Id.*

On April 21, 2014, Ms. Tollefsen served Random House LLC¹ with (but did not file) two complaints, naming as defendants the Jantzes, Gurians, McMurrays, and Random House. *See* CP 166-188. Both alleged that in the book and interview, Dr. Jantz accused Ms. Tollefsen of criminal conduct. *See id.* CP 167 ¶ 1, CP 179 ¶ 1 (“If the statements regarding Plaintiff’s alleged conduct were true, Plaintiff would lose her teaching license and be guilty of thousands of counts of felony distribution of a controlled substance (Schedule 11 drugs) to her students punishable by up to 20 years for each count (RCW 69.50.406). Plaintiff’s alleged conduct also constitutes child abuse under RCW 26.44.020.”); ¶ 17 (Dr. Jantz “was accusing [her] of ... criminal conduct”); ¶ 18 (Dr. Jantz “knows [KCIS] is listened to” by people “who would know which teacher he was accusing of criminal conduct.”); ¶ 19 (“to make sure that everyone knew that Plaintiff was allegedly engaging in criminal activity...”); ¶ 20 (“book

¹ Random House LLC, the named corporate defendant, no longer exists. It was merged into its parent company, Penguin Random House LLC, at the end of 2014.

alleged that Plaintiff regularly gave controlled substances to several of her male students”).

In light of the complaints, Respondents invoked the state Uniform Correction or Clarification of Defamation Act. That 2013 law “provide[s] strong incentives for individuals to promptly correct or clarify an alleged false statement as an alternative to costly litigation,” by limiting damages if a timely clarification is published. RCW 7.96.010, .060, .070. Counsel for Respondents notified Ms. Tollefsen’s counsel they intended to run a clarification before the statutory deadline. *See* CP202 ¶ 3 & CP 209-214. The Legacy Institute aired the clarification on KCIS twice, on May 21 and May 23, 2014. It stated:

Hi, this is Dr. Gregg Jantz. On October 16, 2013, I appeared on this program to discuss a book I co-authored, *Raising Boys by Design*. In the book and on the broadcast, I described an experience my son had in elementary school. My son recounted a daily routine in which several boys proceeded to the front of the classroom to take a pill in the morning. The pill, I explained on this program, was for “attention issues.” An elementary school teacher has started a lawsuit against me and the others, claiming that I falsely accused her of distributing a controlled substance to boys and therefore engaged in criminal acts. I wish to clarify that neither my co-authors nor I intended to imply that any teacher had engaged in any criminal activity whatsoever, nor do I have any reason to believe any teachers did. I believed, and expected readers and listeners to believe, that

the medication was legally prescribed and parents had authorized this conduct in school.

Ex. 1 (audio), CP 199 (transcript).

On July 14, 2014, Ms. Tollefsen filed a complaint similar to the prior ones, adding Ms. Abbott as a defendant and the clarification as another basis for her libel claims. *See* CP 337-338 ¶ 36, CP 341 ¶¶ 61-63.

D. This Court Dismisses Plaintiff's Claims Under the Anti-SLAPP Law and Then on Summary Judgment.

On September 12, 2014, Respondents filed a “Special Motion to Strike” under RCW 4.24.525. CP 218-248. That law, enacted in 2010, was intended to combat SLAPPs, or “lawsuits brought primarily to chill the valid exercise of the constitutional right[] of freedom of speech and petition.” S.B. 6395, 61st Leg., 2010 Reg. Sess. The statute permits the target of a SLAPP to bring an early motion to strike a complaint. RCW 4.24.525(4)(b). At an October 10, 2014 hearing, the Court granted the motion, dismissed the Complaint with prejudice, and awarded fees and statutory damages as required by RCW 4.24.525(6). CP 250-252; CP 254. Ms. Tollefsen moved for reconsideration, which the Court denied. Sub. No. 32.

Ms. Tollefsen filed a notice of appeal December 19, 2014. Sub No. 34. On May 28, 2015, while the appeal was pending, the Washington Supreme Court held RCW 4.24.525 unconstitutional. *Davis v. Cox*, 183

Wn.2d 269, 292-93, 351 P.3d 862 (2015). Respondents moved this Court to remand the case, which it did on November 16, 2015.

