FILED January 19, 2023 03:52 PM
Appellate Court Records

IN THE COURT OF APPEALS OF THE STATE OF OREGON

TREVOR DEHART, BRIAN SHANNON, and DAVE BROWN,

Plaintiffs-Respondents,

and

RENEE POWELL,

Plaintiff,

v.

DEBBIE TOFTE, AJ SCHWANZ, and TAMARA BROOKFIELD,

Defendants-Appellants,

and

KATHERINE BARNETT,

Defendant.

Court of Appeals No. A177995

Yamhill County Circuit Court
No. 21YAM0001CV

PLAINTIFF-APPELLANTS' REPLY BRIEF

The constitutionality of ORS 30.835 is in issue. ORAP 5.12.

Appeal from the Limited Judgment entered on February 11, 2022
By the Honorable Jennifer K. Chapman, Yamhill County Circuit Court Judge

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APPELLANT'S REPLY BRIEF

I. The anti-SLAPP statute applies because Plaintiffs' action arises out of speech protected by ORS 31.150(2).

A. Subsection (d): Defendants' statements were made in connection with a public issue or an issue of public interest.

First, Plaintiffs argue briefly that subsection (d) of ORS 31.150(2) covers only "non-speech expressive conduct" and not speech itself. Ans Br 11. The Court should reject this argument for two reasons. First, Plaintiffs never raised it below and cite no authority for it now. Plaintiffs' Response, TCF Nov 15, 2021; (ER 222–30). Second, this Court has repeatedly treated written and oral statements as conduct in furtherance of free speech. *See, e.g.*, *Neumann v. Liles* (*Neumann III*), 295 Or App 340, 344, 434 P3d 438 (2018), *rev den* 365 Or 195 (2019) ("publishing an online review on a public website" qualifies); *Mullen v. Meredith Corp.*, 271 Or App 698, 704–06, 353 P3d 598 (2015) (reporting on a shooting qualifies). Nothing in subsection (d) limits it to "non-speech expressive conduct."

Next Plaintiffs argue that if Defendants' speech qualifies for anti-SLAPP protection, then the anti-doxing statute and the anti-SLAPP statute conflict. Ans Br 16. Not so. The anti-doxing statute is a *substantive* prohibition on certain types of speech. The anti-SLAPP statute is a *procedural* mechanism whereby the defendant in a suit involving protected speech can obtain an early evaluation

of the merits. *See Plotkin v. State Accident Ins. Fund*, 280 Or App 812, 815, 385 P3d 1167 (2016), *rev den* 360 Or 851 (2017). It asks the defendant to confirm that a suit does involve protected speech, ORS 31.150(2), and then it assigns the plaintiff the burden to prove that he should win on the merits of his claim. ORS 31.150(3).

But it entails no substantive outcome regarding "the conduct on which a claim is predicated." *Tokarski v. Wildfang*, 313 Or App 19, 25, *rev den*, 368 Or 788 (2021); *see also Tamkin v. CBS Broad., Inc.*, 193 Cal App 4th 133, 144 (2011) (rejecting premise that anti-SLAPP statute would eviscerate defamation claims because meritorious claims would still proceed). The anti-SLAPP statute no more conflicts with the anti-doxing statute than does a defendant's motion for summary judgment. ORCP 47 B.

Plaintiffs' main argument is that construing subsection (d) as covering "*any connection* between the dispute[d] speech and an issue of public interest is sufficient to protect that speech" is too broad. Ans Br 17. But the plain language of the anti-SLAPP statute provides that the conduct need only be made "in connection with" a matter of public interest, and the Supreme Court has held that standard is satisfied if the statement is "related to matters of general interest

to the public." *Neumann v. Liles* (*Neumann II*), 358 Or 706, 720, 369 P3d 117 (2016).[1]

Here, as in *Neumann*, Defendants' online statements were *related to* matters of general interest to the public, because (1) Plaintiffs' ban on BLM and Pride symbols was an issue of public interest, Op Br 23–24; and (2) the "specific speech at issue" here has at least as tight a connection with Plaintiffs' ban as the speech in *Neumann III* and *Mullen* had with the issues of public interest there, Op Br 24–31. *See Mullen*, 271 Or App at 706; *Neumann III*, 295 Or App at 345.

