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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 329224

COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION III

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

Appellants,

v.

MICHAEL SOMMER,

Respondent.

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

REPLY BRIEF OF APPELLANTS

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I. ARGUMENT

Michael Sommer (“Mr. Sommer”) should be held accountable for his malicious efforts to destroy the reputation of Defendants Life Designs Inc. and Vincent and Bobbie Barranco (the “Barrancos”) notwithstanding his attempt to deflect his tortious conduct to nonparties such as HEAL.¹ Equipped with a host of false and defamatory statements, Mr. Sommer created a spoof website aimed to reach his target audience: Life Designs’ potential clients, their parents, and their Educational Consultants². (CP 248-57). But Mr. Sommer did not stop there. He also contacted a known referral source of Life Designs, Chad Balagna, and instructed him not to refer young adults to Life Designs. (CP 202-03). Mr. Sommer sought his revenge and his tortious conduct caused Life Designs substantial harm and damages. (CP 47-50, 196-227). The trial court erred when it denied Life Designs’ Motion for Partial Summary Judgment Re: Defamation Per Se and when it dismissed Life Designs’ claims on summary judgment. This Court should reverse the trial court’s decisions and remand for further proceedings.

¹ Unless noted otherwise, “*Life Designs*” refers collectively to Life Designs and the Barrancos.

² Educational Consultants are professionals typically hired by, or parents of, clients to assist in selecting a suitable after-care program for young adults on the path to recovery. (CP 198-99).

A. The False Content Of Mr. Sommer’s Website Is Defamatory Per Se, Notwithstanding That It Does Not Impute Any Crime Or Communicable Disease.

At least three categories of statements are defamatory per se:

“A defamatory publication is libelous per se (actionable without proof of special damages) if 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.”

Maison de France, Ltd. v. Mais Oui!, Inc., 126 Wn. App. 34, 44-45, 108 P.3d 787 (2005) (quoting Caruso v. Local Union No. 690 of Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., 100 Wn.2d 343, 353, 670 P.2d 240 (1983)). Third “[a] publication is also libelous per se if it imputes to the plaintiff criminal conduct involving moral turpitude.” Id. at 45, 108 P.3d 787 (citing Ward v. Painters’ Local Union No. 300, 41 Wn.2d 859, 863, 252 P.2d 253 (1953)).

Mr. Sommer argues that the defamatory content he posted to the internet is not defamatory per se because “*none of the contents of those four (4) pages imputes Life Designs Ranch with a crime or a communicable disease.*” (Resp’t Br. at p. 17). Mr. Sommer, however, fails to account for the other alternative basis for a court to conclude that a defamatory publication is defamatory per se. Specifically, his defamatory website exposed Life Designs to hatred,

contempt, ridicule and obloquy, deprived them of public confidence, and injured them in their business.

On appeal, Mr. Sommer failed to take any position on the issue of whether this case presents an “*extreme*” instance of defamation per se such that Life Designs is entitled to presumed general damages as a matter of law. Caruso, 100 Wn.2d at 354, 670 P.2d 240. Indeed, this case presents such an extreme instance of defamation. Id. In any event, “*reasonable persons could reach but one conclusion*” that the defamatory content of Mr. Sommer’s website is defamatory per se. Ernst Home Ctr., Inc. v. United Food & Commercial Workers Int’l. Union, 77 Wn. App. 33, 40, 888 P.2d 1196 (1995). Mr. Sommer’s website caused significant harm to Life Designs reputation and business. (CP 47-50, 200-203).

Mr. Sommer did not dispute that he acted with fault in publishing his defamatory website. See Mais Oui!, Inc., 126 Wn. App. at 54, 108 P.3d 787 (stating that “*where no matters of public concern are involved, presumed damages to a private plaintiff for defamation without proof of actual malice may be available*”). Mr. Sommer acted with actual malice and revenge sufficient to satisfy any standard of fault. As Mr. Sommer threatened:

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

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

(CP 257). Mr. Sommer sought his revenge by pursuing the extra-judicial route. (CP 248-51).

It must not be overlooked that the policy foundation supporting the law of defamation per se is based upon the practical reality that proof of actual damages is often impossible in many defamation cases notwithstanding that actual harm is apparent:

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

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760 (1985) (quoting W. Prosser, Law of Torts § 112, p. 765 (4th ed. 1971)). Here, serious harm has in fact resulted to Life Designs as a result of Mr. Sommer’s defamatory website. (CP 48-49, 200-202).

