DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

XCENTRIC VENTURES, LLC, an Arizona limited liability company; ED MAGEDSON, an individual, Plaintiffs/Appellants, v. JOHN F. BREWINGTON and JANE DOE BREWINGTON, husband and wife; and JFB ACQUISITIONS, LLC, an Arizona limited liability company, Defendants/Appellees.	No. 1 CA-CV 11-0042 DEPARTMENT D **MEMORANDUM DECISION** Not for Publication (Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-008275

The Honorable Larry Grant, Judge

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

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G E M M I L L, Judge

¶1 Plaintiffs Xcentric Ventures, L.L.C. and Ed Magedson, (collectively "Magedson" unless context requires otherwise) appeal from a grant of summary judgment to John and Jane Doe Brewington and JFB Acquisitions, L.L.C., collectively ("Brewington"). For the following reasons, we affirm in part, reverse in part, and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

¶2 Magedson is the managing member of Xcentric which owns the Internet forum called Ripoff Report ("ROR"). Magedson is also the editor for ROR. ROR is a consumer advocacy website that allows consumers to post comments or complaints concerning their transactions with businesses.

¶3 In 2007, William Stanley began a series of postings on scam.com, among other sites, about Magedson and ROR. Stanley started a campaign to remove ROR from the Internet by contacting its Internet service providers or hosts and encouraging others to do so. Stanley posted personal information about the owners of the companies that did business with ROR. Stanley created websites dedicated to disparaging ROR or its business partners. Each time ROR was bumped from its current Internet host —- based on Stanley's acts, Stanley would redirect his campaign toward any subsequent Internet company hosting ROR. In one post Stanley stated: "Magedson has been removed from the following

hosts last month" (listing eleven hosts) and "[w]e have information [on] what datacenter he is moving to next and we are already set up for protest."

¶4 John Brewington, a private investigator, also followed Stanley's repeated attacks against ROR and made comments on the same forum. Brewington reached out to Stanley and told him he was writing a book on the industry, and they exchanged phone numbers. Stanley and Brewington communicated several times regarding Magedson or ROR. Brewington provided a list of ROR's customers to Stanley. Stanley contacted ROR's customers to continue his campaign against Magedson. Brewington also provided Stanley with information for one of ROR's service providers, Getnet, and Stanley through his same tactics eventually placed enough pressure on Getnet to provoke removal of ROR from Getnet's servers. Both men were cooperating with each other: Brewington provided referrals to Stanley and asked Stanley to remove an unfavorable website about Brewington called www.johnbrewington.net. Stanley, by email responded, "[i]t is dead."

¶5 Magedson filed suit against Stanley in the United States District Court for the District of Arizona in June of 2007. The district court apparently entered a default against Stanley in Magedson's favor and eventually ordered injunctive relief against Stanley.

¶6 Brewington was also in contact with a person in Texas named Shawn Richeson. Richeson sent Magedson's attorney an email claiming to have a video that was made by Brewington in which two individuals stated that Magedson removed unfavorable content on ROR for money. In the email, Richeson wanted to negotiate a deal to remove negative content about his own clients on ROR and if Magedson's attorney agreed, then he would not make the video public. Magedson refused and later Brewington posted the video on YouTube. During a deposition, Richeson claimed he sent the email to lure Magedson's attorney to Texas only to effect service of process in a separate lawsuit against Magedson's attorney.

¶7 Magedson timely appeals and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (Supp. 2011).[1]

ANALYSIS

¶8 We review a grant of summary judgment *de novo*, and we are required to view the facts and reasonable inferences in the light most favorable to the non-moving party. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a

[1] We cite to the current version of the applicable statutes if no revisions material to this decision have since occurred.

matter of law. *Orme Sch. v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990); Ariz. R. Civ. P. 56(c)(1). Summary judgment should be granted only "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch.* at 309, 802 P.2d at 1008.

