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Court of Appeals
Division II
State of Washington
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NO. 54390-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MICHAEL J. COLLINS,

Appellant,

v.

OLYMPIC INTERIORS INC.,

Respondent.

BRIEF OF RESPONDENT OLYMPIC INTERIORS INC.

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I. INTRODUCTION

Olympic Interiors, Inc. respectfully asks this Court to affirm the Trial Court's Order granting Olympic's Motion for Summary Judgment.

Collins was employed by Olympic for *four* days. Collins alleges that he suffered a workplace injury on his first day of work. He then waited almost five months to file a worker's compensation claim with the Department of Labor & Industries ("Department"). After investigation, the Department denied his claim.

Without proof, Collins alleges that the Department relied upon information provided by Olympic to deny his claim. The undisputed evidence shows that the Department conducted an independent investigation and determined that the *medical* evidence did not support Collins' claim – a decision that was affirmed by the Board of Industrial Appeals. Unsatisfied, Collins filed a lawsuit against Olympic alleging (1) intentional infliction of emotional distress/outrage and (2) defamation.

Olympic moved for summary judgment on the grounds that Collins could not establish the prima facie elements of either claim. After reviewing the parties' briefs and accepting oral argument, the Trial Court properly dismissed Collins' lawsuit. Collins filed the present appeal.

In addition to appealing the Trial Court's summary judgment order, Collins now raises a litany of issues that are unrelated to the Trial Court's

Order and were never decided by the Trial Court. Under the Rules of Appellate Procedure, Collins' additional errors are not subject to review.

Olympic respectfully requests that this Court affirm the Trial Court's Order granting summary judgment.

II. STATEMENT OF THE ISSUES

The principal issues presented in this appeal are:

1. Should this Court deny Collins' Assignment of Errors Nos. 2, 3, 7, 9, and 10 when the Trial Court did not decide these issues, and thus, they are not reviewable decisions?

2. Under RAP 9.12, must this Court limit its review to the evidence and argument identified in the Trial Court's Order granting summary judgment?

3. Should this Court affirm the Trial Court's Order granting summary judgment when (1) Collins failed to submit any admissible evidence in opposition to Olympic's motion for summary judgment; (2) Collins failed to prove intentional infliction of emotional distress; (3) Collins failed to prove defamation; and (4) Washington's Anti-SLAPP statute bars Collins' claims?

4. Did the Trial Court properly strike Collins' untimely brief and declaration as improper?

III. STATEMENT OF THE CASE

A. Background Facts

Olympic hired Collins on January 27, 2017, to hang sheetrock at the Green River Community College (“Project”).¹ In total, Collins worked 32 hours between January 30 and February 2. On the afternoon of February 2, Collins left work and never returned.²

The next time that Olympic heard from Collins was eight days later, when he sent Olympic an email indicating that he had not been able to return to work because a snowstorm had prevented him from leaving his house. (Curiously, the email did not mention a workplace injury).³

On June 20, 2017 – almost five months after his last day of work – Olympic received another email from Collins.⁴ In that email, Collins reported that he had filed a claim with the Department, alleging for the *first* time, that he had injured his neck and shoulder while working on the Project.⁵ Collins had not made a contemporaneous report of any injury to

¹ CP 215, ¶3.

² Id.

³ CP 215, ¶¶ 2-4; CP 220-21

⁴ CP 233; 235-236

⁵ Id. Collins has a history of claiming workplace injuries after workplace disputes. In 1993, Collins was terminated after he physically assaulted a co-worker at Arok Construction. Collins claimed that he was the subject of a workplace injury. CP 234. In all, Mr. Collins has filed 10 worker’s compensation claims.

his co-workers, his foreman, or Olympic.⁶

In response, Olympic's Controller, Doug Bagnell, authored a memorandum on June 22 ("Memorandum") recording his observations of Collins' physical restrictions:⁷

I spoke with our Superintendent Bob Essenpreis and the job site foreman Victor Lopez, and neither one recalls being informed of an injury by Michael Collins. I recall hiring Michael and processing his paperwork, as well as issuing him a set of tools and some safety clothing. I do specifically recall Michael having some obvious mobility restrictions with his neck. He seemed unable to turn his neck fluidly, having to use his upper torso to turn. As an employer, I would want to question whether he has had some occupational issues with his neck and shoulder prior to starting work with Olympic Interiors. And we do not have a record of an injury being reported, and we are a bit apprehensive to accept an injury report 6 months later when both myself and the job site foreman noticed some mobility issues with Michael's neck.

