No. 18-2143

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2019

ELMORE LANSFORD,

Petitioner,

v.

SILVIA COURTIER,

Respondent.

On Writ of Certiorari to the
Supreme Judicial Court of the State of Tenley

BRIEF FOR RESPONDENT

Team 219802
Counsel for Respondent

Oral Argument Requested

QUESTIONS PRESENTED

I. Whether an individual can be considered a libel-proof plaintiff under defamation law decades after the individual has been convicted of minor crimes, including one felony, and the crimes did not gain any notoriety or public attention.

II. Whether calculated statements attacking an individual's personal and professional reputation qualify as unprotected defamation or protected rhetorical hyperbole.

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STATEMENT OF JURISDICTION

A Formal Statement of Jurisdiction has been omitted in accordance with the Rules of the Washington College of Law's Burton D. Wechsler First Amendment Moot Court Competition.

STATEMENT OF THE CASE

I. Statement of Facts

Respondent, Silvia Courtier ("Mrs. Courtier"), had a tumultuous upbringing as a child of drug addicted parents and she ultimately became an orphan at ten years old. (J.A. at 5.). Following her parents' deaths, she began committing crimes to support herself during her teenage years. (J.A. at 5.). As a young adult, she succumbed to a drug addiction after having been sexually abused. (J.A. at 5.). She pled guilty to a felony drug charge and spent two years in prison. (J.A. at 5.). While taking responsibility for her actions in prison, Mrs. Courtier rehabilitated her life by earning her G.E.D., enrolling in community college classes, and taking every business class available. (J.A. at 5.).

After being released, Mrs. Courtier opened a small clothing business which she eventually turned into a large business. (J.A. at 5.). Mrs. Courtier became a local business owner and philanthropist in the city of Silvertown, Tenley. (J.A. at 2.). Following her success as a businesswoman, Mrs. Courtier married Raymond Courtier who was the mayor of Silvertown, Tenley before he passed away. (J.A. at 15.). Mrs. Courtier owns a clothing business that caters to clients who purchase high-end designer goods and she maintains a website for her local clothing stores. (J.A. at 2.). Additionally, Mrs. Courtier manages her own website to advocate for various social issues such as improving educational equity, restoring voting rights to former felons, and increasing affordable housing. (J.A. at 2, 16.).

Petitioner, Defendant Elmore Lansford ("Mr. Lansford"), is the current mayor of the town where Mrs. Courtier works, Silvertown. (J.A. at 3.). As mayor, Mr. Lansford campaigned on a platform to "clean up" a low income area of Silvertown that was known for lower-rent housing and public housing units. (J.A. at 3.). In such clean-up, patrols of police officers vigorously

enforced illegal drugs and narcotic distribution law resulting in police brutality and allegations and racial profiling. (J.A. at 3.). Meanwhile, Mr. Lansford also supported efforts overhaul a low income area with new high-rise housing. (J.A. at 3.).

In response to Mr. Lansford's campaign, Mrs. Courtier posted on her website that Mr. Lansford "once was a caring politician" but now Mr. Lansford is allegiant to "special interests" related to wealthy people and "cares little for social justice issues." (J.A. at 3.). Mrs. Courtier characterized Mr. Lansford's actions as "repressive" and contributory to gentrifying Silvertown. (J.A. at 3.). In that same post, Mrs. Courtier suggested that individuals Silvertown residents should vote for a different candidate who cares for all people and champions for social justice issues that affect the community. (J.A. at 4.). In retaliation, Mr. Lansford attacked Mrs. Courtier's comments with the following insults on his website:

> . . . [S]he she is a coddler of criminals. In her early years, Silvia Courtier was a lewd and lusty lush, a leech on society, and a woman who walked the streets strung out on drugs. She is nothing more than a former druggie. . . How ironic that she pimps out these clothes to the rich and lavish. She is corrupt and a swindler, who hoodwinks the poor into thinking she is some kind of modern-day Robinita Hood. I guess she learned something from the streets. Now, this businesswoman is a pimp for the rich and a whore for the Poor. What a Joke!

(J.A. at 4.).

Mrs. Courtier sued Mr. Lansford for defamation of character and false light invasion of privacy for the phrases "a pimp for the rich"; "a leech on society"; "a whore for the poor"; and "corrupt and a swindler." (J.A. at 4-5.).

II. Procedural History

Mrs. Courtier filed a lawsuit against Mr. Lansford for defamation of character and false light of privacy. (J.A. at 5.). In response, Mr. Lansford filed a special motion to dismiss/strike Plaintiff's lawsuit pursuant to the Tenley Public Participation Act, § 5 – 1 – 701 et seq, which

holds "[i]f a legal action is filed in response to a party's exercise of the right of free speech, right to petition, or right of association, that party may petition the court to dismiss the legal action." (J.A. at 6.). Mr. Lansford alleged that Mrs. Courtier's suit was a Strategic Lawsuit Against Public Participation ("SLAPP") suit and Mrs. Courtier is barred from suing for defamation because she is allegedly a "libel-proof plaintiff" such that she has no good reputation to protect. (J.A. at 2.).

The Tenley District Court held that Mrs. Courtier was not a libel-proof plaintiff, and therefore, that doctrine did not apply here. (J.A. at 11.). The district court focused on the fact that Mrs. Courtier transformed her life in prison and legal scholars have cautioned against applying the libel-proof plaintiff doctrine. (J.A. at 10-11.). The court also addressed that concept of rhetorical hyperbole as it relates to defamation law and freedom of speech. (J.A. at 11.). The court equated Mr. Lansford's insults to constitutionally protected political rhetoric. (J.A. at 12.). The court found that Mr. Lansford's speech was rhetorical hyperbole, therefore dismissal was warranted under the anti-SLAPP law, Tenley Code Ann. § 5 – 1 – 701 et seq. as Mr. Lansford was exercising free speech rights. (J.A. at 13-14.). Thus, the court granted Mr. Lansford's special motion to dismiss/strike the defamation claim. (J.A. at 13.).

Mrs. Courtier appealed the district court's decision to the Supreme Judicial Court of State of Tenley. (J.A. at 14.). The supreme court reiterated that under Tenley Code Ann. §5 – 1 – 705(a), Mr. Lansford first had the burden to show that Mr. Lansford exercised right to free speech. (J.A. at 15.). The supreme court affirmed the district court's holding that Mrs. Courtier was not libel-proof because Mr. Courtier rehabilitated her life and has a reputation to protect. (J.A. at 19.). The supreme court reversed the district court ruling that Mr. Lansford's speech was constitutional hyperbole in finding that it was possible that Mrs. Courtier could prove her defamation suit and the court was not willing to dismiss the suit at this stage in litigation. (J.A. at 22-23.).

Mr. Lansford appealed the Supreme Judicial Court of Tenley's decision to the United States Supreme Court. (J.A. at 24.). This Court granted certiorari and directed the parties to address the following issues: "(1) Whether an individual can be a libel-proof plaintiff under defamation law solely on the basis of past criminal convictions, including a felony, that have gained no notoriety or public attention" and "(2) Whether the challenged statements in this case qualify as unprotected defamation or protected rhetorical hyperbole."