On January 28, 2016, Respondents filed a motion for summary judgment. CP 97-127. At the February 26, 2016 hearing on the motion, the court asked Ms. Tollefsen's counsel "where are the damages here?" RP 12:17. Her counsel responded she had "suffered depression" and "damage to reputation is assumed." *Id.* 12:20-23. The Court inquired whether Ms. Tollefsen "los[t] her job" or "g[ot] reprimanded" or whether parents had complained, "[a]ny of those things that flowed from that statement?" *Id.* 12:25-13:6. Ms. Tollefsen's lawyer responded: "[t]he damages with respect to reputation are presumed." *Id.* 13:7-8. On March 22, 2016, the court granted Respondents summary judgment. CP 7-8.

IV. ARGUMENT

A. Standard of Review

This Court reviews *de novo* an order granting summary judgment. *See Beaupre v. Pierce County*, 161 Wn.2d 568, 571, 166 P.3d 712 (2007); *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 63-64, 1 P.3d 1167 (2000). It may affirm the trial court's ruling on any ground supported by the record, "even if the trial court did not consider the argument." *King County v. Seawest Inv. Assocs., LLC*, 141 Wn. App. 304, 310, 170 P.3d 53 (2007) (citation omitted). Summary judgment, in turn, is proper when

there is “no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law.” CR 56(c). Plaintiff “must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.” CR 56(e); *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989).

Ms. Tollefsen failed to make such a showing here.

B. Summary Judgment is Favored in Defamation Cases.

“In defamation cases, summary judgment plays an important role: ‘Serious problems regarding the exercise of free speech and free press guaranteed by the First Amendment are raised if unwarranted lawsuits are allowed to proceed to trial. The chilling effect of the pendency of such litigation can itself be sufficient to curtail the exercise of these freedoms.’” *Life Designs Ranch, Inc. v. Sommer*, 191 Wn. App. 320, 328, 364 P.3d 129 (2015) (quoting *Mark*, 96 Wn.2d at 485). Unless those “desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors.” *Mark*, 96 Wn.2d at 485.

Recognizing this, the Washington Supreme Court has held “a defamation plaintiff resisting a defense motion for summary judgment must establish a *prima facie* case by evidence of convincing clarity.”

Mark, 96 Wn.2d at 487 (emphasis added); accord *Camer v. Seattle Post-Intelligencer*, 45 Wn. App. 29, 37, 723 P.2d 1195 (1986). Ms. Tollefsen suggests this is the wrong standard and the Superior Court erred by applying it. App. Br. at 19-22. But there is no reason to believe (even assuming this is the wrong standard, which it is not²) the Superior Court applied the convincing clarity standard. And Respondents argued in the Superior Court (as they do here) the claims fail regardless the standard. See CP 14. Again, this Court may affirm on any basis.

C. The Superior Court Did Not Err in Concluding Ms. Tollefsen’s Defamation Claim Fails as a Matter of Law.

A defamation plaintiff must prove four elements: (1) a false and defamatory statement of and concerning plaintiff, (2) an unprivileged communication, (3) fault, and (4) damages. *Commodore v. Univ. Mech. Contractors, Inc.*, 120 Wn.2d 120, 133, 839 P.2d 314 (1992); *Camer*, 45 Wn. App. at 36; *Sims v. Kiro, Inc.*, 20 Wn. App. 229, 233, 580 P.2d 642 (1978). See also App. Br. at 19. Ms. Tollefsen cannot show any of the allegedly libelous statements are capable of defamatory meaning or, even

² The Washington Supreme Court has not limited or overruled *Mark v. Seattle Times*, 96 Wn.2d 473, 635 P.2d 1081 (1981). *Richmond v. Thompson*, 130 Wn.2d 368, 922 P.2d 1343 (1996), App. Br. at 20-21, suggests the First Amendment does not demand this proof, but *Mark* does not say it does; rather, it holds that “*policy reasons*, rooted in the First Amendment, for an early testing of plaintiff’s evidence by a convincing clarity burden continue to be persuasive.” 96 Wn.2d at 487 (emphasis added). Thus, the rule is at worst unsettled. See *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005) (“Case law is unclear as to whether a private plaintiff facing a defense motion for summary judgment must make a *prima facie* showing of all of the elements of defamation with convincing clarity or by a preponderance of the evidence.”).

if they are, they are materially false. Nor are the statements “of and concerning” her, as neither the book nor the broadcast identify her. Finally, there is no evidence Ms. Tollefsen suffered any damages, and she cannot recover presumed damages because she has not shown Respondents acted with actual malice. The Superior Court did not err.

