IN THE SUPREME COURT OF THE STATE OF OREGON

CAROL C. NEUMANN and DANCING DEER MOUNTAIN, LLC, an Oregon Domestic Limited Liability Company,

Plaintiffs-Appellants
Cross-Respondents,
Respondents on Review,

v.

CHRISTOPHER LILES,
Defendant-Respondent,
Cross-Appellant,
Petitioner on Review

Lane County Circuit Court
121103711

Court of Appeals
A149982

S062575

OPENING BRIEF ON MERITS ON REVIEW OF DEFENDANT-RESPONDENT/CROSS APPELLANT CHRISTOPHER LILES

Court of Appeals opinion dated: March 12, 2014
Hon. Eric Lagesen, joined by Hon. Rex Armstrong and Hon. Lynn Nakamoto

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I. INTRODUCTION.

This Court granted review of ***Neumann and Dancing Deer Mountain, LLC v. Liles***, 261 OrApp 567 (2014) (the "*Opinion*" followed by official reporter pagination).

Intent to Seek Fees on Appeal. Respondent shall seek attorney fees upon appeal for defense of the trial court's judgment. ORS 31.152(3).

II. STATEMENT OF THE CASE.

Christopher Liles, Petitioner on Review/Defendant/Respondent/Cross-Respondent ("Defendant") adopts his "Statement" presented in his Combined Answering and Cross-Opening Brief (August 8, 2012) to the Court of Appeals ("Liles CACOB") and his Petition for Review (September 2014).

The case arose from Defendant's online consumer "gripe" on Google Reviews. There were two plaintiffs: Carol Neumann and Dancing Deer Mountain, LLC ("DDM"). Neumann alleged "defamation" and "false light." DDM alleged "false light" and "intentional interference with economic relations." Appellants' Corrected ER ["ER"] 1-6. The trial court dismissed all four claims pursuant to ORS 31.150, *et seq*., Oregon's anti-SLAPP statute. OJIN 20. On appeal, the *Opinion* reversed the dismissal of Neumann's defamation claim only. ER 1-4. All references herein to "Plaintiff" refer to Neumann, the only respondent on review.

Defendant cross-appealed the attorney fees award, which the *Opinion* declined to decide. Should this Court reverse the *Opinion*, it should remand

to the Court of Appeals for further consideration of the Defendant's cross-appeal regarding attorney fees.

A. FACTS.

Amanda Block's wedding in June 2010, remains memorable. Plaintiff had run-ins with the bride's family [Complaint ¶¶ 5-12; ER 2-3] about guests (allegedly) consuming alcohol and rowdy behavior. *Id.* Months later, Plaintiff, her co-owner of the venue, and the business each demanded $22,500 from the bride, her mother, the wedding planner, a bride's maid, and Defendant Liles, a wedding guest. SER 1-5 (demand letters).[1]

Defendant attended the wedding because his wife was a bride's maid. He has been a career naval officer since 2002. He is not an Oregon resident and was based in California at the time. Declaration of Christopher Liles; SER 18, ¶¶ 3, 5-6. He did not plan or contract for the event. *Id.* Afterwards, he posted a negative "Review," on a commercial website inviting consumer comments. ER 7.

Defendant's "Review" consisted of these statements in *italics* (followed by counsel's summary of relevance to actionable defamation):

> "*Disaster!!!!! Find a Different Wedding Venue.*" Over-dramatic wording and exaggerated punctuation signify "hyperbole," not verifiable facts.
>
> *There are many other great places to get married, this in not that place.* Opinion.
>
> *The worst wedding experience of my life.* Subjective opinion.

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1. Supplemental Excerpts of Record ("SER") to Liles Combined Answering and Cross Opening Brief to the Court of Appeals.

The location is beautiful the problem is the owners. Both subjective opinions--aesthetic judgment and opinion of what Defendant deems a "problem," supported by specific observations, below.

Carol (female owner) is two faced, crooked, and was rude to multiple guest. Opinion based on personal observation, expressed through vague terms of disapproval not capable of verifiable proof; reasons for opinion are stated in the following specific examples.

I was only happy with one thing: it was a beautiful wedding, when it wasn't raining and Carol and Tim stayed away. Personal emotion and opinion; mild sarcasm.

The owners did not make the rules clear to the people helping with the set up even when they saw something they didn't like they waited until the day of the wedding to bring it up. Clarity of "rules" to Defendant is his subjective opinion; "when" Neumann raised issues may involve factual dispute, but even mistaken personal observations of when and how Plaintiff conducted herself are not provably false.

They also changed the rules as they saw fit. We were told we had to leave at 9pm, but at 8:15 they started telling the guests that they had to leave immediately. Regardless of the "true" time to conclude the event, Defendant's statement he was told "9 pm" is not shown to be false; documents Plaintiff produced have many handwritten changes. Confusion over time to wrap-up a wedding is not defamatory or false, nor proof of even negligence about knowing "rules."

The "bridal suite" was a tool shed that was painted pretty, but a shed all the same. Subjective description of a rural structure as a "pretty shed" is not false, nor does it defame the accommodation, as some might find a rustic setting attractive.

In my opinion She will find a why [sic] to keep $500 deposit and will try to make you pay even more. Opinion based on his stated foregoing observations.

Others displeased with the venue posted negative Google Reviews. ER

8. Others had earlier posted negative comments. "Betsy F." posted on Yelp! in June 2010 (weeks *before* Defendant's review) that she and her fiance

visited DDM but did not choose the venue because, *inter alia*, "We really got the impression that the owner lady wasn't going to be pleasant to work with." SER 9.

Nine months before Defendant's Review, "Valerie" posted on "My Reviews" at WeddingWire.com:

> We are very disappointed with the service of Dancing Deer Mountain. Not only did they contradict their add [*sic*] with lack of their services. * * *. We are just stunned by all the things they were not and the things they were supposed to do and didn't. We will never recommend them to anyone period!

SER 6.

Plaintiff sued only Defendant (who used his real name in his Review).

B. STANDARD OF REVIEW.

Errors in interpreting and applying ORS 31.150, *et seq.*, are reviewed for error of law. ***Trabosh v. Washington County***, 140 OrApp 159, 163 n6 (1996). Findings of "constitutional facts" pertinent to the underlying defamation claim are reviewed *de novo*. ***Bose Corp. v. Consumers Union of U.S., Inc.***, 466 US 485, 511, 514 n2, 104 SCt 1949 (1984); ***Lloyd Lions Club of Portland v. International Ass'n of Lions Clubs***, 81 OrApp 151, 155 n2 (1986) ("***Lloyd Lions Club***"), acknowledging *de novo* review required for findings of "constitutional facts" and "constitutional tests."

The First Amendment determines the *quantum* of evidence to sustain such findings, discussed in context below.

At the anti-SLAPP stage, the record is viewed in "favor of the exercise of the rights of expression described in ORS 31.150(2)." ORS 31.152(4).

C. SUMMARIES OF ARGUMENT.

Summary of arguments regarding anti-SLAPP procedure is within that discussion, pages 6-7, *post*. A summary of arguments regarding errors in the underlying tort of defamation is at pages 25-62, *post*.

Common throughout is the argument that the *Opinion* failed to apply controlling First Amendment law, including the most recent Ninth Circuit decision, ***Obsidian Finance Group, LLC v. Cox***, 740 F3d 1284, 1292 (9th Cir 2014), *cert den*, 134 SCt 2680 (2014) ("***Obsidian***").[2]

> We hold that liability for a defamatory blog post involving a matter of public concern cannot be imposed without proof of fault and actual damages.

III. OREGON ANTI-SLAPP PROCEDURE.

The Petition for Review stated these questions:

1. Considering motions under ORS 31.150., *et seq*., may courts overlook missing *prima facie* elements, speculate on *innuendoes* not pled, or otherwise liberally construe the Complaint in favor of Plaintiff?

   Ruling Requested: No.

3. May defendant offer evidence in an anti-SLAPP motion to establish his conditional privileges to defamation?

   Ruling Requested: Yes.

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2. ***Obsidian*** limits the rule of ***Wheeler v. Green***, 286 Or 99, 124 (1979), and its progeny, including the *Opinion*, on the availability of "presumed" damages in *per se* defamation. It requires private party plaintiffs to allege some level of fault in cases where the speech is of public concern. Defendant cited ***Obsidian*** to the Court of Appeals in his Memorandum of Supplemental Authority (January 21, 2014) and in his Petition for Reconsideration (April 23, 2014).

4. When a defamation defendant makes a *prima facie* showing of conditional privilege * * * must plaintiff make a *prima facie* showing of abuse of the privilege, and must that showing consider heightened burdens for showing subjective actual malice?

   Ruling Requested: Yes.

5. Is * * * ***National Union Fire Ins. Co. v. Starplex***, 220 OrApp 560, 584, *review denied*, 345 Or 317 (2008) (*"**National Union Fire***") authority for elements of defamation?

   Ruling Requested: No.

A. OREGON ANTI-SLAPP STATUTE MODELED ON CALIFORNIA'S.

Oregon's anti-SLAPP statute, enacted in 2001, was closely modeled after California Civil Code § 425.16.

> If the Oregon legislature adopts a statute or rule from another jurisdiction's legislation, we assume that the Oregon legislature also intended to adopt the construction of the legislation that the highest court of the other jurisdiction had rendered before adoption of the legislation in Oregon.

Jones v. General Motors Corp., 325 Or 404, 408 (1997) (citations omitted). Several Court of Appeals decisions agree, "It was intended that California case law would inform Oregon courts regarding the application of ORS 31.150 to ORS 31.155." ***Page v. Parsons***, 249 OrApp 445, 461 (2012); *accord*, ***Young v. Davis***, 259 OrApp 497, 507 (2013).

B. LEGISLATIVE INTENT TO LIBERALLY PROTECT "RIGHTS OF EXPRESSION."

Intent to follow California precedent was made explicit by adoption of SB 540 (2009). In 1997 the California Legislature had adopted a "directive to construe the statute broadly * * * 'to address recent court cases that have

too narrowly construed California's anti-SLAPP suit statute.'" ***Nygard, Inc. v. Uusi-Kerttula,*** 159 CalApp4th 1027, 1039, 72 CalRptr3d 210 (2008) ("***Nygard***"). In 2009, the Oregon Legislature added an instruction for courts to "liberally construe" the anti-SLAPP protections for expression. This corrected an overly narrow construction of Oregon's statute in ***Englert v. MacDonell***, 2006 WL 1310498 (D Or 2006).[3]

> The purpose of the procedure established by this section and ORS 31.150 and 31.155 is to provide a defendant with the right to not proceed to trial in cases in which the plaintiff does not meet the burden specified in ORS 31.150(3). This section and ORS 31.150 and 31.155 are to be liberally construed in favor of the exercise of the rights of expression described in ORS 31.150(2).

ORS 31.152(4). Testimony before the Oregon Senate Committee urged greater conformity with the California statute.[4]

C. OVERVIEW OF ANTI-SLAPP PROCEDURE.

The anti-SLAPP process is two-pronged. Defendant must first make a showing [ORS 31.150(1)] that the claim against him "arises out of" the "rights of expression" [ORS 31.152(4)] described in ORS 31.150(2)(a)-(d) ("arising out of" prong). The burden then shifts to plaintiff to show "that

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3. Judge Aiken concluded (*id.*, p. *7) that Oregon's then-current version of the anti-SLAPP statute did not require broad construction in a defendant's favor, because:

> Oregon's statutes differ in several ways, however, from the California statutes. California's Anti-SLAPP statute expressly calls for broad construction; Oregon's does not.

