

In the Supreme Court of the United States

MATTHEW WRIGHT AND ARTISTIC PIANO, LTD.,

Petitioners,

v.

THOMAS LOWELL, DBA PIANO STUDIOS AND SHOWCASE,

Respondent.

On Appeal from the
Supreme Court of the State of Oregon

**PETITIONERS' AMENDED APPLICATION TO EXTEND TIME
TO FILE PETITION FOR WRIT OF CERTIORARI**

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TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

CORPORATE DISCLOSURE STATEMENT 3

CASE BACKGROUND..... 4

BASIS FOR AN EXTENSION OF TIME..... 9

CONCLUSION 10

NOTICE OF FILING AND PROOF OF SERVICE 11

TABLE OF AUTHORITIES

Cases

<i>Bose Corp. v. Consumers Union of United States</i> , 466 U.S. 485 (1984) ...	6
<i>Brown v. Gatti</i> , 341 Or. 452, 145 P.3d 130 (2006)	5
<i>Lowell v. Wright</i> , 369 Or. 806, 512 P.3d 403 (2022)	5, 6, 8
<i>Milkovich v. Lorain Journal Co.</i> , 497 U.S. 1 (1990)	5, 6
<i>Neumann v. Liles</i> , 358 Or. 706, 369 P.3d 1117 (2016)	5, 6
<i>New York Times v. Sullivan</i> , 376 U.S. 254(1964).....	7
<i>Obsidian Fin. Group v. Cox</i> , 740 F.3d 1284 (9th Cir. 2014)	7
<i>Unelko Corp. v. Rooney</i> , 912 F.2d 1049 (9th Cir. 1990), <i>cert. den</i> , 499 U.S. 961 (1991)	5, 6

Statutes

28 U.S.C § 1254.....	4
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Procedural Rules

ORCP 47 C.....	6
Supreme Court Rule 13.5	4
Supreme Court Rule 22	4
Supreme Court Rule 29.6	3
Supreme Court Rule 30.2	4
Supreme Court Rule 30.3	4

Other Authorities

Restatement (Second) of Torts § 563.....	
U.S. Constitution, First Amendment Freedom of Speech	4, 5, 6, 10
Elena Kagan, <u>A Libel Story: Sullivan Then and Now</u> (reviewing <u>Anthony Lewis, Make No Law: The Sullivan Case and the First Amendment (1991)</u>), 18 Law and Social Inquiry 197 (1993)	7

Corporate Disclosure Statement

Pursuant to Supreme Court Rule 29.6, Petitioners Matthew Wright and Artistic Piano, Ltd. state that Artistic Piano, Ltd. is an Oregon for-profit corporation with no parent corporation and no publicly held company owns 10% or more of its stock.

To the Honorable Elena Kagan, as Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Pursuant to this Court’s Rules 13.5, 22, 30.2, and 30.3, Petitioners Matthew Wright and Artistic Piano, Ltd. (“Petitioners”) respectfully request that the time to file their Petition for Writ of Certiorari in this matter be extended for 60 days up to and including Monday, March 6, 2023. The Supreme Court of the State of Oregon issued its opinion on June 23, 2022. (Appendix (“App.”) A). After timely request for reconsideration, the Supreme Court of the State of Oregon issued an Order Denying Petition for Reconsideration on October 6, 2022. (App. B). Absent an extension of time, the Petition for Writ of Certiorari would be due on January 4, 2023. On December 7, 2022, the Supreme Court of the State of Oregon issued an Appellate Judgment and Supplemental Judgment. (App. C).

Petitioners are filing this Application more than ten days before January 4, 2023. See S. Ct. R. 13.5. This Court would have jurisdiction over the judgment under 28 U.S.C. § 1254(1). The Supreme Court of the State of Oregon issued a judgment and finally decided the First Amendment issues addressed herein. Respondent has no objection to Petitioners’ request for an extension of time.

Case Background

This case involves a libel *per se* claim stemming from a Google review posted by Matthew Wright, the manager of Artistic Piano, following his in-person visit to Piano Studios and Showcase. Neither party possesses the subject review. The Supreme Court of the State of Oregon considered three issues:

(1) whether plaintiff may reach a jury on his libel claim when the text is no longer available; (2) whether the First Amendment's public comment defense is available in these circumstances and, relatedly, whether a defendant speaker's identity or motive is part of the court's inquiry on the defense's availability; and (3) whether Oregon should require a plaintiff claiming defamation to prove that the defendant acted with a heightened culpable mental state, "actual malice," in all cases when the speech is on a "matter of public concern" protected under the First Amendment, abolishing the distinction that requires such proof only when the defendant is a member of the media.

Lowell v. Wright, 369 Or. 806, 808 (2022).

The first issue presented to the Oregon Supreme Court and decided in its opinion is whether *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) requires an analysis of an entire writing, as it has been interpreted by *Unelko Corp. v. Rooney*, 912 F.2d 1049 (9th Cir. 1990) and in other circuits and state courts, which previously included Oregon. See *Brown v. Gatti*, 341 Or. 452, 461 (2006) (“[W]e do not consider ‘isolated sentences’ but the ‘general purport and intent of the article.’”); *Neumann v. Liles*, 358 Or. 706, 720-21 (2016) (although statements read independently and standing alone could create the impression the writer was asserting an objective fact, reading the entire review in context negates that impression and absolved defendant of liability).

To undertake the Constitutional inquiry mandated by *Milkovich* requires the entirety of an allegedly libelous statement. As this Court stated, courts must examine whether the general tenor of the entire publication negates the impression that the defendant was asserting objective fact; whether the defendant used figurative or higher hyperbolic language within the entire publication that negates the impression the writer was asserting objective fact; and whether the statement in question is

susceptible of being proved true or false. *Neumann*, 358 Or. at 715 (applying *Milkovich*). The Supreme Court of the State of Oregon, however, concluded that this analysis did not require an examination of the entirety of the Google review which is directly contrary to the *Milkovich* requirement to evaluate the “whole record.” *Milkovich*, 497 U.S. at 17, citing *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 499 (1984).

The Oregon Supreme Court held that the absence of the Google review, including the snippets of statements it purported to analyze, does not preclude a First Amendment analysis under *Milkovich* and *Unelko*. The court concluded that since there were some disputed recollections of remnants drawn from at least three statements, they could apply the *Unelko* analysis to determine actionability under the First Amendment. Given the Supreme Court and Ninth Circuit case law, this is wholly inconsistent with the Constitutional rigor required by the First Amendment.

The court took the summary judgment standard found in the Oregon Rules of Civil Procedure and determined that a few statements, extracted from the alleged review, could survive Constitutional scrutiny when viewed in a light most favorable to respondent. *Lowell*, 369 Or. at 820. The deployment of that rule circumvents the reviewing court’s obligations required by this Court. See e.g., *Bose Corp.*, 466 U.S. at 511 (“The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross

the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of ‘actual malice.’”)

A second consideration for this Court is Oregon’s refusal to align with the tidal wave of courts to abolish the media/non-media distinction historically drawn from *New York Times v. Sullivan*, 376 U.S. 254 (1964). See e.g. *Obsidian Fin. Group, LLC v. Cox*, 740 F.3d 1284, 1291 (9th Cir. 2014) (discussing why “a First Amendment distinction between the institutional press and other speakers is unworkable[.]”) Justice Balmer and Justice Garrett’s well-reasoned concurrence explains why the majority’s analysis was Constitutionally inadequate. Society is far outpacing the law in the First Amendment context. The cases from half-a-century ago (and beyond) did not, and could not, envision the media/non-media blurring present today. Nor could they anticipate the remedial opportunity available to “defamed” plaintiffs. That leveling of the playing field was of utmost importance when *Sullivan* first issued. *Sullivan*, 376 U.S. at 304-05 (“The public official certainly has equal if not greater access than most private citizens to media of communication.”); Elena Kagan, *A Libel Story: Sullivan Then and Now* (reviewing Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* (1991)), 18 *Law and Social Inquiry* 197, 209 (1993) (“Even when viewed most broadly, *Sullivan* relied upon two essential predicates: a certain kind of speech and a certain kind of power relationship between the speaker and the speech’s target.”) Private party plaintiffs were historically outmatched in their access to the masses, to be heard, and influence a discussion. This case is a prime example of a new era: petitioners wrote on the internet in mass

media forum and respondent was allowed to use the exact same platform to reach the precisely the same audience. As Justice Balmer noted, the definition of “media” has changed over time and Petitioners meet at least one persuasive construction of the term. *Lowell*, 369 Or. at 849.

The Opinion refers to this case not being the “ideal vehicle” for aligning the law to the society it is meant to govern. *Lowell*, 369 Or. at 834. As Justice Balmer pointed out, this case presents a defendant writing to a broad audience in a more accessible manner than any print media previously could in the 1960-70’s when the U.S. Supreme Court was originally grappling with these issues. This case presents a plaintiff with equal ability to reach the same, extensive readership. This case is the Court’s opportunity to confirm the law adopted by a multitude of jurisdictions – state and federal – and recognize this shift in communication and its concomitant impact on defamation law. It is an opportunity to close the loop and guide jurisdictions, like Oregon, that are clinging to cases from the 1970’s before the internet had a foothold in society. This is the Court’s chance to remove Oregon citizens from legal purgatory and from infringing their Constitutional right to speak freely on matters of public concern.

The court’s Opinion leaves Oregon in the minority. The holding is inconsistent with several states, every federal circuit to consider the issue, and the Restatement. Out-of-state residents can come to Oregon federal courts and receive greater constitutional protection than Oregon residents for the exact same speech made within our borders. The court’s justification is the U.S. Supreme Court has not been

clear enough regarding Constitutional privileges despite the overwhelming Federal Circuit court consensus. Accordingly, Oregon now retains a minority construction of the privilege without providing any guidance on its contours. Petitioners will ask this Court to provide the clarity requested by the Oregon Supreme Court.

Basis for An Extension of Time

An extension of time is sought due to limitations resulting from undersigned counsel's duty to prepare and manage its caseload – including two trials in Oregon circuit court in January 2023 (*Daniel Ensley v. City of Ashland*, Jackson County Circuit Court No. 20CV08719; *Nicholas Adams v. Alvin Fronsdaahl, et al.*, Linn County Circuit Court No. 19CV40780) and two weeks of depositions in a jail death case, *Estate of Christina Ryan v. Wellpath, et al.*, U.S. District Court of Oregon, Case No.: 6:22-cv-00350-MC, the undersigned's clients' need for an educated assessment on the complexities involved in appealing to the Supreme Court of the United States of America, the holiday season, and the undersigned recently associating with counsel experienced in appeals at the Supreme Court of the United States of America.

Undersigned counsel's commitments and efforts to obtain experienced appellate counsel necessitates this request for a 60-day extension for the filing of a Petition for a Writ of Certiorari in this case. The undersigned is newly admitted to this Court and lacks the resources to undertake this appeal without associating counsel on the case. Newly assigned counsel will need considerable time to familiarize themselves with the substantial record and prepare a concise petition of maximum helpfulness to the Court.

This case presents issues of importance to Oregonian who are deprived of the same Constitutional analysis as the majority of state and federal courts to consider these issues. It will also serve to clarify the First Amendment's application to the internet era nationwide.

An extension will not prejudice Respondent, as this case is not presently set for trial and this Court's resolution of the issues will conclude the case in a more expedient fashion than drawn out litigation and further appeals.

Conclusion

For the foregoing reasons, Petitioners respectfully request that the time to file the Petition for a Writ of Certiorari in this matter be extended 60 days, up to and including March 6, 2023.

DATED this 21st day of December, 2022.

FROHNMAYER, DEATHERAGE, JAMIESON,
MOORE, ARMOSINO & McGOVERN, P.C.

By: *s/Casey S. Murdock*
Casey S. Murdock, OSB #144914
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Of Attorneys for Petitioners
Matthew Wright and Artistic Piano

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on December 21, 2022, I served a copy of the foregoing **PETITIONERS' AMENDED APPLICATION TO EXTEND TIME TO FILE PETITION FOR WRIT OF CERTIORARI** by email and First-Class U.S. mail pursuant to Supreme Court Rule 22.2 and 29.3 to the following attorney:

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and to the Clerk of Court via the Court's e-filing system and First-Class U.S. Mail:

Supreme Court of the United States
Clerk of Court
1 First Street, NE
Washington, DC 20543

By: s/ Casey S. Murdock
Casey S. Murdock, OSB# 144914
Attorney for Petitioners

APPENDIX A

Pursuant to Rule 34.4 this Appendix contains the June 23, 2022 Opinion issued by the Supreme Court of the State of Oregon in *Lowell v. Wright*, 369 Or. 806, 512 P.3d 403 (2022), including the concurrences by Justice Flynn, Justice Balmer, and Justice Garrett.

Filed: June 23, 2022

IN THE SUPREME COURT OF THE STATE OF OREGON

TOM LOWELL, dba Piano Studios and Showcase,

Respondent on Review,

v.

MATTHEW WRIGHT and ARTISTIC PIANO,
an Oregon corporation,

Petitioners on Review.

(CC 13CV04582) (CA A162785) (SC S068129)

On review from the Court of Appeals.*

Argued and submitted June 24, 2021.

Tracy M. McGovern, Frohnmayer, Deatherage, Jamieson, Moore, Armosino & McGovern, P.C., Medford, argued the cause and filed the briefs for petitioners on review. Also on the briefs were Casey S. Murdock and Alicia M. Wilson.

Linda K. Williams, Portland, argued the cause and filed the brief for respondent on review.

Eugene Volokh, UCLA School of Law, First Amendment Clinic, Los Angeles, California, argued the cause and filed the brief for *amici curiae* Institute for Free Speech; Electronic Frontier Foundation; Professors William Funk, Ofer Raban, and Kyu Ho Youm; Howard Bashman; Scotusblog, Inc.; and Professors Glenn Harlan Reynolds and Eugene Volokh. Also on the brief was Owen Yeates, Institute for Free Speech, Washington, D.C.

James Abernathy and Rebekah Millard, Freedom Foundation, Olympia, Washington, filed the brief on behalf of *amicus curiae* Freedom Foundation.

Before Walters, Chief Justice, and Balmer, Flynn, Duncan, Nelson, and Garrett, Justices, and Nakamoto, Senior Judge, Justice pro tempore.**

NAKAMOTO, S.J.