Aiding And Abetting Claim – vis-à-vis William Stanley

¶9 To establish a prima facie case for tortious aiding and abetting conduct, Magedson must prove three elements: 1) the primary tortfeasor (for this claim, Stanley) committed a tort that caused injury to Magedson; 2) Brewington knew that the primary tortfeasor's conduct constituted a breach of duty; and 3) Brewington substantially assisted or encouraged the primary tortfeasor in the achievement of the breach. *See Wells Fargo Bank v. Arizona Laborers, Teamsters, and Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 485, ¶ 34, 38 P.3d 12, 23 (2002) (citing Restatement (Second) of Torts § 876(b) (1979)).

¶10 Magedson contends that non-party William Stanley committed torts of defamation, false light, and tortious interference with business relationships between Xcentric and its clients and Internet service providers. Magedson also contends that Brewington "assisted Stanley in his campaign by providing Stanley with information that he could use in his plan

to shut down Xcentric" and was therefore aiding and abetting Stanley's conduct constituting the tort of intentional interference with Magedson's business relationships. Brewington contends that Magedson cannot prove that Stanley committed a tort against Magedson.

Stanley's Tortious Acts

¶11 To establish that Stanley committed a tort, Magedson initially relies on the default judgment granting a preliminary injunction issued by Federal District Court Judge Neil V. Wake against Stanley on June 21, 2007. Brewington counters that the district court's ruling against Stanley is inadmissible because it is hearsay or alternatively that it cannot be used because the requirements for issue preclusion (formerly "collateral estoppel") are not satisfied. Brewington cites *Minjares v. State*, 223 Ariz. 54, 58, ¶ 14, 219 P.3d 264, 268 (App. 2009), in which the court explained:

> Issue preclusion prevents a party from relitigating an issue that was actually litigated in a prior proceeding if the parties had a full opportunity and motive to litigate it, resolution of the issue was essential to the decision, a final resolution on the merits resulted, and there is common identity of the parties.

¶12 Brewington contends that the 2007 district court decision was not litigated on the merits because it was essentially a default judgment and further that Brewington was

not a party in that particular proceeding. We agree with Brewington's position here. The district court's ruling cannot be used against Brewington because Brewington was not a party in that federal action.[2]

¶13 For these reasons, we conclude that Magedson has not established evidence of a tortious act by Stanley on the basis of the district court judgment. Nonetheless, we also conclude that Magedson has made a sufficient showing that Xcentric was tortiously harmed by Stanley's acts, entirely aside from the district court judgment.

¶14 There is sufficient evidence in the record to support a finding that Stanley committed the underlying tort of intentional interference with a business relationship. Proving tortious interference requires: "1) [t]he existence of a valid contractual relationship; 2) knowledge of the relationship or expectancy on the part of the interferor; 3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and 4) resultant damage to the party

[2] Additionally, it does not appear that Stanley answered and defended himself in the federal action that resulted in the findings, conclusions, and injunction entered by Judge Wake against Stanley in 2007. To the extent that Judge Wake's determination is essentially a default judgment, the absence of a resolution on the merits would be another reason to reject application of issue preclusion here. Additionally, because we reject issue preclusion on the basis that Brewington was not a party in the federal action, we need not reach the hearsay argument asserted by Brewington.

whose relationship or expectancy has been disrupted." *Antwerp Diamond Exch. of Amer., Inc. v. Better Bus. Bureau of Maricopa County, Inc.*, 130 Ariz. 523, 529-30, 637 P.2d 733, 739-40 (1981).

¶15 The record contains evidence that Stanley was involved in a campaign to remove ROR from the Internet by harassing its clients, its Internet service providers, and other affiliates. In one forum Stanley posted: "We are now going after [Magedson's] current hosting company and I am sure soon they will be saying goodbye to [Magedson] also." Stanley continued: "The goal of our actions is to force [Magedson] to remove Defamation of our Members or face the permanent shut down of his website." Stanley successfully collapsed (at least temporarily) ROR's presence on the Internet with his methods and he forced Magedson to frequently change Internet service providers at cost to Magedson.

