

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

<i>LEVINSKY'S, INC., et al.,</i>)	
)	
<i>Plaintiffs</i>)	
)	
<i>v.</i>)	<i>Civil No. 95-36-P-C</i>
)	
<i>WAL-MART STORES, INC.,</i>)	
)	
<i>Defendant</i>)	

**RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT**

The plaintiffs in this action seek damages arising from certain statements made by the defendant concerning their business. They assert common-law claims for defamation, injurious falsehood, false light, unfair trade practices, interference with advantageous economic relations, and intentional and negligent infliction of emotional distress; a claim for deceptive trade practices under Maine's Uniform Deceptive Trade Practices Act, 10 M.R.S.A. § 1211 *et seq.*; and a punitive damages claim. The defendant has moved for summary judgment on all claims. For the reasons that follow, I recommend that the motion be granted in part and denied in part.

I. Summary Judgment Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the

potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party’ *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and “give that party the benefit of all reasonable inferences to be drawn in its favor.” *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir.) (citing *Celotex*, 477 U.S. at 324), *cert. denied*, 132 L. Ed. 2d 255 (1995); Fed. R. Civ. P. 56(e); Local R. 19(b)(2).

II. Material Facts

Viewed in the light most favorable to the plaintiffs, the following material facts emerge. Plaintiff Levinsky’s, Inc. operates three stores in Portland, Freeport and Windham, Maine. Affidavit of Eric S. Levinsky (“Levinsky Aff.”) (Docket No. 14) ¶ 3. Plaintiffs Philip Levinsky and his sons Eric, Ken and Bruce are shareholders in the corporation. *Id.* ¶¶ 2, 4-6. Eric is the President, Ken is the Vice President, and Bruce until recently was also a Vice President. *Id.* ¶¶ 2, 5-6. Philip is still “very active” in the day-to-day affairs of the business. *Id.* ¶ 4.

In the fall of 1994, Levinsky’s developed a radio advertisement transcribed as follows:

For over 75 years, Levinsky's has built a reputation for the best selection of quality name-brand fashions and at guaranteed lowest prices always. So, to protect our reputation, we visited Wal-Mart to compare. Levinsky's has a great selection and the lowest prices in Maine on Levi's jeans, Dockers and denim shirts. Wal-Mart doesn't carry Levi's, but we did get a good buy on a toaster. Levinsky's has the lowest prices always on Columbia jackets, hats and gloves. Wal-Mart doesn't carry Columbia, but if you are looking for fishing equipment... Children's Oshkosh fashions make great holiday gifts, and Levinsky's has them at the lowest prices. Wal-Mart doesn't carry Oshkosh, but if you need house paint... For Nike hiking boots and footwear, it's Levinsky's. Wal-Mart doesn't carry Nike, but they were having a sale on toothpaste. Everyone loves Woolwich sweaters, flannel and chamois shirts and Duofold turtlenecks and winter underwear. Levinsky's has them. Wal-Mart doesn't. We did find Dickies pants and shirts at Wal-Mart, but Levinsky's has the lower prices. So for holiday shopping, no one beats Levinsky's for the best selection and the lowest prices always. At Levinsky's, start looking good today.

Id. ¶ 13-14. The ad ran on several local stations for approximately one and one-half months in November and December 1994. *Id.* ¶ 15.

Gilbert Olson is the manager of Wal-Mart's Scarborough store. Deposition of Gilbert Olson ("Olson Dep.") at 26, Exh. A to Defendant's Motion for Summary Judgment ("S.J. Motion") (Docket No. 7). After hearing the ad, Olson was told that Wal-Mart's prices on Dickies were lower than Levinsky's. *Id.* at 42-43. Olson called Wal-Mart's legal department to see if Wal-Mart should take any action concerning the ad. *Id.* at 44. The legal department told him to call and ask Levinsky's to "cease and desist." *Id.*

Olson called Levinsky's Portland store but had difficulty getting hold of anybody. *Id.* The first time he called he was put on hold for ten minutes before he hung up. *Id.* at 44-45. He waited at least as long the next time he called. *Id.* He got through on either the second or third call, *id.*, and demanded that Levinsky's "cease and desist" from running the advertisement, Levinsky Aff. ¶ 16. Olson left the name of Rhonda Parrish in Wal-Mart's legal department. *Id.* Eric Levinsky called Parrish to discuss the "cease and desist" demand. *Id.* ¶ 17. He explained that Levinsky's had price-

checked Dickies regularly, and Levinsky's prices were lower. *Id.* Parrish said Levinsky's could keep running the ad as long as it was accurate. *Id.*

