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OREGON CASE UPDATE

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Court Upholds Defamation Claim for Tweets and Customer Website Reviews

From the desk of Josh Hayward: In Oregon, individuals who make false statements about another person or business entity may be subject to a defamation claim. However, certain statements are not subject to a defamation claim because they are protected by the Free Speech Clause of the First Amendment of the U.S. Constitution. In a case where a customer posts a "Tweet" and an online review of a merchant, will those statements be protected from a defamation claim under the First Amendment? Read on to find out.

Claims Pointer: In this case arising out of a defamation suit brought against an angry customer, the Court of Appeals used a new three-part test adopted by the Oregon Supreme Court to determine if statements are subject to protection by the First Amendment. The court looked to the words used in context. In this case, the dispositive question in the court's analysis was whether or not the statement "implies an assertion of objective fact." The case serves as a helpful illustration and reminder of which statements may be subject to defamation claims, and how courts analyze whether such statements are protected by the First Amendment.

Chief Aircraft, Inc. v. Grill, 288 Or App 729 (2017)

Eric Grill ("Grill") was a pilot who owned a small plane. Grill wanted to purchase a preheater for his plane, from Chief Aircraft, Inc. ("Chief Aircraft"), an online seller of aircraft parts. When Chief Aircraft tried to process Grill's credit card payment Chief Aircraft received an error message, requiring Grill to call in with voice authentication or else the transaction would be voided. They conveyed the information to Grill. Grill was frustrated and called his credit card company to verify, but accidentally called the wrong company. Grill then posted a "Tweet" on his Twitter account and wrote a review regarding Chief Aircraft on www.ripoffreport.com ("Ripoff Report"), both which are discussed in more detail below.

As a result, Chief Aircraft filed a defamation suit against Grill for "post[ing] tweets and online reports containing false information." Grill filed a motion to strike pursuant to Oregon's anti-SLAPP statute. The trial court denied the motion, and Grill appealed. The Oregon Court of Appeals affirmed the trial court's decision. However, following that decision, the Oregon Supreme Court came out with a decision in *Neumann v. Lilies*, which offered a framework based on a three-part test for analyzing whether a statement was entitled to First Amendment protection from defamation. 358 Or 706 (2016). In light of the *Neumann* case, Grill asked the Court of Appeals to reconsider whether his statements were protected by the First Amendment.

The Court of Appeals granted reconsideration. The court explained that if a statement involved a matter of public concern, the dispositive question is whether the statement is merely an opinion or one that "implies an assertion of objective fact." To decide whether the statement implies an assertion of an objective fact, Neumann offered a three-part test, which considered:

> (1) Whether the general tenor of the entire publication negates the impression that the defendant was asserting an objective fact; (2) Whether the defendant used figurative or hyperbolic language that negates that impression; and (3) Whether the statement at issue is susceptible of being proved true or false.

The court noted that there was no dispute that Grill's statements were a matter of public concern. The court first looked to Grill's Twitter statement, where Grill "Tweeted" that Chief Aircraft was "completely unreliable and unhelpful." The court explained that Grill's use of the word "completely" made Grill's statement appear hyperbolic. In addition, calling the

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company "completely unreliable and unhelpful" was a subjective statement and not a statement that would be susceptible of being proven true or false. Accordingly, the court found that Grill's Twitter statements did not imply an assertion of objective fact. As a result, the court found that Grill's Twitter statements were protected by the First Amendment.

The court next considered whether Grill's posting on Ripoff Report was protected by the First Amendment. Although Grill's post to Ripoff Report was lengthy, the court focused on the following: (1) "Chiefaircraft.com Has so many chargebacks on their merchant accounts credit card companies will flag deland, Florida," and (2) "because chiefaircraft.com has so many customer service issues and charge backs they flag it."

According to the court, asserting that a merchant has "so many chargebacks" and "so many customer service issues" by itself is too vague to be provable as a true or false statement. However, when considering the context of the entire sentence, Grill's statements suggest that Chief Aircraft has exceeded a certain threshold number of customer service issues and has reached a point where credit card companies will flag charges. The court noted that such statement is susceptible of being proved true or false, as the credit card company either does or does not flag charges because Chief Aircraft exceeded a certain threshold of customer service issues.

Next, the court concluded that Grill's statements did not use hyperbolic or figurative language. Further, the general tenor of the publication, Ripoff Report, does not negate the impression that Grill was stating an objective fact. While the language on the website indicated that Ripoff Report does not vet posting, the website stated that it encouraged and even required its authors to file only truthful reports. Accordingly, the court found that all three elements of the test adopted in Neumann pointed to the fact that Grill's statements in the Ripoff Report posting, if false, were not protected by the First Amendment.

View full opinion at: *http://www.publications.ojd.state.or.us/docs/A155317A.pdf*

Case updates are intended to inform our clients and others about legal matters of current interest. They are not intended as legal advice. Readers should not act upon the information contained in this article without seeking professional counsel.

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