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,

v.

CHRISTOPHER LILES,

Defendant-Respondent
Cross-Appellant.

Lane County Circuit Court Case No. 121103711
Opinion of the Hon. Charles D. Carlson

Court of Appeals
A149982

S062575

BRIEF OF *AMICUS CURIAE* POLICY INITIATIVES GROUP IN SUPPORT OF PETITION FOR REVIEW OF DEFENDANT-RESPONDENT/CROSS APPELLANT CHRISTOPHER LILES

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

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MISCELLANEOUS

Amicus Curiae Policy Initiatives Group ("PInG") supports the Petition for Review filed by Christopher Liles, Defendant/Respondent/Cross-Respondent in *Neumann and Dancing Deer Mountain, LLC v. Liles*, CA No. 149982, 261 OrApp 567 (March 12, 2014) (the "*Opinion*"). PInG agrees with Petitioner that the *Opinion*:

(1) misapplies both the burdens of proof and persuasion under the two-prong test of ORS 31.150., *et seq.*, Oregon's anti-SLAPP law, and

(2) does not follow Oregon cases on defamation.

PInG particularly urges review of these legal questions, presented by Petitioner Liles:

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" [*Wallulis v. Dymowski*, 323 Or 337, 348, 918 (1996)] sufficiently raise conditional privileges?

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

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

This Court should lift the *Opinion*'s chill on consumer online speech and give guidance for the exercise of such rights by consumers who use peer-to-peer social media reviews to exercise those rights. Oregon Constitution, Art I, § 8; First Amendment, U.S. Constitution.

Only this Court can:

(1) clarify burdens under Oregon's anti-SLAPP law [ORS 31.150, *et seq*.] and contemporary standards for evaluating the context of internet speech;

(2) affirm the vitality of the conditional privileges of public concern and of mutual concern among and between members of social media communities; and

(3) acknowledge that voluntary social media and online advertising presence can make a business or businessperson a "limited purpose public figure" on the topics they display and advertise.

I. THE LEGAL QUESTIONS HAVE IMPORTANCE BEYOND THE PARTICULAR CASE AND REQUIRE DECISION BY THIS COURT.

It is important to read exactly what Defendant posted on Google Reviews, set forth by the *Opinion*, 261 Or at 571. Reversing the trial court, the *Opinion* held that these ordinary comments, alleging no crime, were *prima facie* defamatory, because:

> Statements falsely alleging facts that are "likely to lead people to question [a] plaintiff's fitness to perform his job" are defamatory *per se*.

261 OrApp at 576. But the *Opinion* identified no false allegation of fact by Defendant and then failed to apply the correct standard of fault, erring in its conclusion that defamation *per se* is somehow strict liability for defamation. The *Opinion* failed to address fault at all, concluding that liability could be faced upon a finding of fact "that defendant's online statements impute to Neumann conduct that is incompatible with the proper conduct of the operation of a wedding venue." *Id.* Thus, according to the *Opinion*, a consumer posting an online review is liable for defamation if he honestly posts his opinion that a wedding venue manager was "rude," since that would

be "incompatible with the proper conduct of the operation of a wedding venue."

> By stating that Neumann was rude to multiple guests, defendant, at a minimum, implied that Neumann engaged in conduct that breached the rules of decorum expected at a wedding.

Id., 261 OrApp at 578.

If upheld, the *Opinion* will revolutionize the law of defamation and how commerce is conducted in Oregon and will very significantly reduce the unbiased information available to Oregon consumers about products and services.

A. ORAP 9.07(2): THE ISSUES DO AND WILL ARISE OFTEN.

1. CYBER-SLAPP SUITS ALREADY OCCUR OFTEN.

"BE CAREFUL!! In May 2010 Dr. Saleh told me that I had 10 cavities after *never having one in 32 years*, an [*sic.*] filled them at a cost of over $1000 * * *. If you need a cleaning his hygienist do [*sic.*] good work, but if Dr. Saleh tells you that you have cavity - GET A SECOND OPINION and GET IT FILLED ELSEWHERE."

> -- Yelp! review of Portland dentist; defamation and interference with business claims dismissed on anti-SLAPP motions.[1]

"Something creepy about this church." "The pastor of this church thrives on control."