¶16 For instance, Stanley created protest websites devoted to besmirching Magedson such as PMGISUCKS. This particular site had a photo of Magedson and claimed that the company, PMGI, was a business partner of Magedson and that Magedson was the founder of ROR and an "Internet Extortionist." Stanley bragged online

about shutting down Magedson's Internet hosts and DDoS[3] protection companies. Stanley stated in one post that his "aggressive tactics" such as "call[ing] over and over again and creat[ing] unflattering websites about them" like "XXXXXhostingSUCKS.com" were successful.

¶17 Furthermore, Stanley encouraged others to contact Magedson's web hosts: "At this point Gigenet refuses to do anything about this extortionist they are protecting. Their phone number is 800-561-2656[.] Please call them and voice your opinion."

¶18 Businesses that advertised on ROR received emails from Defamation Action, in which Stanley was a founder, that stated ROR was an "Extortion site" and that any advertisers on ROR would be subject to protest through protest websites; posting on high ranking blogs; and press release sites. Further, "[t]hese [s]ites and posts will be optimized for maximum effect on search engines."

¶19 We conclude, therefore, the trial court erred because a reasonable jury could conclude on this record that Stanley intentionally interfered with Magedson's contractual relationships with its Internet service providers or hosts.

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[3] A Distributed Denial of Service or DDoS attack consists of having a large number of computers converge on a single website to overload it causing the website to fail.

Brewington's Knowledge of Stanley's Acts

¶20 Magedson must also establish that Brewington had knowledge of Stanley's actions or at the very minimum was generally aware of Stanley's acts toward ROR. "[A]ctual and complete knowledge" of the primary tortfeasor's actions is not necessary. *Wells Fargo*, 201 Ariz. at 488, ¶ 45, 38 P.3d at 26. A general awareness of the tortious scheme is sufficient. *Id.* "The knowledge requirement can be satisfied even though the aider and abettor did not know all the details of the primary violation . . . and can be established through circumstantial evidence." *Sec. Title Agency, Inc. v. Pope*, 219 Ariz. 480, 491, ¶ 45, 200 P.3d 977, 988 (App. 2008) (citing *Wells Fargo*, 201 Ariz. at 488, ¶ 45, 38 P.3d at 26.)

¶21 The record contains evidence presenting a triable issue regarding Brewington's knowledge of the motive and nature of Stanley's acts. Stanley and Brewington exchanged emails and telephone calls concerning ROR. In one email Brewington stated to Stanley: "Magedson is trying like hell to find options and may find a way to become immune to attack." Brewington was a private investigator who was researching websites like ROR and he was working on a book about forums similar to ROR. Though not indicative of fault, this reflects that Brewington had a great deal of background knowledge on what was taking place in Stanley's and Magedson's industry. Furthermore, Brewington

worked with or for Stanley to provide information about ROR. For instance, Brewington communicated to Stanley in an email that "I think we are going to make some money" and "[i]f you feel I have generated business for you th[e]n I know you will be fair." Moreover, Brewington also told Stanley "I have some tools others do not have that will allow [me] to get the information on the phone number you wanted traced." Finally, Brewington admitted in deposition to knowing about what Stanley was trying to do. Brewington stated: "I think — it was very clear that . . . Mr. Stanley was trying to shut down the Ripoff Report, I think by Mr. Stanley's own admissions."

¶22 Stanley acknowledged his mission and goal concerning ROR, and a reasonable jury, based on the communications between Brewington and Stanley, could find that Brewington was aware of Stanley's acts.

Brewington's Substantial Assistance or Encouragement

¶23 Magedson must further establish that Brewington substantially assisted Stanley with Stanley's attacks on ROR. "[S]ubstantial assistance by an aider and abettor, can take many forms, but means more than 'a little aid.'" *Wells Fargo*, 201 Ariz. at 488, ¶ 46, 38 P.3d at 26 (quoting *In re Amer. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. 1424, 1435 (D. Ariz. 1992)). "[E]ven ordinary course transactions[] can constitute substantial assistance under some circumstances, such

as where there is an extraordinary economic motivation." *Id.* at 489-90, ¶ 48, 38 P.3d at 27-28. "Moreover, substantial assistance does not mean assistance that was necessary to commit the [tort]. The test is whether the assistance makes it 'easier' for the violation to occur, not whether the assistance is necessary." *Id.* at 489, ¶ 54, 38 P.3d at 27 (citation omitted) (quoting *Camp v. Dema*, 948 F.2d 455, 462 (8th Cir. 1991)).