The decision of the Court of Appeals is affirmed in part and reversed in part. The judgment of the circuit court is reversed, and the case is remanded to the circuit court for further proceedings.

Balmer, J., concurred and filed an opinion in which Garrett, J., joined.

Flynn, J., concurred and filed an opinion.

*On appeal from Jackson County Circuit Court,
Dan Bunch, Judge.
306 Or App 325, 473 P3d 1094 (2020)

**DeHoog, J., did not participate in the consideration or decision of this case.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent on Review.

- No costs allowed.
 Costs allowed, payable by: Petitioners on Review.
 Costs allowed, to abide the outcome on remand, payable by:
-

1 NAKAMOTO, S.J.

2 Plaintiff's libel *per se* claim is based on a Google review, written by the
3 manager of plaintiff's business competitor, that subsequently was removed from the
4 internet without a trace. The Court of Appeals reversed a grant of summary judgment to
5 defendants. We resolve three disputed legal questions: (1) whether plaintiff may reach a
6 jury on his libel claim when the text is no longer available; (2) whether the First
7 Amendment's public comment defense is available in these circumstances and, relatedly,
8 whether a defendant speaker's identity or motive is part of the court's inquiry on the
9 defense's availability; and (3) whether Oregon should require a plaintiff claiming
10 defamation to prove that the defendant acted with a heightened culpable mental state,
11 "actual malice," in all cases when the speech is on a "matter of public concern" protected
12 under the First Amendment, abolishing the distinction that requires such proof only when
13 the defendant is a member of the media.

14 The Court of Appeals concluded that the trial court had erred because
15 plaintiff's evidence of the allegedly defamatory statements sufficed to create a question of
16 fact for trial on his claim and the lack of the review's printed text did not affect the
17 analysis of defendants' First Amendment defense. *Lowell v. Wright*, 306 Or App 325,
18 334-35, 473 P3d 1094 (2020). Putting aside the First Amendment defense, we, like the
19 Court of Appeals, conclude that the lack of a copy of the review is not fatal to plaintiff's
20 libel claim and that two of the three allegedly defamatory statements in the review are
21 actionable.

22 To decide whether defendants were entitled to summary judgment based on

1 their First Amendment defense, the threshold question is whether the review about
2 plaintiff's store is subject to First Amendment protection as containing statements on a
3 matter of public concern. As the Court of Appeals recognized, in *Neumann v. Liles*, 358
4 Or 706, 369 P3d 1117 (2016), this court held that a review of a wedding venue contained
5 speech on a matter of public concern protected by the First Amendment's public comment
6 defense, and the review of plaintiff's business in this case is similar to the review in
7 *Neumann*. Although plaintiff argues that a speaker's motive may affect the availability of
8 the defense, an argument that we reject, neither party has asked this court to overrule
9 *Neumann's* holding. Accordingly, *Neumann* controls, and we are compelled to follow it
10 in this case.

11 Finally, we decline to overrule our precedent recognizing the
12 media/nonmedia distinction and to impose an across-the-board heightened proof-of-fault
13 requirement on defamation plaintiffs in cases involving the First Amendment.
14 Defendants and *amici* argue that we ought to abolish the distinction, in part, they assert,
15 because it is sometimes difficult to discern whether a given speaker, such as a blogger, is
16 a media or a nonmedia defendant. This case does not offer an opportunity for careful
17 examination of that issue, considering that defendants are not "media" under any
18 definition and acknowledge that they are "nonmedia" defendants, and defendants have
19 not persuaded us to abandon our precedent and to alter Oregon common law.

20 Ultimately, we conclude that the trial court erred in granting defendants'
21 summary judgment motion and entering a general judgment of dismissal. We affirm the
22 decision of the Court of Appeals in part and remand the case to the trial court.

1 I. BACKGROUND

2 We are reviewing the trial court's ruling granting defendants' motion for
3 summary judgment on plaintiff's claim for defamation. Accordingly, we recount the facts
4 in the light most favorable to plaintiff as the nonmoving party, including reasonable
5 inferences that may be drawn from the facts adduced. ORCP 47 C.

6 Plaintiff Lowell owns and operates Piano Studios and Showcase (Piano
7 Studios), a piano store in Medford. On September 3, 2012, defendant Wright and his
8 wife visited plaintiff's store. At that time, Wright was employed as a general manager by
9 defendant Artistic Piano, another piano store in Medford.¹ On the day of the visit,
10 Wright was off work. Wright testified that he did not tell his boss, Werner, the owner
11 and operator of Artistic Piano, about his plans to visit Piano Studios. Soon after the visit,
12 Wright posted a Google review about Piano Studios.

13 In December 2012, while browsing internet pages mentioning his business,
14 plaintiff found Wright's review and became upset. The review was not posted under
15 Wright's name, but instead under "Amazing Impressions" (Wright's unrelated
16 photography business). Plaintiff eventually found a phone number associated with
17 Amazing Impressions and called it, instructing his employee, Norling, to listen to the
18 phone call and take notes. Wright answered and eventually hung up on plaintiff.

19 After the phone call, Wright spoke with Werner and showed him the

¹ Defendants Wright and Artistic Piano make no arguments independent of each other. This opinion will distinguish between them only when needed to clarify the facts.

1 review. According to Wright, he had told Werner previously about his visit to Piano
2 Studios but had not mentioned his review. Once Werner looked over the review, he
3 suggested that Wright take it down. Wright removed it without saving a copy. Plaintiff
4 also did not save a copy of the review before it was removed. Wright composed the
5 review on a home laptop, which he disposed of, explaining that it had become old and
6 inoperable. Despite a diligent search and a request to Google, the parties were unable to
7 recover a copy of the review during litigation.

8 Although the actual text of the review is unavailable, four people read the
9 review and testified in depositions regarding its contents: Lowell, Norling, Wright, and
10 Werner. Although they could not remember the review verbatim, they largely agreed that
11 it contained the following paraphrased content and that the quoted language (or
12 something extremely close to it) appeared in the review itself: Wright walked around the
13 store for 45 minutes before a salesperson spoke to him, and the store "smelled like
14 grandma's attic." When he eventually spoke with Wright, the salesman told Wright that a
15 Yamaha C-7 piano displayed on the showroom floor was about five years old. The
16 salesman also told Wright that plaintiff can sell new Steinway pianos.² However,

² The witnesses remember the exact wording of the Steinway comment differently. Plaintiff and Norling remembered the review stating that plaintiff's salesman said that the store "can sell new Steinway pianos"; Wright recalled the wording as "is a Steinway dealer." The former comment would indicate that plaintiff is *capable* of selling while the latter would indicate that the plaintiff is *allowed* to sell because he had a dealership agreement with Steinway, authorizing him to sell new Steinway pianos. The significance of this difference, plaintiff explained, is that if the salesman said that the store "can sell new Steinway pianos," that would be true, but if the salesman said that the store "is a Steinway dealer," that would be false.

1 plaintiff cannot sell new Steinway pianos, and "[there] were no new Steinways in the
2 showroom," which is "like a Chevy dealer not having any Chevrolets on the lot." Finally,
3 Wright had been warned about plaintiff's store and now knew that it was true that "this
4 guy can't be trusted."

5 According to plaintiff, Wright not only made false statements -- he made up
6 the entire conversation at Piano Studios. Plaintiff's theory is that defendants' purpose in
7 having Wright go to Piano Studios and write the review was to "cybersmear," a practice
8 whereby one business pseudonymously writes about a competitor on the internet to lower
9 the competitor's reputation and thereby attract more business for itself. In support,
10 plaintiff provided testimony from the salesman on duty the day Wright was in Piano
11 Studios. Plaintiff's sales force kept time logs in which they recorded interactions with
12 potential customers. The salesman's time log from that day does not reflect a
13 conversation with Wright. And, the salesman testified, Wright never conversed with him
14 about Steinways or the Yamaha piano on display. In further support of his theory,
15 plaintiff emphasizes that Wright was the manager of Artistic Piano when he wrote the
16 review, that the review was written under the name "Amazing Impressions" rather than
17 under Wright's own name, and that the review included no details that would suggest that
18 its writer had specialized knowledge or a potential ulterior motive.

19 In 2013, plaintiff filed a defamation action against Wright and Artistic
20 Piano.³ He alleged that Wright acted as Artistic Piano's agent in writing the Google

³ The action also included an unfair trade practices claim, which is not at

1 review. Plaintiff asserted that the review "purported to describe the personal experience
2 of an actual customer" but that "Wright was not a bona fide potential customer." Plaintiff
3 alleged that three statements in the review were false and defamatory assertions of fact:

4 "a. That a Yamaha C-7 piano serial number F4910127 on the
5 showroom floor was misrepresented to Wright as being about 5 years old,
6 when in fact said piano was at least 15 years older and less valuable, and
7 this misrepresentation of the age of the instrument was purposely made in
8 an effort to cheat Wright;

9 "b. That [plaintiff] misrepresents that he sells new Steinway
10 Pianos, when he actually doesn't; and

11 "c. That the above misrepresentations are proof that 'this guy
12 can't be trusted.'"

13 In their answer, among other defenses, defendants asserted that the First Amendment
14 precluded liability for libel.

15 In 2016, defendants filed a motion for summary judgment on the libel
16 claim. They argued that (1) plaintiff could not prevail because he could not prove that
17 the statements were defamatory; (2) any statements made were protected by the First
18 Amendment public comment defense (under which statements on a matter of public
19 concern that are not susceptible to being proved true or false are not actionable); and (3)
20 plaintiff could not prove that defendants acted with actual malice.

21 Plaintiff opposed the motion, providing the deposition testimony about the
22 review's content. He also submitted evidence regarding the falsity of the Yamaha and
23 Steinway statements. Plaintiff submitted a copy of the Yamaha piano's tag, which

issue on review.

1 indicated that it was manufactured in 1990, to support the salesman's testimony that he
2 never falsely told Wright that the piano was five years old. Plaintiff also introduced
3 evidence that he can and does sell new Steinway pianos even though plaintiff was not a
4 Steinway dealer, including documents that he contended related to the store's sales of
5 Steinway pianos.

6 The trial court granted summary judgment to defendants. In a letter
7 opinion, the court addressed the significance of the missing verbatim text for plaintiff's
8 claim that he was defamed by the can't-sell-new-Steinways remark in the review. The
9 court indicated that, as to that statement, plaintiff lacked sufficient evidence for a trial on
10 what the review had said and whether it was false. The trial court did not fault the
11 sufficiency of plaintiff's evidence that the review stated that the salesman had lied to
12 Wright about the age of the Yamaha piano in the showroom. And the "this guy can't be
13 trusted" statement, the court concluded, was so clearly one of subjective opinion that it
14 was not actionable in a defamation claim.

15 The trial court went on to conclude that, because defendants had asserted a
16 First Amendment defense, it was required to determine whether the allegedly false
17 statements about the pianos were constitutionally protected expressions of opinion.
18 Without a copy of the review, the trial court concluded, it was not possible to determine
19 whether the Yamaha and Steinway statements were constitutionally protected or instead
20 actionable statements implying an assertion of objective fact and that, under those
21 circumstances, judgment for defendants was appropriate.

22 The trial court did not address other issues that the parties had raised in

1 connection with defendants' First Amendment defense. The court then entered a general
2 judgment dismissing the action. Plaintiff appealed, and the Court of Appeals reversed
3 and remanded.

4 The Court of Appeals first held that the absence of the text of the review
5 was not dispositive with respect to the defamatory remarks. *Lowell*, 306 Or App at 334.
6 Next, the court considered whether defendants were entitled to summary judgment based
7 on their First Amendment defense. To be protected, the court stated, the speech must be
8 on a matter of public concern that does not imply an assertion of objective fact about
9 plaintiff. *Id.* at 335-36. The court concluded that defendants' speech was on a matter of
10 public concern, but only after concluding that, although "a speaker's motive or purpose in
11 speaking *is* relevant to whether speech is protected by the First Amendment," *id.* at 339
12 (emphasis in original), plaintiff had failed to meet his burden to establish proof of
13 defendants' motive to denigrate his business for private financial advantage. *Id.* at 342.
14 The court then addressed whether the review implied objective facts about plaintiff and
15 held that the Yamaha and Steinway statements could be sufficiently factual to be
16 actionable, but that the statement "this guy can't be trusted" was not. *Id.* at 343.

17 Finally, the Court of Appeals addressed defendants' argument that plaintiff
18 was not entitled to a trial because he had not made a sufficient showing of their actual
19 malice. Following this court's holding in *Wheeler v. Green*, 286 Or 99, 593 P2d 777
20 (1979), the court held that plaintiff need not establish that defendants acted with actual
21 malice to overcome the First Amendment defense because that standard applied only to
22 media defendants, a status defendants lacked, and that, in any case, plaintiff supplied

1 sufficient evidence to establish actual malice for the purposes of summary judgment.
2 *Lowell*, 306 Or App at 348. We allowed defendants' petition for review.

3 II. ANALYSIS

4 A. *Libel Actions in Oregon and the First Amendment Defense, Generally*

5 To put the issues we decide in perspective, we provide some basic law
6 governing libel actions in Oregon. As this court explained in *Neumann*, 358 Or at 711,
7 defamation has long been recognized as tortious in Oregon. Indeed, the remedy clause,
8 Article I, section 10, of the Oregon Constitution, has specified from its adoption that
9 Oregonians shall have a remedy for injury to reputation, providing that "every man shall
10 have remedy by due course of law for injury done him in his person, property, or
11 reputation." In *Horton v. OHSU*, 359 Or 168, 180, 376 P3d 998 (2016), the court
12 explained that, textually, the "clause's focus on providing remedies for specified types of
13 injuries implies that it was intended to guarantee some remedy for those injuries, and not
14 merely be a guarantee of procedural regularity for whatever injuries may, at the moment,
15 enjoy legal protection."

16 A statement that "would subject the plaintiff to hatred, contempt or
17 ridicule," that tends to "diminish the esteem, respect, goodwill or confidence in which
18 [the plaintiff] is held," or that brings about "adverse, derogatory or unpleasant feelings or
19 opinions against" the plaintiff can be the basis for a defamation claim. *Neumann*, 358 Or
20 at 711 (quotation and citation omitted, brackets in original). And, as relevant to this case,
21 a statement also is defamatory if it falsely "ascribes to another conduct, characteristics or
22 a condition incompatible with the proper conduct of his lawful business[.]" *Id.* at 711-12.