III. Standard of Review

A court of appeals "reviews the district court's denial of a special motion to strike *de novo*." *Safari Club Int'l v. Rudolph*, 862 F.3d 1113, 1119 (9th Cir. 2017). "On summary judgment, we must draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S., at 255, 106 S.Ct., at 2513." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 520 (1991).

SUMMARY OF THE ARGUMENT

The Supreme Court of Tenley's decision to deny Mr. Lansford's anti-SLAPP motion and to allow Mrs. Courtier's defamation lawsuit to continue was correct for two reasons: (1) Mrs. Courtier is not a libel-proof plaintiff, and (2) Mr. Lansford's post qualifies as unprotected defamation, not mere rhetorical hyperbole. First, Mrs. Courtier is not a libel-proof plaintiff under the incremental harm doctrine because the challenged statements do injure her reputation as an upright citizen more than the unchallenged portions of Mr. Lansford's post. Further, Mrs. Courtier has a good reputation as a successful business owner and philanthropist to protect, despite her decades-old conviction and subsequent rehabilitation. The libel-proof doctrine cannot extend to Mrs. Courtier because this extension would disincentive criminal rehabilitation and reintegration

into society. Second, Mr. Lansford's anti-SLAPP motion was properly dismissed because he did not meet his burden to prove that his anti-SLAPP motion related to his protected exercise of free speech. Mr. Lansford's post qualifies as unprotected defamation because: (1) the statements contained a defamatory meaning, (2) his assertions were materially false, (3) his attacks were untrue statements of fact, and (4) Mrs. Courtier has met her burden to prove damages. Notably, Mr. Lansford should not be permitted to cower behind Tenley's anti-SLAPP law when it was meant to protect individuals from wealthy corporate actors, and not an immature defamatory rant. Accordingly, the Supreme Court of Tenley correctly dismissed Mr. Lansford's special motion to strike and that decision should be affirmed.

ARGUMENT

I. MRS. COURTIER IS NOT A LIBEL-PROOF PLAINTIFF UNDER DEFAMATION LAW BASED SOLELY ON HER DECADES OLD MINOR CONVICTIONS WHICH DID NOT GAIN NOTORIETY OR PUBLIC ATTENTION

The decision of the Supreme Judicial Court of Tenley should be affirmed because Mr. Lansford damaged Mrs. Courtier's reputation as a successful business owner; therefore, her defamation claim should not be dismissed. (J.A. at 1.). An individual has the right to protect his or her reputation from the harm of a false statement through a state law defamation suit. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). The protection of one's reputation "reflects no more than our basic concept of the essential dignity and worth of every human being." *Id.* (*quoting Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (J. Stewart, concurring) (internal quotation omitted)). The First Amendment was never intended to protect every type of speech; thus courts are empowered to find that "libelous utterances" are not constitutionally protected speech. *Id.* at 386. "[S]uch utterances [have] no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Beauharnais v. Illinois*, 343 U.S. 250, 257 (1952).

Mrs. Courtier brought a defamation claim against Mr. Lansford for public false statements attacking Mrs. Courtier's reputation. Mr. Lansford attempts to punish Mrs. Courtier for questioning Mr. Lansford's politics and lack of social concern which affect the Silvertown community where Mrs. Courtier works. Defamation is generally defined as an injury to an individual's reputation through written or oral expression. *Wexler v. Allegion (UK) Ltd.*, 374 F. Supp. 3d 302, 310 (S.D.N.Y. 2019); *Croce v. New York Times Co.*, 930 F.3d 787, 792 (6th Cir. 2019); *Warren v. Fed. Nat'l Mortg. Ass'n*, 932 F.3d 378, 383 (5th Cir. 2019). Under the umbrella of defamation, most states distinguish between libel and slander suits. *Virginia Citizens Def. League v. Couric*, 910 F.3d 780, 784 n.2 (4th Cir. 2018). Libel refers to written or printed statements whereas slander refers to spoken words. *Albert v. Loksen*, 239 F.3d 256, 265 (2d Cir. 2001). Mr. Lansford published defamatory statements on his social media website. (J.A. at 8.). Therefore, Mr. Lansford's statements are reviewed under the implications of a libel claim.

A. The Libel-Proof Plaintiff Doctrine Has Not Been Adopted By All Jurisdictions And It Has Been Applied In Limited Circumstances, None Of Which Apply To Mrs. Courtier

In response to Mrs. Courtier's suit, Mr. Lansford first argues that Mrs. Courtier is a "libel proof plaintiff," therefore the suit should be dismissed. Defamation is grounded in state law; however, some federal jurisdictions recognize a defense to a libel suit, known as the "libel-proof plaintiff" doctrine. A libel-proof plaintiff is premised on that concept that a plaintiff cannot be damaged by untrue statements because the plaintiff had no good reputation to protect. *See generally Cardillo v. Doubleday*, Co., 518 F.2d 638 (2d. Cir. 1975). Therefore, the suit must be dismissed as a matter of law because even if plaintiff prevailed, plaintiff would only be able to recover nominal damages. *Id.* at 639.

As a matter of first impression, the Supreme Judicial Court of Tenley ruled to accept the libel-proof plaintiff doctrine in the state of Tenley's jurisdiction. (J.A. at 19-20.). However, the court noted that it should be applied narrowly and within limited circumstances. (J.A. at 20.). This doctrine is unsettled as some circuit courts have not adopted it and the U.S. Supreme Court has not expressly recognized it. *See, e.g.*, *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1568-69 (D.C. Cir. 1984), *vacated on other grounds*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (rejecting both theories of libel-proof plaintiff doctrine in finding that it would be impossible for a court determine whether an individual's reputation has "been 'irreparably' damaged" and First Amendment values would not be furthered by such a doctrine).

Both the Tenley District Court and the Supreme Judicial Court of Tenley held that the libel-proof plaintiff doctrine did not apply in this case. The Supreme Court of Tenley took this finding a step further in holding that libel-proof plaintiff doctrine should only be applied narrowly and within limited circumstances. (J.A. at 20.). Similarly, legal scholars have cautioned that it should only be applied with great care. Evelyn A. Peyton, *Rogues' Rights: The Constitutionality of the Libel-Proof Plaintiff Doctrine*, 34 SANTA CLARA L. REV. 179, 179-180 (1993). The reasoning behind this reluctance is that holding as a matter that individuals are beyond the protection of the laws regarding their reputations effectively renders them as outlaws. *Id*. The libel-proof doctrine contravenes "the basic tenets of our society[,]" especially in light of the barriers that already exist in recovery for a defamation claim. *Id.* at 180. Even individuals with a criminal record deserve justice and protection from the law such that they are assured to "have a stake in our society." *Davis v. United States*, 409 F.2d 453, 457 (D.C. Cir. 1969).

Among various jurisdictions that recognize the libel-proof doctrine, there are two prevailing interpretations: either the "incremental harm" doctrine or the "issue-specific libel-proof

plaintiff" doctrine. In finding that Mrs. Courtier was not libel-proof, the Supreme Judicial Court of Tenley chose to recognize libel-proof plaintiff doctrine, but did not express whether the incremental harm theory or issue-specific theory applied in this jurisdiction. *See* (J.A. 19-20.). Accordingly, this brief addresses both theories.