> -- Google Review of Beaverton church by former congregants; defamation claims by Church against 3

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1. *Dental Dynamics, Inc., and Mo Saleh v. Spencer Bailey*, Multnomah County Circuit Court Case No. 1204-04413.

former congregants for online reviews and blog statements, all dismissed on anti-SLAPP motions.[2]

"Disaster!!!!! Find a Different Wedding Venue." "The 'bridal suite' was a tool shed that was painted pretty, but a shed all the same."

-- Google Review found defamatory by The *Opinion* in instant case.

All of the above consumer gripes posted on internet sites by Oregonians resulted in recent lawsuits. Each plaintiff had its own website and solicited comments online. Only the *Opinion* found defendant potentially liable for defamation.

There is a nationwide surge in lawsuits for defamation and related torts arising from negative online reviews of products or services or warnings by consumers, known as "Cyber-SLAPPs."[3] In all of the foregoing examples, the Oregon trial court dismissed all plaintiffs' claims upon motions to dismiss under ORS 31.150, *et seq*, Oregon's anti-SLAPP statute. But the *Opinion* found the consumer warnings in this case were personally defamatory of the individual plaintiff Neumann (proprietor of the business) and reversed the dismissal of that claim.

Other recent Oregon online defamation lawsuits include:

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2. *Beaverton Grace Bible Church v. Julie Anne Smith, et al.*, Washington County Circuit Court Case No. C121174CV. See App-28-30.

3. Comment, *Cybersmear or Cyber SLAPP: Analyzing Defamation Suits Against Online John Does as Strategic Lawsuits Against Public Participation*, 25 Seattle U L Rev 213 (2001) ("*Cybersmear or Cyber SLAPP*"); www.cyberSLAPP.org (website collecting cases since 2004); *In Yelp suit, free speech on Web v. reputations*, WASHINGTON POST, December 4, 2012 (App-19); *Negative online reviews may end in defamation lawsuits*, DETROIT FREE PRESS, September 2, 2014 (App-24).

Jerrold R. Darm, M.D. v. Tiffany Craig, Multnomah County Circuit Court Case No. 1107-08823 ($1 million defamation claim based on blog and tweet (resolved by the parties with anti-SLAPP motions pending);

Chief Aircraft, Inc. v. Eric Grill, Josephine County Circuit Court Case No. 12-CV-1156 (defamation/interference with economic relations claims based on consumer venting about nondelivery of merchandise on consumer gripe site, Ripoff.com; anti-SLAPP motions denied), on appeal as A155317.

Art Robinson v. Peter DeFazio, Josephine County Circuit Court Case No. 12CV1144, (several false light and appropriation of image claims, *inter alia*, based on internet electioneering advertisement stating plaintiff was opposed to creation of Social Security program; all claims dismissed pursuant to anti-SLAPP motions), fee award only on appeal, A156582.

Tom Lowell, dba Piano Studios and Showcase, v. Matthew Wright and Artistic Piano, Ltd, Jackson County Circuit Court Case No. 13CV04582 (defamation *per se* claim for negative Google Review, "this guy can't be trusted," regarding proprietor of Medford area piano showroom, trial pending).

Benco Commercial Real Estate LLC, and Benjamin S. McInnis v. Oouglas A. Duguay, Multnomah County Circuit Court Case No. 140201466 (defamation claims by leasing company and owner over tenant complaints on blog and BetterBusinessBureau.com, anti-SLAPP motions pending).[4]

2. THE ONGOING REVOLUTION IN COMMUNICATION WILL INCREASE OPPORTUNITIES FOR CYBER-SLAPP SUITS.

This Court has not undertaken comprehensive review of free speech and the contextual analysis required by the Oregon and federal constitutions in defamation cases for decades. During that time, the "marketplace" for speech and opinion has changed from one dominated by mass media and a few

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4. Amicus requests the Court take judicial notice of the existence of the claims and procedural facts of all the trial court references, as they are available though OJIN OnLine courts.oregon.gov/OJD/OnlineServices. OEC 201.

wealthy "voices," as noted in ***Miami Herald Publ. Co. v. Tornillo***, 418 US 241, 248-50, 94 SCt 2831 (1974), to one where on the internet:

> any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.

