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FILED
12/27/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JEFF HALEY,

Appellant,

v.

AMAZON.COM SERVICES, LLC, f/k/a AMAZON.COM SERVICES, INC., f/k/a AMAZON FULFILLMENT SERVICES, INC.,

Respondent.

DIVISION ONE

No. 83010-4-I

OPINION PUBLISHED IN PART

DWYER, J. — Summary judgment is a mechanism for dismissing claims that are unsupported by law or fact. It is not a tool for assessing the weight or credibility of a party's evidence.

Here, the trial court dismissed plaintiff Jeff Haley's complaint by granting a motion for summary judgment filed by defendant Amazon.com Services, LLC. In dismissing the complaint, the trial court declined to credit some of Haley's evidence because it was "self-serving," found that Haley's evidence was not credible, and made a series of findings resolving factual issues in Amazon's favor. Because material questions of disputed fact should not be resolved on summary judgment, we reverse.

I

Jeff Haley was the founder and president of OraHealth USA, Inc. (OraHealth). From 2004 until 2019, OraHealth manufactured a product called

XyliMelts, an adhering disc designed to combat dry mouth. OraHealth sold its products wholesale to Amazon, which then sold OraHealth's products to the public.

On December 28, 2011, an employee of OraHealth agreed to a marketing development fund (MDF) agreement[1] (the MDF Agreement) with Amazon, which took effect on January 1, 2012. Pursuant to this agreement, Amazon would deduct 10 percent of the net receipts from the sale of OraHealth products before remitting payment to OraHealth. The MDF Agreement stated that it would "automatically renew on the same terms for additional periods of one year each unless either Vendor or Amazon gives the other party written notice of non-renewal at least 60 days before the end of the term."

During 2012, Amazon made the 10 percent deduction from OraHealth's net receipts on a monthly basis. Haley sent an e-mail to Amazon employee Hiley Olsen in June 2012 objecting to the deductions and expressing his desire to obtain a lower MDF rate. Although OraHealth was unable to successfully negotiate a lower MDF rate, it did raise its prices by 6 percent in order to offset the monthly deductions.

From 2013 to 2015, Amazon made no deductions from OraHealth's net receipts. In January 2016, Amazon sent a notice to OraHealth via e-mail stating that it had conducted an audit and it intended to deduct $47,679.44 from the next disbursement of funds to OraHealth. This amount represented 10 percent of

[1] This agreement is alternatively referred to as the "2012 Agreement," "MDF/Coop Agreement," "Co-op Allowance," or "Base Accrual" throughout the record.

OraHealth's net proceeds for the entire 2014 calendar year. On or about March 1, 2016, OraHealth sent a letter to Amazon protesting the proposed deduction. Amazon did not respond to the letter and made the deduction.

In August 2016, Amazon sent another notice via e-mail to OraHealth stating that it intended to deduct $81,857.16 from the next disbursement. This amount represented 10 percent of OraHealth's net proceeds for the entire 2015 calendar year. OraHealth renewed its objection to this proposed deduction. Amazon made the deduction in October 2016 without resolving OraHealth's objection.

Amazon made no deductions from OraHealth's 2016 proceeds during the 2016 calendar year. It was not until March 2018 that Amazon deducted 10 percent of OraHealth's 2016 net proceeds from its disbursement, in an amount of $34,328.71.

In March 2017, Amazon requested that OraHealth accept the updated terms of its MDF Agreement in Vendor Central.[2] A screenshot of the Vendor Central page dated March 11, 2017, shows the "New Base Accrual/Marketing Development Funds (MDF)" at "13.65% Base Accrual" and the "Current Base Accrual/Marketing Development Funds (MDF)" as "0.00% Base Accrual." OraHealth did not agree to the 13.65 percent rate and was able to negotiate an MDF rate of 6 percent for the remainder of the year.

In March 2018, Amazon again requested that OraHealth accept the updated terms of its agreements in Vendor Central. On March 8, 2018, Haley

[2] Vendor Central is the interface through which Amazon interacted with OraHealth.

contacted Amazon to confirm the MDF rate for 2018. Amazon replied that the MDF rate was 20 percent. Haley insisted to Amazon that he had not accepted the 20 percent MDF rate and, in a series of e-mails that followed, attempted to negotiate a 6 percent MDF rate in line with the previous year's figure. Those negotiations ultimately failed. OraHealth then ceased selling its products to Amazon.

In May 2018, Amazon made a deduction of $28,017, representing 20 percent of OraHealth's net receipts for April 2018, from its disbursement to OraHealth.

Haley filed suit against Amazon on July 22, 2020, asserting claims for declaratory relief, unjust enrichment, accounts receivable, and violation of the Consumer Protection Act[3] (CPA). Haley filed a motion for partial summary judgment on November 9, 2020, seeking entry of judgment on his claim for declaratory relief. In support of this motion, Haley submitted his declaration, testifying to the facts as he perceived them and attaching multiple documents. Therein, Haley asserted that:

> I paid specific attention to the auto-renewal provision, and I contacted Amazon in October of 2012—more than 60 days before the end of the year. I recall submitting a form via Vendor Central instructing Amazon not to renew the 2012 MDF Agreement. I no longer have access to this written communication.
>
> . . . I also followed up by phone to confirm that the MDF was not going to renew the following year. **At least one Amazon representative acknowledged that they had received the email in May and confirmed that the 2012 MDF Agreement would not automatically renew.**

[3] Ch. 19.86 RCW.

Haley also testified that, as far as he could recall, the MDF Agreement did not appear in Vendor Central with the other agreements between OraHealth and Amazon that were in force between 2013 and 2017. Haley stated that had Amazon continued deducting 10 percent of OraHealth's net receipts into 2013, he would have both increased his prices and again notified Amazon in writing to not renew the MDF Agreement.

In response to Haley's motion, Amazon submitted a declaration from Gianmarco Vairo, a paralegal in Amazon's litigation department, stating that he had conducted a search of Amazon's records and was unable to "identify any additional documents or communications from Mr. Haley or any other OraHealth representative with Amazon between 2012 and when Amazon began assessing post-audit coop fee deductions in 2016 other than the email chain attached as Exhibit 1[4] to Ms. Olsen's declaration."

