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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

SCOTT REDMOND,

Plaintiff and Appellant,

v.

GAWKER MEDIA, LLC, et al.,

Defendants and Respondents.

A132785

(San Francisco City & County
Super. Ct. No. CGC-11-508414)

Gawker Media, LLC, and Gawker Sales, LLC (collectively, Gawker) published an article in a technology weblog questioning claims made by Scott Redmond, the chief executive officer (CEO) of a small startup technology company, about the company's products and his past business successes. Redmond sued Gawker and the article's writers, John Herrman and Adrian Covert, for libel and false light. Defendants moved successfully for an order striking the complaint under Code of Civil Procedure section 425.16 (hereafter section 425.16). Redmond contends the trial court erred in finding he had not established a probability of prevailing on his libel claims. Based on our independent review of the record, we affirm the trial court's order.

I. BACKGROUND

A. *The Parties*

Redmond is the CEO and founder of Peep Wireless Telephony Company (Peep), which he describes as "an early stage company developing software intended to replace the current system of server racks and cell towers employed by wireless network carriers." Redmond has also founded other companies which he asserts have successfully

developed, designed, or built prototypes of a range of high-technology products using his ideas and inventions. On January 13, 2011, the technology weblog, Gizmodo, published a post by two of its writers, defendants Herrman and Covert, expressing skepticism about Peep and some of Redmond's other business ventures and technologies (hereafter the article or the post). Gawker owns and operates Gizmodo.

B. *The Article*

Entitled "Smoke & Mirrors: The Greatest Scam in Tech," Herrman and Covert's article begins with the authors' tongue-in-cheek commentary about how the consumer electronics industry promotes its products to technology reporters like themselves: "In the tech world, a few questions are usually enough. Does the product work? Is the idea good? How much does it cost? But as Peep Telephony reminds us, there's a fourth, all-important qualification: Is it *real*? ¶ The Consumer Electronics Show [(CES)], which took place in Las Vegas last week, is a place where you get lied to. A lot. Always, basically, which is one of the reasons reporters attending CES mope so melodramatically: for every cool thing you see, you have to endure hours of pitches, all of which are misleading, and many of which, disingenuously so. ¶ But that's how this industry—and plenty of others—work. They pitch; we parse. They stretch the truth; we try to make it contract. It can be a crude and occasionally uncomfortable system, but it generally works."

The article goes on to describe Peep and a number of Redmond's other business ventures based on information gathered from his Web sites and other sources accessible on the Internet.¹ Links to Redmond's Web sites and to YouTube video clips promoting his products were provided throughout the article. Written in a breezy, irreverent prose style, the article openly questions whether any of Redmond's products and product claims are technologically feasible and whether his product descriptions make

¹ The post states the authors tried to reach the company three times but were unsuccessful. Redmond disputes whether they made a good faith effort to contact him.

technological sense or were mere “technobabble” without real substance.² Hermann and Covert summed up Redmond’s business history as follows: “In addition to [the technology] being arguably impossible, the problems with Peep go much deeper than unclear business plans and sketchy PR. [¶] Peep Wireless is just the latest in a string of seemingly failed tech startups that spans back about two decades, all conceived, helmed and seemingly driven into the ground by one man: Scott Redmond. We’ve done a bit of digging into the Peep CEO’s past projects, and they don’t give us much faith in his current endeavor, to say the least. [¶] The pattern is easy to pick out: This dude shows up whenever there’s a bubble or hot trend in the tech business world that has yet to make it to the marketplace. Then he strings together a bunch of technical jargon that hardly informs what he’s doing, and presumably gets some kind of funding . . . [and forms companies] around said bubble. . . . [¶] Ultimately, the companies just disappear There’s no point in trying to ascribe motives to what Redmond does, and we don’t want to make this about character or intent. Point is, these ventures rarely—if ever—work. And through the harsh lens of hindsight, some look like they weren’t ever meant to.”

