Judge Tosses Libel Suit Based on Environmental Activists' Facebook Post

By Steve Zansberg

On June 20, 2018, a Colorado state court trial judge granted summary judgment to defendant Pete Kolbenschlag in a libel case filed against him by a Texas oil and gas company (SG Interests, or "SGI") on grounds that Kolbenschlag's Facebook post - stating the company was "fined" for colluding with another company to rig bids on oil leases - was substantially true. SG Interests I Ltd v. Kolbenschlag.

Oil Company SLAPPS an Outspoken Critic

Kolbenschlag is a professional community organizer and environmental activist in Paonia, Colorado (pop. 1425) on Colorado's Western Slope. He posted his comment on the website of *Glenwood Springs Post Gazette* in response to a November 2016 news article reporting that the Bureau of Land Management had cancelled leases for oil exploration on BLM lands that had been let to SGI. The article quoted a spokesperson for SGI declaring that the company planned to sue BLM over the decision, citing "evidence of collusion between the Obama administration and environmental interests to reach a 'predetermined political decision.'"

Kolbenschlag's reader comment, posted below the news article, stated: "While SGI alleges 'collusion' let us recall that it, SGI was actually fined for colluding (with Gunnison Energy Corporation) to rig bid prices and rip off American taxpayers. Yes, these two companies owned by billionaires thought it appropriate to pad their portfolios at the expense of you and I and every other hard-working American."

SGI claimed Kolbenschlag's reader comment defamed the company by falsely insinuating that SGI had illegally rigged bids.

The reader comment quoted from a September 2012 press release of the U.S. Department of Justice's Anti-Trust Division, announcing the filing of its federal lawsuit against SGI and the other oil company for having "entered into a written agreement under which they agreed that only SGI would bid at the [BLM oil lease] auctions and then assign an interest in the acquired leases to GEC." The DOJ's press release confirmed, "As a result of the agreement between GEC and SGI, the United States received less revenue from the sale of the four leases than it would have had SGI and GEC competed at the auctions."

In its complaint, SGI claimed Kolbenschlag's reader comment defamed the company by falsely insinuating that SGI had illegally rigged bids, and that it had been found to have engaged in unlawful action for which it had been "fined." In truth, SGI said, it had voluntarily agreed to settle the DOJ's anti-trust case, paying $275,000 in civil damages and it had expressly denied any wrongdoing or liability.

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Activist Fights Back Against the SLAPP Action

As a professional public advocate, Kolbenschlag responded to the suit by launching a GoFundMe campaign (great video) to raise defense funds to fight the suit and to call attention to the SLAPP. That online campaign raised $24K in one week.

Keeping with this theme, Kolbenschlag's motion to dismiss began: "This lawsuit is a classic, textbook example of a 'SLAPP' action – the Plaintiff, a large Texas-based oil company, pleads a single libel claim against an outspoken critic of that company, in a transparent attempt to silence him, and other concerned citizens."

Colorado does not have an anti-SLAPP statute. However, the filing of a motion to dismiss under Rule 12 automatically bars any discovery, and if the motion is granted the defendant is legally entitled to an award of his/her attorney's fees. Kolbenschlag filed a motion to dismiss the single libel claim on alternative grounds that his challenged publication was substantially true (as shown by filed pleadings in the federal court anti-trust action, of which the court could take judicial notice), and, alternatively, inadequate pleading of actual malice (that is required in Colorado on any matter of public interest or concern).

Judge Steven Schultz declined to take judicial notice of the federal court pleadings, and instead converted the motion to one for summary judgment, setting an expedited briefing schedule for the parties to submit any additional evidence. In response, Kolbenschlag limited his motion exclusively to the issue of substantial truth (to avoid all actual malice discovery) and he did not submit any supplemental evidence, beyond the previously-filed federal court pleadings, as the grounds for his motion.

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Further demonstrating its transparent effort to harass Kolbenschlag, SGI sought leave to take his deposition, first on the withdrawn issue of actual malice, and then on the issue of substantial truth. The judge denied SGI's efforts to take discovery.

