

43155-6
No. 42155-6-II

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

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DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

JEFFERY AND RENEE KRUGER, a/k/a Zillow.com user
"pugetsoundcruiser," and the marital community comprised thereof, and
PACIFIC COAST CONSTRUCTION GROUP, INC., a Washington
corporation,

Appellants,

v.

JEFF DANIEL,

Respondent.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

In this lawsuit, Respondent Jeff Daniel, angered by Appellants' opinion about his skills as a real estate agent, alleges claims for libel, unfair competition, and tortious interference with a business expectancy, all because Appellant Jeffery Kruger wrote a negative review of Mr. Daniel on the popular real estate website Zillow.com. The review sets forth the basis for Mr. Kruger's opinion, i.e., that Respondent favors his own listings over those of others. Under hornbook First Amendment law, such opinion (which amounts to no more than an assertion of aggressive salesmanship) is protected speech and cannot be the basis for liability. Claiming someone is "dishonest" (or even unethical) is not a statement of fact, and readers expect such opinions in reviews.

The trial court, rather than dismiss this lawsuit outright, instead refused to apply Washington's new anti-SLAPP statute to Mr. Daniel's claims or grant Appellants' motion for judgment on the pleadings because it preferred to "err" on the side of allowing Respondent his day in court, and because, the court concluded, the review was not a matter of public concern, but rather the result of a personal dispute. In so ruling, the trial court ignored binding precedent.

First, the anti-SLAPP statute and decades of federal and state jurisprudence favor the early dismissal of meritless libel claims, and a

“liberal construction” of what claims are subject to the anti-SLAPP law. As Washington federal courts and California state courts (interpreting that state’s analogous statute) have universally and repeatedly found, consumer information such as online reviews are by definition a matter of public concern subject to the statute’s protections.

Second, the anti-SLAPP statute says nothing about a speaker’s motive, meaning it is wholly irrelevant to deciding whether a claim falls within its purview. Although the few Washington courts to have looked at the anti-SLAPP law have not considered this issue, California courts have. Whether Mr. Kruger intended to help consumers (which he did) or even carry out a vendetta (which he did not), so long as the review contains statements of public concern, it is subject to the anti-SLAPP statute.

Of course, the anti-SLAPP law does *not* provide an absolute immunity. Instead, it just shifts the burden to the defendant to prove, by clear and convincing evidence, a probability of prevailing on the merits of his claims, as on summary judgment. Respondent failed do so here. Not only is the review a protected opinion, but it was not made with the requisite level of fault nor did it cause identified damage. Moreover, Respondent’s remaining claims, premised on the same review, must also fall under the First Amendment. Even if not, courts in Washington have twice found that online reviews are not “trade” or “commerce” for

purposes of the Consumer Protection Act, nor can the subject of the review show any damages. Finally, claims for tortious interference require a prospective business relationship that was disrupted. Respondent has not alleged, let alone provided evidence, of such a relationship.

Even if the trial court properly found the anti-SLAPP statute inapplicable, it erred by failing to dismiss this lawsuit because the Amended Complaint fails to state a claim upon which relief can be granted, for nearly all of the same reasons, most of which do not require consideration of any evidence. Moreover, the Amended Complaint fails to identify the allegedly libelous statements, a First Amendment requirement.

In short, the trial court erred by failing to dismiss this lawsuit, allowing Respondent to increase the costs of meritless claims borne by Appellants, who were just exercising their rights to free speech. Because the anti-SLAPP remedies are mandatory, Appellants ask for their attorneys' fees in the trial court and on this appeal and statutory damages.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by denying Appellants' motion to strike the Amended Complaint under RCW 4.24.525.
2. The trial court erred by denying Appellants' motion to dismiss the Amended Complaint under CR 12(c).

3. The trial court erred by failing to award Appellants their attorneys' fees and impose statutory damages under the anti-SLAPP law.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Is a review about a top-selling real estate agent on a popular real estate website, critiquing the agent's business practices, despite that agent's widespread public statements about his qualifications, a matter of public concern that triggers the application of RCW 4.24.525?

2. If the anti-SLAPP law applies, should a court dismiss a claim premised on such a review where the plaintiff has failed to show the statements are false, were made with negligence or actual malice, or caused damage, and any related claims premised on the same review?

3. If the anti-SLAPP law applies, should a court dismiss a claim under the Consumer Protection Act where the alleged commercial activity comprises writing a review on a website, and the plaintiff has failed to allege any non-speculative damages?

4. If the anti-SLAPP law applies, should a court dismiss a claim for intentional interference with business expectancy where the plaintiff has failed to allege or provide evidence that any prospective relationships were actually disrupted?

5. If the anti-SLAPP law does not apply, should a court dismiss under CR 12(c) the same claims for the same reasons and where the Complaint fails to specify the allegedly libelous statements?

IV. STATEMENT OF THE CASE

A. Appellant Jeffery Kruger Posted a Negative Review of Respondent on the Website Zillow.com.

The following facts are undisputed, except as indicated.

Mr. Daniel is a Washington real estate agent and a leading agent in the Ocean Shores real estate community. CP 20 ¶ 5. He has been featured on radio programs and in newspapers and guides, and a guest speaker for the North Beach Chamber of Commerce. CP 20 ¶ 5; CP 27; CP 179-83; CP 540. He repeatedly holds himself out as honest and trustworthy:

My clients understand from the beginning that *I am serious when I say “I work for you.”* I appreciate that for most people investing in real property is the most momentous financial decision they ever make. I promise to educate my clients and customers about the current real estate market so they can make intelligent and informed decisions in an expedient manner.

CP 157, 165, 168, 170, 174, 176. *See also* CP 150 (describing himself as a “trusted resource for answers about the process”); CP 151 (it is “very important” that “you work with a reputable real estate agent—one who will look out for your best interests”); Mr. Daniel “belong[s] to a group of the most highly respected individuals in the profession of real estate”); CP

160 (pledging to be “BRUTALLY HONEST” and “DEDICATED to you and your needs”) (emphasis in original).

Appellants Jeffery and Renee Kruger are respectively the president and secretary of Appellant Pacific Coast Construction Group, Inc., which provides construction services to individuals building small vacation homes and mid-sized custom homes. *See* CP 83, 90. Ms. Kruger was at one time a licensed real estate agent but generally used the license not to sell homes, but for access to home listings. CP 91; CP 122-27, 209, 268.