1 A court decides whether a statement is capable of a defamatory meaning, and, if so, the
2 jury decides whether the statement did have a defamatory meaning. *Brown v. Gatti*, 341
3 Or 452, 459, 145 P3d 130 (2006).

4 Alleged defamatory statements that the plaintiff engaged in misconduct or
5 dishonesty in conducting the plaintiff's business are actionable *per se*. *Neumann*, 358 Or
6 at 712. Under Oregon law, to establish a *prima facie* claim of libel *per se*, subject to
7 defenses, plaintiff must prove that defendants made a defamatory statement about him
8 and published the statement to a third party. *Id.* at 711. Because the claim is libel *per se*,
9 plaintiff is not obliged to prove a third element: that the defamatory statement caused
10 pecuniary loss or special harm. *Brown*, 341 Or at 458.

11 But it is now well established that state law defamation actions can be
12 affected by the First Amendment rights of speakers. The Supreme Court first extended
13 constitutional protections in a libel case over 50 years ago in *New York Times Co. v.*
14 *Sullivan*, 376 US 254, 84 S Ct 710, 11 L Ed 2d 686 (1964). Before that decision, the
15 Court had recognized libel as one of the "well-defined and narrowly limited classes of
16 speech, the prevention and punishment of which have never been thought to raise any
17 Constitutional problem." *Chaplinsky v. New Hampshire*, 315 US 568, 571-72, 62 S Ct
18 766, 86 L Ed 1031 (1942).

19 Since *New York Times* was decided, the Supreme Court has repeatedly
20 revisited the intersection between defamation claims and the First Amendment freedoms
21 of speech and of the press and articulated additional constitutional principles that may
22 apply in common law defamation cases, sometimes focusing on the identity of the

1 speaker, the identity of the plaintiff, or the nature of the speech involved. At the same
2 time, the Court has noted that competing interests are involved. For example, the Court
3 in *Milkovich v. Lorain Journal Co.*, 497 US 1, 110 S Ct 2695, 111 L Ed 2d 1 (1990), as it
4 had in earlier cases, recognized not only the First Amendment's protection "of free and
5 uninhibited discussion of public issues," but also the "important social values"
6 undergirding common law defamation and strong societal interests "in preventing and
7 redressing attacks upon reputation." *Id.* at 22 (quoting *Rosenblatt v. Baer*, 383 US 75,
8 86, 86 S Ct 669, 15 L Ed 2d 597 (1966)). In *Gertz v. Robert Welch, Inc.*, 418 US 323, 94
9 S Ct 2997, 41 L Ed 2d 789 (1974), the Court also recognized the value of reputation in
10 several ways, noting that states have a legitimate interest in compensating "individuals
11 for the harm inflicted on them by defamatory falsehood" and that "the individual's right to
12 the protection of his own good name 'reflects no more than our basic concept of the
13 essential dignity and worth of every human being -- a concept at the root of any decent
14 system of ordered liberty.'" *Id.* at 341 (quoting *Rosenblatt*, 383 US at 92 (Stewart, J.,
15 concurring)).⁴

16 As relevant here, the First Amendment interacts with plaintiff's claim in
17 two distinct ways. First, defendants raise the First Amendment public comment defense,

⁴ Recently, Justice Thomas has called into question whether, in *New York Times* and the cases that followed, the "constitutional libel rules" adopted by the Court by virtue of the First and Fourteenth Amendments properly displaced the common law of libel developed by the states. *McKee v. Cosby*, ___ US ___, 139 S Ct 675, 678-82, 203 L Ed 2d 247 (2019) (Thomas, J., concurring in denial of *certiorari*). In his view, the states "are perfectly capable of striking an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm." *Id.* at 682.

1 which places federal constitutional constraints on whether a state must require that a
2 plaintiff in a defamation action show that the defamatory statements are provably false.
3 Second, defendants argue that plaintiff must show that they acted with actual malice, a
4 standard that comes from First Amendment doctrine and that some state courts have
5 chosen to apply broadly across defamation actions. We discuss each aspect of First
6 Amendment doctrine in detail.

7 The Supreme Court explained the falsity requirement in *Philadelphia*
8 *Newspapers, Inc. v. Hepps*, 475 US 767, 106 S Ct 1558, 89 L Ed 2d 783 (1986), and
9 *Milkovich*. In *Hepps*, the Supreme Court considered a libel claim brought by a
10 convenience store franchise stockholder against a newspaper over an article alleging that
11 the stockholder had mob ties. 475 US at 769. At issue was whether the plaintiff could
12 recover without a showing that the statements were false. *Id.* The Court held "that, at
13 least where a newspaper publishes speech of public concern, a private-figure plaintiff
14 cannot recover damages without also showing that the statements at issue are false." *Id.*
15 at 768-69. The *Hepps* Court reserved the question of whether a private-figure plaintiff
16 could recover against a nonmedia defendant without making a showing of falsity. *Id.* at
17 779 n 4. In *Milkovich*, the Court reaffirmed its holding in *Hepps*, explaining, "Foremost,
18 we think *Hepps* stands for the proposition that a statement on matters of public concern
19 must be provable as false before there can be liability under state defamation law, at least
20 in situations, like the present, where a media defendant is involved." 497 US at 19-20.
21 *Milkovich* held that a media defendant's speech was protected under the First Amendment
22 as public comment when two criteria were met: (1) the speech was on a matter of public

1 concern and (2) the speech could not reasonably be interpreted as stating facts or was not
2 susceptible to being proved true or false. *Id.* The Court again reserved whether a
3 nonmedia defendant could raise the public comment defense. *Id.* at 20 n 6.

4 Separately, the Supreme Court has held that states cannot allow a private-
5 figure plaintiff to prevail in a defamation claim against a media defendant without
6 making a showing of some level of fault. *Gertz*, 418 US at 347. The states are left to
7 define for themselves the appropriate standard of fault. *Id.* Defendants in this case urge
8 us to hold not only that plaintiff must prove defendants' fault, even though they are not
9 media defendants, but also that the standard of fault should be "actual malice," or reckless
10 disregard for the truth, which the Court has required only for defamation actions brought
11 by public officials and public figures against media defendants. *See New York Times*,
12 376 US at 279-80; *Curtis Publishing Co. v. Butts*, 388 US 130, 87 S Ct 1975, 18 L Ed 2d
13 1094 (1967).

14 In sum, without the overlay of any state law, federal constitutional law
15 currently recognizes two different areas of defamation law in which a state may make
16 rules that distinguish between media and nonmedia defendants within an acceptable
17 range. With respect to falsity, federal constitutional law announced by the Supreme
18 Court demands that a state require a private-figure plaintiff to show falsity when a media
19 defendant's speech is protected by the public comment defense. The Court's decisions do
20 not speak to whether that requirement applies when the defendant is nonmedia. With
21 respect to fault, a private-figure plaintiff may not collect damages from a media
22 defendant without some showing of fault. But *Gertz* does not announce a federal rule for

1 fault in a defamation case brought by a private-figure plaintiff against nonmedia
2 defendants.

3 This court has also issued decisions involving proof of falsity and of fault
4 in cases involving both the First Amendment and Oregon defamation law. In *Neumann*,
5 the court established for the first time that a private-figure plaintiff bears the burden of
6 proving falsity of statements in defamation cases involving the First Amendment public
7 comment defense, even when the action is brought against nonmedia defendants. *See*
8 358 Or at 716 (announcing framework for applying *Milkovich* against factual backdrop
9 with no media defendant). And, in a series of cases decided in the 1970s, this court held
10 that the *Gertz* fault requirement for private-figure plaintiffs applies only to media
11 defendants. *Harley-Davidson v. Markley*, 279 Or 361, 371, 568 P2d 1359 (1977); *Adams*
12 *v. State Farm Mutual Auto. Ins. Co.*, 283 Or 45, 51-52, 581 P2d 507 (1978); *Wheeler*,
13 286 Or at 110.

14 B. *Sufficiency of Evidence in Absence of Text*

15 On review, defendants rely primarily on *Neumann* to argue that the trial
16 court correctly granted their motion for summary judgment. In challenging the reversal
17 by the Court of Appeals, defendants ask this court to address three issues, the first of
18 which is whether a plaintiff may reach a jury in a libel claim based on a writing posted on
19 a publicly available site when the writing itself is no longer available. Defendants urge
20 that, without the actual text of the review, plaintiff cannot establish the content of the
21 defamatory statements or, at least, cannot establish enough content to permit a court to
22 competently analyze defendants' First Amendment public comment defense. We

1 conclude that the lack of the text is not fatal to plaintiff's libel claim.

2 Since Wright removed his Google review, it is no longer available. In lieu
3 of the unavailable writing, plaintiff relies on the testimony of four people who read the
4 review to supply the content of the statements that he contends were defamatory. We
5 reject defendants' contention that plaintiff cannot proceed to trial on his libel claim
6 without a copy of the review.

7 Defendants argue that the loss of the text means that a court cannot
8 competently apply the constitutionally mandated test to discern whether the public
9 comment defense is available. In *Neumann*, this court held that, to determine whether
10 speech was capable of defamatory meaning (and thus whether it satisfied one of the
11 prongs of the public comment defense), a court had to look to three factors: (1) the
12 "general tenor of the entire work"; (2) the specific context and content of the statements
13 including figurative and hyperbolic language; and (3) whether the statement itself is
14 sufficiently factual to be proved true or false. 358 Or at 718. In defendants' view,
15 because the review is lost, a court lacks sufficient information to apply the test and
16 properly perform its gatekeeping role. For instance, defendants doubt whether a court
17 can discern the "general tenor" of the work without the text.

18 Having a copy of the review would certainly simplify matters, but
19 factfinders have long been asked to weigh competing or incomplete evidence and to
20 make credibility determinations. The task is no different here. It is an artifact of how
21 libel cases are typically litigated that we might be tempted to think that a copy of the at-
22 issue writing would be required. Because, definitionally, libel has been put into writing,

1 the parties are typically able to supply the court with the writing. But we can easily find
2 similar defamation cases in which no such exact record was available, and the case was
3 nonetheless able to be tried to conclusion.

4 The Court of Appeals aptly compared this libel case to slander cases.
5 *Lowell*, 306 Or App at 334. Slander cases can be litigated without the benefit of verbatim
6 records of what words were spoken. *See e.g. Worley v. OPS*, 69 Or App 241, 243, 686
7 P2d 404, *rev den*, 298 Or 334 (1984) (relating the factual background, including that the
8 allegedly defamatory statements were spoken in a staff meeting, without verbatim quotes
9 of the statements). In slander cases, a plaintiff need not prove that the defendant spoke
10 exactly the words alleged in the complaint, but only that the words are in substance the
11 same, *i.e.*, "so many of the words alleged in the declaration as constitute the sting of the
12 charge." *Swift & Co. v. Gray*, 101 F2d 976, 981-82 (9th Cir 1939) (internal quotation
13 marks omitted). There is no reason that such a standard should be categorically
14 inapplicable to libel cases because the medium of the speech is different.

15 Here, four people -- plaintiff, Norling, Wright, and Werner -- read the
16 review and testified as to its contents. Their accounts largely agree, and they all seem to
17 agree that they have not collectively forgotten a substantial component of the review
18 (*e.g.*, an additional customer service complaint or remark about the store's instruments).
19 The point of disagreement concerns the exact wording of the statement in the review
20 about Steinway piano sales. Defendants' witnesses recall its wording in one way, and
21 plaintiff's witnesses recall it in another.

22 But, at summary judgment, the trial court must view the evidence in the

1 light most favorable to plaintiff, leaving it to the eventual factfinder to make credibility
2 determinations. ORCP 47 C. And the testimony of the four witnesses is sufficient for a
3 factfinder to find the facts, including whether the review conveyed that plaintiff's
4 salesman had misrepresented to Wright that plaintiff was a Steinway dealer or that
5 plaintiff could sell Steinway pianos.

6 We turn to defendants' additional argument that the text of the review is
7 necessary to apply First Amendment protections properly. Although it certainly is easier
8 to discern the "general tenor" of a piece or the use of hyperbolic or figurative language
9 with the text in hand, and those are important factors to determine whether a statement
10 implies an assertion of fact, nothing in *Neumann* or the case law from which it derives
11 suggests that the fact that exact wording is disputed means that a trial court *must* throw up
12 its hands, declare defeat, and grant summary judgment to the defendants. 358 Or at 718-
13 19. Competent evidence going to the general tenor of the review, its use of language, and
14 the nature of the allegedly actionable statements was available. Thus, a constitutional
15 inquiry was certainly possible, albeit not as straightforward as it would be if the trial
16 court could assure itself that it had all the information that ever existed about the
17 allegedly defamatory writing.

18 Accordingly, we reject defendants' argument that they were entitled to
19 summary judgment because plaintiff could not produce the exact wording of the review.

20 C. *The First Amendment Defense*

21 We turn to the second issue on review: whether defendants are entitled to
22 assert their public comment First Amendment defense. As explained above, under

1 *Milkovich*, for a statement to be protected under the First Amendment, it must (1) be on a
2 matter of public concern and (2) not be susceptible to being proved true or false. 497 US
3 at 19. The parties' dispute here centers on the public concern prong and, in particular,
4 whether the identity of the speaker or the speaker's motive can affect whether speech is
5 on a matter of public concern.

6 We begin by describing the parties' arguments in some detail, as they
7 circumscribe our analysis here. First, plaintiff does not ask us to overrule *Neumann*.
8 Plaintiff briefly discusses *Neumann* but argues that it is distinguishable from the present
9 case. He argues that, because of the procedural posture in which the question about the
10 nature of the statements in *Neumann* arose, the decision had little to do with whether the
11 speech was on a matter of public concern in a constitutional sense. The defendant in
12 *Neumann* had asserted protection under the Oregon Anti-Strategic Lawsuits Against
13 Public Participation (anti-SLAPP) statute, ORS 31.150. In plaintiff's view, the court's
14 comments about the statements at issue being on a matter of public interest concerned the
15 statutory standard under the anti-SLAPP statute, which shifts a modest burden of
16 production to the plaintiff when the allegedly actionable communications are made "in a
17 place open to the public or a public forum in connection with an issue of public
18 interest[.]" ORS 31.150(2)(c).