4. See Statement of Charles F. Hinkle on SB 543 (2009), submitted to House of Representatives Committee on Judiciary, May 14, 2009.

there is a probability that [plaintiff] will prevail on the claim by presenting substantial evidence to support a *prima facie* case." ORS 31.150(3) (the "second prong," addressed at pages 9-16, *post*).

D. DEFENDANT SATISFIED THE FIRST PRONG.

Defendant asserted the claims against him arose under ORS 31.150(2)(c) and (d), and the trial court granted all motions against all claims. OJIN 20. The *Opinion* accepts the necessary intermediate finding that Defendant met the first prong, citing (at 574, 575 n5) cases Defendant urged in his CACOB (pp. 6, 9). The manner in which a defendant satisfies the first prong significantly affects the proper approach to the second prong.

The rights of expression in ORS 31.150(2)(a)-(d) describe situations or topics which enjoy existing Oregon common law privileges and federal constitutional protection. For example, ORS 31.150(2)(a) and (b) describe speech connected to official situations, so meeting the first prong on that basis also raises the defense of absolute privilege, barring the claim under Oregon common law. ***DeLong v. Yu Enterprises, Inc.***, 334 Or 166, 171 (2002).

1. ORS 31.150(2)(c): SPEECH IN A PUBLIC FORUM IN CONNECTION AN ISSUE OF PUBLIC INTEREST.

ORS 31.150(2)(c) pertains to speech in a public forum "in connection with an issue of public interest," so meeting the first prong on that basis could also show the words were used in a situation qualifying for state law privileges based on the circumstances or the intended audience. Such

showing would alter Plaintiff's required *prima facie* showing in the second prong.

Staten v. Steel, 222 OrApp 17 (2008), *review denied*, 345 Or 618 (2009), explained that the first prong standards contemplated common law privileges for speech.

> During their consideration of this statute [now ORS 31.150, *et seq*.], legislators explained that its purpose is to provide for the dismissal of claims against persons participating in public issues, when those claims would be privileged under case law, before the defendant is subject to substantial expenses in defending against them. Audio Recording, House Committee on Judiciary, HB 2460, Apr 16, 2001, at 2:10.38 (comments of Rep. Shetterly and Rep. Ackerman).

222 OrApp at 29. (emphasis added).

In this case, demonstrating that ORS 31.150(2)(c) applies because the Defendant's speech was "in connection with an issue of public interest" included evidence of the circumstances which triggered common law privileges to defamation, such as (1) the "fair comment and criticism" privilege to join debate on matters of public interest and (2) the "mutual concern[5]" privilege to speak to those believed to be similarly concerned with the topic.

Oregon common law privileges, such as the privileges to report, comment and criticize, can be raised by any speaker, whether media or consumer reviewer. ***Bank of Oregon v. Independent News, Inc.***, 298 Or 434, 438, *reh'g den*, 298 Or 819, *cert den*, 474 US 826 (1985) ("***Bank of Oregon***").

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5. ***Wallulis v. Dymowski***, 323 Or 337, 348, 918 (1996).

These privileges protect speech by requiring plaintiff to meet a high bar for showing fault: that defendant abused the privileged situation by acting with "actual malice," as that term is used in defamation law. ***Peck v. Coos Bay Times Pub Co.***, 122 Or 408, 421-2 (1927) ("***Peck***"); ***Tubra v. Cooke***, 233 OrApp 339, 359 (2010).

2. ORS 31.150(2)(d): EXERCISE OF FREE SPEECH IN CONNECTION WITH PUBLIC ISSUE OR ISSUE OF PUBLIC INTEREST.

ORS 31.150(2)(d) describes "[a]ny other conduct in furtherance of the exercise of the * * * constitutional right of free speech in connection with a public issue or an issue of public interest." The First Amendment requires "special protection" for "speech on topics of public interest." ***New York Times Co. v. Sullivan***, 376 US 254, 270 (1964) ("***New York Times***"). So meeting the first prong (by showing ORS 31.150(2)(d) conditions are met) shows that defendant's speech qualifies for federal constitutional protection, based on its "public issue" or "public interest" content.

This also alters Plaintiff's required *prima facie* showing in the second prong. The "special protections" take the form of increased burdens of proof and persuasion upon all plaintiffs (private or public figures) in establishing a *prima facie* case for defamation, requiring:

(1) falsity of defendant's statement [***Hickey v. Settlemier***, 141 OrApp 103, 111 (1996), *review denied*, 323 Or 690 (1996)];[6]

(2) some level of fault on part of defendant [***Obsidian***, *supra*, 740 F3d at 1287, 1292], which cannot be inferred from any finding the words are false [***Bose Corp. v. Consumers Union of U.S., Inc.***, *supra*, 466 US at 511]; and

(3) actual damages [***Obsidian***, *supra*.]

3. DEFENDANT'S SHOWING.

a. ACCESSING AND PUBLISHING ON THE INTERNET SATISFIES AN ELEMENT OF ORS 31.15(2)(c) AND (d).

Defendant expressed his opinion on Google Reviews, a website inviting public comments for display and further commentary.

The internet is a "public forum" within the meaning of ORS 31.150(2)(c). It allows anyone to be "a pamphleteer" or "town crier with a voice that resonates farther than it could from any soapbox." ***Reno v. American Civil Liberties Union***, 521 US 844, 870, 117 SCt 2329 (1997).

Publishing on the internet requires many steps of "conduct" in "furtherance of the exercise of * * * the constitutional right of free speech," such as preparing the content and engaging in tasks to access the internet and accomplish publication. ORS 31.150(2)(d).

The California Supreme Court has expressly held that websites accessible to the public are "public forums" under its anti-SLAPP statute.

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6. "In cases involving public figures or issues of public concern * * * falsity is an element of plaintiff's defamation case," citing ***Philadelphia Newspapers, Inc. v. Hepps***, 475 US 767, 776 (1986) and Smolla, LAW OF DEFAMATION.

Barrett v. Rosenthal, 40 Cal4th 33, 41 n. 4, 51 CalRptr3d 55 (2006). The internet:

> does not lose its character as a public forum simply because each statement posted there expresses only the views of the person writing that statement. It is public because it posts statements that can be read by anyone who is interested, and because others who choose to do so, can post a message through the same medium that interested persons can read.

Wilbanks v. Wolk, 121 CalApp4th 883, 897, 17 CalRptr3d 497 (2004).

b. CONSUMER COMMENTS ARE "IN CONNECTION WITH AN ISSUE OF PUBLIC INTEREST" [ORS 31.150(2)(c)] AND FURTHER "CONSTITUTIONAL RIGHT OF FREE SPEECH IN CONNECTION WITH A PUBLIC ISSUE OR AN ISSUE OF PUBLIC INTEREST" [ORS 31.150(2)(d)].

While the claims in this suit arise between specific parties, consumer interactions with businesses raise "issues of public interest" and are "in connection with an issue of public interest," as those statutory terms have been uniformly construed under ORS 31.150(2) and California law. In this case, Defendant's "consumer complaints of non-criminal conduct by a business" is a topic of public interest, triggering both common law privileges and First Amendment heightened pleading and proof burdens on this Plaintiff. ***Obsidian***, 740 F3d at 1292.

Nygard, *supra*, explains that "'an issue of public interest' within the meaning of [California Civil Procedure Code § 425.16(e)(3)] is *any issue in which the public is interested*" (emphasis in original). This is not tautological but strong emphasis intended to follow the Legislature's instruction to construe the anti-SLAPP protections "broadly" [*Id.*, at 1039].

The Oregon Legislature in 2009 similarly emphasized "liberal" construction to protect speech. ORS 31.152(4).

In ***Wilbanks v. Wolk***, *supra*, a brokerage dealing in "viatical settlements" sued a self-styled consumer "watchdog" for defamation for statements she published on her website:

> Wilbanks and Associates provided incompetent advice.
>
> Wilbanks and Associates is unethical.

Id., 121 CalApp4th at 890. The statements were of public concern under the anti-SLAPP statute.

> The statements made by Wolk were not simply a report of one broker's business practices, of interest only to that broker and to those who had been affected by those practices. Wolk's statements were a warning not to use plaintiffs' services. In the context of information ostensibly provided to aid consumers choosing among brokers, the statements, therefore, were directly connected to an issue of public concern.

Id. at 900.

Similarly, in ***Gilbert v. Sykes***, 147 CalApp4th 13, 23, 53 CalRptr3d 752 (2007), Gilbert's negative statements about a cosmetic procedure performed by Dr. Sykes were of "public interest," because they were of interest to anyone contemplating such procedures or a visit to Dr. Sykes.

In ***Gardner v. Martino***, WL 3465349 (D Or 2005) [upheld in ***Gardner v. Martino***, 563 F3d 981 (9th Cir 2009), discussed below], plaintiffs owned a water-sports equipment business in Boring. They claimed, *inter alia*, they were defamed by a radio talk show host, Martino. He spoke on-air with a

caller (Feroglia), who described her bad experience returning merchandise. Based only on her statements, Martino disparaged the business ("sucks").

Reviewing Oregon trial court opinions applying ORS 31.150, the federal district court concluded the topic--one customer's bad experience at one business--was of public interest:

> [N]otably, given the cases holding that issues of consumerism, including complaints about products and services, are issues of public interest, I conclude that the statements made here about plaintiffs and their alleged treatment of Feroglia and the quality of the product, are properly considered statements about a public issue or an issue of public concern within the meaning of Oregon's anti-SLAPP statute.

Id. at *6.

The numerous websites engaged in ongoing discussion and debate about wedding services show widespread public interest. Defendant's comments are on a topic of interest (the quality of a publicly offered venue for weddings) to all potential patrons in Oregon, particularly those planning weddings.

There are over 24,000 marriages each year in Oregon, and those couples and families may be interested in accommodations. SER 14-17. This group is certainly large enough to make the discussion one of "public interest,"[7] unlike "private" criticism of a single person's job performance. ***Rivero v. AFSCME, AFL-CIO***, 105 CalApp4th 913, 926, 130 CalRptr2d 81 (2003);

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7. ***Damon v. Ocean Hills Journalism Club***, 85 CalApp 4th 468, 479, 102 CalRptr 205 (2000) (statement of interest to 3,000 homeowners); ***Macias v. Hartwell***, 55 CalApp4th 669, 674, 64CalRptr2d 222 (1997) (electioneering statement of interest to 10,000 union members).

Du Charme v. IBEW, 110 CalApp4th 107, 1 CalRptr 501 (2003); ***Cooper v. PGE***, 110 OrApp 581, 588 (1992).

Consumer warnings about advertised goods and services enjoy First Amendment protection, because the public has a "strong interest in the free flow of commercial information." ***Virginia Pharmacy Bd v. Virginia Citizens Consumer Council, Inc.***, 425 US 748, 764 (1976). Accordingly, commentary about a windshield cleaner was of "public concern," because "protection of statements about product effectiveness will 'ensure that debate on public issues [will] be uninhibited, robust and wide-open.'" ***Unelko Corp. v. Rooney***, 912 F2d 1049, 1056 (9th Cir 1990) (quoting ***New York Times***, 376 US at 270).

> [C]onsumer complaints of non-criminal conduct by a business can constitute matters of public concern. See ***Gardner v. Martino***, 563 F3d 981, 989 (9th Cir 2009) (finding that a business owner's refusal to give a refund to a customer who bought an allegedly defective product was a matter of public concern); ***Manufactured Home Cmtys., Inc. v. Cnty. of San Diego***, 544 F3d 959, 965 (9th Cir 2008) (treating claim that a mobile home park operator charged excessive rent as a matter of public concern).