The trial court erred in denying Life Designs’ motion for partial summary judgment regarding defamation per se. (CP 88). At the very least, genuine issues of material fact exist for the trier of fact regarding whether the website is defamatory per se.

B. The False Statements That Mr. Sommer Loaded To His Website Are Actionable And False.

“The court must decide whether the statement is capable of a defamatory meaning and the jury decides whether the statement was, in fact, defamatory.” Wood v. Battle Ground Sch. Dist., 107 Wn. App. 550, 572, 27 P.3d 1208 (2001). If a publication is capable of defamatory meaning, *“[t]he plaintiff must show the statement is provably false, either in a false statement or because it leaves a false impression.”* Mohr v. Grant, 153 Wn.2d 812, 825, 108 P.3d 768 (2005). A statement is provably false if *“it expresses or implies provable facts, regardless of whether the statement is, in form, a statement of fact or opinion.”* Schmalenberg v. Tacoma News, Inc., 87 Wn. App. 579, 590-91, 943 P.2d 350 (2007). *“Falsity in a classic defamation case is a false statement.”* Mohr, 153 Wn.2d at 823, 108 P.3d 768.

Mr. Sommer argues that his statements on his website are true or are non-actionable *“mockery, exaggeration, vituperation, and complaints . . . from a dissatisfied customer complaining of overcharges and poor service.”* (Resp’t Br. at p. 20). He then isolates particular statements contained on his defamatory website to argue that the website is non-actionable. (Id.). However, *“in determining whether a publication is defamatory, it must be read as a whole and not in part or parts detached from the main body.”*

Camer v. Seattle Post-Intelligencer, 45 Wn. App. 29, 37, 723 P.2d 1195 (1986).

Mr. Sommer's myopic view of his own defamatory website overlooks the context of the website as a whole. Mr. Sommer created his website to take on the appearance of Life Designs' true website, a type of website known as a "spoof" website. (CP 248-55). While some spoof websites are harmless comical parody utilizing hyperbole, others are maliciously designed to deceive the website's audience while attacking the intended victim's reputation.

Here, Mr. Sommer's website was not comedic parody or hyperbole but was maliciously designed to deceive young adults, their parents, and Educational Consultants researching for factual information concerning the experience and services that Life Designs offers. Mr. Sommer's malicious intent in creating this website is clear: to attack Life Designs' reputation in the close-knit recovery community. (CP 238).

Mr. Sommer tries to draw an analogy between a comedic restaurant review published in the New York Times and his own spoof website. ("Restaurant Review"). (CP 285-87). To borrow a phrase from the Respondent's Brief: "[Mr. Sommer's] argument is ridiculous." (Resp't Br. at p. 20). The differences in context of the

Restaurant Review compared to Mr. Sommer's defamatory website demonstrates why his website is capable of defamatory meaning.

As indicated by the link running along the bottom of the page of the Restaurant Review, that review was accessed online under "*dining*" and, then, "*reviews*." (CP 285). Unlike Mr. Sommer's website, a reader selecting the link to the Restaurant Review was prepared for—and, indeed, likely looking for—an opinion about the restaurant. Also, unlike Mr. Sommer's website, the Restaurant Review has a comedic tone.

In contrast, a reader searching the internet for Life Designs and, then, selecting the URL www.lifedesignsranchinc.com would expect this link to lead to Life Designs' true website. Indeed, when searching online for Life Designs' website, Mr. Sommer's spoof website appeared next to the legitimate Life Designs website in the search results. (CP 221). Mr. Sommer's website was published to a target audience of young adults, their parents, and their Educational Consultants looking to select a suitable aftercare program. Rather than expecting to read someone's opinion, the audience reasonably expected to obtain factual information about the services and experience that Life Designs offered its clients.

Mr. Sommer relies on Robel v. Roundup Corporation, but his reliance on this case is misplaced. 148 Wn.2d 35, 59 P.3d 611 (2002). (Resp't Br. at p. 19). In Robel:

The trial court found that "[t]he defamatory communications by Fred Meyer's employees included that Robel was a 'bitch,' a 'cunt,' a 'fucking bitch,' a 'fucking cunt,' a 'snitch,' a 'squealer,' and/or a 'liar,' . .