19 Plaintiff also offers reasons to doubt the result of *Neumann's* application to
20 the present matter. Plaintiff would have us conclude that speaker identity and motive can
21 affect the public concern analysis and that, under the circumstances of this case, Wright's
22 identity as an employee for a competitor and his alleged motive of sinking plaintiff's

1 business renders his review not on a matter of public concern. Plaintiff submits that the
2 "attacks by a competing business are not issues of public interest" and argues that the
3 Court of Appeals correctly concluded that the speaker's motivation is relevant to whether
4 the speech is on a matter of public concern. Plaintiff also argues that the Court of
5 Appeals incorrectly concluded that the record was insufficient to establish a factual issue
6 for trial on motivation; he highlights the fact that Wright concealed who he was when he
7 composed the review as a basis to find that defendants were not speaking on a matter of
8 public concern. In response, defendants advance a simple argument: The identity or
9 motive of the speaker is irrelevant to the determination of whether the speech is on a
10 matter of public concern, and *Neumann* controls the outcome here.

11 To address whether the public concern prong of the public comment
12 defense applies under the circumstances of this case, we address both interrelated aspects
13 of the parties' arguments: (1) the degree to which *Neumann* controls and (2) whether a
14 speaker's identity and motive affect the public concern analysis. We conclude that
15 *Neumann* controls in the absence of plaintiff's request that we overrule it, although we
16 have doubts about its approach, and that a speaker's identity and motive do not affect
17 whether a matter is of public concern.

18 1. Neumann v. Liles

19 *Neumann* was a libel action involving a wedding guest's negative online
20 consumer review of a wedding venue posted on Google Reviews. 358 Or at 708. As
21 discussed, the defendant filed a special motion to strike the plaintiffs' claim under
22 Oregon's anti-SLAPP statute, which applies to cases involving written statements

1 presented "in a place open to the public or a public forum in connection with an issue of
2 public interest," among others. *Id.* at 709, 725; *see also* ORS 31.150(2)(c). The trial
3 court granted the motion and dismissed the claim, and the Court of Appeals reversed.
4 *Neumann*, 358 Or at 709. Rejecting the defendant's contention that his review was
5 hyperbolic and mere opinion, the Court of Appeals concluded that some statements in the
6 review were capable of a defamatory meaning and that the plaintiffs had adduced
7 sufficient evidence, if credited, to permit a factfinder to determine that the defendant's
8 statements were defamatory. *Id.* at 710; *see also* ORS 31.150(3) (providing that, if a
9 defendant establishes grounds for the motion under subsection (2), the burden shifts to
10 the plaintiff to establish the probability that "the plaintiff will prevail on the claim by
11 presenting substantial evidence to support a prima facie case"). This court allowed
12 review "to determine how an actionable statement of fact is distinguished from a
13 constitutionally protected expression of opinion in a defamation claim and whether the
14 context in which a statement is made affects that analysis." *Neumann*, 358 Or at 710.

15 This court began by reviewing the Supreme Court's decision in *Milkovich*.
16 358 Or at 713-16. *Neumann* described *Milkovich* as having two prongs for First
17 Amendment protection to apply: first, whether the statements were on a matter of public
18 concern and, second, whether the statements were susceptible to true-false analysis. *Id.*
19 at 714 (citing *Milkovich*, 497 US at 19-20).

20 Notably, *Neumann* did not mention that the Court had reserved judgment in
21 *Milkovich* as to whether its First Amendment limitations applied to nonmedia defendants
22 in defamation cases. *See Milkovich*, 497 US at 20 n 6 ("In *Hepps* the Court reserved

1 judgment on cases involving nonmedia defendants, and accordingly we do the same."
2 (Internal citation omitted)). Additionally, *Neumann's* discussion of whether the wedding
3 review was on a matter of public concern was limited to the following:

4 "[Plaintiff] has not disputed that [the defendant's] statements involve
5 matters of public concern, and we readily conclude that they do. [The
6 defendant's] review was posted on a publicly accessible website, and the
7 content of his review related to matters of general interest to the public,
8 particularly those members of the public who are in the market for a
9 wedding venue."

10 358 Or at 720 (citing *Unelko Corp. v. Rooney*, 912 F2d 1049, 1056 (9th Cir 1990), *cert*
11 *den*, 499 US 961 (1991)).

12 The court then turned to the legal question before it: How should a court
13 determine whether an allegedly defamatory statement is susceptible to a true-false
14 analysis, the second prong of the test in *Milkovich*? The court in *Neumann* adopted the
15 approach the Ninth Circuit had crafted in *Unelko Corp.*, 912 F2d at 1053, soon after the
16 Supreme Court decided *Milkovich*. *Neumann*, 358 Or at 716-19. That approach involves
17 a three-part inquiry, which we described as "(1) whether the general tenor of the entire
18 publication negates the impression that the defendant was asserting an objective fact; (2)
19 whether the defendant used figurative or hyperbolic language that negates that
20 impression; and (3) whether the statement in question is susceptible of being proved true
21 or false." *Neumann*, 358 Or at 719. Through that framework, a court considers the work
22 as a whole, the context of the statements, and the statements themselves to determine
23 whether a factfinder could conclude that the statements imply a false assertion of
24 objective fact. *Id.*

1 The *Neumann* court explained in detail the choice to adopt the *Unelko*
2 approach, but it did not address a factual difference between the two cases: The
3 *Neumann* defendant was nonmedia (a wedding guest who wrote an online review),
4 *Neumann*, 358 Or at 708-09, and the *Unelko* defendants were media (CBS and Andy
5 Rooney, a broadcaster best known for his appearances on *60 Minutes*), *Unelko*, 912 F2d
6 at 1050. In *Unelko*, the Ninth Circuit mentioned but did not dwell on the Supreme
7 Court's language in *Milkovich* reserving the question of whether the First Amendment
8 defense applied to nonmedia defendants. *See id.* at 1056 (quoting *Milkovich's*
9 announcement of the rule as applying "at least in situations, like the present, where a
10 media defendant is involved," *Milkovich*, 497 US at 19-20, and applying the test without
11 acknowledging CBS and Rooney as media defendants). In short, the *Neumann* court did
12 not note that whether the defendant is media or not could affect the analysis, even to
13 reject the idea.

14 The court went on to apply *Unelko* to the wedding guest's online review,
15 agreeing with the Court of Appeals that some of the statements were capable of a
16 defamatory meaning, but stating that the question remained "whether they are
17 nevertheless protected under the First Amendment." *Id.* at 719-20. The court addressed
18 each prong of the *Milkovich* test, and, concluding that the statements were protected
19 expressions of opinion, it reversed the Court of Appeals. *Id.* at 722.

20 In short, while the main issue in, and the clear holding of, *Neumann* was
21 that courts in Oregon would use the *Unelko* three-part inquiry to determine whether
22 speech was capable of defamatory meaning under *Milkovich*, the *Neumann* court decided

1 two other issues with comparatively little to no discussion: (1) that the First Amendment
2 falsity requirement applied when a private-figure plaintiff made claims against nonmedia
3 defendants and (2) that a scathing internet review was on a matter of "public concern."
4 *Neumann* allowed the defendant to raise the First Amendment public comment defense
5 because his speech was on a matter of public concern and his review could not
6 reasonably be interpreted as asserting fact. 358 Or at 722. It appears that the parties did
7 not dispute that the review of the wedding venue was of public concern, a term of art in
8 First Amendment defamation doctrine.

9 In *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 US 749, 105 S Ct
10 2939, 86 L Ed 2d 593 (1985), the Court had the first occasion to consider how the First
11 Amendment applies to a defamation suit between private-figure plaintiffs and nonmedia
12 defendants and used "public concern" as a term of art in the defamation context. A
13 building company sued a credit reporting service for defamation for misreporting to five
14 subscribers that the company had filed for bankruptcy. *Id.* at 751. The Court considered
15 how best to balance the state's interests in protecting its law of defamation and First
16 Amendment values given the context. It noted that the First Amendment interest at issue
17 was "less important than the one weighed in *Gertz*. We have long recognized that not all
18 speech is of equal First Amendment importance. It is speech on matters of public
19 concern that is at the heart of the First Amendment's protection." *Id.* at 758 (internal
20 quotations omitted). The Court explained that the First Amendment was created to
21 protect the interchange of ideas to effectuate the political and social will of the people
22 and that speech concerning public affairs was the "essence of self-government." *Id.* at

1 759. Accordingly, that speech was worthy of the First Amendment's greatest protection.

2 *Id.*

3 On the other hand, speech of only private concern deserved less protection.

4 *Id.* The Court quoted this court's decision in *Harley-Davidson*, 279 Or at 366,

5 extensively and favorably to support that point. *See id.* at 760 ("[There] is no threat to

6 the free and robust debate of public issues; there is no potential interference with a

7 meaningful dialogue of ideas concerning self-government; and there is no threat of

8 liability causing a reaction of self-censorship by the press. The facts of the present case

9 are wholly without the First Amendment concerns with which the Supreme Court of the

10 United States has been struggling.""). When balanced against a much weaker First

11 Amendment interest, the state's interest in protecting its citizens from defamation was

12 much stronger. *Id.*

13 The Court in *Dun & Bradstreet* readily concluded that the speech at issue

14 was of private, not public, concern. *Id.* at 762, 764 (Burger, J., concurring), 774 (White,

15 J., concurring).⁵ It applied the "public concern" test (examining the content, form, and

16 context of the speech) originally developed in public employment cases. *Id.* at 761. The

⁵ *Dun & Bradstreet* was a plurality decision, but five members of the Court (three signing on to the lead opinion and Justices Burger and White concurring separately) agreed that the speech at issue was on a matter of private rather than public concern and saw that as dispositive in distinguishing the case from *Gertz*. Justices Burger and White wrote separately to express disagreement with the trend in the case law of "constitutionalizing the entire law of libel and slander" but agreed that the lead opinion was correct given that case law. *Id.* at 764 (Burger, J., concurring), 766, 774 (White, J., concurring).

1 Court noted that the speech was wholly false, clearly injurious, and made available to
2 only five subscribers. *Id.* at 762. Additionally, there was "simply no credible argument
3 that this type of credit reporting require[d] special protection to ensure that 'debate on
4 public issues [remained] uninhibited, robust and wide-open.'" *Id.* (quoting and citing
5 *New York Times*, 376 US at 270). The Court also noted that the speech at issue was
6 unlikely to be chilled based on the rule announced because its motivation was profit,
7 which would be best served with accurate information. *Id.* at 762-63.

8 We draw two lessons from the Supreme Court's discussion of public
9 concern. First and foremost, the legal rule is that a reviewing court discerns whether
10 speech is on a matter of public concern by looking to its content, form, and context. *Id.* at
11 761. Second, *Dun & Bradstreet* discusses matters of public concern as the "heart of the
12 First Amendment's protection" because they protect the interchange of ideas required for
13 effective self-government. *Id.* at 759.

14 Defendants essentially contend that a negative review of a business posted
15 on the internet is categorically speech on a matter of public concern and that we should
16 follow *Neumann*. Defendants seem to assume that the internet can breathe constitutional
17 importance into speech posted in a way that makes it publicly available. We doubt that
18 sweeping proposition. The internet is revolutionary. Scholars, legal practitioners, and
19 laypeople alike have urged that its revolutionary nature requires an entirely different set
20 of rules, urging that speech on the internet enjoys unusual protection from influence or
21 restraint. But many innovations were once revolutionary. The telegram allowed
22 messages to travel in a matter of minutes or hours, instead of the days it took for letters to

1 reach their destinations. But a statement communicated by telegram is no different from
2 the same one communicated by letter. So too with the internet. In practice, there is no
3 difference between a statement being posted on social media, Google reviews, on a sign
4 carried around outside the plaintiff's home, or written in the sky: The statement is the
5 same no matter how it reaches the public.

6 The touchstone principle in evaluating whether speech is on a matter of
7 public concern is whether the speech must be protected to ensure the continuance of
8 vigorous debate on public issues and, by extension, self-governance. *Dun & Bradstreet*,
9 472 US at 761-62. The idea that negative remarks about a business's practices are always
10 (or almost always) necessary to ensure vigorous debate on public issues or are part of
11 self-governance is doubtful. Although such remarks may be made *in public* or be on a
12 subject that a member of the public finds interesting, those circumstances do not
13 automatically render them of constitutional importance. None of this is to say that a
14 customer's review of a business cannot be on a matter of public concern while hewing
15 closely to *Dun & Bradstreet*. Rather, instead of assuming that a customer review of a
16 business is on a matter of public concern, a careful and more nuanced approach would
17 likely be to examine the "content, form, and context * * * as revealed by the whole
18 record." *Id.* at 761.

19 2. *Application of Neumann*

20 We now turn to whether *Neumann* applies to the present case. Although
21 the court's analysis on public concern consists of little more than a citation to *Unelko*,
22 *Neumann*, 358 Or at 720 (citing *Unelko*, 912 F2d at 1056), we cannot agree with

1 plaintiff's characterization of *Neumann* as holding that, for purposes of the anti-SLAPP
2 statute as opposed to the First Amendment, the wedding review was on a matter of public
3 concern. The court's focus on the First Amendment belies that characterization. The
4 court explained at the outset of its analysis that the "determination of the legal sufficiency
5 of Neumann's defamation claim hinges on whether Liles's statements are protected under
6 the First Amendment[.]" 358 Or at 711. After reviewing state common law and some of
7 the Supreme Court's First Amendment decisions concerning defamation actions,
8 especially *Milkovich*, the court stated that, "to determine whether a defamatory statement
9 is protected under the First Amendment, the first question is whether the statement
10 involves a matter of public concern." *Id.* at 718. If so, "then the dispositive question is
11 whether a reasonable factfinder could conclude that the statement implies an assertion of
12 objective fact." *Id.* at 718-19.

13 Accordingly, considering that plaintiff has not asked us to overrule
14 *Neumann*, the court's determination that the online wedding review in *Neumann* was on a
15 matter of public concern that triggered the First Amendment is relevant. That negative
16 online review of a wedding venue is in many respects like the negative online review of
17 plaintiff's piano store in this case, and both cases involved private-figure plaintiffs and
18 nonmedia defendants. In view of plaintiff's arguments, we apply *Neumann* and conclude
19 that, under that case, the online review in this case was on a matter of public concern.