The next day, Eric Levinsky again spoke with Parrish who this time said that Wal-Mart's price on Dickies was lower and that he had "better stop running that ad." *Id.* ¶ 19. Levinsky responded that he had been in a Wal-Mart store that morning and that she was incorrect. *Id.* Following this exchange of phone calls, Wal-Mart lowered its price by a few cents to beat Levinsky's. *Id.* ¶ 20. Levinsky's, in turn, lowered its price further. *Id.*

Freelance writer Michael Boardman, who does much of his work for *BIZ* magazine, heard the ad and decided to pursue an article focusing on Levinsky's marketing campaign. Deposition of Michael J. Boardman ("Boardman Dep.") at 6, 12-13, Exh. B to S.J. Motion. He called Wal-Mart's Scarborough store and spoke with Olson. *Id.* at 24. Boardman says he told Olson he was with *BIZ* magazine and was writing about Levinsky's ad campaign. *Id.* Olson does not recall Boardman identifying himself as a magazine reporter; his "impression was it was for a school paper, like a USM student or something on that order." Olson Dep. at 38-39.

Olson told Boardman that Levinsky's ad was inaccurate. Boardman Dep. at 25. He cited Levinsky's claims that it carried certain merchandise for less than Wal-Mart, and stated that Wal-Mart carried certain merchandise that Levinsky's did not. *Id.* Olson never got into specifics on these points, *id.* at 26, 29, and Boardman does not recall whether Olson specified Dickies as the product that Levinsky's incorrectly claimed to carry for less than Wal-Mart, *id.* at 25, 29.

During the conversation, Olson said, "I've been in Levinsky's, and I think it's a trashy store." *Id.* at 35. Boardman recalls that Olson was referring specifically to the Portland store. *Id.* at 34. Olson also said, "I'd rather pay a little more money to buy it somewhere else." *Id.* at 39. Finally,

he told Boardman that when you call Levinsky's Portland store, "you are sometimes put on hold for 20 minutes or the phone is never picked up at all." *Id.* Olson then asked Boardman whether he was going to use his name, and Boardman told him that he would not. *Id.* at 40.

Boardman wrote an article focusing in part on Levinsky's ad campaign. The portion of the article concerning the Olson interview reads as follows:

In light of this ambitious effort, BIZ recently spoke with a management official (who wishes to remain anonymous) with Wal-Mart Discount Cities, Inc., to get their reaction on Levinsky's design.

When the ad first appeared on the radio, Wal-Mart was disturbed by its inaccurate information. Though they said they do carry some of the items that Levinsky's claims they do not have, Wal-Mart did not specify what part of this claim was incorrect. The store also said that unlike their public assertion, Levinsky's does not offer similar products -- namely Dickies -- for less. Wal-Mart contacted Levinsky and told him to pull it. While Levinsky defended the accuracy of his assertion to Wal-Mart's Arkansas office, the local store lowered its prices on Dickies to beat Levinsky's claimed price. When Levinsky lowered the price of his Dickies even lower, Wal-Mart again told Levinsky to pull his ad.

Levinsky refused.

...

Wal-Mart also stated that representatives of Levinsky's Inc., have in the past, purchased Wal-Mart merchandise and resold it in their own stores. In addition, this Wal-Mart representative told BIZ that Levinsky's Portland store was "trashy," and that customers should pay a little more money to buy the same item they want somewhere else.

Wal-Mart also said that when you call Levinsky's Portland store, "you are sometimes put on hold for 20 minutes -- or the phone is never picked up at all."

Michael Boardman, *Levinsky's: Leaner and Meaner with Retail Competition*, BIZ, Jan./Feb. 1995 ("BIZ Article") at 4, Exh. C to S.J. Motion.

Eric Levinsky and the members of his family were "extremely saddened, distraught and distressed" by the content of the article. Levinsky Aff. ¶ 29. Eric Levinsky himself was "shocked and extremely disturbed" by the comments in the article. *Id.* ¶ 23. Given how difficult times had become for the stores and the Levinsky family, they were upset at the prospect that the article might

be enough to push the store over the edge. *Id.* ¶ 29. Numerous friends, acquaintances and strangers questioned Eric Levinsky about the article and Olson’s statements. *Id.*

Gross sales and receipts at Levinsky’s have dropped substantially since the article was published, particularly as compared to sales at the same time in the prior year. *Id.* ¶ 30. When Wal-Mart came to the area, Levinsky’s business dropped by about 20 to 30 percent on a weekly basis. *Id.* Since the article was published, business has been down by about 50 percent. *Id.* In the weeks after the publication, the Portland store’s sales were down between 6 and 47 percent compared to the same weeks in the prior year. *Id.*

III. Discussion

A. Defamation (Count I)

Common-law defamation consists of:

- (a) a false and defamatory statement concerning another;
- (b) an unprivileged publication to a third party;
- (c) fault amounting at least to negligence on the part of the publisher; and
- (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Lester v. Powers, 596 A.2d 65, 69 (Me. 1991) (quoting *Restatement (Second) of Torts* § 558 (1977)).