B. In Applying The Incremental Harm Theory Mrs. Courtier Is Not A Libel-Proof Plaintiff

The U.S. Supreme Court has expressly rejected that the First Amendment protects speech under the incremental harm doctrine, therefore the doctrine is based solely on state law. *Masson,* 501 U.S. at 523. Courts have defined incremental harm as measuring the reputational harm caused by the challenged statements against the harm imposed by the unchallenged statements in the remainder of the publication, such that the plaintiff only challenges a minor assertion. *Id.* at 522-23; *see generally The Libel-Proof Plaintiff Doctrine*, 98 HARV. L. REV. 1909, 1912-13 (1985). If the harm caused by the challenged statements is found to be "nominal or nonexistant" then those statements are not actionable. *Herbert v. Lando*, 781 F.2d 298, 311 (2d Cir. 1986); *see also Simmons Ford, Inc. v. Consumers Union,* 516 F.Supp. 742, 750 (S.D.N.Y.1981) (introducing the first application of the "incremental harm" theory in holding that the challenged portion of an article did not harm the plaintiff any further than the remainder of the article). Here, Mr. Lansford's challenged statements cause more harm than the unchallenged statements in his published article on social media.

The incremental harm doctrine rests on the assumption that "one's reputation is a monolith, which stands or falls in its entirety" and ignores the concept that even a public outcast can be "'a liar and a thief,' yet still 'a good family man.'" *Liberty Lobby*, 746 F.2d at 1568 n.6. In *Herbert v. Lando,* 781 F.2d at 303-04, a former controversial Vietnam officer sued a news reporter for statements that a reporter made during a 60 Minutes interview focusing on the officer. The segment

suggested that the officer lied about reporting war crimes and was relieved of duty for other reasons. *Id.* at 307. The court found that nine out of the eleven statements were not made with actual malice, therefore the broadcast was not defamatory because the two remaining actionable statements were only "an outgrowth or subsidiary" to the overall claim. *Id.* at 312.

In the present case, Mrs. Courtier contests Mr. Lansford's allegations that she is "a pimp for the rich"; "a leech on society"; "a whore for the poor"; and "corrupt and a swindler." (J.A. at 4-5.). Mrs. Courtier is a successful local business owner in the city of Silvertown, Tenley. (J.A. at 2.). Mr. Lansford's statements that Mrs. Courtier is a "a pimp for the rich" and "corrupt and a swindler" directly attack Mrs. Courtier's professional reputation. Meanwhile, Mr. Lansford's statements that she is "a leech on society" and "a whore for the poor" attack her personal reputation and could be imputed on her professional reputation.

The unchallenged statements do not harm Mrs. Courtier's reputation as the challenged statements harm her and even if they did, such harm is minimal at best. The remaining statements describe Mrs. Courtier as a "former druggie," notes that "she casts herself as a defender of the less fortunate," she has "upscale, hoity-toity clothing stores lacking in substance and class," and "she learned something from the streets." In fact, Mrs. Courtier does not contest the substantial truth of these unchallenged statements except the characterization that her stores lack in "substance and class." However, the commentary about substance and class is a mere subjective perception or opinion. As to the "druggie" comment, Mrs. Courtier took responsibility for her actions when battled drug addiction and she does not attempt to hide this fact about herself. Mrs. Courtier takes pride in being a defender of the less fortunate as evidenced through her website which focuses on advocacy. The statement that "she learned something from the streets" is neutral in that it is ambiguous; but for Mrs. Courtier's previous experiences, she would not become the successful

woman that she is today. For these reasons, Mr. Courtier did not contest the remaining statements as they do not harm her reputation to the same extent.

C. In Applying The Issue-Specific Libel-Proof Plaintiff Theory, Mrs. Courtier Had A Good Reputation Capable Of Being Damaged Prior To Mr. Lansford's Statements

At the outset, Mrs. Courtier became a successful businesswoman *after* her teenage and early adult convictions. Mrs. Courtier's prior convictions did not tarnish her reputation to the extent that Mr. Lansford claims. Furthermore, she has a good reputation that is capable of harm caused by Mr. Lansford's attack on his social media website. A plaintiff is considered libel-proof under issue-specific doctrine if the individual's reputation is so tarnished or diminished that their reputation cannot be further damaged by the libelous statement. *Wynberg v. National Enquirer, Inc.*, 564 F. Supp. 924, 928-929 (C.D. Cal. 1982); *Lamb v. Rizzo*, 391 F.3d 1133, 1137 (10th Cir. 2004); *Ray v. Time, Inc.*, 452 F. Supp. 618, 622 (W.D. Tenn. 1976); *See also Cardillo*, 518 F.2d at 639. An individual can be considered libel-proof on all issues or specific behavior. *See Ray v. Time, Inc.*, 452 F.Supp. 618, 622 (W.D. Tenn. 1976) (finding that the man who assassinated Martin Luther King Jr. was libel-proof from bringing a claim against publications regarding his "criminal career" history). However, there are few plaintiffs that will have such a bad reputation that they cannot obtain redress even if they are only entitled to nominal damages. *Guccione v. Hustler Magazine Inc.*, 800 F.2d 298, 303 (2d. Cir. 1986).

It is worth noting that Mr. Lansford's argument misapplies the doctrine of specific-issue when he argues that Mrs. Courtier is libel-proof regarding her previous convictions. Such a theory would only apply if Mrs. Courtier challenged statements he made about her criminal past. Rather, Mrs. Courtier brought this claim for his commentary about her being a "pimp," a "whore," "corrupt," and a "swindler." (J.A. at 4-5.). To the extent that this issue-proof theory could apply,

Mrs. Courtier's criminal convictions have not tarnished her reputation such that she cannot attain a good reputation and Mrs. Courtier has a business reputation to protect.

1. Mrs. Courtier's Criminal Convictions did not Tarnish Her Reputation Such That She Became Incapable of Attaining a Good Reputation

Mr. Lansford erroneously characterized Mrs. Courtier as a career criminal, yet her reputation was not so tarnished by her previous convictions as Mr. Lansford claims. Mrs. Courtier's criminal pale in comparison to other individuals who have been found libel-proof as a matter of law. For instance, in *Wynberg*, 564 F. Supp. at 928, the plaintiff found to be libel-proof was criminally convicted of distribution of alcohol and drugs to minors on multiple occasions, bribery related to prostitution, and grand theft. The plaintiff was also subject to various civil default judgments for a litany of offenses including fraud, conversion, and breach of contract. *Id.* Furthermore, at least seventeen local, national, and international news articles reported on the plaintiff's criminal convictions. *Id*. The *Wynberg* court noted that past state and federal decisions have held that when "an individual engages in conspicuously anti-social or even criminal behavior, which is widely reported to the public, his reputation diminishes proportionately." *Id*. Some factors to consider include the nature of the former conduct, the number of former offenses, and the amount of publicity received. *Id*.