The article mentions and provides links to Web sites describing past projects of Redmond’s—none of which seemed to still be ongoing according to the authors: a mid-1990’s technology to stream major films free to any computer or television, even without an Internet connection; a virtual reality product; an inflatable, build-it-yourself electric-powered automobile; a personal flying device; and a hydrogen fuel storage system. The article’s concluding paragraphs return to the theme that claims about new consumer technology products generally should never be taken at face value: “This post isn’t meant as some kind of personal hatchet job, and to be honest, one shouldn’t be necessary

² For example: “Peep’s promises are manifold: customers will ‘never need to pay a phone bill again,’ and ‘all their email, Internet and media access would be free forever’. . . . [¶] But a visit to Peep’s website is vexing. Every page is jam-packed with sentences that don’t make sense, literally and technologically. . . . [¶] To be frank, this all sounds like bullshit. In fact, the combination of everything described was so strange, it almost made the company seem like a larger-than-life prank on the tech world.”

to dissuade investors from throwing money at this venture. Peep’s background information is freely available online, and everything you see above was discovered with a few quick searches on Google. Any investor—or reporter, for that matter—should be able to see these red flags on their own. . . . [¶] Rather, this is a glimpse at what happens when hype overcomes all else. It represents an unchecked version of the pungent, insidious promotional id of events like CES. And it’s worryingly familiar.”

The article generated hundreds of comments from readers, expressing praise and criticism for the authors, positive and negative reaction to Redmond and his products, and opinions and views on a range of subjects related to the CES and the technology industry.

C. Redmond’s Lawsuit

Redmond contacted Gizmodo by e-mail to complain about the piece, and requested to speak to someone “preferabl[y] live on CNN, to understand why you allowed an obvious competitor[’s] attack on my company and on me personally.” Joe Brown, the Gizmodo features editor, replied and offered to meet with Redmond and to correct any factual inaccuracies in the article. Redmond responded with a lengthy e-mail reproducing the text of the Hermann/Covert article interspersed with Redmond’s two- or three-sentence responses to many of its assertions. The e-mail stated in part: “[A]ttached is a list of the factual inaccuracies [the article] contains [and] an explanation of the corrected facts in response. . . . [A]ttached are the true facts. Will you agree to publish them as a fair and accurate counterpoint to the inaccurate post?” Gizmodo posted Redmond’s e-mail in full on January 18, 2011. This posting also generated voluminous comments from readers. Gawker declined Redmond’s subsequent demand that the January 13 and 18 articles be removed from the Internet.

On February 22, 2011, Redmond sued Gawker for libel per se, libel per quod, and false light. The complaint alleged, among other things, that the Gizmodo article falsely asserts or implies Redmond (1) runs a company using “ ‘knock-off’ ” and nonfunctioning technology, (2) uses his ventures to scam investors into giving him money, (3) has predominately or exclusively presided over failed start-up companies, (4) takes advantage of trends in technology without having a novel idea or expertise in the subject

technology, (5) misrepresented the success of his companies, and (6) lies about his business and technological experience. The complaint specifically quotes only one portion of the article: “ ‘Ultimately, the companies just disappear, legacies reduced to comically vague blubs on Redmond’s resume—if that. There’s no point in trying to ascribe motives to what Redmond does, and we don’t want to make this about character [or] intent. The point is, these ventures rarely—if ever—work, and through the harsh lens of hindsight, some look like they were never meant to.’ ” Redmond cites this as an example of how the article “directly implies [he] has put forth his Peep Wireless venture, along with others, to scam investors into giving him money.”

D. *Gawker’s Anti-SLAPP Motion*

Gawker filed a special motion to strike Redmond’s complaint under section 425.16³ on the following grounds: (1) the Gizmodo article constituted protected speech in connection with a public issue; (2) the statements in the article were protected opinions and could not support a libel action; (3) alternatively, if the statements were not opinions, they were substantially true; and (4) Redmond was a limited-purpose public figure who could not prove the requisite “actual” malice.

