

OREGON LAW UPDATE

Want to Write a Critical Online Review? Be Prepared to Pay for a Defense

case in point...

From the desk of Josh Hayward: In a case update from last month Young v. Davis, 259 Or. App. 497, 314 P.3d 350 (2013), we discussed Oregon's anti-SLAPP statute which provides a way for a defendant who is sued over certain actions taken in the public arena to have a questionable case dismissed at an early stage. In a recent case before the Court of Appeals, the Court declined to uphold the trial court's anti-SLAPP dismissal regarding a defamation claim related to an online review of a business.

Claims Pointer: Online reviews generally contain a combination of fact and opinion. Opinions are protected from defamation claims. However, when an "opinion" implies the existence of undisclosed defamatory facts, it is actionable. In the professional context, a statement is defamatory if it is false and ascribes to another conduct, characteristics, or a condition incompatible with the proper conduct of that someone's business, trade, or profession.

Neumann v. Liles, 121103711, 2014 WL 960848 (Or. Ct. App. Mar. 12, 2014)

A Strategic Lawsuit Against Public Participation ("SLAPP") is a lawsuit that is intended to censor, intimidate, and silence critics by burdening them with the cost of a legal defense until they abandon their criticism or opposition. Oregon's anti-SLAPP statute, ORS 31.150, was enacted in 2001 to "permit a defendant who is sued over certain actions taken in the public arena to have a questionable case dismissed at an early stage." The statute provides a two step, burden shifting test. First, the court must determine whether the defendant has met its initial burden to show that the claim "arises out of" one or more protected activities enumerated in the statute. Second, if the defendant meets this threshold, then the burden shifts to the plaintiff to establish that there is a probability that the plaintiff will prevail on the claim by presenting evidence to support a prima facie case. If defendant is successful, the special motion to strike will be treated as a motion to dismiss and the court will enter a judgment of dismissal without prejudice. If the plaintiff meets its burden, the motion to strike will be denied and the court will enter a limited judgment denying the motion.

After attending a wedding at Dancing Deer Mountain, LLC, a wedding venue co-owned and operated by plaintiff Carol Neumann and her husband, defendant Christopher Liles posted a negative review on google.com. In the review, Liles characterized the venue as a "disaster" and Neumann as "two faced, crooked, and rude to multiple guest[s]." He stated further that Neumann and her husband "changed the rules as they saw

fit" by informing guests that they needed to leave the premises earlier than they had originally been told, and that Neumann would find a way to retain any security deposit and charge even more money for use of the facility.

Neumann and Dancing Deer Mountain sued Liles, with Neumann asserting claims for defamation and invasion of privacy by false light, and Dancing Deer Mountain asserting claims for intentional interference with economic relations and invasion of privacy by false light. On Liles' motion, the trial court dismissed the case under ORS 31.150, Oregon's anti-SLAPP statute, concluding that all of plaintiffs' claims fell within the scope of ORS 31.150(2), making them subject to the anti-SLAPP procedures, and that plaintiffs failed to establish a prima facie case in support of any of their claims. The court also awarded Liles his attorney fees under ORS 31.152. Plaintiffs appealed the dismissal of Neumann's defamation lawsuit and the award of attorney fees.

On appeal, plaintiffs argued that the trial court erred at both steps of the process. The court noted that plaintiffs failed to offer a "focused argument" as to why Liles' online review did not fall within Oregon's anti-SLAPP statute. The court declined to issue a ruling on this assignment of error but in discussion stated that it "appears" that online business reviews are within the plain text of the statute.

Plaintiffs argued that they submitted a prima facie case of defamation. Under Oregon law, 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



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harm, unless the statement is defamatory per se and therefore gives rise to presumptive special harm. In the professional context, a statement is defamatory if it is false and ascribes to another conduct, characteristics, or a condition incompatible with the proper conduct of someone's business, trade, or profession. Statements falsely alleging facts that are "likely to lead people to question [a] plaintiff's fitness to perform his job" are defamatory per se. Liles argued that his statements were nonactionable opinions and were figurative, rhetorical or hyperbolic.

The court stated that the evidence supporting the defamation claim was sufficient to meet the "low bar" to "weed out meritless claims meant to harass or intimidate" a defendant under Oregon's anti-SLAPP statute. That is, the evidence submitted by plaintiffs, if true, would permit a reasonable factfinder to rule in Neumann's favor on the defamation claim, and the evidence submitted by Liles does not defeat Neumann's claim as a matter of law. Neumann's evidence provided a basis from which a factfinder could find that Liles's statements were false. Neumann and two others who were present at the wedding that Liles attended submitted affidavits in which they declared that Liles' statements were not true. In addition a factfinder could find that Liles' online statements impute to Neumann conduct that is incompatible with the proper conduct of the operation of a wedding venue. Also, a factfinder could find that Liles' statement that Neumann is "crooked," apart from implying that she is not a wedding vendor who can be trusted, alleges that she is dishonest, and would be defamatory for that reason.

The court reversed the trial court's decision as to the defamation claim, vacated the attorney fee award, and remanded the case for further proceedings consistent with its opinion.



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