In contrast to other cases, Mrs. Courtier's convictions were for minor crimes that occurred for a short period of time during her teenage years and early twenties. She is not a lifelong criminal as she has not had any issues with the law in decades. As it relates to criminal sentencing, she completed boot camp for female offenders and served two years in state prison. She pled guilty to a drug possession charge; thus the nature of her crimes were drug-related and not crimes against the public or violent. More importantly, her criminal past never gained any notoriety or public attention prior to Mr. Lansford's attack. Courts have refused to apply libel-proof doctrine when

there is no evidence of publicity therefore convictions alone are not enough. *McBride v. New Braunfels Herald-Zeimung*, 894 S.W.2d 6, 10-11 (Tex. App. 1994); *Thomas v. Tel. Publ'g Co.*, 929 A.2d 993, 1005 (N.H. 2007). Mrs. Courtier was not a well-known figure or involved in a criminal enterprise, rather she was an orphan attempting to support herself. If no one knew about Mrs. Courtier's prior convictions, the libel-proof doctrine cannot apply because it only applies when someone's reputation is already tarnished. Thus, Mrs. Courtier's reputation could not have been so tarnished that Mr. Lansford's statements would have no effect on her reputation.

2. Mrs. Courtier Attained a Good Reputation Following Her Conviction when She Transformed into a Successful Community Business Owner and Philanthropist

Following her convictions, Mrs. Courtier transformed her life while incarcerated by obtaining a business degree and becoming a successional professional in her community. Furthermore, the factual inquiry in rendering Mrs. Courtier libel-proof should be viewed in a light most favorable to Mrs. Courtier at this stage in the proceeding. *Partington v. Bugliosi*, 825 F. Supp. 906, 914-15 (D. Haw. 1993), *aff'd*, 56 F.3d 1147 (9th Cir. 1995). In *Partington*, the court held that negative publicity surrounding an attorney's former activity in a criminal trial did not reduce his reputation to the level of libel-proof. A reasonable fact finder could find that the defamatory statements harmed the plaintiff's professional reputation as an attorney. *Id.* at 914.

Here, Mrs. Courtier owns multiple clothing stores around Silvertown which largely cater to a specific clientele. She has been a successful businesswoman for years in a high-end market. As a philanthropist, she contributes heavily to her community in advocating for various social issues. She is also known to her community as the widow of the former mayor. She maintains a website focused on her social causes which has a large following, presumably by individuals in Silvertown. She has held several events in her community in support of another woman's political campaign. Similar to the plaintiff in *Partington*, Mr. Lansford's defamatory post attacked the good

professional reputation that Mrs. Courtier attained. Accordingly, considering Mrs. Courtier's business successes and post-conviction integration into her community, she had a good reputation to protect from Mr. Lansford's attacks.

3. The Concept of "Libel-Proof" Applies To Long-Term, "Hard-Core" Criminals with Serious Felonies, Not Someone with Minor Prior Convictions

It is problematic to apply libel-proof plaintiff to individuals with minor felony convictions. David L. Hudson Jr., *SHADY CHARACTER Examining the Libel-Proof Plaintiff Doctrine,* 52 TENN. B.J. 14, 15-16 (2016). This doctrine has traditionally applied to convicted murderers and career criminals. *See Davis v. The Tennessean*, 83 S.W.3d 125, 126-127 (Tenn. Ct. App. 2001) (holding that an inmate sentenced to 99 years' imprisonment for aiding and abetting a felony murder was libel-proof from bringing a suit against a newspaper that misidentified his role in the murder). In contrast, Mrs. Courtier's former offenses largely included minor crimes of marijuana possession (which has since been decriminalized in Tenley), vandalism, simple assault, indecent exposure, and drug possession during her drug addiction.

4. Mrs. Courtier Is Not Presently Incarcerated and the Challenged Statements Were Not Published by a Third-Party Media Outlet, Therefore Specific-Issue Libel-Proof Plaintiff Theory Does Not Apply

More importantly, the doctrine of specific-issue libel-proof plaintiff typically arises in cases where the plaintiff is presently incarcerated and suing a media outlet. *See, e.g.*, *Cardillo*, 518 F.2d at 639 (an incarcerated man brought suit against a publisher and author for a book describing the man's role as a high ranking person in organized crime); *Mattheis v. Hoyt*, 136 F. Supp. 119, 124 (W.D. Mich. 1955) (inmate sought damages from a publisher that falsely reported the inmate confessed to murder); *Dewitt v. Outlet Broadcasting, Inc.*, 1999 WL 1334932 *5 (R.I. Super. Ct. 1999) (holding that plaintiff was libel-proof based on his publicly known criminal history of brutal violent offense against women). In contrast, Mrs. Courtier is not presently incarcerated, and Mr.

Lansford is not a media outlet entity that had no personal connected to Mrs. Courtier. Rather, it has been decades since Mrs. Courtier had any interaction with the law. Mr. Lansford is a private citizen who certainly knows Mrs. Courtier personally considering he had a close relationship with Mrs. Courtier's late husband, Raymond Courtier.

D. Extending The Doctrine Of Libel-Proof Plaintiff To Individuals With Minor Convictions Would Further Stigmatize Criminal Convictions And Disincentivize Post-Conviction Rehabilitation

Similar to this Court's previous warning, it "would create an 'open season' for all who sought to defame persons convicted of a crime." *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 169 (1979). There are already high barriers to proving a defamation claim including elements, privileges, and damages such that libel-proof doctrine bypasses the use of these established principles. Joseph H. King, Jr. *The Misbegotten Libel-Proof Plaintiff Doctrine and the 'Gordion Knot' Syndrome*, 29 HOFSTRA L. REV. 343, 349 (2000). Extending the doctrine to individuals with minor convictions will broaden classifying "who is and who is not characteristically worthy of legal respect." *See id*. For instance, scholars have criticized libel-proof doctrine as an extension of the substantial true defense sought to attack defamation suits at an earlier stage in litigation. Wayne M. Serra, *New Criticisms of the Libel-Proof Plaintiff Doctrine*, 46 CLEV. ST. L. REV. 1 (1998). Courts may apply the doctrine too broadly such that there will be growing range of individuals that are precluded from redress for injury caused by false statements. Hudson, *SHADY CHARACTER*, Tenn. B.J., at 16. For example, the Second Circuit in *Guccione*, 800 F.2d at 302-03 held that a pornography publisher was libel-proof from bringing an action for a publication that identified him as an "adulterer" which was unrelated to any criminal conviction.

The concept of the libel-proof plaintiff doctrine was established in the 1970s when prison system focused on deterrence. *See* NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION

IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 4-5 (Jeremy Travis et al. eds., 2014). However, that focus among federal and state prisons has transitioned into a focus on rehabilitation. The Federal Bureau of Prisons promotes that it is undergoing reform "designed to reduce recidivism and strengthen public safety[] [b]y focusing on evidence-based rehabilitation strategies." U.S. Dep't of Justice, *Prison Reform: Reducing Recidivism By Strengthening The Federal Bureau Of Prisons*, www.justice.gov/archives/prison- reform (last updated Oct. 24, 2018). Furthermore, individuals with convictions are already stigmatized through their inability to vote in elections, hold certain jobs, bear arms, and other restrictions post-conviction. David Wolitz, *The Stigma of Conviction: Coram Nobis, Civil Disabilities, and the Right to Clear One's Name*, 2009 BYU L. REV. 1277-1340, 1294 (2009).