Following an investigation, which included an independent medical examination, the Department accepted Collins' claim for his right shoulder as an "occupational disease," caused by performing 40 years of sheetrock work.⁸ The Department denied Collins' neck claim, concluding that it was not an occupational disease.⁹ However, the Department permitted Collins

⁶ CP 216, ¶5

⁷ CP 223

⁸ CP 237

⁹ CP 237-241

to re-submit his neck claim as an “industrial injury.”¹⁰ After investigation, the Department also denied that claim, concluding that there was “no proof of specific injury at a definite time and place in the course of employment and that the condition was not an occupational disease.”¹¹ Collins appealed both denials to the Board of Industrial Appeals (“BIIA”).

On January 3, 2019, while his worker’s compensation was on appeal, Collins filed his lawsuit against Olympic alleging intentional infliction of emotional distress and defamation. In the Complaint, Collins alleged that the Department relied upon information from Olympic to deny his claims.¹²

On May 13, 2019, after the lawsuit was filed, the BIIA issued its orders dismissing Collins’ appeals, finding that the *medical evidence* did not support his neck-related claims.¹³

B. The Trial Court Grants Summary Judgment

On November 6, 2019, Olympic moved for summary judgment on Collins’ claims on the grounds that Collins could not establish the prima facie elements of either of his claims; that he could not produce evidence

¹⁰ CP 240

¹¹ CP 247-248

¹² CP 223, 225. Collins’ Timesheet indicated that he worked 29 hours of framing and 2 hours of framing; CP 259 – 264

¹³ CP 242-246; CP 250-256

that the Department relied on any information from Olympic when it made the decision to deny his claim (i.e., no causation); and that even if Plaintiff had put forth evidence to support his claims, the claims were barred by Washington's Anti-SLAPP statute.¹⁴

In response to the motion, Collins failed to submit *any* evidence – not even his own declaration.¹⁵

On reply, in addition to explaining how Collins' assertions, even if considered by the Court, had failed to establish the prima facie elements of his claims, Olympic also pointed out that Collins failed to submit any evidence to preclude summary judgment, and as a result, summary judgment was appropriate.¹⁶ Recognizing the error, Collins attempted to file a declaration *after* Olympic had filed its reply.¹⁷ Olympic filed a motion to strike the improper and untimely submissions, which the Trial Court granted.¹⁸

¹⁴ CP 206-214

¹⁵ CP 79-104; CP 135-136

¹⁶ CP 266-272

¹⁷ CP 137-157; CP 158-162

¹⁸ CP 311-319; CP 163-165 Collins' appeal does not address the Trial Court's Order striking his untimely declaration.

At the hearing on Olympic's motion, the Court considered the parties' arguments and their written submissions. At the conclusion of the hearing, the Court ruled that Collins had not sustained his burden:

Now, in this particular instance, Mr. Collins asserts by doing so they intentionally inflicted emotional distress on him, as well as defamed him, *but in order for Mr. Collins here to defeat summary judgment, he has to at least set forth some facts that demonstrate the elements of those two claims. And based on the filing that Mr. Collins has made to this Court, he has failed to do so.*

Based on that, this Court is going to grant the defendant's motion for summary judgment, and I'm dismissing the claims in whole that Mr. Collins has made, and I will sign an order to that effect.¹⁹

IV. ARGUMENT

A. Assignment of Errors Nos. 2, 3, 7, 9, and 10 Are Not Reviewable

Under the Rules of Appellate Procedure, a party may only seek review of a trial's court *decisions*.²⁰ "Decisions" are "rulings, orders, and judgments of the trial court, or the appellate court, as the context indicates."²¹

On appeal, Collins identifies a host of errors for which he seeks review. However, at least half of the errors raised are not subject to review because the Trial Court did not render a "decision." The Trial Court issued

¹⁹ Verbatim Report of Proceedings, 21:12-23

²⁰ RAP 2.1

²¹ RAP 2.1(a)(2)

two decisions: (1) an order granting Olympic's motion for summary judgment and (2) an order granting Olympic's motion to strike Plaintiff's improper evidence. There were no others.

