

# Smith Freed Eberhard

# OREGON LAW UPDATE

## Ninth Circuit Scraps Lawsuit against Rape Accuser under Oregon's anti-SLAPP Law

case in point...

**From the desk of Josh Hayward:** Several years ago, Oregon enacted a law that allows defendants to quickly dispose of meritless libel or defamation lawsuits when the lawsuits are based on the defendant's legitimate exercise of their First Amendment rights. Several states have enacted this type of anti-SLAPP ("Strategic Litigation Against Public Participation") law. The classic example of an appropriate use of the anti-SLAPP law is where a plaintiff sues for libel based on the defendant's protected statements to a newspaper. However, the law can also apply in a number of other contexts, including preventing a retaliatory lawsuit based on rape allegations.

**Claims Pointer:** In this case arising out of an alleged rape, the Ninth Circuit Court of Appeals held that because the plaintiff had failed to proffer any evidence demonstrating that the defendant made non-protected statements that damaged plaintiff's professional reputation, the defendant's anti-SLAPP motion to strike should have been granted. The case demonstrates how courts will analyze the evidence presented in an anti-SLAPP motion, an important consideration when evaluating whether to pursue a motion to strike.

Schwern v. Plunkett, 14-35576, 2017 WL 164323 (9th Cir Jan. 17, 2017)

Noirin Plunkett ("Plunkett") and Michael Schwern ("Schwern"), two open-source software developers, were married in November 2011 and lived together in Portland, Oregon. The marriage did not work out, and on the night the couple filed for divorce on September 19, 2013, they met for one final dinner at the home they once shared. Schwern claims that they then had consensual sex, but Plunkett claimed that he violently raped her. She went to the emergency room where she had a forensic examination, her injuries were photographed, and the police were called. Police arrested Schwern that night on charges of strangulation and harassment.

In the following days, information about Schwern's arrest circulated online. Three prominent open-source developers posted links on Twitter to Schwern's public arrest record, and some organizations with connections to the open-source community issued statements about Schwern's arrest and distanced themselves from him. Meanwhile, Plunkett moved from Oregon to Massachusetts shortly after Schwern's release on bail in late September 2013. In Boston that fall, Plunkett encountered Casey West ("West"), a mutual friend of the couple, and Plunkett allegedly told West about the violent rape.

In January 2014, Schwern sued Plunkett in federal court for defamation, intentional infliction of emotional distress, and intentional interference with economic relations, asserting that his professional reputation suffered due to statements she allegedly made to the individuals and organizations that commented online about his arrest. Plunkett responded by filing a special motion to strike under Oregon's anti-SLAPP law. The trial court denied Plunkett's motion on the ground that Schwern had established a prima facie case (that is, the evidence in his favor was sufficiently strong that Plunkett was called on to answer it). Plunkett appealed the ruling to the Ninth Circuit Court of Appeals.

Oregon's anti-SLAPP statute, ORS 31.150, was enacted in 2001 to create procedure for dismissing unfounded lawsuits attacking certain types of public speech through special motions to strike, also known as anti-SLAPP motions. As the Oregon courts have explained, the purpose of the law is to provide a mechanism for dismissing claims without merit that arise out of the exercise of the right of petition or free speech before the defendant racks up substantial expenses defending them.

The Ninth Circuit first established that it had jurisdiction, noting that the Oregon legislature had recently amended the anti-SLAPP statute to require that when the trial court denies an anti-SLAPP motion, it must enter a limited judgment. Under Oregon law, a limited judgment is appealable, thus allowing the denial of the anti-SLAPP motion to be



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immediately appealed without waiting for a final judgment to be entered.

View full opinion at: <https://cdn.ca9.uscourts.gov/datastore/opinions/2017/01/17/14-35576.pdf>

The Ninth Circuit then moved to the merits of the anti-SLAPP motion. The key issue was whether Schwern had presented substantial evidence to establish that he would prevail on his claims. The court noted that Schwern offered no evidence that Plunkett ever spoke with any of the individuals who posted on Twitter about his arrest or that she communicated with any of the organizations that issued statements on their websites. Rather, the online postings recited truthful information freely available to the public, including Schwern's public arrest record and the fact that he was arrested by Portland Police on charges of harassment and strangulation.

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The only evidence that Plunkett spoke to anyone about the incident was the statement from West that Plunkett told him about the alleged rape. But West's statement did not reveal anything about whether Plunkett was the source of the online commentary. As the court explained, whether Plunkett made a statement to West and whether she made statements to the individuals and organizations that commented online were two separate issues. Schwern offered no evidence that West repeated Plunkett's alleged statement to anyone, and the conversation Plunkett had with West took place after Plunkett moved to Boston. Not only was there no link to the online postings, but the timing was speculative at best.

Without evidence that Plunkett was the source of the online commentary, a jury could not reasonably find that Schwern met his burden of production to support his prima facie case with substantial evidence. Schwern's theory was merely speculative, and his allegation that he believed Plunkett made the statements was insufficient. Accordingly, Plunkett was entitled to relief under Oregon's anti-SLAPP law. The trial court was reversed, and the case was remanded with instructions to grant Plunkett's motion to strike.

case in point...



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