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NO. 72321-9

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

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DEBORAH THOMSON,

Appellant,

v.

JANE DOE,

Respondent.

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RESPONSE BRIEF OF NON-PARTY AVVO, INC.

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Bruce E.H. Johnson, WSBA #7667  
Ambika Kumar Doran, WSBA #38237  
Davis Wright Tremaine LLP  
Attorneys for Avvo, Inc.

1201 Third Avenue  
Suite 2200  
Seattle, WA 98101-3045  
(206) 622-3150 Phone  
(206) 757-7700 Fax

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## I. INTRODUCTION

Appellant Deborah Thomson appeals the Superior Court's order denying her motion to compel non-party Avvo, Inc. to disclose the identity of Respondent Jane Doe, someone who posted a negative review about Ms. Thomson, a Florida attorney, on Avvo's lawyer rating website Avvo.com. Ms. Thomson filed the motion to compel so she could proceed with a (meritless) lawsuit against the reviewer. This Court should affirm the Superior Court's denial of the motion.

*First*, the Superior Court correctly applied a heightened standard to Ms. Thomson's motion. The First Amendment protects the right to speak anonymously. Accordingly, courts nationwide have required plaintiffs seeking to compel disclosure of an online poster's identity to first provide evidence of a prima facie case, or, in other words, enough evidence to survive summary judgment. Such a test is essential to promoting free speech on the Internet. Ms. Thomson does not dispute this and instead argues that the review is "commercial speech" and thus merits less constitutional protection. Under well-established law, it is not.

*Second*, Ms. Thomson failed to satisfy this standard. She did not provide *any* evidence—not even a declaration—let alone evidence of a prima facie case on her claims for libel and intentional infliction of emotional distress. She thus has not shown Doe's statements are false. In fact, the information Avvo received from the reviewer suggests he or she was a client of Ms. Thomson's. Further, the majority of the statements are opinions that are not provably false, and the remaining statements are not

defamatory as a matter of law. Finally, Ms. Thomson provided no evidence of damages.

For these reasons, Avvo respectfully asks the Court to affirm the decision denying Ms. Thomson's motion to compel.

## **II. ISSUES PRESENTED**

Whether the Superior Court correctly declined to require non-party Avvo, Inc. to disclose the identity of an individual who posted to Avvo.com a negative review of Appellant Deborah Thomson, where that review is not defamatory as a matter of law, given that the First Amendment provides significant protections for anonymous speech.

## **III. STATEMENT OF THE CASE**

Avvo operates the world's leading online lawyer-rating and review system. Its mission is simple: to help people make the best decisions for their legal needs, free of charge. CP 78 ¶ 2. In contrast to sites that feature only lawyers who pay to appear, "at Avvo, all lawyers are treated equally. They can't pay to change their ratings, and we don't play favorites to lawyers we know." CP 83. Millions of people have used Avvo's service to find legal counsel. CP 78 ¶ 3.

Avvo's "Rating" feature is a cornerstone of its service. The rating provides a score of zero to ten based on a mathematical model that accounts for a lawyer's publicly available information (e.g., disciplinary history), years of practice, achievements, industry recognition, and other factors. CP 78 ¶ 4. Avvo intends the rating to guide the public in finding

a suitable lawyer. An attorney cannot change his rating by request, but may register on the Avvo website, “claim” her profile, and update information regarding work experience, practice areas, and professional achievements, any of which may change the rating. CP 79 ¶ 5.

Avvo also provides a forum where clients can review lawyers with whom they have had experience. CP 79 ¶ 6. Clients provide feedback in five discrete areas, specifying an (1) overall rating, and whether the attorney (2) is trustworthy, (3) is responsive, (4) is knowledgeable, and (5) kept the client informed. *Id.* Clients may also leave comments. *Id.* As of July 21, 2014, eleven individuals had reviewed appellant Deborah Thomson, resulting in a score of 4.5 out of 5 stars. CP 87-91.

On May 21, 2014, Ms. Thomson filed a complaint against Jane Doe in Florida state court, alleging defamation per se, defamation, defamation by implication, and intentional infliction of emotional distress stemming from reviews posted to three websites, including Avvo.com. *See* CP 37-51. Ms. Thomson alleged Doe “ha[d] never been a client of Plaintiff,” CP 37 ¶ 2, and posted negative reviews of her work, stating:

I am still in court five years after Ms. Thomson represented me during my divorce proceedings. Her lack of basic business skills and detachment from her fiduciary responsibilities has cost me everything. She failed to show up for a nine hour mediation because she had vacation days. She failed to subpoena documents that are critical to the division of assets in any divorce proceeding. In fact, she did not subpoena any documents

at all. My interests were simply not protected in any meaningful way.

*Id.* CP 48. Ms. Thomson posted a response, stating that the writer “was not an actual client of mine,” and instead this was a “personal attack from someone that I know.” CP 94. She disputed several of the statements in the review and criticized Avvo for not “verif[ying] the information contained in a negative client review.” *Id.*

On June 5, 2014, Ms. Thomson filed a broad sweeping subpoena duces tecum in Florida, asking for information about Doe’s account. *See* CP 51-57. The subpoena demands “[a]ny and all account information related to the user profile,” including, for example, all “AVVO products used by the subject AVVO account holder”; as well as “[a]ny and all” information captured by cookies placed on the account holder’s computer or device, server logs, “[a]ny and all user communications,” “[a]ny and all location data,” and “[a]ny and all search queries used by the ... account holder while logged into his/her AVVO account.” CP 54.