20 3. *The impact of speaker motive and identity on public concern*

21 We now turn to the impact of the speaker's motive or identity on the public
22 concern analysis. Although the Court of Appeals did not treat it as dispositive in this

1 case, it declared that "a speaker's motive or purpose in speaking *is* relevant to whether
2 speech is protected by the First Amendment." *Lowell*, 306 Or App at 339 (emphasis in
3 original). To support its conclusion, it cited public employment cases from which *Dun &*
4 *Bradstreet* derived its public concern test, including the following:

5 "[W]hen a public employee speaks not as a citizen upon matters of public
6 concern, but instead as an employee upon matters only of personal interest,
7 absent the most unusual circumstances, a federal court is not the
8 appropriate forum in which to review the wisdom of a personnel decision
9 taken by a public agency allegedly in reaction to the employee's behavior."

10 *Connick v. Myers*, 461 US 138, 147, 103 S Ct 1684, 75 L Ed 2d 708 (1983). The Court
11 of Appeals further reasoned that the motive of the speaker was properly part of the
12 content, form, and context analysis, as part of the context of a statement, in public
13 employment cases in Oregon. *Lowell*, 306 Or App at 340 (citing one of its earlier cases).
14 The Court of Appeals also cited *Harley-Davidson*, 279 Or at 363, 366, as support. In that
15 case, this court held that a fake customer complaint written by a competitor and sent
16 directly to a mutual distributor was not speech on a matter of public concern. The Court
17 of Appeals acknowledged that this court "gave little explanation of its specific reasoning"
18 but concluded that the court derived its result from the touchstone principle that to be
19 speech on a matter of public concern, the speech must be in the interest of democratic
20 dialogue and this court determined that "the interest in democratic dialogue [was] non-
21 existent." *Lowell*, 306 Or App at 340.

22 The parties disagree on whether the Court of Appeals was correct. Plaintiff
23 argues that the Court of Appeals was correct, particularly in treating public employment
24 cases as instructive, and defendants argue the opposite.

1 In the public employment cases, the relationship between whether the topic
2 is one of public concern and the motive of the speaker is as follows: When the topic truly
3 is one of public concern, it is likely that the employee is speaking in her capacity as a
4 citizen, which is protected by the First Amendment irrespective of the fact that the
5 government is also the speaker's employer. But, when the topic is narrow or one of
6 private concern, it is likely that the employee is speaking in her capacity as an employee,
7 which any employer, regardless of whether that employer happens to be the government,
8 may have a legitimate interest in controlling. Plaintiff interprets *Dun & Bradstreet* as the
9 Supreme Court's endorsement of a similar approach in the defamation context because it
10 applied the content, form, and context approach crafted for public employment cases.
11 Plaintiff argues that, when a writer makes negative comments about a business (the
12 content), the writer's status -- business competitor or disgruntled customer (the context),
13 and whether she masks her status in her delivery of those comments (the form) are
14 instructive as to whether the comments truly are on matters of public concern. When the
15 writer is a competitor, the logic goes, it is likely, no matter how the comments are
16 presented, that the subject is one of private concern. When the writer is a disgruntled
17 customer, it is likely that the matter is one of public concern (albeit not one of
18 overwhelming public concern).

19 That reasoning is mistaken because the logic is not parallel in public
20 employment cases and defamation cases. The public employment cases reason from the
21 topic of the speech to determine which relationship between the parties (the citizen-
22 government relationship or the employee-employer relationship) ought to control the

1 outcome. In other words, whether speech is on a matter of public concern is a *tool* of a
2 larger inquiry in public employment cases. In the context of defamation, whether speech
3 is on a matter of public concern is the *object* of the inquiry. Plaintiff asks us to reason
4 from the status of the speaker to determine whether the topic is of public concern, going
5 so far as to suggest that, whenever a competitor or its employee speaks about another
6 business, the speech is of purely private concern. That is mistaken. Defendants correctly
7 note that the rules arising from the public employment context are intended to balance
8 interests where the two players at issue each have two statuses, citizen-employee and
9 government-employer. In deciding whether the topic of the speech was of public or
10 private concern, the court decides which status controls (the citizen-government or
11 employee-employer) and thereby which interests ought to control (a citizen's interest in
12 her free speech rights or an employer's interest in appropriately regulating the
13 workplace). Here, the object of the inquiry is to determine whether the speech is on a
14 topic of public or private concern.

15 The Supreme Court's decision in *Garcetti v. Ceballos*, 547 US 410, 126 S
16 Ct 1951, 164 L Ed 2d 689 (2006), supports that analysis. In that case, a public employee
17 wrote a memo on what he believed to be serious internal misconduct pursuant to his job
18 duties. *Id.* at 414. He was reassigned and denied a promotion soon after. *Id.* at 415. He
19 sued, citing First Amendment protections for speech relating to matters of public concern
20 because whether the department was corrupt was a matter of public concern. *Id.* The
21 Supreme Court held that the memo was not protected by the First Amendment because it
22 was written pursuant to his official duties, *i.e.*, the topic of the speech was part of his duty

1 as an employee, so he wrote it as an employee, not as a citizen. *Id.* at 421. Thus, the
2 government's interests as an employer regulating a workplace controlled. Whether the
3 employee, in addition to having a job duty, was motivated to act because he believed that
4 he was addressing an issue of public concern was not relevant in determining whether the
5 speech was First Amendment-protected. *Id.*

6 Focusing on the motive of the speaker also distracts from the question
7 central to the inquiry: Does the speech bear on public discourse, self-governance, or the
8 ordering of society? There is no reason to suppose that the exact same words delivered in
9 the exact same way have different ramifications for those areas of constitutional concern
10 because the speaker's motive is different in the two cases. A useful example of that
11 comes from a Connecticut case, *Gleason v. Smolinski*, 319 Conn 394, 125 A3d 920
12 (2015). In that case, the defendants, family members to a missing person, posted missing
13 person signs around the plaintiff's neighborhood. *Id.* at 396-97, 125 A3d at 927. The
14 defendants believed that the plaintiff, the missing person's girlfriend, was involved in his
15 being missing or dead. *Id.* at 396, 125 A3d at 927. Although there was substantial
16 evidence that some of the defendants' motive in posting the signs was to harass the
17 plaintiff so that she would divulge information about the missing person, the Connecticut
18 Supreme Court concluded that the matter was of public concern because it related to a
19 police investigation and finding a missing person. *Id.* at 433 & 433 n 33, 125 A3d at 949
20 & 949-50 n 33. The fact that the defendants were partially motivated by a desire to harm
21 the plaintiff did not detract from the speech being on a matter of public concern, a police
22 investigation of a missing person.

1 Additionally, adoption of the Court of Appeals' analysis would be
2 inconsistent with First Amendment values, which include "secur[ing] the widest possible
3 dissemination of information from diverse and antagonistic sources." *New York Times*,
4 376 US at 266 (internal quotation omitted). Motives like competition, hatred, and
5 ridicule may underlie speech vital to the public discourse, which the First Amendment is
6 intended to protect. Allowing the government to scrutinize the motive of a speaker to
7 determine the scope of that speaker's protection from government enforcement against
8 her under the First Amendment invites the government to define the contours of the
9 public discourse according to the motives it finds the worthiest. Rather than giving
10 expression the "breathing space" it needs to survive, *id.* at 271-72, we would suffocate it.

11 4. *Whether the speech is susceptible to true-false analysis*

12 Having concluded that *Neumann* applies to this case such that the speech is
13 on a matter of public concern and that motive and speaker identity do not alter that
14 outcome, we turn to the last step in applying the First Amendment public comment
15 defense, in view of defendants' position that we are unable to make that determination on
16 this record. That last step is whether the speech is susceptible to being proved true or
17 false under *Milkovich*. The First Amendment precludes liability for statements that a
18 reasonable factfinder could not find to imply an assertion of objective fact. The Court of
19 Appeals applied the *Unelko* test adopted in *Neumann* to resolve that question, and we
20 agree with its conclusions.

21 As discussed above, the three-part inquiry for discerning whether speech is
22 susceptible to a true-false analysis is as follows: "(1) whether the general tenor of the

1 entire publication negates the impression that the defendant was asserting an objective
2 fact; (2) whether the defendant used figurative or hyperbolic language that negates that
3 impression; and (3) whether the statement in question is susceptible of being proved true
4 or false." *Neumann*, 358 Or at 719. In the present matter, we examine how the three-part
5 inquiry applies to three different statements: (1) the remark that plaintiff misrepresented
6 whether his business could sell new Steinway pianos, (2) the statement that the salesman
7 misrepresented the age of the Yamaha C-7 piano, and (3) "this guy can't be trusted."

8 We agree with the Court of Appeals that the Steinway and Yamaha
9 statements are sufficiently factual to be actionable but that "this guy can't be trusted" is
10 not. *Lowell*, 306 Or App at 343. Starting with the last prong of the *Unelko* test, whether
11 plaintiff's business misrepresented its ability to sell new Steinway pianos and whether the
12 salesman misrepresented the age of the Yamaha piano are factual matters with truth
13 values. Straightforward sets of facts would make Wright's statements in the review either
14 true or false. Applying the two other prongs of the *Neumann* inquiry does not alter that
15 result with respect to those two statements. Based on the record of the contents of the
16 review, nothing in the review's "general tenor" would negate the impression that the
17 writer really was asserting that the business and its employees were misrepresenting facts
18 about pianos to customers. Although there is some evidence that the review used
19 evocative language, such as the store "smelled like grandma's attic," that language is not
20 so figurative or hyperbolic as to undermine a reader's impression that the review is
21 alleging that plaintiff's business lied to the writer about selling new Steinway pianos and
22 the age of the Yamaha piano on display. *See Milkovich*, 497 US at 21 (considering

1 whether the writer's use of "loose, figurative, or hyperbolic language" or the "general
2 tenor of the article" negated the impression that the writer "was seriously maintaining that
3 petitioner committed the crime of perjury").

4 The analysis differs with respect to the "this guy can't be trusted" remark.
5 In isolation, the statement is subjective and not susceptible to being proved true or false.
6 And, viewing the remark in the context of the whole review does not alter that result. As
7 the Court of Appeals explained in its opinion, *Lowell*, 306 Or App at 345, the remark can
8 be best understood as a conclusion that the writer drew from the "facts" presented in the
9 review: The business misrepresented whether it could sell new Steinway pianos and the
10 age of a piano on display, and therefore its owner "can't be trusted." The writer's
11 conclusion implies no facts beyond those already offered in the review and is not
12 actionable.

13 5. *Whether to alter defamation law in Oregon by following Obsidian Finance*

14 Because the public comment First Amendment defense is available to
15 defendants and applies to two statements, we address what plaintiff's burden is to show
16 defendants' fault and the media/nonmedia distinction that applies when a private figure
17 plaintiff sues a nonmedia defendant. Defendants ask that, if *Neumann* did not already
18 abolish the distinction between media and nonmedia defendants in defamation claims
19 brought by private figures, we now should do so and follow the Ninth Circuit's approach
20 in *Obsidian Finance Group, LLC v. Cox*, 740 F3d 1284, 1291 (9th Cir 2014). We decline
21 to abolish the media/nonmedia distinction. The principles of *stare decisis* counsel that
22 result for a few reasons. First, the facts of the case before us are far from an ideal vehicle

1 for considering the nuances of the question with which we are confronted, and *amici's*
2 hypotheticals are no substitute. Second, we are not persuaded by the strength of *Obsidian*
3 *Finance's* logic and support to overrule our existing precedent.

4 At the outset, we note that "the party seeking to change a precedent must
5 assume responsibility for affirmatively persuading us that we should abandon that
6 precedent," and we assume, grounded in the principle of *stare decisis*, that "fully
7 considered prior cases are correctly decided." *State v. Ciancanelli*, 339 Or 282, 290, 121
8 P3d 613 (2005). *Stare decisis* is "a prudential doctrine that is defined by the competing
9 needs for stability and flexibility in Oregon law." *Farmers Ins. Co. v. Mowry*, 350 Or
10 686, 697-98, 261 P3d 1 (2011). Importantly, "[s]*tare decisis* does not permit this court to
11 revisit a prior decision merely because the court's current members may hold a different
12 view than its predecessors about a particular issue. At the same time, *stare decisis* is not
13 absolute." *Couey v. Atkins*, 357 Or 460, 485, 355 P3d 866 (2015).

14 This court held in *Wheeler* that plaintiffs must prove that a defendant acted
15 with actual malice to obtain presumed damages only if the defendant is a media
16 defendant. 286 Or at 110. That has been an established rule of the law of defamation in
17 Oregon for decades. *Wheeler* and its related cases do not suffer from some of the faults
18 that have compelled us to overrule precedent in the past. The rule was not adopted in
19 what amounted to *dicta* or without explanation. See *Couey*, 357 Or at 485 (identifying
20 the above as a reason to overcome the application of *stare decisis*). *Wheeler* discussed its
21 decision in detail, relying on *Gertz's* own emphasis on the fact that it dealt with media
22 defendants. See 286 Or at 108-10 (quoting *Gertz* extensively). Nor was *Wheeler's*

1 analysis clearly incorrect, *see Couey*, 357 Or at 485 (identifying that as an additional
2 reason to overcome the application of *stare decisis*): *Gertz* did not itself resolve whether
3 it applied to nonmedia defendants.

4 Defendants and *amici* urge that the time has come to overturn *Wheeler* and
5 to abolish the media/nonmedia distinction because it has become incompatible with
6 modern times and technology. First, they argue that the distinction creates a "double
7 standard" at odds with the Supreme Court's current approach. They note that the
8 Supreme Court has said that the press has no special speech privileges distinct from those
9 of other speakers, *see Citizens United v. Federal Election Comm'n*, 558 US 310, 352, 130
10 S Ct 876, 175 L Ed 2d 753 (2010), and that all speakers, whether or not members of
11 traditional media, should have the same standards of liability. Second, defendants and
12 *amici* argue that *Wheeler* is at odds with the majority approach of most federal appellate
13 courts, including the Ninth Circuit. Given the split between Oregon state law and the law
14 binding the Ninth Circuit, defendants and *amici* argue that Oregon defamation defendants
15 will be less protected than their out-of-state counterparts facing similar suits in diversity
16 cases in federal court. *Amici* further argue that *Wheeler* conflicts with the approach of the
17 majority of states that have addressed the question. Defendants urge, in summary, that
18 "[t]here should be no different constitutional analysis for a news reporter[] (media
19 defendant), a food-critic blogger (arguably media-defendant *or* non-media defendant), a
20 private citizen review on Google or Yelp (non-media defendant), and any other person
21 who posts a consumer review that is accessible to the public."