Obsidian, 740 F3d at 1292.

As noted, the First Amendment's "special protections" for speech on topics of public concern impose added burdens upon all defamation plaintiffs. ***Obsidian***, *supra*. There, bankruptcy trustees in Oregon sued over highly critical blog posts. They were held to the constitutional burdens for proving damages and defendant's fault, not because they were "public figures" in any way [*Id.*, at 1293] but because the criticism of them was of public concern,

especially to that segment of the public invested in the bankrupt's estate. *Id.*, at 1292.

4. PLAINTIFF'S BURDEN: THE SECOND PRONG.

The burden shifted to Plaintiff to (1) show her claim for defamation was legally cognizable and (2) produce substantial evidence on each element of her claim. Defendant made a record that his statements "would be privileged under case law" [***Staten v. Steel***, *supra*, 222 OrApp at 29] and were entitled to First Amendment free speech defenses by "stating the facts upon which the * * * defense is based." ORS 31.150(4). Doing so added to Plaintiff's *prima facie* case for defamation the burdens of (1) overcoming Defendant's privilege and (2) overcoming Defendant's First Amendment protections.

Proving fault to the required level and proving abuse of privilege are the defamation Plaintiff's burden. ***Walsh v. Consolidated Freightways, Inc.***, 278 Or 347, 356 (1977) ("***Walsh***").

a. DEFENDANT SHOWED CIRCUMSTANCES SUFFICIENT TO RAISE COMMON LAW PRIVILEGES.

The *Opinion* (at 556) erred in stating the record was insufficient "to conclude as a matter of law that defendant was privileged to make the allegedly defamatory statements * * *." Defendant met the "low bar" (*Opinion*, at 575) for his *prima facie* showing that common law privileges applied.

Consideration of Defendant's evidence is mandated: "the court shall consider pleadings and supporting and opposing affidavits." ORS 31.150(4). The facts must be "liberally construed in favor of the exercise of the rights of expression described ORS 31.150(2)." ORS 31.152(4).

> When evaluating an affirmative defense in connection with the second prong of the analysis of an anti-SLAPP motion, the court, following the summary-judgment-like rubric, generally should consider whether the defendant's evidence in support of an affirmative defense is sufficient, and if so, whether the plaintiff has introduced contrary evidence, which, if accepted, would negate the defense.

Bently Reserve L.2P. v. Papaliolios, 218 CalApp4th 418, 427, 160 CalRptr3d 423 (2013) ("***Bently Reserve***"). ***Comstock v. Aber***, 212 CalApp4th 931, 953, 151 CalRptr3d 589 (2012), found that Aber's report of sexual harassment to a hospital nurse and a co-worker were:

> conditionally privileged under Civil Code section 47, subdivision (c)[8], providing Aber a possible affirmative defense, one lost only if Comstock could show malice.
>
> The law is that to defeat a SLAPP motion, Comstock must overcome substantive defenses. ***Gerbosi v. Gaims, Weil, West & Epstein, LLP,*** 193 CalApp4th 435, 447-448, 122 CalRptr3d 73 (2011). And his claim would fail for his inability to show malice, as have the claims of many other plaintiffs who lost SLAPP motions because of such inability. See ***Rosenaur v. Scherer***, 88 CalApp4th 260, 275, 105 CalRptr2d 674 (2001); ***Annette F. v. Sharon S.***, 119 CalApp4th 1146, 1162, 15 CalRptr3d 100 (2004); ***Stewart v. Rolling Stone LLC***, 181 CalApp4th 664, 689-690, 105 CalRptr3d 98 (2010); ***Daniels v. Robbins***, 182 CalApp4th 204, 226-227, 105 CalRptr3d 683 (2010).

Id.

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8. This is California's codification of the common law privilege of communication to others on topic of mutual concern.

Defendant notes inconsistency in Court of Appeals decisions on whether mandated "consider[ation] of supporting and opposing" materials [ORS 31.150(4)] permits or requires "weighing" the evidence.[9] However, on the record of this case, the facts supporting Defendant's conditional privileges are not in dispute. Whether a conditionally privileged situation exists can be decided as a matter of law on undisputed facts. ***Johnson v. Brown***, 193 OrApp 375, 380-1 (2004).

The record shows existence of the following common law privileges:

(1) Defendant published comment which reflected his actual opinion on a topic of public interest, in this case a consumer warning.

No more is required to raise the conditional privilege of "fair comment." *Note, Fair Comment*, 62 HARVLREV 1207, 1208-9 (1949) ("subjects of public interest * * * include * * * anything inviting public attention"). The closely related privilege of "fair criticism" of any subject under public discussion is longstanding. ***Campbell v. Spottiswoode***, 3 Best & SQB, 113 Eng Comm Law 774.

"Where the qualified privilege of 'fair comment and criticism' was applicable, the defendants would not be liable if the publication was made in

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9. ***Staten v. Steel***, 222 OrApp at 27: "In deciding whether the plaintiff has met its burden, the trial court may need to weigh the evidence." ***Young v. Davis***, *supra*, 259 OrApp at 508, seems contrary in stating that the "court also considers the defendant's opposing evidence, but only to determine if it defeats the plaintiff's showing as a matter of law."

good faith and without malice."[10] ***Bank of Oregon***, *supra*, 298 Or at 437, citing ***Peck***. ***Peck*** held that statements about Peck's affiliation with the Ku Klux Klan came within the qualified privilege. 22 Or at 422. Peck, not a public official or candidate, could not object to "fair comment" about his public activities (the rule of RESTATEMENT (1ST) OF TORTS § 610(3) (App Rev 4).

(2) Defendant responded to publicity and advertisements generated by Plaintiff.

RESTATEMENT (1ST) OF TORTS § 610(1) and (2) summarized the common law privileges for criticism of publicly offered products, advertisements and solicitations. App Rev 4-5. These remain robust. ***Magnusson v. New York Times***, 98 P3d 1070, 1075 (2004 Utah) (televised consumer report about plastic surgeons within common law privilege).

In ***Steak Bit of Westbury, Inc. v. Newsday, Inc.***, 70 Misc2d 437, 440-1, 334 NYS2d 325 (1972), owners objected to a restaurant review, especially that its fare "was mostly all fake food, ground-up schmutz." They failed to

> overcome the qualified privilege of fair comment which protects criticism of institutions serving the public. * * * Certainly, a restaurant which serves food to the general public is involved in an enterprise of public interest.

Mashburn v. Collin, 355 So2d 879, 889-890 (La 1977), held:

> It is undisputed that the Maison de Mashburn is a public restaurant, actively engaged in advertising and seeking commercial patronage.

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10. Defendant's comments were in "good faith" in that they were based on what he recalled and he had no ulterior motive, such as being a business competitor. Declaration of Christopher Liles, ¶ 11, SER 19.

> Thus the establishment was a matter of public interest and properly a subject of fair comment under the common law * * *.

There is no dispute that Plaintiff advertised on her website [SER 10-12] and specialized consumer information sites. Defendant published his statements in the same manner that Neumann advertises and solicits customers. Defendant's Review was criticism about his experience at a publicly advertised business. No other facts are necessary to establish a conditional privilege.

(3) Defendant's comments were addressed to those with mutual concerns.

Commentary by actual patrons and consumers to other potential customers also comes within the privilege for speech addressed to those with "mutual concerns." ***Wallulis v. Dymowski***, *supra*, 323 Or at 350. Defendant used a platform, Google Reviews, which assures that the audience for his Review will be mutually interested in the content, because they will only see the Review displayed if:

(1) they use relevant search terms, such as "wedding + venue + Eugene"; and

(2) click on the link entitled "Google Reviews" for the specific merchant under discussion.

Overcoming privilege requires proof of Defendant's actual malice. The heightened burden of proof of fault affects the *quantum* of evidence Plaintiff must adduce at the anti-SLAPP stage to meet test of a "probability of prevailing" on the claim of defamation. ORS 31.150(3). "Courts must take into consideration the applicable burden of proof in determining whether the

plaintiff has established a probability of prevailing." ***Annette F. v. Sharon S.***, 119 CalApp4th 1146, 1166-1167, 15 CalRptr3d 100, 114 (2004) (citations omitted).

b. DEFENDANT'S WORDS WERE ENTITLED TO CONSTITUTIONAL FREE SPEECH PROTECTION.

At the trial and appellate levels, Defendant showed that his Review was within the Constitutional protections of freedom of speech. See pages 12-16, *ante*; Liles CACOB, pp. 11-28; Memorandum in Support of Special Motions to Strike [ER 32-40]. Defendant met the "low bar" (*Opinion*, at 575) for his *prima facie* showing that Constitutional free speech protections applied to his Review, altering Plaintiff's *prima facie* showing.

Wilcox v. Superior Court, 27 CalApp4th 809, 824, 333 Cal Rptr 446 (1994) (plaintiff must "show[] the defendant's purported constitutional defenses are not applicable to the case as a matter of law or by a *prima facie* showing of facts which, if accepted by the trier of fact, would negate such defenses").

Plaintiff did not provide the facts necessary to negate the constitutional free speech burdens, failing to provide:

(1) proof of the defamatory nature of the words;

(2) "substantial evidence" to a heightened *quantum*--"clear and convincing"-- of Defendant's intent to state or imply defamatory meanings [***Newton v. National Broadcasting Co., Inc.***, 930 F2d 662, 681 (9th Cir 1990) ("***Newton***")]; or

(3) proof of Defendant's fault at any level of culpability.

At the anti-SLAPP stage, heightened trial burdens of proof for elements affect the *quantum* of evidence Plaintiff must show to meet the "probability of prevailing" test. ORS 31.150(3). ***Annette F. v. Sharon S.***, *supra*. In applying second prong of anti-SLAPP statute, courts "bear in mind the higher clear and convincing standard of proof." ***Robertson v. Rodriguez***, 36 CalApp4th 347, 358, 42 CalRptr2d 464 (1995).

E. SUMMARY OF THE *OPINION*'S ERRORS OF LAW IN APPLYING ANTI-SLAPP ANALYSIS.

The *Opinion* (at 578) declines to follow ***Obsidian***, incorrectly referring to this Ninth Circuit decision arising from Oregon and applying federal constitutional law as "extra-jurisdictional authority."

The *Opinion* (at 575), relies upon ***National Union Fire***, 220 OrApp at 584:

> [A] claim for defamation has three elements: "(1) the making of a defamatory statement; (2) publication of the defamatory material; and (3) a resulting special harm, unless the statement is defamatory per se and therefore gives rise to presumptive special harm."

This summary is obviously incomplete and should not be cited as Oregon law of defamation. The *Opinion* (at 576) concedes that falsity is necessary by citing to ***Brown v. Gatti***, 341 Or 452, 458 (2006).

In cases involving speech on topics of public concern, plaintiff must always prove fault and damages, as discussed immediately above. The *Opinion* fails to hold Plaintiff to showing "substantial evidence" of any level of fault in her *prima facie* case.

The *Opinion* (at 576) "liberally" construes the allegations in the Complaint in favor of Plaintiff by holding that Neumann stated a claim for *per se* defamation. It does so by borrowing allegations of business harm to DDM in its claims (not alleged by Neumann) and finding the existence of unstated and unasserted *innuendoes*. The inadequacy of the pleading and error in supplying *innuendo* is discussed at pages 28-43, *post*.

Plaintiff did not allege *per se* defamation to her business reputation or any level of defendant's "fault." Instead, she asserted Defendant's words were "an attempt to diminish Plaintiff Neumann's reputation." ER-4, ¶ 15.[11] She failed to allege the culpability element of defamation. ***Henry v. Collins***, 380 US 356, 357 (1965). The "constitutional fault" that removes words from First Amendment protection is measured by the speaker's attitude towards the truth, not any negligent or intentional disregard of Plaintiff's reputation. ***Bank of Oregon***, 298 Or 442-43.