Id. at 55, 59 P.3d 611. On appeal, the Court concluded that these words were not capable of defamatory meaning, reasoning they were "*vulgarisms*" and not intended to be statements of fact. Id. at 56-58, 59 P.3d 611.

Unlike Robel, Mr. Sommer intended to and did set forth a series of false factual assertions, none of which are hyperbole, opinion, or vulgarity. The website contains false factual assertions concerning the education and experience of Life Designs' staff, the quality of its recovery programs, and the therapeutic environment offered to its clients. (CP 248-51). The website is actionable.

1. Twelve Step Meeting.

Mr. Sommer posted the following false statement to his webpage:

What you get

A bed

Food

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

(CP 248). Life Designs is not, however, located in a “*western Washington community*” but is, rather, located in Eastern Washington and, specifically, in Cusick Washington, in the Pend Oreille River Valley. (CP 47, 52). Mr. Sommer argues that his statement is true because: Cusick, Washington is “*west of Minnesota*”; it “*is in the American West,*”; the state of Washington is located in the “*Pacific Northwest*”; and Cusick, Washington is in the “*Inland Northwest.*” (Resp’t Br. at pp. 20-21).

However, Mr. Sommer’s false statement was that Life Designs was located in “*western Washington.*” (CP 248). The word “*western*” is in relation to the state of “*Washington,*” not in relation to the United States and not in relation to “*Minnesota.*” (CP 248). This is a classic false statement. Notably, the distinction between eastern Washington and western Washington is one with a difference because a critical component of the after-care program is the outdoor therapeutic environment that Life Designs offers. Life Designs’ location in eastern Washington is a critical component of the therapeutic environment that it offers.

2. Therapeutic Environment.

Mr. Sommer also posted the following false statement:

What you get

...

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

(CP 248). Mr. Sommer attempts to downplay the factual and legal significance of this statement by describing it as “[o]pinion[] about scenery”. (Resp’t Br. at p. 21)³. The statements that a river cannot be seen, that mountains cannot be seen, and that Life Designs offers a visual experience of dead pine trees are false factual statements, not opinions. (CP 248). Mr. Sommer argues that these statements are no different than some harmless customer “complaint” concerning a business. (Resp’t Br. at p. 21). However, that a false statement is a complaint does not somehow make that false statement of fact one of opinion.

3. The Remaining Content Of Mr. Sommer’s Website Is Also Actionable.

Mr. Sommer concludes that “[t]he remainder of the statements of the Sommer webpages are all protected speech,

³ Mr. Sommer also argues that “if an accurate description of Cusick, Washington is causing harm to its business, its remedy is to relocate.” (Resp’t Br. at p. 21). But, again, this description of Cusick, Washington is patently false based on any reasonable reading and, of course, a defamation plaintiff is not required to uproot a business to make a false statement made by a defamation defendant true. Life Designs’ remedy is an award of damages, general and special, to be determined by the trier of fact.

and are likewise non-actionable.” (Resp’t Br. at p. 22). This is incorrect because there are many other examples of false statements capable of defamatory meaning. For example, Mr. Sommer made the following false statement concerning the education, experience, and compassion of Life Designs’ staff:

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

(CP 249). At his deposition, Mr. Sommer conceded that if Life Designs had any employee with substance abuse experience or education then the foregoing statement would be false. (CP 245). Life Designs in fact employed people with education, experience, and compassion for young adults. (CP 64-65, 190-95)

C. Mr. Sommer Republished Defamatory Statements By Supplying A Hyperlink To The HEAL Website.

A defendant may be liable for republishing defamatory content. Momah v. Bharti, 144 Wn. App. 731, 182 P.3d 455 (2008). This case presents an issue of first impression regarding republication in the internet age: whether providing a hyperlink to a particular webpage may be a republication of that webpage. Stated narrowly, the issue is whether posting a hyperlink to a webpage communicates the content of that webpage to a third person. See

Lamon v. City of Westport, 44 Wn. App. 664, 668, 723 P.2d 470 (1986) (“Any act by which the defamatory matter is intentionally or negligently communicated to a third party is a publication”).