1. The Book, Broadcasts, And Clarification Are Not Defamatory As A Matter Of Law.

A “court must initially decide, *as a matter of law*, whether the statement or communication is capable of a defamatory meaning.” *Ernst Home Ctr., Inc. v. United Food & Commercial Workers Int’l Union*, 77 Wn. App. 33, 44, 888 P.2d 1196 (1995) (emphasis added). *See also* App. Br. at 32-33 (“Courts determine whether a communication is capable of defamatory meaning.”) (citation omitted). This is because “not every misstatement of fact is actionable.” 77 Wn. App. at 44. “Rather, it must be apparent that the false statement or communication presents a substantial danger to the plaintiff’s personal or business reputation.” *Id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 559 (1977) (statement is defamatory if “it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him”).

Thus, courts dismiss defamation claims based on statements that, while allegedly false, are not reasonably susceptible to any defamatory meaning. *See, e.g., Sabharwal & Finkel, LLC v. Sorrell*, No. 155808/2012, 2013 N.Y. Misc. LEXIS 2066 (N.Y. Sup. Ct. May 9, 2013) (“The statement made by defendants that plaintiffs were hired on a contingency fee basis is also not defamatory as there is nothing improper or derogatory in a law firm handling a case on a contingency fee basis.”); *Contemporary Mission, Inc. v. N.Y. Times Co.*, 665 F. Supp. 248, 259-60 (S.D.N.Y. 1987) (“[o]ther statements alleged to be libelous are not false, or even if false could not be considered defamatory,” including statement that diocese has jurisdiction over certain priests), *aff’d*, 842 F.2d 612 (2d Cir. 1988); *Pulver v. Avco Fin. Servs.*, 182 Cal. App. 3d 622, 638 (1986) (allegation that person failed to pay debts of another was not defamatory absent statement that person was responsible for the debts); *Aronson v. Creditrust Corp.*, 7 F. Supp. 2d 589, 592 (W.D. Pa. 1998) (dismissing defamation claim arising from statement that plaintiff entered into a settlement agreement because the statement, “even if false, is not capable of a defamatory meaning”); *Tatur v. Solsrud*, 481 N.W.2d 657, 658 (Wis. Ct. App. 1992) (false statements about a candidate’s voting record not considered defamatory), *aff’d*, 498 N.W.2d 232 (Wis. 1993).

Courts also routinely reject claims that a statement is defamatory because it implies disparaging facts about the plaintiff. “It is the statements themselves that are of primary concern in the analysis.” *Auvil v. CBS “60 Minutes”*, 67 F.3d 816, 822 (9th Cir. 1995) (applying Washington law to reject claim of libel by implication). *See also Yeakey v. Hearst Commc’ns, Inc.*, 156 Wn. App. 787, 793, 234 P.3d 332 (2010) (rejecting claim that news report about crane accident implied crane operator caused the accident merely because it discussed his criminal record and substance abuse). As another case notes:

The defamatory character of the language must be ***apparent from the words themselves***. Washington courts are bound to invest words with their natural and obvious meaning and ***may not extend language by innuendo or by the conclusions of the pleader***. Even if language is ambiguous, resolution in favor of a disparaging connotation is not justified.

Lee v. Columbian, Inc., 64 Wn. App. 534, 538, 826 P.2d 217 (1991)
(emphasis added) (internal quotation marks and citations omitted).

Without this rule, it would be “difficult for broadcasters to predict whether their work would subject them to tort liability,” which would “raise[] the spectre of a chilling effect on speech.” *Auvil*, 67 F.3d at 822.

Thus, in *Lee*, the Court of Appeals refused as a matter of law to read a disparaging implication into a report that plaintiff, a poker

promoter, “ha[d] devised an unusual way to reduce his taxes and stay within the letter of the law on gambling” by lowering his poker table fees by 50 cents per half hour and instead charging the same amount as a parking fee. 64 Wn. App. at 536. The plaintiff alleged the statement implied he was exploiting a tax loophole. *Id.* at 538. The court disagreed: “Even if language is ambiguous, resolution in favor of a ‘disparaging connotation’ is not justified.” *Id.*