On March 3, 2009, Mr. Kruger met Mr. Daniel and toured a home. CP 86-87. The parties dispute what happened at that meeting. Mr. Kruger recalls that Respondent told him he sells homes for which he is the listing agent by finding “some type of defect” in other homes and advising clients it is “indicative of the quality of this builder,” but not “point[ing] such things out” for his own listings. *Id. Cf.* 462 (Respondent denying claim without evidence). Although the parties dispute whether Appellants hired xl 50 \s WDKIOCore or after this meeting, it is undisputed that they did hire him. CP 207-08. As Appellants anticipated, Respondent sold more of their homes after becoming their agent. CP 115 ¶ 4; CP 116 ¶ 12.

Over time, at least one other agent and a former client of Mr. Daniel’s told Appellants that Respondent made more effort to sell his own listings than those of others. The customer told the trial court his

experience was “marred by [Respondent’s] lack of professionalism and the strong sense that he was purposefully steering us to only properties for which he was the listing agent.” CP 135 ¶¶ 4-8; CP 119 ¶ 28; CP 111 ¶¶ 5-8. A real estate agent told the Krugers that Respondent “attempt[ed] to frustrate all of us agents so that we would quit selling his listings and he would control them and get both sides.” CP 138-39 ¶¶ 9.14-9.20; 219.

Although the parties dispute the truth of these statements, Appellants do not ask the Court to accept them as such. Instead, it is undisputed (and Appellants offer them only to show) that the individuals relayed this information to Mr. Kruger before the alleged libel. *See* CP 10 ¶¶ 18-19; CP 107 ¶¶ 3, 7; CP 111 ¶¶ 3-8; CP 117 ¶¶ 16-17; CP 118-19 ¶¶ 27-28; CP 238. As a result, Mr. Kruger told Mr. Daniel directly in an email that other agents believed Respondent “regularly act[s] in ways that aren’t in the best interest of your clients/listers.” CP 242. And he recounted details of the 2009 meeting to another agent. CP 224.

The parties routinely discussed whether, and to what extent, Mr. Daniel would represent Appellants’ competitors. CP 226. This disagreement led to the end of their business relationship in March 2010. CP 96-97 ¶¶ 7-16. *See also* CP 222 (instructing Respondent to stop selling Appellants’ homes); CP 226; CP 242; CP 246; CP 249 (calling Respondent a “strategic partner” and noting discomfort with him

representing builder who “directly competes” with Appellants). Although the parties dispute who fired whom, it is undisputed that the relationship ended for this reason. CP 226. Thereafter, Respondent showed but did not sell any of Appellants’ homes. CP 108 ¶ 10; CP 112 ¶¶ 9-10.

More than a year later, on March 5, 2011, Mr. Kruger visited Zillow.com, a popular website that aims to “empower consumers with information about real estate,” including ratings for those agents who choose to establish profiles, which “can be an incredibly useful tool to help consumers choose an agent.” CP 210. *See also* CP 215 (Zillow’s goal is to “provid[e] access to as much information as possible”). Agents may respond to reviews and flag them for re-moderation. CP 211. If they do not want to be reviewed, they need not create a profile at all.

Mr. Kruger wrote a review of Respondent, which is the subject of this lawsuit. CP 147 ¶ 7, 627. It states:

This is another Ocean Shores agent that will really push you to buy one of his own listings. He will find something negative to say about other listings in hope that as the “expert” the clients will listen and not consider the listing.

Jeff Daniel said some horrible things about other builders whose homes he didn’t list. He would point out the smallest of flaws and say it was indic[a]tive of the quality of that builder and say that we should just turn around and leave. When I pointed out some

of the same flaws in some of his listings he would just pooh pooh it and say that it can be easily fixed. He never said it was in any way indic[a]tive of the quality of that home. He readily boasts about being the highest produc[ing] agent in the small area. I am surprised that so many people fall for his obvious ploys. I would not rec[om]m[en]d anyone that wants an honest agent that places their needs first work with Jeff Daniel.

CP 599. Mr. Kruger, who frequently writes online reviews, told the trial court he believed the review to be true and hoped it would help consumers select an agent. CP 120-21 ¶¶ 36-41; CP 11. Respondent has disputed this, without citing any evidence of Mr. Kruger's intent. CP 490.

Although the parties disagree about the date the review was published, the following is undisputed. Mr. Kruger wrote a review March 5, 2011. CP 147 ¶ 7; 627. He received an email stating Zillow could take up to seven days to review and publish it. CP 147 ¶ 7; CP 221, 240. Zillow rejected the review. CP 221. Mr. Kruger edited the review and re-submitted it on March 9, 2011, and again received an email stating Zillow would review it prior to publication. CP 147 ¶ 7. He received a notice on March 10, 2011, that the review had been published, but when he looked on Zillow.com, he did not find it. CP 148 ¶ 8;. If the review was published, by Mr. Daniel's own admission, it was taken down within one

business day. CP 542.¹ Mr. Daniel identified just one person who saw the review before its removal. CP 635-36.

B. Respondent Filed a Lawsuit Claiming the Review is Defamatory, and the Trial Court Refused to Dismiss It.

Mr. Daniel filed the operative complaint on July 28, 2011. CP 19-24. Although the review is the subject of the Amended Complaint, the Complaint itself does not identify which statements form its basis. *Id.* It alleges claims for defamation per se, violation of the Consumer Protection Act, and intentional interference with business relationships. *Id.*

On September 28, 2011, Appellants filed a special motion to strike the Amended Complaint and dismiss it under CR 12(c). CP 38-446. The trial court heard oral argument on December 5, 2011. During the hearing, the judge stated that “I just don’t see how I can conclude [Mr. Kruger’s] subjective state of mind,” RP at 11:1-2; and that “my personal preference is ... when you’re dealing with these sort of case-terminating motions, to be very careful and err on the side of letting the thing be aired out in open court using the justice system.” *Id.* at 13:1-6.

The trial court denied the motion on February 15, 2012. CP 26. Rather than apply the anti-SLAPP statute to the claims or dismiss them

¹ Respondent argued in the trial court that the review was published March 5, 2012. CP 461. But the evidence cited, an email from Zillow, states only that the review was *written* that day, not that it was published. CP 627.

under Rule 12(c), the court found the review “does not pertain to a matter of public concern” but “appears to be a personal dispute.” *Id.*

V. ARGUMENT

A. This Court Reviews the Trial Court’s Order *De Novo*.

This Court reviews the trial court’s decisions to not apply the anti-SLAPP statute and not dismiss a lawsuit under CR 12 *de novo*. The trial court made these decisions based on documentary evidence only, and both presented purely questions of law. *See Spokane Police Guild v. Wash. State Liquor Control Bd.*, 112 Wn.2d 30, 35- 36, 769 P.2d 283 (1989) (“Where ... the record ... consists of affidavits and documents ... the appellate court stands in the same position as did the trial court”); *Paradise, Inc. v. Pierce Cnty.*, 124 Wn. App. 759, 777, 102 P.3d 173 (2004) (appellate court reviews denial of motion to dismiss for failure to state a claim upon which relief can be granted *de novo*).

