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January 2023

Colorado Court of Appeals SLAPPs Dentist's Defamation Case Over Consumer Review

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PUBLISHED IN: [MediaLawLetter January 2023](#)

TOPICS: [Anti-SLAPP](#), [Defamation](#)

In one of the first appellate decisions interpreting and applying the state's new Anti-SLAPP law, the Colorado Court of Appeals reversed the trial court's denial of the defendant's Anti-SLAPP motion, dismissing an endodontist's defamation case against a former patient who posted negative reviews about her treatment, and ordering the trial court to award the patient her attorneys' fees. [Creekside Endodontics, LLC v. Sullivan](#), 2022 COA 145 (Colo. App. Dec. 22, 2022).

Background

Kathryn Sullivan visited Dr. Andrew Stubbs, an endodontist, at his practice Creekside Endodontics in July 2019 regarding severe pain in four teeth. Shortly thereafter, Dr. Stubbs performed root canal treatment on all four teeth.

In the following weeks, Ms. Sullivan experienced acute pain that she attributed to those teeth. When she asked Dr. Stubbs about this, he prescribed painkillers but told her his treatment was appropriate. One month after treatment, Dr. Stubbs saw Ms. Sullivan for a follow-up examination. He took a 3D x-ray and advised her that two of the teeth were overfilled, meaning the filling material extended beyond the root of the tooth, but that the overfills were within the normal limits and wouldn't be the cause of her pain. He told Ms. Sullivan she should see a neurologist because her pain was "atypical." After months of extensive email communications between them, Dr. Stubbs told Ms. Sullivan their relationship had become "adversarial" and he wouldn't see her as a patient anymore.

Patient wrote negative online reviews about her endodontist after she says he overfilled her root canals and "gaslighted" her.

Contemporaneously, and in an effort to find answers and relief from her pain, Ms. Sullivan sought opinions of other professionals both in person and online. One endodontist based in Mexico examined the x-rays of her teeth post-treatment and told her three of the four root canals were overfilled, and this could be the cause of her pain. Ms. Sullivan also posted her x-rays on a Facebook forum called "Denver Dental Peeps" where individuals Dr. Stubbs alleged were dental professionals opined that the root canals were within normal limits and couldn't be the cause of her pain. However, another dentist in Florida examined her in person and also advised three teeth were overfilled, there was a severe

infection, and she should have her teeth extracted. Finally, she visited another Florida dentist who advised her to have all four teeth extracted. This dentist extracted the most painful tooth, and Ms. Sullivan soon thereafter had the three other teeth and an adjacent tooth extracted.

As Ms. Sullivan learned more information from these professionals, she asked Dr. Stubbs for a refund of the money he had been paid by Medicaid so she could seek treatment elsewhere. After initially suggesting he would give her some sort of refund if she agreed to a nondisparagement agreement, he reneged. She then posted two negative one-star reviews about Dr. Stubbs and his practice on Yelp and Google Reviews, and posted a third after she had the most painful tooth extracted. She claimed that, according to other dental professionals, Dr. Stubbs had overfilled her root canals, which caused her severe pain. She also wrote that Dr. Stubbs had “gaslighted” her and “ignored her pain” and told her to see a neurologist. In two of these reviews she included x-rays of the treated teeth that she said demonstrated the overfill. And in the final review, she stated Dr. Stubbs gave her blank CDs rather than CDs containing her x-rays to cover up his mistakes, which was based on the fact that two dentists she consulted in person tried to view the x-rays on the CDs Dr. Stubbs had provided to Ms. Sullivan and couldn’t do so.

Procedural History

On September 23, 2020, Dr. Stubbs and Creekside Endodontics sued Ms. Sullivan for defamation and product and trade disparagement over the negative reviews. Ms. Sullivan filed a special motion to dismiss under Colorado’s Anti-SLAPP statute, § 13-20-1101(3)(a), C.R.S., which is modeled after the California Anti-SLAPP statute and provides a mechanism for early dismissal of claims based on speech of public interest where the plaintiff cannot demonstrate a “reasonable likelihood” of prevailing.

Ms. Sullivan moved for dismissal on two grounds—that the reviews were Ms. Sullivan’s constitutionally protected opinions and that the plaintiffs failed to plead actual malice, which applies to all defamation claims arising from statements on matters of public concern in Colorado. Plaintiffs countered they could not allege all supportive actual malice facts without violating HIPAA. The trial court, after a Zoom hearing, determined the Anti-SLAPP statute applied, denied the Anti-SLAPP motion on both grounds Ms. Sullivan had asserted, but then granted her alternative motion to dismiss made under Rule 12(b)(6) for plaintiffs’ failure to plead actual malice. The court granted plaintiffs leave to amend the complaint to bolster their pleadings with HIPAA-protected details about Ms. Sullivan’s treatment on the ground that Ms. Sullivan had waived her HIPAA rights in defending against the lawsuit.

Patient loses two Anti-SLAPP motions in the district court.

Plaintiffs filed an amended complaint and Ms. Sullivan filed another Anti-SLAPP motion arguing that plaintiffs could not meet their actual malice burden as a matter of law, some of the statements were substantially true, and the remaining statements at issue were nonactionable statements of opinion. In support of her motion, Ms. Sullivan submitted declarations by three dental professionals—the Mexican endodontist who examined her x-rays, the first Florida dentist who advised of the overfills, and a Colorado endodontist who provided his professional opinion that the teeth were overfilled. She also submitted dental records from Dr. Stubbs as well as the dental professionals who extracted her teeth, and her own extensive declaration that included an explanation of the investigation she undertook. For his part, Dr. Stubbs submitted his own affidavit, email exchanges in which he tells Ms. Sullivan he treated her correctly, and an affidavit by a dental assistant who stated she assisted Dr. Stubbs in treating Ms. Sullivan.

After another Zoom hearing, the trial court again denied Ms. Sullivan’s Anti-SLAPP motion. The judge accepted that the statements were of public interest and the Anti-SLAPP statute applied, but determined the plaintiffs met their burden of demonstrating a reasonable likelihood of prevailing. The trial court declined to take into account the “clear and convincing” evidentiary standard that applies to actual malice at summary judgment and at trial and determined the Facebook posts and Dr.

Stubbs' emails with Ms. Sullivan were enough for the lawsuit to proceed. The court also determined Ms. Sullivan's reviews were intended to be taken as statements of fact, pointing specifically to the blank CD statement.

Court of Appeals Decision

Ms. Sullivan appealed on grounds that (1) the trial court erred in not taking plaintiffs' clear and convincing evidentiary burden into account in ruling on Ms. Sullivan's Anti-SLAPP motion, (2) given the evidence submitted, plaintiffs did not demonstrate a reasonable likelihood of producing clear and convincing evidence that Ms. Sullivan posted her reviews with actual malice, and (3) many statements within the reviews were protected statements of opinion.

On December 22, 2022, a three-judge panel in the Court of Appeals issued its opinion ruling that the trial court erred in denying Ms. Sullivan's Anti-SLAPP motion and ordering the trial court to award Ms. Sullivan her legal fees and costs, which is mandatory when an Anti-SLAPP movant prevails, on remand. In addressing the actual malice burden, the Court looked to *L.S.S. v. S.A.P.*, 2022 COA 123, a decision it issued just weeks before, holding that where the Anti-SLAPP statute applies, "a plaintiff must establish a probability"—which is the language used in the California Anti-SLAPP statute that the Court of Appeals determined was synonymous with "reasonable likelihood" in the Colorado law—"that they will be able to produce clear and convincing evidence of actual malice at trial."

A win for online review speech made without actual malice.

The court categorized the statements in the reviews as (1) "concern[ing] Dr. Stubbs' alleged overfilling (e.g., he overfilled the canals, this caused her pain, etc.)" and (2) "concern[ing] his reaction to her complaints (e.g., he ignored her pain, he 'gaslighted' her, etc.)."

For statements regarding the dental work performed, the Court of Appeals found the record demonstrated "three dentists told Sullivan the overfilling could be the cause of her pain, and she based her statements on these professional opinions." The Court overruled the trial court's determination that the contradictory Facebook comments by other professionals could meet plaintiffs' actual malice burden; rather, they were "but one small part of a two-month-long investigation," and Ms. Sullivan "chose to believe the opinions of three dentists — two of whom examined her in person — with credentials she trusted, rather than the Dental Peeps commenters who opined, based on screenshots of the images, that Dr. Stubbs' work appeared normal." Dr. Stubbs' insistence that the overfilling was not causing her pain was also not evidence that she entertained serious doubts about her statements, for "Sullivan was not required to take Dr. Stubbs' professional opinion as conclusive fact over those of three other dentists she consulted." Ms. Sullivan's "ill will" toward Dr. Stubbs, particularly after he refused to provide a refund, also did not meet the actual malice burden.

The Court concluded the remaining statements that Dr. Stubbs "ignored her pain" were Ms. Sullivan's opinion based on disclosed facts within the reviews "(1) that other dentists told Sullivan her teeth were overfilled and causing her pain; (2) that [Dr. Stubbs] suggested she see a neurologist rather than provide further treatment of the subject teeth; (3) that she took two additional CBCT scans because the other dentists could not view the ones on Dr. Stubbs' CD; (4) that he terminated their relationship; and (5) the images themselves."

One judge specially concurred, stating that although plaintiffs did not argue on appeal that the statements were not of public concern, he viewed the reviews as a private consumer dispute, and he would have held the actual malice standard did not apply had the issue been preserved. He also questioned whether this should differ from the "public interest" test for application of the Anti-SLAPP statute.

Ashley I. Kissinger of Ballard Spahr LLP's Denver, Colorado office and Lauren Russell of Ballard Spahr LLP's Washington, D.C. office represented Kathryn Sullivan. Weston Cole, currently of Gelman Law LLC, in Greenwood Village, Colorado, and Douglas Norberg and Dani Wilson, currently of Alchemy Law Firm, LLC in Denver, Colorado, represented Dr. Stubbs and Creekside Endodontics LLC.

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