Collins' Assignment of Errors Nos. 2, 3, 7, 9, and 10 do not relate to either decision of the Trial Court:

- **Assignment of Error No. 2** concerns a CR 56(f) continuance of Olympic's Motion for Summary Judgment. Collins did not make this request to the Trial Court, and the Trial Court did not render a decision.
- **Assignment of Error No. 3** concerns a motion to compel that Collins did not properly note for hearing. The Trial Court did not render a decision.
- **Assignment of Error No. 7** concerns an allegation of spoliation. Collins never filed a motion with the Court alleging spoliation, and the Trial Court did not render a decision.
- **Assignment of Error No. 9** concerns an assertion that the Trial Court did not specifically decide the "actionability of [Collins'] RCW 51.24.020 case. This was not an issue that was raised to the Trial Court, and the Trial Court did not render a decision.
- **Assignment of Error No. 10**, concerns, like Assignment of Error No. 7, an unsupported assertion of spoliation and Collins' perceived failure by the Trial Court not to impose an "adverse inference" instruction.

Again, this was not an issue brought to the attention of the Trial Court, and the Trial Court did not render a decision.

Because the Trial Court did not render a decision on Assignments of Errors Nos. 2, 3, 7, 9, and 10 as required by the Rules of Appellate Procedure, these Assignments of Error are not subject to review.

B. Review is Limited to the Evidence and Issues Identified in the Order Granting Summary Judgment

RAP 9.12 (“Special Rule For Order on Summary Judgment”) limits the documents and issues that are subject to review when a motion granting summary judgment is appealed:

On review of an order granting or denying a motion for summary judgment *the appellate court will consider **only** evidence and issues called to the attention of the trial court.* The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered. Documents or other evidence called to the attention of the trial court but not designated in the order shall be made a part of the record by supplemental order of the trial court or by stipulation of counsel.²²

In the Order granting summary judgment, the following documents were called to the Trial Court’s attention:

1. Defendant Olympic Interiors, Inc.’s Motion for Summary Judgment filed November 6, 2019;

²² RAP 9.12 [emphasis added]

2. Declaration of Doug Bagnell in Support of Defendant Olympic Interiors, Inc.'s Motion for Summary Judgment and attached Exhibits A – D filed November 6, 2019;

3. Declaration of Sheryl J. Willert in Support of Defendant Olympic Interiors, Inc.'s Motion for Summary Judgment and attached Exhibits 1 and 2 filed November 6, 2019;

4. Plaintiff Opposition to Defense Motion for Summary Judgment to Dismiss filed November 8, 2019;

5. Plaintiffs' Further Opposition to Defense Motion to Dismiss and to Support My October 28, 2019 Motion to Compel, and All My Thus Far Plaintiffs' Filings to Support Denial of Dismissal as Addendum to 11/08/19 Opposition filed November 12, 2019;

6. Defendant Olympic Interiors, Inc.'s Reply in Support of Its Motion for Summary Judgment filed November 27, 2019;

7. Defendant Olympic Interiors, Inc.'s Motion to Strike Plaintiff's Improper Brief and Declaration filed December 5, 2019; and

8. Declaration of Jeffery M. Wells in Support of Defendant Olympic Interiors, Inc.'s Motion to Strike Plaintiffs' Improper Brief and Declaration, with attached Exhibit A filed December 5, 2019.²³

²³ CP 163-165

At the Trial Court, it was only *after* Olympic pointed out Collins' failure to submit evidence in its summary judgment reply brief that Collins tried to correct the error by submitting an untimely and improper supplemental brief and declaration. Olympic moved to strike the improper submission, which the Trial Court granted.