B. The Trial Court Erred by Failing to Apply the Anti-SLAPP Statute to This Lawsuit and Rejecting Decades of Precedent Favoring Early Dismissal of Libel Claims.

The Washington legislature enacted RCW 4.24.525 to curb “lawsuits brought primarily to chill the valid exercise of the constitutional right[] of freedom of speech” (i.e., “Strategic Lawsuits Against Public Participation,” or SLAPPs). S.B. 6395, 61st Leg., 2010 Reg. Sess. (Wa. 2010). SLAPPs “are typically dismissed as groundless or

unconstitutional, but often not before the defendants are put to great expense, harassment, and interruption of their productive activities,” deterring them from “fully exercising their constitutional rights.” *Id.*

To prevent this, the statute allows the target of a SLAPP to bring a special motion to strike at the outset, and requires the responding party to “establish by clear and convincing evidence a probability of prevailing.” *See* RCW 4.24.525(4)(b). *Davis v. Avvo, Inc.*, 2012 WL 1067640 (W.D. Wash. Mar. 28, 2012) (dismissing claims under anti-SLAPP statute); *Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104 (W.D. Wash. 2010) (same). Discovery is stayed pending a decision on the motion, and a defendant who cannot meet his burden is subject to dismissal of his claims and a damage and fee award. *See* RCW 4.24.525(5)(c), (6)(a).

In enacting the law, the legislature directed that it be “construed liberally.” S.B. 6395, 61st Leg., Reg. Sess. (Wa. 2010). This reflects decades of jurisprudence favoring the early dismissal of cases that implicate the First Amendment—opposite the presumption the trial court adopted. *See* RP at 13:1-6 (expressing preference to “err on the side of letting the thing be aired out in open court”). The Supreme Court noted:

Our court has recognized that *summary judgment plays a particularly important role in defamation cases*: 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.

Mohr v. Grant, 153 Wn.2d 812, 821, 108 P.3d 768 (2005) (emphasis added) (internal quotation marks and citations omitted); *see also Mark v. Seattle Times*, 96 Wn.2d 473, 484-85, 635 P.2d 1081 (1981). By failing to heed these well-established principles, the trial court erred.

1. Mr. Kruger’s statements were about matters of public concern.

To invoke the anti-SLAPP statute, “[a] moving party ... has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition.” RCW 4.24.525(4)(b); *see also Aronson*, 738 F. Supp. 2d at 1109; *Castello v. City of Seattle*, 2010 WL 4857022, at *6 (W.D. Wash. Nov. 22, 2010). This includes “[a]ny ... lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern” and “[a]ny ... statement made ... in a ... public forum in connection with an issue of public concern.” RCW 4.24.525(2)(d)&(e).

Although no state court has interpreted the anti-SLAPP statute, outside this context, Washington courts have construed the term “public concern” broadly. For example, Division III of this Court found that

statements about a court decision resolving a dispute between two companies, though private, nonetheless touched on a matter of public concern—software piracy—requiring a libel plaintiff to prove a higher level of fault. *Alpine Indus. Computers, Inc. v. Cowles Publ'g Co.*, 114 Wn. App. 371, 393-94, 57 P.3d 1178 (2002). The Supreme Court has found that “even the *slightest tinge* of public concern is sufficient” when deciding the protection afforded a public employee’s speech. *White v. State*, 131 Wn.2d 1, 12 n.5, 929 P.2d 396 (1997) (nurse’s internal report about patient’s abuse was of public concern) (emphasis added).

Courts interpreting California’s anti-SLAPP statute—after which Washington’s was modeled²—have defined “public concern” as “*any* issue in which the public is interested.” *Nygaard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1042, 72 Cal. Rptr. 3d 210 (2008). “[An] issue need not be ‘significant’ to be protected by the anti-SLAPP statute—it is enough that it is one in which the public takes an interest.” *Id.*

Accordingly, Washington and California courts have unanimously found that consumer information is of public concern. “Members of the public ... clearly have an interest in matters which affect their roles as consumers, and peaceful activities ... which inform them about such

² Federal courts have relied on California decisions interpreting the anti-SLAPP statute. See, e.g., *Aronson*, 738 F. Supp. 2d at 1110; *Phoenix Trading, Inc. v. Kayser*, 2011 WL 3158416, at *7 (W.D. Wash. July 25, 2011).

matters are protected by the First Amendment.” *Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 899, 17 Cal. Rptr. 3d 497 (2004). In *Wilbanks*, the defendant, a consumer watchdog, warned on her website to “[b]e very careful when dealing” with the plaintiff, a viatical settlement broker, because the plaintiff “provided incompetent advice” and was “unethical.” 121 Cal. App. 4th at 890. The court, noting the claims failed the most common test used to decide the applicability of the anti-SLAPP statute (and relied upon exclusively by Respondent, CP 471), still found the statute applied because statements about “unethical or questionable practices” were “consumer protection information” and necessarily of public interest. *Id.* at 899. *See also New York Studio, Inc. v. Better Business Bureau of Alaska, Or. & W. Wash.*, 2011 WL 2414452 (W.D. Wash. June 13, 2011) (barring claims arising from BBB press release).

If there were any doubt about the *Wilbanks* court’s wisdom, numerous other courts, in California and Oregon,³ have applied anti-SLAPP statutes to consumer reviews. *See, e.g., Makaeff v. Trump Univ., LLC*, 2010 WL 3341638, at *2-4 (S.D. Cal. Aug. 23, 2010) (statements about plaintiff’s deceptive business practices); *Sedgwick Claims Mgmt. Servs., Inc. v. Delsman*, 2009 WL 2157573, at *8 (N.D. Cal. July 17, 2009) (disgruntled customer’s web postings accusing insurance broker of

³ Oregon’s anti-SLAPP statute, too, applies to speech “in connection with a public issue or an issue of public interest.” Or. Rev. Stat. § 31.150(2).

breaking laws); *Higher Balance, LLC v. Quantum Future Grp., Inc.*, 2008 WL 5281487, at *5 (D. Or. Dec. 18, 2008) (rejecting argument that statements posted to website forum about institute's co-founder were of interest "only to a limited, definable portion of the public" because the "quality of [plaintiff's] products and services" were of public interest); *Gilbert v. Sykes*, 147 Cal. App. 4th 13, 23-24, 53 Cal. Rptr. 3d 752 (2007) (patient's website about "nightmare" results from plastic surgeon); *Gardner v. Martino*, 2005 WL 3465349, *6-7 (D. Or. Sept. 19, 2005) (statements about plaintiff's products; "issues of consumerism, including complaints about products and services, are issues of public interest").

