CASE NO. 329224

IN THE COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

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

Appellants,

v.

MICHAEL SOMMER,

Respondent.

RESPONDENT'S BRIEF

PAINE HAMBLEN LLP
Scott C. Cifrese, WSBA #25778
William C. Schroeder, WSBA #41986
717 W. Sprague Avenue, Suite 1200
Spokane, WA 99201-3505
(509) 455-6000
Attorneys for Respondent

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I. INTRODUCTION

"When a defendant in a defamation action moves for summary judgment, the plaintiff has the burden of establishing a *prima facie* case on all four elements of defamation: falsity, an unprivileged communication, fault, and damages." *Sisley v. Seattle Pub. Sch.*, 180 Wn. App. 83, 87, 321 P.3d 276 (2014)(*quoting LaMon v. Butler*, 112 Wn.2d 193, 197, 770 P.2d 1027 (1989)). Summary judgment "plays a particularly important role in defamation cases" because permitting unwarranted defamation suits to proceed to trial can chill speech protected by the First Amendment. *Mohr v. Grant*, 153 Wn.2d 812, 821, 108 P.3d 768 (2005).

Prior to the dispute at issue in the present case, a non-party published a website accusing Appellant Life Designs Ranch, Inc. ("Life Designs Ranch") of being a cult-like, illegal school, quasi-enslaving children to perform menial labor while charging their parents more than the annual Harvard tuition for a five-month work camp. That website is published and maintained by an organization called "HEAL," and is located at www.heal-online.org/lifedesigns.htm. The website remains in operation, and was updated as recently as December 10, 2014.

Entirely unrelated to the HEAL website, in 2012, Respondent Michael Sommer ("Sommer") paid about $50,000 to Life Designs Ranch for a program attended by his son, in Cusick, Washington. Sommer was

dissatisfied with the services received, and a dispute ensued over $12,800 Sommer contended Life Designs Ranch and its owners, Vincent Barranco ("V. Barranco") and Bobbie Barranco ("B. Barranco"), had overcharged him. When unable to resolve the matter amongst themselves, or with the aid of the Better Business Bureau, Sommer, still dissatisfied, created a negative website complaining of Life Designs Ranch's prices and services. Included on the bottom of one of four pages of content maintained by Sommer was the statement "for more info click or cut and paste the link below," with a hyperlink to www.heal-online.org/lifedesigns.htm.

Within a few months, Life Designs Ranch (and the Barrancos, each individually) commenced suit against Sommer, but not HEAL, alleging defamation, invasion of privacy, and interference with business expectancy. The trial court dismissed all claims on summary judgment, holding Life Designs Ranch failed to establish the elements of their claims: the content of the Sommer webpage was not defamatory; no privacy was invaded; no specific business expectancy was identified as interfered with; and there was no competent evidence of special damages.

The trial court further held that merely hyperlinking to an allegedly defamatory webpage did not expose Sommer to defamation liability for the content of the hyperlinked page.

Consistent with established Washington law, Sommer requests this Court affirm the trial court's dismissal of the claims against him, as Life Designs Ranch and its owners failed to establish the elements of their claims, after having opportunity for discovery.

In what appears to be an issue of first impression in this Division, Sommer also requests this Court hold that merely providing a hyperlink to a webpage does not expose the party providing the hyperlink to defamation liability, assuming that the page linked to contains defamatory content.

II. CHRONOLOGICAL STATEMENT OF THE CASE

A. Non-Party HEAL Published A Website Highly Critical of Life Designs Ranch.

Approximately seven (7) pages of detailed criticism of Life Designs Ranch, its practices, and its staff were published on January 21, 2011, by an organization called "HEAL," on a webpage located at www.heal-online.org/lifedesigns.htm.[1] (CP 289-95)

There is no dispute this HEAL website is neither owned nor maintained by Sommer, and he had no role in its creation.

Among the accusations against Life Designs Ranch made on the HEAL website are:

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[1] At the time of the summary judgment hearing, the HEAL page had last been updated January 21, 2011. (*See* CP 295) The webpage remains active, and at the time of this submission it provides that it was last updated December 10, 2014.

- Life Designs Ranch is run like a cult (CP 294)
- It illegally exploits the labor of its "students." (CP 294)
- It illegally calls itself a school. (CP 292)
- One of its staff members worked at another camp, at which a boy died. (CP 289)
- It amounts to paying $6,000 per month for children to work as ranch hands for the owners. (CP 290)
- The remoteness of the location creates a safety hazard, by not being near help in the event of an emergency. (CP 290-91)
- It costs more than the annual tuition of Harvard University. (CP 292-93)
- It charges hidden fees for mandatory additional workshops. (CP 292)
- It is engaging in "peonage." (CP 295)

B. Life Designs Ranch's Owners Were Aware of the HEAL Website, But Elected Not To Take Action Against HEAL.

V. Barranco acknowledged that the Heal website is critical of his program. (CP 118) He believed that the HEAL website existed prior to his ownership of Life Designs Ranch and acknowledged that the HEAL website predated the existence of Sommer's webpage. (CP 118) V. Barranco also testified he became aware of the Heal website and its contents in the winter of 2012, but has taken no legal action against Heal or its owner or publisher. (CP 118)

C. Sommer Sent His Son To Life Designs Ranch; A Dispute Developed Between Sommer and Life Designs Ranch Over a Matter of $12,800.