Under RAP 9.12 then, this Court's review is limited to the documents identified above. Despite this express limitation, Collins attempts to "back door" new evidence through the appendix to his brief. This tactic impermissible under RAP 10.3(a)(8). None of the evidence that Collins seeks to submit here was submitted (or allowed) by the Trial Court. Thus, it should not be considered.

C. Standard for Review for Summary Judgment

The Court reviews summary judgment *de novo* and engages in the same inquiry as the trial court. *Kruse v. Hemp*, 121 Wn.2d 715, 722 (1993). Summary judgment is appropriate when the pleadings, affidavits, depositions, and admissions on file show the absence of any genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. CR 56(c). The appellate court can affirm the superior court's order granting summary judgment "on any basis supported by the record." *Coppernoll v. Reed*, 155 Wn.2d 290, 296 (2005).

1. **Collins Did Not Submit Evidence Precluding Summary Judgment**

“When a motion for summary judgment is made and supported as provided in [CR 56], an adverse party may *not* rest upon the mere allegations or denials of a pleading, but a response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.”²⁴

Collins’ opposition to Olympic’s motion for summary judgment rested exclusively on allegations.²⁵ Apart from a passing reference to the Declaration of Doug Bagnell, which Olympic submitted with its motion, Collins failed to put forth *any* admissible evidence to support his factual assertions. The only other documents Collins submitted were “attachments” that failed to comply with CR 56(e).²⁶ Because Collins failed to submit any

²⁴ CR 56(e) [emphasis added]; *Becker v. Washington State University*, 165 Wn. App. 235 (2011) (holding that on summary judgment, the nonmoving party may not rely on speculation, argumentative assertions, or in having its affidavits considered at face value; rather, after the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists).

²⁵ Collins’ failure to submit evidence is likewise evident on appeal as he fails to comply with RAP 10.3(a)(5), which requires that Collins support each of his factual statements with a reference to the record.

²⁶ Collins’ *pro se* status does not relieve him of the duty to comply with the Court rules. *See e.g., State v. Bebb*, 44 Wn. App. 803, 806 (1986) (self-representation is not a license to avoid compliance with court rules), *aff'd*, 108 Wn.2d 515 (1987); *Spokane Research & Defense Fund v. Spokane County*, 139 Wn. App. 450 (2007) (holding that a letter from senior assistant attorney general regarding the tax exempt status of parking garage was not admissible in summary judgment hearing where the city attached the letter to a memorandum it filed in the superior court and made no attempt to provide a supporting affidavit on which to base the admission of the letter).

admissible evidence, this Court should affirm the Trial Court's Order granting summary judgment.

2. Collins Failed to Prove Intentional Infliction of Emotional Distress

However, even if the Court considered the inadmissible attachments, Collins failed to prove the prima facie elements of his intentional infliction of emotional distress/outrage claim.²⁷ To prove the claim, Collins must show (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) severe emotional distress. The alleged conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency and regarded as atrocious, and utterly intolerable in a civilized community."²⁸ Extreme and outrageous conduct must be such that the recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim "outrageous!"²⁹ Liability *only* exists when the conduct has been so outrageous and extreme in degree as to go beyond all possible bounds of decency and to be regarded

²⁷ Under Washington law, "outrage" and "intentional infliction of emotional distress" are the same. See e.g., *Snyder v. Medical Services Corp. of Eastern Wash.* 98 Wn. App. 315 (1999); *Repin v. State*, 198 Wn. App. 243, 265 (2017) ("The tort of outrage is synonymous with a cause of action for intentional infliction of emotional distress.")

²⁸ *Id.* at 867.

