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Of Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

GREGG SCHUMACHER and LINDA SCHUMACHER, individually and as husband and wife, and GREGG SCHUMACHER FURS LLC dba SCHUMACHER FURS & OUTERWEAR,

Plaintiffs

v.

CITY OF PORTLAND, a municipal corporation; IN DEFENSE OF ANIMALS, a foreign nonprofit corporation; ANIMAL LIBERATION FRONT, an unincorporated association; PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC., a foreign nonprofit corporation; MATT ROSSELL; KEVIN MEIRAS aka "Bluejay";

No. CV 07-601-MO

PLAINTIFFS' COMBINED REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR RECONSIDERATION

CONNIE DURKEE; ALEX LILLI; JOHN
DOES 1-10; and JANE DOES 1-10

I. INTRODUCTION

Due to the manifest injustice caused by premature dismissal of plaintiffs' claims prior to the opportunity to conduct full discovery, and the clear error of law which occurred when the Court did not apply a motion to dismiss standard when evaluating defendants' anti-SLAPP motion, the Court should reconsider and reverse its earlier dismissal. The Court should also reconsider the manner in which it applied the two-prong test used in determining whether to grant a motion to strike pursuant to ORS 31.150, as plaintiffs were inappropriately required to show a probability of prevailing on their claims prior to defendants satisfying the first prong. Moreover, the court should apply the same standards argued herein as to the pending supplemental briefing concerning defendant Mieras, which the Court has yet to rule on. As a matter of law, defendants can not meet the first prong of the test because the conduct complained of is undeniably illegal.

II. ARGUMENT

A. This Court Should Reconsider its Prior Dismissal to Prevent Manifest Injustice to Plaintiffs and Clear Error of Law.

Defendants concede in their responses that Rule 60(b)(6) is an equitable remedy that allows a court to reconsider an earlier decision to prevent manifest injustice or clear error of law. Defendant PETA's Response p. 4; Defendant IDA's Response p. 3. The circumstances of this litigation warrant the use of this equitable tool because plaintiffs have demonstrated clear error in that the Court applied ORS 31.150 in a manner inconsistent with the language of the statute. Specifically, the statute requires that an anti-SLAPP motion be treated as a motion to dismiss; however, in this

case it was applied in a manner inconsistent with the standards and safeguards required in a motion to dismiss; namely, the Court did not appear to assume the truth of all allegations in the pleadings, including all inferences that may be drawn therefrom, and view the allegations and inferences in the light most favorable to the nonmoving party. *See L. H. Morris Electric v. Hyundai Semiconductor*, 187 Or App 32, 35, 66 P3d 509 (2003).

Furthermore, the Court appeared to weigh the parties' contradictory affidavits, which is allowed by ORS 31.150(4), but disallowed pursuant to ORCP 21, and, thus, disallowed by the ORS 31.150(1). Defendants argue that ORCP 21 does allow the Court to consider "affidavits, declarations, and other evidence" in the context of resolving a motion to dismiss, and therefore ORS 31.150(1) and (4) do not conflict. *See* Defendant PETA's Response p. 8; Defendant IDA's Response p. 4. What defendants fail to mention is that a court is only allowed to consider such evidence when a party moves to dismiss pursuant to ORCP 21(1) - (7). Where, as here, the issue is whether to dismiss a case pursuant to ORCP 21(8)(failure to state ultimate facts sufficient to constitute a claim) the court may not consider such evidence and may not determine the existence or nonexistence of facts. Since anti-SLAPP motions are essentially motions to dismiss for failure to state a claim, ORCP 21 does not allow a court to weigh opposing affidavits and make factual determinations when applying the anti-SLAPP statute.

Defendant PETA labels the legal arguments in plaintiffs' memorandum as "newly hatched legal theories." Defendant PETA's Response p. 5. However, plaintiffs argued during the hearing on the anti-SLAPP motion that the Court was inappropriately imposing a summary judgment standard and requiring them to prove ultimate issues of fact prematurely. Contrary to defendants'

portrayal of plaintiffs' legal arguments, plaintiffs are not asking this Court to strike down ORS 31.150 as unconstitutional on its face; rather, plaintiffs' position is that the statute was *applied* to them in a manner depriving them of certain constitutional rights, including the right to due process and the right to a jury trial. Plaintiffs did not anticipate that the Court would apply the anti-SLAPP statute in this manner, and this motion for reconsideration is not a second bite at the apple.