On July 3, 2014, Avvo’s in-house attorney, Josh King, wrote Ms. Thomson to inform her Avvo would allow Doe to object to the subpoena and provide Avvo other relevant information. CP 100-02. Ms. Thomson indicated she as “pretty certain [she was] aware who wrote it.” *Id.* Mr. King contacted Doe, who provided him documents sufficient to show the reviewer had in fact been a client of Ms. Thomson’s. CP 79 ¶ 8. Mr. King asked Ms. Thomson to withdraw her subpoena; she refused. CP 101.

On July 16, 2014, Ms. Thomson filed a motion to compel. CP 2. She argued that Civil Rule 26 allows for broad discovery, and that no exception exists under the First Amendment because libel is not constitutionally protected speech. CP 3-4. Avvo opposed the motion, noting the First Amendment imposes a heightened standard to compel disclosure of an anonymous speaker, and that Ms. Thomson had failed to meet that standard because she had not shown a prima facie case of libel. CP 59-76. On July 28, 2014, the Superior Court denied the motion to compel, finding Ms. Thomson “failed to make a prima facie showing re: defamation claim.” CP 114. Ms. Thomson filed a timely notice of appeal.

#### IV. ARGUMENT

This Court reviews the Superior Court’s decision whether the First Amendment protects Doe’s communications *de novo*. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 505 (1984) (directing courts to conduct an independent review to “be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited”). But “[i]n all other respects, the abuse-of-discretion standard is appropriate.” *Krinsky v. Doe* 6, 159 Cal. App. 4th 1154, 1161-62 (2008) (describing standard of review in cases involving compelled disclosure of anonymous poster’s identity, which involve questions of law and fact); *see also T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 138 P.3d 1053 (2006) (Ordinarily, this Court

“reviews a trial court’s discovery order for an abuse of discretion.”). Applying these principles here, the Superior Court correctly applied a heightened standard to deny Ms. Thomson’s motion to compel.

**A. The Superior Court Correctly Decided to Apply a Heightened Standard to Ms. Thomson’s Motion.**

The First Amendment protects the right to speak anonymously. *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 166-67 (2002); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 199-200 (1999); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995). As the United States Supreme Court said in *McIntyre*:

[A]n author generally is free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible. Whatever the motivation may be ... the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, ***an author’s decision to remain anonymous***, like other decisions concerning omissions or additions to the content of a publication, ***is an aspect of the freedom of speech protected by the First Amendment.***

514 U.S. at 341-42 (emphasis added).

These concerns apply equally to speech on the Internet, which “stands on the same footing as other speech.” *In re Anonymous Online*

*Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011) (citing *Reno v. ACLU*, 521 U.S. 844, 870 (1997)). Indeed, more so than elsewhere, “[t]he free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously.” *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001). Online commenters may wish to remain anonymous for myriad reasons—ranging from embarrassment about a particular subject to fear of retribution. Thus, “discovery requests seeking to identify anonymous Internet users must be subjected to careful scrutiny by the courts.” *Id.* See also *SaleHoo Grp., Ltd. v. ABC Co.*, 722 F. Supp. 2d 1210, 1214 (2010) (“subpoenas seeking the identity of anonymous individuals raise First Amendment concerns”).

No Washington appellate court has had occasion to decide the proper standard in this context. But courts nationwide require a plaintiff to provide some evidence to support each element of her claims before compelling disclosure of an anonymous poster’s name. There are two prevailing tests. The first was announced by a New Jersey court in 2001. *Dendrite Int’l, Inc. v. John Doe No. 3*, 342 N.J. Super. 134, 775 A.2d 756 (2001). There, a court decided that a company angered by anonymous posts about its practices could not compel disclosure of the poster’s identity unless it (1) tried to notify the poster, (2) specified the statements upon which its claims were based, (3) stated a facially valid claim, and (4) produced sufficient evidence supporting the claims to make a prima facie case. *Id.* at 141. If it could satisfy those elements, a court would balance

the defendants' First Amendment right of anonymous speech against the strength of the case presented.

In 2005, a Delaware court announced a modified test. *Doe v. Cahill*, 884 A.2d 451 (Del. 2005). In *Cahill*, a town council member and his wife sought the identity of a poster who stated the member had “character flaws” and “obvious mental deteriorations,” and was “paranoid.” *Id.* at 466-67. The court adopted the first and fourth *Dendrite* requirements, requiring the plaintiffs to attempt to notify the poster and to produce sufficient evidence to survive a summary judgment motion. *Id.* at 461. Applying that standard, the court found the statements were not capable of defamatory meaning. *Id.* at 467-68.

