

Law Court Again Faces “Tortured” anti-SLAPP Jurisprudence

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The Law Court — in the words of Chief Justice Valerie Stanfill — took another “wrong turn” in the “tortured evolution” of its anti-SLAPP jurisprudence recently when a majority of the court decided to stick with a definition of “actual injury” (for anti-SLAPP purposes) that differs from the common law definition in defamation cases. The Chief Justice, in a rare *dubitante* opinion, invited the Legislature “to revisit the anti-SLAPP statute in light of legal developments in Maine and other states since it was enacted.” A *dubitante* opinion is sometimes issued by a judge when the “judge considers himself or herself to be constrained or bound by precedent, but wishes to suggest an alternative view.”

In *Weinstein v. Old Orchard Beach Family Dentistry, LLC*, attorney Neal Weinstein sued a dental practice after its owner filed a complaint with the Board of Bar Overseers regarding his conduct in making a complaint to the dental board. Weinstein sued the owner and the practice for, among other things, defamation. Defendant brought a special motion to dismiss under Maine’s anti-SLAPP statute, arguing that the suit was filed to discourage defendant’s right to petition under the Maine and U.S. Constitution. The Superior Court granted the motion to dismiss and Weinstein appealed.

A majority of the Law Court, in an opinion authored by Justice Gorman, upheld the Superior Court’s decision. The Court explained that, although it had recently “refashioned” the multi-step procedure that a court must undertake when evaluating a special motion to dismiss, this appeal concerned the second step, which requires to plaintiff to demonstrate that defendant’s statements caused “actual injury.” The Court noted that “the only form of injury that Weinstein both referenced in his complaint and provided evidence about in his affidavit opposing the special motion to dismiss was injury in the form of embarrassment, shame, humiliation, emotional distress, and harm to his reputation.”

Under anti-SLAPP precedent, the Court held that “emotional injury” is not “actual injury” unless it is “so severe that no reasonable person could be expected to endure it.” Additionally, even though the common law rule provides that harm to reputation is actionable *per se* without proof of damages, an anti-SLAPP plaintiff must demonstrate specific damages. Weinstein had not carried his burden by presenting sufficient information about either of these injuries.

Justice Jabar, in a dissent joined by Justice Humphrey, argued the Court had gone astray when it diverged from the common law definition of “actual injury” for anti-SLAPP purposes in *Maietta Construction, Inc. v. Wainwright*, a 2004 opinion. The dissent opined that the definition adopted in *Maietta* is too narrow and results in the dismissal of meritorious cases.

The dissent would have instead overruled *Maietta* and adopted the common law definition of “actual injury” in anti-SLAPP cases. In arguing that *stare decisis* was not an absolute barrier to taking a new approach, the dissent noted that the Court has “a tortured history ... in dealing with many aspects of this statute.”

The Chief Justice wrote that she agreed with the majority that the case law interpreting the anti-SLAPP statute compelled the result the majority reached, but also agreed with the dissent that the court had “taken a wrong turn in defining ‘actual injury’ as used in § 556, with the result that meritorious cases are dismissed.” She differed from the dissent; however, “because the doctrine of *stare decisis* cautions that the fact that a case was wrongly decided may be insufficient justification to overrule it.” Instead, she invited “the Legislature to revisit the anti-SLAPP statute in light of legal developments in Maine and other states since it was enacted.”

Janna L. Gau and Alfred J. Falzone, III, of Eaton Peabody in Bangor and Portland represents Old Orchard Beach Family Dentistry and Marina Narowetz. Attorney Gau stated that “We were obviously pleased with the result and believe it was the correct one.” She stated that, “the majority correctly applied the statute. It is important to note that Maine’s anti-SLAPP statute provides procedural safeguards for plaintiffs who assert defamation-based claims that arise out of the defendant’s exercise of the defendant’s right of petition under the Constitution of the United States or the Constitution of Maine, of which Mr. Weinstein did not take advantage. So, while the dissent is upset with the statute, it is my opinion the frustration should be with the plaintiff’s failure to either: 1) seek an amendment to the complaint; or 2) request certain discovery be conducted as allowed by the statute. Mr. Weinstein did not avail himself of these opportunities. Maine’s anti-SLAPP statute serves an important purpose and, in this case, was correctly applied.”

Attorney Neal L. Weinstein of Old Orchard Beach represents himself in the case and did not return a request for comment before deadline.

The opinion in *Weinstein v. Old Orchard Beach Family Dentistry, LLC*, MLR #129-22, is summarized at page 3.



Janna Gau



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