²⁹ *Kloepfel v. Bokor*, 149 Wn.2d 192, 196 (2003); *Reid v. Pierce County*, 136 Wn.2d 195, 201-02 (1998)

as atrocious and utterly intolerable in a civilized community.³⁰ There is no liability for “mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.”³¹

Generally, the elements of an intentional infliction of emotional distress claim are questions of fact.³² On summary judgment, however, a trial court makes an initial determination as to whether the conduct may reasonably be regarded as so “extreme” and “outrageous” as to warrant a factual determination by the jury.³³

Collins cannot overcome summary judgment. First, none of Olympic’s conduct as alleged by Collins rises to the level of intentionally inflicting emotional distress, particularly in Washington, where “the level of outrageousness required is *extremely* high.”³⁴ Nothing that Collins alleges would make a reasonable person exclaim that Olympic’s conduct was “outrageous!”³⁵ Instead, Collins asks the Court to impose liability on

³⁰ *Grimshy v. Samson*, 85 Wn.2d 52, 59 (1975) [emphasis added]

³¹ *Kloepfel v. Bokor*, 149 Wn.2d at 196

³² *Strong v. Terrell*, 147 Wn. App. 376, 385 (2008)

³³ *Sutton v. Tacoma School District No. 10*, 180 Wn. App. 859, 869 (2014); *Strong v. Terrell*, 147 Wn. App. at 385

³⁴ *Repin v. State*, 198 Wn. App. 243, 267 (2017) [emphasis added]

³⁵ *Benoy v. Simons*, 66 Wn. App. 56 (1992) (affirming summary dismissal of IIED claim where plaintiff sued neonatologist after giving birth to severely disabled premature child, the neonatologist “needlessly pressured her family to create a guardianship, maintained the infant needlessly on life support, led her to believe her son’s condition improved when it deteriorated, told her to bring her son’s body home on a bus, and billed her for needless care); *Christian v. Tohmeh*, 191 Wn. App. 709 (2015) (affirming motion for summary

Olympic for exercising its right to dispute a worker's compensation claim that he filed months after leaving Olympic's employment. Permitting liability based on conduct that is unequivocally *lawful* would chill an employer's right to dispute bogus claims, and as set forth more fully below, is impermissible under the Anti-SLAPP statute.

Second, Collins cannot put forth evidence that Olympic caused any harm. Collins alleges, without support, that the Department denied his worker's compensation claim because it considered the information from

judgment dismissal of IIED claim where plaintiff presented evidence that defendant engaged in a pattern of intentional behavior to obfuscate a true diagnosis of plaintiff's neurological deficits in an attempt to avoid legal liability; referred plaintiff to a neurologist but not ordering nerve conduction studies; yelled and shouted at her; told plaintiff that she had no neurological deficits, her problems were all in her head, and whatever was wrong would have happened anyway; implied to plaintiff that she was lazy and obese; spoke angrily to plaintiff's other treating physician and attempted to influence the physician's diagnosis; told the second physician that plaintiff suffered from significant emotional or psychological issues that rendered plaintiff's history less valid; and referred plaintiff to a urologist, who found a neurogenic bladder, yet told plaintiff that the urologist's findings were normal); *Cangemi v. Advocate South Suburban Hospital*, 364 Ill.App.3d 446, 845 N.E.2d 792, 300 Ill.Dec. 903 (2006) (Dismissing a claim for intentional infliction of emotional distress where a mother sued her obstetrician for damages suffered by her son during birth. The mother alleged that the physician attempted to conceal the injuries sustained by the boy by fraudulently telling her that the size of the baby's head necessitated a caesarean section); *In Hart v. Child's Nursing Home Co.*, 298 A.D.2d 721, 749 N.Y.S.2d 297 (2002) (affirming trial court's summary judgment dismissal of outrage claim where Plaintiffs complained about the care of their mother in a nursing home. The plaintiffs alleged that nursing staff threatened them with physical violence, otherwise harassed them, interfered in their visits with their mother, and provided them inaccurate information regarding their mother's health and death. The reviewing court affirmed the trial court's dismissal of the action for outrage. The conduct of the nursing staff did not transcend the bounds of human decency); *C.M. v. Tomball Regional Hospital*, 961 S.W.2d 236 (Tex. App. 1997) (affirming dismissal of IIED claim where plaintiff sought treatment at the hospital after being raped. She testified that hospital staff treated her "like dirt," told her that the hospital does not treat rape victims, suggested that she lost her virginity by riding a bike or horse, and interviewed her in a rude and insensitive manner in a public waiting room).