One of the major functions of the Federal Bureau of Prisons is to "[p]rovide services and programs to address inmate needs, provide productive use-of-time activities, and facilitate the successful reintegration of inmates into society, consistent with community expectations and standards." U.S. Dep't of Justice, *Organization, Mission And Functions Manual: Federal Bureau Of Prisons*, https://www.justice.gov/jmd/organization-mission-and-functions-manual-federal-bureau-prisons (last updated Oct. 24, 2018). Likewise, the state of Tenley prison offered business courses, community college class, and business degrees. (J.A. at 5.). Thus, the state of Tenley prison follows the mission in the Federal Bureau of Prisons in that rehabilitation is important. The state prison was successful in rehabilitating Mrs. Courtier and holding a plaintiff libel-proof for minor decades-old convictions would contravene the state's mission to reintegrate individuals into society.

II. MR. LANSFORD'S PUBLISHED ATTACK ON MRS. COURTIER'S PROFESSIONAL CHARACTER QUALIFIES AS UNPROTECTED DEFAMATION, NOT MERE RHETORICAL HYPERBOLE

Mr. Lansford alternatively argues that even if Mrs. Courtier is not libel-proof, his statements regarding Mrs. Courtier are constitutionally protected under the First Amendment as rhetorical hyperbole. The Supreme Court of Tenley correctly overruled the Tenley District Court's holding that Mr. Lansford was exercising his right to free speech within the meaning of Tenley Code Ann. § 5 – 1 – 704, anti-SLAPP law. (J.A. at 14.).

Mr. Lansford's post qualifies as unprotected defamation because the challenged statements: (1) have a defamatory meaning and Mr. Lansford posted about Mrs. Courtier with a reckless disregard for the truth of his statements; (2) are materially false; (3) are untrue statements of fact; and (4) Mrs. Courtier established damages.

As a threshold issue, Mr. Lansford did not meet his burden in the pending anti-SLAPP motion because he did not successfully prove that Mrs. Courtier's legal action was filed in response to his exercise of the right to free speech because he did not prove that his speech was protected. The lower courts mischaracterized Tenley's Public Participation Act and determined that Mr. Lansford "showed that the underlying lawsuit was related to or in response to his social media post – his expression." (J.A. at 15.). This mischaracterization was incorrect because Tenley's Public Participation Act requires that: "[i]f a legal action is filed in response to a party's *exercise of the right of free speech*…, that party may petition the court to dismiss the legal action." (J.A. at 14.) (quoting Tenley Code Ann. § 5 – 1 – 704(a) (emphasis added)). While Mrs. Courtier's action was filed in response to Mr. Lansford's post, Mr. Lansford failed to prove that his post was an exercise of the right of free speech. Mrs. Courtier is not attempting to punish or silence him for freedom of expression, rather, she is trying to protect her business and reputation. Additionally, anti-SLAPP

laws are not meant to be used in this context, but rather codified "the aims of protecting citizens from a David and Goliath power difference[.]" *Stuborn Ltd. P'ship v. Bernstein*, 245 F. Supp. 2d 312, 314 (D. Mass. 2003). The purpose of an anti-SLAPP law is to prevent a wealthy corporate actor from chilling the speech of an individual who is critical of the wealthy corporate actor. Matthew D. Bunker & Emily Erickson, *#AINTTURNINGTHEOTHERCHEEK: USING ANTI-SLAPP LAW AS A DEFENSE IN SOCIAL MEDIA*, 87 UMKC L. REV. 801, 802. In addition to not meeting his burden for a successful anti-SLAPP motion, Mr. Lansford is not the type of person meant to be protected by an anti-SLAPP law, and accordingly his anti-SLAPP motion should be denied. Even if this Court did find that Mr. Lansford met his burden, the burden shifts to Mrs. Courtier under an anti-SLAPP motion for Mrs. Courtier to prove her underlying claim. In the present case, Mrs. Courtier has successfully pleaded a defamation claim.

A. Mr. Lansford's Statements are Unprotected Defamation because the Untrue Statements had a Defamatory Meaning

The State of Tenley has adopted the view that defamation includes the following elements: "identification; publication; defamatory meaning; falsity; statement of fact; and damages." (J.A. at 7.) (quoting David L. Hudson Jr., *First Amendment Law: Freedom of Speech*, §5:7). The District Court found that Mr. Lansford identified Mrs. Courtier in his post and that Mr. Lansford published the document when he posted the article to his website. (J.A. at 8.). Accordingly, this brief discusses the remaining contested issues at greater length: (1) defamatory meaning, (2) falsity, (3) statement of fact, and (4) damages.

1. Mrs. Courtier Has Successfully Proven That Mr. Lansford's Post Was Defamatory and Contained Actual Malice

Mr. Lansford's post constitutes defamation because it contained a defamatory meaning.[1] Further, Mr. Lansford posted his crude remarks about Mrs. Courtier with actual malice, which satisfies the standard for an actionable defamation claim established in *New York Times Co. v. Sullivan*, 376 U.S. 254, 282 (1964). Mr. Lansford's statements are capable of being defamatory, therefore, Mrs. Courtier's underlying lawsuit should be allowed to proceed to trial.

a. Mr. Lansford's Published Attack on Mrs. Courtier was Defamatory because It Could Harm Her Professional Reputation and Standing in the Community

With respect to the first element, defamatory meaning, "[a] communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Restatement (Second) of Torts § 559 (1977). In other words, a statement qualifies as defamatory when "it tends to injure plaintiff in his trade, profession or community standing, or lower him in the estimation of the community." *Howard Univ. v. Best*, 484 A.2d 958, 988 (D.C. 1984); *Moldea v. New York Times Co.*, 15 F.3d 1137, 1143 (D.C. Cir. 1994) (holding "allegation that a journalist and author is 'sloppy,' or that his book's portrayals of central events are incorrect or misleading" can have a defamatory meaning if it "would tend to injure [plaintiff] is his chosen profession, investigative journalism"); *See Pub. Relations Soc. of Am., Inc. v. Rd. Runner High Speed Online*, 8 Misc. 3d 820, 825, (Sup. Ct. 2005)

[1] Because "[m]odern defamation law is a complex mixture of common-law rules and constitutional doctrines[,]" this brief addresses the element of defamatory meaning separately. *Pan Am Sys., Inc. v. Atl. Ne. Rails & Ports, Inc.*, 804 F.3d 59, 64 (1st Cir. 2015). For the sake of clarity, this brief addresses the elements of defamation as adopted by the state of Tenley. (J.A. at 7.).

(finding "the e-mail statement [was] actionable because it disparage[d] [plaintiff] before her employers and the statement assert[ed] her general incompetency in her job performance").

