IN THE COURT OF APPEALS OF THE
STATE OF OREGON

CHIEF AIRCRAFT, INC.,
an Oregon corporation,
Plaintiff-Respondent,

v.

Eric GRILL,
Defendant-Appellant.

Josephine County Circuit Court
12CV1156; A155317

On remand from the Oregon Supreme Court, *Chief Aircraft, Inc. v. Grill*, 360 Or 400, 381 P3d 836 (2016).

Thomas M. Hull, Judge.

Submitted on remand October 17, 2016.

Linda K. Williams and Daniel W. Meek filed the briefs for appellant.

Michael J. Mayerle and Hornecker Cowling LLP filed the brief for respondent.

Before Tookey, Presiding Judge, and Hadlock, Chief Judge, and Aoyagi, Judge.

AOYAGI, J.

Affirmed.

AOYAGI, J.

This is an online defamation case. Defendant made certain statements about plaintiff on a consumer website and on Twitter, which led plaintiff to file this lawsuit against him for defamation and intentional interference with economic relations (IIER). Defendant filed an Anti-Strategic Lawsuits Against Public Participation (anti-SLAPP) motion under ORS 31.150, which the trial court denied. We affirmed, and defendant sought review. Thereafter, the Supreme Court issued its decision in *Neumann v. Liles*, 358 Or 706, 369 P3d 1117 (2016), wherein, as a matter of first impression, it adopted an explicit framework for analyzing whether a defamatory statement is entitled to First Amendment protection. The court then allowed defendant's petition for review and vacated and remanded our decision for reconsideration in light of *Neumann*. Applying *Neumann*, we reach the same conclusion as we did previously. Accordingly, we affirm.

FACTS

The following facts are largely undisputed. Any disputed facts are stated in the light most favorable to plaintiff. *Neumann v. Liles*, 261 Or App 567, 570 n 2, 323 P3d 521 (2014), *rev'd on other grounds*, 358 Or 706 (2016).

Plaintiff sells aircraft parts. Defendant is a pilot who owns a small airplane. On December 19, 2011, defendant placed an order with plaintiff for a preheater for his airplane. He provided a credit card number to pay for the part, which cost $175.87. When plaintiff tried to process the charge, it received an error message that defendant needed to call in to provide voice authentication for the charge. Plaintiff relayed that information to defendant and told him that it would hold the order until it heard from him.

Defendant was upset by that information. On December 20, 2011, he emailed plaintiff, threatening to post about the situation on the social networking site Twitter, where he claimed to have over 6,000 pilots following him. He warned, "Don't be surprised to see your online reputation take a huge hit as it will appear #1 in google for you." Plaintiff replied that it was the credit card company that was requiring defendant to call to authorize the charge. At

that point, defendant called one of his credit card companies, but apparently forgot which card he had used and called the wrong credit card company. Defendant then emailed plaintiff again stating, "Your merchant account is considered high risk which is why it was triggered. I did talk to my credit card company; it's because of all the charge backs your company receives." Defendant expressed his displeasure about not receiving the part, said that he had just posted on Twitter about it, and suggested that plaintiff search its company name on Google in a week to "see what shows up first." Defendant concluded that email: "There were quite a few of my followers who expressed an interest in the same product I was buying, but I assure you nobody will be buying from you now."

That same day, defendant posted on his Twitter account: "Do not order from chiefaircraft.com they are completely unreliable and unhelpful, will post more later on the details." He also posted on a website called Ripoff Report, www.ripoffreport.com:

> **"Chiefaircraft.com Has so many chargebacks on their merchant account credit card companies will flag deland, Florida**
>
> "Ordered a preheater for my airplane was told I would receive it on Thursday. It never came and then I was told that my credit card company would not authorize the charge. Since I have never had a problem with my credit card like this before I called them and because chiefaircraft.com has so many customer service issues and charge backs they flag it.
>
> "When I tried to call the company there [*sic*] voicemail system doesn't work, it wasn't until I tried over and over that I spoke with someone and was told tough luck and there was nothing they could do about it."

(Bold in original.)

In October 2012, plaintiff filed this action against defendant, asserting claims for defamation *per se*, defamation, and IIER.[1] Plaintiff asserts in its complaint that defendant

[1] Plaintiff also pled an "injunction" claim but subsequently acknowledged to the trial court that an injunction is a remedy, not a claim, under Oregon law and indicated that it would move to amend to fix that error.