Reno v. American Civil Liberties Union, 521 US 844, 870, 117 SCt 2329 (1997). Anyone can now publish on Facebook, Twitter, personal blogs, and dozens of websites soliciting consumer reviews as part of their own income-producing business models. CONSUMER REPORTS provided a partial list of the most prominent of such sites as of August 2011 (App-1),[5] including

AirlineComplaints.org	Complaints.com	My3cents.com
Amazon.com	ComplaintsBoard.com	PissedConsumer.com
Angie's List	ConsumerAffairs.com	RateMDs.com
ApartmentRatings.com	The Consumerist	RipoffReport.com
Avvo.com	Edmunds.com	TripAdvisor.com
Charity Navigator	Epinions.com	TrustLink.org
CNET	MeasuredUp.com	Yelp.com

Since then more prominent consumer review sites have emerged, such as Google Reviews.

Online commentary on products and services is exploding. Facebook became open to everyone over 13 (not just persons connected to select schools[6]) in 2006. Twitter, a micro-blogging site, was launched in 2006. Google Reviews started even later.

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5. http://www.consumerreports.org/cro/money/consumer-protection

6. Carlson, "At Last -- The Full Story of How Facebook was Founded," *Business Insider*, March 5, 2010; http://www.businessinsider.come/how-facebook-was founded-2010-3?op=1

B. ORAP 9.07(3): MANY PEOPLE ARE AFFECTED BY THE DECISION, AND ITS CONSEQUENCES ARE IMPORTANT TO THE PUBLIC.

Literally hundreds of millions of people read reviews of and comments about products and services posted on the internet by ordinary consumers, such as Christopher Liles (Defendant). Literally millions of people have posted such reviews and comments. The result is an ongoing and rapidly expanding revolution in commerce. Consumers now rely on these millions of volunteered reviews and comments. Nielsen Corp., *Consumer Trust in Online, Social and Mobile Advertising Grows* (April 2012) (App-3).

Need to hire a contractor to work on your house? Find thousands of review of local contractors on Angie's List or Google Reviews or Yelp!. Need a wedding venue? Check out Weddingwire.com or Theknot.com or Weddinglocation.com or Yelp! or Google Reviews or TripAdvisor. Or you can navigate to websites maintained by each merchant and check out the reviews posted there, although the merchants can remove or alter the negative reviews posted on their own sites.

Once the voices of the few dominated [***Miami Herald Publ. Co. v. Tornillo***, *supra*, 418 US at 251], and millions were passive listeners, viewers or subscribers to the few who controlled the airwaves or owned newspapers or magazines. Now, "[e]very customer is a potential reviewer--a development that shifts economic strength from business owners and traditional media outlets to consumers." "The dissatisfied can easily reach interested (or annoyed) audiences on Yelp, Facebook, or Twitter." *Comment,*

When the Customer is Wrong: Defamation, Interactive Websites, and Immunity, 33 REVIEW OF LITIGATION 679, 682, notes 6, 10 (Summer 2014).

"Every consumer" is also now a potential defendant in a suit for hundreds of thousands or even millions of dollars by

> third parties suing users directly in an effort to shut them up, close them down, or teach them a costly lesson. The weapon - SLAPP - has been a tactic for decades, but the proliferation of online targets such as Facebook pages, blogs and consumer gripe sites, has breathed new life into this disfavored litigation practice.

Richards, *A SLAPP in the Facebook: Assessing the Impact of Strategic Lawsuits Against Public Participation on Social Networks, Blogs and Consumer Gripe Sites*, 21 DEPAUL J. ART, TECH. & INTELL. PROP. L. 221 (Spring 2011) ("*SLAPP in the Facebook*").[7]

Any action by the courts to allow merchants to stifle online consumer reviews and comments will have widespread effects. Consumers will be intimidated against posting reviews, so other consumers will be denied the benefit of their experiences.

The prospect of consumer liability for posting a negative review is made worse by the Computer Decency Act (1996), 47 USC § 230(c)(1) and (2), which granted blanket tort immunity to commercial internet sites and social media platforms, deeming them not "publishers" of the consumer-generated content they display.[8] This leaves the consumer/reviewer as the only target

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7. Frosch, *Venting Online, Consumers Can Find Themselves in Court*, THE NEW YORK TIMES, September 22, 2014 (App-4).

8. See, ***Barnes v. Yahoo!, Inc.***, 570 F3d 1096, 1101-02 (9th Cir 2009) (for (continued...)

defendant, and it removes the incentive for the commercial sites and platforms to even warn users that they may be cyber-SLAPPed for lawsuits seeking millions of dollars.