United States Mission Corp. v. Kiro TV, Inc., 172 Wn. App. 767, 292 P.3d 137 (2013), rejected the plaintiff’s claim of implied defamation. The court found the broadcasts at issue did not imply plaintiff, a halfway house, was “deliberately” seeking violent criminals to participate in its door-to-door soliciting program, but instead stated that some of its residents had prior felony convictions, and that these residents engaged in door-to-door solicitation. *Id.* at 774. A statement from a neighbor that she found the solicitors threatening did not imply plaintiff “deliberately employs known criminals to solicit donations as a tactic because use of such people to solicit donations is an effective means of threatening people with harm if they do not contribute.” *Id.* The court also rejected plaintiff’s theory that the broadcasts implied it “falsely pretends to have a religious mission in order to escape government regulation,” even though the broadcasts stated the plaintiff “says the government can’t regulate their

door-to-door solicitation because of religious free speech,” a licensing division had “opened an investigation anyway,” a former resident said there were no religious aspects when he was a resident, and neighbors solicited said “nobody mentioned religion.” *Id.* at 774-75.

As these cases make clear, “the fact that some person might, with extra sensitive perception, understand ... a [defamatory] meaning cannot compel [a] court to establish liability at so low a threshold.” *Forsher v. Bugliosi*, 26 Cal. 3d 792, 803, 805-06 (1980) (rejecting claim that book implied plaintiff murdered someone by stating plaintiff and companion drove victim to remote campground where victim’s body was later found, police did not verify his alibi, and companion was later murdered). *See also, e.g., Loeb v. New Times Commc’ns Corp.*, 497 F. Supp. 85, 90-91 (S.D.N.Y. 1980) (article did not imply plaintiff caused a fire despite statements that it was “mysterious” and disposed of plaintiff’s primary competitor); *Moritz v. Med. Arts Clinic, P.C.*, 315 N.W.2d 458, 459, 461 (N.D. 1982) (letter from clinic to patient stating its doctors would no longer treat her because “your past actions have made it difficult for them to accept you as a patient” did not accuse her of “wrongful acts or behavior, whether of a direct criminal nature or of a socially immoral or distasteful conduct”).

Applying this law here, none of the statements Ms. Tollefsen targets can be the basis for a viable defamation claim. First, the Court may quickly dispense with Ms. Tollefsen's claims as to the clarification broadcast (the only basis for liability against Ms. Abbott). Ms. Tollefsen alleges the clarification is defamatory because it "accused [her] of dispensing controlled substances to students in her class." CP 331 ¶ 9. The clarification says no such thing. It simply notes the unnamed teacher's first lawsuit *claimed* defendants "falsely accused her of distributing a controlled substance to boys and therefore engaged in criminal acts," and then *dispels* that very alleged implication: "neither my co-authors nor I intended to imply that any teacher had engaged in any criminal activity whatsoever" and Dr. Jantz "believed, and expected readers and listeners to believe ... that the medication was legally prescribed and parents had authorized this conduct in school." Ex. 1 & CP 199. The clarification states the *opposite* of the implication alleged. It is not defamatory as a matter of law.

Second, the anecdote in the book and broadcast about boys taking pills in front of their teacher in the classroom, in the context of a discussion about the over-diagnosis of attention disorders in boys, does not imply that the teacher engaged in any criminal acts, or state anything else remotely capable of defamatory meaning. It merely recounts a story

told to Dr. Jantz by his young son. Ms. Tollefsen does not (nor could she) allege that Dr. Jantz's son did not tell him this story, which in any event was meant to focus on the fact that boys take medication in school—not the manner in which it was administered. Moreover, Dr. Jantz (and, in the book, his co-authors) repeatedly state that such diagnoses and medication are *not* the fault of any one teacher. *See* Ex. 2 at 147 (book: “The vast majority of teachers are good people who want their students to succeed” and are “often delighted to learn that help is available.”); Ex. 1 & CP 197 (broadcast: Dr. Jantz was “not ... picking on a teacher” but wondering “[h]ow can we do the very best for our sons in the classroom understanding there are brain differences?”).

As a matter of law, no reasonable reader would interpret the book or broadcast as stating the teacher is—as Ms. Tollefsen asserts—“guilty of thousands of counts of felony distribution of a controlled substance to her students,” engaged in “criminal conduct,” or “regularly gave controlled substances to several of her male students.” CP 329 ¶ 1, CP 332-333 17-20. Ms. Tollefsen's declaration supports this conclusion: Even her fellow teachers and school administrators believe her claims are meritless. *See* CP 82 ¶ 26 (“There was never any support from King's Schools or from the parent organization CRISTA Ministries to come to my defense ...”); CP 92 (school's statement it “did not see a viable claim”).