“A ‘link,’ ‘button,’ or ‘hyperlink’ is ‘an electronic link providing direct access from one distinctively marked place in [an electronic] document to another in the same or a different document.’” Benson v. Processing Serv., Inc., 136 Wn. App. 587 n.1, 150 P.3d 154 (Dist. of Columbia 2007). Or. The access to the content to which a link leads is nearly instantaneous and operates as an incorporation by reference. See Boley v. Atl. Monthly Grp., 950 F. Supp.2d 249, 262 (2013) (explaining that hyperlinking to a different article incorporated that article by reference).

Mr. Sommer relies on Klein v. Omeros Corp. to support his contention that providing a hyperlink to a defamatory website is not a republication of the material on that website. 897 F. Supp. 2d 1058 (W.D. Wash. 2012). (Resp’t Br. at p. 33). The United States District Court for the Western District of Washington distinguished two Washington appellate decisions addressing republication, explaining that Momah v. Bharti and Lamon v. City of Westport each “hinged on the defendant’s communication of the contents of the original, allegedly defamatory statements” and that Court

erroneously equated providing a URL to a mere reference rather than to a republication. *Id.* at 1073 (citing Momah, 144 Wn. App. 731, 182 P.3d 455; Lamon, 44 Wash. App. 664, 723 P.2d 470).

As a preliminary matter, a Federal Court's application of Washington state law is not binding on this Court. Furthermore, the Klein decision missed the mark. Providing a hyperlink is qualitatively different than, for example, a footnote in a periodical because, unlike a footnote, a hyperlink takes you directly, and nearly instantaneously, to the very source referenced. In this way, by providing a hyperlink, a person is doing more than providing a reference to a different webpage; that person is supplying direct access to the content of the webpage itself.

Additionally, the distinction between posting a hyperlink to a defamatory website and reposting the content of a defamatory website does not make any meaningful difference because, in both instances, a communication is made to a third person.

Furthermore, that a hyperlink may constitute republication for defamation purposes is supported by Washington law. For example, in Lamon v. City of Westport, the Court explained that:

the placing of the file in the public library would constitute, assuming communication of its contents to a third party, a republication of statements made originally in the course of a judicial proceedings. . . .

Lamon, 44 Wn. at 668, 723 P.2d 470. Here, posting a hyperlink on a website to defamatory content contained on a separate webpage is the modern-day equivalent of placing a file on a library rack. Just as any person in a library would be able to access a book on a shelf, any person on the internet is able to access the information to which a link leads. Similarly, a hyperlink is also the modern-day equivalent of a direction contained in a newspaper for the reader to turn to a particular page to read the rest of the article.

Here, Mr. Sommer republished the false and defamatory content of the HEAL website by posting a hyperlink thereto:

*For more info click or cut and paste the link below
<http://www.heal-online.org/lifedesigns.htm>.*

(CP 249). Mr. Sommer not only provided a link to the HEAL website but provided his audience with direction regarding how to access the defamatory website: by either clicking the hyperlink or cutting and pasting the hyperlink to instantaneously bring the false and defamatory content of the HEAL website before them. (CP 249). Mr. Sommer, thus, republished the HEAL website by virtue of a hyperlink.

D. Mr. Sommer's Tortious Conduct Caused Life Designs' Damages.

Mr. Sommer did not dispute that his conduct was the legal cause of Life Designs' damages but, rather, contends that Life Designs relies on "*conjecture and speculation*" to support factual, but for, causation. (Resp't Br. at p. 23). In taking this position, Mr. Sommer refuses to acknowledge the wealth of evidence before the Court showing that, but for his tortious conduct, Life Designs would not have had a substantial decrease in referrals and enrollment.

For instance, the Declaration of Clay Garrett provides ample evidence of causation and damages. (CP 196-203). Mr. Garrett began his work with Life Designs in 2010, and was later promoted to the position of Program and Admissions Director. (CP 196-200). In this role, Mr. Garrett developed new business through referrals from Educational Consultants and by creating a positive online presence. In this way, Mr. Garrett actively maintained Life Designs' positive reputation in the community.