Plaintiffs do not contest the first proposition. Indeed, they conceded below that the "bulk" of Defendants' comments "clearly *do* touch on issues of public interest." Plaintiffs' Response at 7, TCF Nov. 15, 2021 (emphasis added). And they appear to concede on appeal that "the broader debate" over "the actions of the Newberg School Board" was connected to that public issue. Ans Br 20–21.

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[1] Plaintiffs argue that "*Neumann* … was focused entirely on the second prong of Anti-SLAPP," *i.e.*, the merits under ORS 31.150(3) and not the threshold test under ORS 31.150(2). Ans Br 18. Plaintiffs appear to have confused *Neumann II* with *Neumann III*. *Neumann II* enunciated the merits test for public interest, but in *Neumann III*, this Court held that the same test applied to ORS 31.150(2)(d)'s threshold requirement. 295 Or App at 345.

Instead, Plaintiffs ask the Court to scrutinize "specific statements" in isolation, "divorce[d]" from that broader debate. *See* Ans Br 1, 19–20. But at the anti-SLAPP threshold, courts do not pluck and dissect specific "portion[s] of what was said." *Mullen*, 271 Or App at 705. Instead, they "assess more generally what sort of claim" is before them. *Id.* That is why the threshold question in *Mullen* focused on the news broadcast, not the defendant's "show[ing] plaintiff['s] likeness, identity and location as part of the news broadcast." 271 Or App at 704–06 (simplified). And in *Neumann III*, the threshold question focused on the "online review on a public website," not the specific statements alleged to be false and defamatory. 295 Or App at 344–45. So too here. The threshold question focuses on the "bulk" of Defendants' speech, not their specific comments about Plaintiffs' employers.[2] And that bulk undisputedly "touch[ed] on an issue of public interest." Plaintiffs' Response at 7, TCF Nov. 15, 2021.

Plaintiffs also contend that Defendants seek a *per se* rule that all information about public officials' private employment is of public interest. Ans Br 21–22. Not so. Defendants contend that public officials' private employment

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[2] As Plaintiffs themselves concede, courts should not "parse the defendant's statements" or "act as editors when evaluating Anti-SLAPP motions." (Ans Br 19.)

is of public interest only when raised *in response to* and *in protest of* political action by the public officials. *See Publius v. Boyer-Vine*, 237 F Supp 3d 997, 1011 (ED Cal 2017) (in context of protest against public officials' vote on gun legislation, "legislators' personal information becomes a matter of public concern").

Yet Plaintiffs parade a series of horribles that will ensue if their claims must undergo anti-SLAPP scrutiny. Ans Br 20. But as explained above, determining that speech qualifies for anti-SLAPP analysis under ORS 31.150(2) is not a merits determination. Even without anti-SLAPP, Plaintiffs will eventually have to prove that their claims withstand constitutional scrutiny. All that the anti-SLAPP statute means is that they must do so now.

In sum, Plaintiffs' claims arise out of statements made during a vigorous public debate on their own conduct as elected officials. So the "sort of claim" before the Court is "one that arises out of conduct in furtherance of free speech in connection with an issue of public interest." *Mullen*, 271 Or App at 705. Defendants are therefore entitled to an early evaluation of the merits of Plaintiffs' claims.[3]

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[3] Plaintiffs ask the Court to reach the first anti-SLAPP prong as to Defendant Schwanz, but fail to develop that argument. *See* Ans Br 25.