The trial court denied Haley's motion for partial summary judgment on December 4, 2020. In its 10-page order, the trial court entered a number of factual findings and related legal conclusions. On page three of its order, the trial court entered a finding that, "The Court finds that Mr. Haley never repudiated the 2012 Agreement." In the same paragraph, the trial court further found that "Mr. Haley changed OraHealth's pricing and shipping cost structure in acknowledgment that coop fees were required." In the following paragraph, the trial court made the express finding that Mr. Haley did not repudiate the 2012

[4] Exhibit 1 to Olsen's declaration are the e-mails between Olsen and Haley from June 2012.

MDF Agreement. That paragraph of the trial court's order reads as follows:

> Mr. Haley claims that he repudiated the 2012 Agreement in communications with unidentified Amazon representative(s) in October 2012. Mot. at 6:3-7 ("Mindful of the automatic renewal clause in the 2012 MDF Agreement, Haley reached out to Amazon through Vendor Central and by phone around October 2012, and at least one Amazon representative affirmed that Haley had properly communicated a cancellation of the 2012 MDF Agreement for the following year."). But Mr. Haley offers no evidence supporting that he had any further communications with Amazon regarding the 2012 Agreement after his May and June 2012 emails with Ms. Olsen. *See* Haley Decl. ¶¶ 10-11. In any event, Mr. Haley's phone communications with Amazon would be ineffective to cancel the 2012 Agreement, which required advance "written notice" for any valid termination. Haley Decl. Ex. 2. The Court also notes that Mr. Haley never mentioned these purported October 2012 communications with Amazon in either of his two previously filed complaints in this action (Dkt. 1 & 22) or in the six complaints he brought in his 2017-18 action against Amazon concerning these same deductions. *See OraCoat,* Dkt. 1, 16, 18, 23, 26, 29B. [5] The Court finds that Mr. Haley did not effectively repudiate the 2012 Agreement in writing at any point in 2012.

On April 9, 2021, the parties filed dueling motions for partial summary judgment. Amazon asked the trial court to dismiss all of Haley's claims other than the account receivable claim for 2018. Haley, on the other hand, requested that the trial court enter judgment in his favor on his accounts receivable claims for 2014 through 2018. Both parties submitted affidavits and other evidentiary material in support of their arguments.

The trial court entered orders on both motions on May 7, 2021. In both orders, the trial court relied in part on its prior order denying Haley's first motion for partial summary judgment. First, in denying Haley's second motion for partial

[5] The trial court noted that it relied in part upon previous filings in OraCoat v. Amazon Fulfillment Servs., Inc., No. 17-2-30301-1 KNT. The only pleading from that case included in our appellate record is the fourth amended complaint.

summary judgment, the trial court found that the motion was "an untimely and improper attempt to seek reconsideration of the Court's Order" on the first summary judgment motion. Second, in granting Amazon's motion for partial summary judgment, the trial court reiterated that it had previously made "findings" that it was now treating as conclusive. In paragraph three of the order, the trial court stated:

> In its previous Order, the Court found and concluded that (1) "Amazon undisputedly exercised its express contract rights in conducting the audits and deducting for the overpayments that Mr. Haley challenges," Order ¶ 3; (2) "Mr. Haley never repudiated the 2012 Agreement," *id.* ¶ 6; and (3) " [t]he deductions were validly taken, " *id.* ¶ 8. Nothing in the evidence the parties submitted with respect to Amazon's summary judgment motion changes any of the Court's prior findings or conclusions.

Moreover, in paragraph eight of the order, the trial court concluded, "The Court dismisses Mr. Haley's account receivable claim with respect to the challenged deductions under the 2012 Agreement, given that the Court has found these were validly taken."

The trial court dismissed Haley's CPA claim both as being time barred and because it concluded that Haley could not satisfy the statutory public interest requirement. Haley's claim for unjust enrichment was also dismissed as being time barred. The only claim remaining following the trial court's order was the account receivable claim for deductions made pursuant to the 2018 MDF Agreement.

On July 15, 2021, the parties executed and filed a "Stipulation and Order of Voluntary Dismissal of Remaining Claim With Prejudice; Entry of Final Judgment," dismissing Haley's one remaining claim and striking the trial date.

The trial court signed the order the same day. Haley then appealed.[6]

II

Haley asserts that he presented a triable issue of material fact concerning the termination of the 2012 MDF Agreement and that the trial court erred when it refused to credit his declaration and entered summary judgment in Amazon's favor. Amazon contends that Haley's declaration was "self-serving" and did not need to be accepted "at face value," and was therefore insufficient to create a triable issue of fact.[7] The trial court, for its part, treated the issue as conclusively proved in Amazon's favor in its ruling on Haley's first summary judgment motion. Haley is correct. The trial court erred.

A

We review de novo a trial court's decision on summary judgment. Boyd v. Sunflower Props. LLC, 197 Wn. App. 137, 142, 389 P.3d 626 (2016). Accordingly, we engage in the same inquiry as the trial court. Green v. Normandy Park Riviera Section Cmty. Club, Inc., 137 Wn. App. 665, 681, 151 P.3d 1038 (2007).

Summary judgment is properly granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

[6] Haley seeks review of the dismissal of his accounts receivable and CPA claims; he does not challenge the trial court's dismissal of his declaratory judgment and unjust enrichment claims.

[7] Amazon also argues that summary judgment was proper on Haley's accounts receivable claims because Washington does not permit equitable estoppel to be used offensively. This argument fails as Haley's invocation of equitable estoppel was defensive. See Wilson v. Dep't of Ret. Sys., 15 Wn. App. 2d 111, 124-25, 475 P.3d 193 (2020).

moving party is entitled to a judgment as a matter of law." CR 56(c). "A 'material fact' is a fact upon which the outcome of the litigation depends, in whole or in part." Morris v. McNicol, 83 Wn.2d 491, 494, 519 P.2d 7 (1974) (quoting CR 56(c)).

The party moving for summary judgment bears the initial burden of showing that there is no disputed issue of material fact. Young v. Key Pharms., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The burden then shifts to the nonmoving party to present evidence that an issue of material fact remains. Young, 112 Wn.2d at 225. This the party may accomplish by submitting affidavits setting forth any facts that would be admissible as evidence and attaching any documents that would be similarly admissible. CR 56(e). The party may also support its position by submitting depositions, answers to interrogatories, and admissions. CR 56(e).