In the present case, Mr. Lansford's statements had a defamatory meaning because they called Mrs. Courtier's competency as a store owner into question. Mr. Lansford labeled her businesses as "hoity-toity clothing stores that are lacking in class and substance." (J.A. at 4.). He described her work as "pimp[ing] out these clothes to the rich and lavish." (J.A. at 4.). His statement also referred to her as a "lewd and lusty lush," "a whore for the poor," and "corrupt and a swindler." (J.A. at 4.). These statements could injure her professional reputation and likely will cause readers to choose not to associate with Mrs. Courtier.

b. Mr. Lansford's Crude Remarks Contain Actual Malice

Because the lower courts' opinions did not address whether Mrs. Courtier is a public figure, this brief addresses the issue to show that Mrs. Courtier can successfully plead her underlying defamation claim. Notably, Mr. Lansford did not allege that Mrs. Courtier was a public figure. Therefore, Mrs. Courtier reserves her position on whether she qualifies as a public figure. For the limited purpose of Mrs. Courtier pleading her underlying claim in this appeal, this brief will consider her as a public figure in order to fully address the element of defamatory meaning, namely Mr. Lansford's actual malice. This Court has provided that there are two alternative bases to determine if an individual is a public figure:

> In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.

Gertz, 418 U.S. at 351. In *Gertz*, this Court found that an individual who was an active participant in his community was not a public figure. *Id.* at 352. This Court stated that it "would not lightly assume that a citizen's participation in community and professional affairs rendered him a public

figure for all purposes." *Id.* This Court provided that the proper inquiry to determine whether an individual qualifies as a public figure is to look "to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Id.*

This Court prohibits "a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice[.]'" *New York Times Co. v. Sullivan*, 376 U.S. at 279-80. This Court promulgated this prohibition in response to a state law which required the critic of a public official to guarantee the truth of all of his assertions. *Id.* at 279. The Court feared that this type of state law would deter protected speech when the "rule compell[ed] the critic of *official* conduct to guarantee the truth of all his factual assertions[.]" *Id.* (emphasis added). This Court extended that holding to include not only public officials, but also public figures as well. *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 155 (1967).

"Actual malice" is when an individual makes a statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co.*, 376 U.S. 254, 280. A plaintiff establishes a reckless disregard for the truth when he can prove "that the false publication was made with a high degree of awareness of probable falsity, or that the defendant entertained serious doubt as to the truth of his publication." *Starr v. Boudreaux*, 2007-0652 (La. App. 1 Cir. 12/21/07). Generally, a court will infer actual malice from objective facts. *Celle v. Filipino Reporter Enterprises Inc.*, 209 F.3d 163, 183 (2d Cir. 2000) (citing *Bose Corp. v. Consumers Union of United States, Inc.*, 692 F.2d 189, 196 (1st Cir.1982)). "These facts should provide evidence of 'negligence, motive and intent such that *an accumulation of the evidence and appropriate inferences* supports the existence of actual malice.'" *Id.* (quoting *Bose Corp.*, 692 F.2d at 196). Notably, "[e]vidence of ill will combined with other circumstantial evidence indicating

that the defendant acted with reckless disregard of the truth or falsity of a defamatory statement may also support a finding of actual malice." *Id.*

In the present case, the fact that Mrs. Courtier supported Mr. Lansford's political opponent, combined with Mr. Lansford's close relationship with Mrs. Courtier's late husband, Mr. Lansford acted with a reckless disregard of the truth of his statements. Mr. Lansford posted his attack on Mrs. Courtier in response to her criticisms of Mr. Lansford's politics. (J.A. at 3.). The District Court of Tenley characterized his post as a "fusillade of insults." (J.A. at 4.). Mr. Lansford likely reacted with such an obscene attack because he faced a "stiff challenge" in the upcoming mayoral election. (J.A. at 3.). Notably, Mrs. Courtier's late husband served as the city of Silvertown as mayor for 18 years before he passed away and he was an early supporter of Mr. Lansford's political career. (J.A. at 2-3.). Mrs. Courtier's late husband and Mr. Lansford were political allies at one time. (J.A. at 3.) Given the nature of this relationship, Mr. Lansford should have known that Mrs. Courtier was not a "leech on society" or "nothing more than a former druggie." Accordingly, Mr. Lansford posted with actual malice because he had a reckless disregard for the truth about Mrs. Courtier.

2. Mr. Lansford's Statements Were Not True or Substantially True

As it relates to the element of falsity, "a materially false statement is one that 'would have a different effect on the mind of the reader [or listener] from that which the ... truth would have produced.'" *Air Wisconsin Airlines Corp. v. Hoeper*, 571 U.S. 237, 239 (2014) (quoting *Masson*, 501 U.S. at 517. This Court has provided that it focuses on the substantial truth of a statement because "[m]inor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.'" *Masson v. New Yorker Magazine*, 501 U.S. at 517 (quoting *Heuer v. Kee*, 15 Cal. App. 2d 710, 714 (1936)).

An illustrative case is *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1228 (7th Cir. 1993). In *Haynes*, a man and his wife sued an author who wrote about the man's life in the author's book. *Id.* at 1224. The man specified three statements that allegedly defamed him: he left his children alone at night instead of watching them; his drinking caused him to lose jobs; and he chose to buy a car for himself instead of shoes for his children. *Id.* at 1226. The court reasoned that the uncontested facts of the case did not exhibit the man in a worse light than the book. *Id*. at 1228. The court found that the man admitted to: drinking heavily while unemployed, abandoning his children, and refusing to pay child support while purchasing a Pontiac. *Id.* at 1227-28. The alleged falsehoods in the book paled in comparison to the uncontested facts, and if the book had switched "the true for the false[,] and the damage to [his] reputation would be no less." *Id.* at 1228. Notably, the court cautioned against so broadly construing the statements by bringing up every disreputable act that the plaintiff may have committed in an attempt to prove that the plaintiff is as bad as the defamatory statement provides. *Id.* The court warned that "[t]his would strip people who had done bad things of any legal protection against being defamed; they would be defamation outlaws. The true damaging facts must be closely related to the false ones." *Id.*

In the present case, Mr. Lansford's statements were materially false because they did not describe the gist of Mrs. Courtier's background, business, and philanthropy. Mr. Lansford's post contained major inaccuracies and omissions regarding Mrs. Courtier's life and character. One false portion of his statement reads, "In her early years, Silvia Courtier was a lewd and lusty lush, a leech on society, and a woman who walked the streets strung out on drugs. She is nothing more than a former druggie." (J.A. at 4.). This attack portrays an inaccurate story of Mrs. Courtier's upbringing. First, Mrs. Courtier was not a "lewd and lusty lush," when she was younger, but rather a survivor of childhood trauma and sexual abuse. (J.A. at 5.). No reasonable factfinder would