Davis v. Avvo is instructive. There, a lawyer dissatisfied with his rating on the website Avvo.com filed a lawsuit based on allegedly incorrect information in his profile. 2012 WL 1067640, at *1. The court had "no difficulty finding that the Avvo.com website is an action involving public participation, in that it provides information to the general public which may be helpful to them in choosing a doctor, dentist, or lawyer," and that the profile pages on Avvo.com are a "vehicle of discussion of public issues ... distributed to a large and interested community." *Id.* at *3 (quotation marks, citation omitted).

Mr. Kruger's conduct is both an exercise of his free speech rights

and speech made in a public forum⁴ in connection with an issue of public interest. RCW 4.24.525(2)(d)(e). He was merely alerting the public to problems he had encountered with a real estate agent who repeatedly and publicly holds himself out as a trustworthy professional. The public unquestionably has a significant interest in this information, not only because, as Mr. Daniel has admitted, purchasing a house is a “momentous financial decision,” but also because the state heavily regulates real estate purchases. *See* RCW 18.85 *et seq.*; 18.86 *et seq.* *See also Nuttall v. Dowell*, 31 Wn. App. 98, 108, 639 P.2d 832 (1982) (“Title 18 makes it apparent that the welfare of the general public is implicated by the primary purpose underlying the [law]—to promote a minimum standard of conduct for those engaged in the business of real estate who are often conducting their business in the capacity of a fiduciary.”).

This is especially true given the context in which the review was posted—a website dedicated to providing consumers with information about real estate agents. Just as in *Davis*, reviews on Zillow.com are a “vehicle of discussion of public issues ... distributed to a large and interested community.” To confine the inquiry to a single review might lead to an erroneous finding that each one is not a matter of public concern because it relates to just one real estate agent. Under this theory, however,

⁴ Respondent conceded in the trial court that Zillow.com is a public forum. CP 470.

none of the statements on Zillow.com would be subject to the anti-SLAPP statute, even though the reviews, as a whole, facilitate the sharing of precisely the type of consumer information that merits protection.

The cases Respondent cited in the trial court are inapposite. None of the published cases dealt with consumer information.⁵ Two concerned statements about reasons for firing employees, CP 472, 476. *Du Charme v. Int'l Bhd. of Elec. Workers Local 45*, 110 Cal. App. 4th 107, 1 Cal Rptr. 3d 501 (2003); *Rivero v. Am. Fed'n of State, Cnty., & Mun. Emps., AFL-CIO*, 105 Cal. App. 4th 913, 130 Cal. Rptr. 2d 81 (2003). A third, *Weinberg v. Feisel*, 110 Cal. App. 4th 1122, 1132-33, 2 Cal. Rptr. 3d 385 (2003), CP 476, declined to apply the anti-SLAPP statute to an allegation of theft. A fourth, CP 473, *Dyer v. Childress*, 147 Cal. App. 4th 1273, 55 Cal Rptr. 3d 544 (2007), concerned an unflattering representation of a consultant in a movie. In the fifth, CP 475, *Mann v. Quality Old Time Serv., Inc.*, 120 Cal. App. 4th 90, 15 Cal. Rptr. 3d 215 (2004), the defendants posed as employees of the plaintiff to make disparaging comments to its customers. And though *Consumer Justice Center v.*

⁵ Several cases Respondent cited to the trial court are unpublished. CP 472, 474. In California, unpublished state court opinions “must not be cited or relied on by a court or a party.” Cal. Rule of Court 8.1115(a); GR 14.1 (party may cite unpublished decision from another jurisdiction only if that jurisdiction so allows). This Court allows citation to unpublished federal cases, although Respondent claimed otherwise in the trial court. CP 479. *Duncan v. Alaska USA Fed. Credit Union, Inc.*, 148 Wn. App. 52, 67 n.54, 199 P.3d 991 (2008). To the extent Appellants relied on unpublished California decisions in the trial court, they erred and do not do so on appeal.

Trimedica International, Inc., 107 Cal. App. 4th 595, 132 Cal. Rptr. 2d 191 (2003), CP 473, involved statements about a product, they were made by the defendant in an ad, and are thus not the kind of third-party criticism the anti-SLAPP statute was designed to protect.

Respondent—and the trial court—also placed substantial reliance on Mr. Kruger’s intent, claiming his review was merely fallout from a failed business relationship. CP 26. As Mr. Kruger stated, he made the postings to inform the public about Respondent’s practices. CP 120-21 ¶¶ 36-41. But even assuming he did not, intent “is irrelevant to the determination of [the statements’] status as protected speech. If the actionable communication fits within the definition contained in the statute, *the motive of the communicator does not matter.*” *Dible v. Haight Ashbury Free Clinics, Inc.*, 170 Cal. App. 4th 843, 851, 88 Cal. Rptr. 3d 464 (2009) (emphasis added).

In short, this is precisely the type of lawsuit the anti-SLAPP statute was designed to curb. If the trial court had *any* doubt about this, it was obligated to err on the side of application, both because the law expressly states it shall be “liberally construed” and because Washington courts favor early dismissal of meritless libel claims. Because it did not, it erred.

2. Respondent failed to prove a probability of prevailing by clear and convincing evidence.

Once Appellants showed that the anti-SLAPP statute applies to Respondent's claims, the burden shifted to Respondent to prove a probability of prevailing on the merits by clear and convincing evidence. RCW 4.24.525(4)(b). This requires "a prima facie showing of facts ... admissible at trial ... sufficient to support a judgment in the plaintiff's favor as a matter of law, as on ... summary judgment." *Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664, 679, 105 Cal. Rptr. 3d 98 (2010).

Respondent failed to make this showing. Above all, the trial court failed to recognize that Mr. Kruger's review was an opinion not capable of being proven false (or true), one premised on his experience (even if Mr. Daniel disputes this) and opinions by others in the community (something that is not disputed). Unequivocally, this cannot be the basis for libel. Nor, under well-established First Amendment law, can it be the basis for any other claim. Even if the trial court reached the remaining libel elements, it should have dismissed the lawsuit, given the absence of evidence as to fault or damages, and that courts have squarely rejected consumer protection and tortious interference claims premised on the types of allegations in the Amended Complaint. The trial court should have dismissed this lawsuit.

a. Respondent failed to prove a probability of prevailing on his libel claim.

A libel plaintiff must show by clear and convincing evidence that an allegedly defamatory statement is false, unprivileged, made with the requisite level of fault, and caused damage. *See Mark*, 96 Wn.2d at 486. Because Respondent failed to show the review is false, was made with actual malice, and caused damage, his claims should have been dismissed.