Sommer entered into a contract to send his son to Life Designs Ranch, for the cost of $52,200 for a 6 month program, plus $1,200 in interview fees, plus $12,000 in "transitional housing." (CP 48) The parties eventually agreed on a 3 month stay.

A contract dispute ensued in which Sommer contended Life Designs had been overcharging him. (CP 48, 237) Sommer believed he had been overcharged by $12,800, and that he was owed a refund. (CP 237) Sommer subsequently sent an email to Barranco concerning the $12,800 dispute:

> From: Mike Sommer [sommerfami@gmail.com]
> Sent: Tuesday, June 26, 2012 6:57 PM
> To: Vince Barranco
> Subject: Re: Fee
>
> Vince,
>
> Please review your contract again. It specifically states that any partial months are billed at full and the last month is not refundable. I think you are in a highly indefensible position. The 26K was put into brackets to show that was the amount we were at THE MOST liable for, not the least. I am willing to get legal with this. Are you? 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. You are wrong on all fronts. Please reconsider before we find it necessary to proceed.
>
> Mike

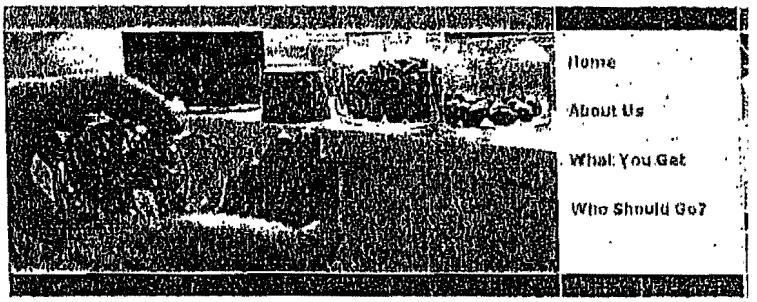
(CP 257)

The dispute over the $12,800 was not resolved by the email exchange.

D. Sommer Created A Webpage Critical Of Life Designs Ranch.

Dissatisfied that Life Designs would not resolve the contract dispute, Sommer contacted the Better Business Bureau, and also registered the domain name www.lifedesignsranchinc.com for free. (CP 239-40) When the Better Business Bureau was unable to help resolve the $12,800 contract dispute, Sommer placed the following four pages of content onto the free domain he had registered at www.lifedesignsranchinc.com:

Life Designs Ranch



What you need to know before you go.

Are you a young adult or the parent of a young adult looking for a therapeutic environment to work on or strengthen your recovery efforts? If you are and have considered Life Designs Ranch in Cusick Washington you would be much better off if you looked somewhere else.

The problems with this organization are numerous. Life Designs Ranch claims to help you pursue your life's passions. That is only true if your life passion fits into what the other 11 prisoners and their wardens consider their life passion. The structure is rigid with any individual idea considered to be an assault on their authority.

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

If you want to look further at least consider alternatives. You will be much better off

http://www.strugglingteens.co/substance-abuse-treatment-programs-washington.html

http://www.lifedesignsinc.com/This is the website for Life Designs Ranch. Do not send your

About Us

We are here to try to protect people from the financial and emotional distress that comes with attending Life Designs Ranch.

While the concept sounds good and the marketing is even better this is only good if you need somewhere to warehouse a young adult and keep them from trouble for 5 months. Healing is not done and seems to be very limited in it's attempt. Keep your money, go somewhere else, or dedicate yourself to your young adults recovery. You will be $44,000 and much richer in experience and recovery.

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.

A visit to Spokane once a week to restock the ranch

Hours and hours of pure boredom

A visit to the local healthclub 3 times a week

Experience in how to ride in a van with 11 other individuals endlessly.

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!!!!

Who Should Go?

You should go to Life Designs if:

You consider cleaning llama crap a therapeutic adventure (seriously, they have llama's)

You or your parents think it is worth $44,000 to have food and shelter for 5 months.

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.

For more info click or cut and paste the link below

http://www.bent-antlers.org/lifedesigns.htm

(CP 248-251)

E. Life Designs Ranch Commenced Suit Against Sommer, But Not Against HEAL.

Life Designs Ranch filed suit on March 25, 2013. (CP 1-7). The Amended Complaint asserts causes of action for defamation, intrusion, false light, and interference with business expectancy. (CP 11-19)

F. The Trial Court Denied Life Designs Ranch's Motion for Summary Judgment – Defamation Per Se

Prior to depositions being taken, on November 20, 2013, Life Designs Ranch moved for partial summary judgment, seeking an order that the content of the four webpages published by Sommer constituted defamation *per se*. (CP 33-46)

V. Barranco submitted a declaration alleging that Life Designs Ranch's business had declined in volume from 2012 to 2013. (CP 49) He asserted that the sole cause of the alleged drop in business was the existence of the Sommer website. (CP 49)

Kimberly Mlinarik provided a declaration stating she did not work at Wilderness Quest in 2007. (CP 65) This declaration appears to have been provided in response to a statement made on the HEAL website, but not on Sommer's website. (*Compare* CP 248-251 *with* CP 289 *and* CP 65)

A response (CP 69-79) and a reply (CP 80-86) were filed, and the trial court ultimately denied the motion, finding that while the content of the webpages published by Sommer was "possibly false," Life Designs Ranch did not establish as a matter of law that the content was defamation *per se*. (CP 88; 89-92)

G. Fact Witness Discovery Was Conducted, After Denial of Life Designs Ranch's Motion.

After the Court's January 6, 2014 denial of Life Designs Ranch's Motion for Summary Judgment re Defamation *per se*, depositions of various fact witnesses were taken. (*See* CP 118, 237, 122, 128) Sommer elicited the following testimony, which formed the basis of his summary judgment motions:

1. There is a great deal of competition across the country for the services provided by Life Designs Ranch.

> **Q.** Any idea – Say across the United States, any idea how many companies like yours there are operating?
> **A.** Hundreds.