the Memorandum, and his Olympic Timesheet and paystub, but Collins has zero evidence that the Department received (or relied upon) the information when it denied Collins' claim. In fact, the Board of Industrial Insurance Appeals' orders dismissing Collins' appeal make clear that the Department reached its decision based on the medical evidence, *not* information provided by Olympic. Collins did not submit any documents, deposition testimony, declarations or other evidence to support his theory. In his "Further Opposition to Olympics Motion to Dismiss," Collins pointed to a Supplemental Quarterly Report as a document that would have impacted his worker's compensation claim, but Collins fails to show that this information (or any other information) was received or considered by the Department (i.e., no causation).³⁶ That is because the record is clear: the Department's decision to deny Collins' claim was based on the lack of medical evidence.³⁷ Without this causal link, Collins' claim must fail as a matter of law.

In his brief, Collins cites *Polk v. INROADS*, 951 S.W.2d 646 (1997) for the proposition that Olympic engaged in a "calculated plan" to cause intentional infliction of emotional distress. In *Polk*, the Court reversed a

³⁶ Quarterly Reports and Supplemental Quarterly Reports are sent to a different divisions than the divisions adjudicating worker's compensation claims. Compare <https://lni.wa.gov/insurance/quarterly-reports/file-quarterly-reports/> and <https://lni.wa.gov/claims/for-employers/file-employers-report-of-accident>.

³⁷ CP 237-256

trial court order granting defendant's *motion to dismiss* the plaintiff's intentional infliction of emotional distress claim. In reviewing the record, the *Polk* court determined that plaintiff had put forth sufficient allegations to withstand the motion to dismiss by asserting the defendant engaged in the following acts after plaintiff had reported alleged misconduct by the employer:

- Employer targeted plaintiff by confiscating files from her office and altering company documents relating to her vacation time to make it appear that she had taken more vacation than permitted and more than she had;

- Employer followed plaintiff at work, even on trips to the bathroom;

- Employer made six prank phone calls to plaintiff in a four hour period while she was on sick leave;

- Employer misrepresented to plaintiff's co-workers that she was the cause of the lack of success of the company's operations;

- Employer demoted plaintiff and stripped her of her duties and responsibilities; and,

- Employer created unreasonable and unattainable work production requirements for plaintiff, which it did not do for other employees.³⁸

Polk is distinguishable. First, the *Polk* court was reviewing an order granting a motion to dismiss, which is a different standard than summary judgment. In opposing a motion to dismiss, a plaintiff *may* rest on allegations, and the Court must accept them as true with all reasonable inferences arising therefrom.³⁹ Collins was not permitted to rest on allegations because Olympic moved for summary judgment. As such, he was required to submit admissible evidence raising a genuine issue of material fact.

Second, the plaintiff in *Polk* articulated a string of facts from which an inference could be drawn that the defendant engaged in a pattern of conduct intentionally designed to inflict emotional distress. Collins' allegations do not rise to this level. Instead, Collins aims to hold Olympic liable for disputing his claim. Permitting liability in this context would create a watershed of litigation against employers who exercise their right to dispute an employee's worker's compensation claim.

³⁸ *Polk*, 951 S.W.2d at 648

³⁹ *Id* at 647

Collins' brief also mentions *Ortiz v. Chipotle*. That case is also distinguishable. In *Ortiz*, the employee filed a worker's compensation claim because of a wrist injury. Within five days of taking medical leave, she was terminated by her employer. The employer then alleged that she had stolen money from the company. Not only was the theft disputed and proven to be a ruse, but the company also destroyed the videotape that allegedly showed "the theft" after the allegations were made.⁴⁰

Olympic did not terminate Collins' employment for filing his worker's compensation claim, and he makes no claim that they did.⁴¹ Olympic did not accuse Collins of theft or other misconduct. Olympic simply disputed his claim because he did not contemporaneously report an alleged injury. Finally, Olympic did not spoliage evidence.