When reviewing the affidavits and other evidentiary material, the trial court must construe all evidence and the reasonable inferences therefrom in favor of the nonmoving party. Boyd, 197 Wn. App. at 142 (citing Holmquist v. King County, 182 Wn. App. 200, 207, 328 P.3d 1000 (2014)). Only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact" should summary judgment be granted. CR 56(c). If this standard is not met, the matter must proceed to trial.

The purpose of summary judgment is to avoid useless trials where there is no genuine factual issue to be decided. Preston v. Duncan, 55 Wn.2d 678, 681,

349 P.2d 605 (1960). However, "a trial is not useless, but is absolutely necessary where there is a genuine issue as to any material fact." Balise v. Underwood, 62 Wn.2d 195, 199, 381 P.2d 966 (1963) (citing Preston, 55 Wn.2d 681); accord Barber v. Bankers Life & Cas. Co., 81 Wn.2d 140, 144, 500 P.2d 88 (1972).

On summary judgment, the trial court may not weigh the evidence, assess credibility, consider the likelihood that the evidence will prove true, or otherwise resolve issues of material fact. Davis v. Cox, 183 Wn.2d 269, 290, 351 P.3d 862 (2015), abrogated on other grounds by Maytown Sand & Gravel, LLC v. Thurston County, 191 Wn.2d 392, 423 P.3d 223 (2018); Duckworth v. City of Bonney Lake, 91 Wn.2d 19, 21-22, 586 P.2d 860 (1978), abrogated on other grounds by Yim v. City of Seattle, 194 Wn.2d 682, 451 P.3d 694 (2019). "The function of a summary judgment proceeding, or a judgment on the pleadings is to determine whether or not a genuine issue of fact exists, not to determine issues of fact." State ex rel. Zempel v. Twitchell, 59 Wn.2d 419, 425, 367 P.2d 985 (1962).

Our summary judgment standard precludes resolution of issues of material fact because our constitution protects the right to have factual issues decided by a jury. Specifically, article I, section 21 of our state constitution holds sacred the right to trial by jury, which "guarantees litigants the right to have a jury resolve questions of disputed material facts." Davis, 183 Wn.2d at 289. This right is fundamental in our judicial system. As our Supreme Court has explained, adjudication by the trial court on the merits of nonfrivolous factual issues invades the role of the jury and violates the right to a jury trial. Davis, 183 Wn.2d at 294.

However, the right to trial on disputed issues of fact is not reserved solely for litigants bringing claims to which the right to a jury extends. The right to a jury afforded by article I, section 21 attaches only to causes of action in which a jury was available in 1889. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 648, 771 P.2d 711, 780 P.2d 260 (1989). Excluded from this ambit are claims brought in equity, which includes claims such as dissolution, child custody, partition, probate, requests for an accounting, and claims for injunctive or declaratory relief, to name but a few. However, litigants pursuing these types of claims may not be deprived of the right to trial merely because they are not entitled to a jury. Our civil rules make clear that CR 56, and the limits on when it may be utilized, are applicable in "all suits of a civil nature whether cognizable as cases at law or in equity," whether or not a constitutional right to a jury trial exists. CR 1. Accordingly, persons who bring suits in equity are as much entitled to a trial on disputed issues of material fact as are those who bring suits at law. Indeed, we have previously reversed trial court orders that deny litigants in equitable actions their right to a trial on disputed issues of material fact. See, e.g., S.D. Deacon Corp. of Wash. v. Gaston Bros. Excavating, Inc., 150 Wn. App. 87, 90, 206 P.3d 689 (2009) ("The summary procedure" for release of frivolous mechanics' liens "is not to be used as a substitute for trial where there is a legitimate dispute about the amount of work done and money paid."); In re Marriage of Lane, 188 Wn. App. 597, 604, 354 P.3d 27 (2015) ("[T]here is no dispute the right to trial" in dissolution action "is a substantial right.").

In short, "summary judgment should not be used as a means to 'cut

litigants off from their right to a trial.'" Garbell v. Tall's Travel Shop, Inc., 17 Wn. App. 352, 353, 563 P.2d 211 (1977) (quoting Bernal v. Am. Honda Motor Co., 87 Wn.2d 406, 416, 553 P.2d 107 (1976)). As stated by our Supreme Court:

> The summary judgment rule will best serve its purpose when we all, bench and bar alike, become aware that, ...
>
> ". . . Summary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if *they really have evidence which they will offer on a trial*, it is to carefully test this out, in advance of trial *by inquiring and determining whether such evidence exists*."

Preston, 55 Wn.2d at 683 (alteration in original) (quoting Whitaker v. Coleman, 115 F.2d 305, 307 (5th Cir. 1940)).

B

1

With these principles in mind, we turn to the case at hand. Amazon asserts that the trial court's decision to grant summary judgment in its favor was correct because Haley's "self-serving declaration . . . is not sufficient to defeat summary judgment."[8] Thus, it asserts, the trial court properly refused to credit Haley's testimony contained in his declaration. We disagree.

Because the purpose of summary judgment is to determine whether evidence exists, Zempel, 59 Wn.2d at 425, the trial court must consider all admissible evidence presented to it. Rather than weighing the evidence, the court must view all facts and reasonable inferences therefrom in the light most

[8] Br. of Resp't at 29.

favorable to the nonmoving party. In accordance with these rules, a court may not disregard a party's declaration simply because it believes the testimony to be "self-serving." Indeed, classifying a party's declaration as "self-serving" is essentially meaningless. *All* evidence submitted by a party should be self-serving. That is the purpose of introducing evidence: to lend credence to the party's theory of the case.

The court's decision in Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Grp., Inc., 114 Wn. App. 151, 52 P.3d 30 (2002), on which Amazon relies, does not stand for a contrary proposition. In Newton, we stated that, "[i]n opposing summary judgment, a party may not rely merely upon allegations or self-serving statements." 114 Wn. App. at 157. We did not explain what we meant by this statement, nor did we discuss the evidence submitted by the parties. However, for this proposition we cited three sources: CR 56, Young, 112 Wn.2d 216, and Seybold v. Neu, 105 Wn. App. 666, 19 P.3d 1068 (2001).