The *Opinion*'s supplying of omitted allegations and disregard of Plaintiff's omissions in her *prima facie* defamation case contradicts ORS 31.152(4)'s instruction to protect Defendant's right of expression. Strictly construing a complaint against the pleader may appear harsh to trial courts which ordinarily have "broad discretion" to "liberally" allow amendments to pleadings. But discretion to allow amendment, or viewing in favor of the non-moving party, are countermanded by ORS 31.150, *et seq*.

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11. Unsuccessful plaintiff DDM alleged harm to its business, but Neumann did not, alleging harm only to her general "reputation." ER-4, ¶¶ 15-17.

Both ORS 31.150, *et seq.*, and the rules of civil procedure apply to civil litigation. ORS 31.150, *et seq.*, deals specifically with the subset of lawsuits with claims "arising from" communicative acts. While the anti-SLAPP procedure specifically suspends otherwise applicable civil rules governing discovery [ORS 31.152(2)] and the timing of defendant's motions/Answer [***Horton v. Western Protector Ins. Co.***, 217 OrApp 443, 453 (2008)], nothing in ORCP countermands ORS 31.150, *et seq*. Thus they can be read harmoniously. "[A] specific or special act controls over a general act." ***Davis v. Wasco Intermediate Education District***, 286 Or 261, 272 (1979).

Gardner v. Martino, 563 F3d 981, 990-1 (9th Cir 2009), rejected plaintiffs' argument that the court should "apply a liberal amendment standard under [ORCP] Rule 21" to the complaint challenged under ORS 31.150, *et seq*.

Even proffering an amended complaint as a matter of right under the California equivalent of ORCP 23A does not change the instruction to the court to decide all pending anti-SLAPP motions directed against the original complaint.

> It is the public policy of the State that complaints arising from the exercise of free speech rights be evaluated at an early stage. This cannot be defeated by filing an amendment [to the complaint] even as a matter of right * * *.
>
> [T]here is no express or implied right in section 451.16 to amend a pleading to avoid a SLAPP motion.

Sylmar Air Conditioning v. Pueblo Contracting Services, Inc., 122 CalApp4th 1049, 1052, 1055, 18 CalRptr3d 882 (2004).

Since plaintiffs cannot amend complaints to defeat pending anti-SLAPP motions, courts should not be allowed to effectively "amend" a defective complaint through interlineation and liberal construction in favor of plaintiff.

Adoption of the anti-SLAPP statute in 2001 requires plaintiffs do due diligence in drafting and researching speech-related claims, because their proof and pleadings will be scrutinized at the earliest stage. Dismissals are "without prejudice" [ORS 31.150(2)], so the eventual right to trial is not compromised. Plaintiff may research, revise, and file anew. But Plaintiff cannot burden Defendant with mounting expenses defending against a "moving target." Here, it is the *Opinion* that moved the target by modifying and adding to Neumann's claims.

The *Opinion* (at 570 n2) errs in viewing "facts underlying plaintiff's claims in the light most favorable to plaintiffs." "Facts" leading to the conclusion that the Defendant's speech fell outside First Amendment protection are reviewed *de novo*, not with plaintiff-colored glasses. ***Lloyd Lions Club***, *supra*. To the extent any proffered testimonial "facts" are admissible, they are to be construed in favor of "rights of expression" asserted under ORS 31.150(2) by Defendant. Defendant addresses why the "facts" asserted by Plaintiff fail on the merits at pages 28-?, *post*.

IV. THE *OPINION* ERRED IN APPLYING UNDERLYING DEFAMATION LAW.

Defendant's Petition for Review included these questions:

6. Do Ninth Circuit Court of Appeals decisions on First Amendment law not yet resolved by the United States Supreme Court bind Oregon courts?

   Ruling Requested: Yes.

2. Does showing defendant's statements are fair reports of consumer warnings and "a subject of mutual concern to defendants and the persons to whom the statement was made" * * * sufficiently raise conditional privileges?

   Ruling Requested: Yes.

7. Is Plaintiff * * * a "limited purpose public figure" on the topic of her conduct based on her voluntary internet solicitations and responses to reviews on that topic?

   Ruling Requested: Yes.

A. STANDARD OF REVIEW.

The Supremacy Clause, U.S. Constitution, Article VI, cl 2, requires that Ninth Circuit decisions interpreting the First Amendment are binding on Oregon courts, where the Supreme Court has not spoken. Any facts leading to conclusions that Defendant's words are actionable or that Plaintiff meets constitutional standards for proof must be reviewed *de novo*. ***Lloyd Lions Club***, *supra*.

B. SUMMARY OF ERRORS.

The *Opinion* failed to apply proper evidentiary burdens in applying defamation law.

In evaluating whether words are capable of defamatory meaning, the *Opinion* fails to hold Plaintiff to the burden of showing that the meanings it infers from phrases were intended by Defendant. It must be shown "by clear

and convincing evidence that [Defendant] intended to convey the defamatory impression." ***Newton,*** *supra*, 930 F2d at 681. Allowing claims against Defendant to proceed without such proof

> eviscerates the First Amendment * * *. It would permit liability to be imposed not only for what was not said but also for what was not intended to be said.

Id., 930 F2d at 681. Speculating that some implied *innuendo* could exist incorrectly assigns the burdens of pleading and proof under ORS 31.150, *et seq.*, and the underlying tort.

Defendant disputes that any of his words fell outside constitutional protection:

(1) Properly read in context of online communications, his consumer "Review" is understood as an overall expression of opinion.

(2) His opinions are based on personal observations and reasons fully disclosed in the entire "Review," so no reasonable reader would assume further undisclosed defamatory facts were intended and he opinions remain protected even if facts are inaccurate.

(3) Words found capable of defamatory meaning ("rude", "crooked") are too vague to falsely declare facts or imply other undisclosed defamatory facts.

(4) However unflattering, Defendant's words do not impugn an attribute of Plaintiff that is uniquely necessary for her profession.

(5) There is no admissable evidence that any statement of fact in the Review is verifiably false.

The Opinion's conclusion that any statements are capable of being proved "false" is not supported by any admissible evidence. It rests on inadmissable testimonial evidence to which Defendant objected, unsupported inferences and impermissible stacking of the speculative inferences,

impermissibly drawn in Plaintiff's favor and against the rights of expression asserted by Defendant. ORS 31.152(4).

Even if Defendant's complained-of statements are capable of defamatory meaning and provably false, his speech was on topics of public interest, so private party Plaintiff must produce substantial evidence of some level of fault. ***Obsidian***, *supra*, 740 F3d at 1292. The required base level of fault would have been negligence, heightened to "actual malice" because of:

(1) Defendant's conditional privileges; and, independently,

(2) Plaintiff's own conduct which made her a limited purpose public figure required to show actual malice.

Plaintiff offered no admissible proof of any level of fault.

C. ERRORS IN FINDING WORDS DEFAMATORY/FALSE.

The *Opinion* (at 578) holds that Defendant's critique of Neumann "could be understood to state facts or imply the existence of undisclosed defamatory facts." Even if this "could" be the case, existence of an implied defamatory meaning must itself be pled as *innuendo* under Oregon's ultimate fact pleading [ORCP 18], not interjected *sua sponte* by an appellate court. ***Marr v. Putnam***, 196 OR 1, 24 (1952).

1. WORDS NOT DEFAMATORY IN CONTEXT.

Allegedly defamatory speech must viewed in its entire context. "[W]e do not consider isolated 'isolated sentences' but the 'general purport and 'intent.'" ***Brown v. Gatti***, *supra*, 341 Or at 459, citing ***Peck***, *supra*, 122 Or at 418.

The question is whether the words can reasonably be understood to declare or imply a provably false assertion of fact. ***Milkovich v. Lorain Journal Co.***, 497 US 1, 18-19 (1990) ("***Milkovich***"); ***Hickey v. Settlemier***, *supra*, 141 OrApp at 110 (citing ***Milkovich***). This is a question of law for the court. ***Reesman v. Highfill***, 327 Or 597, 603 (1998).

The answer requires consideration of the "totality of circumstances." ***Underwager v. Channel 9 Australia***, 69 F3d 361, 366 (9th Cir 1995). Federal review of context is summarized in ***Obsidian***, *supra*, 740 F3d at 1293:

> (1) whether the general tenor of the entire work, negates the impression that the defendant was asserting an objective fact; (2) whether the defendant used figurative or hyperbolic language that negates that impression; and (3) whether the statement in question is susceptible of being proved true or false.

a. BROAD CONTEXT: THE INTERNET.

The broad context is the internet. Audiences understand that much online speech is spontaneous, not scrutinized by paid editors or lawyers. Commentators and courts recognize that online sites draw audiences familiar with the mixture of opinion and facts in those settings.

Krinsky v. Doe 6, 159 CalApp4th 1154, 1162, 72 CalRptr 231 (2008), found:

> [T]he Internet forum promotes a looser, more relaxed communication style. Users are able to engage freely in informal debate and criticism, leading many to substitute gossip for accurate reporting and often to adopt a provocative, even combative tone. Internet forum promotes a looser, more relaxed communication style.

Nicosia v. De Rooy, 72 FSupp2d 1093 (ND Cal 1999) (statements made on personal website and through online discussion group less likely to be seen as assertions of fact); ***Too Much Media, LLC v. Hale***, 206 NJ 209, 234-35, 20 A3d 364, 378-79 (2011) (online message boards "promote a looser, more relaxed communication style"); ***Sandals Resorts Int'l, Ltd. v. Google, Inc.***, 925 NYS2d 407, 415-16, 86 AD3d 32, 43-44 (NY AppDiv 2011) ("readers give less deference to allegedly defamatory remarks published on online * * * than to similar remarks made in other contexts"); ***Art of Living Foundation v. Does***, 2011 WL 2441898, *5 (ND Cal 2011) (though blog criticisms by disgruntled yoga instructors--"embezzle, "fraud,"-- "reflect poorly on Art of Living," they "[did] not amount to factual accusations of criminal activity," given context).

In summary judgment rulings, the trial court in ***Obsidian*** found that dozens of accusatory website posts against plaintiffs were nonactionable, agreeing with above-cited cases that readers recognize loose, colloquial standards for online speech. The nonactionable accusations included "corrupt," "crookedest," "illegal," "immoral," "criminals," "cold hearted evil asshole," "hire a hit man," "thug," and "thief." ***Obsidian v. Cox,*** 2011 WL 2745849 (D Or 2011); ***Obsidian Finance Group, LLC v. Cox***, 812 FSupp2d 1220, 1223 (D Or 2011) (both upheld by ***Obsidian***, *supra*, 740 F3d 1284). The nonactionable comments were specific as to individuals and entities. Word limits do not permit further examples.

b. "REVIEW" SIGNALS PERSONAL OPINION AND INTERPRETATION OF FACTS.

Here, the complained-of words are under a large bold typeface heading: REVIEW. ER-8. MERRIAM-WEBSTER DICTIONARY (2010) defines review: "a critical evaluation of <review a novel>." Readers of newspaper or magazine restaurant or book reviews expect judgmental evaluations and provocative opinions, so take any "railings with a grain of salt." ***Moldea v. New York Times Co.***, 22 F3d 310, 313 (1st Cir 1994). It is obvious that Defendant was not a professional reviewer, so the readers would sprinkle a few more grains of salt on his Review.

c. CONSUMER WARNING REVIEWS.