¶24 Magedson provided evidence demonstrating Brewington assisted Stanley. First, Brewington provided personal information on the owner of Getnet (one of ROR's Internet hosts) to Stanley, and Stanley used that information to further his campaign against Magedson. Second, Brewington provided Stanley with personal information about ROR's customers including a client list. Furthermore, Brewington was sending Stanley referrals and was concerned with helping Stanley reach his "goals." Finally, and as already noted, Brewington was interested in financial gain based on his relationship with Stanley. *See supra* ¶ 21.

¶25 We conclude on this record that Brewington's actions could support a finding of substantial assistance. A reasonable jury could find that Brewington encouraged Stanley to continue his campaign against ROR and Magedson. Black's Law Dictionary defines "encouragement" as follows: "To instigate; to incite

into action; to embolden; to help. See AID AND ABET." 547 (7th ed. 1999). A jury could decide that Brewington helped Stanley achieve his goals.

¶26 For these reasons, we conclude that the trial court erred in granting summary judgment on this claim because the evidence is sufficient to present genuine issues of material fact concerning the Stanley/Brewington aiding and abetting claim.

Aiding And Abetting Claim — vis-à-vis Shawn Richeson

¶27 Magedson's next claim focuses on a video that Brewington created concerning Magedson and ROR. Magedson argues that Brewington aided and abetted non-party Shawn Richeson when Richeson sent Magedson's attorney an email allegedly blackmailing Magedson by proposing a deal to withhold the release of the video about Magedson. Specifically, Richeson sent Magedson's attorney an email stating that he "would like to work out a deal" because some of his "261K" clients have been adversely affected by Magedson's ROR website. Richeson's email implied he would refrain from taking the video public if some sort of arrangement could be made.

Richeson's Tortious Act

¶28 The initial element that Magedson must establish for the aiding and abetting claim against Brewington is that Richeson committed a tort that damaged Magedson. *See supra* ¶ 9.

At the trial court Magedson repeatedly alleged that Richeson blackmailed him. Magedson did not, however, allege theft by extortion, nor did he allege or identify the statute that criminalizes such conduct, nor did he allege that the tort of negligence per se had been committed by Richeson. These arguments (theft by extortion, violation of A.R.S. § 13-1804(A)(6),[4] and negligence per se) are asserted for the first time on appeal. Brewington points this out in his answering brief and argues that the blackmail issue should therefore be waived on appeal.

¶29 We recognize that the terms blackmail and extortion are sometimes used interchangeably. *See* 31A Am. Jur. 2d Extortion, Blackmail, etc. § 1 (2011) (noting that "extortion" and "blackmail" may connote somewhat different behavior, nonetheless "blackmail" is often used as a synonym of "extortion").[5] Although Magedson asserted at the trial court

[4] Arizona has codified the crime of extortion under A.R.S. § 13-1804(A)(6) (Supp. 2011): "A person commits theft by extortion by knowingly obtaining or seeking to obtain property or services by means of threat to do in the future [by] [e]xpos[ing] a secret or an asserted fact, whether true or false . . . to impair a person's credit or business."

[5] Section 13-1804(A), A.R.S., defines "theft by extortion" to include several categories of obtaining or seeking to obtain property or services by means of threatening to, for example: cause physical injury with a deadly weapon; cause physical injury other than with a deadly weapon; cause damage to property; accuse someone of a crime; or cause anyone to part with any property.

that Richeson's email constituted blackmail, Magedson has not argued that blackmail or extortion constitutes a tort under Arizona law. Instead, Magedson argues for the first time in his opening brief that Richeson's activities are in violation of the criminal extortion statute which in turn provides grounds for a finding of negligence per se.