The trial court granted Gawker’s motion to strike the complaint, ruling (1) all three of Redmond’s causes of action arose out of conduct in furtherance of the constitutional right of free speech in connection with a public issue; and (2) Redmond failed to establish a probability of prevailing in his claims because (a) in context, the statements in issue constituted statements of protected opinion rather assertions of verifiable fact, and (b) Redmond is a limited-purpose public figure, but failed to present any prima facie evidence of actual malice.

³ Section 425.16 is commonly referred to as the “anti-SLAPP statute.” SLAPP stands for Strategic Lawsuit Against Public Participation. Section 425.16 was enacted in order to discourage the practice of filing retaliatory, meritless lawsuits against opponents on a public issue in order to chill their exercise of free speech. (See legislative findings in Code Civ. Proc., § 425.16, subd. (a).)

Redmond timely appealed from the trial court's order.

II. DISCUSSION

Redmond contends the trial court erred in determining (1) the statements in issue concerned a matter of public interest, (2) the statements were of opinion rather than fact, (3) he is a limited-purpose public figure, and (4) he failed to show a likelihood of establishing defendants published the article with actual malice.⁴

A. *Standard of Review*

Subdivision (b)(1) of section 425.16 provides in pertinent part “[a] cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech . . . in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.”

An order granting a special motion to strike under section 425.16 is reviewed de novo. (*Kyle v. Carmon* (1999) 71 Cal.App.4th 901, 907.) We apply our independent judgment to determine whether the plaintiff’s causes of action arose from acts by the defendants in furtherance of the defendants’ right of petition or free speech in connection with a public issue. (*Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 721, disapproved on another point in *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123, fn. 10.) Assuming this threshold condition is satisfied, we must then independently determine, from our review of the record as a whole, whether appellant has established a reasonable probability he would prevail on his claims at trial. (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 653, disapproved on another point in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.) We must reverse the judgment of dismissal if appellant made a prima facie showing in the trial court of facts which, if proved at trial, would support a judgment in his favor. (*Church of Scientology*, at p. 653.)

⁴ Based on our disposition of issues (1) and (2), we have no occasion to reach the latter two issues in this opinion.

B. Nexus to a Public Issue

Redmond argues Gawker failed to meet its burden of showing how the post invokes any issue of public interest. He asserts he “never offered any goods for purchase to the general public,” but merely offered them “to a limited number of pre-qualified investors.” Thus, according to Redmond, the subject matter of the post as Redmond defines it—his “truthfulness in connection with his investment opportunity available to a limited segment of the populace”—does not concern a matter of public interest.

Subdivision (e) of section 425.16 defines the statutory phrase “ ‘in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue,’ ” in relevant part to include “any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest” (§ 425.16, subd. (e)(3).)

Redmond does not dispute his claims arise from an exercise of free speech rights in a “place open to the public or a public forum.” (§ 425.16, subd. (e)(3).) As the Supreme Court has recognized, the Internet is “ ‘the most participatory form of mass speech yet developed’ ” and thus Internet communication is “entitled to ‘the highest protection from governmental intrusion.’ ” (*Reno v. American Civil Liberties Union* (1997) 521 U.S. 844, 863.) Where, as here, the “gravamen of the lawsuit is the content of [the defendant’s] Web site,” the action arises from an “act in furtherance of the right of free speech.” (*Kronemyer v. Internet Movie Database Inc.* (2007) 150 Cal.App.4th 941, 946–947; see also *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 41, fn. 4 and cases cited therein [Web sites accessible to the public are public forums for purposes of the anti-SLAPP statute].)

Speech has been found to concern a public issue where it (1) concerned a person or entity in the public eye, (2) addressed conduct that could directly affect a large number of people beyond the direct participants, or (3) contributed to the public debate on a topic of widespread public interest. (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 898 (*Wilbanks*); accord, *Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 924.)