The online consumer review is now a familiar contemporary format, with hundreds of websites showing millions of consumer-generated comments.[12] Those reading review websites or sections of sites devoted to reviews

> should be predisposed to view them with a certain amount of skepticism, and with an understanding that they will likely present one-sided viewpoints rather than assertions of provable facts.

Summit Bank v. Rogers, 206 CalApp4th 669, 696-97, 142 CalRptr3d 40 (2012) (finding negative comments about bank's practices and stability on "Rants and Raves" review section of Craigslist.com nonactionable).

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12. Recent news article states over 200 million reviews have been posted to TripAdvisor.com about food, lodging and entertainment venues. *Harsh TripAdvisor reviewer's anonymity is protected: Oregon Coast hotel drops $74,999 defamation suit*, OREGONIAN, December 30, 2014). App Rev 2.

While negative consumer reviews contribute information on topics of public interest, courts understand that, in context, "warnings" often result from unpleasant encounters and that strong opinions and loose invective often signal nonactionable consumer warning:

> "This guy is a criminal and a deadbeat dad."
>
> "I wouldn't let him into my house if I wanted to keep my possessions or my sanity."

Chaker v. Mateo, 209 CalApp4th 1138, 1148, CalRptr 496 (2012),[13] held the above statements (on Ripoff.com) nonactionable.

> We * * * have little difficulty finding the statements were of public interest * * * [and] plainly fall within the rubric of consumer information about Chaker's Counterforensics' business and were intended to serve as a warning to consumers about his trustworthiness.

Id., at 1146.

Krinsky v. Doe 6, *supra*, 159 CalApp4th at 1176, held "Management consist[s] of boobs, losers and crooks" nonactionable in context of discussion on online message board.

"Blatantly dishonest," a "crooked company," engaging in "fraud," and "running scams" posted by defendant on his self-created website to criticize an warranty issuer was not actionable, because the phrases

> when viewed in full context of their publication were subjective expressions of personal opinion by a disgruntled customer based upon his personal dealings with the plaintiff.

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13. Defendant's Memorandum of Supplemental Authority (April 5, 2014) cited this case, among others.

Penn Warranty Corp. v. DiGiovanni, 10 Misc3d 998, 1005, 810 NYS2d 807, 813 (NYSup 2005).

When aggrieved tenants used a online review site to complain their former landlords were: "crooks" that "will take full advantage of you! Run from them," the court dismissed the landlords' defamation claims:

> While * * * the term "crooks" can carry a criminal connotation, in the context of Defendants' online review, the term is clearly not being used in this manner. Indeed, given the context here of an online forum intended for consumers to review local businesses, we are convinced that "even the most careless reader [would] perceive[ ] that the word ['crooks'] was no more than rhetorical hyperbole." See ***Greenbelt Coop. Publ'g Ass'n v. Bresler***, 398 US 6, 14, 90 SCt 1537, 26 LEd2d 6 (1970).

Westmont Residential LLC v. Buttars, 2014 WL 6982644, *5 (Utah App 2014).

d. CONTEXT SHOWS DEFENDANT'S REASONS ARE STATED IN THE REVIEW.

Viewing the "entire writing," the court looks to whether opinions are based on stated reasons. ***Partington v. Bugliosi***, 56 F3d 1147, 1152-53 (9th Cir 1995). ***Standing Committee v. Yagman***, 55 F3d 1430 (9th Cir 1995) ("***Standing Committee***") (expressly following ***Milkovich***), used examples from RESTATEMENT (2ND) OF TORTS § 566, to contrast nonactionable opinion statements based upon expressly stated facts with actionable opinions implying undisclosed facts.

Attorney Yagman was sanctioned by the bar for statements that a judge "has a penchant for sanctioning Jewish lawyers: me, David Kenner and Hugh Manes. I find this to be evidence of anti-semitism." *Id.* at 1438. The first

sentence was factual but the second expressed protected opinion, as "it conveys Yagman's personal belief that Judge Keller is anti-Semitic." *Id.* at 1439. Such personal belief was protected, regardless of how unfair it might be, because Yagman stated his underlying reasons, justifying First Amendment protection.

> When the facts underlying a statement of opinion are disclosed, readers will understand they are getting the author's interpretation of the facts presented; they are therefore unlikely to construe the statement as insinuating the existence of additional, undisclosed facts.

Id. at 1439. When facts are disclosed, "Readers were 'free to form another, perhaps contradictory opinion from the same facts' * * * as no doubt they did." *Id.*, at 1440.[14] The specific RESTATEMENT (2D) OF TORTS examples are discussed at Liles CACOB, pp. 21-22.

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14. Plaintiff relied on ***Slover v. Oregon State Bd. of Clinical Social Workers***, 144 OrApp 565 (1996), that an opinion can imply unstated defamatory facts. Appellant's Corrected Opening Brief, pp. 15-16. Slover limited his clinical practice to settle disciplinary charges. The Board published a summary and an article in its regular bulletin, "A Dubious Therapeutic Technique," noting Slover's "highly questionable techniques" treating adolescent boys. The court concluded the article implied undisclosed facts about Slover's conduct. In ***Slover***, the publisher was the regulator who had investigated Slover's practice. That credential and the formal evidence presentation in administrative proceedings could imply that there were other facts beyond those stated in the articles.

    Here, the context is not the official publication of an investigative agency. It is brief "consumer review" by a layperson who fully explained his personal observations were formed at one event, not upon investigation.

Gardner v. Martino, *supra*, 563 F3d at 988-989, considered a defamation claim under Oregon law, dismissed under ORS 31.150, *et seq*. It summarizes First Amendment law:

> (1) "[W]hen a speaker outlines the factual basis for his conclusion, his statement is not defamatory and receives First Amendment protection."
>
> (2) The First Amendment "protect[s] a speaker who reasonably relies on facts that may be false." ***Flowers v. Carville***, 310 F3d 1118, 1129 (9th Cir 2002).

Oregon analysis incorporates similar principles. In ***Brown v. Gatti***, *supra*, plaintiff doctor sued the lawyer who prevailed on a malpractice claim against him, claiming the lawyer's statements to news outlets were defamatory. This Court looked to the entire newspaper account and the entire televised colloquy. Defendant's complained-of characterization (the doctor had "betrayed" his patient) was found to be based on a summary of facts about the botched cosmetic procedure. In that context, the words could not reasonably imply some other undisclosed facts of "betrayal." *Id.*, 341 Or at 464.

Hickey v. Settlemier, *supra*, was one in a series of suits brought by a kennel which collected and sold strays and shelter animals for medical research. The owner sued a neighbor who had described the kennels as "inhumane" during a televised news account. Defendant argued "inhumane" was opinion

> "based upon her observations when she was in fact over there" and that those alleged eyewitness observations--e.g., overcrowded cages, empty food bowls, empty water bowls, *etc*.,--were fully disclosed.

The court agreed her opinion was supported by these observations and "inhumane" did not imply still other undisclosed facts. *Id.*, 141 OrApp at 110.

The *Opinion* [at 579] then refutes an argument Defendant never urged. He did not argue his statements were entirely "figurative, rhetorical, or hyperbolic." Instead, he argued that his opinions ("Disaster!!!!!," "In my opinion She will find a why [*sic*] to keep $500 deposit and will try to make you pay even more") were based on facts set out in the Review.[15] Liles CACOB, pp. 14-15, 16-19.

Like defendant in ***Hickey v. Settlemier***, Liles was in fact on site, formed judgments, and fully disclosed the reasons for his opinions. Those stated reasons include:

(1) His perception that Neumann was rude to others;

(2) Neumann's delay in raising "issues;"

(3) perceived lack of value ("bridal suite" a "shed");

(4) Neumann "did not make the rules clear" and "changed the rules";

(5) example of such change was "at 8:15 they started telling the guests that they had to leave immediately" even though Defendant understood the event was to end at 9:00 p.m.

The *Opinion* finds these "factual details" "would not be brushed off as hyperbole," but Defendant never claimed they would be. These details

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15. Online readers understand the overstatement expressed by web conventions, such as exaggerated punctuation Defendant used. His errors and typos suggest haste and emotional urgency and increase the likelihood the entire review will be viewed as consumer venting.

constitute the facts (correct or disputable) which support his opinions and countermand the conclusion Defendant implied or inferred some other derogatory, but unstated, facts.

Plaintiff may find the stated reasons flawed, but readers are "free to form another, perhaps contradictory opinion." ***Standing Committee***, 55 F3d at 1440. The only First Amendment question is not the truth of the reasons but whether Defendant "reasonably relied" on his own recollections of the facts in his later Review. ***Gardner v. Martino***, *supra*.

As a final aspect of context, Defendant's review joined the give and take of other consumer reviews about Plaintiff, including earlier unflattering impressions of her. See page 3, *ante*. The online debate about Plaintiff continues. App Rev 1. Defendant's comments were germane to the topic of general interest and pertinent to ongoing controversy about Neumann's demeanor as hostess.

2. WORDS TOO VAGUE TO IMPLY CRIMES, OR FACTS IMPUGNING ANY ATTRIBUTE UNIQUE TO WEDDING VENUE RENTALS.

To be actionable *per se*, Defendant's words must either unambiguously (without *innuendo*) accuse Plaintiff of a crime of "moral turpitude" [***Ruble v. Kirkwood***, 125 Or 316, 319-20 (1928)] or impugn her fitness to perform unique aspects of her specific trade. ***L&D of Oregon, Inc. v. American States Ins. Co.***, 171 OrApp 17, 26 (2000) ("***L&D of Oregon***"). The accusation of professional misconduct must be provably false. ***Wheeler v. Green***, 286 Or 99, 124 (1979).

a. "RUDE" IS NOT DEFAMATORY.

The *Opinion* finds the word "rude" actionable and that describing a structure on Plaintiff's rural property as a "shed" is demeaning and an accusation of her unfitness in providing a wedding venue. Defendant offers holdings from other states as evidence of widely accepted common meanings understood by readers.

"Rude" expresses a subjective judgment. ***Gosling v. Conagra, Inc.***, 1996 WL 199738, *3 (ND Ill 1996), dismissed defamation and defamation *per se* claims by a salesman based on a customer's statements he was "rude" and "unprofessional," among other complaints, as the terms are not verifiable.

> Determining whether a person is rude or nasty or unhelpful or unprofessional or arrogant or skeptical on any given set of facts is an inherently subjective task that, excluding extreme cases, yields differing results among different people.

Id., at *6.

"Rude" is "too imprecise" to be actionable. "[A]s a matter of law, the alleged statements that [plaintiff] was 'hard to work with' and 'rude' are not actionable." ***Schibursky v. IBM Corp.***, 820 FSupp 1169, 1181-2 (D Minn 1993). An email describing plaintiff as "rude and overreaching," was "plainly [defendant's] opinion, which "fails to state a claim for defamation." ***Rigsby v. AM Community Credit Union***, 353 Wis2d 553, ¶ 10, 846 NW2d 33 (2014). A review calling restaurant owners "unconscionably rude and vulgar" did not state or imply any particular defamatory facts about them. ***Pritsker v. Brudnoy***, 389 Mass 776, 782-3 (1983).

b. "CROOKED" IS NOT AN ACCUSATION OF A SPECIFIC CRIME.

In finding *per se* defamation, the *Opinion* (at 576-77) focuses on Defendant's adjective "crooked." But instead of evaluating it in context, the *Opinion* substitutes the noun "crook" for "crooked." Analyzing a word not used by Defendant is devoid of any context. There is no evidence that Defendant intended to call Plaintiff a "crook" and then infer from a word not uttered that he intended accusation of a crime.