¶30 These arguments are waived because they were not asserted at the trial court. *See Odom v. Farmers Ins. Co. of Ariz.*, 216 Ariz. 530, 535, ¶ 18, 169 P.3d 120, 125 (App. 2007); *Van Loan v. Van Loan*, 116 Ariz. 272, 274, 569 P.2d 214, 216 (1977) (stating issue raised on appeal for first time is untimely and deemed waived).

¶31 We conclude, therefore, that the trial court did not err. Summary judgment was appropriate on this aiding and abetting claim against Brewington because Magedson did not present evidence and develop a sufficient legal basis to support a finding that Richeson committed a tort that damaged Magedson.

Defamation Claim — Brewington's Statement

¶32 We turn now to Magedson's defamation claim based on Brewington's alleged statement to Magedson's former neighbor. In order for this claim to survive, Magedson must make a prima facie case for defamation. The elements of defamation of a private person are: publication of a false and defamatory communication concerning a private person or public figure

relating to a private matter if, and only if, the defendant knows that the statement is false and defamatory or acts in reckless disregard of the truth or falsity or acts negligently in failing to ascertain the truth or falsity. *See Peagler v. Phoenix Newspapers, Inc.*, 114 Ariz. 309, 315, 560 P.2d 1216, 1222 (1977) (adopting Restatement (Second) of Torts § 580B (1975)). "To be defamatory, a publication must be false and must bring the defamed person into disrepute, contempt, or ridicule, or must impeach plaintiff's honesty, integrity, virtue, or reputation." *Turner v. Devlin*, 174 Ariz. 201, 203-04, 848 P.2d 286, 288-89 (1993) (quoting *Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 341, 783 P.2d 781, 787 (1989)). Additionally, truth is a defense to defamation. *Godbehere*, 162 Ariz. at 341, 783 P.2d at 787.

¶33 Magedson contends that Brewington defamed him by knowingly and falsely stating to Magedson's former next door neighbor, Steve J., that "there were federal indictments in place and that the authorities wanted to get in touch with Magedson." Brewington denies he told Steve J. about any federal indictments.

¶34 The determination of which witness is more credible is a decision within the purview of the jury. *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 490, 724 P.2d 562, 576 (1986) ("Credibility determinations, the weighing of the evidence and

the drawing of legitimate inferences are jury functions.") (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). Accordingly, for summary judgment purposes, we must assume that Brewington made the alleged statement to Steve J. *See Andrews*, 205 Ariz. at 240, ¶ 12, 69 P.3d at 11.

¶35 Additionally, the statement was defamatory and called Magedson's character into question with members of his local community. The statement was concerning Magedson and his potential criminal conduct or status. Moreover, Steve J. is a third party and the making of such a statement to a third party satisfies the publication requirement for defamation. *See Dube v. Likins*, 216 Ariz. 406, 417, ¶ 36, 167 P.3d 93, 104 (App. 2007) ("Publication for defamation purposes is communication to a third party.").

¶36 Viewing the facts and reasonable inferences from those facts in a light most favorable to Magedson, as we must, we conclude that Magedson has met his prima facie burden of demonstrating Brewington made a defamatory statement.

¶37 Furthermore, a person considered a public figure must prove by clear and convincing evidence that the statement was made with actual malice, which means falsity (knowing the statement to be false) or a reckless disregard for its truth. *See Currier v. W. Newspapers, Inc.*, 175 Ariz. 290, 292, 855 P.2d 1351, 1353 (1993) (citing *New York Times v. Sullivan*, 376 U.S.

254, 279-80 (1964)); Restatement (Second) of Torts § 580A (1977).

¶38 Magedson contends he is not a public figure. Brewington offers several exhibits showcasing numerous news articles, Internet traffic, and "Google hits" containing the words "Ed Magedson" as proof of Magedson's public figure status. We agree with Brewington that Magedson is a limited public figure in the context of his defamation claim against Brewington. *See Khawar v. Globe Int'l., Inc.*, 965 P.2d 696, 701 (Cal. 1998) ("At trial, whether a plaintiff in a defamation action is a public figure is a question of law for the trial court." "On appeal, . . . the trial court's resolution of the ultimate question of public figure status is subject to independent review for legal error.") (citations omitted).