CR 56(e), concerning the evidence that a party may submit when filing or defending against a motion for summary judgment, states:

> When a motion for summary judgment is made and supported as provided in this rule, 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.

As dictated by the rule, the only requirements for an affidavit or declaration to be considered are that it "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." CR 56(e). Thus,

far from excluding a party's favorable testimony, the rule explicitly contemplates that a party will submit testimony in its own favor when responding to a summary judgment motion.

Young and Seybold reiterated the rule delineated in CR 56(e). The Supreme Court in Young stated that, in responding to a motion for summary judgment, "the nonmoving party cannot rely on the allegations made in its pleadings." 112 Wn.2d at 225. In Seybold, we echoed the Supreme Court and stated that in responding to the defendant's motion for summary judgment, "the plaintiff may not rely upon the allegations in his pleadings. He must respond with affidavits or other documents allowed by Civil Rule 56(e)." 105 Wn. App. at 676.

It is apparent from the cited sources that our court in Newton did not purport to announce some new rule forbidding a party to submit testimony in its own favor when responding to a summary judgment motion. Rather, we simply reiterated the requirement articulated in CR 56(e) that a party may not rely on its pleadings and must submit evidence in response to a motion for summary judgment. By "self-serving statements," we clearly meant allegations contained in a pleading and not, as Amazon would have us read it, a party's declaration or affidavit testimony as to his recollection of the events.

2

To the extent that any appellate decision can be read to exclude "self-serving" declarations from consideration on summary judgment, those cases were effectively repudiated by Division Two in two recent cases. In Reagan v. Newton, 7 Wn. App. 2d 781, 436 P.3d 411 (2019), the trial court granted

summary judgment to the defendant, Newton, on Reagan's medical battery claim. Newton urged the appellate court to affirm the trial court's ruling because Reagan "relie[d] only on her own self-serving testimony that he intentionally injured her." Reagan, 7 Wn. App. 2d at 806. Division Two rejected that argument, holding that "a party's declaration is enough to create a question of fact where her . . . testimony was based on her personal observations." Reagan, 7 Wn. App. 2d at 806. Accordingly, the appellate court reversed the trial court's order granting summary judgment to Newton.

Division Two addressed a similar argument the following year in Mackey v. Home Depot USA, Inc., 12 Wn. App. 2d 557, 459 P.3d 371, review denied, 195 Wn.2d 1031 (2020). There, plaintiff Mackey brought a retaliation claim against her employer, Home Depot. The trial court granted summary judgment in Home Depot's favor. On appeal, Home Depot argued that summary judgment was proper because Mackey had not provided evidence that she engaged in any protected activity, despite having submitted a declaration testifying that she had complained of another employee's discriminatory actions to the store manager. Mackey, 12 Wn. App. 2d at 574-75. Home Depot asserted that Mackey's declaration was properly disregarded because "Mackey's statement is not sufficient to show that she actually complained before her termination because it was self-serving, was unsubstantiated, and could not be corroborated." Mackey, 12 Wn. App. 2d at 575. Division Two again rejected this argument, holding that "on summary judgment a nonmoving party's declaration must be taken as true and can create a genuine issue of material fact even if it is 'self-serving.'"

Mackey, 12 Wn. App. 2d at 575 (quoting Reagan, 7 Wn. App. 2d at 806). Thus, the court concluded that Mackey's declaration constituted sufficient evidence to establish a question of fact that she had engaged in protected activity.

3

Here, Haley submitted a declaration stating that he notified Amazon in writing of his desire to not renew the 2012 MDF Agreement. Rather than accepting this declaration as true, the trial court, at Amazon's urging, disregarded it as "self-serving." But Haley's declaration submitted in response to Amazon's motion for summary judgment is not a pleading; it is evidence. In accordance with CR 56(e) and pertinent case law, Haley's testimony should have been considered by the trial court so long as the declaration was made on personal knowledge, set forth admissible facts, and showed that he was competent to testify.

Haley's testimony about his own actions was clearly made on his personal knowledge, as it recounted the actions he took in his business relationship with Amazon. There is no dispute that Haley was competent to testify.

That Haley's testimony served his purpose by supporting his claims in no way makes the evidence inadmissible. Rather, Haley's testimony was admissible if it was relevant. ER 402. To be relevant, Haley's declaration needed to make facts at issue "more probable or less probable" than they would be without the evidence. ER 401. Haley's assertion in his declaration that he contacted Amazon in writing to cancel the MDF Agreement in 2012, makes more probable his allegation that he did not have an MDF Agreement with Amazon

between 2013 and 2016. His testimony was therefore relevant to the issues presented on summary judgment.[9]

As admissible evidence, Haley's testimony in his declaration should have been considered and construed in the light most favorable to him as the nonmoving party. As our case law makes evident, Haley was not required to corroborate his testimony or prove himself credible in order to defeat Amazon's motion for summary judgment. The declaration alone was sufficient. The trial court erred by failing to construe all facts and inferences presented in Haley's declaration in his favor when deciding Amazon's motion for summary judgment.

C

Amazon further argues that, even if Haley's declaration was not "self-serving," the trial court properly declined to credit Haley's declaration testimony that he submitted a written repudiation of the 2012 MDF Agreement to Amazon in October 2012. This is so, Amazon asserts, because trial courts are not required to take a party's declaration "at face value" when ruling on a motion for summary judgment. We disagree.

1

When deciding a motion for summary judgment, the court must view all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. Boyd, 197 Wn. App. at 142. The corollary of this rule is that "on summary judgment a nonmoving party's declaration must be taken as true"

[9] Had Amazon believed that any evidence presented in Haley's declaration was inadmissible, it had a remedy by filing a motion to strike the inadmissible statements. Amazon did not do so.

unless it is inadmissible on other evidentiary grounds. Mackey, 12 Wn. App. 2d at 575.

Federal Rule of Civil Procedure 56 jurisprudence recognizes a narrow exception to this principle that applies only when the nonmovant's evidentiary proffer is so implausible that no reasonable person could conclude that its assertions of fact can be true.[10] This does not mean that the evidentiary proffer is insufficient to convince a unanimous jury of the truth of the proffered facts. Nor does it mean that most persons would not be so convinced. Only when no reasonable person could find the proffered facts to be true does the principle apply.