B. Subsection (c): Alternatively, Defendants' written statements were made in a public forum.

Plaintiffs argue that subsection (c) of ORS 31.150(2) also does not apply because Defendants' speech was made in a "private, access controlled, [Facebook] group." Ans Br 11–15. The Court need not reach this argument because Defendants need show only that their speech satisfies one subsection of the statute, and subsection (d) suffices for the reasons above. *See Terry v. Davis Cmty Church*, 131 Cal App 4th 1534, 1545 (Cal Ct App 2005) (fourth category does not require a public forum and applies to private conversations about public issues).

If the Court chooses to reach the issue, Plaintiffs are mistaken. The NEEd group is a "visible private group" on Facebook. (ER 155–56.) Anyone can see the group's name and description, find the group, and ask to join. (*Id.*) By contrast, "secret private group[s]" are neither visible by nor accessible to the public. (*Id.*) Membership in those groups is by invitation only, while membership in NEEd is open to everyone who agrees to abide by some basic rules of respect. (*Id.*)

In other words, joining NEEd is much like joining Facebook. *Cf. Terms of Use*, Facebook, https://www.facebook.com/terms.php (last visited Jan. 19, 2023). Just as Facebook is a public forum because it is accessible to "anyone who consents to Facebook's Terms," the NEEd group is a public forum because

it is accessible to anyone who consents to NEEd's terms. *Cross v. Facebook, Inc.*, 14 Cal App 5th 190, 199 (2017). Even Plaintiffs admit Facebook is a public forum, even though it can "restrict speech on [its] own platforms" and "delete posts from users who violate [its] terms of service." Ans Br 15. So too with NEEd. *See Piping Rock Partners, Inc. v. David Lerner Associates, Inc.*, 946 F Supp 2d 957, 976 (ND Cal 2013) (website forum was public forum even where operator had ability to "restrict, edit, delete, or prohibit posts"); *see also Packingham v. North Carolina*, 137 S Ct 1730, 1735–36 (2017) (social media is akin to "traditional" public forums). Defendants' speech satisfies ORS 31.150(2)(c) as well as (2)(d).

II. Plaintiffs fail to meet their burden to establish a *prima facie* claim under ORS 30.835.

A. Defendants did not "disclose" anything under ORS 30.835.

At the heart of the parties' dispute is the anti-doxing cause of action's use of "disclose." ORS 30.835(2). Plaintiffs argue that even though they themselves made all the information at issue public—Brown discussed his employer in the press, DeHart advertised his on LinkedIn, and Shannon touted his *in his campaign materials*—Defendants nevertheless "disclosed" that information when they reposted it to Facebook. Ans Br 25–26; (ER 129, 82, 58). That interpretation clashes both with the plain meaning of the word and with common sense. *See* Op Br 33–34. Once Plaintiffs themselves disclosed and

published the information to the public, it was already "disclosed"—the cat was out of the bag, so to speak—and Defendants could not disclose it anew.

Plaintiffs focus on ORS 30.835(1)(a), in which the legislature offered some exemplary terms to help demonstrate the *means* and *manners* through which disclosure might occur. *See* Op Br 33. Those exemplary terms do not limit the word's common meaning that the information disclosed was previously "secret or not generally known." *Disclose*, *Webster's Third New Int'l Dictionary Unabridged* (2017); *see Schmidt v. Mt. Angel Abbey*, 347 Or 389, 408–09, 223 P3d 399 (2009) ("The legislature may instead use examples to illustrate the applicability of a term, without intending to limit or narrow its common meaning, or to broaden the common meaning of a term."). For example, one of the exemplary terms the legislature offered is to "distribute." ORS 30.835(1)(a). One might "distribute" the recipe for Coca-Cola—that could be a "disclosure." But one might also "distribute" the Oregon Rules of Appellate Procedure—not so much.

Even so, Plaintiffs argue that the term "disclose" "contains no requirement the 'personal information' be secret, i.e. unavailable to others." Ans Br 3. In effect, Plaintiffs invite the Court to rewrite the statute, replacing "disclose" with "communicate." This the Court may not do. ORS 174.010. The context of the statute confirms Defendants' interpretation: The legislature

created a cause of action only for "improper disclosure of *private* information." ORS 30.835(2) (emphasis added).