(CP 117).

> **Q.** How many other programs throughout the country are there currently, or as of two years ago, that these kids would –
> **A.** I could only give you an estimate.
> **Q.** That would be fine.
> **A.** I would say one hundred plus programs.
> **Q.** So there is an awful lot to choose from in terms of where these clients go after they're done with the wilderness?
> **A.** They do have a lot of choices, yes.

(CP 123).

2. The HEAL website is highly critical of Life Designs Ranch.

> **Q.** Are you aware of any other groups that have ever criticized your business other than Mr. Sommer?

A. Yes, there's a heal.com type thing, I'm not exactly sure what the website is, but they – as well as my program, any other program that basically exists out there, they have something not good to say about it?

Q. Was there criticism of Life Designs Ranch specifically? Did that occur before Mr. Sommer was criticizing?

A. It was before I even owned it.

Q. Do you know if the criticism continues?

A. I don't know. I don't really look at it.

. . . . .

Q. And so have you seen the criticisms that they have laid against your company?

A. Yes.

Q. Okay. I'm assuming you don't agree with the criticisms? Would that be accurate?

A. I haven't read them for a long time, so I'm not sure that I could respond to that. But I would say, yes, I would agree that if they're criticisms, yes, I don't agree with them.

Q. Okay, What, if anything have you done to rebut or to call into question some of the criticisms from heal-online?

A. I have done nothing.

Q. Okay. So no cease and desist letter from you to them?

A. No.

Q. No lawsuit against them?

A. No.

(CP 118)

3. <u>Life Designs Ranch had no proof that Sommer's website caused any damages.</u>

Q. Has anyone contacted you since this website was established and said that

they were not going to refer you any more clients based upon what they've read on the internet?

A. No.

Q. Have you received any calls from anybody, whether it be a referral source or anyone else, saying they were not going to send you any clients based on the website they read on the internet?

A. Not that I recall.

Q. Have you received any letters or e-mails, same question.

A. Not that I recall.

Q. Do you have any documents whatsoever that shows that you – that clients have not been coming to Life Designs Ranch because Mr. Sommer put this website on the internet?

A. No.

(CP 119-120)

Q. Did you ever speak with an educational consultant that told you they were no longer going to refer any more clients to Life Designs based on the other website that was established by Mike Sommer?

A. No.

Q. Did you ever talk to anybody, and let's now – let's talk about therapists, did you ever speak to any therapists that told you they were no longer going to refer any clients to Life Designs, based on the internet site that was established by Mike Sommer?

A. No.

Q. Did you ever talk to anybody, whole world, that told you they weren't going to refer anybody or any new clients to Life Designs based on the website established by Mike Sommer?

A. No.

Q. Okay. Other than a telephone conversation, did you receive anything in print, in email, or a letter from either an educational consultant, a therapist, or anyone else in the world that said they were not going to refer another client to Life Designs based on the website established by Mike Sommer?

A. No.

Q. To your knowledge, has anyone at Life Designs ever received either a telephone call or an e-mail or a letter from an educational consultant, therapist, or anyone else in the whole world saying they weren't going to refer any new clients to Life Designs based on the website that was established by Mike Sommer?

A. No.

(CP 126)

Q. Have you had any conversation with anyone that told you that they were not going to refer any new students, or patients or clients, however you want to say it, to Life Designs Ranch because Mr. Sommer posted his website?

A. No.

Q. Okay. Have you received any letters or e-mails from anyone saying that they're not going to refer any clients to Life Designs because of the website that Mr. Sommer posted?

A. No.

Q. And broaden that, have you receive – have you had any conversations with anyone or received any letters or e-mails or any type of communication in the world saying that people were not

going to send either their children or people that they know to Life Designs Ranch based on the website that was posted by Mr. Sommer?

A. No.

Q. Okay. Are you aware of any conversation that anyone has had that said they weren't going to send their kids or any referrals to Life Designs Ranch because of the website?

A. No.

Q. All right. Do you possess any documents at all which shows that the website had an adverse affect on your company?

A. Me personally?

Q. Yes.

A. No.

(CP 130-131)

H. The Trial Court Granted Sommer's Summary Judgment Motion, Holding Life Designs Ranch Could Not Establish The *Prima Facie* Elements Of A Defamation Claim.

Upon completion of fact witness depositions, on the basis of the above-quoted testimony, Sommer moved for summary judgment as to the defamation claim, contending that a) the complained-of webpage content was not defamatory; and b) Life Designs Ranch lacked evidence of damages. (*See* CP 95-108)

Life Designs Ranch responded with a memorandum (CP 132-189), as well as three declarations. A declaration of Jonathan Gross was submitted, in which Mr. Gross asserted he was qualified to help other

people with addiction problems because of his own experience with addiction. (CP 190-91). A declaration of Matt Donahue was submitted, similarly stating that because Mr. Donahue was a former addict, he was qualified to help other people with addiction. (CP 193-194).