While consumer review sites make money and enjoy immunity from tort liability, the costs of defending the speech actually posted on their sites falls upon the reviewer. Only the courts, by proper application of free speech jurisprudence and anti-SLAPP laws, can protect consumers who use these services to share information.

Further, imposing liability for defamation upon the consumer/reviewer for sharing his honest views of the merchant, as does the *Opinion,* will further disrupt the economic system by favoring large corporations over small merchants. As any review posted online can reach worldwide, a large corporation can claim far greater "damages" than a local store or service. Any consumer who posts a negative review or comment about a product or service of a large corporation could well face a life-changing money judgment, under the *Opinion*.

Professor Richards notes [*A SLAPP in the Facebook, supra,* p. 222] the $750,000 suit against a student who started a Facebook page for complaints about a towing company and similar claims:

8.(...continued)

purposes of immunity provision, courts must determine if the internet service provider or social media provider is the "publisher or speaker," and it becomes the speaker only if it actively edits content provided by a third party before presenting the content on its site).

> He is not alone in finding himself a defendant in a lawsuit over remarks he made over the Internet. In fact, he is part of a growing trend of businesses and professionals suing consumers who griped about them online. Jennifer Batoon, a San Francisco marketing manager, used Yelp.com to vent about "a particularly painful visit to the dentist."] * * *. The dentist then sued Batoon "for defamation, charging that the review caused a drop in her revenue." Batoon said "she was shocked" when the lawsuit was served on her and feared "the prospect of paying tens of thousands of dollars in legal fees."] Fortunately for her, the matter took place in California, a state with one of the nation's earliest anti-SLAPP laws. Under the terms of that law, a judge dismissed the defamation counts and ordered the dentist "to pay $43,000 for Batoon's legal fees."

Once again, huge damages sought against ordinary consumer warnings are not happening only in California. Oregon has also seen a dentist sue for $300,000 a dissatisfied patient who complained on Yelp! *Dental Dynamics v. Spencer Bailey, supra*. App-7.

C. ORAP 9.07(1)(a) and (g) and ORAP 9.07(14): THE CASE PRESENTS SIGNIFICANT ISSUES STATE AND FEDERAL CONSTITUTIONAL PROVISIONS AND COMMON LAW;THE *OPINION* APPEARS TO BE WRONG, AND ONLY THIS COURT CAN CORRECT THE ERRORS.

This case requires interpretation and application of the First Amendment and long-established case law of conditional privileges to speak under Article I, § 8, of the Oregon Constitution. Failure to properly apply privileges and burdens in defamation law undermines rights of defendants to assert successful anti-SLAPP defenses.

The *Opinion* is wrong and creates serious injustice by chilling consumer speech. These errors cannot be corrected by another branch of government.

1. INCONSISTENT STANDARD FOR ACTIONABLE OPINIONS BETWEEN FEDERAL LAW AND THE *OPINION*.

After news accounts of the *Opinion* in this case, the following comment about Neumann and her wedding venue, Dancing Deer Mountain, appeared on Citysearch and Yelp! [App-9]. It illustrates the chill on those who use the internet to share consumer information:

> Abbi H.
>
> The venue was beautiful and the pictures turned out awesome, but we thought that the owners were very difficult to work with. According to an article published by The Register Guard (the local newspaper), Dancing Deer Mountain has tried to sue past guests for posting negative reviews. You can Google it. I don't want to get sued so I won't elaborate on all of the negatives about the owners. The article also states that Dancing Deer Mountain hires a company called "Review Boost" to post positive reviews about them.

Under the reasoning of the *Opinion*, Abbi can be sued for defamation because of her statement "the owners were very difficult to work with." After all, if a statement that the owners were "rude" was defamation (because it was "incompatible with the proper conduct of the operation of a wedding venue," 261 OrApp at 576) then the statement that "the owners were very difficult to work with" is also defamation. Abbi is not saved by her vagueness, as the *Opinion* would find she "implied" undisclosed facts for her overall negative impression. 261 OrApp at 578.

Her vagueness is not actionable, under ***Standing Committee v. Yagman***, 55 F3d 1430 (9th Cir 1995) ("***Standing Committee***"). Attorney Yagman was sanctioned by the bar for stating that Judge Keller "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 Ninth Circuit found the first part of the statement factual and true but the second sentence to be "opinion; it conveys Yagman's personal belief that Judge Keller is anti-Semitic." *Id.* at 1439. No matter how unjustifed the opinion, "Readers were 'free to form another, perhaps contradictory opinion from the same facts' * * * as no doubt they did." *Id.*, at 1440 (citation omitted).