In this case, Gawker came forward with evidence that before cowriting the article, defendant Herrmann had viewed posts by other Internet commentators raising similar questions and concerns about Redmond's Peep venture. These included a January 3, 2011 Twitter post by Sascha Segan, a mobile device analyst and editor for PC Magazine, which included a link to a January 3 article in PC Magazine's online news site entitled, "Peep Proposes Wireless P2P System,"⁵ describing some of the claims Peep was making about its technology. The Twitter post asked, "Wireless folks, does this read like crazy to you?" The linked article contains quotes about the product from an unnamed Peep "spokesman," apparently sent to the author by e-mail, as well as language taken from a Peep press release announcing plans to demonstrate its software product for investors at the CES.

Herrman also reviewed a January 4, 2011 CNET online news article by regular CNET contributor, Rafe Needleman, expressing his own skepticism about the Peep technology. Needleman had interviewed Redmond at the CES who told him he was there to seek out business partners for his company. Among other things, the CNET article's author wrote that his "credulity strained" at some of Redmond's claims and he doubted "if Peep ha[d] the discipline to develop any of its ideas into viable businesses." Gawker submitted evidence the CNET article generated a considerable number of reader comments, both positive and negative, about Redmond's venture.

Herrman identified two other Web pieces regarding the Peep venture posted in the days leading up to the 2011 CES. A post in the weblog www.crunchgear.com labeled Peep's promotion "the first outrageous claim of CES," and generated numerous pro and con reader comments on Peep's claimed technology. Another post on www.rcrwireless.com also questioned the viability of Peep's technology, stating Peep

⁵ "P2P" refers in this context to a "peer-to-peer" network in which mobile device users would transmit and receive communication through one another's devices, without needing or having to pay for an external infrastructure of cell towers, base stations, and servers.

“wins our award for sheer originality,” and “it’s nice to see a bit of mobile madness is alive and well at CES.”

As mentioned earlier, Gawker produced a press release issued by Peep on January 3, 2011, announcing it would be demonstrating its technology to potential commercial partners and investors at a Las Vegas hotel suite during the CES. Peep’s own Web site included several videos promoting the company and its technology, and boasted extensive press coverage about the Peep “team” claiming “[t]here are over 2000 media articles about their past successes.” The videos were also available on the Peep Wireless YouTube channel. Another of Redmond’s Web sites, for Clever Industries LLC, described him as an “award-winning visionary” whose “ventures and services are acclaimed in over 2500 press and media acknowledgements.” The site stated his past projects had been featured on the Discovery Channel, Fox, E! Entertainment, Green Seed Radio, CNET, the New York Times, the Wall Street Journal, Aero News, NPR, XM Radio, the Mike O’Meara radio show, and in “hundreds” of other publications and media outlets, achieving “extensive media acclaim globally.” Redmond’s evidentiary submissions in opposition to Gawker’s motion to strike did not contradict Gawker’s evidence on the question of whether the Gizmodo article concerned an issue of public interest. In fact, Redmond sought judicial notice of other publications and Web sites describing technologies under development by well-known companies he contended were similar to those ridiculed by the Gizmodo article.

The preamble to section 425.16 states its provisions are to be construed broadly to safeguard the constitutional right of free speech. (§ 425.16, subd. (a).) Broad construction must therefore be given to the phrase “an issue of public interest” in subdivision (e)(3). (*Tamkin v. CBS Broadcasting, Inc.* (2011) 193 Cal.App.4th 133, 143.) Here, Redmond sought to be and was “a person or entity in the public eye.” (*Wilbanks, supra*, 121 Cal.App.4th at p. 898.) He actively promoted his product ideas in Internet media heavily trafficked by tech consumers and members of the tech community. He sent out press releases, responded to inquiries by well-known tech writers, gave interviews, maintained Web sites with promotional videos, and sought to use the CES

and the publicity surrounding it as a means to bring his company to the attention of the public and potential investors. His own Web sites touted media interest in his ventures as a selling point. Moreover, the Gizmodo article was disseminated in a public forum and concerned a public controversy. At least four articles about Peep, as well as a widely followed Twitter message by a well-known tech analyst, had preceded the Gizmodo article. Four of these had expressed open skepticism about Redmond's technological claims, and significant reader response had been generated.