determine that the gist of a childhood sexual abuse survivor is the same as that of a "lusty and lewd lush." Second, there is no evidence in either of the lower court opinions that suggest Mrs. Courtier ever "walked the streets strung out on drugs." After being raised by two drug-addicted parents, Mrs. Courtier was charged with possession of marijuana and cocaine as a teenager. (J.A. at 15.). Mrs. Courtier later pled guilty to one possession charge in her twenties and rehabilitated herself while serving time in prison. (J.A. at 5, 15.). As the Tenley District Court aptly noted "[s]he underwent a transformation in prison[.]" (J.A. at 10.). Under the *Haynes* test of swapping the true for the false, Mr. Lansford's post would have a substantially different effect on the reader if he accurately portrayed Mrs. Courtier's life as a child of drug-addicted parents who rehabilitated herself while serving her sentence than as "a woman who walked the streets strung out on drugs." Finally, Mr. Lansford's assertion that Mrs. Courtier "is nothing more than a former druggie" is entirely false. Mrs. Courtier is an educated business owner who has achieved "significant accomplishments in the business world[.]" (J.A. at 16.). The Supreme Court of Tenley described her as someone who "devoted much of her adult life to altruistic, charitable, and philanthropic efforts." (J.A. at 21.). To say that Mrs. Courtier is nothing more than a former druggie when she is a hardworking business owner and human being deserving of basic dignity is entirely untrue. Mr. Lansford's statements were materially false because they do not capture the gist of Mrs. Courtier's background, education, and activism. Mr. Lansford's derogatory remarks about Mrs. Courtier were not mere inaccuracies. Rather, they were vehemently contrary to the truth, sought to harm her reputation in the community by detracting from Mr. Lansford's own political actions.

3. Mr. Lansford's Attack on Mrs. Courtier Constitutes an Untrue Statement of Fact

The threshold inquiry in a defamation claim is whether a reasonable factfinder could conclude that the statement "impl[ies] an assertion of objective fact." *Unelko Corp. v. Rooney*, 912

F.2d 1049, 1053 (9th Cir. 1990) (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990)). The standard is "whether a challenged statement is reasonably susceptible of an interpretation which implies a provably false assertion of actual fact." *John Doe 2 v. Superior Court*, 1 Cal. App. 5th 1300, 1312 (2016) (quoting *Kahn v. Bower*, 232 Cal. App. 3d 1599, 1608 (1991)). In other words, the First Amendment protects speech only when the speech could "have been interpreted as stating actual facts about the public figure involved." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988). This Court has provided that "a statement of fact ('the coffee is hot') expresses certainty about a thing, whereas a statement of opinion ('I think the coffee is hot') does not." *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1325 (2015). In *Omnicare*, this Court explained that a CEO who says his product has the highest quality in the market, despite knowing that the product placed second, has stated an untrue statement of fact. *Id.* at 1326.

A court will examine the totality of the circumstances in which a statement was made to determine whether the statement implies a factual assertion. *Underwager v. Channel 9 Australia*, 69 F.3d 361, 366 (9th Cir. 1995). The Ninth Circuit has provided three factors for this examination: (1) first, looking at the broad context of the statement, including the subject matter, the setting, and the general tone of the entire work; (2) second, turning to the specific context of the statement, including the extent of figurative language and the reasonable expectations of the audience; and (3) finally, inquiring "whether the statement itself is sufficiently factual to be susceptible of being proved true or false." *Id.*

In the present case, the context surrounding Mr. Lansford's posts show that Mr. Lansford made untrue factual assertions about Mrs. Courtier. First, Mr. Lansford himself argued that the statements contained in his posts were true or substantially true. (J.A. at 18.). In his attempt to

defend his crude remarks, he admitted that he meant to construe post, including "a pimp for the rich" and "corrupt and a swindler" as true statements about Mrs. Courtier. (J.A. at 18.). Second, the close relationship between Mr. Lansford and Mrs. Courtier's deceased husband provides further evidence that Mr. Lansford's statements could be construed as facts. Mrs. Courtier's late husband, Raymond Courtier, was an early supporter of Mr. Lansford and helped Mr. Lansford enter the political arena. (J.A. at 3.). The late Mr. Courtier and Mr. Lansford were one-time allies and political contemporaries. (J.A. at 3.). Given the close nature of this relationship, a reader of Mr. Lansford's post could understand his statements about Mrs. Courtier to be true. Mr. Lansford made his statements with certainty, using calculated language that discussed specific details of Mrs. Courtier's store and background. Mr. Lansford posted his reckless statements so that his readers would interpret them as true, and accordingly the post was a statement of fact.

4. Damages are presumed because Mr. Lansford's attack on Mrs. Courtier's constitutes Defamation *Per Se*

In determining the type of damages that a plaintiff must be pled in defamation claim, some states categorized defamation into defamation *per quod* or defamation *per se*. Defamation *per quod* includes statements that are not defamatory on their face but require extrinsic information to interpret their meaning or statements that do not fall under the limited categories of "defamation *per se*". Defamation *per se* refers to written or oral statements that are so blatantly harmful that damages are presumed. *In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015). There are typically four types of statements that states recognize as defamation *per se*: (1) accusations of a serious crime, (2) accusations about having a communicable disease, (3) attacks on an individual's trade, profession, or business, and (4) imputing unchastity or sexual misconduct. *Zherka v. Amicone*, 634 F.3d 642, 645 n.6 (2d Cir. 2011); *Crowe v. Cty. of San Diego*, 608 F.3d 406, 442 (9th Cir. 2010); *Fiber Sys. Int'l, Inc. v. Roehrs*, 470 F.3d 1150, 1161 (5th Cir. 2006); *Marcone v. Penthouse Int'l*

Magazine For Men, 754 F.2d 1072, 1080 n.1 (3d Cir. 1985); *Green v. Rogers*, 917 N.E.2d 450, 491-92 (2009). Mr. Lansford attacked Mrs. Courtier's business reputation and chastity, therefore his actions were defamation *per se*.

a. Mr. Lansford Falsely Attacked Mrs. Courtier's Professional Competency and Portrayed Her as an Unchaste Woman Therefore His Accusations Are Defamation *Per Se*

Mr. Lansford attacked Mrs. Courtier's professional competency when he called her "corrupt and a swindler". False accusations regarding fraudulent, dishonest, or questionable business methods are defamation *per se*. *Barnes-Hind, Inc. v. Superior Court*, 226 Cal. Rptr. 354, 358-59 (Cal. Ct. App. 1986). For example, in *Laughland v. Beckett*, 870 N.W.2d 466, 477 (Wis. Ct. App. 2015), an appellate court upheld the lower court's finding that harm to a professor's professional reputation was defamation *per se*, and upheld the jury award of $15,000 in general damages and $10,000 in punitive damages. In *Laughland*, the defendant portrayed the plaintiff on social media as a "preying swindler," "corrupt," and a "debt to society" that engaged in "underhanded business practices." *Id.* at 474. The court held that these statements were unprotected in that they were not substantially true, they were not protected opinions, the statements diminished the plaintiff's reputation, and the defendant acted with actual malice. *Id.* at 474-77.