Standing Committee discusses the examples set oout in § 566 of the RESTATEMENT (2D) OF TORTS.

> "I think Jones is an alcoholic," * * * is an expression of opinion based on implied facts, see [RESTATEMENT], § 566, cmt. c, illus. 3, because the statement "gives rise to the inference that there are undisclosed facts that justify the forming of the opinion" [] Readers of this statement will reasonably understand the author to be implying he knows facts supporting his view * * *.

Standing Committee, *supra*, 55 F3d at 1439.

This is contrasted with stated facts to reach a disputable conclusion:

> [Jones] moved in six months ago. He works downtown, and I have seen him during that time only twice, in his backyard around 5:30 seated in a deck chair ... with a drink in his hand. I think he must be an alcoholic.

Id. In the second example, the conclusion may be seem unreasonable to some, but is not actionable because, with those few facts stated "readers are therefore unlikely to construe the statement as insinuating the existence of additional, undisclosed facts. *Id.*

The *Opinion*, on the other hand, is confusing and chilling to expression. It disregards controlling Ninth Circuit First Amendment jurisprudence that a derogatory opinion based on stated facts is nonactionable, regardless of how

unreasonable the opinion drawn from those stated facts. Under the *Opinion*, a commentor is held potentially liable for actually stating facts which formed the basis of his opinion: the appearance of the "bridal suite," the dispute over deposit return, confusion over rules for alcohol service and when to wrap-up the weekend event. But the *Opinion* found that Defendant "implies" still other, unknown defamatory facts.

The *Opinion* thus poses a dilemma for everyone in Oregon who even thinks about posting a negative review. If you state a negative consumer warning reasonably based on what you experienced, and you can be successfully sued for defamation in Oregon under the *Opinion* for implying still other facts. If you state a negative overall opinion without any supporting facts, you can be sued for possible defamation in federal court. The bigger the merchant, the more you have to pay in damages. Any reasonable person would never offer a negative review or comment about any merchant, product, or service and would particularly avoid any possibility of offending a large corporation that could allege large, worldwide damages resulting from a single consumer’s negative review.

The *Opinion* requires self-censorship instead of expression and stifles consumer reviews.

2. FAILURE TO PROPERLY CONSIDER CONTEXT FOR ACTIONABLE OPINIONS UNDER CONTEMPORARY STANDARDS.

While consumer online reviews and comments have become important elements of commerce, readers retain the ability to distinguish between hyperbole and reality.

Sarcasm and "snark" are part of what the online audience understands, but even such "tweets" are subject to suit:

> * * * Chicago resident Amanda used her Twitter account to complain about mold in her apartment, which provoked the landlord to sue her. Horizon Group Management, LLC sought $50,000 in damages from after she tweeted: "Who said sleeping in a moldy apartment was bad for you? Horizon realty thinks it's okay." * * * Jeffrey Michael, a company spokesperson, said * * * "We're a sue first, ask questions later kind of an organization." A judge dismissed the case in January 2010.
>
> Indeed, Jeffrey Michael's attitude is representative of that of a SLAPP filer. Winning the lawsuit is not the objective of a SLAPP. Rather, the goal is achieved by "sinking a critic deep into legal fees even if the court will eventually toss the case."[9]

SLAPP in the Facebook, supra, p. 223.[10]

The *Opinion* fails to properly consider conversational communications online. Such online speech is not scrutinized by paid editors or vetted by cautious media law firms. Nor does the audience expect it to be. Internet

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9. Citing at n39 and n40: Donovan, *Tenant's 'Moldy' Tweet Not Libel: Judge*, CHICAGO SUN-TIMES, January 22, 2010, at 6; Beahm, *Social Media Complaint, Defamation & SLAPP Suites*," Reuters, June 4, 2010.

10. Oregon has had a far more threatening Twitter suit for a $1 million, filed by a doctor against a Twitter commenter who linked her tweets to publicly-available medical disciplinary records. *Darm v. Craig, supra*. App-10-20.

commentary is recognized for spontaneity, informality, and often exaggerated and hastily written exchanges. See Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE LJ 855, 936-7 (2000). Considering statements posted in a section of Craigslist entitled "Rants and Raves," ***Summit Bank v. Rogers***, 206 CaLApp4th 669, 696-97, 142 CalRptr3d 40 (2012), found that a reader

> 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.