22 We begin with defendants' concerns about the changing times and later

1 address their arguments based on case law. Notably, defendants' arguments have little to
2 say about the facts of this case, with good reason: Wright is not a blogger or a food
3 critic. He is an individual who wrote a review of a retailer and posted it to the internet,
4 just as millions of other Americans do. Artistic Piano is just a store that sells musical
5 instruments and accessories. At bottom, defendants argue that the media/nonmedia
6 distinction should be abandoned as clearly wrong because it presents a difficult line-
7 drawing problem, but they make that argument in a case in which the line is entirely
8 clear: Defendants are not media under any workable definition. We also note that the
9 resolution of the issue may make little practical difference under the circumstances of this
10 case: Plaintiff is correct that he could make the required showing of actual malice to
11 overcome summary judgment. Plaintiff's theory of the case is not that the review's
12 statements are just false; it is that the conversation described in the review was entirely
13 made up, and plaintiff adduced evidence in support of that theory. Because at summary
14 judgment all reasonable inferences are drawn in the light most favorable to the
15 nonmoving party, a factfinder may very well conclude that the conversation reported in
16 the review never took place. And, if defendants described an entirely made-up
17 conversation, anything they claim was "said" in it would be made knowing that it was
18 false or with reckless disregard for the truth, *i.e.*, with actual malice, the very fault
19 standard for which defendants advocate.

20 In short, we have before us a case in which the defendants are admittedly
21 not media and may very well have acted with actual malice. Defendants do not engage
22 with those facts in their efforts to persuade us to overrule the media/nonmedia distinction

1 for purposes of determining what showing of defendants' fault plaintiff must make. *Stare*
2 *decisis* is not mechanistic, *Mowry*, 350 Or at 697, but it is demanding. And it does not
3 permit us to destabilize over 40 years of precedent on the strength of a few hypotheticals
4 and some abstract concerns about modernity. We acknowledge the competing need for
5 flexibility in a modern world and recognize that old rules can become outmoded with the
6 passage of time, *see id.* at 697-98, but this case simply does not present an example of
7 how the rule has become outmoded. It instead presents facts to which the rule can be
8 straightforwardly applied.⁶

9 In the absence of an argument that the facts illustrate why the existing
10 media/nonmedia distinction ought to be overruled, defendants attempt to meet their
11 burden to show why precedent should be abandoned by appealing to case law from other
12 jurisdictions, particularly *Obsidian Finance*. We are not persuaded that defendants'
13 argument meets that burden, nor do we find *Obsidian Finance*'s logic persuasive enough
14 to convince us that our longstanding approach ought to be abandoned.

15 In *Obsidian Finance*, the Ninth Circuit acknowledged that the Supreme
16 Court has not directly addressed whether its First Amendment defamation rules apply
17 equally to the institutional press and to private, nonmedia defendants. 740 F3d at 1291.

⁶ Our colleagues criticize us for not announcing a test to distinguish media from nonmedia. __ Or at __ (Balmer, J., concurring) (slip op at 1:5-7). The rationale for not offering a test follows from the discussion above: The facts of this case do not lend themselves to the nuances that we would need to consider to craft one, and *amici*'s hypotheticals are no substitute. We have no difficulty applying the distinction to the facts of this case: Wright and Artistic Piano are clearly not media defendants, and therefore the plaintiff need not show actual malice to obtain relief.

1 However, the Ninth Circuit held that a defendant blogger's allegations that a bankruptcy
2 trustee was corrupt were protected by the First Amendment, though the defendant was
3 not a trained journalist and "apparently ha[d] a history of making similar allegations and
4 seeking payoff in exchange for retraction." *Id.* at 1287, 1291. The court's rationale, like
5 defendants' and *amici*'s argument before this court, was largely based on decisions by the
6 Supreme Court -- in contexts other than defamation claims -- rejecting constitutional
7 privileges for the institutional press greater than those available to individuals engaged in
8 the same activities. *See id.* at 1290 (citing cases). Citing decisions from other circuits,
9 the Ninth Circuit concluded that the First Amendment defamation rules "apply equally to
10 the institutional press and individual speakers." *Id.* at 1291.

11 We stand by our previous reasoning, that the legal context here, a
12 defamation claim, matters for the purposes of whether and how the First Amendment
13 must alter state common law. Defamation law in Oregon has developed over time mainly
14 in the common law tradition (the anti-SLAPP statute is a notable exception). The
15 common law libel cause of action exists to provide remedies in individual cases of harm
16 caused by false speech, and liability is by no means a foregone conclusion, even in cases
17 of libel *per se*, as a result of common law privileges and defenses recognized in Oregon.
18 We have already discussed in detail how the Supreme Court approaches defamation
19 cases. In our view, the Supreme Court's approach in state common law defamation cases
20 is different from cases that involve a jurisdiction that enacts and seeks to enforce laws
21 against speakers that are not content-neutral or suffer from similar constitutional defects.
22 *See Hepps*, 475 US at 777 (acknowledging that "a suit by a private party is obviously

1 quite different from the government's direct enforcement of its own laws").

2 And, the Court has recognized that the common law speech-based torts are
3 varied and call for an appreciation of the specific context at issue. *See, e.g., Zacchini v.*
4 *Scripps-Howard Broadcasting Co.*, 433 US 562, 97 S Ct 2849, 53 L Ed 2d 965 (1977).
5 In *Zacchini*, the Ohio Supreme Court had held that a television news broadcast of the
6 plaintiff's "human cannonball" act in its entirety without the performer's permission was
7 protected as reporting on a matter of public interest, relying on the Court's decision in a
8 false light case, *Time, Inc. v. Hill*, 385 US 374, 87 S Ct 534, 17 L Ed 2d 456 (1967). The
9 Supreme Court reversed, noting that the tort in *Time* "involved an entirely different tort"
10 from the plaintiff's cause of action for appropriation of his right of publicity under Ohio
11 law, *Zacchini*, 433 US at 571, and explained that the "differences between these two torts
12 are important," *id.* at 573. The Court also recognized that its line of cases involving the
13 First Amendment and defamation, including *Gertz*, were inapplicable. *Id.* at 574.

14 As a result, we are not persuaded that the Supreme Court's First
15 Amendment cases involving other legal contexts are or should be determinative as to
16 state law defamation cases. For example, in *Bartnicki v. Vopper*, 532 US 514, 121 S Ct
17 1753, 149 L Ed 2d 787 (2001), a case cited in *Obsidian Finance*, 740 F3d at 1290, the
18 plaintiffs' mobile phone conversation was unlawfully intercepted and recorded by an
19 unknown third party during a labor dispute, and one defendant gave the recording to the
20 media defendants. After the recording was broadcast over radio and published in
21 newspapers, the plaintiffs brought claims for damages based on federal and Pennsylvania
22 wiretap acts that prohibited disclosure of content of communications that a party has

1 reason to know were obtained unlawfully. The defendants asserted that, if they violated
2 the wiretap laws, their disclosures of the conversation between the plaintiffs were
3 protected by the First Amendment. *Id.* at 518-21.

4 The Third Circuit Court of Appeals evaluated the statutes and concluded
5 that they deterred more speech than necessary to protect the privacy interests involved
6 and therefore reversed the district court's denial of the defendants' motion for summary
7 judgment. *Id.* at 521-22. Applying its framework for reviewing statutes challenged
8 under the First Amendment, the Supreme Court agreed that the statutes were content-
9 neutral. *Id.* at 526-27. However, the Court noted that it repeatedly had held that, if the
10 press has lawfully obtained truthful information, state action punishing publication of
11 information of public concern will generally be unconstitutional. *Id.* at 527-28. The
12 Court concluded that the call between the union president and the union's chief
13 negotiator, in which the president threatened use of physical harm during ongoing
14 negotiations over the terms of compensation for teachers at the public high school, was
15 on a matter of public concern. *Id.* at 535. Thus, the question in the case was whether the
16 First Amendment protected the defendants when they had reason to know that the
17 interception of the phone call was unlawful. The Court in *Bartnicki* acknowledged the
18 communication privacy interest that the statutes protected but concluded that, based on
19 the facts of the case -- particularly the kind of speech that was publicized and the fact that
20 none of the defendants had performed the interception -- all the defendants were

1 protected from liability for the publication. *Id.*⁷ Similarly, *Cohen v. Cowles Media Co.*,
2 501 US 663, 111 S Ct 2513, 115 L Ed 2d 586 (1991) (contract claim for breach of
3 confidentiality), and *First National Bank of Boston v. Bellotti*, 435 US 765, 767, 98 S Ct
4 1407, 55 L Ed 2d 707 (1978) (freedom of speech challenge to a Massachusetts criminal
5 statute forbidding banks and corporations from making campaign contributions or
6 expenditures to influence public votes on referenda other than those affecting their
7 property, business, or assets), arise in contexts that are dissimilar to common law
8 defamation claims.

9 Finally, we have reviewed the other circuit court decisions that the Ninth
10 Circuit also treated as persuasive in concluding that the First Amendment defamation
11 rules apply both to the institutional press and nonmedia defendants. Three of the cases
12 are not on point, because they do not involve private figure plaintiffs and nonmedia
13 defendants, thus obviating the need to decide the question of how the First Amendment
14 applies in a defamation claim between two wholly private, nonmedia parties. *See Garcia*
15 *v. Bd. of Ed. of Socorro Consol. Sch. Dist.*, 777 F2d 1403, 1408 (10th Cir 1985) (the

⁷ It is unclear why the Court relieved all defendants of liability. *See id.* at 525 n 8 (stating only that "we draw no distinction between the media respondents and Yocum [the individual who gave the recording to the media]. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 265–266, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 777, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978)"). But, as in *New York Times* and the Court's other cases involving publication by the press of information it obtains on matters of public concern, it is apparent that the Court was concerned with freedom of the press. That concern, rather than an interest in treating all defendants alike in defamation and other cases with a First Amendment dimension, would be a likely basis for the Court's treatment of Yocum.

1 plaintiffs, school-board members in a defamation cross-claim against a fired school
2 superintendent, were public officials); *Avins v. White*, 627 F2d 637, 648 (3rd Cir 1980)
3 (the plaintiff was a public figure); *Davis v. Schuchat*, 510 F2d 731, 734 n 3 (DC Cir
4 1975) (the defendant was a reporter). Although another case stated that, whether the
5 defendant is media or nonmedia is "irrelevant to the question of what level of
6 constitutional protection that right is to receive," *In re IBP Confidential Business*
7 *Documents Litigation*, 797 F2d 632, 642 (8th Cir 1986), that case concerned the degree to
8 which the First Amendment right *to petition* was implicated and should be protected. It is
9 unsurprising that the Eighth Circuit concluded that the media/nonmedia distinction
10 should be irrelevant when the context is the defendant's exercise of the right to petition
11 the government.

12 And we are not persuaded by the two remaining cases, which emphasize
13 the difficulties in defining media. *See Snyder v. Phelps*, 580 F3d 206, 219 n 13 (4th Cir
14 2009), *rev'd on other grounds*, 562 US 443, 131 S Ct 1207, 179 L Ed 2d 172 (2011)
15 (stating -- as to an intentional infliction of emotional distress claim -- that "[a]ny effort to
16 justify a media/nonmedia distinction rests on unstable ground, given the difficulty of
17 defining with precision who belongs to the 'media'"); *Flamm v. American Ass'n of*
18 *University Women*, 201 F3d 144, 149 (2d Cir 2000) ("We agree that a distinction drawn
19 according to whether the defendant is a member of the media or not is untenable."). Thus
20 far, the Supreme Court itself has recognized that distinction in defamation cases.

21 The values underlying defamation claims have been recognized by this
22 court for over 150 years, *see Neumann*, 358 Or at 711 (citing *Hurd v. Moore*, 2 Or 85

1 (1863)), and in the common law for much longer, *see Milkovich*, 497 US at 11 (noting
2 that the common law cause of action has existed since "the latter half of the 16th
3 century"). As discussed earlier, the Supreme Court has repeatedly recognized the strong
4 interests of the states in providing remedies for harms to reputation and the individual and
5 societal benefit in preventing and remedying invidious false speech. Considering the
6 Court's precedents in defamation cases and its overall approach to assessing the interests
7 of speakers in light of the legal context (and concomitant competing interests), we are not
8 persuaded that the Supreme Court requires states to alter their common law by applying
9 First Amendment protections in defamation cases brought by private figures against
10 nonmedia defendants. We therefore decline to overrule existing precedent based on
11 *Obsidian Finance*.

12 In sum, we affirm the decision of the Court of Appeals in part on different
13 grounds. On remand to the trial court, plaintiff's libel claim is subject to the First
14 Amendment defense, but plaintiff will not be subject to a heightened proof-of-fault
15 requirement based on the Supreme Court's First Amendment cases that apply to media
16 defendants in defamation cases.

17 The decision of the Court of Appeals is affirmed in part and reversed in
18 part. The judgment of the circuit court is reversed, and the case is remanded to the circuit
19 court for further proceedings.

1 FLYNN, J., concurring.

2 I agree with the concurrence that *Neumann* is not only controlling but
3 correct, and that the critique of that case's reasoning in the majority opinion is *dicta*. And
4 I am persuaded by the argument in the concurrence that a media-nonmedia distinction is
5 in tension with the Supreme Court's more recent First Amendment decisions. But we are
6 not writing on a clean slate. Rather, we are being asked to overrule our own controlling
7 precedent on the strength of predictions about how the Supreme Court ultimately will
8 rule on the question of whether the First Amendment requires proof of fault in cases like
9 this. In my opinion, it is both premature and potentially unnecessary to declare our
10 precedent overruled.