Before Mr. Sommer posted his defamatory website and directed Educational Consultant Chad Balagna not to refer any clients to Life Designs, Life Designs had a historic average referral rate of 17 referrals and an average client enrollment rate of 4.6 clients per quarter. (CP 49). However, during the quarter that Mr. Sommer launched his defamatory website, Life Designs received no

new clients and only 9 referrals. (CP 49). Life Designs' average referral rate ultimately dropped to 6.25 referrals per quarter and its client enrollment rate dropped to 1.75 clients per quarter. (CP 49).

As further evidence of damages, Mr. Garrett provided the following expert opinion:

Based upon my experience and expertise in the role of admissions director of an after-care program like Life Designs and other roles in this field, and after completing the analysis of Sommer's spoof website on Life Designs client enrollment, it is my conclusion that the website caused Life Designs to lose referrals and consequently 9-12 students.

(CP 202). Therefore, the drop in referral and enrollment rates was the result Mr. Sommer's tortious acts.

Mr. Sommer has argued that evidence that Life Designs' referral rate dropped after Mr. Sommer created his defamatory website is nothing more than a "coincidence" in time. (Resp't Br. at pp. 22-23). The trial court erroneously agreed with Mr. Sommer and erred in doing so. (CP 297, 348).

The sequence of events in time may give rise to an inference of causation sufficient to defeat a defense motion for summary judgment. For instance, at issue in Borden v. City of Olympia was "whether a trier of fact could rationally find that the [defendant's] breach, if any, proximately caused damage to the [plaintiffs]. 113

Wn. App. 359, 372, 53 P.3d 1020 (2002). There, landowners had sued the City of Olympia (the “City”) for damages resulting from flooding that was allegedly caused by the City’s negligence in “*altering the flow of naturally occurring surface and groundwater.*” *Id.* at 368, 53 P.3d 1020.

The Washington State Court of Appeals reversed the trial court’s dismissal of the landowners’ negligence claim. *Id.* at 374, 53 P.3d 1020. In doing so, the Court considered evidence that the flooding occurred after the City’s completion of a stormwater drainage project, that the flooding recurred on a continual basis thereafter, and that the flooding subsided when another drainage facility channeled water elsewhere. *Id.* at 372, 53 P.3d 1020. Thus, that Court concluded: “*This coincidence in timing gives rise to an inference that the flooding was a proximate result of the 1995 drainage project*” sufficient to give the issue to the trier of fact. *Id.*

Here, Life Designs’ has more than enough evidence, sufficient to support an inference that Mr. Sommer’s website and directive to Mr. Balagna caused Life Designs’ to lose clients. This evidence goes beyond a sequence of events. It includes the expert opinion testimony of Mr. Garrett, former Admissions and Program Director of Life Designs. (CP 196-230). This evidence also includes

the declaration of Mr. Barranco. (CP 47-63). Ultimately, Mr. Sommer achieved his goal: causing substantial damages to Life Designs resulting from his extra-judicial tortious conduct. (CP 257).

E. Mr. Garrett's Declaration Is Admissible As An Expert Opinion.

Evidence Rule ("ER") 702 governs testimony by expert witnesses, and provides that "*a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.*" ER 702. See also ER 703 ("*The facts or data . . . upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing*"). "*Application of the rule raises two questions: (1) does the witness qualify as an expert, and (2) would the witness's testimony be helpful to the trier of fact.*" Acord v. Pettit, 174 Wn. App. 95, 111, 302 P.3d 1265 (2013). Witnesses may qualify as experts by practical experience. Id.

Mr. Garrett easily passes the foregoing test. Mr. Garrett was Life Designs' employee. (CP 196). He began working for Life Designs on December 15, 2010. (CP 196). He attended Sul Ross State University, worked for 10 years at the Dallas Zoological Society, and has been the director of a scouting program. (CP 197). He later worked at a wilderness treatment program for young

adults known as Second Nature Therapeutic Programs, which is located in Santa Clara, Utah. (CP 197). He worked there for four years, first as a Mentor and, then, as a Field Director. (CP 197). At Life Designs, Mr. Garrett worked in many capacities including that of a Mentor, Life Coach, and Program and Admissions Director. (CP 197). As a Program and Admissions Director, Mr. Garrett was responsible for new business development including Life Designs' online component and reaching out to Educational Consultants. (CP 198). He ensured Life Designs' website was professionally presented and he tracked online traffic to this website. (CP 200).