The cases cited by Collins do not support his position, but rather, they confirm that the Trial Court properly dismissed his claims.

3. Collins Failed to Prove Defamation

To prove defamation, Collins must prove (1) a false and defamatory communication; (2) lack of privilege; and (3) damages. A communication is defamatory if it tends so to harm the reputation of another as to lower him

⁴⁰ *Ortiz v. Chipotle Mexican Grill, Inc.* JVR No. 1806060045, 2018 WL 3058345 (Cal. Super. 2018); 2018 WL 2267747 (special verdict form)

⁴¹ Collins did not file his worker's compensation claim until five months after he abandoned his job.

in the estimation of the community or to deter third persons from associating or dealing with him.⁴²

First, none of the information transmitted (or allegedly transmitted) to the Department rises to the level of a defamatory statement that would lower Collins “in the estimation of the community or to deter third persons from associating or dealing with him.”⁴³ The Memorandum, which is the center of Collins’ defamation claim, merely disputes the cause of Collins’ alleged injury and informs the Department that Collins did not contemporaneously report an alleged injury to Olympic.⁴⁴ Collins puts forth no legal authority to support the proposition that Olympic defamed him by recording observations of his physical limitations and disputing his worker’s compensation claim.

Collins also failed to demonstrate “causation.” As set forth above, Collins offers no evidence that the Department – which is comprised of numerous divisions – considered any information provided (or alleged to

⁴² *Right-Price Recreation, LLC v. Connells Prairie Comm. Council*, 146 Wn.2d 370, 382 (2002)

⁴³ A statement is *per se* defamatory when it (1) exposes a living person to hatred, contempt, ridicule or obloquy, to deprive him of the benefit of public confidence or social intercourse, or (2) injures him in his business, trade, profession or office. *Caruso v. Local Union No. 690 of Int’l Bhd. of Teamsters, Etc.*, 100 Wn.2d 343, 353 (1983); *Valdez-Zontek v. Eastmont Sch. Dist.*, 154 Wn. App. 147, 165 (2010).

⁴⁴ Collins’ Further Opposition To Defense Motion to Dismiss, p. 5 (“Defamation,,comes from the June 22, 2017 MEMO”)

have been provided) by Olympic when it made the decision to deny Collins' claim. The undisputed evidence is that the Department made its decision solely on the independent investigation that it conducted, particularly the IME performed by Dr. Sullivan.⁴⁵

Finally, as set forth below, any information or communication to the Department is privileged under RCW 4.24.510; thus, a defamation claim cannot be maintained.⁴⁶

4. Collins' Claims Are Barred by Washington's Anti-SLAPP Statute

There is a more direct reason that Collins' claims fail: any communication between Olympic and the Department regarding his worker's compensation claims are privileged under Washington's Anti-SLAPP statute (RCW 4.24.510). "Anti-SLAPP statutes punish those who file lawsuits—labeled strategic lawsuits against public participation or SLAPP—that abuse the judicial process in order to silence an individual's free expression or petitioning activity."⁴⁷ This statute grants the speaker immunity from claims based upon his or her communication to a government entity regarding any matter reasonably of concern to the

⁴⁵ CP 247

⁴⁶ A claim for defamation requires a lack of privilege. *Right-Price Recreation, LLC v. Connells Prairie Comm. Council*, 146 Wn.2d 370, 382 (2002).

⁴⁷ *Davis v. Cox*, 183 Wn.2d 269, 294 (2015)

governmental entity.⁴⁸ Further, the statute grants Olympic statutory immunity, as well as reasonable attorneys' fees, against the party making the claim for civil liability:

A person who communicates a complaint or **information** to... local government... is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization.⁴⁹

Collins argues, as he did below, that the statute does not apply, and if it does, that Olympic must show good faith. Collins is incorrect: First, the statute does apply. The section of the statute that Collins alludes to regarding complaints of “public concern” pertains to RCW 4.24.525, which was found to be unconstitutional in *Davis v. Cox*.⁵⁰ But that is not the section upon which Olympic relies. Instead, Olympic relies on RCW 4.24.510.