Given the absence of any reported Oregon decisions construing the contradictory anti-SLAPP standards and procedures, and given the manifest injustice and injury to plaintiffs caused by dismissing their lawsuit prior to full discovery and exposure to attorneys fees, plaintiffs believe this is an appropriate occasion for this Court to exercise its discretion to use the equitable remedy of reconsideration, and respectfully request that it do so. Plaintiffs also believe it would be unfair to be held to a higher standard than Defendant Kevin Mieras was when he sought his motion for reconsideration pursuant to Rule 60, which was granted by the Court.

B. ORS 31.150 Does Allow a Court to Weigh Opposing Evidence in a Manner Inconsistent With a Motion to Dismiss.

Defendant PETA accuses plaintiffs of "misleading" the Court by "infusing Oregon's anti-SLAPP statute with a provision that requires a court to weigh the evidence before it." Defendant PETA's Response pp. 7-8. Plaintiffs steadfastly dispute that they have attempted to mislead the Court by misquoting the statutory provision. A review of plaintiffs' opening brief shows that it is plaintiffs' *argument* that ORS 31.150(4) requires a court to weigh competing evidence in determining whether a plaintiff has shown a probability of prevailing. *See* Plaintiffs' Memorandum p. 3. While the text obviously does not contain the phrase "weigh the evidence,"plaintiffs *argue* that is the practical effect of construing the provision as the Court did. Indeed, when a court is instructed

to make a factual determination regarding whether a plaintiff has shown a probability of prevailing, and the court is instructed to make this determination by considering opposing affidavits, how else could a court make this determination other than by weighing the opposing evidence?

There is no other reasonable interpretation for ORS 31.150(4) other than that the court is allowed to weigh the opposing evidence in determining whether a plaintiff has met its burden under the anti-SLAPP statute. The only other interpretation would be that the provision does not allow weighing evidence, and that the plaintiffs' pleadings and affidavits must be accepted as true, as in a motion to dismiss. Under such an interpretation, which would be consistent with ORS 31.150(1), defendants' affidavits would not have been considered at all by the Court in making factual determinations, and plaintiffs' claims would not have been dismissed. Furthermore, as stated above, ORCP 21 does not allow a court to consider opposing affidavits and make factual determinations when determining whether to dismiss a case pursuant to failure to state facts sufficient to constitute a claim.

Defendants point to California case law as support for allowing an Oregon court to weigh opposing evidence in the context of an anti-SLAPP motion. Defendant PETA's Response p. 8. However, although the California anti-SLAPP statute has a provision identical to ORS 31.150(4), the critical distinguishing factor is that the California statute does not state that it should be treated as a motion to dismiss. Therefore, California's statute does not contain the internal inconsistencies that occur in the Oregon statute, and the fact that California's statute has been upheld is of no consequence to Oregon's statute or this case. Another significant difference is that California courts have ruled that a plaintiff must only prove that his lawsuit has "minimal merit." *Flatley v. Mauro*,

121 Cal App 4th 1523, 18 Cal Rptr 3d 472 (2004)*(citing Navellier v. Sletten*, 29 Cal 4th 82, 89, 93-94 (2002)). This standard is significantly lower than Oregon's "substantial evidence" standard and is, therefore, less draconian and less constitutionally suspect.

C. ORS 31.150 Was Applied in a Manner Which Violated Plaintiffs' Right to a Jury Trial.

Defendants argue that plaintiffs do not have an absolute right to a jury trial by citing two cases that are inapposite to the present case. *Fujitsu Microelectronics, Inc. v. Lam Research Corp.*, 174 Or App 513 (2001), is cited for the proposition that a case may be dismissed pursuant to FRCP 56 if the moving party shows that there is no genuine issue as to any material fact. However, the motion at issue in the current case is not a motion for summary judgment, and if it were certain due process limitations would apply, such as allowing the nonmoving party to have an opportunity to full and complete discovery, and forbidding the trial court from resolving the merits of disputed factual claims. Furthermore, there are many disputed issues of material fact in this case that could not be appropriately decided through summary judgment.

Defendants also cite *Reed v. Western Union Telegraph Co.*, 70 Or 273 (1914), which is irrelevant to the instant case because it involved a situation where there were no disputed facts. The Oregon Constitution guarantees the right to a jury trial in this case; therefore, plaintiffs are entitled to have a jury resolve all factual issues, and the anti-SLAPP procedure violates this right.