In the analogous context of common-law privacy torts, the Supreme Court has observed that "[o]ne's preferred seclusion or anonymity may be lost in many ways; the question remains who is legally bound to protect those interests at the risk of liability." *Humphers v. First Interstate Bank*, 298 Or 706, 713, 696 P2d 527 (1985). Here, Plaintiffs voluntarily disclosed to the public where they worked. They used their gainful employment to communicate that they were fit for public office. If disclosures were made, they were the ones who made them. They cannot now seek to hold their constituents liable for the results. Defendants "disclosed" no private information, so Plaintiffs have failed to state a claim under ORS 30.835.[4]

B. Plaintiffs fail to meet their burden to show Defendants knew or should have known they lacked consent.

Relatedly, Defendants did not know and could not reasonably have known that Plaintiffs did not consent to public discussion of their employers.

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[4] Plaintiffs further argue that disclosure of a public website address, in defendant Tofte's case, is a "disclosure" of contact information. The ramifications of this interpretation are dire. Anyone who shares a publicly available website address, where the website happens to contain an employer's contact information, would be liable, even where the individual does not separately disclose the contact information or encourage anyone to contact the employer.

Cf. ORS 30.385(2)(b). After all, it was Plaintiffs who openly disclosed that information into the public sphere. Op Br 37–39.

Plaintiffs do not rebut this point. Instead, they argue that they obviously would never have consented to discussion of their employers in the context of "calls to action" in a "divisive climate." Ans Br 32–34. But the statute requires constructive knowledge of lack of consent to disclosure generally—not to disclosure in specific contexts. In effect, Plaintiffs claim editorial rights over the public sphere. They may disclose whatever they wish, they argue, but once disclosed, no one else may use that information in an unfriendly way. The chilling effect of such an interpretation need not be belabored.

C. Plaintiffs fail to meet their burden to show causation or that a reasonable person would be harassed.

The anti-doxing statute requires that even if there is a disclosure, a would-be plaintiff must be "harassed * * * *by* the disclosure." ORS 30.185(2)(c).[5] In other words, any harassment the plaintiff experiences must be *caused* by the disclosure.

Plaintiffs offered no evidence that the alleged disclosure of their employment *caused* them any harassment. Op Br 41. There is no evidence that

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[5] The "stalk[ing]" and "injur[y]" elements of the statute are not at issue. ORS 30.835(2)(c). Plaintiffs have consistently alleged only that they were harassed. (ER 4; Ans Br 35.)

anyone actually contacted their employers, for example. They attempt to fill this gap with claims of subjective distress in their homes—for example, that they felt compelled to install video cameras outside their houses (ER 147) or keep "personal protection" nearby when sleeping (ER 149).

But that still leaves a gap: How did "disclosure" of their employers' contact information make them feel unsafe at home? Plaintiffs argue that they cannot "be certain" that "other posts had not disclosed their home address." Ans Br 36. But the burden is not Defendants' to disprove Plaintiffs' conjectures. *Cf.* ORS 31.150(3). Plaintiffs must produce some evidence causally linking their subjective fear to the alleged disclosure. They have none.

Plaintiffs also argue that their fears need "not be rational." Ans Br 36. But the statute specifically requires Plaintiffs to prove that a reasonable person would be harassed by the disclosure. ORS 30.835(2)(d). Their subjective belief does not suffice. *See* Op Br 39–41.

III. If the anti-doxing statute applies to Defendants' conduct, it is unconstitutional.

On an anti-SLAPP motion, a plaintiff must both prove his cause of action and negate any constitutional defenses defendants raise. *See Neumann II*, 358 Or at 711 (on anti-SLAPP motion, court's determination of "legal sufficiency" of plaintiff's claim "hinges" on constitutional arguments).