Mr. Garrett analyzed referrals and client enrollment to determine the impact that Mr. Sommer's defamatory website had on Life Designs' business. (CP 202). To do this, he utilized Google Analytics, which generates detailed statistics about a website's traffic and traffic sources and measures conversions and sales, and he used Life Designs' business records. (CP 202). Mr. Garrett is qualified as an expert and his declaration sets forth a proper foundation. His declaration is admissible as expert testimony.

Mr. Sommer erroneously states that “[t]he trial court did not err in declining to consider Garrett's declaration.” (Resp't Br. at p. 26). However, Mr. Sommer did not and cannot point to anywhere

in the record where the trial court made any evidentiary ruling concerning the admissibility of Mr. Garrett's declaration⁴. Furthermore, Mr. Sommer's argument that Mr. Garrett has "*no basis for his opinions*" and argument that he lacks "*training and foundation to offer his opinions*" is disingenuous in light of the testimony set forth in Mr. Garrett's declaration as explained above.

F. Genuine Issues Of Material Fact Exist With Respect To The Remaining Elements Of Life Designs' Defamation Claim And No Privilege Applies.

Mr. Sommer does not dispute that he was not privileged to publish false and defamatory information, nor does he dispute that his actions in publishing false and defamatory information rose to the level of a malice standard of fault.

G. The Trial Court Erred In Dismissing Life Designs' Tortious Interference Claim.

Mr. Sommer argues that: (1) he did not interfere with any business expectancy of Life Designs; (2) if he did interfere, it was

⁴ In the trial court's ruling dismissing Life Designs' defamation claim, the court stated that "[o]nly the possible question of general damages remains for trial" and, in a footnote, explained that "*Clay Garret is an informed fact witness—knowledgeable about Life Design's enrolment process.*" (CP 298). That court recognized that Mr. Garrett was able to provide testimony to support the question of general damages as to Life Designs' defamation per se claim. To be sure, Mr. Garrett is an informed fact witness able to testify in support of general damages under a theory of defamation per se. However, nothing in this decision forecloses consideration of Mr. Garrett's declaration as expert witness testimony under ER 702.

not improper; and (3) Life Designs did not suffer any pecuniary loss. (Resp't at pp. 29-32). These arguments are addressed in turn.

1. Interference.

Mr. Sommer does not dispute that Life Designs had a valid business expectancy in receiving referrals and enrolling clients. He contends, rather, that Life Designs did not show “*any specific interference with a specific relationship.*” (Resp't Br. at p. 29) (emphasis added). Here, Mr. Sommer refused to address the evidence in the record as to his interference. Specifically, Mr. Sommer interfered with Life Designs' relationship with Chad Balagna, whom Mr. Sommer knew to be a key referral source of Life Designs. (CP 202-203). Further, Mr. Sommer interfered with relationships between Life Designs and young adults, and their families, looking to enroll in an after-care program. (CP 47-50).

2. Improper Purpose Or Improper Means.

The fourth element of a tortious interference claim “*requires an improper objective or the use of wrongful means that in fact cause injury*” to one's expectancy. Leingang v. Pierce Cnty. Med. Bureau, Inc., 131 Wn.2d 133, 157, 930 P.2d 288. Importantly, this test is stated in the disjunctive: interference may be wrongful because the defendant interfered with an improper purpose or by

utilizing improper means. *Id.* Nevertheless, Mr. Sommer incorrectly asserts as follows: “*the only argument made by Life Designs Ranch that any interference is improper is entirely predicated upon the assumption that the content of the Sommer website was defamatory.*” (Resp’t at p. 30).

No doubt, that Mr. Sommer published a false and defamatory website is evidence of improper means. Mr. Sommer does not address, however, the additional, and **independent basis**, that creates genuine factual issues as to whether Mr. Sommer’s tortious interference was wrongful. Namely, he acted with an improper objective of harming Life Designs’ reputation. Mr. Sommer’s own words speak for themselves: “*But I would go both routes if I have to.*” (CP 257). The evidence supporting Life Designs’ defamation claim reinforces the tortious interference claim, but the tortious interference claim does not rise and fall on the outcome of Life Designs’ defamation claim.

