

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

Supreme Court
S062575

BRIEF OF *AMICUS CURIAE* REPORTERS
COMMITTEE FOR FREEDOM OF THE PRESS
IN SUPPORT OF PETITION FOR REVIEW

AMICUS CURIAE INTENDS TO FILE A BRIEF ON
THE MERITS OF THE CASE ON REVIEW

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

September 2014

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I. INTRODUCTION

The Reporters Committee for Freedom of the Press (“Reporters Committee”) urges this Court to take review of the Court of Appeals’ decision (the “Decision”) in order to resolve a conflict between state and federal courts in Oregon on an issue of fundamental importance to free speech: the proper analysis of opinion in a defamation action. The Decision’s narrow application of that doctrine is at odds with recent federal case law originating from Oregon, creating uncertainty that makes it not only difficult for journalists to report news to the public without increased fear of civil liability, but also harms the public’s ability to engage in public discourse online. The confusion the Decision creates concerning what may be stated in an online review, and what will expose a commenter to liability, could effectively limit free speech and thus have serious consequences for public debate.

The news media has a substantial interest in advocating for robust protections for statements of opinion, and in ensuring that the hyperbole commonly employed in the context of online speech is fully considered when analyzing whether challenged speech constitutes protected opinion. The right to express one’s opinion is a cornerstone of the promotion of public discourse and the free flow of ideas. The internet provides a wealth of opportunities for consumers to offer reviews of products and services, and for other consumers to make more informed decisions based on others’ opinions. Because the internet

is a forum that thrives on immediate give-and-take, discourse naturally tends to be more hyperbolic, and it is vital for courts to take that context into account when determining whether online speech is actionable. It is crucial that Oregon courts not adopt an analysis that will limit the free flow of ideas and opinions in online forums.

II. REVIEW OF THE DECISION IS IMPORTANT TO CLARIFY THE PROPER ANALYSIS OF OPINION IN DEFAMATION ACTIONS

A. This Court should Grant Review to Promote the Uniform Protection of Speech in Oregon's State and Federal Courts.

The Decision's analysis places state and federal courts in Oregon at odds over the proper interpretation of the opinion doctrine under the First Amendment. This case thus presents an important opportunity for this Court to address the non-uniform application of the opinion doctrine in Oregon courtrooms.

The Court of Appeals rejected defendant Christopher Liles's argument that numerous statements that he made in his review of Dancing Deer Mountain on the website Google.com were nonactionable as opinion and/or hyperbolic statements, and therefore not defamatory. In particular, the Decision concludes that, in the context of an online review of a consumer's business experience, the words "rude" and "crooked" to describe the plaintiff were defamatory.

See Neumann v. Liles, 261 Or App 567, 578-79 (2014). That analysis is difficult to reconcile with the Ninth Circuit's recent opinion in *Obsidian Finance Group, LLC v. Cox*, 740 F3d 1284 (9th Cir 2014), which held (in an appeal from the District of Oregon) that the defendant's use of such terms as "immoral," "thugs," and "evil doers" to describe the plaintiff on her website was not defamatory. *Obsidian Finance*, 740 F3d at 1294. The Ninth Circuit based its decision on the context of the statements, including the general tenor of the posts and the fact that they were made on an online blog in which the defendant used "extreme language," indicating to the court that much of what the defendant wrote was hyperbole. *See id.* In short, the Ninth Circuit's analysis factored in the realities of the online medium of communication in evaluating the context of the statements.

The Decision here, in contrast, rejects the argument that defendant's challenged statements were hyperbole. *Neumann v. Liles*, 261 Or App at 579. The Decision reached that conclusion despite the fact that defendant titled his online review "Disaster!!!! Find a different wedding venue" and included the statement "The worst wedding experience of my life!" Both statements signify that the defendant was using hyperbole of the type common in online forums. Yet the Decision concludes that the "bulk of the post is nonrhetorical and factual," apparently including the challenged statements "rude" and "crooked."

Neumann v. Liles, 261 Or App at 578-79. As discussed below, that analysis is flawed in that it fails to properly consider the context of the statements.

But in any event, just as significant for purposes of this Court's review is the Decision's suggestion that such an analysis may be of only limited relevance to Oregon courts, because it is based on "extra-jurisdictional authority" from the Ninth Circuit's "First Amendment jurisprudence." See 261 Or App at 579 ("To the extent that extra-jurisdictional authority informs our analysis, we disagree that defendant's statements, as a whole, are hyperbolic").¹ The protection afforded to speech should not depend on whether a defendant is in a state or federal court in Oregon. The Decision's analysis, however, suggests that reality.