"posted tweets and other online reports containing false information published on the internet and other social media sites." The only specific statement that plaintiff cites in its complaint is defendant's posting on the Ripoff Report website.

In January 2013, defendant filed a special motion to strike pursuant to Oregon's anti-SLAPP statute, ORS 31.150 to 31.155, seeking dismissal of all of plaintiff's claims. The trial court denied the motion, concluding that, while plaintiff's complaint is susceptible to an anti-SLAPP motion, plaintiff met its burden to survive the motion. Defendant appealed. In *Chief Aircraft, Inc. v. Grill*, 272 Or App 330, 353 P3d 1261 (2015), we affirmed the court's ruling, relying on our decision in *Neumann*, 261 Or App at 580, in which we held that the defendant's online criticism of a wedding venue was factual in nature, such that it was not protected by the First Amendment if false, and that the plaintiff had met its burden to survive an anti-SLAPP motion.

While *Neumann* was pending review in the Supreme Court, defendant filed his own petition for review. The Supreme Court then issued its decision in *Neumann*. As a matter of first impression, the court adopted a specific framework for analyzing when a defamatory statement is entitled to First Amendment protection. *Neumann*, 358 Or 706. Applying that framework, it concluded that the speech at issue in *Neumann* was constitutionally protected, and affirmed the trial court's grant of the anti-SLAPP motion. Subsequently, the court granted defendant's petition for review in this case, vacated our decision without discussion, and remanded "for reconsideration in light of *Neumann v. Liles*, 358 Or 706, 369 P3d 1117 (2016)."

SCOPE OF REMAND

In issuing our first opinion, we necessarily resolved a number of issues in deciding to affirm the trial court's denial of defendant's anti-SLAPP motion, including that plaintiff's claims are susceptible to an anti-SLAPP motion, that some of defendant's speech is not protected by the First Amendment if false, and that plaintiff put forward sufficient evidence to support a *prima facie* case to defeat the anti-SLAPP motion. *See Plotkin v. SAIF*, 280 Or App 812,

814, 385 P3d 1167 (2016) (regarding legal issues on review of an anti-SLAPP motion). On remand, we reconsider only the First Amendment issue. The Supreme Court remanded this case for reconsideration in light of *Neumann*, and the only issue that it addressed in *Neumann* is how to determine when defamatory speech is protected by the First Amendment. *See Neumann*, 358 Or 706. We typically limit reconsideration on remand to issues within the scope of the remand and do not revisit other issues already decided. *E.g.*, *State v. Williams*, 276 Or App 688, 694, 368 P3d 459, *rev den*, 360 Or 423 (2016). Accordingly, the only issue we reconsider here is whether the Supreme Court's decision in *Neumann*, particularly the new framework that it adopted for determining when defamatory speech is protected by the First Amendment, changes our prior conclusion in this case. For the reasons explained below, it does not.

ANALYSIS

Whether a defamatory statement is protected by the First Amendment is a question of law. *Neumann*, 358 Or at 719-22. In *Neumann*, the Supreme Court adopted a specific framework for answering that question of law, which is the same framework that the Ninth Circuit articulated in *Unelko Corp. v. Rooney*, 912 F2d 1049 (9th Cir 1990).[2] For defamatory statements that involve a matter of public concern, the "dispositive question is whether a reasonable factfinder could conclude that the statement implies an assertion of objective fact." *Neumann*, 358 Or at 718-19. We follow a three-part inquiry to make that determination: (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;[3] and (3) whether

[2] In *Neumann*, 358 Or at 719-22, the Supreme Court discusses the case law leading up to its decision to adopt the *Unelko* framework. In short, in response to certain United States Supreme Court decisions, courts nationwide began distinguishing between speech that communicates "opinion," which was generally viewed as protected by the First Amendment, and speech that communicates "facts," which was generally viewed as actionable if false and defamatory. The law evolved over time, culminating in the test articulated by the Ninth Circuit in *Unelko* and now adopted by the Oregon Supreme Court in *Neumann*.

