

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

ANDY NGO,

Plaintiff,

v.

ROSE CITY ANTIFA, an unincorporated
association; BENJAMIN BOLEN, an
individual; JOHN HACKER, an individual;
CORBYN (KATHERINE) BELYEA, an
individual; JOSEPH CHRISTIAN EVANS, an
individual; MADISON LEE ALLEN, an
individual; DOES 1-50,

Defendants.

)
) Case No. 20CV19618
)
)
) **DEFENDANT BOLEN’S RESPONSE**
) **TO PLAINTIFF’S MOTION TO**
) **STRIKE EVIDENCE SUBMITTED**
) **WITH DEFENDANT BOLEN’S**
) **ANTI-SLAPP MOTION**

I. INTRODUCTION

Along with his response to Mr. Bolen’s anti-SLAPP motion, plaintiff has filed a motion to strike the entirety of both declarations submitted with the motion. The Court should deny the motion, and even if it agrees that some portion or paragraphs of the declarations are inadmissible, it should simply not consider them. The remedy is not to strike the entire declarations.

II. THE COURT SHOULD NOT PERMIT PLAINTIFF TO LITIGATE THE ANTI-SLAPP MOTION WITHIN THE MOTION TO STRIKE

Rather than simply assert an evidentiary basis for striking the declarations or portions of the declarations, plaintiff appears to attempt to litigate the merits of the anti-SLAPP motion

1 within a separate motion to strike. This appears as a ham-fisted attempt to give plaintiff the last
2 word on the anti-SLAPP motion. Mr. Bolen absolutely objects to plaintiff litigating the merits of
3 the anti-SLAPP motion within the motion to strike. And he objects to any attempt by plaintiff to
4 have the last word on the anti-SLAPP motion by submitting a reply in support of the motion to
5 strike addressing the anti-SLAPP motion and not just the request to strike evidence.

6 **III. THE STATEMENTS FROM MR. BOLEN THAT PLAINTIFF SEEKS TO**
7 **STRIKE EITHER PROVIDE BACKGROUND INFORMATION THAT**
8 **PROVIDES CONTEXT FOR THE LAWSUIT AND THE MOTION, ARE BASED**
9 **ON PERSONAL KNOWLEDGE OR OPINION, OR ARE NOT SUBMITTED**
10 **FOR THE TRUTH OF THE MATTER THEREIN BUT INSTEAD TO SHOW**
11 **HOW PLAINTIFF IS PERCEIVED BY PEOPLE AT THE RALLIES OR**
12 **PROTESTS**

13 First, contextual or background information is admissible. “Although the contextual
14 material itself had limited, if any, *independent* relevance to an issue in the case, the trial court
15 properly admitted it, because it assisted in establishing the relevance of the victim's declarations
16 of her own state of mind or future intentions.” *State v. Voits*, 186 Or. App. 643, 655–56 (2003)
17 (emphasis in original). *See also* 10 See Legislative Commentary, quoted in Laird C. Kirkpatrick,
18 Oregon Evidence § 401.02, Art. IV–4 (4th ed. 2002) (“Evidence which is essentially background
19 in nature can scarcely be said to involve disputed matter, yet it is universally offered and
20 admitted as an aid to understanding.”).

21 Second, Mr. Bolen testified that he had personal knowledge relating to his testimony. For
22 instance, it is undisputed that Mr. Bolen regularly attends leftist political rallies and protests-the
23 same ones that plaintiff attends and at which plaintiff was allegedly injured on several occasions.
24 He also follows plaintiff on Twitter. As such, he is perfectly competent to testify that plaintiff
25 appears at these rallies, uncovers the identity of those in attendance and posts their identities
online with personal identifying information. Not only has Mr. Bolen witnessed this activity, he
has cited to numerous news articles and sources that confirm this.

////

1 Next, Mr. Bolen does not need to prove that plaintiff has a bad character or bad motives.
2 Plaintiff misses the point here. The point is that people in attendance at these rallies think that
3 plaintiff has a bad character or bad motives, as is evidenced by the numerous news sources
4 discussing this topic. The reason this is relevant to the case is that it shows that there are dozens
5 if not hundreds of people at these rallies that have a motive to punch plaintiff. This fact is borne
6 out in the Complaint itself. Plaintiff has named 50 does as defendants. *See also* Paragraph 16 and
7 41 of the Complaint.

8 Finally, although this case involves a case of mistaken identity, and Mr. Bolen's
9 argument is that plaintiff knows it was not him who punched plaintiff but has named him as a
10 defendant anyway, plaintiff suggests that Mr. Bolen is not permitted to offer his opinion *in the*
11 *context of an anti-SLAPP motion*, that he believes the suit against him is politically motivated.
12 There is no support for this at all. One of the issues in the motion is the motivation for naming
13 Mr. Bolen as a defendant when he did not punch plaintiff.

14 **IV. THE SAME GOES FOR MR. BURLEY'S TESTIMONY**

15 Mr. Burley qualified himself in his declaration as a journalist by stating the organizations
16 he works for, the book he has authored, and his attendance at and coverage of the rallies or
17 protests at which plaintiff alleges he was injured. He testified that he is familiar with plaintiff's
18 work. And he offers his opinions based on his work as a journalist who covers Mr. Ngo himself.

19 His testimony is also submitted to give context and background for the dispute. He is one
20 of the journalists that writes about the protests and about plaintiff. His testimony is offered not so
21 much to prove the truth of the statements about Mr. Ngo's character, but to illustrate that plaintiff
22 is reviled by leftists who attend the protests and rallies that Mr. Ngo attends, so the number of
23 potential people with a motive to punch plaintiff at one of these rallies numbers in the dozens at
24 least and in the thousands at most.