Moreover, there is no good faith requirement.⁵¹ However, even if it was a requirement, Olympic acted in good faith by disputing Collins' claim,

⁴⁸ *Id.*

⁴⁹ RCW 4.24.510 [emphasis added]. In *Davis*, the Washington Supreme Court declared a separate section—RCW 4.24.525—unconstitutional. *Davis*, 183 Wn.2d at 294. But it specifically left intact the remainder of the statute, including .510. *Id.* at 274; *see also Phoenix Trading, Inc. v. Loops, LLC*, 732 F.3d 936, 942 (9th Cir. 2013) (differentiating between the two sections). Olympic is proceeding under Section .510.

⁵⁰ 183 Wn.2d 269 (2015)

⁵¹ *Bailey v. State*, 147 Wn. App. 251 (2008); *Phoenix Trading, Inc. v. Loops LLC*, 732 F.3d 936 (2013)

which was not contemporaneously reported and which he did not file until months after leaving Olympic.

Washington's Anti-SLAPP statute is another basis upon which the Trial Court could have properly dismissed Collins' claims.⁵² The Statute is clear: Collins cannot maintain a claim against Olympic premised on the communications with, or information provided to, the Department regarding his worker's compensation claim.⁵³ Here, Collins premises his *entire* lawsuit on those protected communications. Thus, the claims must fail.

5. The Trial Court Properly Struck Collins' Improper Brief and Declaration

The briefing established by CR 56(c) contemplates three briefs on summary judgment: an opening brief, an opposition, and a reply.

Olympic filed its motion for summary judgment on November 6, 2019. In response, Collins improperly filed two opposition briefs. Neither opposition was supported by evidence. In reply, Olympic pointed out that Collins had failed to submit evidence as mandated by CR 56(e), and therefore, it was appropriate for the Court to accept Olympic's factual assertions and grant summary judgment. After receiving Olympic's

⁵² The appellate court affirmed the superior court's order granting summary judgment "on any basis supported by the record." *Coppernoll v. Reed*, 155 Wn.2d 290, 296 (2005)

⁵³ RCW 4.24.510.

response, Collins sought to correct this mistake by filing an untimely declaration.

Collins' submissions violated CR 56(c) twice. First, by submitting two opposing motions. Second, by filing another brief and declaration after Olympic filed its reply.

Collins' submissions after Olympic's reply are not permitted by CR 56, and the reason is plain: a party opposing summary judgment should not be able to wait until after the moving party has filed its closing brief to spring new evidence and argument on it. Collins had two opportunities to file a proper declaration with his opposing briefs. He did not. The Trial Court properly struck his late submissions.

V. CONCLUSION

As set forth above, this Court should decline to consider Collins' Assignment of Errors Nos. 2, 3, 7, 9, and 10 because they were not decisions made by the Trial Court, and thus, not reviewable on appeal.

With respect to Olympic's Motion for Summary Judgment, the Trial Court did not err. Collins failed to submit any evidence to preclude summary judgment. However, even if Collins had submitted appropriate evidence, his claims would still fail. Collins did not articulate any conduct rising to the level of intentional infliction of emotional distress or defamation. Collins also failed to demonstrate causation on either claim.

Finally, Collins fails to overcome Olympic's anti-SLAPP defense as his entire lawsuit is premised on protected communications with the Department.

For these reasons, the Trial Court's Order granting summary judgment should be affirmed.

RESPECTFULLY SUBMITTED this 10th day of March, 2020.

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s/ Jeffery M. Wells

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on March 10, 2020, I caused a true and correct copy of the foregoing document to be delivered via U.S. mail and the court efilng system to:

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DATED this 10th day of March, 2020, at Seattle, Washington.



Sandra V. Brown, Legal Assistant

WILLIAMS KASTNER

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