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Colorado Court Grants Anti-SLAPP Motions of Media Defendants Sued for Reporting on Health Company Fallout With State

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On August 15, 2023, a trial judge in Arapahoe County, Colorado became the fourth state jurist to [dismiss libel claims](#) against media companies applying Colorado’s anti-SLAPP Act, § 13-20-1101, C.R.S., passed into law in 2019. Judge Ben Leutwyler ruled that all five publications at issue were immune from liability on alternative grounds of truth, privilege, rhetorical hyperbole, and lack of actual malice.

Background

The plaintiffs are a health services company, Jogan Health, LLC, and its CEO, Daniel Dietrich. Dietrich founded Jogan in January 2021, and just two months later he applied to the Colorado Department of Public Health and Environment (CDPHE) to provide COVID-19 vaccinations at hundreds of pop-up drive-through, and mobile (bus) sites across the state. Jogan was one of 18 vendors, chosen by CDPHE from 32 applicants, to provide the life-saving vaccines to the state’s residents. CDPHE, which renewed its contract with Jogan through June 30, 2022, paid that company \$72.3 million for these services.

Just months after Jogan began administering the vaccines, complaints began to emerge that the company was not timely paying its traveling nurses and other staffers, and that it had refused to reimburse company employees for travel-related expenses it had promised when it hired them.

The Reports at Issue

After being contacted by several disgruntled current and former Jogan employees, Bayan Wang, an investigative reporter (and part-time anchor) at Scripps-owned, ABC affiliate KMGH-TV (a/k/a “The Denver Channel”) prepared the first of four broadcast reports on the company. In the first KMGH report, which aired in January 2022, Wang displayed several emails and texts showing that company employees had not been paid, and that their mileage and hotel expenses were not being reimbursed as had been promised in their contracts. Prior to airing the first broadcast, Wang reached out to Jogan and Dietrich for comment but received no response.

KMGH’s second report on the company aired February 4, 2022. This report provided further documentation for the large number of Jogan employees who were owed wages and expense reimbursements. One former employee, who had worked in payroll/accounting for Jogan, stated that she had “over 100 emails [from] people who didn’t get paid appropriately.”

Wang’s third report on Jogan aired on KMGH on June 20, 2022 (ten days before Jogan’s contract with the state was set to expire). It focused on the fact that officials at CDPHE had not checked the three work history references Jogan had listed on its application to secure the vaccination contract. Jogan’s application had stated that it had extensive experience in mounting large-scale health delivery

programs in Florida, Texas and Louisiana. Wang sent emails to all three jurisdictions and quickly confirmed they had not had any previous relationship with, or even awareness of, Jogan. Thereafter, Wang confronted CDPHE about its failure to contact the only three references listed on Jogan's contract; on camera, a CDPHE official claimed he had contacted two of the three references, but shortly after the interview, CDPHE emailed Wang to correct the record: CDPHE had not contacted any of the three references listed on Jogan's application. That report also included the statement "Work was halted from Jogan Health amid growing concerns months before their contract was supposed to end in June."

In its fourth, and final, KMGH report that aired October 12, 2022, Wang covered the official published report by Colorado's Department of Labor and Employment which found that Jogan Health had engaged in systematic and willful violation of the state's labor and employment laws. The *Denver Post* newspaper, a media partner with KMGH, published a version of Wang's online version of the story.

Subsequently, Mike McKibbin, a freelance reporter for the online-only news outlet NewsBreak, published an article regarding Jogan's other contract with Douglas County, Colorado. That article, titled "DougCo extends contract with health company Colorado fired," largely focused on Jogan's contract with Douglas County, which the municipality stood behind despite the company's fallout with the state. The NewsBreak article repeated the gist of KMGH's reporting that CDPHE had suspended work with Jogan following employee complaints and other issues discovered in Wang's investigation.

The Lawsuit

In December 2022, Jogan and Dietrich filed a complaint naming Scripps Media, Bayan Wang, DP Media Network (the publisher of the *Denver Post*), Mike McKibbin, and Wang's four on-camera sources, for libel, intentional infliction of emotional distress, and tortious interference. Jogan also asserted a claim of trespass against Wang and KMGH for Wang's purportedly refusing to leave the lobby of the building in which it leased an office when he was asked to do so.

As the basis for its libel claim, Jogan claimed that its contract with CDPHE did not end prior to its termination date on June 30, 2022, that it had not misrepresented its work history on its application to CDPHE, and it did not fail to timely pay its employees or withhold expense reimbursements it promised them. Jogan also claimed McKibbin defamed the company by falsely stating CDPHE had "fired" the company following a series of complaints.

The Anti-SLAPP Motions

The so-called "Scripps Defendants" (Scripps Media, Wang, and the *Denver Post*), and McKibbin, separately, each filed special motions to dismiss the complaint pursuant to Colorado's Anti-SLAPP Act, § 13-20-1101(3)(a), C.R.S., which was adopted in 2019, almost verbatim from California's statute. The statute provides a mechanism for early dismissal of claims based on speech of public interest where the plaintiff cannot demonstrate a "reasonable likelihood" of prevailing and awards prevailing movants their attorneys' fees. (Before the briefing was completed on those two motions, Jogan voluntarily dismissed the four former Jogan employees who appeared on camera in Wang's reports.)

The Scripps Defendants' motion argued that all four broadcast reports on the company were substantially true, the fourth report (on the Department of Labor's findings) was entitled to the fair report privilege, and Plaintiffs could not demonstrate a reasonable likelihood that they could produce clear and convincing evidence of actual malice, as is required to prevail on a defamation claim based on statements of public concern in Colorado. McKibbin's motion argued his single article was substantially true, and Plaintiffs also could not demonstrate a reasonable likelihood of producing clear and convincing evidence of his actual malice.

Among the exhibits the Scripps Defendants tendered in support of their motion was an email to Wang from CDPHE, dated May 12, 2022, which declared that "we expect our vendors to operate in an ethical manner and to comply with local, state and federal laws. Our confidence in Jogan Health has eroded. We believe *our decision to stop assigning them work* was absolutely the right decision to make." (Emphasis added). Another exhibit was an email Wang had received directly from Jogan's corporate spokesperson, confirming that Jogan's contract with the state had "officially ended" on April 30, 2022, two months before the contract's termination date of June 30, 2022.

In response to the two motions, Jogan sought to conduct discovery into both sets of Defendants' reporting, through interrogatories, document requests, and "limited" depositions, in order to counter their claim that they lacked actual malice. The Scripps Defendants immediately withdrew their defense of lack of actual malice and asked to set the hearing on their motion within 28 days of its being filed, as the anti-SLAPP statute provides. McKibbin opposed Jogan's motion seeking "limited" discovery on grounds that it was contrary to the expedited resolution process set forth in Colorado's anti-SLAPP statute.

The judge denied Jogan's motion to conduct discovery with respect to either set of Defendants, and he set a briefing schedule and hearing on the two pending special motions to dismiss.

The Ruling

After both motions were fully briefed, and following oral argument, Judge Leutwyler issued his written ruling granting both sets of Defendants' motions to dismiss, in full, and awarding Defendants their attorney's fees and costs in an amount to be determined. (At oral argument, Jogan's counsel withdrew its claim for trespass, and he conceded that contrary to his prior claims, Wang and KMGH did not accuse Jogan of not having an electronic payroll system.)

With respect to the claims against the Scripps Defendants, the Court determined, based on the news reports and documents proffered, that all four of Wang's news reports on Jogan Health were substantially true: Jogan had failed to timely pay the wages and benefits it owed its employees (just as Colorado's Department of Labor and Employment had determined); the CDPHE did, in fact, stop sending any work to Jogan because its confidence in the company "ha[d] eroded;" and Jogan had falsely stated on its application to CDPHE that it had provided healthcare services in three jurisdictions in which it had no actual experience. The court also found that Wang's description of the complaints about Jogan as "flooding" the CDPHE was a form of rhetorical hyperbole and protected opinion.

With respect to Jogan's claims against McKibbin, the Court found the NewsBreak article's headline stating Jogan had been "fired" was substantially true, as the CDPHE did state it decided to stop assigning the company any work months before the expiration date of its contract. Plaintiffs also could not meet their burden of showing a "reasonable likelihood" of presenting clear and convincing evidence of his actual malice, because he relied on the reputable reporting of Wang and KMGH.

Prior to oral argument in the case, Bayan Wang's reports on Jogan Health, which aired on KMGH, was awarded a 2023 Heartland Emmy for Politics/Government coverage.

Jogan Health and its CEO have not yet announced whether they will appeal the trial court's ruling dismissing their case.

Steve Zansberg of The Law Office of Steven D. Zansberg, L.L.C. in Denver represented Scripps Media, Inc., Bayan Wang and DP Media Network, LLC. Mike McKibbin was represented by Robert Gutierrez and Greg Szewczyk of Ballard Spahr LLP in Los Angeles and Denver, and Lauren Russell of Ballard Spahr LLP in Washington, DC. Jogan Health, LLC and Daniel Dietrich were represented by Geoff Blue of Gessler Blue LLC in Greenwood Village, Colorado.