Wilbanks, decided by this court, presents somewhat analogous facts. The defendant in *Wilbanks* published a Web site about a very specialized topic, the use of “viatical settlements,” arrangements by which dying persons sell their life insurance policies to obtain funds for medical care and other purposes. (*Wilbanks, supra*, 121 Cal.App.4th at p. 889.) The underlying suit was brought by a firm in the business of brokering such arrangements after the defendant used her Web site to warn potential customers against using the firm. (*Id.* at pp. 889–890.) This court held in part the publication was connected to an issue of public interest because it was in the nature of consumer protection information, providing information relevant to choosing among brokers. (*Id.* at pp. 890, 898–901.) Similarly here, the Gizmodo article was a warning to a segment of the public—consumers and investors in the tech community—that Redmond's claims about his latest technology were not credible. That segment was at least as large as the rather specialized group of consumers involved in *Wilbanks*. Although Redmond states he was not offering any product to consumers, and was only seeking to reach qualified investors, he was doing the latter by claiming to have developed a high-impact technology that would be of tremendous interest and value to consumers and to the cellular telephone industry. He actively sought media attention for his company with such claims, and succeeded in getting it. He cannot now plausibly maintain there was no public interest in whether the claims were credible.

We therefore find this case comes within the purview of section 425.16.

C. *Opinion Versus Fact*

False statements in publications, even if objectively unjustified or made in bad faith, cannot form the basis for a libel action if they are statements of opinion rather than fact. (*Campanelli v. Regents of University of California* (1996) 44 Cal.App.4th 572, 578.) “[O]pinions are the lifeblood of public discussion promoted by the First Amendment, under which speakers remain free to offer competing opinions based upon their independent evaluations of the facts.” (*Paterno v. Superior Court* (2008) 163 Cal.App.4th 1342, 1356 (*Paterno*).) The determination of whether an allegedly libelous statement constitutes fact or opinion is a question of law for the court. (*Campanelli*, at p. 578.)

California courts use a “ ‘totality of the circumstances’ ” test to determine whether an alleged defamatory statement is one of fact or of opinion. (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260 (*Baker*).) We look both to the language of the statement and to the full context in which it appears. (*Ibid.*) “[W]hat constitutes a statement of fact in one context may be treated as a statement of opinion in another, in light of the nature and content of the communication taken as a whole.” (*Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 601 (*Gregory*).) Where, for example, the language of the statement is “cautiously phrased in terms of apparency,” the statement is less likely to be reasonably understood as a statement of fact rather than opinion. (*Id.* at p. 603.) Disclosure of the facts supporting the challenged statement is also highly significant in determining whether it is actionable. (*Carr v. Warden* (1984) 159 Cal.App.3d 1166, 1170.)

Redmond places great reliance on his contention the word “scam” in the article’s title —“Smoke & Mirrors: The Greatest Scam in Tech”—is an assertion of fact about his business rather than opinion. But the word “scam” has no precise meaning. (See *McCabe v. Rattiner* (1st Cir. 1987) 814 F.2d 839, 842 (*McCabe*).) Although undoubtedly a pejorative term, “scam” means different things to different people and is used to describe a wide range of conduct. (*Ibid.*) It could refer to anything involving an arguably inaccurate representation, from exaggerating the value of a product or charging too much

for it to carrying out a massive criminal fraud. It would not be unusual to see the word “scam” used in a pure opinion piece expressing the author’s opinion of a restaurant, a product or service, a piece of legislation, or a business proposal. “The lack of precision makes the assertion ‘X is a scam’ incapable of being proven true or false.” (*Ibid.*) Thus, defendants’ use of the term “scam,” by itself, does nothing to establish a probability Redmond will prevail against them in a libel claim.