Finally, a declaration of Clay Garrett was submitted, which alleged, *inter alia*, that Sommer was a "liar" and that Life Designs Ranch's business had declined "56%." (CP 196-230).[2]

Sommer replied (CP 258-280)[3], and after oral argument the trial court dismissed the defamation claim, holding that Life Designs Ranch lacked evidence of damages, and that the alleged defamatory statements fall within the category of rhetorical hyperbole, and are "non-actionable...when considered in the totality of the circumstances." (*See*

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[2] The details of the Garrett Declaration, and Sommer's argument both below and here as to why it is inadmissible lay opinion, are discussed *infra*.

[3] Included with the Reply was an example of non-defamatory criticism of a business, published in the New York Times: "GUY FIERI, have you eaten at your new restaurant in Times Square?...Did panic grip your soul as you stared into the whirling hypno wheel of the menu, where adjectives and nouns spin in a crazy vortex?...[D]id your mind touch the void for a minute?...Hey, did you try that blue drink, the one that glows like nuclear waste?...Any idea why it tastes like some combination of radiator fluid and formaldehyde?...When you hung that sign by the entrance that says, WELCOME TO FLAVOR TOWN!, were you just messing with our heads? Does this make it sound as if everything at Guy's American Kitchen & Bar is inedible? I didn't say that, did I? ... And when we hear the words Donkey Sauce, which part of the donkey are we supposed to think about? Is the entire restaurant a very expensive piece of conceptual art? Is the shapeless, structureless baked alaska that droops and slumps and collapses while you eat it, or don't eat it, supposed to be a representation in sugar and eggs of the experience of going insane? ... Guy's American Kitchen & Bar POOR ... ATMOSPHERE 500 seats, three levels, three bars, one chaotic mess. SERVICE The well-meaning staff seems to realize that this is not a real restaurant." (CP 285-287).

CP 297-98) The trial court further held that providing the hyperlink to the HEAL webpage did not expose Sommer to liability. (CP 298)

I. The Trial Court Granted Sommer's Motion To Dismiss Life Designs Ranch's Remaining Claims.

Sommer subsequently moved for summary judgment to dismiss Life Designs residual claims of invasion of privacy and interference with a business expectancy. (*See* CP 299-307) After a response (CP 312-334), and a reply (CP 335-342), the trial court granted the Motion to dismiss the remaining claims. (CP 348)

The trial court held that the intrusion and false light claims could not be maintained by Life Designs Ranch, as it is not a natural person. (*Id.*) The court also held that the statements on the Sommer's website pertained to the business and the ranch, not the Barancos' private affairs. *(Id.)* The court also dismissed the business expectancy claim because there was no evidence as to either a specific expectancy or loss of such expectancy. (*Id.*) Finally, the trial court once again noted that there was a lack of evidence of damages, and that coincidence is not proof of causation. (*Id.*)

J. Life Designs Ranch Timely Appealed.

On November 13, 2014 Life Designs Ranch timely sought review of this Court. (CP 352-65)

III. ARGUMENT

A. Standard of Review.

Summary judgment orders are reviewed *de novo*. *See Mohr v. Grant*, 153 Wn.2d 812, 108 P.3d 768 (2005). Summary judgment is proper if the evidence shows there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c).

"When a defendant in a defamation action moves for summary judgment, the plaintiff has the burden of establishing a *prima facie* case on all four elements of defamation: falsity, an unprivileged communication, fault, and damages." *Sisley v. Seattle Pub. Sch.*, 180 Wn. App. 83, 87, 321 P.3d 276 (2014) (internal quotation omitted).

Summary judgment "plays a particularly important role in defamation cases" because permitting unwarranted defamation suits to proceed to trial can chill speech protected by the First Amendment. *Mohr*, 153 Wn.2d at 821.

B. Life Designs Ranch Failed To Make A *Prima Facie* Showing Of Each Element Of Defamation Sufficient To Resist Summary Judgment.

1. The content of Sommer's webpage was not defamatory *per se*, and Life Designs Ranch was unable to seek general damages.

Under Washington law a claim of defamation *per se* generally "requires imputation of a crime or communicable disease." *Davis v.*

Fred's Appliance, Inc., 171 Wn. App. 348, 367, 287 P.3d 51 (2012). General damages are not recoverable in defamation, unless defamation *per se* is established. *Id.*

Here, the entire contents of the now-defunct Sommer website have been reproduced; none of the contents of those four (4) pages imputes Life Designs Ranch with a crime or a communicable disease. The trial court did not err in denying Life Designs Ranch's motion for partial summary judgment.

2. The content of Sommer's webpage consists of opinion, hyperbole, and vituperative – and is not defamatory.

Not "every misstatement of fact, however insignificant, is actionable as defamation." *Sisley*, 180 Wn. App. at 87 (*quoting Mark v. Seattle Times*, 96 Wn.2d 473, 493, 635 P.2d 1081 (1981)). Rather, "state law requires not only that there be fault on the part of the defamation defendant, but that 'the substance of the statement makes substantial danger to reputation apparent.'" *Id.* (*quoting Mark*, 96 Wn.2d at 493). "The defamatory character of the language must be apparent from the words themselves." *Id.* (*quoting Lee v. Columbian, Inc.*, 64 Wn. App. 534, 538, 826 P.2d 217 (1991)). Where language is ambiguous, "resolution in favor of a 'disparaging connotation' is not justified." *Id.* at 87-88 (*quoting*

Lee, 64 Wn. App. at 538). A defamation claim may not be based on the negative implication of true statements. *Id.* at 87-88.