D. Plaintiffs' Due Process Rights Were Denied Because Their Claims Were Dismissed Prior to Full Discovery.

ORS 31.152(2) only provides for limited "specific" discovery on motion and for good cause

shown; it does not provide for full, complete discovery to which plaintiffs have a due process right. The United States Supreme Court has stated that in the context of a premature summary judgment motion, a dispositive motion *must* "be refused where the nonmoving party has not had the opportunity to discover information that is essential to her opposition." *Anderson v. Liberty Lobby*, 477 US 242, 250 n.5 (1986). In *Celotex Corp. Catrett*, 477 US 317 (1986), the Supreme Court similarly stated that, "Any potential problem with such premature motions can be adequately dealt with under Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on motion to be continued, if the nonmoving party has not had an opportunity to make *full* discovery." *Id.* at 326 (emphasis added).

In the case at hand, nothing less than full discovery would have allowed plaintiffs to obtain the evidence it needs to connect the defendants to the illegal protest activities. Given the covert nature of the illegal protest acts, and the failure of the Portland police to arrest and identify protestors, plaintiffs are unable to "specify" exactly what type of discovery would lead to the information they seek. As such, the "specific" discovery allowed by the anti-SLAPP statute is not adequate and does not prevent plaintiffs from being denied their due process right to full discovery.

E. The Court Misapplied the First Prong of the Anti-SLAPP Test by Requiring Plaintiffs to Produce Substantial Evidence Linking Defendants to the Illegal Acts.

Defendants have never denied that the conduct underlying plaintiffs' claims were illegal – such as harassment, vandalism, nudity and blocking public sidewalks and the store entrance. Rather, defendants argue that plaintiffs do not have evidence linking *them* to such conduct and invite the Court to focus solely on protected activities that are not the basis of this action. Defendants argue that they have satisfied the first prong of the test because plaintiffs cannot prove that defendants

participated in the illegal conduct. However, the first prong of the test does not involve an analysis of evidence regarding ultimate liability; rather, it involves an analysis regarding the nature of the challenged conduct. Defendants cite *Flately v. Mauro*, 39 Cal 4th 299, 314 (2006), and concede that where "the illegality is conclusively shown by the evidence," the anti-SLAPP statute does not apply. Defendant PETA's Response p. 14. Defendants also cite *Huntingdon Life Sciences v. Stop Huntingdon Animal Cruelty*, 129 Cal App 4th 1228, 1246 (2005), for the proposition that, "If . . . the evidence conclusively establishes the conduct complained of was illegal, as a matter of law the defendant cannot make a prima facie showing the action arises from protected activity."

Because there is no dispute that the actions complained of in the present case were illegal, and the evidence establishes the illegality of such actions, as a matter of law the defendants cannot meet the first prong of the test, and the burden never should have shifted to plaintiffs to produce substantial evidence of ultimately prevailing on the claims. In other words, plaintiffs do not have to provide evidence linking the defendants to the illegal actions until the second prong is reached, and that as a matter of law did not occur. Notably, defendants do not address plaintiffs' argument that they and the Court conflated the two prongs of the test and inappropriately required plaintiffs to introduce factual evidence of the defendants' liability for the illegal acts before defendants satisfied the first prong of the test.

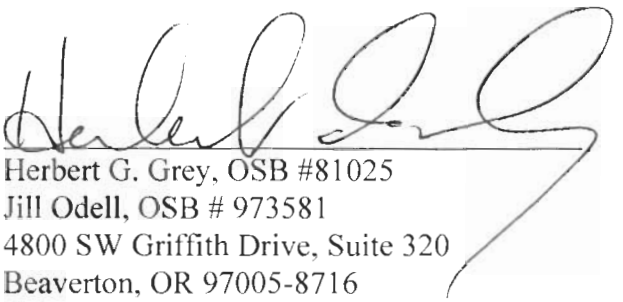
Defendants also attempt to portray *Wilcox v. Superior Court*, 27 Cal App 4th 809 (1994), as a case which states that plaintiffs cannot "carve out" unprotected activity from protected activity. However, *Wilcox* does not deal with a situation where parties are carving out or separating unprotected from protected conduct. Rather, *Wilcox* addresses the situation where protected activity

is simply unfairly *labeled* as unprotected activity for the purpose of instigating a SLAPP suit. In the case at hand, plaintiffs are not mislabeling peaceful protest activities as vandalism or harassment (i.e., throwing red paint on a store front is indisputably vandalism that does not fall within the scope of the anti-SLAPP statute).

CONCLUSION

Respectfully, the Court's judgment of dismissal should be rescinded, and plaintiffs should be allowed to proceed with full discovery as to all defendants.

DATED this 7th day of September, 2007.



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