¶39 The supreme court, in *Dombey*, observed that "defining a public figure 'is much like trying to nail a jellyfish to the wall.'" 150 Ariz. at 483, 724 P.2d at 569 (quoting *Rosanova v. Playboy Enters., Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976)). Yet, the supreme court articulated that private persons may reach public status by purposefully thrusting themselves into matters of public controversy or by having close involvement in resolving matters of public concern. *Id.* (citing *Antwerp*, 130 Ariz. at 527, 637 P.2d at 737).

¶40 Magedson is the editor of ROR which is a consumer

advocacy forum for members of the public to voice their concerns regarding interactions with businesses. People make complaints about issues of public concern. Magedson's website tries to resolve those public issues by making other potential consumers aware of pitfalls in transacting business. Accordingly, we conclude Magedson is a public figure for purposes of this claim because through his website, he has thrust himself into the public forum seeking resolution of matters of public concern.

¶41 Brewington further argues that Magedson failed to carry his burden that Brewington made the statement with actual malice. Assuming as we must, that Brewington made the statement to Steve J., Magedson supports his argument for actual malice with Brewington's admission in a deposition that he knew Magedson was not wanted by the F.B.I. and he knew Magedson was not a criminal on the run. This is direct testimony given by Brewington that he knew the substance -- or at least the implication -- of the information in the alleged statement to Steve J. was false. Therefore, if the jury finds that Brewington did make the statement to Steve J., Magedson has met his burden of producing evidence that could support a reasonable jury in finding by clear and convincing evidence that Brewington knew the statement to Steve J. was false or that Brewington was reckless as to its truth or falsity. Accordingly, the trial court erred in granting summary judgment on this claim.

¶42 Brewington further argues that the statement is directed only toward Magedson and not Xcentric, noting that the alleged statement to Steve J. never mentions Xcentric. Brewington contends that because Magedson is not seeking damages on the defamation claim personally, as testified in a deposition and later at an evidentiary hearing, the defamation claim fails as a matter of law because "there is no harm to remedy."

¶43 Magedson's testimony during the deposition was as follows:

> Q. BY MR. INGLE: Well, let me ask you: These things that were allegedly said about you, not Xcentric, about you, have they caused you to suffer any damages?
>
> A. I'm not claiming, I don't think, damages for what he said about me personally. I don't think. I should, but I don't think –
>
> Q. Well, has it cost you any money?
>
> A. I don't know. Is that's a real- a needed question, because I'm not making a claim - I don't think I'm making a claim. I should be making a claim, but I don't think I am making a claim for person - you know, the way he damaged me. It's stuff basically that he damaged - and the way that he damaged, you know, the website.
>
> Information he gave out, whether it be to somebody from the media, you know. I think only one out of so many people he talked to probably - you know, bit on some of his bologna.
>
> Q. So the damages that are at issue in this case, those are the four or $500,000 in

moving service providers; right?

A. Correct.

Q. Okay. Are there any other damages that I don't know about?

A. Well, I don't understand the false light. I don't understand what those things are. I did read the lawsuit, but I can't understand everything, and I'm not going to - this is the way I'm going to remember it.

Q. Okay. I'm just --I am trying to ask: Are you asking for money for the defamation claim?

MS. SPETH: Form.

A. BY THE WITNESS: I'm asking -- I know I'm asking for money to pay for the costs that he - that he helped instigate and create and facilitate.

Q. BY MR. INGLE: That's the service providers; right?

A. All of my expenses for what he did there.

¶44 Magedson responded similarly concerning the contents of his complaint during cross-examination at an evidentiary hearing on Magedson's request for a preliminary injunction. Magedson had sought a preliminary injunction requiring Brewington to remove the video from the Internet. Magedson said he was not an attorney and his full reply to whether he was seeking damages to his reputation personally was, "I don't think so." The trial judge questioned Brewington's attorney, stating: "What does the complaint — what does his knowledge of the — he's

not a lawyer."