1 BALMER, J., concurring.

2 The majority holds that Oregonians who publish a review of a local
3 business may be liable for defamation without any showing of fault on their part. In so
4 doing, the opinion upholds an untenable distinction between "media" and "nonmedia"
5 defendants without clearly articulating the differences between the two. In my view, any
6 approach that retains that distinction must be supported by a workable test to delineate
7 media from nonmedia, and the majority makes no attempt to provide that test. I would
8 follow the federal and state courts that have rejected that distinction for purposes of
9 defamation claims by a private figure and would hold that the First Amendment equally
10 protects the media and private individuals.

11 The majority also casts doubt on this court's decision in *Neumann v. Liles*,
12 358 Or 706, 369 P3d 1117 (2016), based on arguments that are not made by the parties
13 and are unrelated to the case before us. I would not reach beyond the facts of this case to
14 call into question a recent decision of this court that no party here has challenged and that
15 was correctly decided.

16 Thus, although I agree with much of what the majority opinion holds --
17 including its discussion of the missing text of the review, its conclusion regarding the role
18 of motive in identifying speech of public concern, and its ultimate disposition -- I
19 disagree with key parts of the majority's First Amendment analysis. I therefore
20 respectfully concur in the judgment, but not in all of the analysis.

21 At issue in this case are two First Amendment protections that apply in
22 defamation cases, which I address in turn. The first is that a plaintiff must show that a

1 defendant acted with some level of fault, with the specific level of fault depending on the
2 identities of the parties. The second is that a statement must be provably false to be
3 actionable if the statement involves matters of public concern.

4 As to the first protection, the Supreme Court has indicated that the level of
5 fault that a plaintiff must show varies with the circumstances. If the plaintiff is a public
6 figure, for example, the plaintiff must show that the allegedly defamatory statement was
7 made with "actual malice." *See New York Times Co. v. Sullivan*, 376 US 254, 283, 84 S
8 Ct 710, 11 L Ed 2d 686 (1964); *Curtis Publishing Co. v. Butts*, 388 US 130, 155, 87 S Ct
9 1975, 18 L Ed 2d 1094 (1967). A plaintiff who is not a public figure must show that a
10 defendant acted with negligence (or some higher level of fault) to recover, at least in
11 cases involving media defendants. *See Gertz v. Robert Welch, Inc.*, 418 US 323, 347, 94
12 S Ct 2997, 41 L Ed 2d 789 (1974). *Gertz* further held that, to recover presumed or
13 punitive damages, a plaintiff who is not a public figure must show that the defendant
14 acted with actual malice. *Id.* at 349.

15 Following *Gertz*, state and federal courts have split on whether *Gertz's* fault
16 requirements apply in cases involving nonmedia defendants, as described below. For its
17 part, this court held several decades ago that *Gertz* did not apply to nonmedia defendants,
18 as the majority explains. ___ Or at ___ (slip op at 14:9-13) (citing *Harley-Davidson v.*
19 *Markley*, 279 Or 361, 371, 568 P2d 1359 (1977); *Adams v. State Farm Mutual Auto. Ins.*
20 *Co.*, 283 Or 45, 51-52, 581 P2d 507 (1978); *Wheeler v. Green*, 286 Or 99, 110, 593 P2d
21 777 (1979)).

22 That approach to *Gertz*, however, fails to engage with the increasingly

1 difficult question of how to distinguish clearly between media and nonmedia defendants
2 and, for that reason, places this court at odds with recent decisions from other state and
3 federal courts. Those cases, and the rapidly changing nature of media, communications,
4 and public discourse, counsel that reevaluating the media/nonmedia distinction may lead
5 to a sounder approach to protecting our "profound national commitment to the principle
6 that debate on public issues should be uninhibited, robust, and wide-open." *New York*
7 *Times*, 376 US at 270. In short, I would reject the media/nonmedia distinction to which
8 the majority adheres and would reconsider this court's limitation of *Gertz* to media
9 defendants in *Harley-Davidson*, *Wheeler*, and *Adams*, in light of more recent case law
10 and the changing media landscape.

11 As identified by the majority, one helpful recent federal case is *Obsidian*
12 *Finance Group, LLC v. Cox*, 740 F3d 1284, 1291 (9th Cir), *cert den*, 572 US 1142
13 (2014), where the Ninth Circuit held that the *Gertz* fault rules should apply equally to
14 media and nonmedia defendants. ___ Or at ___ (slip op at 34:12). *Obsidian Finance* noted
15 that, of the six federal circuit courts that had then reached the issue, all had extended the
16 First Amendment protections of "[*New York Times v.*] *Sullivan* and its progeny,"
17 including *Gertz*, to media and nonmedia defendants. 740 F3d at 1291. The Ninth Circuit
18 agreed with that approach, observing:

19 "The protections of the First Amendment do not turn on whether the
20 defendant was a trained journalist, formally affiliated with traditional news
21 entities, engaged in conflict-of-interest disclosure, went beyond just
22 assembling others' writings, or tried to get both sides of a story. As the
23 Supreme Court has accurately warned, a First Amendment distinction
24 between the institutional press and other speakers is unworkable * * *."

1 *Id.* The Court therefore applied the *Gertz* negligence requirement for private defamation
2 actions in that case involving a nonmedia defendant.

3 The majority rejects *Obsidian Finance* and the cases it cites as variously
4 inapposite or unpersuasive. ___ Or at ___ (slip op at 42:9 - 43:20). The majority is correct
5 that some of those cases are not precisely on point here, because they considered only
6 whether the *New York Times* fault rule for defamation actions by public figures extended
7 to nonmedia defendants (as it already does in Oregon, see *Wheeler*, 286 Or at 110-11
8 ("We conclude that all defendants, not only those associated with the media, continue to
9 be protected by the *New York Times* rule in cases involving comment upon public
10 officials and public figures.")) rather than the *Gertz* fault rule for plaintiffs that are not
11 public figures. *E.g.*, *Garcia v. Bd. of Ed. of Socorro Consol. Sch. Dist.*, 777 F2d 1403,
12 1410 (10th Cir 1985), *cert den*, 479 US 814 (1986); *Avins v. White*, 627 F2d 637, 649
13 (3rd Cir), *cert den*, 449 US 982 (1980).

14 At the same time, however, the majority disregards the significance of the
15 cases cited by *Obsidian Finance* as a set as well as the persuasive reasoning of the Ninth
16 Circuit. Together with *Obsidian Finance*, those cases show that recent federal court
17 decisions have uniformly rejected the media/nonmedia distinction in the First
18 Amendment context and have done so for two primary reasons. First, in the context of
19 the evolving communications and media landscape, with the boundary between
20 traditional media and new or social media disappearing, that distinction is "unworkable,"
21 *Obsidian Finance*, 740 F3d at 1291, "rests on unstable ground," *Snyder v. Phelps*, 580
22 F3d 206, 219 n 13 (4th Cir 2009), *aff'd*, 562 US 443, 131 S Ct 1207, 179 L Ed 2d 172

1 (2011), or is "untenable," *Flamm v. American Ass'n of University Women*, 201 F3d 144,
2 149 (2d Cir 2000). Second, that distinction is at odds with the fundamental First
3 Amendment principle that the value of speech "does not depend upon the identity of its
4 source, whether corporation, association, union, or individual." *In re IBP Confidential*
5 *Bus. Documents Litigation*, 797 F2d 632, 642 (8th Cir 1986), *cert den*, 479 US 1088
6 (1987) (quoting *First National Bank of Boston v. Bellotti*, 435 US 765, 777, 98 S Ct
7 1407, 55 L Ed 2d 707 (1978)).

8 The federal courts are not alone. Several state courts have taken a similar
9 tack, either by explicitly applying *Gertz* to nonmedia defendants or applying a
10 functionally equivalent fault-based rule under state law. *See, e.g., Antwerp Diamond*
11 *Exch. v. Better Bus. Bur.*, 130 Ariz 523, 528, 637 P2d 733, 738 (1981) (applying *Gertz* to
12 nonmedia defendant); *Bierman v. Weier*, 826 NW2d 436, 470-71 (Iowa 2013) (Hecht, J.,
13 concurring in part and dissenting in part) (listing cases and noting that 22 state and
14 federal jurisdictions apply *Gertz* to nonmedia defendants, while only eight states,
15 including Oregon, have held that *Gertz* does not apply to nonmedia defendants); *Lester v.*
16 *Powers*, 596 A2d 65, 69 (Me 1991) (holding that Maine common law requires a showing
17 of "fault amounting at least to negligence" in defamation suits against nonmedia
18 defendants); *Jacron Sales Co., Inc. v. Sindorf*, 276 Md 580, 592, 350 A2d 688, 695
19 (1976) ("[W]e conclude as a matter of state law that the *Gertz* holding should apply to
20 media and non-media defendants alike * * *"); *Maethner v. Someplace Safe, Inc.*, 929
21 NW2d 868, 878-79 (Minn 2019) (concluding that the limitation on presumed damages in
22 *Gertz* applies equally to media and nonmedia defendants in suits by private plaintiffs);

1 *Bender v. City of Seattle*, 99 Wash 2d 582, 599, 664 P2d 492, 503 (1983) (citing *Gertz*
2 and requiring a showing of fault in actions by private individuals against nonmedia
3 defendants). At least one state has gone even farther and extended the *New York Times*
4 actual malice requirement to cases involving private plaintiffs and nonmedia defendants
5 based on statements involving matters of public concern. *See Durando v. Nutley Sun*,
6 209 NJ 235, 250, 37 A3d 449, 458 (2012) ("Today, in New Jersey the actual-malice
7 standard protects both media and non-media defendants who make statements involving
8 matters of public concern, regardless of whether the targets of the statements are public
9 figures or private persons.").

10 The *Restatement (Second) of Torts* takes the same approach as many of
11 those cases, stating that, although the precise holding of *Gertz* was limited to media
12 defendants, "the principle of the *Gertz* decision would appear to be broad enough to
13 cover" situations involving only private, nonmedia individuals. *Restatement (Second) of*
14 *Torts* § 580B comment e (1977). As the *Restatement* explains,

15 "It would seem strange to hold that the press, composed of professionals
16 and causing much greater damage because of the wider distribution of the
17 communication, can constitutionally be held liable only for negligence, but
18 that a private person, engaged in a casual private conversation with a single
19 person, can be held liable at his peril if the statement turns out to be false,
20 without any regard to his lack of fault."

21 *Id.* The *Restatement* goes on to explain that, even if *Gertz* itself is limited to media
22 defendants, "the common law of the states is almost certain to apply the same standard"
23 of requiring a fault showing for private defamation actions. *Id.*

24 The majority responds by emphasizing that the defamation context is

1 unique among First Amendment applications, and states, "Thus far, the Supreme Court
2 itself has recognized that [media/nonmedia] distinction in defamation cases." __ Or at __
3 (slip op at 43:19-20). But the Court itself has never taken up the question of whether
4 *Gertz* applies to nonmedia defendants. To the contrary, when the Court has considered
5 the media/nonmedia distinction, even in the context of defamation, the Court has
6 consistently declined to embrace that distinction and just as often has strongly cautioned
7 against employing it.

8 For example, in *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 US
9 749, 105 S Ct 2939, 86 L Ed 2d 593 (1985), the Court considered a defamation action by
10 a private figure (a construction contractor) against a nonmedia defendant (a credit
11 reporting agency). In resolving that case, the Court did not rely on a media/nonmedia
12 distinction, but instead concluded that the speech at issue was not of public concern. *See*
13 *id.* at 772-73 (White, J., concurring in the judgment).

14 The majority discusses *Dun & Bradstreet*, __ Or at __ (slip op at 23:9 -
15 25:13), but it does not mention that, although the plurality opinion did not decide the
16 issue, a majority of the Court in that case nevertheless *explicitly rejected* the
17 media/nonmedia distinction in the defamation context. At least five justices agreed that,
18 "in the context of defamation law, the rights of the institutional media are no greater and
19 no less than those enjoyed by other individuals or organizations engaged in the same
20 activities." *Id.* at 784 (Brennan, J., dissenting, joined by Marshall, Blackmun, & Stevens,
21 JJ.); *see also id.* at 773 (White, J., concurring in the judgment) ("I agree with JUSTICE
22 BRENNAN that the First Amendment gives no more protection to the press in

1 defamation suits than it does to others exercising their freedom of speech. *None of our*
2 *cases affords such a distinction; to the contrary, the Court has rejected it at every turn.*"
3 (Emphasis added.)

4 The Court reaffirmed that principle more recently in *Citizens United v.*
5 *Federal Election Comm'n*, 558 US 310, 340, 130 S Ct 876, 175 L Ed 2d 753 (2010),
6 where the Court noted that treating media differently from nonmedia in the First
7 Amendment context is particularly fraught. "With the advent of the Internet and the
8 decline of print and broadcast media," the Court observed, "the line between the media
9 and others who wish to comment on political and social issues becomes far more
10 blurred." *Id.* at 352. As a result, the Court has "consistently rejected the proposition that
11 the institutional press has *any constitutional privilege* beyond that of other speakers." *Id.*
12 (emphasis added). Thus, although the Court has never specifically held that *Gertz* applies
13 to a nonmedia defendant, the majority's brief assessment that "the Supreme Court has
14 recognized that distinction in defamation cases," __ Or at __ (slip op at 43:19-20), is
15 belied by the Court's own statements emphasizing that it has drawn no such line.

16 Few would disagree that, as the Court observed in *Citizens United* in 2010,
17 the line between the media and nonmedia is indeed "blurred" and that it has only become
18 more so in the last decade. Even if the Court had endorsed such a distinction in the
19 abstract, we would be left with the difficult task of crafting a workable test to distinguish
20 between types of defendants. It is no secret that, in today's world of internet-based
21 communication and social media, private individuals and groups who are not part of any
22 kind of "traditional media" can share similarly powerful platforms for the dissemination

1 of speech on matters of public concern.