"Crooked" does not describe any violation of the criminal code, certainly not one of moral turpitude. In Defendant's Review, "crooked," and "try to keep the $500 deposit" cannot reasonably be read as accusations of "theft" but are opinions based on stated observations.

Per se defamation must disparage Plaintiff in some way that is peculiarly harmful to her profession. Disparagement of a general nature, equally discreditable to all persons, is not actionable. The criticized quality must be peculiarly necessary to Plaintiff's profession. RESTATEMENT (2D) OF TORTS § 573 (1977).

While pejorative, neither "rude" nor "crooked," impugns any attribute unique to preforming wedding hostess duties. A pleasant disposition and honest treatment of patrons are desireable traits in everyone dealing with the public--salespersons, food service employees, call center workers, bank tellers, health care aides, or lawyers. Stating that Plaintiff lacked such qualities does not implicate any task or attribute uniquely necessary for her work performance. Even "distasteful" remarks that an African American

mechanic was unfit to perform certain skilled tasks in the repair shop because of his race were not *per se* defamatory. The bigoted stereotyping did not actually state the employee was "not capable of performing his job." ***L&D of Oregon,*** *supra.* Here also, Defendant did not state Plaintiff was incapable of performing her job.

Payment disputes can occur in any business transaction, not just wedding rentals. Disputes about pricing and return polices are not specific to any particular trade. *See* ***Fowler v. Stradley***, 238 Or 606, 616-17 (1964) (statement that lawyer charged more than "the going rate" not defamatory, as did not impugn lawyering skills) and cases collected therein where accusations of overcharging were not *per se* defamatory of unique professional attributes.

Neither Plaintiff nor the ***Opinion*** cites any authority finding "crooked" defamatory. But many cases find "crooked" lobbed at sales staff, various companies, and judges not actionable. Railings on a blog accusing a family court judge of "criminal conduct," and being "crooked" were nonactionable. Defendant "sincerely (albeit unreasonably) believed his statements" but in context, "reasonable readers would understand" these as exaggerations based on defendant's interactions with the judge during a custody dispute. ***Brewington v. State***, 7 NE3d 946, 961 (Ind 2014).

"The words,'[y]ou crooked bastard you' and 'you're crooked' are not actionable *per se*." ***Hruby v. Kalina***, 228 Neb 713, 715 424 NW2d 130 (1988). Also nonactionable: "Crooked politician" [***Fletcher v. San Jose***

Mercury News, 216 CalApp3d 172, 191, 264 CalRptr 699 (1989)]; "shady," "on the crooked side," said of a salesman [***Swagman v. Swift & Co.***, 152 NW2d 562, 563, (Mich App 1967)]; "con artist" and a "crooked" business [***Foley v. CBS Broadcasting, Inc.***, 2006 WL 6619947, 4 (NYSup 2006)].

Lacking authority finding "crooked" actionable, both Plaintiff and the *Opinion* rely instead upon cases with the noun "crook." But ***Mannex v. Bruns***, 250 OrApp 50, 52 (2012) (cited in *Opinion*, at 577) does not find "crook" defamatory. The word was complained-of, but the court never concluded it was defamatory. The word was used in a privileged situation, and there was no evidence defendant lacked "reasonable belief in the truth of her statements. Thus, there was no evidence that defendant abused her qualified privilege." 250 OrApp at 61.

Durr v. Kelleher, 54 OrApp 965 (1981) (*Opinion* at 575), did find calling a police investigator a "crook" and a "dishonest police officer" *per se* slanderous. Any lawbreaking is incompatible with the duty of a sworn officer to uphold the law, but Plaintiff has not taken such an oath as part pf her profession. "Dishonest police officer" is an accusation of misconduct by a public official, which is a criminal code violation. ORS 162.415.

Plaintiff cites ***Weiner v. Leviton***, 244 NYS 176 (2nd AD 1930). Appellants Opening Brief (Corrected) ("AOB"), p. 13. It was overruled 47 years ago.

> [W]e conclude that the rule enunciated in ***Weiner*** should be discarded. * * * [T]he word "crook" is not commonly understood today as imputing an indictable crime. * * * However abusive, it

> has been bandied about to such an extent that its sting has been greatly reduced.

Klein v. McGauley, 288 NYS2d 751, 754-5 (2d AD 1968).

Courts throughout the United States agree that in contemporary usage "crook" is a negative term that is not *per se* actionable.

> "It is true the word 'crook' is derogatory but the word does not in and of itself impute the commission of a crime." ***Ciquanta v. Burdett***, 154 Col 37, 40 (1963).

> "Crooks," engaged in "unethical," "sometimes illegal" sales practices, said of insurance sales staff were "broad, unfocused, wholly subjective" and nonactionable. ***Lauderback v. American Broadcasting Companies***, 741 F2d 193, 196 (8th Cir 1984).

> "Crook" is "a word of general disparagement rather than a direct allegation of specific criminal conduct." ***Waymire v. DeHaven***, 313 Ark 687, 691 (1993).

> "Exaggerated language used to express opinion, such as 'blackmailer,' 'traitor' or 'crook,' does not become actionable merely because it could be taken out of context as accusing someone of a crime." ***Hodgins v. Times Herald Co.***, 169 MichApp 245, 425 NW2d 522, 527 (1988).

The only other case cited by Plaintiff [AOB, p. 13], ***Albertini v. Schaefer***, 159 CalRptr 98, 102 (1979), found calling plaintiff/attorney a "crook" slanderous *per se* because "imputing dishonesty or lack of ethics to any attorney" damages a lawyer's professional reputation. This reasoning does not apply to Plaintiff; wedding venue hostesses do not have ethics review boards, are not officers of the court, and cannot be disbarred.

Moreover, most courts disagree that generalized invective can injure attorney reputations. ***Fowler v. Stradley***, *supra.*[16] As noted at page 30, *ante*, the ***Obsidian*** federal trial court held dozens of online accusations ("criminal," "corrupt") against bankruptcy trustee and its Portland lawyers to be nonactionable. Also nonactionable were blog posts, which out of context might have been accusations of crimes by trustees and the lawyers: "fraud," "money laundering," and "tax crimes." ***Obsidian***, 740 F3d at 1293.

D. NO EVIDENCE OF ANY LEVEL OF FAULT.

Plaintiff offered no admissible evidence of Defendant's negligence and does not discuss any evidence of Defendant's negligence in her AOB. She did not respond in her Combined Reply and Answering Brief to Defendant's argument that she failed to produce evidence of negligence. Liles CACOB, pp. 21-24. She does make inadmissible, conclusory accusations in her Affidavit that Defendant was "malicious," all objected to as lacking foundation and being lay opinion on a question of law.

The *Opinion* does not point to any evidence satisfying any level of fault.

The *Opinion* does (at 576) use the phrase *per se* defamation. Even if that were an appropriate characterization of Plaintiff's defamation claim, that terminology derives from early common law cases which allowed

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16. "You don't want to hire him, he's a crook," applied to assistant district attorney was "disparagement" and "name calling" but not defamatory. "A specific crime or moral turpitude is not imputed, nor does it injure Moore's profession." ***Moore v. Waldrup***, 166 SW 3d 380, 386 (TexApp 2005).

presumptions of falsity and damages (but not fault) when complained-of words unequivocally made certain kinds of accusations. These presumptions are no longer Constitutional, where speech is on a topic of public interest. ***Obsidian***, *supra*.

Per se defamation is not "strict liability," and strict liability for defamation, when the topic is in the public interest, violates the First Amendment. ***Obsidian***, 740 F3d at 1291. While it is unclear whether Article I, § 8, of the Oregon Constitution requires all defamation plaintiffs suing non-media defendants to show at least negligence, under controlling First Amendment jurisprudence Plaintiff had to show some evidence of Defendant's negligent disregard of the truth in making his consumer warnings. ***Bank of Oregon***, 298 Or 434, 443, acknowledging ***Gertz v. Robert Welch, Inc.***, 418 US 323, 340 (1974) ("***Gertz***"); ***Gardner v. Martino***, *supra*, 563 F3d at 987 (summarizing ***Bank of Oregon***). In this case, Defendant also asserted conditional privileges, independently requiring Plaintiff to show higher culpability, "actual malice."

1. NO EVIDENCE OF UNREASONABLE RELIANCE ON PERSONAL OBSERVATION AND RECOLLECTION.

Plaintiff offered a Rental Agreement and a much-revised Bridal Check List as evidence to the trial court that Defendant negligently or recklessly made "false" statements contrary to the "true facts" ascertainable from those documents.

Contrary to AOB (p. 2), her Complaint did not allege that Defendant was "aware of the terms of the agreement (ER-2)," (referencing the Rental Agreement and "Bridal Check List" negotiated by others). Defendant had no "duty" to consult documents he did not sign before relying on what he saw and later recalled (even if what he relied upon was incomplete or is disputed by Plaintiffs).

As a matter of law, it is irrelevant whether Neumann could establish that Defendant was mistaken when he stated that her insistence on closing the event at 8:15 p.m. amounted to "changing the rules." ***Gardner v. Martino***, *supra*, 563 F3d at 988-989, instructs that the relevant First Amendment inquiry is whether defendant's reliance on disputed or disputable facts was "reasonable." *Id.* at 989. Thus, Defendant is entitled to rely on his own perceptions supporting his opinions, as was defendant in ***Hickey v. Settlemier***. To the extent Defendant was confused or mistaken about facts he relied upon, he

> would be protected unless he was negligent or unreasonable in doing so. See ***Gertz v. Robert Welch, Inc.***, 418 US 323, 345, 94 SCt 2997, 41 LEd2d 789 (1974) (holding that where a statement involves a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault); ***Bank of Oregon v. Ind. News, Inc.***, 298 Or 434, 693 P2d 35, 43 (1985) (holding that "plaintiffs must prove that the false and defamatory statements were made negligently, i.e., without due care to ascertain whether they were true.").
>
> Thus, the analysis does not turn on whether Feroglia's story was wrong as urged by Appellants but on whether Martino's reliance on those facts was reasonable.

563 F3d at 988-989.

Gardner v. Martino, *supra*, explains why evidence of unreasonable conduct is required.

> [I]t would be unreasonable to require a speaker to determine the actual truth or falsity of every fact the speaker relies on before stating his or her opinion. A lesser standard than the "reasonable reliance" standard, as proposed by Appellants, would chill speech and frustrate the purpose of the First Amendment.

Id., 563 F3d at 989 (emphasis supplied).

Most customers rely on their own recollection in writing a review. Imposing a duty to reaffirm the actual truth of every recalled fact would chill all critical consumer speech. Chilling the rights of ordinary consumers to complain disables the free flow of debate on consumer topics, leaving only one viewpoint (flattering reviews) free from threats and self-censorship.

Applying ORS 31.150, the Ninth Circuit held:

> We conclude that the Appellants have not presented substantial evidence to support a *prima facie* case that Martino's reliance on Feroglia's story was unreasonable or negligent. The declarations submitted by the Appellants show that Feroglia's statements may have been false, but do not show that Martino was negligent or unreasonable in relying on Feroglia's story, given the nature of talk shows, such as his. * * * Appellants were given the opportunity to call in to the program and explain their version of events but chose not to do so.

Id., 563 F3d at 989. Here too, Plaintiff's evidence fails to show negligence, and the Review format allowed Plaintiff unfettered opportunity to comment directly in response to the offending Review.

It is common practice to recount a personal experience from memory, as Defendant did in his Review. However strongly Plaintiff disputes

Defendant's statements, it was objectively reasonable for him to rely on his own recent experience.