(1) Respondent failed to show Appellants' review is false.

Because an opinion is incapable of being proven true or false, “a statement must be one of fact to be actionable.” *Duc Tan v. Le*, 161 Wn. App. 340, 352, 254 P.3d 904 (2011), *review granted*, 172 Wn.2d 1010, 259 P.3d 1108. As the United States Supreme Court emphasized long ago, under the First Amendment, “there is no such thing as a false idea.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974). “However pernicious an opinion may seem,” the Court continued, “we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.” *Id.* at 339-40. *See also Robel v. Roundup Corp.*, 148 Wn.2d 35, 55-56, 59 P.3d 611 (2002) (statements that plaintiff was a “squealer,” “snitch,” and “liar” were non-actionable opinions).

This issue presents a question of law. *Rodriguez v. Panayiotou*, 314 F.3d 979, 985-86 (9th Cir. 2002) (“whether an allegedly defamatory

statement constitutes fact or opinion is a question of law for the court to decide.”); *Riley v. Harr*, 292 F.3d 282, 291 (1st Cir. 2002) (“[C]ourts treat the issue of labeling a statement as verifiable fact or as protected opinion as one ordinarily decided by judges as a matter of law.”) (quotation marks and alterations omitted); *Hammer v. City of Osage Beach*, 318 F.3d 832, 842 (8th Cir. 2003) (“Whether a purportedly defamatory statement is a protected opinion or an actionable assertion of fact is a question of law for the court.”); *Ollman v. Evans*, 750 F.2d 970, 978 (D.C. Cir. 1984) (“the distinction between opinion and fact is a matter of law”).

Two principles of the opinion doctrine are significant here.

First, statements that someone is “dishonest” (or even “unethical,” which the review did *not* state), where the basis is disclosed, are non-actionable opinions. *See, e.g., Underwager v. Channel 9 Australia*, 69 F.3d 361, 367 (9th Cir. 1995) (assertion that plaintiff was “lying”); *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1440-41 (9th Cir. 1995) (calling judge “dishonest”); *Lauderback v. ABC*, 741 F.2d 193, 195-98 (8th Cir. 1984) (suggesting insurance agent was “unethical” and “sometimes illegal”); *WinePress Publ’g v. Levine*, 2009 WL 3765188 (W.D. Wash. Nov. 9, 2009) (critiquing plaintiff’s honesty, “there are plenty of honest Christian publishers. Find one.”); *Wait v. Beck’s N. Am., Inc.*, 241 F. Supp. 2d 172, 183-84 (N.D.N.Y. 2003) (“Statements that

someone has acted unprofessionally or unethically generally are constitutionally protected statements of opinion.”); *Global Telemedia Int’l, Inc. v. Doe 1*, 132 F. Supp. 2d 1261, 1269-70 (C.D. Cal. 2001) (anonymous accusation on Internet that plaintiff took shareholder money, then “[lied about] how it will be used”); *Doherty v. Kahn*, 289 Ill. App. 3d 544, 682 N.E.2d 163, 170 (Ill. App. Ct. 1997) (statements that former employee was “dishonest”); *James v. San Jose Mercury News, Inc.*, 17 Cal. App. 4th 1, 12-15, 20 Cal. Rptr. 2d 890 (1993) (implication that plaintiff used “sleazy, illegal, and unethical” tactics); *Savage v. Pac. Gas & Elec. Co.*, 21 Cal. App. 4th 434, 444-45, 26 Cal. Rptr. 2d 305 (1993) (statement that plaintiff had “a conflict of interest”); *Hollander v. Cayton*, 536 N.Y.S.2d 790, 792, 145 A.D.2d 605 (App. Div.1988) (statements that physician was “unethical” and “immoral”).

Second, even if such a statement could be actionable in theory, Mr. Kruger’s statements were made in a review, and reviews “are, by their very nature, subjective and debatable.” *Browne v. Avvo, Inc.*, 525 F. Supp. 2d 1249, 1252 n.1 (W.D. Wash. 2007). Courts have consistently rejected libel claims premised on reviews. *See, e.g., Aviation Charter, Inc. v. Aviation Research Grp.*, 416 F.3d 864, 868-71 (8th Cir. 2005) (safety rating of airline company, though interpretation of objectively verifiable data, “was ultimately a subjective assessment”); *Moldea v. New York*

Times Co., 22 F.3d 310, 315 (D.C. Cir. 1994) (emphasizing that allegedly defamatory statements appeared in a book review column, where readers expect reviewers to express opinions); *Mr. Chow of New York v. Ste. Jour Azur S.A.*, 759 F.2d 219 (2d Cir. 1985) (allegedly libelous statements in review); *Themed Rests., Inc. v. Zagat Survey, LLC*, 781 N.Y.S.2d 441, 4 Misc. 3d 974, 980 (Sup. Ct. 2004) (ratings and review of restaurant guidebook); *Hammer v. Amazon.com*, 392 F. Supp. 2d 423, 430-31 (E.D.N.Y. 2005) (book reviews on Amazon.com); *Kronenberg v. Baker & McKenzie LLP*, 692 F. Supp. 2d 994, 998 (N.D. Ill. 2010) (lawyer performance review ratings and comments); *Thomas v. Los Angeles Times Commc 'ns, LLC*, 189 F. Supp. 2d 1005, 1015-16 (C.D. Cal. 2002) (statements in feature article questioning factual basis of book); *Trump v. Chicago Tribune Co.*, 616 F. Supp. 1434, 1435-36 (S.D.N.Y. 1985) (commentary by architecture critic; “one’s opinion of another, however unreasonable the opinion or vituperative, since [it] cannot be subjected to the test of truth or falsity... [is] entitled to absolute immunity from liability”) (citations omitted); *Stuart v. Gambling Times, Inc.*, 534 F. Supp. 170, 171-72 (D.N.J. 1982) (review stating that gambling book was “#1 fraud ever”); *Wheeler v. Neb. State Bar Ass’n*, 244 Neb. 786, 508 N.W.2d 917 (1993) (survey responses evaluating judge); *Baker v. Los Angeles*

Herald Exam'r, 42 Cal. 3d 254, 721 P.2d 87 (1986) (television critic's criticism of sex education documentary).⁶

Applying this law here, the review states a protected opinion that cannot be the subject of a libel (or any other) claim. Although the Amended Complaint fails to specify the statements in the review Respondent claims are false (which itself merited dismissal, *infra* at V.C), Mr. Daniel appears to be most angered by the statement that the Mr. Kruger “would not rec[om]m[en]d anyone that wants an honest agent that places their needs first work with Jeff Daniel.”