> With respect to falsity, Washington does not require a defamation defendant to "prove the literal truth of every claimed defamatory statement." "A defendant need only show that the statement is substantially true or that the gist of the story, the portion that carries the 'sting,' is true." "The 'sting' of a report is defined as the gist or substance of a report when considered as a whole." In applying this test, [the court] require[s] plaintiffs to show that the false statements caused harm distinct from the harm caused by the true portions of a communication.

Sisley, 108 Wn. App. at 88 (*quoting Mohr*, 153 Wn.2d at 825).

"Rhetorical hyperbole" is not actionable as defamation, and is constitutionally protected. *Hauter v. Cowles Publishing Co.*, 61 Wn. App. 572, 586, 811 P.2d 231 (1991).

> Before the truth or falsity of an allegedly defamatory statement can be assessed, a plaintiff must prove that the words constituted a statement of fact, not an opinion. Because expressions of opinion are protected under the First Amendment, they are not actionable.

Robel v. Roundup Corp., 148 Wn.2d 35, 55, 59 P.3d 611 (2002) (internal citation and quotation omitted).

"Whether the allegedly defamatory words were intended as a statement of fact or an expression of opinion is a threshold question of law for the court." *Id.*

> To determine whether a statement is nonactionable, a court should consider at least (1) the medium and context in which the statement was published, (2) the audience to whom it was published, and (3) whether the statement implies undisclosed facts.

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

"[S]ome statements...cannot reasonably be understood to be meant literally and seriously and are obviously mere vituperation and abuse." *Robel*, 148 Wn.2d at 55 (*quoting* RESTATEMENT (SECOND) OF TORTS § 566 cmt. e (1977)).

By way of example, in *Robel*:

> [W]okers "laughed" and "acted out a slip and fall," as "one of them yelled 'Oh, I hurt my back, L&I, L&I!'"... They "audibly called [her] a 'bitch' and 'cunt.'" ... They also "told customers she had lied about her back and was being punished by Fred Meyer ... she overheard [about herself] 'Can you believe it, [she's] gonna sit on her big ass and get paid.'"

Robel at 41-42.

In *Robel*, the trial court found the above statements defamatory, and permitted the case to proceed to trial. Finding "all of the utterances identified in the finding were nonactionable opinions," the Washington Supreme Court "affirm[ed] the reversal of the trial court's judgment on [the] defamation claim." *Id.* at 57.

Here, none of the content of the Sommer webpages is defamatory. The contents entirely consist of mockery, exaggeration, vituperation, and complaints over pricing and the quality of services received. This Court, as did the trial court, should determine as a matter of law that this website from a dissatisfied customer complaining of overcharges and poor service is protected, and not defamatory.

a. Identification of Life Designs Ranch as being in a "very small western Washington community" is not defamatory.

Life Designs Ranch argues that the website identifies Cusick, Washington, as a "very small western Washington community," and that since Cusick is in "Eastern," as opposed to "Western," Washington (as it is described locally), the statement is therefore "false," and thus "defamatory." The argument is ridiculous.

Cusick, Washington, is a very small community, with the 2010 United States Census finding 207 total residents. Cusick, Washington, is approximately 1,400 miles to the west of Minnesota, the state of Sommer's residence.

To establish a prima facie case of defamation, a plaintiff must first establish the existence of the statement and its contents, and then must prove four elements: falsity, an unprivileged communication, fault, and damages. *Davis*, 171 Wn. App. at 366. "The prima facie case must consist

of specific, material facts, rather than conclusory statements, that would allow a jury to find that each element of defamation exists." *Id.* at 366-67.

Life Designs Ranch cannot establish the elements of defamation as to their "western" contention. Life Designs Ranch cannot establish falsity, because Cusick is small, and is in the American West, and is in a state located on the West Coast, and is in a state commonly referred to as being part of the Pacific Northwest, and is in a part of the state commonly referred to as being the Inland Northwest. Life Designs Ranch cannot establish an unprivileged communication or fault, because Sommer is entitled under the First Amendment to tell the world that Cusick Washington is a small western community in the State of Washington. Life Designs Ranch cannot establish damages, because if an accurate description of Cusick, Washington is causing harm to its business, its remedy is to relocate.

b. Opinions about scenery are non-actionable.

Life Designs Ranch argues about its proximity to certain geographical features. This misses the point. An expression that one "can't even see trees / mountains" is no different in character from any other complaint about a view, or a service, or a business, or a location. ("I don't

see what's so great about (Mt. Rushmore / Willis Tower / Burj Khalifa / Three Gorges Dam / Paris). I couldn't even see anything!").

Life Designs Ranch has failed to establish that comments about trees, mountains, or views are non-opinion, and therefore, actionable in defamation.

c. The remaining statements on the Sommer webpages are of opinion, express dislike and disgust in an exaggerated fashion, and are non-actionable in defamation.

The remainder of the statements on the Sommer webpages concern the cost, quality of services received, and messages to "take your business elsewhere" and to not patronize Life Designs Ranch. These statements are all protected speech, and are likewise non-actionable opinion.

3. <u>Life Designs Ranch lacked admissible evidence of special damages.</u>

a. Life Designs Ranch only offered conjecture and speculation as to special damages.