Evidence of Defendant's culpability must include "evidence of the mental state of the declarant at the time of the statement." ***Bendl v. Parks***, 164 OrApp 699, 706 (2000). No affidavit or exhibit provides any evidence that Defendant was negligent or unreasonable in relying on what he observed.

2. THERE IS NO ADMISSIBLE EVIDENCE OF FALSITY, HENCE NO EVIDENCE DEFENDANT WAS EVEN NEGLIGENT TOWARDS "TRUTH."

Defendant stated the facts as he recalled them and swears:

> While in attendance at the wedding I formed an opinion about the site, the services offered and manner in which some Plaintiffs interacted with members of the wedding party.

Declaration of Christopher Liles ¶ 7; SER 19.

> Given defendant's testimony that the conditions she described did, in fact, exist on the day she visited the kennels * * * it was incumbent on plaintiff, as the party bearing the constitutional burden of falsity, to present evidence that the conditions did not exist or could not exist.

Hickey v. Settlemier, *supra*, 141 OrApp at 112.

Plaintiff did not meet her required showing that the events/problems Defendant describes did not exist. The *Opinion* (at 578) references proffered affidavits providing evidence which "if true," would show "defendant's statements were false." Plaintiff adverts to some "evidence" in her AOB, so we assume that is what the *Opinion* references.

Neumann proffered a Rental Agreement [ER 76] and a much-changed "Bridal Check List" [Affidavit, Exhibit B], neither signed by Defendant.[17] Finding any statement "false" requires making two independent unsupported inferences and stacking them. The factfinder would first have to find these documents are capable of proving a verifiable fact (such as a "true" time to adjourn) and infer which of conflicting handwritten times was "true." Then the factfinder would have to infer from the fact that Defendant was observed meeting with Neumann sometime that he literally knew the "true" terms of the much revised documents.

a. OBJECTIONS TO PLAINTIFF'S EVIDENCE.

Affidavit testimony is subject to objection. ***Davis v. County of Clackamas***, 205 OrApp 387, 396 (2006). During the anti-SLAPP process, "The evidence put forward at this stage must be admissible." ***Wallace v. McCubbin***, 196 CalApp4th 1169, 1212, 128 CalRptr3d 205 (2011); *accord*, ***Bently Reserve***, *supra*, 218 CalApp4th at 427. Plaintiff's "must show that [his claim] is supported by a sufficient *prima facie* showing, one made with 'competent and admissible evidence.'" ***Comstock v. Aber***, *supra*, 212 CalApp4th at 948 (citation omitted).

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17. Plaintiff failed to include Exhibit B, Bridal Check List, in her excerpts. The *Opinion* apparently accepts her averments of what that document contained or supposedly "proved" (over Defendant's objections). Since Neumann's Affidavit is not the best evidence of what the Bridal Check list showed at any time, Defendant includes her omitted Exhibit B as an excerpt on review (ER Rev 1-2).

Defendant moved to strike many of the proffered statements as hearsay, lay opinions on the law, without foundation, and/or irrelevant. Word limits do not allow Defendant to repeat his many objections, set out in motions and in Defendant's Reply Memorandum to the trial court [OJIN 28] (included in excerpts accompanying Plaintiff's AOB, ER 119-126). Defendant preserved and renewed his evidentiary objections on appeal. Liles CACOB, pp. 24-5, 38-43. The trial court did not rule on any objections but did not rely upon such proffers in granting the anti-SLAPP motions against all of Plaintiffs' claims. The *Opinion* then resurrects the objected-to "evidence," <u>without addressing the objections</u>.

Defendant stated:

> "*The owners did not make the rules clear to the people helping with the set up.*"
>
> "*They also changed the rules as they saw fit. We were told we had to leave at 9pm, but at 8:15 they started telling the guests that they had to leave immediately.*"

Affidavit of Carol Neumann ¶ 14 [ER 73] ("Neumann") avers without foundation that Defendant had "prior knowledge" of the terms of documents she offered as exhibits. She states that during the weekend Defendant "participated in the review of the Rental Agreement and Bridal check list." Neumann ¶ 17 again claims Defendant "knew" the documents had been signed by the bride's mother. There is no evidence Defendant (on active duty in California and at sea) had "prior knowledge" of anything signed by the bride's mother a year earlier, such as the Rental Agreement.

Neumann ¶ 15, ER 73, (AOB, pp. 21-22) claims the Rental Agreement proves the event was to end "one hour before sunset",[18] but she admits [¶ 16] the time was later changed and claims the "true" wrap-up time is found in the much revised and scribbled-upon Bridal Check List. The Rental Agreement and Bridal Check List are inconsistent, and the Check List shows conflicting handwritten changes to the time. There is no competent evidence Defendant knew what the terms might have been at any time.

Defendant's objections included:

(1) Neumann's testimony that Defendant "participated" in a "review" of documents is not specific as to conduct that revealed Defendant's interior thoughts, comprehension or knowledge. Neumann does not state she observed Defendant reading or revising, or heard him discuss any version of the documents.

(2) Plaintiff is not competent through first hand knowledge to testify what was in the mind of another as "prior" knowledge.

(3) There is no foundation for admitting any version of the much-amended "Bridal Check List" as evidence [ER Rev 1]. It is covered with handwritten notes with no testimony identifying when or who made changes, the sequence in which the changes were made, or which version is "final."

(4) The Bridal Check List does not "prove" an agreed-upon time to conclude. The printed line on first page of the Check List (left column) reads: "guests will be offsite by ____" followed by handwritten "time to vacate," "8:45-9 pm." Opposite *that*

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18. Rental Agreement, ¶ 1 [ER 78], provides "sunset" is ascertained by "Astronomical US Naval Tables," which show that on June 19, 2010, one hour before sunset in Eugene was 7:59 pm. That time is changed in the Check List to one of the several different handwritten notes for clean-up times. Defendant requests judicial notice of the change from the original time, which is verifiable on the official Navy website: aa.usno.navy.mil/data/docs/RS-OneDay.php.

> note in the right column, in different handwriting, "8:30 agreed upon & all clean-up done."

(5) The Check List cannot refute Defendant's statement he was "told" the event would close at "9 pm."

If considered at all, the Bridal Check List's facial inconsistencies and inferences to be drawn from those are probative and in Defendant's favor:

(1) Terms in the Check List were "changed".

(2) Under one handwritten version clean-up was to end at "9 pm".

(3) It is likely some guests were aware of that and "told" Defendant, "9 pm".

(4) Given the altered and conflicting terms, confusion about the "rules" was foreseeable.

Whatever the time for adjourning, it is not "defamatory" to state that the venue closed 45 minutes earlier than Defendant anticipated. Neumann ¶¶ 14-16 do not tend to "prove" anything about falsity, or any conduct of Defendant's from which his negligence or subjective actual malice can permissibly be inferred.

Neumann ¶ 21 [ER 74], claims the statement, "the problem is the owners," is provably false, because Defendant was "aware the problems * * * were not caused by Co-owner Tim Benton or me." As noted below, Benton testifies to unruly guest behavior which he considered "problems," but no affiant claims Defendant was present at any of the described rowdy scenes. Benton testifies to conduct he disapproves of by the bride's mother and the wedding planner [¶¶ 12-13] but does not claim Defendant accompanied them.

Several affiants claim wedding guests or the wedding planner ignored contracted terms for alcohol on premises. The point seems to be that rules about liquor service were ignored, not "changed," so Defendant falsely stated the "rules were changed." This is misdirection. Defendant did not refer to rules or changes in rules about alcohol service. He referred generally to confusion among those setting up and specifically the "change" in time to close.

Colin Norbet ("Norbet") ¶ 3 [ER 84] claims he "saw" Defendant meet with Neumann and the wedding planner and "[Defendant] had full knowledge of the terms of the Agreement," cited in AOB, p. 22. Norbet ¶ 4 [ER 84] again claims Defendant "knew" the terms. Timothy Benton's Affidavit ("Benton") ¶ 10 [ER 81], claims he saw a meeting from a distance between Defendant, Neumann and the wedding planner and Defendant was "actively participating and asking questions."

Neither Norbet nor Benton lay a foundation for their claims about what Defendant "knew." Merely seeing a meeting between others at a distance while working cannot prove or tend to prove what another "knew." Neither affiant is competent to testify what was said or heard at a meeting neither attended. Seeing Defendant appear to talk does not allow testimony that Defendant "asked questions." Curiously, Neumann does not testify that Defendant spoke or asked her pertinent questions. Only Benton, who did not hear anything, makes this claim.

Neither Norbet or Benton claims any personal knowledge of what documents or what versions of documents (if any) were the subject of the meeting they observed from a distance. Neither is competent to testify Defendant's knowledge of such (unidentified) documents.

There is no direct evidence about Defendant's knowledge or state of mind. There is no circumstantial evidence that Defendant said or did anything revealing "prior" or "full" knowledge or any awareness of contract terms. Defendant's "Review" is the best evidence of his state of mind: he was confused by the changing rules.

Norbet ¶ 10 [AOB, p. 22, ER 86] purports to "describe" what Neumann said to Defendant on another occasion, also without foundation that he heard Neumann's statements. Norbet ¶ 10 [ER 86] describes a "nightmare" and "bad acts" occurring during the weekend without stating he (or anyone) saw or heard Defendant engage in any of this conduct. Norbet claims some persons "abused" Neumann. He does not claim Defendant was present or knew of such alleged incidents.

Benton ¶ 14 [AOB, p. 21, ER 82] is irrelevant, offering scandalous remarks berating other attendees (the groom's elderly father exposed himself) but no probative value concerning Defendant, since Benton does not claim Defendant was present or involved in the scenes he describes.

b. STACKING INFERENCES.

Even if affiants' claims of clairvoyant knowledge of Defendant's "knowledge" of "rules" were not stricken, the falsity of Defendant's

statements that Plaintiff "changed the rules" or ordered the party to adjourn early rely on impermissible inferences drawn and then "stacked" from two unrelated offers of proof. "Falsity" requires (1) an inference that "Bridal Check List" contains final "rules" and (2) an inference that Defendant's attendance meant that he knew what was in those documents. *Opinion*, at 576.

Since no affiant identifies who or when the changes to the Bridal Check List were made, it is illogical to draw an intermediate inference that any "rule" was final and somehow "true." Defendant's (undisputed) attendance at the event or being seen with Neumann does not permit an inference he read and "knew" terms in documents he did not sign.[19] Neither inference naturally flows; stacking them is speculation, not "substantial proof." ***State v. Bivens***, 191 OrApp 460, 469 (2004).

3. NO EVIDENCE OF ACTUAL MALICE.

Evidence of actual malice is required in Plaintiff's *prima facie* case, because Defendant pled sufficient facts to show (1) Oregon case law conditional privileges and/or (2) Plaintiff is a limited purpose public figure for First Amendment analysis. In defamation sense, actual malice "has

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19. Affiants undermine their own "evidence" of Defendant's alleged perfect comprehension, knowledge and recall by their (irrelevant) accusations he was not sober, "smelled of alcohol," and "slurred" his speech during the weekend.

nothing to do with ‘bad motive or ill will.’" ***Harte-Hanks Communications, Inc. v. Connaughton***, 491 US 657, 667 n7 (1989).

Actual malice in its defamation sense is a subjective standard. ***St. Amant v. Thompson***, 390 US 727, 731, 88 SCt 1323 (1968).

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.

The Constitutional mandate is, of course, followed in Oregon.

> "‘[K]nowledge’" or "‘reckless disregard’" is a subjective matter, a question of state of mind, quite distinct from any question of objective reasonableness or prudence.’"