A. Plaintiffs' procedural objections are meritless.

Plaintiffs ask the Court to overlook the constitutional defects in their claims because Defendants did not initially comply with ORAP 5.12. Ans Br 4 n1, 37, 39. The Court should decline their request. First, ORAP 5.12 applies by its terms to *facial* challenges—"challenges [to] the constitutionality of an Oregon statute"—not to *as-applied* challenges. Second, even if it applies, it is not jurisdictional. The Court may "on its own motion or on motion of any party * * * waive any rule." ORAP 1.20(5). Defendants notified the Attorney General on January 6, 2023, and the AG declined to appear. App 1; *see also State v. Mendenhall*, 53 Or App 174, 177 n3, 631 P2d 791 (1981) (substantial compliance with ORAPs sufficient). The Court should waive application of ORAP 5.12 here.

Plaintiffs also argue that Defendants' constitutional arguments were not preserved. Ans Br 38. This Court should reject that argument. Defendants vigorously contested the constitutionality of Plaintiffs' claims. See Op Br 18; ER 14–16, 249–51, 269, 274–75. Their constitutional arguments are preserved. *Peeples v. Lampert*, 345 Or 209, 219, 191 P3d 637 (2008).

B. Plaintiffs cannot constitutionally hold Defendants liable for their speech.

If Plaintiffs' allegations are cognizable under the anti-doxing statute, then it is unconstitutional as applied to Defendants' speech. Plaintiffs' only argument

to the contrary is that ORS 30.835 is not a strict liability statute: It requires an "intent to cause harm." Ans Br 40. But that mental-state requirement "does nothing to alleviate [the statute's] content-based nature." *Sheehan v. Gregoire*, 272 F Supp 2d 1135, 1146 (WD Wash 2003). The U.S. Supreme Court has explained that even for torts like intentional infliction of emotional distress, "public officials may not recover * * * without showing in addition that the publication contains a *false* statement of fact which was made with 'actual malice.'" *Hustler Mag., Inc. v. Falwell*, 485 US 46, 56 (1988) (emphasis added). In other words, the constitutional touchstone for speech torts is not intent but truth: "[S]tate action to punish the publication of truthful information seldom can satisfy constitutional standards." *Bartnicki v. Vopper*, 532 US 514, 527 (2001); *Neumann II*, 358 Or at 715 (likewise under the Oregon Constitution). Plaintiffs concede that Defendants' speech was true, Ans Br 40, so their claims cannot pass constitutional muster.

Plaintiffs barely dispute this. Their section on the constitutionality of their claims is less than two pages long and cites only one case. Ans Br 39–41. And even that lone citation is a non sequitur: They argue that the statute held unconstitutional in *Sheehan* still appears in Washington's Revised Code. Ans Br 41 n13. Of course it does. Courts enforce constitutional standards by "declin[ing] to enforce" unconstitutional statutes, not by redlining them out of

the statute books. Jonathan F. Mitchell, *The Writ-Of-Erasure Fallacy*, 104 Va L Rev 933, 933 (2018).

Elsewhere in their brief, Plaintiffs seek to distinguish *Publius*, 237 F Supp 3d at 1012, arguing that the prohibition there was triggered only after a written takedown demand. Ans Br 23–24. But that only heightens the comparative chilling effect of ORS 30.835, which operates even without notice. Plaintiffs argue also that the *Publius* statute required no showing of intent. Ans Br 23. But as explained above, that is irrelevant to the constitutional analysis. Finally, Plaintiffs argue that the "tight nexus" between the speech and the law it was protesting was dispositive in *Publius*. Ans Br 23–24. Not so. The dispositive fact in *Publius* was that the speech at issue was made in the "context of political speech." 237 F Supp 3d at 1014. So too here, for all the reasons above. So Plaintiffs' attempt to distinguish *Publius* falls flat.