Nor is the statement that boys take medication in front of their teacher capable of defamatory meaning. Such conduct is legal: a school may train and designate any employee, including a teacher, to dispense medication. *See* RCW 28A.210.260. Defendants did not know nor imply that Gregg Jr.’s teacher lacked this training. In fact, Dr. Jantz did not even know to which teacher Gregg Jr. was referring. CP 150-151 ¶ 3.

Ms. Tollefsen claims this analysis “only applies when the allegedly defamatory statement is actually true.” App. Br. at 33. But she cites no case that says this, nor is it correct: if a false statement is not capable of defamatory meaning, just as if it were a true statement, it cannot be the basis of a claim for libel by implication. *Supra* at 16. Ms. Tollefsen relies on *Lee v. Columbian, Inc.*, 64 Wn. App. 534, 540 (1991), but that case does not, as she claims, limit its analysis to true statements. (Indeed, the page she cites does not even discuss the plaintiff’s defamation claim, but rather his outrage claim.) Moreover, even if Ms. Tollefsen’s argument were correct (and it is not), she provides no evidence or reason to believe the statement at issue—that Gregg Jr. told Dr. Jantz boys take medication in front of the teacher—is false.³

³ Ms. Tollefsen also cites *Garrison v. Louisiana*, 379 U.S. 64 (1964), for the proposition that “‘knowingly false statement[s] and false statements made with reckless disregard for the truth’ are not entitled to First Amendment protection.” App. Br. at 33 n.89. But as the Supreme Court has held, there is no such categorical rule. *See, e.g., Rickert v. State, Pub. Disclosure Comm’n*, 161 Wn.2d 843, 850 n.7, 168 P.3d 826 (2007) (Supreme Court

In essence, Ms. Tollefsen asks this Court to permit liability for a statement that an unidentified teacher supervised children taking medication for attention disorders. As a matter of law, this is not actionable. It says nothing negative about the teacher. It does not suggest she engaged in criminal conduct. And the context expressly negates the innuendo Ms. Tollefsen's pleadings artfully seek to read into these statements. As in *Forsher*, "the fact that [Ms. Tollefsen]" has "extra sensitive perception" and took the book or broadcast to convey a defamatory meaning does mean the statements are defamatory. 26 Cal. 3d at 805-06. *See also Moritz*, 315 N.W.2d at 461 ("The fact that plaintiff places a defamatory connotation on the statement does not make it actionable."). Ms. Tollefsen offers no evidence that the meaning she ascribes Respondents' statements is anything but her own. The Superior Court properly dismissed Ms. Tollefsen's claims.

2. The Statements Are Not Materially False.

Ms. Tollefsen's claims also fail because she has not provided any evidence of falsity. Ms. Tollefsen repeatedly accuses Respondents of

"has not held that false statements about public figures made with actual malice, but which are not defamatory, are devoid of all constitutional protection"). In fact, the U.S. Supreme Court has distinguished *Garrison*, noting that "isolated statements in some earlier decisions do not support the ... submission that false statements, as a general rule, are beyond constitutional protection" and reasoning that "some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee." *United States v. Alvarez*, ___ U.S. ___, 132 S. Ct. 2537, 2544-45 (2012).

stating, as a fact, that boys took medication in front of their teacher. *See, e.g.,* App. Br. at 2, 26, 27-28, 30, 40. But that is not what they said. Instead, they said Dr. Jantz's young son told him this happened. *See* Ex. 2 at 8; Ex. 1, CP 196. These are two very different things. Further, a reasonable reader would not assume the truth of every detail in a statement attributed to a child. Sub No. at 17-18; Sub No. at 7. Nor has Ms. Tollefsen produced any evidence suggesting Gregg Jr. did not, in fact, tell his father this anecdote. Thus, whether Ms. Tollefsen has ever been present when a child took medication in her classroom is irrelevant to proving falsity.

In any event, Ms. Tollefsen's claims fail because the alleged inaccuracies she challenges are immaterial. Ms. Tollefsen asserts the book and broadcast are false because students do not take medication in front of the teacher; rather, they go to the nurse. CP 335-336 ¶¶ 27-31. This minor inaccuracy is insufficient to support a defamation claim.