One of the very few cases in which this narrow exception has been applied is Scott v. Harris, 550 U.S. 372, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007). Therein, the plaintiff filed a civil rights action against a deputy sheriff, alleging the use of excessive force during a vehicle pursuit. Scott, 550 U.S. at 375-76. The civil defendant filed a motion for summary judgment seeking to dismiss the claim. Scott, 550 U.S. at 376.

In response to the motion, the plaintiff submitted a declaration stating that he remained in control of his vehicle at all times, slowed for intersections, signaled for turns, and did not run any motorists off the road. Scott, 550 U.S. at 379. The pursuing police officer denied that this was true.

Crucially, a video recording was submitted to contravene the plaintiff's testimony. This video showed the plaintiff swerving around over a dozen cars,

[10] This is sometimes phrased as "not taking the opponent's declaration at face value."

forcing vehicles off the road to avoid collisions, running multiple red lights, and driving in the center left-turn-only lane. Scott, 550 U.S. at 379-80. Given the events depicted on the video, the Supreme Court determined that the plaintiff's "version of events is so utterly discredited . . . that no reasonable jury could have believed him." Scott, 550 U.S. at 380. The Court thus held that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." Scott, 550 U.S. at 380. In short, the plaintiff's declaration set forth facts that were so implausible, given the complete record, that no reasonable person could believe those facts to be true.

The Scott decision also highlights a necessary restriction on resort to this exception. Scott does not invite a trial court to decide that a party's *witness* is more credible than the witnesses for the opposing party. Instead, in Scott, the plaintiff's testimony was shown to be directly at odds with a piece of evidence that was not capable of being impeached—a video of the events at issue. The trial court was not allowed to discount the plaintiff's declaration on the basis of finding countervailing testimony to be greatly more persuasive. Instead, it was the neutral but clear video evidence that demonstrated that the plaintiff's testimony was not possibly accurate and, therefore, did not present an issue that needed to be determined by a jury.

To be clear, the Scott exception applies when (1) the moving party and the nonmovant submit declarations or deposition testimony that directly contradict

one another as to a material fact, *and* (2) the moving party also submits neutral, unimpeachable, irrefutable, and unrebuttable evidence that clearly demonstrates the truth of that set forth in the moving party's evidentiary submission. Only then may the nonmovant be denied the benefit of the summary judgment standard—to have its tendered evidence viewed as true and be given the benefit of all inferences arising therefrom.

In Scott, this was described as a function of the "no reasonable person" standard of summary judgment decision-making. In truth, however, there is more to it. Scott should also be viewed as a decision based on prudential concerns: no procedural rule should compel the courts and the justice system to give credence to blatantly perjured testimony or the evidentiary product of known false statements made under oath. In sum, the decision in Scott was as compelled by the need to protect the integrity of the court as it was by the application of a summary judgment analysis.

2

(a)

Scott, however, finds no corollary in Washington's CR 56 jurisprudence. Although Amazon correctly notes that occasional Washington appellate decisions have recited a platitude about nonmovants not being entitled to have their declarations "taken at face value," a review of the case law demonstrates that this supposed principle has been far more frequently stated than applied. Indeed, Washington's CR 56 case law is bereft of any reported decision in which the supposed principle has been utilized to justify denying a nonmovant of the

benefits of the rule—to have its evidence treated as true and to be given the benefit of all inferences therefrom—on the basis Amazon urges here—that the moving party's evidence is so persuasive that *no* reasonable person could believe the nonmovant's version of events.

Indeed, Washington's CR 56 jurisprudence contains no decision quite like the Scott case. In Washington, the cases stating the supposed principle that a nonmovant's declaration need not be accepted at "face value" fall instead into three categories:

(1) Cases in which the principle is recited but not applied;

(2) Cases in which an ultimate fact at issue (e.g., due diligence, reasonableness) is unsupported by predicate facts; and

(3) Cases applying the notion based on the prudential concern of not rewarding perjury or false swearing at the expense of the integrity of the courts.

(b)

This third category of cases—those based on a prudential concern—is both easy to describe and has no application to the present litigation.

"'"When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony."'" Cornish Coll. of the Arts v. 1000 Virginia Ltd. P'ship, 158 Wn. App. 203, 227, 242 P.3d 1 (2010) (alteration in original) (quoting Marshall v. AC&S, Inc., 56 Wn. App. 181,

185, 782 P.2d 1107 (1989) (quoting Van T. Junkins & Assocs., Inc. v. U.S. Indus., Inc., 736 F.2d 656, 657 (11th Cir. 1984))). In this way, courts will not take the declaration "at face value."

However, "[t]his rule is a narrow one. The 'self-serving affidavit' must 'directly contradict' the affiant's 'unambiguous sworn testimony' previously given." Taylor v. Bell, 185 Wn. App. 270, 294, 340 P.3d 951 (2014) (quoting Kaplan v. Nw. Mut. Life Ins. Co., 100 Wn. App. 571, 576, 990 P.2d 991, 6 P.3d 1177 (2000)); accord Berry v. Crown Cork & Seal Co., 103 Wn. App. 312, 322, 14 P.3d 789 (2000) ("While [the] statements contain potential inconsistencies, they are not necessarily contradictory, and certainly do not rise to the level of clear contradiction necessary to invoke the Marshall rule."). "Moreover, if the subsequent affidavit offers an explanation for previously given testimony, whether the explanation is plausible is an issue to be determined by the trier of fact." Taylor, 185 Wn. App. at 294 (citing Safeco Ins. Co. v. McGrath, 63 Wn. App. 170, 175, 817 P.2d 861 (1991)).

(c)

Nothing in the record of this dispute between Haley and Amazon calls for or authorizes application of the prudential rule set forth in Marshall and discussed in Taylor and similar decisions. In fact, this third category of decisions—those applying this prudential rule—are the only Washington appellate opinions which authorize denying the nonmovant the benefit of the standards of CR 56—that the nonmovant's evidence be treated in the light most favorable to the nonmovant

and that the benefit of all inferences arising from that evidence be given to the nonmovant.