¶45 Regarding the preliminary injunction hearing, Magedson's attorney argued to the trial court that she was not "claim[ing] that this video has anything to do with aiding and abetting. . . . That's not the basis for my preliminary injunction request, nor is reputational damage." We recognize that Magedson's attorney was referring to the video Brewington created, rather than Brewington's alleged statement to Steve J. during the evidentiary hearing. More importantly, Magedson was not -- in the evidentiary hearing -- seeking a determination of money damages for reputational damage. Instead, a preliminary injunction was sought. The asserted admission by Magedson in the evidentiary hearing that he did not think he was seeking damages for injury to his reputation does not waive his right to seek such damages in the pending action.

¶46 Magedson's deposition testimony, *see supra* ¶ 43, presents a closer question. But we conclude based on the entire record that Magedson did not waive the entire claim for defamation when he displayed uncertainty during the deposition concerning damages to himself as an individual. Magedson asked for damages in the complaint and subsequent pleadings.

¶47 We conclude there are genuine issues of material fact to be resolved by a jury concerning Magedson's defamation claim based on the statement Brewington allegedly made to Steve J.

Defamation Claim – Brewington's Video

¶48 Magedson also claims there are two defamatory statements in Brewington's video: first, that Magedson took money in exchange for removing reports on ROR; and second, that a former employee of Magedson was authorized to edit third party content on ROR. According to Magedson, Brewington was the videographer and disseminator of the video, and these assertions were defamatory and false.

¶49 Brewington contends that he was interviewing two people who had personal knowledge of Magedson's actions. Brewington further argues that he did not make the statements about Magedson in the video; rather, the statements were made by the people he interviewed. Brewington also claims his participation was limited to a preamble concerning the contents of the video; to questioning or interviewing the speakers; and to a conclusion where he extends help to any members of the viewing public if they are disturbed by the content.

¶50 Using the same defamation analysis outlined above we conclude that the trial court erred by granting summary judgment on this claim. *See supra* ¶¶ 32, 34-35, 37-41.

¶51 Magedson relies on *State v. Superior Court*, 186 Ariz. 294, 299, 921 P.2d 697, 702 (App. 1996) and *Green Acres Trust v. London*, 142 Ariz. 12, 17, 688 P.2d 658, 663 (App. 1983) *affirmed in part and vacated in part on other grounds*, 141 Ariz. 609,

611, 688 P.2d 617, 619 (1984) to support his argument that "repetition of a defamatory statement made by a third person is actionable even if the defamer attributes the statement to a third person."

¶52 Although we do not find these two cases particularly applicable or persuasive on the issue before us, we do agree that the defamer need not be the author of the defamatory statements. We find the analysis in *Austin v. CrystalTech Web Hosting*, 211 Ariz. 569, 572, ¶ 8, 125 P.3d 389, 392 (App. 2005), to be more pertinent to this case. In *Austin*, we distinguished the liability for defamers that are primary publishers, conduits, or distributors. *Id.* We determined that "[p]rimary publishers [such as book or newspaper publishers] . . . are generally held to a standard of liability comparable to that of authors because they actively cooperate in publication." *Id.* (citing Prosser & Keeton on The Law of Torts 810 (W. Page Keeton, ed., West Group 5th ed. 1984)); Restatement Second of Torts § 581(1) cmt. c (1977). Whereas, "distributors [such as a book store, library, or news dealer] are . . . subject to an intermediate standard of responsibility, and may be held liable as publishers if they know or have reason to know of the defamatory nature of the matter they disseminate." *Id.* (citing Restatement (Second) § 581(1) cmts. d, e). Conduits, on the other hand, are more akin to a "telephone company" and "lack the

ability to screen and control the information being communicated and are therefore ordinarily immune from liability." *Id.* (citations omitted).