Viewing the full context of the article, we believe it falls into the category of constitutionally protected opinion rather than fact. First, the article is written in a casual first-person style, which puts the reader on notice the authors are expressing their own views rather than stating objectively verifiable facts. (See *McCabe, supra*, 814 F.2d at p. 843.) The article has the tone and style of a sarcastic product or movie review—negative about its subject matter to be sure, but with little pretense of objectivity. The authors assert, for example, Peep’s product descriptions “don’t make sense,” “sound[] like bullshit,” and are “filled with meaningless technobabble.” Redmond’s video of his concept for the standardization of fuel cell components, makes “the thing seem[] more like a movie prop.” Peep “is just the latest in a string of seemingly failed tech startups . . . all conceived, helmed and seemingly driven into the ground by . . . Scott Redmond.”⁶ In our view, the article’s general tenor and language would give a reasonable reader the impression the authors were expressing subjective opinions, not reporting facts. (See, e.g., *Paterno, supra*, 163 Cal.App.4th at p. 1356 [“loose and figurative” language signals constitutionally protected opinion rather than actionable, false assertions of fact].)

⁶ The assertion Redmond’s businesses “seemingly failed” is inherently subjective. (See *Gray v. St. Martin’s Press, Inc.* (1st Cir. 2000) 221 F.3d 243, 249–250 [statement the plaintiff’s company had “failed” was “very much a matter of opinion”].) Equally, the assertion his companies “just disappear” has so many possible meanings—from going out of business to losing public or Internet visibility—that it cannot be classified as a true or false objective fact. (See *Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1382 [statement must be provably false before there can be liability].)

Second, the article is completely transparent. The sources upon which the authors rely for their conclusions are specified, and the article incorporates active links to many of the original sources—mainly Web sites and promotional material created and maintained by Redmond and his ventures. As the article states in its concluding paragraphs, “Peep’s background information is freely available online, and everything you see above was discovered with a few quick searches on Google.” Having ready access to the same facts as the authors, readers were put in a position to draw their own conclusions about Redmond and his ventures and technologies. As shown by the comments posted, many readers did view these sources, and not all of them agreed with the authors’ views. Statements are generally considered to be nonactionable opinion when the facts supporting the opinion are disclosed. (*Baker, supra*, 42 Cal.3d at p. 266, fn. 7; see also *Partington v. Bugliosi* (9th Cir. 1995) 56 F.3d 1147, 1156–1157 [“when an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment”].)

Third, the authors couched their conclusions in the language of “apparency” (*Gregory, supra*, 17 Cal.3d at p. 603): Peep’s technological claims were “*arguably* impossible”; Peep was “just the latest in a string of *seemingly* failed startups . . . *seemingly* driven into the ground” by Redmond; Redmond “*seems* drawn to areas where there are cash prizes available”; some of Redmond’s ventures “look like” they were never meant to work. (Italics added.) The authors also expressly disclaim any intention to impute bad motives or character to Redmond, and invite readers to check Redmond’s own Web site or conduct their own Google search to find out about his ventures. All of this qualifying language reinforces the impression that Herrman and Covert were expressing their personal, subjective perspective rather than declaring objective facts.

For these reasons, we conclude the Gizmodo article constituted protected opinion and cannot provide the basis for a successful libel suit. As Redmond concedes, his false light cause of action based on the same publication therefore also fails. (See *Reader’s*

Digest Assn. v. Superior Court (1984) 37 Cal.3d 244, 265 [liability cannot be imposed on any theory for what has been determined to be a constitutionally protected publication].)

III. DISPOSITION

The order granting defendants' motion to strike is affirmed.

Margulies, J.

We concur:

Marchiano, P.J.

Banke, J.