Art of Living Found. v. Does, 2011 WL 2441898, at *7, found that critical blog statements with "heated" discussion and criticism in context were not defamatory assertions of fact[11]). See ***Nicosia v. De Rooy***, 72 FSupp2d 1093, 1101 (ND Cal 1999), 72 FSupp2d at 1101 (statements made on online group less likely to be seen as assertions of fact or were based on

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11. 2011 WL 2441898, at *7:

> As to the specific context the Court considers the "content of the allegedly defamatory statements, which includes the extent of figurative and hyperbolic language and the reasonable expectations of the readers." Certain statements are obviously critical, and do use words like "embezzle," "fraud," and "abuse." For example, there are statements that: "they obtained money from participants on false, deceitful declarations"; "companies, individuals give money to AOL organization for specific projects, but the money never reaches those projects ... "; and "if you ... want to launder your black money ... then AOL is for you." Plaintiff has its strongest case for defamation when these particular statements are read in isolation. With context, however, these statements of hyperbole reflect poorly on Art of Living, but do not amount to factual accusations of criminal activity, especially on Blogs that readers obviously expect are critical of Art of Living.

some facts[12]); ***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 message boards, chat rooms, and blogs, than to similar remarks made in other contexts").

3. FAILURE TO CONSIDER ROLE OF TRADITIONAL CONDITIONAL PRIVILEGES IN REPORTING ON MATTERS OF MUTUAL CONCERN TO ONLINE COMMUNITIES.

The *Opinion* (p. 580) errs in holding, "On this record, we cannot conclude as a matter of law that defendant was privileged to make the allegedly defamatory statements regarding Neumann."

First, this placed the burden of proof on the wrong party. Under ORS 31.150, it is the plaintiff who must show a probability of prevailing on the merits, not defendant who must show that he prevails "as a matter of law."

Second, the internet creates communities of interest and allows anyone to fairly report on or to review topics of mutual interest. Twitter hashtags (such as #chevysucks, #fordsucks, #toyotasucks, and literally millions more) rapidly

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12. "[Plaintiff] killed Jan plaintiff covered up "embezzlement of at least $33,000 from Jan heirs," and was a "self-serving fraud and criminal," "acted illegally," and was "a man who has alienated, betrayed or lied to everyone in the Beat community," were all found to be hyperbole or opinion based on facts disclosed during a long course of defendant's discussion of the literary affairs. *Id.*, 72 FSupp2d at 1101.

form networks of commentators on a particular product or business practice. "[P]rotection 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 Co. v. Sullivan***, 376 US 254, 260 (1964)).

New York Times Co. remains relevant, since it draws its rationale [376 US at 280-82] from a "fair comment" decision, ***Coleman v. MacLennan***, 78 Kan 711, 98 P 281 (1908), which held that, regardless of damage to reputation, statements about matters of public concern were essential for the public welfare.

4. FAILURE TO CONSIDER PLAINTIFF'S VOLUNTARY INTERJECTION OF HERSELF INTO THE PUBLIC EYE OF MILLIONS THROUGH INTERNET AND SOCIAL MEDIA.

The *Opinion* (p. 579) errs in relying upon ***Bank of Oregon v. Independent News, Inc.***, 298 Or 434, 443 (1985), in dismissing a limited purpose public figure ("LPPF") analysis under the First Amendment. Individuals and commercial entities may (as facts warrant) be LPPFs based on online advertising, voluntary publicity-seeking, and engaging in social media debates about their products or services.

Gertz v. Robert Welch Inc., 418 US 323, 94 SCt 2997 (1974), set out heightened evidentiary burdens under the First Amendment for certain defamation plaintiffs: "persons who are public figures for all purposes and those who are public figures for particular public controversies." In that

second category of LPPF is "an individual [who] voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Id.*, at 351.

The first rationale for higher burdens on LPPFs is that they are less vulnerable to injury from defamatory statements because they can resort to effective "self-help" publicity (legacy print and broadcast media publicize their responses because of their fame or celebrity).

> Thus they "have a more realistic opportunity to counteract false statements than private individuals normally enjoy."

Id. at 345. But now the offended merchant has the "self-help" of responding to online comments or offering his own comments, an ability at least the equivalent of the pre-internet version of an LPPF.