But one cannot prove whether someone is “honest” or “puts the needs” of his clients first, statements that, because they are opinions, vary from person to person. What might be white lies to one person could be a complete distortion of the truth to another. *Cf. Underwager*, 69 F.3d at 367 (“the term ‘lying’ applies to a spectrum of untruths including ‘white lies,’ ‘partial truths,’ ‘misinterpretation,’ and ‘deception’”). Here, consumers could readily disagree whether pointing out the flaws only when it is in an agent’s interest is “dishonest,” “putting the client’s needs” second, or just aggressive salesmanship. Because the review states its

⁶ Contending that courts “universally” hold the opposite, CP 485, Respondent cited two cases in the trial court. But in both, the language was *dicta*, and the opinions contained no analysis the term “dishonest.” *Vern Sims Ford, Inc. v. Hagel*, 42 Wn. App. 675, 683-84, 713 P.2d 736 (1986), concerned accusations of criminal misconduct; and *Sullivan v. Conway*, 157 F.3d 1092 (7th Cir. 1998), dealt with a statement that the plaintiff was a “very poor” lawyer.

basis—Mr. Kruger’s experience with Mr. Daniel at a 2009 meeting—consumers could make that judgment for themselves.

Moreover, consumers expect to find opinions—not facts—when reading anonymous Internet posts. In such a context, a reviewer “must be given the constitutional ‘breathing space’ appropriate to the genre.” *Moldea*, 22 F.3d at 315. To suggest that readers believe every word in each of the millions of reviews posted on the Internet is nonsense; quite the opposite, users have come to expect exactly the types of review Mr. Kruger wrote, and to take them with a grain of salt. In short, the review presents unverifiable opinions that cannot be libelous.⁷

Respondent in the trial court relied heavily on his allegation that the review falsely suggested that the reviewer had toured a home as a prospective buyer. But the review does not explicitly state this, and this Court is “bound to invest words with their natural and obvious meaning and may not extend language by innuendo or by the conclusions of the pleader.” *Lee v. Columbian, Inc.*, 64 Wn. App. 534, 538, 826 P.2d 217 (1991). Moreover, even if Mr. Kruger had disclosed his status as a home

⁷ The percentage of homes Respondent sells as a dual agent is wholly irrelevant, and his statement in the trial court that Appellants “pointed to no evidence suggesting that selling this percentage of ‘dual agency homes’ would be unethical or dishonest” only shows the futility of his claims. CP 486. The review does not accuse Respondent of being unethical, but even if it had, there is no way to “prove” that a certain percentage of dual agency sales is “dishonest” or “unethical.” A consumer is entitled to the *opinion* that *all* (or no) such sales are unethical, but that does not make the statement verifiable.

builder, the gist of the review would have remained the same, meaning it is not actionable. See *Schmalenberg v. Tacoma News, Inc.*, 87 Wn. App. 579, 598, 943 P.2d 350 (1997) (“[W]hen a defamation defendant’s statement is partly true ... and partly false ... the defamation plaintiff may not recover for damage that would have occurred even without the false part”). Mr. Kruger expressed his opinion—whether as a home buyer or not—and as such, it is incapable of being proven true or false.

**(2) Respondent failed to show
Mr. Kruger acted with actual
malice.**

In general, “[t]he degree of fault necessary to make out a prima facie case of defamation depends on whether the plaintiff is a private individual.” *Camer v. Seattle Post-Intelligencer*, 45 Wn. App. 29, 41, 723 P.2d 195 (1986). If he is, “a negligence standard of fault applies. Otherwise, the plaintiff must prove actual malice, i.e., knowledge of falsity or reckless disregard of falsity.” *Id.* at 41-42. In Washington, even where the plaintiff is a private figure, the actual malice standard applies to statements about matters of public concern. *Alpine Indus. Computers, Inc.*, 114 Wn. App. 371.

Courts have broadly defined “public figure.” “When citizens voluntarily expose themselves to the limelight, they may become public figures.” *Exner v. Am. Med. Ass’n*, 12 Wn. App. 215, 221, 529 P.2d 863

(1974) (self-professed expert on fluoridation of water was public figure). Numerous courts have found that self-professed experts and companies are public figures for purposes of their purported expertise. *See, e.g., Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 273-74 (3rd Cir. 1980) (corporation with large advertising expenses and about whom numerous consumers had complained was public figure); *Gilbert*, 147 Cal. App. 4th at 24 (plastic surgeon who heavily marketed himself was a public figure as to plastic surgery); *Sunshine Sportswear & Elecs., Inc. v. WSOC Television, Inc.*, 738 F. Supp. 1499, 1507 (D.S.C. 1989) (company was public figure for purposes of report by television station).

Here, because the review was about a matter of public concern, *supra* at V.B.1, and because Mr. Daniel is a public figure, the actual malice standard applies. Respondent holds himself out as an expert on real estate in the Ocean Shores community. He has appeared on radio programs, submitted his analysis to newspaper for publication, spoken to a local Chamber of Commerce about real estate, and vociferously pursues publicity on the internet, including by making representations about his trustworthiness and honesty. CP 150, 151, 157, 160, 165, 168, 170, 174, 176. He is therefore a public figure for the purpose of criticism about his profession, and must prove Mr. Kruger acted with actual malice.

Actual malice presents a heavy burden. A plaintiff must show the allegedly defamatory statement was made “with knowledge that it was false or with reckless disregard of whether it was false or not.” *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991) (quotation marks and citations omitted). It focuses entirely on the defendant’s subjective state of mind “at the time of publication.” *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 512 (1984). “Knowledge of falsity means simply that the defendant was actually aware that the contested publication was false.” *Woods v. Evansville Press Co.*, 791 F.2d 480, 484 (7th Cir. 1986) (emphasis added). To establish “reckless disregard,” a plaintiff must present “sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.” *St. Amant v. Thompson*, 390 U.S. 727, 730-31 (1968); *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) (plaintiff must show defendant “actually had a high degree of awareness of ... probable falsity”) (quotation marks omitted). It is irrelevant “whether a reasonably prudent man would have published, or would have investigated before publishing.” *St. Amant*, 390 U.S. at 730-31.

Respondent failed to make this showing in the trial court. In fact, the *only* evidence before the court suggested that Mr. Kruger actually believed his statements to be true. Appellants provided evidence that Ms.