Special damages are only recoverable in defamation when a plaintiff establishes "specific, material facts to support" such damages. *Davis v. Fred's Appliance, Inc.*, 171 Wn. App. 348, 367, 287 P.3d 51 (2012). Conclusory allegations as to the existence of special damages are insufficient to establish a *prima facie* case as a matter of law. *Id.*

"Coincidence is not proof of causation." *Anica v. WalMart Stores, Inc.*, 120 Wn. App. 481, 489, 84 P.3d 1231 (2004). An argument that

because a second event comes after a first, the second event was therefore caused by the first is the logical fallacy of *post hoc ergo propter hoc. Id.*

The assumption that a sequence of events alone establishes causation is an example of the fallacy of *post hoc, ergo propter hoc* ("after this, therefore because of this"), which "is neither good logic nor good law." *Volentine & Littleton v. U.S.*, 144 Cl. Ct. 723, 169 F. Supp. 263, 265 (Cl.Ct. 1959).

Here, Life Designs Ranch supplied only conjecture and speculation as evidence of special damages. It was unable to prove any particular potential customer viewed the webpage; or that any potential customer declined to pay for Life Designs Ranch's services as a result. Lacking admissible evidence of special damages, Life Designs Ranch failed to establish that element of its defamation claim, and was properly dismissed on summary judgment.

b. The declaration of Life Designs Ranch employee Garrett was not admissible as expert testimony.

In response to Sommer's summary judgment motion before the trial court, Life Designs Ranch submitted a declaration of its former employee Garrett, in an effort to establish damages. As was argued to the trial court, the Garrett declaration was inadmissible as expert opinion, as Garrett was not qualified to offer the opinions contained in that

declaration, and much of the declaration was inadmissible conclusory allegations of a lay witness, rather than admissible expert opinion. (*See* CP 275-278).

"Expert testimony on scientific, technical or specialized knowledge is admissible under ER 702 if it will assist the tier of fact understand the evidence or a fact in issue." *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn. App. 722, 734-35, 959 P.2d 1158 (1998) (*citing Queen City Farms, Inc. v. Central Nat'l Ins. Co.*, 126 Wn.2d 50, 102, 882 P.2d 703, 891 P.2d 718 (1994)). ER 702 requires the Court to make two inquiries: "(i) does the proffered witness qualify as an expert; and (ii) would the proposed testimony be helpful to the trier of fact." *State v. Greene*, 92 Wn. App. 80, 960 P.2d 980, 988 (1998); *State v. Janes*, 121 Wn.2d 220, 235-36, 850 P.2d 495 (1993).

But the expert testimony of an otherwise qualified witness is not admissible if the issue at hand lies outside the witness' area of expertise. *Queen City Farms*, 126 Wn.2d at 103-04. In *Queen City*, the Supreme Court found the witness' testimony to be "conjecture and speculation." *Queen City Farms*, 126 Wn.2d at 104.

> The above authorities suggest that when analyzing the admissibility of lay opinion testimony, we first determine whether the opinion relates to a core element or to a peripheral issue. Where the opinion relates to a core element that the [party]

> must prove, there must be a substantial factual basis supporting the opinion. Courts also consider whether there is a rational alternative answer to the question addressed by the witness's opinion. In that circumstance, a lay opinion poses an even greater potential for prejudice.

State v. Farr-Lenzini, 93 Wn. App. 453, 462-63, 970 P.2d 313 (1999) (internal citation omitted).

Garrett had no basis for his opinions, nor did he have the requisite training and foundation to offer his opinions, and those opinions are largely *ipse dixit* conclusions (*See* CP 275-278):

- Garrett's degree was in herpetology. (CP 197)
- He states that "once that reputation is impinged it is axiomatic that referrals from educational consultants will stop." (CP 198)
- He claims to have designed a new website for Plaintiff. (CP 200)
- He also claims that the Sommer's website "was defamatory and clearly interfered with Life Designs business." (CP 201)
- He states that "it is Mr. Sommer's website that is the reason Life Designs suffered a drop in client enrollment[.]" (CP 202)
- Never mentioned in the Garratt declaration is the HEAL website, which has existed for a number of years, was last updated in 2011, names Life Designs as a cult, and accuses its staff of being untrained and complicit in criminal wrongdoing.

- Never mentioned was Garrett's deposition testimony that hundreds of other programs exist across the country making this business very competitive.
- Garrett never mentions his deposition testimony that provides that he has no proof that anyone looked at the website, including Educational Consultants, or that the website had any effect on Life Designs Ranch whatsoever.

Garret's opinion was inadmissible under ER 702 and ER 703, to oppose Sommer's summary judgment motions. The trial court did not err in declining to consider Garrett's declaration as competent evidence of causation, special damages, or specific pecuniary loss.

C. Life Designs Ranch Lacked Evidence to Establish the Elements of An Invasion of Privacy Claim.

> The protectable interest in privacy is generally held to involve four distinct types of invasion: intrusion, disclosure, false light and appropriation. These four privacy torts are related in that "each involves interference with the interest of the individual in leading, to some reasonable extent, a secluded and private life, free from the prying eyes, ears and publications of others."

Eastwood v. Cascade Broadcasting, 106 Wn.2d 466, 469, 722 P.2d 1295 (1986) (footnotes omitted).

1. Life Designs Ranch abandoned its intrusion claim.

Although Life Designs Ranch's Amended Complaint pleaded a claim for intrusion, on appeal it appears to have abandoned that claim.