¶53 We also recognized in *Austin*, that the Internet has challenged our common law defamation categories described above. *Id.* at ¶ 9 (stating that the Internet has created new issues concerning common law defamation analysis based on a new medium). In the present case, we believe a reasonable jury could find that Brewington was a producer because he actively participated in the creation and publication of the YouTube video. Alternatively, we also believe that a reasonable jury could find that Brewington was a distributor because he uploaded the video to YouTube, posted it on his own website, and may also have given the video to Richeson.

¶54 We agree with Magedson that the claims made in the video are harmful to Xcentric, ROR, and himself. We also agree that the comments are of and concerning Xcentric, ROR, and Magedson. Virtually any video posted on YouTube is published to third parties, due to the expanse of the Internet. However, a determination of falsity (for public figure designees) will require a reasonable jury to determine which party is speaking the truth and whether Brewington knew the statements were untrue or whether he recklessly disregarded the truth or falsity. *See Dombey*, 150 Ariz. at 488, 724 P.2d at 574 (citing *Anderson*, 477

U.S. at 256-57 and explaining that statements by interested parties must be evaluated by the jury for credibility and requiring plaintiff to provide "significant probative evidence" that defendant had doubts about statements' truth before publication). One speaker in the video testified in deposition that her statements in the video were true. Brewington also declared he had no reason to doubt the veracity of the people he interviewed for his video. On the other hand, Magedson claims the video is a staged prevarication.

¶55 We conclude that the trial court erred by granting summary judgment on this defamation claim. A jury determination is necessary to resolve the disputed factual issues.

False Light Claims

¶56 Magedson raised two false light issues in his statement of facts section of the opening brief, including Brewington's statements to Magedson's neighbor and the statements made in the video that Brewington produced. However, Magedson has failed to develop the false light issues regarding the video in his brief. Therefore, we deem the false light claim regarding the video to be waived. *See Polanco v. Indus. Comm'n of Ariz.*, 214 Ariz. 489, 491 n.2, ¶ 6, 154 P.3d 391, 393 n.2 (App. 2007) (stating appellant's failure to develop an argument waives issue on appeal); *see also* ARCAP 13(a)(6).

¶57 Turning to Magedson's false light claim arising from

Brewington's alleged statement to Steve J., we first note that to prove a false light claim, Magedson must demonstrate that Brewington gave publicity to a matter that places Magedson before the public in a false light; the false light caused by Brewington was highly offensive to a reasonable person; and Brewington had knowledge or acted in reckless disregard to the falsity of the publicized information. *See Hart v. Seven Resorts Inc.*, 190 Ariz. 272, 280, 947 P.2d 846, 854 (App. 1997). In *Hart*, we distinguished the terms publication and publicity. *Id.* Publicity, for purposes of false light, "means that the matter is made public, *by communicating it to the public at large, or to so many persons that the matter must be regarded substantially certain to become one of public knowledge*." *Id.* (quoting Restatement (Second) § 652D cmt. a. (1977)). In contrast, the term "published," for purposes of defamation, requires only that the statement be communicated to a third party. *Id.*

¶58 Brewington allegedly spoke to Magedson's neighbor, Steve J., concerning Magedson's federal indictments. We recognize that this conversation is in contention. However, on this record, even assuming that Steve J.'s description of the statement is accurate, Magedson cannot demonstrate that the statement was publicized to the public at large. Publication to one person, Steve J., is not enough. Magedson has not presented

evidence that this alleged false light information was made known by Brewington to the public at large.

¶59 Accordingly, the trial court was correct in granting summary judgment on the false light claim. We find no error.

CONCLUSION

¶60 We affirm summary judgment on the aiding and abetting claim involving Richeson and the false light claims. We reverse the summary judgment on the aiding and abetting claim involving Stanley and the defamation claims based on the alleged statement to Steve J. and the publishing of the video. We remand this matter for further proceedings consistent with this decision.

___/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

____/s/_____
JON W. THOMPSON, Presiding Judge

____/s/_____
MAURICE PORTLEY, Judge