¹ It is not simply an issue of an inconsistency with Ninth Circuit authority. If this Court grants review, the Reporters Committee intends to file a brief addressing why binding United States Supreme Court precedent supports a more robust evaluation of context in determining whether a challenged statement is actionable, focusing on two broad principles reaffirmed by the United States Supreme Court in *Milkovich v. Lorain Journal Co.*, 497 US 1 (1990): First, "a statement on matters of public concern must be provable as false before there can be liability." *Id.* at 19-20 (citations omitted). And second, a statement is not defamatory if it "cannot 'reasonably [be] interpreted as stating actual facts' about an individual," a requirement that the Court described as "provid[ing] assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." *Id.* at 20 (citations omitted). The Reporters Committee intends to argue how these principles, and the case law on which they are based, support a fuller analysis – and a different result – than that in the Decision.

B. The Court Should Grant Review to Establish the Proper Analysis of Opinion in the Context of Online Settings.

It was error for the Court of Appeals not to fully consider the context of the purportedly defamatory statements. The Reporters Committee urges this Court to grant review in this case to establish the framework for Oregon courts to consider that context in the future. That framework should provide that any evaluation of opinion or hyperbole in an online setting must include consideration of both the importance of contributing to a robust public discourse on issues of public concern as well as the more informal and hyperbolic context of online reviews.

Failure of the courts to take such context into account could result not only in the imposition of excessive liability on members of the public who choose to share their opinions online, but the chilling of this type of speech. Online sites such as Yelp, TripAdvisor, and Google Plus provide public forums for consumers to post their opinions of service providers for other members of the public to read and use to make their own consumer choices. Such sites are invaluable resources for today's average consumer, who can now look to innumerable reviews available online to decide where to eat, which doctor to visit, or how to choose a provider of virtually any service imaginable. Sharing information and views on these services is unquestionably a matter of public interest and concern. It is critical that consumers be able to post reviews

without fear that their negative opinions and frequent hyperbole will result in a lawsuit, and a potentially staggering amount of financial penalties.

This emphasis on the statement's context is particularly applicable in cases involving online consumer reviews. Such reviews must be evaluated in a way that recognizes their informality of expression and tendency toward hyperbole. Like online message boards, review websites encourage a “looser, more relaxed communication style,” allowing users to “engage freely in informal debate and criticism.” *Krinsky v. Doe*, 159 Cal App 4th 1154, 1162-63 (Cal Ct App 2008). In this setting, “[h]yperbole and exaggeration are common, and ‘venting’ is at least as common as careful and considered argumentation.” Larissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke LJ 855, 863 (2000). Online forums for consumer reviews—which are in many ways designed for “venting”—encourage posters to use a different tone, and that is the context in which writers and readers understand the reviews.

The question of how to evaluate online review opinions in defamation actions is one that many courts around the country are facing.² As these suits

² For example, the United States Court of Appeals for the Sixth Circuit recently held that a TripAdvisor ranking of the “Dirtiest Hotels” on their website was protected, nonactionable opinion because the tone of the list made clear that actual facts were not being stated. *See Seaton v. TripAdvisor LLC*, 728 F3d 592 (6th Cir 2013); *see also, e.g., McKee v. Laurion*, 825 NW2d 725 (Minn 2013) (dismissing doctor’s defamation claims against patient’s son who wrote

become more prevalent, it will only become more important for courts to properly consider the online context of the challenged statements. The Reporters Committee urges this Court to take review and establish that framework for Oregon courts.

III. CONCLUSION

For the foregoing reasons, the Reporters Committee urges this Court to accept review of the Decision. If such review is granted, the Reporters Committee expects to file a brief on the merits.

DATED this 24th day of September, 2014.

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negative reviews on rate-your-doctor websites about the care his father received); *Krinsky*, 159 Cal App 4th at 1174-78 (discussing similar cases).

³ This brief was prepared with the significant contribution of the Reporters Committee legal staff.

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH
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Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 1,647 words.

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CERTIFICATE OF FILING

I hereby certify that on September 24, 2014, I filed the BRIEF OF
AMICUS CURIAE REPORTERS COMMITTEE FOR FREEDOM OF THE
PRESS IN SUPPORT OF PETITION FOR REVIEW with the State Court
Administrator at this address:

<http://appellate.courts.oregon.gov/wps/myportal/>

via electronic filing through the eFiling system.

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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2014, I served the foregoing
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