2 The difficulty in drawing the media/nonmedia distinction has also been
3 highlighted by other courts and scholars. *See, e.g., Snyder*, 580 F3d at 219 n 13; *Flamm*,
4 201 F3d at 149; Ryan M. Walters, *When Can You Shoot the Messenger? Understanding*
5 *the Legal Protections for Entities Providing Information on Business Products and*
6 *Services in the Digital Age*, 96 Or L Rev 185, 191 (2017) ("The barrier between a news
7 organization and an individual has never been lower."); Clay Calvert, Emma Morehart &
8 Sarah Papadelias, *Plausible Pleading & Media Defendant Status: Fulfilled Promises,*
9 *Unfinished Business in Libel Law on the Golden Anniversary of Sullivan*, 49 Wake Forest
10 L Rev 47, 73-83 (2014) (describing three reasons why the media/nonmedia distinction
11 "should be obliterated": difficulties in defining "media" in a digital world, the
12 democratization of media empowering private individuals to respond to defamation, and
13 notions of speaker equality espoused in *Citizens United*, as discussed above).

14 Even if a workable distinction between media and nonmedia might be
15 possible, the majority makes no attempt to explain how that distinction would be made.
16 The majority asserts that defendants are "not 'media' under any definition." __ Or at __
17 (slip op at 2:17-18). But in making that assertion, the majority does not provide any
18 definition of media. Although dictionary definitions are of limited use in discerning the
19 meaning of Supreme Court opinions, a few examples nevertheless illustrate that
20 defendants are "media" under at least *some* definitions of the term. For example, *Black's*
21 *Law Dictionary* defines media as certain means of communication: "Collectively, the
22 means of mass communication; specif., television, radio, newspapers, magazines, and the

1 Internet regarded together." *Black's Law Dictionary* 1175 (11th ed 2019). Here, the
2 allegedly defamatory statements were made through the internet, which is one of those
3 listed "media." More importantly, the statements were posted as a review on Google. A
4 central purpose of posting an online review is to make the writer's views regarding a
5 product or service available to the broader public -- including potentially any person in
6 the world with an internet connection and a browser. The extent of that potential reach is
7 exactly the "means of mass communication" we think of as "media."

8 Under the above definition, defendants here could be deemed to have been
9 acting as "media" insofar as they created content about a local business for broad online
10 publication. Defendants, of course, might not fit the mold of traditional "media," as the
11 majority seems to understand that term, such as major newspapers or television
12 broadcasters. But the very fact that defendants fit the terms of a definition of "media,"
13 but do not seem to fit the unexpressed terms of the majority's definition of "media,"
14 highlights the difficulty and ambiguity in clearly distinguishing between media and
15 nonmedia, particularly where user-generated internet content is involved.

16 Without an explanation of how to distinguish between media and
17 nonmedia, the remainder of the opinion relying on that distinction is unpersuasive.
18 Various federal and state courts have rejected that distinction, and I find *Obsidian*
19 *Finance's* explanation of why to do so persuasive. As a result, I conclude that that
20 distinction should not hold in defamation cases.

21 If the *Gertz* rule were applied here, plaintiff would have to allege and prove
22 at least negligence on defendants' part to be able to recover for defamation at all, and he

1 would have to show actual malice to recover for his defamation *per se* claim, which may
2 proceed "without proof of specific harm." *Brown v. Gatti*, 341 Or 452, 458, 145 P3d 130
3 (2006); *see Gertz*, 418 US at 350 ("In short, the private defamation plaintiff who
4 establishes liability under a less demanding standard than that stated by *New York Times*
5 [*i.e.*, actual malice] may recover only such damages as are sufficient to compensate him
6 for actual injury."). The majority asserts that applying that actual malice standard "may
7 make little practical difference under the circumstances of this case," because "Plaintiff is
8 correct that he could make the required showing of actual malice to overcome summary
9 judgment." __ Or at __ (slip op at 37:10-11). I disagree that requiring that showing
10 would be of "little practical difference" to defendants. A heightened burden of proof for
11 plaintiff could change whether defendants are liable for their alleged defamation -- which
12 is why defendants raised the actual malice argument. I agree, however, that plaintiff has
13 raised a triable issue of fact as to whether he may be able to make what would be the
14 required showing of actual malice in this case. Thus, although I disagree with the
15 majority's analysis on this point, I concur in the judgment.

16 The second type of constitutional protection for speech that applies in
17 defamation cases is the requirement that an allegedly defamatory statement be provably
18 false to be actionable. That requirement stems from Supreme Court decisions that were
19 recently relied on by this court in *Neumann*. 358 Or at 713-16 (citing *Philadelphia*
20 *Newspapers, Inc. v. Hepps*, 475 US 767, 106 S Ct 1558, 89 L Ed 2d 783 (1986);
21 *Milkovich v. Lorain Journal Co.*, 497 US 1, 110 S Ct 2695, 111 L Ed 2d 1 (1990)). In
22 *Neumann*, we applied the requirement that statements be provably false to statements

1 involving matters of public concern made by a nonmedia defendant. *Id.* at 722 (holding
2 that the defendant's online review was "an expression of opinion on matters of public
3 concern that is protected under the First Amendment"). *Neumann* also adopted a test for
4 whether a statement is provably false that was articulated by the Ninth Circuit in *Unelko*
5 *Corp. v. Rooney*, 912 F2d 1049, 1053 (9th Cir 1990), *cert den*, 499 US 961 (1991). 358
6 Or at 718. I agree with the majority's ultimate conclusion that *Neumann* controls this
7 case in part and that some, but not all, of defendant's statements are actionable under the
8 *Unelko* test. I disagree, however, with other aspects of the majority's discussion of
9 *Neumann*.

10 The majority upholds *Neumann* begrudgingly, and seemingly only because
11 plaintiff failed to ask us to overrule it. *See* ___ Or at ___ (slip op at 19:14-16) ("We
12 conclude that *Neumann* controls in the absence of plaintiff's request that we overrule it,
13 although we have doubts about its approach * * *.") As part of that discussion, the
14 majority explains at length some effects of the internet on modern communication and
15 the extent to which the advent and development of the internet has changed, or not
16 changed, defamation law in Oregon. ___ Or at ___ (slip op at 25:14 - 26:18). The majority
17 also questions whether *Neumann* properly considered whether a media/nonmedia
18 distinction might affect the analysis in that case, and it casts doubt on *Neumann's*
19 conclusion that the online review in that case was on a matter of public concern. ___ Or at
20 ___ (slip op at 20:20 - 21:11, 22:11-13, 25:14 - 26:18).

21 But because the majority upholds *Neumann* and applies it to this case, the
22 extended critique of that case's reasoning does not bear on the result here and is *dicta*.

1 Whether online reviews should be automatically considered matters of public concern, or
2 whether the internet can "breathe constitutional importance" into a potentially defamatory
3 statement, are questions that are neither presented by this case nor relevant to its
4 outcome. __ Or at __ (slip op at 25:16-17). I would not express an opinion on matters so
5 far removed from the situation at hand.

6 Nevertheless, in response to the majority's discussion, I would observe that
7 *Neumann* is far more defensible than the majority suggests. In *Neumann*, this court
8 "readily conclude[d]" that the statements in that case involved matters of public concern.
9 358 Or at 720. That ready conclusion was not due to a lack of consideration by this
10 court, but rather due to the clarity with which the court understood that the character and
11 reputation of a local business can be of great importance to members of the surrounding
12 community, regardless of whether they are consumers of that business's services or
13 products. Indeed, it appears that it did not even occur to the litigants in that case to argue
14 otherwise. In *Unelko*, the Ninth Circuit similarly held that a statement made on 60
15 Minutes that the product Rain-X "didn't work" involved a matter of public concern,
16 because the statement was "of general interest and was made available to the general
17 public," and because "protection of statements about product effectiveness will 'ensure
18 that debate on public issues will be uninhibited, robust and wide-open.'" 912 F2d at 1056
19 (quoting *Dun & Bradstreet*, 472 US at 762 (internal quotation marks and brackets
20 omitted)). There should be no doubt that the "content, form, and context" of the
21 statements here indicate that they too involve matters of public concern. *Dun &*
22 *Bradstreet*, 472 US at 761 (indicating that "'whether speech addresses a matter of public

1 concern must be determined by the expression's content, form, and context as revealed by
2 the whole record'" (quoting *Connick v. Myers*, 461 US 138, 148, 103 S Ct 1684, 75 L Ed
3 2d 708 (1983) (alterations and brackets omitted))).

4 The majority also casts doubt on *Neumann's* holding that the First
5 Amendment's provably-false rule should apply to nonmedia defendants. *See* ___ Or at ___
6 (slip op at 22:1-13) ("In short, the *Neumann* court did not note that whether the defendant
7 is media or not could affect the analysis, even to reject the idea."). As the majority
8 recognizes, that question has not been decided by the Supreme Court, but, instead, has
9 been expressly reserved. ___ Or at ___ (slip op at 12:15-17, 13:2-3) (citing *Hepps*, 475 US
10 at 779 n 4; *Milkovich*, 497 US at 20 n 6). But even if *Neumann* had not resolved the issue
11 for purposes of Oregon law, which it did, this court should have come to the same
12 conclusion in this case and applied the provably-false rule to defendants without regard to
13 their media or nonmedia status. In the absence of such a rule, Oregonians who post
14 online reviews of businesses would have to be prepared to defend the truth of their
15 statements in court or face liability for defamation -- even where their statements are not
16 susceptible to being proven either truth or false.

17 The same arguments that weigh in favor of rejecting the media/nonmedia
18 distinction in the *Gertz* context, articulated above, also support *Neumann's* rejection of
19 that distinction. The majority offers no example of another state that allows its citizens to
20 be sued for defamation on matters of public concern where the statement at issue does not
21 satisfy *Milkovich's* provably-false standard, and several state courts have taken the
22 opposite approach and agree with *Neumann*. *See, e.g., Dodson v. Dicker*, 306 Ark 108,

1 111, 812 SW2d 97 (1991) (applying *Milkovich* in a case with a nonmedia defendant);
2 *Kahn v. Bower*, 232 Cal App 3d 1599, 1606-07, 284 Cal Rptr 244, 248-49 (1991) (same).

3 Because *Neumann* is settled law, no party challenges its underlying
4 reasoning (whereas they do challenge the media/nonmedia distinction in *Harley-*
5 *Davidson*, *Wheeler*, and *Adams*), and its First Amendment conclusions remain sound, I
6 would not cast doubt on *Neumann's* reasoning and its application in this case.

7 In sum, the majority adheres to a distinction between media and nonmedia
8 defendants, for purposes of defamation claims by private figures, that has not been
9 embraced by the Supreme Court and that has been rejected by multiple federal and state
10 courts, numerous scholars, and the *Restatement*. Although the majority is correct that the
11 Court has not yet applied *Gertz* to nonmedia defendants, the Court has also consistently
12 rejected the media/nonmedia distinction, and, in its own words, refused to offer the media
13 "any constitutional privilege beyond that of other speakers." *Citizens United*, 558 US at
14 352. I would not continue to hold that *Gertz* applies only to media defendants in the
15 absence of a workable method for distinguishing between media and nonmedia, and the
16 majority makes no attempt to provide one.

17 As to *Neumann*, I would not cast doubt on a case that goes unchallenged by
18 the parties, and I would not express an opinion on matters unrelated to the facts and legal
19 arguments presented by this case.

20 For the foregoing reasons, I disagree with parts of the majority's First
21 Amendment analysis and concur in the judgment.

22 Garrett, J., joins in this concurring opinion.

APPENDIX B

Pursuant to Rule 34.4 this Appendix contains the October 6, 2022 Order Denying Petition for Reconsideration in *Lowell v. Wright*

IN THE SUPREME COURT OF THE STATE OF OREGON

TOM LOWELL, dba Piano Studios and Showcase,
Plaintiff-Appellant,
Respondent on Review,

v.

MATTHEW WRIGHT and ARTISTIC PIANO,
an Oregon corporation,
Defendants-Respondents,
Petitioners on Review.

Court of Appeals
A162785

S068129

ORDER DENYING PETITION FOR RECONSIDERATION

Upon consideration by the court.

The court has considered the petition for reconsideration and orders that it be denied.



MARTHA L. WALTERS
CHIEF JUSTICE, SUPREME COURT
10/6/2022 10:26 AM

c: Tracy M McGovern
Alicia Marie Wilson
Linda K Williams
Casey S Murdock
James G Abernathy
Rebekah C Millard
Edward Addison Piper

ms

ORDER DENYING PETITION FOR RECONSIDERATION

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section,
Supreme Court Building, 1163 State Street, Salem, OR 97301-2563

APPENDIX C

Pursuant to Rule 34.4 this Appendix contains the Appellate Judgment and Supplemental Judgment issued in *Lowell v. Wright*.

IN THE SUPREME COURT OF THE STATE OF OREGON

TOM LOWELL, dba Piano Studios and Showcase,
Plaintiff-Appellant,
Respondent on Review,

v.

MATTHEW WRIGHT and ARTISTIC PIANO, an Oregon corporation,
Defendants-Respondents,
Petitioners on Review.

Court of Appeals
A162785

S068129

APPELLATE JUDGMENT AND SUPPLEMENTAL JUDGMENT

On review from the Court of Appeals.*

Argued and submitted June 24, 2021.

Attorney for Petitioners on Review: Tracy M. McGovern.

Attorney for Respondent on Review: Linda K. Williams.

Before Walters, Chief Justice; Balmer, Flynn, Duncan, Nelson; and Garrett,
Justices, and Nakamoto, Senior Judge, Justice *pro tempore*.

The decision of the Court of Appeals is affirmed in part and reversed in part. The judgment of the circuit court is reversed, and the case is remanded to the circuit court for further proceedings.

*On appeal from Jackson County Circuit Court, Dan Bunch, Judge.
306 Or App 325, 473 P3d 1094 (2020)

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent on Review.

[X] Costs allowed, payable by: Petitioners on Review.

APPELLATE JUDGMENT AND SUPPLEMENTAL JUDGMENT

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section,
Supreme Court Building, 1163 State Street, Salem, OR 97301-2563

MONEY AWARD

Creditor: Tom Lowell

Attorney: Linda K. Williams, 10266 SW Lancaster Rd., Portland, OR 97219

Debtors: Matthew Wright and Artistic Piano

Attorney: Tracy M. McGovern

Costs: \$1,073.00

Total Amount: \$1,073.00

Interest: Simple, 9% per annum, from the date of this appellate judgment.

Appellate Judgment
Effective Date: December 7, 2022

SUPREME COURT
(seal)

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APPELLATE JUDGMENT AND SUPPLEMENTAL JUDGMENT

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section,
Supreme Court Building, 1163 State Street, Salem, OR 97301-2563