3. Pecuniary Loss.

The Washington Supreme Court has succinctly stated the policy supporting tortious interference claims as follows:

“The interest protected is the interest in reasonable expectations of economic advantage.”

Scymanski v. Dufault, 80 Wn.2d 77, 84, 491 P.2d 1050 (1971) (quoting 1 F. Harper and F. James, *The Law of Torts*, s 6.11 at p. 510 (1956)). “A *valid business expectancy includes any prospective contractual or business relationship that would be of pecuniary value.*” Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Grp., Inc., 114 Wn. App. 151, 158, 52 P.3d 30 (2002) (citing Restatement (Second) of Torts § 766B, cmt. c).

Here, Life Designs had a valid business expectancy in receiving referrals and, specifically, enrolling young adults choosing an after-care program. This business expectancy has significant economic value. (CP 48). Mr. Sommer’s spoof website caused Life Designs to lose 9-12 students. (CP 202). The cost for one potential client to have an interview with Life Designs is \$1,200. (CP 48). The six-month program in Cusick, Washington costs \$52,200. (CP 48). The cost of transitional housing in Spokane, Washington is \$12,000. (CP 48). Mr. Sommer’s tortious conduct, thus, caused Life Designs substantial pecuniary loss.

Mr. Sommer argues that Life Designs’ has not identified specific relationship between it and a third party, citing to Pac. Nw. Shooting Park Ass’n v. City of Sequim. 158 Wn.2d 342, 144 P.3d 276 (2006). (Resp’t at p. 31). This argument ignores that Life Designs

has alleged, argued, and provided evidence that Mr. Sommer interfered with Life Designs' business expectancies with potential clients looking to enroll in an after-care program.

Furthermore, a close reading of Pacific Northwest Shooting Park Association confirms that it is of no assistance to Mr. Sommer. 158 Wn.2d 342, 144 P.3d 276. In that case, the plaintiff argued on appeal that it had been damaged by the defendant's tortious interference with business expectancies that the plaintiff asserted to have with gun show vendors and the general public. Id. at 351-53, 144 P.3d 276. The court affirmed dismissal of the tortious interference claim because the issue was not properly before it. Id. at 353, 358, 144 P.3d 276. The court reasoned that the plaintiff never alleged any interference between the plaintiff and the gun show vendors or the general public. Id. at 352-53, 144 P.3d 276. Unlike in Pacific Northwest Shooting Park Association, Life Designs alleged, argued, and provided admissible evidence that Mr. Sommer interfered with the business expectancy of enrolling new clients.

H. The Trial Court Erred In Dismissing The Barrancos' False Light Invasion of Privacy Claim.

Mr. Sommer argues that the Barrancos do not have a false light invasion of privacy claim because the defamatory website that he posted to the internet does not specifically identify Ms. Barranco

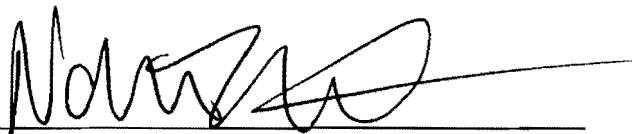
by name and because the website contains opinions and complaints. (Resp't Br. at pp. 27-28). Ms. Sommer placed the Barrancos in a false light by posting false content to the internet concerning the operations of their business. That creates a false impression about the way in which the owners, including Ms. Barranco, operate Life Designs. (CP 250). Again, the content that Mr. Sommer posted is not opinion but contain false factual assertions. Furthermore, Mr. Sommer is not entitled to cast others in a false light under the guise of a so-called "*complaint*."

II. CONCLUSION

The trial court erred in denying Life Designs' Motion for Partial Summary Judgment Re: Defamation Per Se and in dismissing Life Designs' claims of defamation, tortious interference, and false light invasion of privacy. Life Designs respectfully requests that this Court reverse the trial court and remand.

DATED this 11th day of May, 2015.

PISKEL YAHNE KOVARIK, PLLC

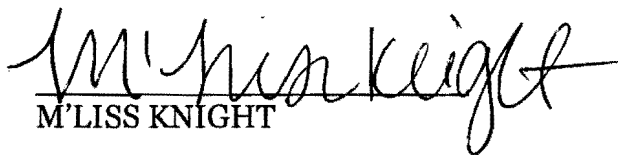


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CERTIFICATE OF SERVICE

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

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