Plaintiffs also insinuate that if their claims fail, elected officials will be defenseless to stalking and other harassing behavior. Ans Br 27. Again, not so. Under American principles of freedom of speech, elected officials do have to tolerate "vehement, caustic, and sometimes unpleasantly sharp attacks." *New York Times Co. v. Sullivan*, 376 US 254, 270 (1964). But true threats and incitement to violence are not protected speech. *See Virginia v. Black*, 538 US 343, 359 (2003); *Brandenburg v. Ohio*, 395 US 444, 447 (1969) (per curiam).

That is where the Constitution draws the line. Defendants' repeating facts about Plaintiffs' employers that Plaintiffs themselves first publicized in an effort to protest Plaintiffs' political votes easily falls on the protected side. Plaintiffs cannot constitutionally hold Defendants liable for their speech.

CONCLUSION

For all these reasons, this court should reverse and remand with instructions for the trial court to enter an order granting Defendants' special motions to strike and addressing only the remaining issue of Defendants' attorney fees related to the anti-SLAPP motions on remand.

RESPECTFULLY SUBMITTED this 19th day of January, 2023.

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APPENDIX

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Constitutional challenge to ORS 30.835

Gutman Benjamin <Benjamin.Gutman@doj.state.or.us> Tue, Jan 17, 2023 at 12:53 PM
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Cc: "Athul K. Acharya" <athul@pubaccountability.org>, "paul.l.smith@state.or.us" <paul.l.smith@state.or.us>, Kelly Simon <ksimon@aclu-or.org>, "Rian Peck (rian@visible.law)" <rian@visible.law>

I appreciate your courtesy on the briefing schedule. We do not plan to intervene at this stage, so no reason to adjust the schedule on our behalf.

Regards,

Ben

Benjamin Gutman (he/him)

503.378.4402

From: Shenoa Payne <spayne@paynelawpdx.com>
Sent: Tuesday, January 17, 2023 12:50 PM
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Subject: Re: Constitutional challenge to ORS 30.835

Hi Ben.

I'm just checking in to see whether the State has decided to intervene in this case. Our reply brief is due in two days and we want to assure that we can cooperate in delaying that deadline to allow the State to intervene if it so decides. If the State has decided not to intervene, please let us know as soon as possible.

Thanks,

Shenoa Payne, Attorney

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On Fri, Jan 6, 2023 at 3:44 PM Gutman Benjamin <Benjamin.Gutman@doj.state.or.us> wrote:

> Confirming receipt, thanks. We'll review and let you know if we plan to file anything.
>
> Regards,
>
> Ben
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> **From:** Athul K. Acharya <athul@pubaccountability.org>
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Subject: Constitutional challenge to ORS 30.835

CAUTION EXTERNAL EMAIL* This email originated from outside of DOJ. Treat attachments and links with caution. *CAUTION EXTERNAL EMAIL

Dear General Gutman,

I, along with Kelly Simon, Shenoa Payne, and Rian Peck (all cc'd), represent the defendants in *DeHart v. Tofte*, No. A177995 (Or. Ct. App.). I attach our opening brief, which contains a challenge to the constitutionality of ORS 30.835. We will consent to any motion to intervene by the State. Please let us know as soon as possible should the State decide to intervene. Our reply currently is due January 19, 2023, but we will cooperate with the State in seeking an extension to accommodate the State's ability to file a response to our opening brief.

Very truly yours,

Athul Acharya

Athul K. Acharya

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CERTIFICATE OF COMPLIANCE

Brief length:

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b)(ii) and (2) the word-count of this brief (as described in ORAP 5.05(1)(a)) is (3,300) words.

Type size:

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(3)(b)(ii).

/s/ *Athul K. Acharya*
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CERTIFICATE OF SERVICE AND FILING

I hereby certify that I filed the foregoing **APPELLANT'S REPLY BRIEF** by Electronic filing on January 19, 2023.

I further certify that on the same date, I served the same document on the following lawyer(s) by electronic service:

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