25 ///

1 **V. REQUEST FOR JUDICIAL NOTICE**

2 Mr. Bolen requests, pursuant to ORE 201, that the Court take judicial notice of the fact
3 that it is widely reported in the media that plaintiff doxes people attending the protests, and that
4 the people attending the protests are aware of this. Mr. Bolen does not ask the Court to take
5 judicial notice of the truth of the stories. Instead, he asks only that the Court take judicial notice
6 that many media stories have said as much, whether it is true or not. The support for this are the
7 dozens of news stories cited in the footnotes to the motion, and in the declaration from Mr.
8 Bolen.

9 It is common for courts to take judicial notice of what the media is covering or has
10 covered, even if the court does not take judicial notice of the truth of statements in the articles.
11 “Courts may take judicial notice of publications introduced to “indicate what was in the public
12 realm at the time, not whether the contents of those articles were in fact true. * * * Accordingly,
13 we take judicial notice of them solely as an indication of what information was in the public
14 realm at the time.” *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960
15 (9th Cir. 2010). *See also State v. Langley*, 214 Or. 445, 484 (1958) (“We take judicial notice of
16 the controversy that has been and is now raging over this rule and the efforts of the news
17 media—the newspapers and news magazines and the broadcasters by radio and television—to
18 bring about its relaxation.”).

19 **VI. CONCLUSION**

20 The Court should not strike either of the declarations in whole or in part. Instead, if the
21 Court is of the opinion that some testimony is inadmissible for some reason, even if it is just

22 ///
23 ///
24 ///
25 ///

1 background or context, which the case law says is admissible, it should simply not consider that
2 testimony when performing the analysis the Court is required to perform in deciding the anti-
3 SLAPP motion.

4 DATED this 15th day of October, 2020.

5 DAVIS ROTHWELL
6 EARLE & XÓCHIHUA, P.C.

7 /s/ Jonathan Henderson
8 Hilary A. Boyd, OSB No. 152095
9 hboyd@davisrothwell.com
Jonathan Henderson, OSB No. 063554
jhenderson@davisrothwell.com
Of Attorneys for Defendant Bolen

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I served the foregoing **DEFENDANT BOLEN'S RESPONSE TO**
3 **PLAINTIFF'S MOTION TO STRIKE EVIDENCE SUBMITTED WITH BOLEN'S**
4 **ANTI-SLAPP MOTION** on the following attorney(s) of record:

5 James L Buchal (OSB #921618)
6 counsel@buchal.com
7 Murphy & Buchal LLP
8 3425 S.E. Yamhill, Suite 100
9 Portland OR 97214

10 Harmeet K. Dhillon, *Pro Hac Vice*
11 harmmeet@dhillonlaw.com
12 Dhillon Law Group Inc.
13 177 Post Street, Suite 700
14 San Francisco, California 94108
15 *Of Attorneys for Plaintiff*

16 David D. Park, OSB #803358
17 Elliott & Park, P.C.
18 324 S Abernethy Street
19 Portland, OR 97239-8529
20 Tele: 503- 227-1690
21 Fax: 503- 274-8384
22 dave@elliott-park.com
23 *Of Attorneys for John Hacker*

24 Michelle R Burrows, OSB # 861606
25 MICHELLE R. BURROWS P.C.
1333 Orenco Station Parkway# 525
Hillsboro, OR 97124
Tel: 503-241-1955
michelle.r.burrows@gmail.com
Of Attorneys for John Hacker

David F. Sugerman, OSB #862984
SUGERMAN LAW OFFICE
707 SW Washington St., Ste. 600
Portland, OR 97205
Tel: 503-228-6474
Fax: 503-228-2556
david@sugermanlawoffice.com
Of Attorneys for John Hacker

Christopher A. Larsen, OSB # 910679
PICKETT DUMMIGAN MCCALL LLP
210 SW Morrison St., 4th FL
Portland, Oregon 97204
Tel: 503-223-7770
Fax: 503-227-5350
chris@pdm.legal
Of Attorneys for John Hacker

Gabriel Chase, OSB # 142948
CHASE LAW, PC
621 S.W. Alder St., Ste. 600
Portland, OR 97205
Tel: 503-294-1414
Fax: 503-294-1455
gabriel@chaselawc.net
Of Attorneys for John Hacker

Jane L. Moisan, OSB # 181864
PEOPLE'S LAW PROJECT
818 S.W. 4th Ave. #221-3789
Portland, OR 97204
Tel: 971-258-1292
peopleslawproject@gmail.com
Of Attorneys for John Hacker

Joe Piucci, OSB # 135325
Stephen Piucci, OSB #821056
PIUCCI LAW LLC
900 SW 13th Ave., Ste. 200
Portland, OR 97205
Tel: 503-228-7385
Fax: 503-228-2571
joe@piucci.com
steve@piucci.com
Of Attorneys for John Hacker

24
25 ///

1 by mailing to the foregoing a true copy thereof, placed in a sealed envelope, with postage
2 prepaid, addressed as listed above, and depositing the same in the United States mail through a
3 post office at Portland, Oregon, on this day.

4 DATED this 15th day of October, 2020.

5 DAVIS ROTHWELL
6 EARLE & XÓCHIHUA, P.C.

7 /s/ Jonathan Henderson
8 Hilary A. Boyd, OSB No. 152095
9 hboyd@davisrothwell.com
Jonathan Henderson, OSB No. 063554
jhenderson@davisrothwell.com
Of Attorneys for Defendant Bolen