Similarly, Mr. Lansford called Mr. Courtier "corrupt", a "swindler", and even a "leech on society." (J.A. at 4-5.) Mr. Lansford commentary was not substantially true as previously addressed in this brief, he specifically attacked Mrs. Courtier's business in pointing to her clothing stores, and he acted with malice to dissuade constituents in his community. Mr. Lansford intended for other community members to disassociate themselves from Mrs. Courtier and her political to the candidates running against Mr. Lansford. A statement is defamatory if it is intended to deter

other individuals from associated with the targeted or defamed individual. *Laughland*, 870 N.W.2d at 473. Here, Mrs. Courtier had social media followers that presumably had access to the Mr. Lansford's social media post, just like in *Laughland.*

When Mr. Lansford called Mrs. Courtier a "lewd and lusty, lush" along with "pimp for the rich and a whore for the Poor", he portrayed her as an unchaste woman. The category under defamation *per se* of imputing unchaste character includes an indication that an individual is willing to or has engaged in sexual acts. *Ogle v. Hocker*, 430 F. App'x 373, 375 (6th Cir. 2011) (citing *Shand v. State*, 653 A.2d 1000, 1009 (Md. App. 1995) for the proposition that an individual's reputation can be harmed by both categories). Mr. Lansford's commentary implicates various words that courts have found to be defamation *per se*. *Walia v. Vivek Purmasir & Assocs., Inc.*, 160 F. Supp. 2d 380, 394 (E.D.N.Y. 2000) (holding that an employer calling his employee a "whore" to members in the community was defamation *per se*); *Dalbec v. Gentleman's Companion, Inc.*, 828 F.2d 921, 925 (2d Cir. 1987) (holding that a magazine mistakenly publishing a woman's full name in a swinger's magazine advertisements in a small town portrayed her a promiscuous and was defamation *per se*). Similarly here, Mr. Lansford's attacks called out Mrs. Courtier's full name and portrayed her as a promiscuous "lewd and lusty, lush" and used blatantly derogatory terms or "pimp" and "whore". Taken together, these words qualify as imputing unchastity upon her and therefore qualify as defamation *per se.*

b. Mr. Lansford's Social Media Attacks Constitutes Defamation *Per Se,* and Accordingly Damages Are Presumed

Courts have allowed the presumption of damages in defamation cases for centuries and this Court has recognized the state interest in doing so. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc*., 472 U.S. 749, 761 (1985) (plurality opinion). A person's reputation is invaluable to oneself therefore, a state has an interest in protecting the good name of its citizens. *Denny v. Mertz*, 318

N.W.2d 141, 151 (Wis. 1982). Under defamation or defamation *per quod*, a plaintiff must show actual damages which "include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Gertz*, at 350. If a state recognizes "defamation *per se*" then a plaintiff does not have to prove actual harm prior to an award for damages; rather, damages are presumed. *Id.* at 349. This Court has limited *per se* and punitive damages only to instances where a plaintiff proves "knowledge of falsity or reckless disregard for the truth." *Id*. There is nothing in the record to indicate that Mr. Lansford had any indication that Mrs. Courtier had questionable business practices or that she was unchaste. There are no allegations from her customers or any other community members regarding her reputation either. Therefore, Mr. Lansford's actions was at minimum, a reckless disregard for the truth and his published attack qualifies as defamation *per se*.

B. Mr. Lansford's False Statements do not Qualify as Rhetorical Hyperbole because a Reasonable Reader could Construe their Meaning as True

Although Mr. Lansford has argued that his statements were mere character descriptions or name-calling, his posts cannot be protected speech because his statements do not qualify as rhetorical hyperbole. (J.A. at 6.). Rhetorical hyperbole refers to the obvious use of loose, figurative language which expresses an opinion. *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 284 (1974). These opinions are protected under the First Amendment, even when expressed in the most pejorative terms. *Id.* This Court explained the rationale for protection of rhetorical hyperbole in *Greenbelt Coop. Pub. Ass'n v. Bresler*, 398 U.S. 6, 14 (1970). In *Greenbelt*, the plaintiff had sued a newspaper company after it published a story that labeled his negotiation tactics as "blackmail." *Id.* at 13. The Court explained "[n] No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging [plaintiff] with the commission of a criminal offense." *Id.* at 14.

When the challenged statements are not employed in a loose, figurative sense, they are not protected as mere rhetorical hyperbole. *See Cianci,* 639 F.2d at 64 (finding a newspaper article that stated the plaintiff had raped a woman was not rhetorical hyperbole because the article conveyed the image of the plaintiff committing rape); *See also Smith v. McMullen*, 589 F. Supp. 642, 644-45 (S.D. Tex. 1984) (finding that the description "despicable human being" cannot be protected as mere hyperbole when viewed in the context of the entire statement, especially when the statement regarded his professional competence). Many courts have found that rhetorical hyperbole does not apply when a statement implies a lack of integrity in one's profession, dishonesty, or deception. *Kolegas v. Heftel Broad. Corp.*, 154 Ill. 2d 1, 12-16 (1992) (finding that a radio broadcast which described plaintiff as "scamming" was not rhetorical hyperbole because the statement offended plaintiff's integrity); *See also Bentley v. Bunton,* 94 S.W.3d 561, 583-84 (Tex. 2002) (finding that "corrupt" was not rhetorical hyperbole when the Mr. Lansford argued that his statement, which labeled the plaintiff as corrupt, was true). Specifically, when a statement alleges that the plaintiff "was engaged in 'scamming'--cheating or swindling[,]" the statement may be defamatory because it insults his integrity, reputation, and profession. *Kumaran v. Brotman*, 247 Ill. App. 3d 216, 226 (1993).

In the present case, Mr. Lansford's post cannot be considered rhetorical hyperbole because it is likely that a reasonable reader could believe some of his statements. First, his statements that Mrs. Courtier "is a coddler of criminals," "walked the streets strung out on drugs," and "is nothing more than a former druggie," may convey the image of a drug addict or criminal in the mind of the reader. (J.A. at 18.). Although Mrs. Courtier is rehabilitated, it is not impossible that a reader may believe these statements given Mrs. Courtier's troubled past and difficult childhood. Finally, Mr. Lansford stated that "she is corrupt and a swindler[.]"

(J.A. at 18.). He alleged that she engaged in swindling, cheating, and deception. Accordingly, Mr. Lansford's statements do not qualify as rhetorical hyperbole because a reasonable reader might interpret them as true and the statements insult Mrs. Courtier's professional integrity.

This Court has long held that not all speech is protected equally under the First Amendment. *Dun & Bradstreet*, 472 U.S. at 758 ; *Cohen v. California*, 403 U.S. 15, 19 (1971); *Roth v. United States*, 354 U.S. 476, 483 (1957); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942). Reputational protections under defamation law exists because "the Constitution does not provide absolute protection for false factual statements that cause private injury." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 777 (1976). Mrs. Courtier is entitled to dignity as a human being and she deserves to protect her business reputation from the harm caused by Mr. Lansford. Anti-SLAPP laws are not meant to protect Mr. Lansford from facing the consequences of defaming a business owner and philanthropist in his community and therefore he cannot hide behind Tenley's anti-SLAPP law when Mrs. Courtier has met the burden of proving her underlying claim. Therefore, we ask that this Court affirm the lower court's finding that she deserves to pursue her lawsuit as "her competence and professionalism as a business person" has been called into question. (J.A. at 23.).

CONCLUSION

WHEREFORE, for the reasons stated above, Respondent asks this Court to affirm the decision of the Supreme Judicial Court of Tenley.

Respectfully submitted,

Team 219802
Counsel for Respondent