[3] "Figurative" language is "characterized by figures of speech or elaborate expression." *Webster's Third New Int'l Dictionary* 848 (unabridged ed 2002).

the statement at issue is susceptible of being proved true or false. *Id*. at 719. Words should not be considered in isolation, but, rather, "the work as a whole, the specific context in which the statements were made, and the statements themselves" must be analyzed "to determine whether a reasonable factfinder could conclude that the statements imply a false assertion of objective fact and therefore fall outside the protection of the First Amendment." *Id*. (quoting *Partington v. Bugliosi*, 56 F3d 1147, 1153 (9th Cir 1993)).

Here, both parties recognize and we agree that defendant's statements pertain to a matter of public concern, so the test articulated in *Neumann* applies. We therefore turn to the statements at issue.

To the extent that plaintiff's claims include defendant's posting on his Twitter account, that statement is protected by the First Amendment. Calling a merchant "completely unreliable and unhelpful" is an inherently subjective statement that is not susceptible of being proved true or false. The use of the word "completely" in this context also makes the statement appear to be hyperbolic. The concluding words, "will post more later on the details," further suggest that the statement is being made loosely and will be followed up with specifics at some later time. On the whole, a reasonable factfinder could not conclude that this statement implies an assertion of objective fact. Therefore, defendant's posting on Twitter on December 20, 2011, is protected speech.

As for defendant's posting on the Ripoff Report website, plaintiff identifies two specific statements as defamatory: (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."[4] The first statement appears as a title to the posting, suggesting that it is intended to summarize or identify the

"Hyperbolic" language is characterized by "extravagant exaggeration that represents something as much greater or less, better or worse, or more intense than it really is or that depicts the impossible as actual." *Id.* at 1112.

[4] Plaintiff does not cite any other statements in the posting as a basis for its claims so we do not address other statements, except as context for the challenged statements.

thrust of the posting. The second statement is in the body of the posting and, in context, suggests that defendant is repeating or characterizing what he was told when he called his credit card company to investigate the problem with the denied charge.

Whether these statements are protected by the First Amendment is a close call, but, on the whole, we conclude that a reasonable factfinder could conclude that the statements imply a false assertion of objective fact and therefore fall outside the protection of the First Amendment. Asserting that a merchant has "so many chargebacks" and "so many customer services issues and charge backs" is too vague in and of itself to be provable as true or false. However, those words do not stand alone. In context, they communicate that, whatever the threshold number is, plaintiff has exceeded it, and, as a result, "credit card companies" will "flag" charges attempted by plaintiff. According to the posting, "flag" means that the credit card company will "not authorize the charge." The statement in the title line is hyperbolic in that it refers to "credit card companies" in the plural, whereas the posting text makes clear that defendant only spoke with one, unidentified credit card company, of which he is personally a customer. Nonetheless, the statement is susceptible of being proved true or false with respect to the credit card company that defendant called. That credit card company either *does* or *does not* "flag" charges because plaintiff has exceeded its threshold for customer service issues and charge backs. Thus, although defendant's statements regarding a credit card company policy or practice of "flagging" charges run by plaintiff are somewhat vague in nature, they are susceptible of being proved true or false.

Neither the statements nor the posting as a whole use hyperbolic or figurative language, except for the pluralization of "credit card companies" that has already been addressed and does not meaningfully negate the impression that defendant was asserting an objective fact. The general tenor of the publication also does not meaningfully negate the impression that defendant was asserting an objective fact. Although the website makes clear that it does not vet postings for accuracy, it states that "we encourage and even require authors to only file truthful reports," and the

website's tagline is "Don't let them get away with it® Let the truth be known!™" It is not the role of this court to assess the overall *credibility* of a particular website or those who post on it—we look at the website only to understand the context and tenor of the statements and whether a reasonable factfinder could conclude that a statement implies an assertion of objective fact. Here, the general tenor of the website does not negate the impression that defendant is asserting an objective fact.

Applying the test adopted in *Neumann*, we therefore conclude that the two statements at issue in the Ripoff Report posting, if false, are not protected by the First Amendment.

CONCLUSION

In sum, we conclude that a reasonable factfinder could conclude that the two statements at issue in defendant's Ripoff Report posting—that "Chiefaircraft.com Has so many chargebacks on their merchant accounts credit card companies will flag deland, Florida" and "because chiefaircraft.com has so many customer service issues and charge backs they flag it"—imply an assertion of objective fact. Accordingly, those statements, if false, are not protected by the First Amendment.

Affirmed.