2. Life Designs Ranch, a corporation, has no privacy claims.

The "protectable interest in privacy" is personal in character, for living natural persons. RESTATEMENT (SECOND) OF TORTS, § 652I ("[A]n action for invasion of privacy can be maintained only by a living individual whose privacy is invaded."). *See also Rhinehart v. Seattle Times*, 98 Wn.2d 226, 236-27, 654, P.2d 673 (1982) (adopting § 652I of the *Restatement*).

"A corporation . . . has no personal right of privacy. It has therefore no cause of action for any of the four forms of invasion [of privacy.]" RESTATEMENT (SECOND) OF TORTS, § 652I cmnt. c.

Life Designs Ranch not being a natural person, the trial court did not err in dismissing its invasion of privacy claims.

3. B. Barranco, who is unmentioned by name on the Sommer webpages, has no invasion of privacy claim.

Although Life Designs Ranch seeks review of the dismissal of B. Barranco's invasion of privacy claim, it remains undisputed that B. Barranco was never mentioned by name on the now-defunct Sommer website. A false light claim requires the following:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

RESTATEMENT (SECOND) OF TORTS, § 652E.

"[I]t is essential to the [invasion of privacy – false light] rule . . . that the matter published concerning the plaintiff is not true." *Id.* at § 652E cmnt. a.

Here, as the Sommer website did not mention B. Barranco by name, nor did it identify any information personal to her, she had no claim for invasion of privacy, and the trial court did not err in dismissing it.

4. <u>Criticism of Life Designs Ranch's prices does not meet the elements of a 'false light' claim for V. Barranco.</u>

The complained-of website mentioned V. Barranco once:

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

This "negative review" of Life Designs Ranch's pricing, which mentioned V. Barranco by name, does not meet the elements of a false light claim, as the above mixes an opinion with a complaint about pricing

and services received. The trial court did not err in dismissing V. Barranco's false light claim.

D. Life Designs Ranch Lacked Evidence To Establish The Elements Of A Tortious Interference Claim.

To prove tortious interference, the plaintiff must produce evidence sufficient to support all the following findings:

> (1) the existence of a valid contractual relationship or business expectancy, (2) the defendant's knowledge of and intentional interference with that relationship or expectancy, (3) a breach or termination of that relationship or expectancy induced or caused by the interference, (4) an improper purpose or the use of improper means by the defendant that caused the interference, and (5) resultant damage.

Easier v. City of Spokane, 121 Wn. App. 799, 811, 91 P.3d 117 (2004).

1. Life Designs Ranch lacked evidence of "interference."

As with the lack of evidence of special damages on the defamation claim, Life Designs Ranch was unable to present competent, admissible evidence of any specific interference with a specific relationship. Rather, Life Designs Ranch was only ably to offer conjecture that the website was viewed, that viewing the website caused anyone to change their minds, or that there was any causal relationship between the claimed reduction in business and the existence of the website. Lacking that evidence, Life Designs Ranch likewise lacked evidence of an "interference" for the

purposes of a tortious interference claim, and the trial court did not err in dismissing it.

2. Life Designs Ranch lacked evidence any "interference" was "improper."

"To be improper, interference must be wrongful by some measure beyond the fact of the interference itself, such as a statute, regulation, recognized rule of common law, or an established standard of trade or profession." *Moore v. Comm. Aircraft Interiors*, 168 Wn. App. 502, 510, 278 P.3d 197 (2012) (*citing Pleas v. Seattle*, 112 Wn.2d 794, 804, 774 P.2d 1158 (1989)). Importantly, "[i]nterference alone is not enough." *Id.* at 509.[4]

Here, the "improper interference" alleged by Life Designs Ranch is actually a restatement of the defamation claim. That is, 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. However, if the content was not defamatory, then even if the Sommer webpage interfered with Life Designs Ranch's business expectancy, that interference was not "improper," and the trial court likewise did not err in dismissing the claim.

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[4] For example, a written message to the public urging them to not go to a particular business, or a "do not patronize" message, is protected speech. *See Caruso v. Local 690*, 100 Wn.2d 343, 348, 670 P.2d 240 (1983).

3. Life Designs Ranch lacked admissible evidence of specific pecuniary loss.

"[A] claim of tortious interference with a business expectancy requires a threshold showing of resulting pecuniary damages." *Tamosaitis v. Bechtel Nat'l, Inc.*, 182 Wn. App. 241, 249, 327 P.3d 1309 (2014), *review denied*, 181 Wn.2d 1029 (2014).

"In the absence of pecuniary loss, an action for interference with contract brought for the purpose of recouping damages for loss of reputation only, would be nothing more than a defamation action under a different caption." *Tamosaitis*, 182 Wn. App. at 252 (*quoting Pelagatti v. Cohen*, 370 Pa. Super. 422, 435-36, 536 A.2d 1337 (1987)).

"Previously successful promotional efforts, including its online presence and relationships formed with referral sources . . . [and] hard-earned reputation" do not satisfy the elements required by Supreme Court precedent. *Pac. Nw. Shooting Park Ass'n v. City of Sequim,* 158 Wn.2d 342, 352-53, 144 P.3d 276 (2006) (the complaint "alluded to losses [it]...had sustained, but it did not tie those losses to specific relationships between [it] and identifiable third parties.").