(d)

We next discuss the first category of "face value" appellate opinions. These are decisions in which the platitude was stated but not applied. Instead, in those cases, the decision is invariably best understood as simply holding that *even when* the nonmovant was given the benefits of all of the evidence presented, a material question of fact was not established. See, e.g., Shoulberg v. Pub. Util. Dist No. 1 of Jefferson County, 169 Wn. App. 173, 280 P.3d 491 (2012);[11] Dombrosky v. Farmers Ins. Co. of Wash., 84 Wn. App. 245, 928 P.2d 1127 (1996).[12]

(e)

Our discussion of the second category of "face value" opinions requires more nuance. Some confusion has arisen from these cases. But when the decisions are understood for what they are—opinions resting on the distinction between ultimate facts and predicate facts—it is clear that the opinions are correctly decided. It is equally clear that they have nothing whatsoever to do with resolution of the Haley-Amazon dispute.

Of the cases falling into this category, two are far and away most prominent in terms of subsequent citations to them appearing in appellate

[11] Cited at Br. of Resp't at 22.
[12] Cited at Br. of Resp't at 22.

opinions that recite but do not apply the supposed "face value" principle. We will discuss each in turn.

The first of these was decided nearly six decades ago. That case, Meissner v. Simpson Timber Co., 69 Wn.2d 949, 421 P.2d 674 (1966), was a breach of contract dispute. Meissner was a Simpson Timber employee who, in early 1952, co-invented "a process of fabricating a wood fibre acoustical tile . . . which seemed to have significant economic potential." Meissner, 69 Wn.2d at 951. The company sought to obtain "an assignment of the coinventors' rights therein." Meissner, 69 Wn.2d at 951. Meissner was informed of the company's intent by a personal friend, Charles Devlin, who was a corporate officer. Devlin told Meissner that Simpson Timber would "'probably'" give Meissner "'an extraordinary bonus or a royalty arrangement,'" Meissner, 69 Wn.2d at 951, in exchange for the assignment.

In April 1952, Meissner signed an "'Agreement of Assignment of Invention'" tendered by Simpson Timber. Meissner, 69 Wn.2d at 952. It recited consideration of "'One Dollar ($1.00) and other valuable consideration.'" Meissner, 69 Wn.2d at 952.

Sometime in the spring of 1952 an "executive meeting" was held among several corporate officers. At this meeting, it was agreed among these officers that Meissner should receive a monetary bonus plus "20 per cent of certain royalty income." Meissner, 69 Wn.2d at 952. Devlin mentioned this to Meissner in a conversation taking place in the fall of 1952, at a dinner party at Devlin's home. Meissner, 69 Wn.2d at 953. Devlin also made clear that he had not been

directed by company officials to inform Meissner of the royalty discussion. Meissner, 69 Wn.2d at 954. Instead, to Meissner, it was "'like a good friend passing along some good news.'" Meissner, 69 Wn.2d at 954.

In March 1955, Meissner was officially informed by the company that "$10,000 had been appropriated as compensation for the assignment." Meissner, 69 Wn.2d at 955. Of this amount, $6,000 was paid to Meissner. Meissner, 69 Wn.2d at 955. Meissner accepted the payment as "'full compensation'" for his assigned interest. Meissner, 69 Wn.2d at 955.

In 1958, Simpson Timber began granting licenses to other businesses "to produce the acoustical tile invented by" Meissner. Meissner, 69 Wn.2d at 955. In 1963, Meissner sued, seeking 20 percent of the royalties thus obtained by Simpson Timber. Meissner, 69 Wn.2d at 955.

Meissner's breach of contract claim was premised on his contention that he was "'orally promised'" 20 percent of royalties. Meissner, 69 Wn.2d at 955. Our Supreme Court analyzed the issue as follows:

> The ultimate question thus becomes: Assuming the fact of the conversation, and the truth of the statements therein made, are these facts sufficient to raise a genuine issue as to the existence of a promise by defendant to pay plaintiff the royalties he seeks in this lawsuit? It is our considered opinion that they do not.

Meissner, 69 Wn.2d at 956 (footnote omitted).

The court then proceeded to utilize various verbs to explain its method of analysis, employing the types of verbs often later appearing in various "'not take at face value'" opinions. The court, it said, would "'pierce such formal allegations of fact'" and not allow "mere assertion[s]" or "bare allegations" that would not

allow "reasonable men" to conclude that an oral promise was made. Meissner, 69 Wn.2d at 951, 955-57 (quoting Reed v. Streib, 65 Wn.2d 700, 706, 399 P.2d 338 (1965)).

But the true basis for the court's decision is found elsewhere in its opinion. Put simply, the ultimate fact (whether a promise was made) was not established by the proffered predicate facts (Meissner was told that members of the board intended to offer royalty payments). As the court reasoned:

> The evidence discloses, at most, that defendant, at one time, had *intended* to pay royalties to plaintiff, and that this intention was disclosed to him. But an intention to do a thing is not a promise to do it. An 'intention' is something formed in the mind of a man; a 'promise' is an express undertaking or agreement to carry the purpose into effect.
>
> . . . .
>
> . . . Conceding the truth of the allegations, then, we hold that they are without legal probative force. On trial, such evidence would compel the direction of a verdict in favor of the defendant.

Meissner, 69 Wn.2d at 957.

To be clear, what the court in Meissner did not "take at face value" was Meissner's deposition testimony that he had received an oral promise. This ultimate fact, the court ruled, even when giving Meissner the benefit of the truth of the predicate evidence he presented and the inferences therefrom, was not established by the predicate facts adduced, i.e., the existence of a mere intention to later make a promise.

The second opinion sometimes cited in support of the purported "not take at face value" principle was decided 30 years ago. That case, Allen v. State, 118 Wn.2d 753, 826 P.2d 200 (1992), arose out of the December 1979 Pierce County

murder of Stephen Allen. Allen's widow ultimately commenced the wrongful death lawsuit at issue, asserting that the State was liable because Stephen's murderers were free to kill him only because they had been negligently paroled.

Stephen died on December 18, 1979. Allen, 118 Wn.2d at 754-55. Beverly, his widow, was not present. In the aftermath, Beverly spoke with police, who were then unaware of the identity of Stephen's killers. Allen, 118 Wn.2d at 755. Beverly then returned to her Mount Vernon home.

After several months, Beverly ceased contact with the police. Allen, 118 Wn.2d at 755.