Following the lead of New Jersey and Delaware, nine of the ten state appellate courts confronted with the same question have adopted some version of the *Dedrite* or *Cahill* tests. *See Doe v. Coleman*, 436 S.W.3d 207, 211 (Ky. Ct. App. 2014) (adopting *Cahill* test); *In re Indiana Newspapers*, 963 N.E.2d 534 (Ind. Ct. App. 2012) (*Dendrite*); *Pilchesky v. Gatelli*, 12 A.3d 430, 442-43 (Pa. Super. Ct. 2011) (*Dendrite*); *Mortg. Specialists, Inc. v. Implode-Explode Heavy Indus. Inc.*, 999 A.2d 184, 239 (N.H. 2010) (*Dendrite*); *Solers, Inc. v. Doe*, 977 A.2d 941 (D.C. 2009) (*Cahill*); *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432 (Md. 2009) (*Dendrite*); *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008) (similar to *Cahill*); *In re Does 1-10*, 242 S.W.3d 805 (Tex. App. 2007)

(*Cahill*); *Mobilisa, Inc. v. Doe*, 170 P.3d 712 (Ariz. Ct. App. 2007) (*Dendrite*).<sup>1</sup>

Numerous federal courts have also adopted a heightened standard, including in Washington. For example, Judge Robart noted that “[t]he case law, though still in development, has begun to coalesce around the basic framework of the test articulated in *Dendrite*.” *SaleHoo Grp.*, 722 F. Supp. 2d at 1214. The court refused to compel disclosure because the plaintiff had failed to state facially valid claims and provide prima facie evidence of its claims. *Id.* at 1217. See also *Highfields Capital Mgmt. v. Doe*, 385 F. Supp. 2d 969, 976 (N.D. Cal. 2005) (requiring evidentiary showing and balancing of interests); *Fodor v. Doe*, 2011 WL 1629572, at \*5 (D. Nev. Apr. 27, 2011) (same); *Koch Indus., Inc. v. Doe*, 2011 WL 1775765, at \*10 (D. Utah May 9, 2011) (noting case law has trended toward *Dendrite*); *Best W. Int’l, Inc. v. Doe*, 2006 WL 2091695, at \*5-6 (D. Ariz. July 25, 2006) (claim would not survive summary judgment, declining to address other factors); *In re Baxter*, 2001 WL 34806203, at \*16 (W.D. La. Dec. 20, 2001) (requiring showing of reasonable possibility or probability of success); *Sinclair v. TubeSockTedD*, 596 F. Supp. 2d 128, 132 (D.D.C. 2009) (declining to decide between *Cahill* and *Dendrite* tests

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<sup>1</sup> In addition, two states have interpreted court rules to impose a heightened standard. See *Maxon v. Ottawa Publ’g Co.*, 929 N.E.2d 666 (Ill. App. Ct. 2010); *Thomas M. Cooley Law Sch. v. Doe I*, 833 N.W.2d 331 (Mich. Ct. App. 2013). Only one appellate court, in Virginia, declined to adopt a heightened standard because that state’s legislature had enacted a statute “directly addressing requests for the identity of an anonymous poster.” See *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 752 S.E.2d 554 (Va. Ct. App. 2014). That case is on appeal. No. 140242 (Va. May 29, 2014). And Washington does not have such a statute.

because plaintiff could not satisfy either); *Alvis Coatings, Inc. v. Does*, 2004 WL 2904405, at \*4 (W.D.N.C. Dec. 2, 2004) (compelling disclosure where defendant did not dispute authorship and plaintiff provided affidavit about falsity of comments); *Doe I v. Individuals whose true names are unknown*, 561 F. Supp. 2d 249 (D. Conn. 2008) (compelling disclosure where plaintiffs presented evidence of prima facie libel claim).

In light of these well-established principles, the Superior Court applied a heightened standard to Ms. Thomson's motion to compel and denied it because she "failed to make a prima facie showing re: defamation claim." CP 114. Ms. Thomson claims that "[f]ailing to make a prima facie showing is language that a court uses when ruling on a Motion to Dismiss," and that, as a result, the Superior Court must have dismissed her claim under CR 12(b)(6). App. Br. at 12. Not so. Consistent with *Dendrite*, its progeny, and Washington law, "prima facie showing" is the standard on summary judgment. *See SaleHoo Grp.*, 722 F. Supp. 2d at 1216 ("[T]he prima facie and summary judgment tests impose similar burdens ... essentially requiring sufficient evidence to create a jury issue on the underlying claim."); *Sisley v. Seattle Pub. Sch.*, 180 Wn. App. 83, 87, 321 P.3d 276 (2014) ("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."). Thus, the Superior Court applied a *Dendrite*-style test to

conclude Ms. Thomson had failed to provide sufficient evidence to overcome a motion for summary judgment.

Ms. Thomson also argues that “[c]ourts have authorized discovery to unmask defendants that engage in anonymous online behavior.” App. Br. at 21. *See also id.* at 23 n.2. But the cases she cites are inapposite. Two allow subpoenas to be served but do not compel compliance with the subpoenas, expressly reserving that question. *Chavan v. Doe*, 2013 U.S. Dist. LEXIS 154497 (W.D. Wash. Oct. 28, 2013); *Malibu Media, LLC v. Does 1-23*, 2012 WL 1144822 (D. Colo. Apr. 4, 2012) (“nothing set forth herein abrogates the protections afforded to Defendants under Fed. R. Civ. P. 45(c)”). Both *Malibu Media* and three other cases concern copyright infringement, a context in which some courts find “First Amendment privacy interests are exceedingly small.” *Arista Records LLC v. Does 1-19*, 551 F. Supp. 2d 1, 8 (D.D.C. 2008) (cited at App. Br. at 21).<sup>2</sup> The sixth case, *Cottrell v. Unknown Correctional Officers 1-10*, 230 F.3d 1366 (9th Cir. 2000), does not concern compelled disclosure, a subpoena, or the First Amendment, and is unpublished so cannot be cited.<sup>3</sup>