Second, and more important, is that LPPFs have "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). Virtually every lower court discussion of the public figure/private figure dichotomy

> has treated the voluntariness requirement as central to the determination, and it is probably the most firmly entrenched of all the factors courts consider.

Smolla, LAW OF DEFAMATION §2:31 (West database updated May 2014).

> [T]he plaintiff is not permitted to avoid the strictures of 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.

Id. § 2:32. Today, online publicity and comment will foreseeably arise from the selling of any product or service.

Such publicity will certainly arise, when the merchant affirmatively seeks attention on the internet, as did Plaintiffs here. They sought online comments, created a social media presence, touted the owners' activities, and contacted earlier negative online reviewers (Affidavit of Carol C. Neumann, ER-72, ¶ 13). They had access to "channels of effective communication" [***Gertz***, at 344] and voluntarily thrust the topics of their attributes into the public realm.

Makaeff v. Trump University, LLC, 715 F3d 254 (9th Cir 2013), held Trump University to be an LPPF on the topic of its real estate courses, not because of the notoriety of Donald Trump, but because:

> (1) "[b]y 2007 and 2008, disgruntled Trump University customers were posting complaints on public Internet message boards" [*id.*, at 259] so that "the 'specific question' of Trump University's legitimacy had become a public controversy" [*id.*, at 267]; and
>
> (2) "this dispute had the potential to affect 'the general public or some segment of it in an appreciable way.'" *Id.*

Quoting ***Gertz***, 418 US at 345, ***Makaeff***, 715 F3d at 267-8, concluded:

> Advertising * * * addressing or creating a public controversy, can be a way of 'voluntarily expos[ing] [the company] to increased risk of injury from defamatory falsehood' concerning the company and its advertised products.

It relied upon ***Steaks Unlimited, Inc. v. Deaner***, 623 F2d 264 (3d Cir 1980), which found plaintiff an LPPF because of its "advertising blitz" and ***Nat'l***

Found. for Cancer Research, Inc. v. Council of Better Bus. Bureaus, Inc., 705 F2d 98 (4th Cir 1983).

When businesses advertise, they invite criticism. ***Park v. Capital Cities Communications***, 181 AD2d 192, 197, 585 NYS2d 902 (1992), found an ophthalmologist to be an LPPF based on "actively seeking media attention" which "invited favorable publicity for his practice." The plaintiff in ***Parker v. Evening Post Publ'g Co***., 317 SC 236, 452 SE2d 640, 644 n3 (1994), by advertising his auto dealing, "invited the public's attention and assumed the accompanying risk of that attention." *See, e.g.*, ***Quantum Elec. v. Consumers Union of United States***, 881 FSupp 753, 764 (D RI 1995); ***S&W Seafoods Co. v. Jacor Broad. of Atlanta***, 194 GaApp 233, 390 SE2d 228, 230 (1989); ***Greer v. Columbus Monthly Publ'g Corp.***, 4 Ohio App3d 235, 448 NE2d 157, 162 (1982); ***Journal-Gazette Co., Inc. v. Bandido's, Inc***., 712 NE2d 446, 454 (Ind 1999); ***Pegasus v. Reno Newspapers, Inc.***, 118 Nev 706, 721 (2002).

Those merchants, such as Plaintiffs here, who engage with online critics join the fray about their particular personal attribute or product. They should

be considered LPPFs.

Dated: September 24, 2014

Respectfully Submitted,

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

Length of Brief in Support of Petition for Review

I certify that (1) the foregoing BRIEF OF AMICUS CURIAE POLICY INITIATIVES GROUP IN SUPPORT OF PETITION FOR REVIEW OF DEFENDANT-RESPONDENT/CROSS APPELLANT CHRISTOPHER LILES complies with the word-count limitation of ORAP 5.05(2)(b)(ii), and (2) the word count of this brief for elements of text described in ORAP 5.05(2)(a) is 4838 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: September 24, 2014

/s/ Daniel W. Meek

Daniel W. Meek

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I FILED this date by Efile the original of the foregoing BRIEF OF AMICUS CURIAE POLICY INITIATIVES GROUP IN SUPPORT OF PETITION FOR REVIEW OF DEFENDANT-RESPONDENT/CROSS APPELLANT CHRISTOPHER LILES by Efile and further that I SERVED by it by Efile, on all counsel listed in this case in the records of this Court.

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