Kruger, another real estate agent, and a former customer of Mr. Daniel's all told Mr. Kruger that they believed Respondent pushed customers to purchase houses he had listed. CP 135 ¶¶ 4-8; CP 119 ¶ 28; CP 111 ¶¶ 5-8; 138-39 ¶¶ 9.14-9.20, 219. Mr. Daniel does not dispute this. If this were not enough, Mr. Kruger, in an email a *year* before he wrote the review, told Mr. Daniel that other agents believed he "regularly act[s] in ways that aren't in the best interest of your clients/listers." CP 242. Respondent does not dispute this, either. Respondent disputes only Mr. Kruger's description of the parties' March 2009 meeting (with a self-serving declaration), something this Court need not even consider to find an absence of actual malice (or even negligence).

The trial court failed to consider this argument, instead stating "I just don't see how I can conclude [Mr. Kruger's] subjective state of mind," RP at 11:1-2. This finding contravenes bedrock First Amendment law. As the U.S. Supreme Court has stated, "[t]he question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." *Harte-Hanks Commc'ns*, 491 U.S. at 685. *See also Bose Corp.*, 466 U.S. at 498 (faulting trial court for failing to identify "any independent evidence that [speaker] realized the inaccuracy of the statement, or entertained serious doubts about its truthfulness, at the time of publication"). Accordingly, California courts

routinely grant anti-SLAPP motions where the plaintiff has failed to present clear and convincing evidence of actual malice. *See, e.g., Rosenaur v. Scherer*, 88 Cal. App. 4th 260, 275-77, 105 Cal. Rptr. 2d 674 (2001); *Sipple v. Found. for Nat'l Progress*, 71 Cal. App. 4th 226, 248-250, 83 Cal. Rptr. 2d 677 (1999); *Bradbury v. Superior Court*, 49 Cal. App. 4th 1108, 1117, 57 Cal. Rptr. 2d 207 (1996); *Robertson v. Rodriguez*, 36 Cal. App. 4th 347, 358-59, 42 Cal. Rptr. 2d 464 (1995).

This was the proper result here. No matter how counterintuitive the trial court found it, the First Amendment—as interpreted by binding Supreme Court law—required it to independently evaluate the record to determine whether there was any evidence that Mr. Kruger believed the statements in the review to be false. It failed to do so.

(3) Respondent failed to show damages.

Respondent's failure to show any damages or actual malice also dooms his claim. Well-established law forbids any "presume[d] damages when liability [is] based on negligence, not actual malice." *Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters*, 100 Wn.2d 343, 354, 670 P.2d 240 (1983) (trial court "did exactly what" the U.S. Supreme Court forbade: "it permitted the jury to presume damages when liability was not based on actual malice"). *Cf. Vern Sims Ford, Inc. v. Hagel*, 42 Wn. App.

675, 681, 713 P.2d 736 (1986) (affirming presumed damages award where plaintiff had shown actual malice). Because Respondent did not show actual malice, he was required to—but did not—show damages. Respondent claims only that the review reached prospective customers. CP 491. He provides no evidence (let alone clear and convincing evidence) to show this, instead isolating a single friend who saw the review once. CP 635-36. This is insufficient as a matter of law.

b. Failure to prove a libel claim requires dismissal of the remaining claims.

Respondent cannot evade the constitutional bar to his libel claim by alleging a claim under the Consumer Protection Act and one for tortious interference with a business expectancy. First Amendment protections “are not peculiar to [defamation] actions but apply to *all* claims whose gravamen is the alleged injurious falsehood of a statement.” *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 1042-43, 728 P.2d 1177 (1986) (emphasis added); *see also Reader’s Digest Ass’n v. Superior Court*, 37 Cal. 3d 244, 265, 690 P.2d 610 (1984) (“liability cannot be imposed on any theory for what has been determined to be a constitutionally protected publication”). In *Hustler Magazine, Inc. v. Falwell*, for example, the U.S. Supreme Court held that the First Amendment barred not only the Reverend Jerry Falwell’s defamation

claim arising from a satirical feature in *Hustler* magazine, but also his intentional infliction of emotional distress claim arising from the same publication. 485 U.S. 46, 50, 54-57 (1988).

Following the Court's lead, courts nationwide have found that where the targeted speech constitutes protected opinion, plaintiffs may not raise other claims arising from the same facts, including unfair competition and tortious interference. *Jefferson Cnty. Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc.*, 175 F.3d 848 (10th Cir. 1999) (intentional interference with contractual and business relations and antitrust); *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057-58 (9th Cir. 1990) (trade libel and tortious interference with business relationships); *Presidio Enters., Inc. v. Warner Bros. Distrib. Corp.*, 784 F.2d 674 (5th Cir. 1986) (state consumer protection statute); *Redco Corp. v. CBS, Inc.*, 758 F.2d 970 (3d Cir. 1985) (interference with contractual relations); *Films of Distinction, Inc. v. Allegro Film Prods., Inc.*, 12 F. Supp. 2d 1068, 1082-83 (C.D. Cal, 1998) (trade libel, intentional interference with prospective economic advantage, and negligent interference with prospective economic advantage).

Under this well-established law, the trial court was obligated not only to dismiss Respondent's libel claim, but his remaining claims, too.

c. Respondent failed to prove a probability of prevailing on his consumer protection and tortious interference claims.

Even if the First Amendment does not bar Respondent's claims for unfair competition and tortious interference, Mr. Daniel failed to state a claim for (let alone provide evidence of) either claim.

First, Mr. Daniel repeatedly in the trial court rested his unfair competition claim on the premise that the parties are competitors. *E.g.*, CP 493. But a review on a website is not an act in "trade" or "commerce," no matter the status of the parties. *Browne*, 525 F. Supp. 2d at 1254. The statute defines these terms to mean "the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington." RCW 19.86.010(2). As Judge Lasnik reasoned when deciding a similar claim against Avvo.com:

Avvo collects data from public sources, attorneys, and references, rates attorneys (where appropriate), and provides both the underlying data and the ratings to consumers free of charge. No assets or services are sold to people who visit the site in the hopes of finding a lawyer and no charge is levied against attorneys or references who choose to provide information. It is hard to imagine how an information clearinghouse and/or ratings service could be considered "commerce[.]"

Browne, 525 F. Supp. 2d at 1254. See also *Fid. Mortg. Corp. v. Seattle Times Co.*, 131 Wn. App. 462, 470, 128 P.3d 621 (2005) (newspaper's publication of mortgage rates was not trade or commerce absent payment from lenders); *Davis*, 2012 WL 1067640, at *6 (Avvo.com's publication of attorney ratings was not in trade or commerce). Thus, even assuming the parties are competitors, Mr. Daniel's CPA claim fails.

Second, Mr. Daniel has not suffered any direct harm from Appellants' publication. Washington courts have adopted a three-part test to decide whether damages are too remote, asking

(1) whether there are more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general; (2) whether it will be difficult to ascertain the amount of the plaintiff's damages attributable to defendant's wrongful conduct; and (3) whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries.