For the first time on appeal, Ms. Thomson argues that Doe’s review is “commercial speech” and thus not subject to a heightened standard. *See* App. Br. at 25. This is wrong. Ms. Thomson does not

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<sup>2</sup> The remaining two copyright cases Ms. Thomson cites are *The Thompsons Film, LLC v. Does 1-194*, Case No. 2:13-cv-00560-RSL (W.D. Wash. Apr. 1, 2013) and *Digital Sin, Inc. v. Does 1-5698*, 2011 WL 5362068 (N.D. Cal. Nov. 4, 2011). App Br. at 22.

<sup>3</sup> Under Ninth Circuit Rule 36-3, unpublished decisions before January 1, 2007 cannot be cited. *See* GR 14.1 (party may cite unpublished decision from another jurisdiction only if that jurisdiction so allows).

allege Doe is a competitor seeking to promote her own commercial interests, yet “commercial speech” is “speech which does no more than propose a commercial transaction.” *Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952, 957 (9th Cir. 2012) (quotation marks omitted). Thus, courts have found that consumer reviews are not commercial speech. *See Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm’n*, 149 F.3d 679, 686 (7th Cir. 1998) (cataloguing cases). And two courts have specifically found Avvo’s reviews are not done “in commerce” so as to trigger the Washington Consumer Protection Act. *Browne v. Avvo, Inc.*, 525 F. Supp. 2d 1249, 1254 (W.D. Wash. 2007); *Davis v. Avvo, Inc.*, 2012 WL 1067640, at \*6-7 (W.D. Wash. Mar. 28, 2012).

Further, the case Ms. Thomson relies on, *In re Anonymous Online Speakers*, 661 F.3d at 1176, **supports** Avvo. It recognizes the need to balance the “important value of anonymous speech” against a party’s need for discovery, and suggests the correct standard depends on the nature of the speech—in that case, speech by one business about another. Here, not only is Doe’s speech not “commercial” or that of a competitor, it is of significant public value. *See, e.g., AR Pillow Inc. v. Maxwell Payton, LLC*, 2012 WL 6024765, at \*5 (W.D. Wash. Dec. 4, 2012) (“members of the public clearly have an interest in matters which affect their roles as consumers”). Thus, a *Dendrite*-style standard should apply.

**B. The Superior Court Correctly Concluded Ms. Thomson Failed to Meet this Standard Because She Did Not Provide Evidence of a Prima Facie Claim.**

The Superior Court also correctly found, under this heightened standard, that Ms. Thomson failed to provide evidence of a prima facie defamation claim. As Ms. Thomson admits, a defamation plaintiff must prove four elements: that the allegedly libelous statements are not privileged, are false and defamatory, were made with the requisite level of fault, and caused her damage. *Mark v. Seattle Times*, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981). App. Br. at 14-21.<sup>4</sup>

Although Ms. Thomson argues the statements are not privileged and were made with the requisite degree of fault, App. Br. at 16-17, Avvo did not oppose her motion on these grounds. Instead, as it argued in the Superior Court, portions of the allegedly defamatory review are not provably false, and others are not defamatory. Moreover, Ms. Thomson

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<sup>4</sup> Ms. Thomson concedes Washington law applies to this Court's analysis of her claims. Even if this Court engages in a choice-of-law analysis, it should apply Washington law, given this State's policy of protecting its citizens from meritless lawsuits that target free speech rights. *See, e.g.*, RCW 4.24.525. Further, the First Amendment concerns raised by Thomson's lawsuit apply no matter what state's law is applicable, and to Avvo's knowledge, the relevant common law principles do not differ in Florida.

In addition, although Ms. Thomson also alleged a claim for intentional infliction of emotional distress, CP 13, the First Amendment limitations on defamation actions "apply to all claims whose gravamen is the alleged injurious falsehood of a statement." *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 1042 (1986). Thus, courts dismiss emotional distress claims that accompany constitutionally deficient defamation claims. *See, e.g.*, *Hutchins v. Globe Int'l, Inc.*, 1995 WL 704983, at \*11 (E.D. Wash. Oct. 10, 1995) ("Because Plaintiffs have failed to establish sufficient disputed facts to submit their defamation claim to a jury, their claims of intentional infliction of emotional distress and outrage must also be dismissed."); *Hitter v. Bellevue Sch. Dist. No. 405*, 66 Wn. App. 391, 402, 832 P.2d 130 (1992) (where privilege barred libel claim, emotional distress claim failed); *Hoppe v. Hearst Corp.*, 53 Wn. App. 668, 677, 770 P.2d 203 (1989) (dismissing emotional distress claim where plaintiff failed to show fault on libel claim).

supplied no evidence of damages. In fact, she “provided no evidence at all,” instead relying on her complaint; a complaint, though, “is not evidence.” *Davis*, 2012 WL 1067640, at \*7 (dismissing claim by another Florida attorney who failed to provide evidence sufficient to overcome summary judgment). Under *Dendrite* and its progeny, the Superior Court properly denied the motion to compel. The *Dendrite* requirements are even more important in this case because, as Avvo demonstrated, Ms. Thomson has claimed the author was not a client, casting doubt on her remaining allegations. CP 79 ¶ 8.