1. Fact or Opinion

A “defamatory statement” must contain either an assertion, explicit or implied, of false facts or an opinion implying the existence of undisclosed facts that are false. *Id.* at 69, 71. This

requirement derives from the First Amendment to the United States Constitution.¹ *Caron v. Bangor Publishing Co.*, 470 A.2d 782, 784 (Me.), *cert. denied*, 467 U.S. 1241 (1984). The defendant contends that the words at issue are an expression of opinion, not fact.

An opinion that does not imply the allegation of undisclosed defamatory facts as the basis thereof is not actionable. *Caron*, 470 A.2d at 784-85. In contrast, an opinion containing such an implication is actionable. *True v. Ladner*, 513 A.2d 257, 262 (Me. 1986). “The determination whether an allegedly defamatory statement is a statement of fact or opinion is a question of law. If the average reader could reasonably understand the statement as either fact or opinion, the question of which it is will be submitted to the jury.” *Caron*, 470 A.2d. at 784 (citations omitted).

The plaintiffs’ complaint premises liability on Olson’s statements to Boardman. Thus, the appropriate context within which to consider the statements is the conversation between Olson and Boardman, rather than the article published in *BIZ* magazine. As it happens, with one important exception, any differences between these two contexts are inconsequential. The exception concerns the statement appearing in the article attributing to Wal-Mart the assertion that Levinsky’s claims Wal-Mart does not carry some items that it in fact does. In fact, the only thing Olson said to Boardman on this score was that Wal-Mart carries merchandise Levinsky’s does not. There is a critical difference in meaning between these two statements. Had Boardman accurately reported what Olson told him, there would be no dispute of the kind generated by the statement actually published since Levinsky’s ad itself acknowledges that Wal-Mart carries many items for sale that

¹ As the United States Supreme Court explained in an oft-quoted passage, “Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) (footnote omitted).

it does not. Of course, Wal-Mart cannot be exposed to liability for Olson's inaccurate reporting in this regard.

These, then, are the statements in issue: (1) Levinsky's ad contained inaccurate information; (2) Levinsky's does not offer at a lower price products similar to those carried by Wal-Mart; (3) when you call Levinsky's Portland store you are sometimes put on hold for 20 minutes, or the phone is never picked up at all; (4) Levinsky's Portland store is "trashy"; and (5) Olson would "rather pay a little more money to buy it somewhere else."² I conclude that, as a matter of law, the first three statements are assertions of fact only, the fourth is an opinion that implies the existence of undisclosed facts (namely, that the store is unkempt, disheveled or in a state of clutter or disrepair) and the fifth is pure opinion (Olson's preference to pay more in order to avoid having to shop in trashy stores or Wal-Mart's opinion that shoppers should be willing to pay more in order to achieve the same result).

² In the article this last statement was reported as a statement by Wal-Mart that "customers should pay a little more money to buy the same item they want somewhere else."

2. Defamatory Message

“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.’” *Bakal v. Weare*, 583 A.2d 1028, 1029 (Me. 1990) (quoting *Restatement (Second) of Torts* § 559 (1977)). Whether a statement is capable of conveying a defamatory message is a question of law. *Id.* at 1030. In making that determination, the court must evaluate the statement in the context in which it was made and in light of the extrinsic circumstances as far as they were known to the recipient. *See id.*; *Restatement (Second) of Torts* § 563 cmts. d & e (1977).

The only conceivable defamatory interpretation of the first two statements is that Levinsky’s lied in its public advertising and is therefore dishonest and untrustworthy. Evaluating these statements in context and in light of other facts known to Boardman, however, they do not reasonably lend themselves to such inferences. To begin with, while Olson stated that Levinsky’s ad contained inaccurate information, the only supporting detail he provided consisted of the uncontroverted statement that Wal-Mart carries certain merchandise that Levinsky’s does not -- misreported as noted earlier -- and that Levinsky’s does not offer similar products such as Dickies for sale at a lower price. Since, in context, it is apparent that Wal-Mart had no other specific instances of inaccurate information to offer, the more general “inaccurate information” statement has meaning only to the extent the other two statements convey a defamatory message. The first, of course, clearly does not. Nor does the second when one considers the extent of Boardman’s awareness of the fact that both companies were vying to undercut each other on the price of Dickies and that when the ad ran and at other times Levinsky’s very likely was underselling Wal-Mart. The

article itself sufficiently describes this scenario. These first two statements, then, were not capable of conveying a defamatory message.

By contrast, the “telephone call” statement asserted a pattern of conduct that a reasonable listener might consider reflects unacceptably poor customer service, and the “trashy” statement implied to a reasonable listener that the store is unkempt, disheveled or in a state of clutter or disrepair. Both statements taken together implied, as the plaintiffs suggest, *see Levinsky Aff.* ¶ 26, that the plaintiffs were careless and operate a slipshod business. These statements were capable of so harming Levinsky’s reputation in the community as to deter consumers from doing business with it, and thus could have conveyed a defamatory message.

3. “Of and Concerning” the Individual Plaintiffs

The defendant argues that the surviving statements were not “of and concerning” the individual plaintiffs. The individual plaintiffs are shareholders in Levinsky’s. The article portrays Levinsky’s as a “private family-owned corporation” and details the individual plaintiffs’ involvement in the business. *Biz* Article at 6. They are so connected with the corporation that a reasonable recipient of the statements at issue would not likely distinguish between the practices of the corporation and the individuals. *See Brayton v. Crowell-Collier Publishing Co.*, 205 F.2d 644, 645 (2d Cir. 1953) (defendant liable to individual and corporate plaintiff where individual controlled corporation and numerous readers understood article to charge both individual and corporation with improper conduct); *Peagler v. Phoenix Newspapers, Inc.*, 560 P.2d 1216, 1222-23 (Ariz. 1977) (where article described individual plaintiff as owner of corporate plaintiff and used individual’s last name in name of corporation, individual was so connected with business practices of the corporation

that readers would not likely distinguish between the two). A rational fact finder could conclude that the statements at issue were “of and concerning” the individual plaintiffs as well as the corporation.

4. Constitutional Protection

Generally, a plaintiff need only prove that the defendant was negligent in failing to ascertain whether a statement was false and defamatory. *Restatement (Second) of Torts* § 580B(c) (1977); *see Lester*, 596 A.2d at 69. The First Amendment, however, imposes a more stringent burden if the plaintiff is a public figure or is defamed on a matter of public concern.

The First Amendment prohibits a public official from recovering damages for defamation relating to his official conduct absent proof of the defendant’s “actual malice” -- *i.e.*, knowledge that the statement was false or reckless disregard of whether it was false. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). This actual malice standard also applies to public figures. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967) (four Justices joining Chief Justice Warren’s concurrence in relevant part). Where a private person alleges defamation on a matter of public concern, the plaintiff must prove the statement false. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986). The Supreme Court has not decided whether these protections apply to non-media defendants such as Wal-Mart. *Id.* at 779 n.4; *Hutchinson v. Proxmire*, 443 U.S. 111, 133-34 n.16 (1979). Assuming, *arguendo*, that they are available to non-media defendants, I nonetheless find them inapplicable in this case.³

³ The defendant argues that the Maine Constitution may provide more protection than the Federal Constitution. *See Me. Const. art. I, § 4* (“Every citizen may freely speak, write and publish his sentiments on any subject, being responsible for the abuse of this liberty.”). The defendant, however, cites no cases holding that these words provide more protection than the First Amendment.

(continued...)

a. Public Figure

The defendant claims that, as limited-purpose public figures, the plaintiffs must prove actual malice. *See Curtis Publishing*, 388 U.S. at 164. Some individuals may achieve such “pervasive fame or notoriety” that they become public figures for all purposes. *Gertz*, 418 U.S. at 351. “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.” *Id.*

In *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980), the First Circuit established a framework for determining whether a plaintiff is a limited-purpose public figure. The controversy that gave rise to the alleged defamation must have been a public controversy that preceded the alleged defamation. *Id.* at 590-91. Furthermore, the plaintiff must have thrust himself into the controversy or engaged the public’s attention to influence its outcome. *Id.* at 591.

The summary judgment record reveals no public controversy, indeed no controversy at all, preceding the alleged defamation. Levinsky’s simply ran an ad comparing itself to Wal-Mart. If mere advertising were sufficient to create a public controversy, then nearly all businesses would be limited-purpose public figures. *See Golden Bear Distrib. Sys. of Texas, Inc. v. Chase Revel, Inc.*, 708 F.2d 944, 947, 952 (5th Cir. 1983) (mere advertising did not render plaintiff a public figure).

³ (...continued)

U.S. Const. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”). Although the Law Court has not decided the scope of art. I, § 4 in the defamation context, *see True*, 513 A.2d at 261 n.4, it has found art. I, § 4 and the First Amendment to be “equally applicable” in another context. *Solmitz v. Maine Sch. Admin. Dist. No. 59*, 495 A.2d 812, 816 n.2 (cancellation of symposium on tolerance did not violate plaintiffs’ rights under art. I, § 4 or First Amendment). I find no reason for the court to extend greater constitutional protection to defamation defendants under art. I, § 4 than under the First Amendment, particularly in light of the caveat that citizens must “be[] responsible for the abuse of this liberty.”

Some courts have recognized public controversies involving merchants, but only where there was an ongoing debate among consumers or the general public.⁴ In contrast, where consumers had negative experiences with the defendant's boats but there was no evidence of an ongoing controversy, the First Circuit held that there was no public controversy. *Bruno & Stillman*, 633 F.2d at 591. The First Circuit distinguished that situation from one where "persons actually were discussing some specific question . . . [and] a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution." *Id.* (quoting *Waldbaum*, 627 F.2d at 1297). This record discloses no evidence that Levinsky's was a topic of debate anywhere.

⁴ See *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1298-99 (D.C. Cir.) (public debate over supermarket's pathbreaking marketing policies and viability of cooperatives as form of commercial enterprise constituted public controversy), *cert. denied*, 449 U.S. 878 (1980); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 273-74 (3d Cir. 1980) (numerous complaints from consumers regarding quality of steaks and asserted misrepresentations by plaintiff constituted public controversy); *Quantum Elec. Corp. v. Consumers Union of United States, Inc.*, 881 F. Supp. 753, 765 (D.R.I. 1995) (expressions of concern by government, private entities and consumers on safety and efficacy of ozone-generating air purifiers constituted public controversy); *Bose Corp. v. Consumers Union of United States, Inc.*, 508 F. Supp. 1249, 1272-73 (independent reviews, precipitated by plaintiff, of plaintiff's unique speaker design constituted public controversy), *supplemented by* 529 F. Supp. 357 (D. Mass. 1981), *rev'd on other grounds*, 692 F.2d 189 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984).

b. Matter of Public Concern

The defendant further argues that, as private figures allegedly defamed on matters of public concern, the plaintiffs must prove that the statements were false. *See Philadelphia Newspapers*, 475 U.S. at 768-69 (newspaper articles alleging that plaintiffs used their links to organized crime to influence state governmental process constituted speech of public concern). “[W]hether . . . speech addresses a matter of public concern must be determined by [the expression’s] content, form, and context.” *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (plurality) (quoting *Connick v. Meyers*, 461 U.S. 138, 147-48 (1983)). The *Dun & Bradstreet* plurality held that statements in a credit report did not concern a public issue. *Id.* at 762. “There is simply no credible argument that this type of credit reporting requires special protection to ensure that ‘debate on public issues [will] be uninhibited, robust, and wide-open.’” *Id.* (quoting *New York Times*, 376 U.S. at 270).

Two allegedly defamatory statements survive at this point: the “telephone call” statement and the “trashy” statement. These statements do not address matters of public concern. One court has gone so far as to hold that a consumer product’s performance is a matter of public concern. *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1056 (9th Cir. 1990) (statement by Andy Rooney on *60 Minutes* that product did not work addressed matter of public concern), *cert. denied*, 499 U.S. 961 (1991). The telephone practices and appearance of Levinsky’s Portland store, however, are of far less import to the public than the performance of consumer products. Special protection of speech on these matters is not necessary to ensure uninhibited debate on public issues. *See Dun & Bradstreet*, 472 U.S. at 762.

5. Truth as an Affirmative Defense

The defendant bears the burden of proving truth as a defense. *Lester*, 596 A.2d at 69 n.5 (citing *Ramirez v. Rogers*, 540 A.2d 475, 477 (Me. 1988)). There is a factual dispute over the truth of Olson's statement that, when you call Levinsky's Portland store, "you are sometimes put on hold for 20 minutes or the phone is never picked up at all." Olson stated in his deposition that he was on hold for only ten minutes during his first call, and at least that long on his second call. Furthermore, Olson did not mention a call where the phone was never picked up at all. A rational fact finder could conclude that his statement was false.⁵

Similarly, there is a factual dispute over the truth of Olson's statement that Levinsky's Portland store was trashy. Although Olson claims he never referred to the Portland store, Olson Dep. at 58, a rational fact finder could conclude that he did. Since the defendant has presented no evidence of the condition of the Portland store, there is a failure of proof on this summary judgment record that the statement was true.

To recapitulate, I recommend that the defendant's summary judgment motion be granted on the defamation claim to the extent that claim rests on Olson's factual statements that Levinsky's ad contained inaccurate information and Levinsky's does not offer at a lower price products similar to those carried by Wal-Mart, and his opinion statement about where he and/or others should shop, and that it be denied to the extent the claim rests on the "telephone call" statement and the "trashy"

⁵ The defendant argues that "[t]ruth' will protect the defendant from liability even if the precise literal truth of the defamatory statement cannot be established. Slight inaccuracies are tolerated; the test is whether the statement is 'substantially true.'" S.J. Motion at 18 n.3 (quoting Smolla, *Law of Defamation* § 5.08 at 5-16 (1994)). The difference between ten and twenty minutes, in this context, is more than a slight inaccuracy.

statement.

B. Injurious Falsehood (Count II)

This court has recognized a Maine common-law cause of action for slander of title, a subcategory of the tort of injurious falsehood. *See Fischer v. Bar Harbor Banking & Trust Co.*, 673 F. Supp. 622, 625-26 (D. Me. 1987), *aff'd*, 857 F.2d 4 (1st Cir. 1988), *cert. denied*, 489 U.S. 1018 (1989). Here, as in *Fischer*, there is no Maine state decisional law on injurious falsehood, so I look to the law of other jurisdictions. The elements of this tort are set forth in the *Restatement (Second) of Torts* § 623A (1977) (adopted by *Falls v. Sporting News Publishing. Co.*, 834 F.2d 611, 617 (6th Cir. 1987)):

One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if

(a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and

(b) he knows that the statement is false or acts in reckless disregard of its truth or falsity.

Contrary to the defendant's argument, injurious falsehood does not require a showing of fraud or intimidation.⁶ *Id.*

Injurious falsehood, like defamation, requires a "statement." *Id.* As discussed above, only statements of fact are actionable in defamation. *Lester*, 596 A.2d at 71. The First Amendment justification for this limitation applies equally to injurious falsehood. *See Caron*, 470 A.2d at 784.

⁶ In its motion for summary judgment, the defendant does not raise the issues of whether the statements were false, whether Olson intended or should have expected their publication to harm the plaintiffs' pecuniary interests, or whether Olson acted with knowledge or reckless disregard of their falsity.

For the reasons discussed above, the plaintiffs may not base their claim for injurious falsehood on Olson's opinion that he would rather pay more to shop elsewhere than to shop in Levinsky's Portland store. *See Falls*, 834 F.2d at 617 (injurious falsehood plaintiff must prove that disclosed or undisclosed facts upon which defendant based his opinion were false); *Chernick v. Rothstein*, 612 N.Y.S.2d 77, 78 (N.Y. App. Div. 1994) (personal opinion and hyperbole, as opposed to objective fact, not actionable as injurious falsehood).

To be actionable as an injurious falsehood, a statement must harm a pecuniary interest. *Restatement (Second) of Torts* § 623A. As discussed above, the defendant's factual statements concerning inaccurate information and pricing were not capable of so harming Levinsky's reputation as to deter others from dealing with it. For that reason, they do not harm a pecuniary interest. The "telephone call" statement and the "trashy" statement, however, could harm the plaintiffs' pecuniary interest because they could deter others from dealing with Levinsky's.

Thus, I recommend that the defendant's summary judgment motion be granted on the injurious falsehood claim to the extent that claim rests on Olson's purely factual assertions regarding inaccurate information and pricing and his opinion about where he and/or others should shop, and that it be denied to the extent the claim rests on the "telephone call" statement and the "trashy" statement.

C. False Light (Count III)

The plaintiffs also assert a false light claim. False light, a subcategory of the tort of invasion of privacy, is defined as follows:

One who gives publicity to a matter concerning another that places the other before

the public in a false light is subject to liability to the other for invasion of his privacy, if

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Restatement (Second) of Torts § 652E (1977); *Nelson v. Maine Times*, 373 A.2d 1221, 1223 (Me. 1977). A corporation has no personal right of privacy. *Restatement (Second) of Torts* § 652I & cmt. c. Accordingly, I recommend that judgment be entered against the corporate plaintiff on the false light claim.

As discussed above, Olson’s statement that he would rather pay more than shop in Levinsky’s Portland store is an opinion that implies no undisclosed defamatory facts. It is essential to the false light claim that the matter published be false. *Id.* § 652E cmt. a. Since pure opinion cannot be proven false, *see Caron*, 470 A.2d at 784, this opinion is not actionable.

The plaintiffs must prove that the false light in which they were placed would be “highly offensive to a reasonable person,” *i.e.*, that a reasonable person “would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity.” *Restatement (Second) of Torts* § 652E cmt. c. As discussed above, the factual statements concerning inaccurate information and pricing impute to the plaintiffs neither dishonesty nor untrustworthiness. No rational fact finder could conclude that these statements placed the plaintiffs in a highly offensive false light. In contrast, the “telephone call” and “trashy” statements could be interpreted as highly offensive.

Publicity under § 652E differs from the publication element of a defamation claim. *Id.* §§ 652D cmt. a, § 652E cmt. a.⁷ One publicizes a matter by communicating it to the public at large

⁷ Section 652E, comment a, contains a typographical error. Although it claims to incorporate (continued...)

or to so many persons that it is substantially certain to become public knowledge. *Id.* § 652D cmt. a. Thus, a statement made to one person generally will not constitute publicity. *See id.* Yet, a rational fact finder could conclude Olson knew he was talking to a reporter, and that his statements were substantially certain to become public knowledge when Boardman published them.⁸ *Arroyo v. Rosen*, 648 A.2d 1074, 1081 (Md. Ct. Spec. App. 1994) (sufficient publicity to maintain invasion of privacy claim where defendant’s dissemination of information to general circulation newspaper reporter rendered it substantially certain to become public knowledge). Thus, whether the statements were publicized is a disputed factual issue.⁹

I reject the defendant’s argument that the privacy interests protected by the false light tort are not implicated here. The defendant bases its argument on the discussion of privacy in the commentary to section 652D, which imposes liability for highly offensive publicity given to the *private life* of another. In contrast, a false light claim “does not depend upon making public any facts concerning the private life of the individual.” *Restatement (Second) of Torts* § 652E cmt. a.

A jury could find that: (1) Olson said the Portland store was trashy, although he had never

⁷ (...continued)

the discussion of publicity found in § 652C, comment a, that comment has nothing to do with publicity. The drafters intended to incorporate § 652D, comment a, which discusses publicity.

⁸ Although one might question whether *BIZ* has sufficient circulation to “place[] the [plaintiffs] before the public in a false light,” *Restatement (Second) of Torts* § 652E, the defendant has not raised this argument.

⁹ Contrary to the defendant’s assertion, *Hawley v. Atlantic Cellular Tel. Corp.*, Civ. No. 93-362-P-H, 1994 WL 505029, at *4 (D. Me. Sept. 2, 1994), *aff’d*, 51 F.3d 264 (1st Cir. 1995) (table), does not compel a different result. In *Hawley*, this court stated in dicta that “[n]o Maine case supports [the plaintiff]’s argument that this defamation doctrine [of liability for republication] applies to the privacy tort.” *Id.* I do not incorporate liability for republication into the false light tort. I merely find that knowingly stating matters to a reporter renders them substantially certain of becoming public knowledge, and thus constitutes publicizing them under § 652E.

been in that store; (2) he was on hold for ten minutes the first time he called Levinsky's and at least as long the second time, but he said you are put on hold for twenty minutes when you call Levinsky's; and (3) Olson never placed a call to Levinsky's that went unanswered, yet he said sometimes the phone is never picked up at all. A rational jury could conclude that he made these statements with knowledge or reckless disregard of their falsity and the false light in which they would place the plaintiffs.

Accordingly, I recommend that the defendant's summary judgment motion be granted on the false light claim to the extent that claim rests on Olson's purely factual assertions regarding inaccurate information and pricing and his opinion about where he and/or others should shop, and that it be denied to the extent the claim rests on the "telephone call" statement and the "trashy" statement.

D. Deceptive Trade Practices (Count IV)

The defendant correctly argues that the Maine's Uniform Deceptive Trade Practices Act provides only injunctive relief.¹⁰ 10 M.R.S.A. § 1213; *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 629 F. Supp. 644, 647 (D. Me. 1986). The plaintiffs do not seek injunctive relief in their deceptive trade practices claim. Thus, I recommend that the defendant's motion for summary judgment be granted on the plaintiffs' claim under the Act.

The Act "does not affect unfair trade practices otherwise actionable at common law," 10 M.R.S.A. § 1212, and the relief provided under the Act "is in addition to remedies otherwise

¹⁰ Attorney fees may be available to the party who prevails on a claim for injunctive relief. 10 M.R.S.A. § 1213.

available against the same conduct under the common law,” *id.* § 1213. The plaintiffs also assert a common-law claim for a “deceptive or unfair” trade practice. However, they provide no authority holding that disparaging a business is actionable at common law as an unfair trade practice. The plaintiffs’ cited cases deal only with trademark and trade name infringement at common law. *W.R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co.*, 103 Me. 334, 336 (1907); *W.R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co.*, 100 Me. 461, 464 (1905). Accordingly, I recommend that the defendant’s motion for summary judgment be granted on the plaintiffs’ common-law claim for a deceptive or unfair trade practice.

E. Interference with Advantageous Economic Relations (Count V)

Although the Law Court recognizes an action for tortious interference with an *existing* employment or contract relationship, *MacKerron v. Madura*, 445 A.2d 680, 682 (Me. 1982), it has not yet recognized the broader tort of interference with the type of advantageous economic relations asserted here. Were it to extend the tort of interference to apply in these circumstances, the Law Court would require that the plaintiffs prove either fraud or intimidation by the defendant. *DiPietro v. Casco Northern Bank*, 490 A.2d 215, 218-19 (Me. 1985).

The Law Court has defined fraud as “any cunning, deception or artifice used to circumvent, cheat or deceive another,” *Dubie v. Branz*, 146 Me. 455, 460 (1950), and intimidation as “[u]nlawful coercion, extortion, duress, or putting in fear,” *State v. Janiszak*, 579 A.2d 736, 738 (Me. 1990) (quoting Black’s Law Dictionary 736 (5th ed. 1979)). Nothing in the summary judgment record supports the plaintiffs’ argument that the defendant attempted to intimidate potential customers from doing business with Levinsky’s, nor is there any hint that the defendant attempted to defraud

Levinsky's customers. Accordingly, I recommend that the defendant's motion for summary judgment be granted on the plaintiffs' claim for interference with advantageous economic relations.

F. Intentional Infliction of Emotional Distress (Count VI)

To recover for intentional infliction of emotional distress, the plaintiffs must prove that the defendant's conduct "was so 'extreme and outrageous' as to exceed 'all possible bounds of decency' and must be regarded as 'atrocious and utterly intolerable in a civilized community.'" *Vicnire v. Ford Motor Credit Co.*, 401 A.2d 148, 154 (Me. 1979) (quoting *Restatement (Second) of Torts* § 46 cmt. d (1965)). A consumer-oriented business cannot expect to be immune from criticism, even unfair criticism. The defendant's statements about Levinsky's fall far short of being "atrocious and utterly intolerable in a civilized community."

G. Negligent Infliction of Emotional Distress (Count VII)

Though Maine recognizes the tort of negligent infliction of emotional distress, the Law Court has characterized this tort as one of "severe" or "serious" emotional distress. *Gammon v. Osteopathic Hosp. of Maine, Inc.*, 534 A.2d 1282, 1284-86 & n.9 (Me. 1987). Serious mental distress occurs "where a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the event." *Id.* at 1285 n.8 (citation omitted). For example, in *Gammon*, the Law Court held that the plaintiff had a valid claim for negligent infliction of emotional distress based on his discovery that a hospital bag, represented to be the personal effects of his deceased father, actually contained a severed bloody leg. *Id.* at 1282-83.

Eric Levinsky has testified that the Levinsky family was “extremely saddened, distraught and distressed” by the article, and that they were upset at the prospect that the article might “push the store over the edge.” Other than these conclusory statements, the summary judgment record is devoid of any evidence indicating that any of the individual plaintiffs were unable to cope with the mental stress engendered by the publication of the *BIZ* article or, more to the point, that a reasonable, normally constituted person would be unable to cope with that stress. The plaintiffs’ statements themselves fall far short of the *Gammon* standard.

H. Punitive Damages (Count VIII)

Maine law permits punitive damages only if the defendant acted with malice. *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985). “Express” or “actual” malice exists where the defendant’s tortious conduct is motivated by ill will toward the plaintiff. *Id.* A jury could reasonably find that Olson had no idea what the Portland store looked like, and that he knew that, when you call, they do not put you on hold for twenty minutes or never pick up the phone. Yet, a jury could also find that he said the Portland store was trashy and when you call they put you on hold for twenty minutes or never pick up the phone. From these findings, a jury could reasonably conclude that his statements were motivated by ill will toward the plaintiffs.

Punitive damages, of course, are available only if the underlying conduct is tortious. *Id.* Because I have concluded that certain statements in issue are not actionable, I recommend that judgment be entered against the plaintiffs on their punitive damages claim to the extent that it rests upon these statements.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion for summary judgment be **GRANTED** in full as to Counts IV (deceptive trade practices), V (interference with advantageous economic relations), VI (intentional infliction of emotional distress) and VII (negligent infliction of emotional distress); **GRANTED** in full against the corporate plaintiff Levinsky's, Inc. on Count III (false light); **GRANTED** against the individual plaintiffs on count III (false light) and against all plaintiffs on Counts I (defamation), II (injurious falsehood), and VIII (punitive damages) insofar as those claims rest on Olson's factual statements concerning inaccurate information and pricing; and otherwise **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 16th day of January, 1996.

*David M. Cohen
United States Magistrate Judge*