In May 1982, a jury found John Anderson and Robert Stratton guilty of Stephen's murder. Allen, 118 Wn.2d at 755. Both men were on parole at the time of the murder. Allen, 118 Wn.2d at 755. Beverly maintained that she was unaware of this until September 1985. Allen, 118 Wn.2d at 757.

Members of her family, however, became aware much earlier:

- Beverly's father, who lived in Mount Vernon, learned of the convictions in 1983, when he was sent news clippings describing the murder trial. Allen, 118 Wn.2d at 756. The father did not inform Beverly because he did not want to cause her stress. Allen, 118 Wn.2d at 756.

- In March 1984, Beverly's son, Troy, discovered the articles when visiting his grandfather. Troy showed the articles to an attorney in May 1984. The attorney suggested that there might be a cause of action against the State "for the manner in which it paroled Steve Allen's killers." Allen, 118 Wn.2d at 756. However, Troy did not inform his mother of this because he did not want to upset her. Allen, 118 Wn.2d at 756.

On October 9, 1985, Beverly, having recently learned of the convictions, filed a wrongful death suit on behalf of herself and her children. Allen, 118 Wn.2d at 757.

The State moved for summary judgment, claiming that Beverly's cause of action had accrued no later than May 1982 when various newspapers, including those distributed in Skagit County, reported on the results of the murder trial. Allen, 118 Wn.2d at 757. Thus, the State alleged, the applicable 3-year limitation period expired no later than May 1985—several months before Beverly filed her complaint. Allen, 118 Wn.2d at 757. Beverly, the State claimed, had not exercised due diligence to learn of the factual basis of her cause of action.

Due diligence presents a fact question. In Allen, it was an ultimate fact. The predicate facts were those that supported or did not support the conclusion that Beverly had exercised due diligence.

The Supreme Court ruled that Beverly's claim that she had exercised due diligence was not enough to establish that fact. This was so, the court ruled, because the predicate facts did not support it. Beverly did not take steps to stay in contact with the police, acted as though she "wanted to put her husband's death behind her," and did not even read local newspapers containing articles about the trial of Stephen's murderers. Allen, 118 Wn.2d at 758-60. Thus, even when she was given the benefit of the summary judgment standard as to her proffered predicate facts, "reasonable minds could only conclude that due diligence would have alerted Beverly Allen to the factual basis for her action more than 3 years before she filed suit." Allen, 118 Wn.2d at 760.

In this way—the failure to proffer predicate facts that, if true, would establish the ultimate fact—the Allen case did not accept Beverly's declaration of having exercised due diligence at "face value."

(f)

We now return to the dispute between Haley and Amazon. Here, no similar situation exists. Haley's declaration was based on his firsthand knowledge and directly states the actions he took. He was competent to so testify and his testimony, when credited, establishes a clear dispute of fact.

The trial court's grant of summary judgment cannot be approved of on this basis.

D

The trial court should not have entered findings of fact when deciding Haley's first summary judgment motion in Amazon's favor. The court later compounded its error by utilizing those factual findings in granting Amazon relief in the summary judgment orders giving rise to this appeal.

A trial court may only enter findings of fact when ruling on a motion for summary judgment under the limited circumstances outlined in CR 56(d). Pursuant to this rule, if a motion for summary judgment is not dispositive on all aspects of the case, the trial court can make findings as to material facts that exist "without substantial controversy." However, the trial court may do so only upon a motion that does not seek adjudication of the case as a whole. CR 56(d). Furthermore, the trial court must examine the pleadings and evidence before it and inquire of counsel to ensure that the facts are agreed. CR 56(d). This did not happen here. Furthermore, in its order, the trial court must specify which facts exist without contention and which remain in controversy. CR 56(d). The trial court's order here did not so specify.

When the trial court does make findings of fact without following the procedures dictated in CR 56(d), its findings are nullities. Duckworth, 91 Wn.2d at 21-22. Because findings of fact in an order on summary judgment not entered pursuant to CR 56(d) are nullities, the trial court errs by relying on those findings in entering a subsequent order. Hamilton v. Huggins, 70 Wn. App. 842, 849, 855 P.2d 1216 (1993).

Here, the trial court made numerous findings of fact in rendering its order denying Haley's first motion for partial summary judgment. Notably, the trial court entered a finding that "Mr. Haley did not effectively repudiate the 2012 Agreement in writing at any point in 2012." Whether Mr. Haley notified Amazon in writing of his desire to not renew the 2012 MDF Agreement is clearly a fact, and it is one that is highly disputed by the parties. As such, the trial court never should have entered findings of fact declaring the Agreement renewed and binding after December 31, 2012.

The trial court's findings of fact should have been treated as nullities when the court considered Amazon's later motion for summary judgment. This is especially so as the procedural posture of the parties had reversed; Haley was now the nonmovant. Instead, the trial court concluded that its factual finding that Haley did not repudiate the 2012 Agreement effectively established that the MDF Agreement remained valid, thus warranting dismissal of Haley's accounts receivable claims. In this, the court erred. Haley's claims were neither proved nor disproved on his earlier motion for partial summary judgment. The only conclusion appropriately reached by the denial of Haley's summary judgment

motion is that material issues of fact existed at the time the order was entered. Any other conclusion was unfounded.

Haley's testimony that he notified Amazon in writing of his repudiation of the 2012 MDF Agreement is sufficient to establish a material question of fact on Haley's accounts receivable claims.[13] The trial court erred by finding that testimony not credible, entering findings of fact to that effect, and dismissing Haley's accounts receivable claims following this resolution of a factual dispute. Because material issues of disputed fact existed, the trial court should not have granted summary judgment in favor of Amazon. We therefore reverse the trial court's order with respect to Haley's accounts receivable claims.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

III

Amazon next asserts that the trial court correctly dismissed Haley's CPA claims as barred by the applicable four-year statute of limitations. This is so, Amazon contends, because Washington does not recognize a continuing tort doctrine applicable to CPA claims and, therefore, any later deductions from OraHealth's receipts do not save a claim that accrued in February 2016. This

[13] To be clear, in resolving Amazon's summary judgment motion, the trial court erred both by *not* viewing the evidence in the light most favorable to Haley *and* by instead giving the paralegal's declaration submitted by Amazon the benefit of all inferences from the evidence (e.g., the paralegal was properly trained, the paralegal did his work correctly, Amazon's system was foolproof, etc.).

argument is without merit. Haley does not allege a continuing tort. A continuing tort is one where "'no single incident in a continuous chain of tortious activity can "fairly or realistically be identified as the cause of significant harm"'" Hill v. Dep't of Transp., 76 Wn. App. 631, 638, 887 P.2d 476 (1995) (quoting Page v. United States, 729 F.2d 818, 821-22 (D.C.Cir.1984)). Here, there was no allegation of a continuous chain of tortious activity. Rather, Haley alleges that four separate deductions taken by Amazon were the cause of his injuries. Amazon took those deductions in February 2016, August 2016, March 2018, and May 2018.