**1. Ms. Thomson failed to allege or show that the statements in the review are provably false.**

Ms. Thomson claims each statement in the review is defamatory. CP 33-34 ¶ 13; App. Br. at 15. But the majority of them are opinions, not facts, and a statement must be one of fact to be actionable. As the United States Supreme Court emphasized, under the First Amendment, “there is no such thing as a false idea.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974). “However pernicious an opinion may seem,” it continued, “we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.” *Id.* at 339-40. *See also Robel v. Roundup Corp.*, 148 Wn.2d 35, 55-56, 59 P.3d 611 (2002) (statements that plaintiff was a “squealer,” “snitch,” and “liar” were opinions). This issue presents a question of law. *Rodriguez v. Panayiotou*, 314 F.3d 979, 985-86 (9th Cir. 2002) (“whether an allegedly defamatory statement constitutes fact or opinion is a question of law for the court”); *Riley v. Harr*, 292 F.3d

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

Two principles of the opinion doctrine are significant here.

First, “[s]tatements that someone has acted unprofessionally or unethically generally are constitutionally protected statements of opinion.” *Wait v. Beck’s N. Am., Inc.*, 241 F. Supp. 2d 172, 183-84 (N.D.N.Y. 2003). Thus, courts have repeatedly found statements about the ability of attorneys are opinions which present “no core of objective evidence” for verification, even where those statements contain statements of fact. *Partington v. Bugliosi*, 56 F.3d 1147 (9th Cir. 1995).

Opinions vary significantly concerning what skills make a good trial lawyer and whether a particular individual possesses them.  
***There is no objective standard by which one can measure an advocate’s abilities with any certitude or determine conclusively the truth or falsity of statements made regarding the quality of his or her performance.***

*Id.* at 1157-58 (emphasis added). See also *Sullivan v. Conway*, 157 F.3d 1092, 1096-97 (7th Cir. 1998) (statement that plaintiff “is a very poor

lawyer” was protected because it “would be unmanageable to ask a court... to determine whether ‘in fact’ [plaintiff] is a poor lawyer”); *Quilici v. Second Amendment Found.*, 769 F.2d 414, 418 (7th Cir. 1985) (statements that attorney’s “presentation before [the] court was poor, and may have ‘sunk’ the appeal,” “did not cooperate with other attorneys arguing on his side” of the case, “used more time for oral argument than had been allocated to him and, as a result, used up all of the rebuttal time,” and that his “presentation was ‘rambling and often pointless’”); *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1300 (D.C. Cir. 1988) (statements in editorial criticizing plaintiff’s strategy as “crude,” “ugly,” “pernicious,” and “breathtaking in its daring”); *Coles v. Wash. Free Weekly, Inc.*, 881 F. Supp. 26, 31 (D.D.C. 1995) (statements that attorney’s trial presentation was “vague,” used “confusion as a weapon,” and failed to ask “key” questions), *aff’d*, 88 F.3d 1278 (1996); *Kirsch v. Jones*, 464 S.E.2d 4, 6 (Ga. Ct. App. 1995) (statements that attorney “bungled” the case).<sup>5</sup>

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<sup>5</sup> See also *Remick v. Manfredy*, 238 F.3d 248, 260-63 (3d Cir. 2001) (statement that lawyer was attempting to extort money); *Owen v. Carr*, 497 N.E.2d 1145, 1146 (Ill. 1986) (statement that attorney “did not file his complaint in the interest of justice, but instead was trying deliberately to intimidate [a judge] and other judges in future cases involving [his client]”); *Morris v. Gray & Co.*, 378 So. 2d 1081, 1082 (La. Ct. App. 1979) (statements that attorney “refuse[d] to cooperate [with opposing counsel]” and was “merely intent on building [his] client’s claim to the best of [his] ability”); *Guarneri v. Korea News, Inc.*, 214 A.D.2d 649 (N.Y. App. Div. 1995) (statement that attorney “was considered by various sources ... to have been unprepared and negligent, and that he lost an opportunity to appeal despite having being granted two extensions”); *James v. San Jose Mercury News, Inc.*, 17 Cal. App. 4th 1, 14-15 (1993) (statements that plaintiff “apparently” violated law in obtaining child’s school records and his tactics were “common and sleazy”); *El Paso Times, Inc. v. Kerr*, 706 S.W.2d 797, 800 (Tex. App. 1986) (statement criticizing attorney’s conduct during criminal trial to the effect that “[t]he burden [to prove guilt] is no excuse for cheating”); *Golub v. Esquire Publ’g Inc.*,

**Second**, even if such a statement could be actionable, Ms. Thomson bases her complaint on a review, and reviews “are, by their very nature, subjective and debatable.” *Browne*, 525 F. Supp. 2d at 1252 n.1 (dismissing putative class action brought by lawyers dissatisfied with their ratings). Courts have consistently rejected libel claims premised on reviews. *See, e.g., Aviation Charter, Inc. v. Aviation Research Grp.*, 416 F.3d 864, 868-71 (8th Cir. 2005) (airline safety rating, though interpretation of objectively verifiable data, “was ultimately a subjective assessment”); *Moldea v. New York Times Co.*, 22 F.3d 310, 315 (D.C. Cir. 1994) (allegation of “sloppy journalism” was protected; emphasizing that statements appeared in a book review column, where readers expect reviewers to express opinions); *Mr. Chow of New York v. Ste. Jour Azur S.A.*, 759 F.2d 219 (2d Cir. 1985) (allegedly libelous statements in review); *Themed Rests., Inc. v. Zagat Survey, LLC*, 781 N.Y.S.2d 441, 447-48 (Sup. Ct. 2004) (ratings and review of restaurant guidebook), *aff’d*, 801 N.Y.S.2d 38 (App. Div. 2005); *Hammer v. Amazon.com*, 392 F. Supp. 2d 423, 430-31 (E.D.N.Y. 2005) (book reviews on Amazon.com); *Kronenberg v. Baker & McKenzie LLP*, 692 F. Supp. 2d 994, 998 (N.D. Ill. 2010) (lawyer performance review ratings and comments); *Thomas v. L.A. Times Commc’ns, LLC*, 189 F. Supp. 2d 1005, 1015-16 (C.D. Cal.)

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124 A.D.2d 528, 529 (N.Y. App. Div. 1986) (statement that plaintiff was a “loose-tongued lawyer” who “revealed his innermost secrets”); *Beinin v. Berk*, 88 A.D.2d 884 (N.Y. App. Div.) (statements that attorney “is no good as a lawyer,” and “is not handling [the case] right nor “putting ... much effort into it”), *aff’d*, 444 N.E.2d 1005 (N.Y. 1982); *Anton v. St. Louis Suburban Newspapers, Inc.*, 598 S.W.2d 493, 499 (Mo. Ct. App. 1980) (editorial referring to lawyer’s “sleazy sleight-of-hand”).

(statements in feature article questioning factual basis of book), *aff'd*, 45 F. App'x 801 (2002); *Trump v. Chi. Tribune Co.*, 616 F. Supp. 1434, 1435-36 (S.D.N.Y. 1985) (commentary by architecture critic; "one's opinion of another, however unreasonable or vituperative, since [it] cannot be subjected to the test of truth or falsity... [is] entitled to absolute immunity from liability") (citations omitted); *Stuart v. Gambling Times, Inc.*, 534 F. Supp. 170, 171-72 (D.N.J. 1982) (review stating that gambling book was "#1 fraud ever"); *Wheeler v. Neb. State Bar Ass'n*, 508 N.W.2d 917 (Neb. 1993) (survey responses evaluating judge); *Baker v. L.A. Herald Exam'r*, 721 P.2d 87 (Cal. 1986) (television critic's criticism of documentary).

These principles apply with special force on the Internet. "Courts that have considered the matter have concluded that Internet message boards and similar communication platforms are generally regarded as containing statements of pure opinion rather than statements or implications of actual, provable fact." *Ghanam v. Does*, 845 N.W.2d 128, 144 (Mich. Ct. App. 2014) (refusing to compel disclosure of identity of posters where their statements were opinions). "[R]eaders give less credence to allegedly defamatory remarks published on the Internet than to similar remarks made in other contexts ... [T]he anonymity ... makes it more likely that a reasonable reader would view its assertions with some skepticism and tend to treat its contents as opinion rather than fact." *Tener v. Cremer*, 2012 N.Y. Misc. LEXIS 3721, at \*13 (N.Y. Sup. Ct. July 16,

2012) (quoting *Sandals Resorts Int'l Ltd. v. Google, Inc.*, 925 N.Y.S.2d 407, 416 (N.Y. App. Div. 2011)). See also *Chaker v. Mateo*, 147 Cal. Rptr. 3d 496, 503 ( Cal. Ct. App. 2012) (“[T]he very fact that most of the posters remain anonymous, or pseudonymous, is a cue to discount their statements accordingly.”; dismissing claim premised on negative review of business); *Global Telemedia Int'l, Inc. v. Doe I*, 132 F. Supp. 2d 1261, 1267 (C.D. Cal. 2001) (dismissing claims premised on statements in chat room that “lack[ed] the formality and polish typically found in documents in which a reader would expect to find facts”); *Silvercorp Metals Inc. v. Anthion Mgmt. LLC*, 959 N.Y.S.2d 92 (N.Y. Sup. Ct. 2012) (statement questioning company’s accounting practices; “The anonymous submission also indicates that the statements are not to be understood as fact.”); *Barna Log Homes of Ga., Inc. v. Wischmann*, 714 S.E.2d 402, 405 (Ga. Ct. App. 2011) (affirming summary judgment on libel claim premised on statement in consumer review section of website that plaintiff “was grossly overcharging” and “did a poor job” because it “would not be taken by any reader as anything other than the wholly subjective opinion of one customer”).

