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Colorado Court of Appeals Tees Up Anti-SLAPP Procedural Issue for State Supreme Court

In a pair of recent anti-SLAPP decisions, the Colorado Court of Appeals highlighted a procedural quandary the state Supreme Court will likely need to step in to resolve. Readers may know that about six years ago, Colorado adopted an anti-SLAPP statute, which is designed to curb so-called "strategic litigation against public participation." Colorado's anti-SLAPP statute attempts to balance people's constitutional rights to petition, speak, associate, and otherwise participate in government with the rights of plaintiffs to bring meritorious lawsuits. To accomplish this goal, the anti-SLAPP statute permits a defendant to file a special motion to dismiss at the start of the case.

This special motion to dismiss differs from a standard motion to dismiss. In resolving an anti-SLAPP motion to dismiss, courts first decide whether the anti-SLAPP statute is implicated. For the anti-SLAPP statute to apply, the claim must arise from an act "in furtherance of the [defendant's] right of petition or free speech . . . in connection with a public issue." If the claim does arise from such an act, courts must then decide whether the plaintiff has established a "reasonable likelihood of prevailing on the claim."

It is at this second stage where the two recent Court of Appeals decisions – *Coomer v. Salem Media of Colorado* (a case involving allegations of defamation stemming from the 2020 election) and *Jogan Health v. Scipps Media* – leave an open question for the Colorado Supreme Court to step in and decide how, exactly, courts are to make this determination. Although both cases were decided unanimously, both had special concurrences highlighting this procedural issue.

All judges in both cases agree that, in responding to a special anti-SLAPP motion to dismiss, a plaintiff must "present evidence establishing a likelihood of success" and cannot merely rest on the factual allegations in the complaint. The concurring judges in each opinion, however, diverged from the two majorities at the next point. The majorities in each case determined that although courts do not accept the complaint's allegations as true in evaluating an anti-SLAPP motion to dismiss, they "*must* accept" the plaintiff's "*evidence* as true." The majority opinions went further and noted that courts do not make "factual findings, make credibility determinations, or weigh the evidence to resolve factual conflicts" when deciding an anti-SLAPP motion to dismiss. The majorities also emphasized that a plaintiff need not prove his case in response to an anti-SLAPP motion to dismiss; he need only make a *prima facie* showing "of evidence that – if later presented at trial – is reasonably likely to sustain a favorable judgment."

Although the concurring judges in each of *Coomer* and *Jogan Health* agreed on the ultimate outcome of the cases, they did not necessarily agree with the majorities' conclusions about the procedure for resolving anti-SLAPP motions to dismiss.

Judge Tow concurred in *Coomer* while retired Judge Berger, sitting by assignment of the Chief Justice, concurred in *Jogan Health*. Both Judges Tow and Berger focused on a conflict caused by two prior Court of Appeals decisions on this issue – *L.S.S. v S.A.P.* and *Salazar v. Public Trust Institute*. Although this conflict is about three years old, the Colorado Supreme Court has not yet resolved it. So, Judges Tow and Berger each separately wrote to highlight this split of authority. Judges Tow and Berger would both follow *Salazar*, while the majorities in each case follow *L.S.S.*

For his part, Judge Tow highlighted what he views as an irreconcilable inconsistency between *Salazar* and *L.S.S. Salazar*, which was decided first, held that a court ruling on a special motion to dismiss must "assess whether the allegations and defenses are such that it is reasonably likely that a jury would find for the plaintiff." *L.S.S.*, however, held that the court must accept the "plaintiff's evidence as true" and "evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as matter of law." As Judge Tow put it, *Salazar* does not require a court to accept as true the plaintiff's evidence, while *L.S.S.* does. Judge Tow believes that *Salazar* is the correct decision on this point.

To buttress this point, Judge Tow first looked to the language of the anti-SLAPP statute. As Judge Tow pointed out, the statute puts the burden on the plaintiff to establish a reasonable likelihood that he will prevail. *L.S.S.*, according to Judge Tow, does not follow this command and instead puts the burden on the defendant to show the plaintiff "cannot possibly prevail."

Judge Tow next asserts that *L.S.S.* and the majority in *Coomer* make the anti-SLAPP statute a redundancy. If a court, in ruling on an anti-SLAPP motion to dismiss, must accept the plaintiff's evidence as true, in Judge Tow's view, this essentially reduces such a motion to an ordinary motion to dismiss. That is, if a defendant can show "as a matter of law" that the plaintiff cannot prevail even if his evidence is assumed to be true, the defendant could already obtain dismissal without the anti-SLAPP statute.

Third, Judge Tow asserted that the anti-SLAPP statute's prohibition against using a preliminary finding by the trial judge that the plaintiff has established a reasonable likelihood of success as evidence at trial is rendered a nullity if the court cannot weigh the evidence.

Fourth, Judge Tow believes that the *L.S.S.* standard makes it too easy for plaintiffs to fend off an anti-SLAPP motion. According to Judge Tow, because a trial judge must accept the plaintiff's evidence as true, all the plaintiff need do is submit his affidavit that states that he denies the things the defendant has (in a defamatory way) accused him of.

Finally, Judge Tow pointed out differences between Colorado's anti-SLAPP statute and California's (Colorado's statute is patterned after California's, but not identical). And even if the statutes were the same, Judge Tow would not follow California precedent "in lockstep."

And in his concurrence in *Jogan Health*, retired Judge Berger raised many of the same points in arguing that *Salazar*, and not *L.S.S.*, sets out the right framework.

Given this recent split in authority, and the powerful concurrences from Judges Tow and Berger, it appears likely that the Colorado Supreme Court will step in to resolve the apparent conflicts between *Salazar* and *L.S.S.* Like the U.S. Supreme Court, the Colorado Supreme Court often takes cases to decide questions on which lower courts have split. It would not be surprising if it did so here.

For what it is worth, Judges Tow and Berger seem to have the better of the argument. *Salazar* hues closer to the text, purpose, and intent of the anti-SLAPP statute than does *L.S.S.* Advocacy organizations and interest groups should strongly consider submitting amicus briefs when petitions for writs of certiorari are filed in *Coomer* and *Jogan Health*. Although this may seem a technical procedural issue, a decision from the Colorado Supreme Court will establish the rule going forward for all cases and will have a significant impact on how effective anti-SLAPP motions can be.

This blog post was drafted by Jacob Hollars, a partner in the Spencer Fane Denver office. For more information visit spencerfane.com.

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