McNabb v. Oregonian Publishing Co., 69 OrApp 136, 140-41, 685 P2d 458, *review denied*, 297 Or 824, 687 P2d 797 (1984), *cert den*, 469 US 1216, 105 SCt 1193 (1985) (citations omitted). Actual malice must be shown by "clear and convincing evidence." ***Gertz***, *supra*, 418 US at 342.

A series of "cumulative" facts or inferences, none of which standing alone could show actual malice, is inconsistent with the constitutional requirement of "clear and convincing" evidence.

> This is much more than a nice technicality. If courts are too expansive in permitting findings of actual malice to be supported by cumulative evidence, then there is a danger that the integrity of the constitutional standard will be undermined.

Smolla, LAW OF DEFAMATION §3.25 (West updated December 2014).

a. PLAINTIFF DID NOT SHOW ABUSE OF CONDITIONAL PRIVILEGES.

Facts supporting conditional privileges and the court's obligation to consider the Defendant's evidence are discussed at pages 16-21 and 56-57, *ante*.

Plaintiff offered no admissible evidence of Defendant's subjective mental state regarding intentional or reckless disregard for the true facts. As noted above, the affiants make inadmissible conclusory the Defendant knew the terms of documents and seek to further infer he thus "knew" some of his statements were false. But, *arguendo*, even if Plaintiff had shown some admissible evidence that some of Defendant's statements were "false," the mere showing of falsity is not evidence of Defendant's subjective mental state to recklessly or intentionally ignore the truth.

Affiants also repeatedly offer unsupported conclusions, such as Defendant "maliciously distort[ed] information" [Norbet, ¶ 5, ER 85] or made "a deliberate misrepresentation of the facts and not *opinion.*" Neumann ¶ 21, ER 74 (emphasis in original). Defendant objected to such statements, including: Neumann ¶¶ 19-20 (lay opinions on the legal question of what statements are defamatory); Neumann ¶¶ 17-21 [ER 73-4] (lay testimony of what constitutes "opinion").

Benton ¶ 15 [ER 82][20] displays his *animus* towards Defendant by claiming the rowdy behavior of others shows the "entitled, belligerent, and uncooperative attitude reflected in Liles' posting." Benton does not purport

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20. Defendant objected to this at trial and in Liles CACOB, p. 42.

that Defendant himself was "belligerent" or displayed any "attitude" at all. There is no inference to be drawn from the raucous behavior of others about the falsity of Defendant's stated opinions or any level of culpability.

The only direct evidence of Defendant's subjective state of mind was that he was confused about what he thought were changes in rules. Affiants merely speculate about what he knew or thought and repeat the word "malice." Their inadmissible opinions are not creditable.

Nor can there be any inference about Defendant's knowledge or subjective mental state based on testimony about what others (bride's mother, wedding planner) knew about the contract terms. Even if the thoughts of others were proven, that cannot justify an inference this Defendant shared their thoughts or knowledge and had actual malice. ***Walsh***, 278 Or at 357.

b. LIMITED PURPOSE PUBLIC FIGURE.

Defendant argues that Plaintiff pled defamation to her personal reputation, not *per se* defamation of her business reputation. Should this Court construe Plaintiff's claim as alleging her business reputation was impugned, Defendant urges that Neumann is a limited purpose public figure for First Amendment analysis for two different reasons. She (1) offers a place of public accommodation and/or (2) advertises her services, voluntarily interjecting herself into debate with online commentators who respond to her solicitations and then are put off by her demeanor.

Plaintiffs who are otherwise private persons but become public figures on specific issues bear the heightened First Amendment burden of proving

actual malice, as do public figures. Greater constitutional burdens apply, because they "voluntarily exposed themselves to increased risk of injury from the defamatory falsehood concerning them." ***Wolston v. Reader's Digest Ass'n, Inc.***, 443 US 157, 164, 99 SCt 27 (1979) (citing ***Gertz***, 418 US at 345).

The *Opinion* relies upon ***Bank of Oregon*** and its holding that the Bank did not become a public figure merely by carrying on its business. 298 Or at 444. Defendant does not rely upon routine business activities, such as incorporating or applying for licenses, but on facts distinguishing Plaintiff's services. Unlike a bank, Plaintiff offers a place of public accommodation, touts online the unique nature of the venue, and seeks online testimonials ("special thanks to Carol"[21]), in the same manner a restaurant touts its food and chef. Defendant relies on Liles CACOB, pp. 29-32, discussing those who offer such public accommodations as public figures for defamation.

As a separate basis for limited public figure status, creating or entering an ongoing debate makes one a limited purpose pubic figure for the topics in that controversy. ***Curtis Publ'g Co. v. Butts***, 388 US 130, 164, 87 SCt 1975 (1967). ***Bank of Oregon***, 298 Or at 443. Defendants in ***Bank of Oregon*** conceded there had not previously existed a public controversy involving the bank president, so he had not become a public figure. *Id.*, 443. Defendant makes no concession regarding Neumann.

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21. See http://dancingdeermtn.com/testimonials.

Plaintiff had a practice of interjecting herself into discussions about her venue and demeanor, a debate which pre-existed Defendant's criticism of her interactions with guests when he was in attendance. See posts of Betsy F. and Valerie (p. 3, *ante*) and Neumann ¶ 13 [ER-72], describing her interactions with those who had posted negative reviews.

Steaks Unlimited, Inc. v. Deaner, 623 F2d 264, 280 (3rd Cir 1980), concluded that a promotional campaign by a butcher made it a limited purpose public figure regarding quality and pricing of its products:

> Steaks' actions were calculated to draw public attention to the company and to stimulate consumer interest in its product. The company thereby voluntarily relinquished whatever protection it may have possessed as a purely private entity and is, in the context of this suit, properly characterized as a public figure within the meaning of ***Gertz***.

Bose Corp. v. Consumers Union of U.S., Inc., 466 US 485, 104 SCt 1949 (1984), refused to permit any recovery based on a CONSUMER REPORTS review and words which, even if incorrect, represented "the sort of inaccuracy that is commonplace in the forum of robust debate to which the ***New York Times*** rule applies." The district court had found Bose to be a limited purpose public figure, specifically basing its analysis upon cases discussed at Defendant's briefing to the courts below [CACOB, pp. 29-31] (in particular, ***Steaks Unlimited, Inc.***, *supra*). The U.S. Supreme Court reviewed *de novo*, approving the limited public figure finding, without elaboration.

The determinative factors making Bose a limited public figure apply in this case. Bose sought publicity for its products and its promotional

advertising stressed the product's attributes. ***Bose Corp. v. Consumers Union of U.S., Inc.***, 508 FSupp 1249, 1273 (D Mass 1981). CONSUMER REPORTS did not create the controversy over Bose's product; it merely "added its voice" to the those already debating the subject. *Id.* Bose injected itself into the dispute through its advertising [*id.*] and solicitation of reviews. *Id.*, 508 FSupp at 1274.

Makaeff v. Trump University, LLC, 715 F3d 254 (9th Cir 2013), made a similar finding based on a pre-existing online controversy about Trump University. It became a limited purpose public figure on the topic of its real estate courses. When Makaeff commented, there existed online student/customer complaints and debate on the University's legitimacy. *Id.*, 715 F3d at 267. Both "Advertising * * * and addressing or creating a public controversy, can" voluntarily interject the business and its advertised products into debate on a topic of public interest. *Id.*, 715 F3d at 267-8.

Plaintiff here actively engages in advertising her services to the public. It is entirely foreseeable that people will form opinions about her role, and express them. Plaintiff cannot avoid being a limited public figure on the topics for which she seeks publicity by claiming she wants only flattering comments in response.

> [T]he plaintiff is not permitted to avoid the * * * actual malice standard by protesting, "I didn't want the attention." The proper question is not whether the plaintiff volunteered for the publicity but whether the plaintiff volunteered for an activity out of which publicity would foreseeably arise.

Smolla, LAW OF DEFAMATION, § 2:32.

Neumann admits she contacted earlier negative online commentators [Neumann ¶ 15, ER 73] and so voluntarily joined the fray to change their negative assessments. She did so "in order to influence the resolution of the issues involved." ***Gertz***, at 345. Defendant added his voice to that discussion, and Plaintiff must show his actual malice in making the Review.

E. INSUFFICIENT PROOF OF DAMAGES.

The *Opinion* refers to affidavit testimony that bookings at the venue dropped sometime after Defendant's Review in June 2010 as sufficient to show damages. There is no evidence any drop in bookings resulted from Defendant's statements. There is a difference between an inference which may be drawn from circumstantial evidence and mere speculation. Here, the only provable circumstances were that Defendant's Review appeared in June 2010 and there was a later drop in bookings in 2011. Coincidence is not correlation. Correlation is not causality.

Inferences must be reasonable. It is not logically probable that economic harm was caused by Defendant's Review, when that is but one possibility among plausible other causes. There can be yearly fluctuations in the number of booked events, so there is no probative value in variation between 2010 and 2011. Oregon had been in an economic slump since 2008. Couples during the downturn may have opted to wed without the expense of renting a weekend venue.

Importantly, other negative online reviews of Plaintiff's business appeared before Defendant's and after. There is no logical reason to infer a

drop in bookings following the 2010 Review was caused by Defendant's Review than there is to blame the downturn on Valerie's or Betsy F.'s earlier negative comments. Reduced bookings could have been caused by poor word-of-mouth from them or others.

Since it cannot be inferred that the Review caused any drop in bookings, any expenses incurred by Neumann claimed in ¶¶ 8-9 [ER 71] (or the business, which is no longer a plaintiff) for upgrading the business's web presence cannot be "caused" by the Review.

Benton ¶ 5 [ER 80] avers two couples visited the venue, used phrases similar to Defendant's, then did not book the site. Visiting and then not contracting does not allow an inference that the Review caused the couples to look elsewhere. They may have preferred another accommodation. Others declined to rent because of the alcohol policy and negative impressions after meeting Neumann. SER 9 (Betsy F.)

To the extent the *Opinion* considered the following, Defendant objected as hearsay and lacking proof that any out-of-court declarants declined to book an event at all. Neumann ¶ 12 [ER 72]; Norbet ¶ 18 [ER 88].

Defendant repeats and incorporates his objections stated at (OJIN 28), ER 120; Liles CACOB, p. 38.

V. CONCLUSION.

For the reasons stated above, the *Opinion* should be reversed.

Dated: January 15, 2015

Respectfully Submitted,

/s/ Linda K. Williams

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CERTIFICATE OF COMPLIANCE WITH LENGTH LIMITATIONS AND TYPE SIZE REQUIREMENTS ORAP 5.05

Length of Opening Brief on Review

I certify that (1) the foregoing OPENING BRIEF ON MERITS OF DEFENDANT-RESPONDENT/CROSS- APPELLANT CHRISTOPHER LILES complies with the word-count limitation of ORAP 5.05(2)(b)(i), and (2) the word count of this brief for elements of text described in ORAP 5.05(2)(a) is 13987 words as determined by the word-counting function of Wordperfect 5.1.

Type Size

I certify that the size of the type is not smaller than 14 point for both the text and footnotes, as required by ORAP 5.05(2)(d)(ii).

Dated: January 15, 2015

/s/ Linda K. Williams

Linda K. Williams

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I FILED this date by Efile the original of the foregoing OPENING BRIEF ON MERITS OF DEFENDANT-RESPONDENT /CROSS-APPELLANT CHRISTOPHER LILES and further that I SERVED by it by Efile, per instructions of the Clerk of the Oregon Supreme Court, on all opposing counsel listed in this case in the records of this Court.

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