Under this well-established authority, the review Ms. Thomson challenges states an opinion that is not actionable. As Ms. Thomson admitted to the trial court, three statements contain opinions: that Ms. Thomson has a “lack of basic business skills,” the client’s “interests were ... not protected,” and Ms. Thomson failed to subpoena documents

“critical” to the case. *See* CP 5-7 ¶ 13. Ms. Thomson nonetheless claims, in each instance, that the statement “implies the existence of false facts supporting its claims.” *Id.* But she fails to specify what those allegedly false facts are, and none of the statements implies the existence of any particular facts. *Valdez-Zontek v. Eastmont School District*, upon which Ms. Thomson relies, App. Br. at 15, is inapposite. In that case, the court rejected a claim that the phrase “inappropriate relationship” did not imply the existence of a sexual affair. 154 Wn. App. 147, 157-58, 225 P.3d 339 (2010). Stating that Ms. Thomson “cost me everything,” or that “my interests were not protected in any meaningful way” is plainly an opinion that does not imply the existence of any particular facts.<sup>6</sup>

Ms. Thomson claims on appeal that an ordinary reader would understand the review to be “valid” and a “warning to stay away from Ms. Thomson and her law firm” because such a reader would “assume that the contents” of Avvo’s site “would surely have to be verified, at least to some degree.” App. Br. at 20. This argument is flawed for several reasons.

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<sup>6</sup> Moreover, Washington rejects libel claims based on “an implied, disparaging message. It is the statements themselves that are of primary concern in the analysis.” *Auvil v. CBS “60 Minutes”*, 67 F.3d 816, 822 (9th Cir. 1995) (applying Washington law). “The defamatory character of the language must be apparent from the words themselves. Washington courts are bound to invest words with their natural and obvious meaning and may not extend language by innuendo or by the conclusions of the pleader. Even if language is ambiguous, resolution in favor of disparaging connotation is not justified.” *Lee v. Columbian, Inc.*, 64 Wn. App. 534, 538, 826 P.2d 217 (1991) (citations omitted) (internal quotation marks omitted). Thus, for example, Ms. Thomson’s claim that Doe’s review implies she left a client to “sit in mediation all by herself” must fail. App. Br. at 20. The review says no such thing. It states that Ms. Thomson failed to show up for a nine-hour mediation, but it is Ms. Thomson who concludes that the client sat through the mediation by herself, rather than the more logical conclusion that the mediation was canceled. Under *Lee*, adopting Ms. Thomson’s interpretation is impermissible.

First, the cases demonstrate that readers assume that an online anonymous review is *not* verified and is less likely to assert facts. Second, the review *is* a “warning,” and there is nothing defamatory about warning someone to stay away from another person. Finally, the portion of the review that *was* verified suggests it is valid: after Ms. Thomson issued the subpoena, Avvo obtained information from the reviewer that he or she had in fact been a client of Ms. Thomson’s. CP 79 ¶ 8. Notably, Ms. Thomson did not dispute this to Avvo or in the Superior Court, nor does she here.

**2. Ms. Thomson failed to allege the statements are defamatory.**

The remaining three statements in the review—that the client is “still in court five years after Ms. Thomson represented me,” she “failed to show up for a nine hour mediation,” and “she did not subpoena any documents at all”—are not defamatory as a matter of law. “Not every misstatement of fact is actionable.” *Ernst Home Ctr., Inc. v. United Food & Commercial Workers, Int’l Union*, 77 Wn. App. 33, 44, 888 P.2d 1196 (1995). “Rather, it must be apparent that the false statement or communication presents a *substantial danger* to the plaintiff’s personal or business reputation.” *Id.* (emphasis added). *See also* RESTATEMENT (SECOND) OF TORTS § 559 (1977) (statement is defamatory if it “it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him”). “Accordingly, the court must initially decide, as a matter of law,

whether the statement or communication is capable of a defamatory meaning.” 77 Wn. App. at 44.

None of these statements meets this test. For example, that a client is “still in court five years after Ms. Thomson represented me” suggests only that the client is engaged in protracted litigation, *not* that Ms. Thomson caused the delay, or even that Ms. Thomson still represents the client. The statement simply does not present “substantial danger” to Ms. Thomson’s reputation. This is particularly true given the context of the review and the fact that readers take online reviews, especially anonymous ones, with a grain of salt.

**3. Ms. Thomson failed to provide any evidence of damages.**

The Superior Court also correctly dismissed Ms. Thomson’s claims because Ms. Thomson provided no evidence that the review has caused any damage. Nor is such evidence likely, given that Ms. Thomson, at the time of her motion, had a favorable Avvo rating, seven peer endorsements, and eleven largely positive reviews, resulting in a client rating of 4.5 out of 5 stars, and an overall rating of 8.5 out of 10. CP 87-98. The existence of a single negative review, to which Ms. Thomson responded, from an anonymous poster, almost certainly cannot have itself cost Ms. Thomson any business.

As she argued in the trial court, Ms. Thomson again claims the review is defamatory *per se* and that as a result, she need not prove any damages. App. Br. at 17-18. But the doctrine of libel *per se* relieves a

plaintiff only of its obligation to show *special* damages, and *only* in cases where the standard of fault is actual malice. *Wood v. Battle Ground Sch. Dist.*, 107 Wn. App. 550, 573, 27 P.3d 1208 (2001) (“[A] trier of fact cannot presume damages under the libel per se doctrine unless liability is based upon malice.”) (citation omitted). *See also Caruso v. Local Union No. 690 of Int’l Bhd. of Teamsters*, 100 Wn.2d 343, 354, 670 P.2d 240 (1983) (well-established law forbids any “presume[d] damages when liability [is] based on negligence, not actual malice”; trial court “did exactly what” the U.S. Supreme Court forbade: “it permitted the jury to presume damages when liability was not based on actual malice”). “[A]ctual malice ... is not ill will or spite but rather the publisher’s knowledge that his statements are false or his reckless disregard for their falsity.” *Herron v. Tribune Publ’g Co.*, 108 Wn.2d 162, 170, 736 P.2d 249 (1987).<sup>7</sup> Because Ms. Thomson has provided no evidence of fault, much less actual malice—other than her erroneous statement that the reviewer was not a client—she must provide evidence of damages. She failed to do that.

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<sup>7</sup> This Court has found this rule does not apply where the statements are not about a matter of public concern. *See Maison de France, Ltd. v. Mais Oui!, Inc.*, 126 Wn. App. 34, 54, 108 P.3d 787 (2005) (“where no matters of public concern are involved, presumed damages to a private plaintiff for defamation without proof of actual malice may be available”). Although the Washington Supreme Court has not adopted this principle, it is irrelevant, for the reviews on Avvo’s website are matters of public concern. *See Davis*, 2012 WL 1067640, at \*3 (review met “public concern” element of anti-SLAPP statute because Avvo.com is a “vehicle for discussion of public issues ... distributed to a large and interested community”); *AR Pillow*, 2012 WL 6024765, at \*5 (review met “public concern” element of anti-SLAPP statute because “members of the public clearly have an interest in matters which affect their roles as consumers”).

To argue damages may be presumed, Ms. Thomson cites two treatises and an Illinois case. App. Br. at 17-18. But the case she cites does not contain the quote in her brief, App. Br. at 18 (purporting to quote *Bryson v. News America Publications, Inc.*, 672 N.E.2d 1207 (Ill. 1996)), and the quote instead appears in *Carey v. Piphus*, 435 U.S. 247 (1978), a case that does not even concern defamation. For one of the treatises, she quotes a portion about the law “prior to [then-] recent decisions of the Supreme Court,” which made clear that the “first amendment ... does not permit recovery of presumed or punitive damages” absent a showing of actual malice, i.e., that the speaker “had knowledge of the falsity or acted in reckless disregard of the truth of the defamatory matter published.” W. Page Keeton et al., *Prosser and Keaton on the Law of Torts* § 112, at 796 (5th ed. 1984). The second treatise, *Law of Damages*, was written in 1935, well before *Gertz*, 418 U.S. at 342. See *Haueter v. Cowles Publ’g Co.*, 61 Wn. App. 572, 579, 811 P.2d 231 (1991) (*Gertz* established that “when liability is not based on a showing of actual malice” the law does not “permit recovery of presumed ... damages”) (quotation marks omitted). Nor has Ms. Thomson ever rebutted the ample authority Avvo cited. Her failure to provide evidence of damages itself warranted the Superior Court’s decision to deny her motion to compel.

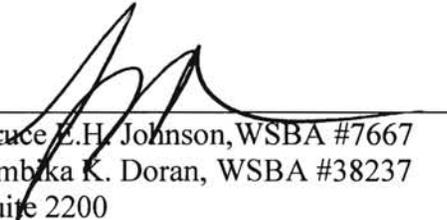
## V. CONCLUSION

Ms. Thomson complains that she has no remedy for Doe’s speech. App. Br. at 10. She does—she could and did post a response to the

review. Her remedy does not include requiring a non-party to comply with an overbroad subpoena for all information related to Doe's account. That information, and Doe's identity, is protected by the First Amendment. Avvo respectfully asks that the Court affirm the Superior Court's decision.

RESPECTFULLY SUBMITTED this 19th day of December, 2014.

Davis Wright Tremaine LLP  
Attorneys for Avvo, Inc.

By 

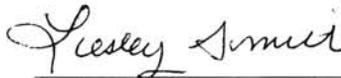
Bruce E.H. Johnson, WSBA #7667  
Ambika K. Doran, WSBA #38237  
Suite 2200  
1201 Third Avenue  
Seattle, WA 98101-3045  
Telephone: 206.622.3150  
Fax: 206.757.7700  
E-mail: [brucejohnson@dwt.com](mailto:brucejohnson@dwt.com)  
E-mail: [ambikadoran@dwt.com](mailto:ambikadoran@dwt.com)

CERTIFICATE OF SERVICE

I hereby certify that I caused the document to which this certificate is attached to be delivered to the following as indicated:

Deborah L. Thomson	<input type="checkbox"/>	Messenger
Pro se' Appellant	<input type="checkbox"/>	U.S. Mail
13902 N. Dale Mabry Hwy	<input type="checkbox"/>	Federal Express
Suite 137	<input type="checkbox"/>	Facsimile
Tampa, FL 33618	<input checked="" type="checkbox"/>	Email
Email:		
dthomson@thewomenslawgroup.com		

Declared under penalty of perjury under the laws of the state of Washington this 19th day of December, 2014.

  
\_\_\_\_\_  
Lesley Smith