Washington does not require the "literal truth of every claimed defamatory statement." *U.S. Mission Corp.*, 172 Wn. App. at 779. A statement need only be "substantially true or [] the gist of the story, the portion that carries the 'sting', [must be] true." *Id.*

Ms. Tollefsen argues the "sting" inquiry "goes to the elements of causation and damages." CP 43. She fails to explain why, even if true,

this alters the conclusion about the gist of the statements. Moreover, she offers no authority for this conclusion, and it is wrong. As the Court of Appeals has held, to prevail on the *falsity* element of a libel 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.” *U.S. Mission Corp.*, 172 Wn. App. at 769. Ms. Tollefsen also claims “the ‘sting’ inquiry is only applicable when a statement contains a mixture of true and false negative statements about the person that is the subject of the statement.” CP 43. None of the authority she cites supports this assertion.⁴ A portion of Respondents’ statements—that a child told his father that boys take medication in school—is true. Because the allegedly false portion—this takes place in front of their teacher—does not change the “sting,” Ms. Tollefsen has not shown falsity.

3. The Statements Were Not “Of and Concerning” Plaintiff.

The book and broadcasts also are not defamatory because they do not identify Ms. Tollefsen. A *prima facie* claim of defamation requires the allegedly defamatory statement be “of and concerning” the plaintiff,

⁴ Ms. Tollefsen relies on *Duc Tan v. Le*, 177 Wn.2d 649, 300 P.3d 356 (2013), but that decision is inapposite and, if anything, supports Respondents. *Duc Tan* concerned an attempt to extend the “sting” analysis “to allow opinion statements to provide protection to otherwise actionable false statements.” *Id.* at 667. Respondents do not advocate such an extension here. Moreover, in *Duc Tan*, there was no truth to any of the defendants’ statements. *Id.* at 668. Here, undisputedly, it is true that boys take medication in school.

meaning “the identification of the plaintiff as the person defamed” “must be certain and apparent from the words themselves.” *Sims*, 20 Wn. App. at 234. The “of and concerning” element also is required by the First Amendment, *Rosenblatt v. Baer*, 383 U.S. 75, 82-83 (1966), because it “limits the right of action for injurious falsehood ... to those who are the direct object of criticism and den[ies] it to those who merely complain of nonspecific statements they believe cause them some hurt.” *Blatty v. N.Y. Times Co.*, 42 Cal. 3d 1033, 1044 (1986). The requirement “immunize[s] a kind of statement which, though it can cause hurt to an individual, is deemed too important to the vigor and openness of public discourse in a free society to be discouraged.” *Id.*

The “of and concerning” test turns on “not whom the story intends to name but who a part of the audience may reasonably think is named[.]” *Sims*, 20 Wn. App. at 234. *See also Seelig v. Infinity Broad. Corp.*, 97 Cal. App. 4th 798, 809 (2002) (“[s]tatements ... cannot form the basis of a defamation action if they cannot ‘reasonably [be] interpreted as stating actual facts about an individual.’”).

[I]f it can be said as a matter of law that the plaintiff has failed to submit convincingly clear proof of his identity as a target of an allegedly libelous statement, the trial court must dismiss the action when a motion for summary judgment is brought on that basis by the defendant.

Sims, 20 Wn. App. at 234.

Neither the book nor the broadcast are of and concerning Ms. Tollefsen. Respondents did not reveal her name or the name of the school where she teaches. They did not specify the year Dr. Jantz's son attended school, or provide any other details that would aid a reader or listener in identifying Ms. Tollefsen. No gender was disclosed in the reference and, furthermore, Ms. Tollefsen was one of three sixth-grade teachers at Gregg, Jr.'s school. Dr. Jantz did not know which of them his son was referring to when Gregg Jr. told him the anecdote. The book and broadcast simply do not identify Ms. Tollefsen.

Ms. Tollefsen has presented no admissible evidence anyone understood the passage as referring to her. Instead, she says she is identifiable because the removal of a student from class is rare and the interview was broadcast on a station owned by the same parent company as the school. App. Br. at 24, 26. This speculation cannot create an issue of fact. *See Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986) (A "nonmoving party in a summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on affidavits considered at face value.").