Fidelity Mortg., 131 Wn. App. at 470-71 (quotation marks omitted) (plaintiff lacked standing to sue because it did not rely on allegedly misleading mortgage rates, damages would be too remote, and apportionment would be too complicated).

For example, in *Browne*, the court rejected the plaintiff's consumer protection claim that ratings on the website Avvo.com misled third-party

consumers of legal services who, as a result, may not have hired him. 525 F. Supp. 2d at 1254. Applying the *Fidelity Mortgage* test, the court found the claimed damages were “so remote that they were not proximately caused by defendants’ publication of the offending attorney profiles.” *Id.* at 1255. Consumers, not plaintiff, were “the direct victims of the alleged wrongdoing.” *Id.* The court continued:

Identifying consumers who went elsewhere, determining what, if any, role Avvo's website played in their decision to hire another attorney, and establishing that the consumer was in fact injured would be incredibly difficult. Even if one were able to identify such a consumer, calculating plaintiffs’ expected revenues from the “lost” client would be speculative at best. Finally, apportioning damages between Avvo and the providers of incorrect data and/or competing attorneys who “game” the system would be very complex.

Id. See also *Davis*, 2012 WL 1067640, at *7 (same).

Here, Respondent does not allege he suffered any damages, claiming only that prospective consumers may have seen the review (and providing no evidence of that). CP 491. He does not allege this cost him any business, or otherwise caused him damage. As in *Browne* and *Fidelity Mortgage*, this damage is too remote and speculative to be cognizable.

Finally, Respondent failed to allege, let alone provide evidence, of his tortious interference claim. This claim requires proof of five elements:

(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 interfered for an improper purpose or used improper means; and (5) resultant damage.

Moore v. Commercial Aircraft Interiors, LLC, 278 P.3d 197, 200 (Wash. Ct. App. 2012). Respondent did not allege, much less prove, facts supporting *any* of these elements: the existence of any expectancy, Appellants' knowledge of that expectancy, Appellants' intentional interference with that expectancy for an improper purpose or using improper means (a review on a website is quite the opposite), or any damage. For this reason, the trial court should have dismissed this claim.

3. The trial court erred by failing to award Appellants their attorneys' fees and impose statutory damages.

Under RCW 4.24.525(6), a moving party who prevails "shall" be awarded its attorneys' fees and a \$10,000 penalty. This remedy "is mandatory." *Castello v. City of Seattle*, 2011 WL 219671, *1, 4 (W.D. Wash. Jan. 24, 2011). Because the anti-SLAPP law applies and Respondent failed to show a probability of prevailing on the merits by clear and convincing evidence, the trial court erred by refusing to impose these remedies.

C. The Trial Court Erred by Failing to Dismiss the Claims Under CR 12.

The trial court also erred by failing to dismiss Mr. Daniel's claims under Rule 12(c) for two reasons. First, the review is an opinion and the Amended Complaint failed to allege claims under the CPA or for tortious interference, findings that require no consideration of any evidence that were apparent from the face of the Complaint. Second, the Amended Complaint failed to specify the statements Respondent claims are libelous.

Rule 12(c) requires dismissal if "it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief." *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 214, 118 P.3d 311 (2005). Consideration of a Rule 12(c) motion is not limited to the pleadings. "Documents whose contents are alleged in a complaint but which are not physically attached to the pleading may also be considered." *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 726, 189 P.3d 168 (2008).

"[W]here a plaintiff seeks damages ... for conduct which is *prima facie* protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required." *Flowers v. Carville*, 310 F.3d 1118, 1130 (9th Cir. 2002); *see also Harris*

v. *City of Seattle*, 2003 WL 1045718, at *3 (W.D. Wash. Mar. 3, 2003) (“[C]ourts should consider First Amendment concerns even at the pleading stage.”). As a result, courts, including this state’s highest court, dismiss defamation complaints that fail to specify the allegedly libelous statements. See, e.g., *Whitehouse v. Cowles*, 48 Wash. 546, 548, 93 P. 1086 (1908) (affirming trial court’s ruling sustaining demurrer where plaintiff failed to specify which statements, if any, were false); *Harris v. City of Seattle*, 315 F. Supp. 2d 1112, 1123-24 (W.D. Wash. 2004) (dismissing defamation claim for failure to identify the allegedly defamatory statements).⁸

In his Amended Complaint, Respondent quoted the entire review without specifying which statements he claims are false and defamatory. CP 21. The trial court did not even address this argument, which alone required dismissal of the Amended Complaint. Because it did not, Appellants have been forced to incur significant fees and expense in an attempt to defend *all* of the statements in the review, even though, undoubtedly, some do not form the basis for Respondent’s claims.

⁸See also *Fed. Deposit Ins. Corp. v. Bathgate*, 27 F.3d 850, 875 (3rd Cir. 1994) (dismissal where party claiming libel failed to identify statements); *Phantom Touring, Inc. v. Affiliated Pub’ns*, 953 F.2d 724, 728 n.6 (1st Cir. 1992) (plaintiff was limited to its complaint in defining the scope of alleged defamation); *Bobal v. Rennselaer Polytechnic Inst.*, 916 F.2d 759, 763 (2d Cir. 1990) (district court properly dismissed claims where plaintiff failed to plead adequately the actual words spoken); *Asay v. Hallmark Cards, Inc.*, 594 F.2d 692, 698-99 (8th Cir. 1979).

D. Appellants are Entitled to Attorneys' Fees on Appeal.

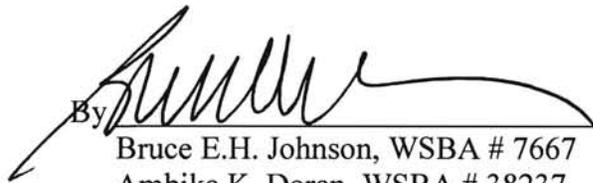
Because the anti-SLAPP statute's award is mandatory for any fees and costs "incurred in connection with each [anti-SLAPP] motion on which the moving party prevailed," RCW 4.24.525(6)(a)(i), Appellants are entitled to their fees on appeal if the Court reverses the trial court's decision. *See Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 423, 161 P.3d 406 (2007) ("[W]here a prevailing party is entitled to attorney fees below, they are entitled to attorney fees ... on appeal.").

VI. CONCLUSION

For these reasons, Appellants ask that this Court reverse the trial court's order, dismiss this action, and award them their attorneys' fees and statutory damages.

RESPECTFULLY SUBMITTED this 6th day of August, 2012.

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Declared under penalty of perjury under the laws of the state of Washington this 6th day of August, 2012.


Bruce E.H. Johnson

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