Here, Life Designs Ranch never supplied evidence of losses to specific relationships between it and identifiable third parties. Instead, it relied almost entirely on the *post hoc ergo propter hoc* assertion that

because its business volume allegedly dropped some time after Sommer's website, the two are related. This is insufficient as a matter of law to establish the specific pecuniary loss requirement of a tortious interference claim, and the trial court did not err in dismissing it.

E. Providing A Hyperlink To A Webpage Which Contains Allegedly Defamatory Content Does Not Expose The Hyperlinker To Defamation Liability.

While case law exists concerning re-publication in a defamation context, *see LaMon v. Westport*, 44 Wn. App. 664, 723 P.2d 470 (1986), and also exists concerning the direct publication of defamatory material on a webpage, *see Momah v. Bharti*, 144 Wn. App. 731, 749-51, 182 P.3d 455 (2008), the question of whether a person who provides a hyperlink to another webpage which contains allegedly defamatory content is liable as if that person originated the content appears to be one of first impression in this Division.

There is no dispute that Sommer was and remains uninvolved in the creation, maintenance, and upkeep of the HEAL webpage.

There is also no dispute that the entirety of the reference to the HEAL webpage on the now-defunct Sommer webpage was as follows:

> For more info click or cut and paste the link below
> http://www.bent-online.org/ilfqdesigns.htm

(CP 249).

One federal court in the Western District of Washington, construing Washington law, has held that providing a hyperlink to already existing content on the web does not expose the party providing the hyperlink to liability for defamation. *See U.S. Ex Rel. Klein v. Omeros Corp.*, 897 F.Supp.2d 1058, 1072-74 (W.D.Wash. 10-15-2012).

In *Klein*, it was argued that providing a URL which leads to defamatory content exposes the party who provides the URL to defamation liability. *Id.* at 1072. Rejecting this contention, and relying upon Washington law, the *Klein* court noted that "[under Washington precedent] a finding of republication hinged on the defendant's communication of the *contents* of the original, allegedly defamatory statements. Here, [the party] merely provided a URL, or reference, to such statements. He did not republish any of the complaint's contents." *Id.* at 1073 (italics in original).

> It appears that the common thread of traditional republication is that it presents the material, in its entirety, before a new audience. A mere reference to a previously published article does not do that. While it may call the existence of the article to the attention of a new audience, it does not present the defamatory contents of the article to that audience. Therefore, a reference, without more, is not properly a republication.

Id. at 1073 (*quoting Salyer v. Southern Poverty Law Center, Inc.*, 701 F.Supp.2d 912, 916 (W.D. Ky. 2009)).

Another federal district court, considering a similar question, found that the "hyperlink is the twenty-first century equivalent of the footnote for purposes of attribution in defamation law, because it has become a well-recognized means for an author or the Internet to attribute a source." *Adelson v. Harris*, 973 F.Supp.2d 467, 484 (S.D.N.Y. 2013).

> [P]rotecting defendants who hyperlink to their sources is good public policy, as it fosters the facile dissemination of knowledge on the Internet. It is true, of course, that shielding defendants who hyperlink to their sources makes it more difficult to redress defamation in cyberspace. But this is only so because Internet readers have far easier access to information that should decrease the need for defamation suits.

Id. at 485.

Here, the entirety of Sommer's reference to the HEAL website was the statement "for more info click or cut and paste the link below" with a hyperlink to www.heal-online.org/lifedesigns.htm. (CP 249) This hyperlink reference does not constitute a republication. Even assuming, *arguendo*, that the contents of the HEAL website are defamatory to Life Designs Ranch, the trial court did not err in holding that Sommer's hyperlink reference did not expose him to defamation liability for the contents of the HEAL website.

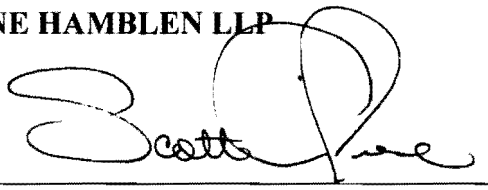
IV. CONCLUSION

Nothing in the Sommer website was defamatory. Likewise, no privacy was invaded and no interference of a business expectancy occurred. Perhaps more importantly, Life Designs Ranch produced no competent evidence whatsoever to prove any damages flowed from the website.

Respondent respectfully requests this Court affirm the trial court's decisions.

RESPECTFULLY SUBMITTED this 10th day of April, 2015.

PAINE HAMBLEN LLP



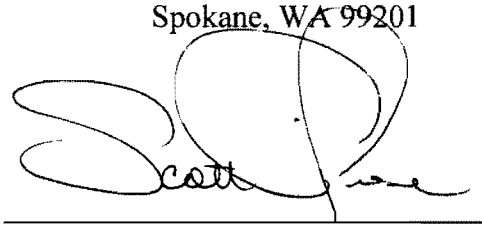
By: _____

Scott C. Cifrese, WSBA #25778
William C. Schroeder, WSBA #41986
717 W. Sprague Avenue, Suite 1200
Spokane, WA 99201-3505
(509) 455-6000
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10TH day of April, 2015, I caused to be served a true and correct copy of **RESPONDENT'S BRIEF** to the following:

✓	HAND DELIVERY	Jason T. Piskel
___	U.S. MAIL	Nicholas D. Kovarik
___	OVERNIGHT MAIL	Piskel Yahne Kovarik, PLLC
___	VIA FACSIMILE	522 W. Riverside Ave., Suite 410
		Spokane, WA 99201



Scott C. Cifrese

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