Ms. Tollefsen suggests two colleagues recognized she was the subject of the statements. CP 40. But those colleagues refused to give

declarations, and Ms. Tollefsen did not seek to take their depositions. Her say-so is inadmissible hearsay. *See* CP 80 ¶¶ 15-16. *See* CR 56(e) (non-movant cannot rely on inadmissible evidence to oppose summary judgment). Further, the two colleagues are the other sixth-grade teachers, and the school told Ms. Tollefsen it “did not see a viable claim based on *the vague wording and lack of reference to King’s, CRISTA or you.*” CP 92 (emphasis added). Because Respondents’ statements are not “of and concerning” Ms. Tollefsen, dismissal was proper for this reason, too.

4. Ms. Tollefsen Has Provided No Evidence of Fault Or Damages.

Ms. Tollefsen’s libel claim fails for additional reasons: she has not alleged, nor can she provide any evidence, either that Respondents acted with actual malice, or that she suffered any recoverable damages. “[I]n a defamation action, the plaintiff must present evidence of special or actual damages resulting from the statement.” *Robel v. Roundup Corp.*, 103 Wn. App. 75, 92-93, 10 P.3d 1104 (2000), *rev’d on other grounds*, 148 Wn.2d 35 (2002). Alternatively, if a statement is libelous per se, damages can be “presumed,” but *only* if “liability is based upon malice.” *Wood v. Battle Ground Sch. Dist.*, 107 Wn. App. 550, 573, 27 P.3d 1208 (2001).

Here, the Complaint does not allege (as CR 9(g) requires) and Ms. Tollefsen does not submit any competent evidence of special damages,

i.e., “compensatory damages that reflect ‘the loss of something having economic or pecuniary value.’” *Schmalenberg v. Tacoma New, Inc.*, 87 Wn. App. 579, 599 n.56, 943 P.3d 350 (1997) (quoting RESTATEMENT (SECOND) OF TORTS § 575 cmt. b). Ms. Tollefsen says King’s Schools did not renew her teaching contract, but admits the school told her it did so because she chose to bring this lawsuit, *not* because of Respondents’ statements or the school believed she had illegally medicated students. CP77 ¶ 4, CP 82 ¶ 26. *Schmalenberg*, 87 Wn. App. at 599 n.56 (to show special damages, economic loss must be proximately caused by defamatory statement). She offers only her unsupported “belief” that the statements in the book and broadcast were “factors in the school’s decision.” CP 77 ¶ 4. This is insufficient to create an issue of material fact. *See Meyer*, 105 Wn.2d at 852.⁵

Alternatively, although Ms. Tollefsen has alleged Respondents committed libel *per se*, she is not entitled to presumed damages, for at least two reasons.

First, she has not (nor could she) alleged actual malice, which requires showing a defendant knew the statement was false or acted with reckless disregard of its falsity. *Mark*, 96 Wn.2d at 482. Put to her proof,

⁵ Ms. Tollefsen’s declaration states she has suffered depression. CP 80 ¶ 17. It does not say her depression was caused by the passage, nor does she provide any independent evidence (e.g., a statement from her doctor) of this fact, or any evidence of money spent on treatment.

Ms. Tollefsen offers no evidence of actual malice, other than a conclusory, unsupported assertion that “[i]t is clear ... that Defendant Jantz’s story ... is a total fabrication.” App. Br. at 39. Ms. Tollefsen also notes the anecdote differs in the book and broadcast, App. Br. at 40, but points to no reason the differences are material or would be the result of intentional deception. This is not enough to prove actual malice, which requires showing the defendant “did in fact [entertain] serious doubts as to the truth of his publication.” *Herron v. Tribune Publ’g Co.*, 108 Wn.2d 162, 171, 736 P.2d 249 (1987); *Kauzlarich v. Yarbrough*, 105 Wn. App. 632, 647, 20 P.3d 946 (2001) (“circumstantial evidence of a possible malicious motive is a far cry from proving with clear and convincing evidence that [the defendant] knew his statement was false or was reckless in regard to its truth or falsity”).⁶

Second, under the state correction statute, the statutory clarification aired by Respondents absolutely bars Plaintiff from recovering presumed damages based on the radio broadcast. RCW 7.96.060.

5. The Litigation Privilege Bars Claims Premised On The Clarification.

To the extent Ms. Tollefsen bases her claim on the clarification itself, it is also barred by the litigation privilege. To take advantage of the

⁶ Defendants do not argue, as Ms. Tollefsen appears to believe, App. Br. at 36, she must show actual malice because she is a public figure. Nor have they made any argument relating to the common interest or fair report privileges, *see id.* at 35-36.

new clarification statute—which limits damages available to libel plaintiffs—Respondents were obligated to and did air a clarification within 30 days of service of the complaint. RCW 7.96.070(1) (clarification must be made within 30 days of request for correction or clarification); RCW 7.96.040(4) (service of complaint constitutes request). The litigation privilege provides absolute immunity for all claims based on the clarification. *See Demopolis v. Peoples Nat'l Bank of Wash.*, 59 Wn. App. 105, 109, 796 P.2d 426 (1990).

Ms. Tollefsen claims the litigation privilege is absolute only in judicial proceedings themselves. App. Br. at 34-35. But the authority she cites creates no such bright line rule. Moreover, the Restatement of Torts states that “[a] party to a private litigation ... is ***absolutely privileged*** to publish defamatory matter concerning another in communications ***preliminary to*** ... or in the institution of or during the course and as part of, a judicial proceeding in which he participates, if the matter has some relation to the proceeding.” Restatement (Second) of Torts § 587 (1977). Ms. Tollefsen admits she had served her lawsuit on Respondents when the clarification aired, App. Br. at 35, commencing an action. CR 3(a). Respondents’ clarification is related to, and was in fact part and parcel of that action, made pursuant to a statute that required timely compliance. *See* RCW 7.96.070. It is therefore absolutely privileged.

D. Ms. Tollefsen's Emotional Distress Claims Fail For the Same and Additional Reasons.

Ms. Tollefsen's remaining claims for intentional or negligent infliction of emotional distress are based on the same allegations as her defamation claim. CP 339-340 ¶¶ 51-59. As such, they fail for all the reasons her defamation claims fail. The constitutional limitations on defamation actions "apply to all claims whose gravamen is the alleged injurious falsehood of a statement." *Blatty*, 42 Cal. 3d at 1042; *see Snyder v. Phelps*, 562 U.S. 443, 451 (2011). Thus, where the First Amendment bars a libel claim, it also bars other claims based on the same facts. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52-57 (1988) (First Amendment barred Rev. Jerry Falwell's defamation claim based on satiric magazine feature, and also his infliction of emotional distress claim).

Following this rule, the Superior Court correctly dismissed Ms. Tollefsen's emotional distress claims, as numerous courts have done in similar cases. *See, e.g., Hutchins v. Globe Int'l, Inc.*, No. CS-95-097, 1995 WL 704983, at *11 (E.D. Wash. Oct. 10, 1995) ("Because Plaintiffs have failed to establish sufficient disputed facts to submit their defamation claim to a jury, their claims of intentional infliction of emotional distress and outrage must also be dismissed."); *Hitter v. Bellevue Sch. Dist.* No. 405, 66 Wn. App. 391, 402, 832 P.2d 130 (1992) (where common interest

privilege barred libel claim, emotional distress claim failed); *Hoppe v. Hearst Corp.*, 53 Wn. App. 668, 677, 770 P.2d 203 (1989) (no emotional distress claim where plaintiff failed to show actual malice on libel claim).

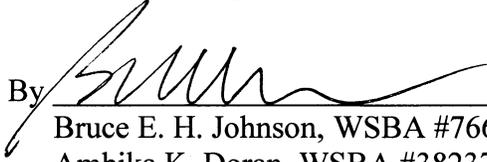
The Superior Court correctly dismissed the emotional distress claims on two additional bases. First, Respondents' conduct does not rise to the level required for intentional infliction of emotional distress (also known as "outrage"), because as a matter of law their conduct, even if wrongful, is not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989). Second, a claim for negligent infliction of emotional distress requires that the defendant has put the plaintiff in "actual peril," i.e., caused physical harm. *Waller v. State*, 64 Wn. App. 318, 337, 824 P.2d 1225 (1992); *Gain v. Carroll Mill Co.*, 114 Wn.2d 254, 787 P.2d 553 (1990). Ms. Tollefsen has not alleged any physical injury.

V. CONCLUSION

For these reasons, Respondents respectfully ask the Court to affirm the Superior Court's grant of summary judgment.

RESPECTFULLY SUBMITTED this 9th day of September, 2016.

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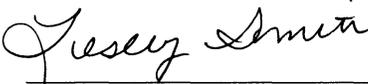
CERTIFICATE OF SERVICE

I hereby certify that I caused the document to which this certificate is attached to be delivered to the following as indicated:

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Declared under penalty of perjury under the laws of the state of Washington this 9th day of September, 2016.



Lesley Smith