Truth May Hurt, But It Isn't Actionable

In a thorough, 21-page opinion, Judge Schultz granted Kolbenschlag's motion for summary judgement on grounds that his posting was substantially true.

Relying exclusively on the federal court pleadings on file in the DOJ's anti-trust case, judge Schultz determined that the U.S. government had proven, conclusively, that SGI and another oil company had, in fact, entered into a written agreement by which the two companies agreed, in secret, to submit joint bids at the BLM oil lease auction and to thereafter split 50/50 the revenues from such extraction. To maintain the false impression that they were competitors, each company sent its own representative to BLM's bid unsealing event.

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SGI obtained one lease through this fraudulent process for $2 per acre, the minimum permissible bid price. SGI's vice president conceded in an earlier deposition that the purpose of the joint bidding scheme was to save money by avoiding higher fees that would have resulted from competitive bidding. In rejecting the original settlement proposal from SGI and DOJ, the federal judge found the amount of monies SGI had agreed to pay was too small to have the "deterrence effect" necessary to dissuade others in the industry from engaging in such unlawful bid-rigging. Ultimately, SGI agreed to pay twice the original proposed settlement amount, which the federal judge approved.

Rejecting SGI's argument that labeling its settlement payment a "fine" was materially false, the court stated, "the term 'fine' is commonly defined as 'a sum imposed as punishment for an offense; or 'a forfeiture or penalty paid to an injured party in a civil action.' . . .The Court is aware that SGI settled the cases by paying a specific sum without admitting liability. That is a common practice for companies for a variety of reason. The Court just does not find that the distinction between paying a settlement and paying a fine is of sufficient difference to the average reader to support a defamation action on those grounds."

Moreover, the judge questioned SGI's motivation for suing Kolbenschlag for use of that term. The judge noted that five years earlier, when the government's anti-trust case against SGI was resolved, numerous press outlets, industry blogs, and law firm commentators had described SGI's payment as a fine, yet "the Plaintiff never brought any defamation actions against [any of] those entities."

Recognizing that Colorado law requires that a statement must be "materially false," not merely less than 100% accurate, to be actionable in libel, regardless of the means of communication, the court particularized its discussion to the facts of the case:

"The Court just does not find that the distinction between paying a settlement and paying a fine is of sufficient difference to the average reader to support a defamation action on those grounds."

> The Court would also note that the Plaintiff disregards the full context of the Defendant's statement. It was made in the comments section of a newspaper article. It was not part of any official publication, nor was it even subject to the same journalistic standards as the information in the article above [it]. It was a comment by a member of the public to other members of the public on the equivalent of a chat board about a matter of newsworthy interest. To hold it to the exacting standards that the Plaintiff is proposing would not only be unwarranted, but would be chilling to protected speech.

In addition, the Court ruled that Kolbenschlag's technical legal error in describing SGI's payment as a "fine" did not cause reasonable people to "think significantly less favorably about the plaintiff than they would if they knew the truth." Reviewing all the facts as set forth in the anti-trust action papers, the court concluded "the accurate facts in the federal actions are far

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more damaging to SGI's reputation than the vague commentary made by the Defendant in his newspaper posting."

Because SGI had failed to show, by the requisite clear and convincing evidence, that Kolbenschlag's posting was "materially false," the court granted his motion for summary judgment. The court again formerly denied SGI's motion seeking to take Kolbenschlag's deposition on the issue of material falsity, because he was not a competent witness to offer testimony about SGI's collusive agreement in 2005 or the 2012 U.S. DOJ anti-trust action.

Fees and Possible Appeal to Be Determined

Kolbenschlag will be filing a motion seeking an award of his attorney's fees under the "groundless, frivolous, or vexatious" discretionary standard, which will note that the court's ruling on his converted motion for summary judgment was premised exclusively on the exhibits he had filed in support of his motion to dismiss. SGI has not yet determined if it will appeal the trial court's ruling dismissing its libel suit.

Steve Zansberg, Ballard Spahr LLP, Denver, CO, represented Kolbenschlag. SGI was represented by William E. Zimsky of Abadie & Schill, PC, in Durango, CO.