Haley filed his lawsuit against Amazon in July 2020. Because there is no allegation of a continuing tort, Haley correctly concedes that his CPA claim based on the February 2016 deduction is barred by the statute of limitation. See RCW 19.86.120 (statute of limitation for CPA claims is four years). However, Haley's CPA claims based on the October 2016, March 2018, and May 2018 deductions were timely made.

Unlike McFarling v. Evaneski, 141 Wn. App. 400, 171 P.3d 497 (2007), upon which Amazon relies, this is not an instance in which the plaintiff suffered ongoing damages as the result of a single tortious action by the defendant.[14] Rather, Haley allegedly suffered damages as the result of four distinct actions taken by Amazon. The trial court erred when it dismissed Haley's CPA claims in their entirety as being time barred.

IV

Amazon next avers that Haley's CPA claims should nevertheless be

[14] The tortious act in McFarling was a motor vehicle collision. See 141 Wn. App. at 402.

dismissed in full because Haley did not present evidence on a question of material fact. Specifically, Amazon alleges that there is no evidence that Amazon's challenged actions affect the public interest. We agree.

A plaintiff asserting a claim under the CPA must present evidence of "(1) an unfair or deceptive act or practice (2) occurring in trade or commerce (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation." Behnke v. Ahrens, 172 Wn. App. 281, 290, 294 P.3d 729 (2012) (citing Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986)).

The plaintiff has the burden to show that the unfair or deceptive act has "'the *capacity* to deceive a substantial portion of the public.'" Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 74-75, 170 P.3d 10 (2007) (quoting Hangman Ridge, 105 Wn.2d at 785). Whether an act has the capacity to deceive a substantial portion of the public is usually a question of fact. Behnke, 172 Wn. App. at 292. However, "a breach of a private contract affecting no one but the parties to the contract is not an act or practice affecting the public interest." Hangman Ridge, 105 Wn.2d at 790. For a private dispute to affect the public interest, the plaintiff must show either that the action constitutes a per se violation of the CPA, or that it is likely that other persons have been or will be injured in exactly the same manner. Hangman Ridge, 105 Wn.2d at 790-91.

Haley does not argue that Amazon's challenged actions constituted a per se violation of the CPA. Rather, Haley asserts that three pieces of evidence

submitted to the trial court support his claim that Amazon's conduct affected or would affect other persons in the exact same manner. First, Haley submitted a copy of the decision entered in Goped Ltd. LLC v. Amazon.com Inc., 2018 WL 834591 (D. Nev. Feb. 12, 2018). In that case, the plaintiff brought claims against Amazon for declaratory relief, violation of the Racketeer Influenced and Corrupt Organizations ("RICO") Act, fraud, unjust enrichment, and deceptive trade practices. Goped, 2018 WL 834591, at *1. Although the factual allegations made by the plaintiff are similar to the ones made by Haley, this trial court decision is not evidence that other persons have been injured in the exact same manner. This is particularly so given that the court dismissed the plaintiff's claims therein due to a lack of evidence. Goped, 2018 WL 834591, *4-5. Even were we to consider this decision as evidence, however, it would not by itself be sufficient to demonstrate a public interest impact. The question of public interest is whether "many" consumers would be affected by the defendant's actions, not whether one other consumer may have been so affected. Hangman Ridge, 105 Wn.2d at 790.

Second, Haley relies upon an investigative report by the United States House Subcommittee on Antitrust, Commercial and Administrative Law. Haley did not provide a copy of this report to the trial court but, instead, extracted one quotation therefrom and provided an Internet link to the report in a footnote to his response to Amazon's summary judgment motion. This was not sufficient. A party responding to a summary judgment motion must demonstrate the existence of a material issue of fact through use of "pleadings, depositions, answers to

interrogatories, . . . admissions on file, [and] affidavits." CR 56(c). For an appellate court to consider evidence on an appeal from a summary judgment order, the evidence must have been "called to the attention of the trial court." RAP 9.12. Merely providing an Internet link to a document may alert the trial court to its existence, but does not properly call its contents to the trial court's attention. See Gartner, Inc. v. Dep't of Revenue, 11 Wn. App. 2d 765, 776-77, 455 P.3d 1179 (2020) (striking reference to website in appellate brief where party had not provided documentation of evidence contained on website). If the plaintiff wishes for the trial court to review documents obtained from the Internet in connection with a summary judgment motion, the proper method of doing so is to attach those documents to an affidavit. CR 56(e); see also Milligan v. Thompson, 110 Wn. App. 628, 635, 42 P.3d 418 (2002) (trial court did not err by refusing to consider ER 904 documents on summary judgment, as they had not been provided to the court). Because the investigative report was not submitted to the trial court as an attachment to an affidavit, it was not "called to the attention of the trial court." Accordingly, we will not consider it as part of the evidence on appeal.

Third, Haley relies on a website from Riverbend Consulting. As with the House investigative report, Haley did not provide a copy of any documents from the website to the trial court but instead set forth a link to the website in a footnote in his response to Amazon's motion for partial summary judgment. Accordingly, the contents of this website also were not "called to the attention of the trial court" and will not be considered on appeal.

In sum, Haley provides no evidence that "many" other persons have been or will be injured in exactly the same manner as OraHealth. Nothing in our record presents a triable issue of fact as to whether Amazon's conduct affected the public interest. Thus, the trial court did not err by dismissing Haley's CPA claims.

Reversed in part, affirmed in part, and remanded for further proceedings.

WE CONCUR: