

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO 7325 S. Potomac Street Centennial, CO 80112	DATE FILED: August 15, 2023 4:06 PM CASE NUMBER: 2022CV32372
Plaintiffs: JOGAN HEALTH, LLC, DANIEL DIETRICH v. Defendants: SCRIPPS MEDIA, INC. d/b/a KMGH-TV, BAYAN WANG, DP MEDIA NETWORK, LLC, MIKE MCKIBBIN	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> Case No. 2022CV32372 Div. 15
ORDER REGARDING SPECIAL MOTIONS TO DISMISS	

Before the Court is the Special Motion to Dismiss the Complaint, or, in the alternative, to dismiss for failure to state a claim ("Motion"), filed by Defendants Scripps Media, Inc., Bayan Wang, and DP Media Network, LLC (collectively, "the Scripps Defendants"), and the substantially similar motion from Defendant Mike McKibbin ("McKibbin"). The Court, having considered the Complaint and all filings related to the issues presented, and after a hearing held on August 7, 2023, hereby GRANTS the motions.

BACKGROUND

Plaintiff Jogan Health, L.L.C. and its owner, Daniel Dietrich (collectively, "Jogan") sought and obtained state contracts worth many millions of dollars for providing testing and vaccination services related to the COVID-19 pandemic. The Scripps Defendants engaged in investigative reporting related to the Colorado Department of Public Health and Environment's ("CDPHE") awarding of the contract to Jogan, Jogan's performance under the contract, and Jogan's handling of certain wage issues with its employees. McKibbin reported separately on the award of a similar contract by Douglas County to Jogan in light of the issues experienced by CDPHE. Jogan filed

their Complaint alleging against some or all of the Scripps Defendants: defamation, intentional infliction of emotional distress, interference with business relationships, trespass, and injunctive relief, and against McKibbin: defamation and injunctive relief. Defendants brought their Special Motions to Dismiss pursuant to Colorado's anti-SLAPP statute, C.R.S. section 13-20-1101. The briefing of the issues has been presented through the Motions, Jogan's Response, Defendants' Replies, and Jogan's surreply. The Court has reviewed and considered each of these filings and their respective exhibits. During the hearing held on August 7, 2023, Jogan presented three additional exhibits. The Court finds that those exhibits were not timely presented and the Court has not considered them.

APPLICABLE LAW

The general assembly enacted the anti-SLAPP statute to "encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, to protect the rights of persons to file meritorious lawsuits for demonstrable injury." § 13-20-1101(1)(b), C.R.S.

Under this statute a lawsuit arising from any act in furtherance of the person's right of petition or free speech in connection with a public issue is subject to a special motion to dismiss unless the plaintiff establishes there is a reasonable likelihood he will prevail on his claims. *See*, § 13-20-1101(3)(a), C.R.S.

The statute establishes a two-step process for considering a special motion to dismiss. First, the court determines "whether the defendant has made a threshold showing that the conduct underlying the plaintiff's claim falls within the scope of the anti-SLAPP statute—that is, that the claim arises from an act in furtherance of the [defendant's] right of petition or free speech...in connection with a public issue." *L.S.S. v. S.A.P.*, 2022 COA 123, ¶ 21. Here, the parties agree that the first prong has been met.

Once the first step has been met the burden shifts to the plaintiff to establish a reasonable likelihood of prevailing. *L.S.S.*, ¶ 22. At this step "the court does not weigh the evidence or resolve conflicting claims, but simply accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law." *Id.* at ¶ 23 (internal quotes and citation omitted).

Defamation

The elements of defamation are "1) a defamatory statement concerning another; 2) published to a third party; 3) with fault amounting to at least negligence on the part of the publisher; and 4) either actionability of the statement irrespective of special damages or the existence of special damages to the plaintiff caused by the publication." *L.S.S.*, ¶ 35 (quoting *McIntyre v. Jones*, 194 P.3d 519, 523-524 (Colo. App. 2008)).

When the statement concerns a public figure or a matter of public concern, it is subject to heightened standards. *Id.*, ¶ 36. In such circumstances, the plaintiff must prove both the falsity of the statement, and that the speaker published the statements with actual malice, by clear and convincing evidence. *Id.* The Scripps Defendants have withdrawn their defense of actual malice for purposes of this Motion; McKibbin has not.

The reporting at issue here involved the manner in which a state agency, CDPHE, awarded a multi-million dollar contract to Jogan for the provision of medical services related to the COVID-19 pandemic, Jogan's performance under the contract, and Jogan's treatment of its employees. The issues clearly involve matters of public concern. Therefore, the heightened standard must be applied in this case.

1. Publications Related to Jogan's Bid for Contract

Jogan claims that the Scripps Defendants, and Defendant Wang specifically, defamed Jogan when they published an article on June 22, 2022 [Complaint, Ex. 3] in which "Wang declared that

Jogan lied on its application when it identified work done by its subcontractor, Safety Management Systems, LLC, as references for CDPHE", Complaint, ¶ 86, and that "Wang published the claim that "...Dan Dietrich and his Jogan Health, LLC did not have the experience it claimed in its application.'" Complaint, ¶ 92. The specific statement at issue is:

It took Denver7 Investigates just three emails to the entities Jogan Health claimed to have done work for to figure out Dan Dietrich and his Jogan Health, LLC did not have the experience it claimed in its application. CDPHE still insists it did extensive vetting of Jogan Health before handing over \$72 million of Coloradans' tax dollars.

Complaint, ¶ 92.

Jogan Health, LLC was formed in January, 2021. Response, Ex. D, Dietrich Decl. at ¶ 4. Jogan's bid for the CDPHE contract is dated March 3, 2021, no more than two months after Jogan's formation. In its bid Jogan made multiple references to its work on significant projects in other parts of the country. For instance, Jogan stated:

- Our Clinical Services Division is based on the US Gulf Coast, is part of one of the largest privately held ambulance companies in the US and has 40+ years of experience;
- [o]ver the last year we've been a major provider of staff and expertise to numerous government agencies like the Louisiana, Florida, and Harris County (TX) Departments of Health;
- in early March 2020, we were contracted to construct, supply, and staff a 150-bed field hospital in Ft. Lauderdale, FL;
- [i]n April 2020 we were asked to provide medical personnel and project management service for five of the city's COVID-19 community testing sites; and,
- [i]n June of 2020, we were contracted by the Louisiana Department of Health to provide congregate facility and strike team COVID-19 test administration services in LDH regions 2-5.

Motion, Ex. 2, pp 4-5.

The quoted statements are clearly at odds with the fact that Jogan was formed only two months prior to the time it claims to have many years of experience. A fair reading of Jogan's bid leads to the conclusion that Jogan itself was awarded contracts

with the three different entities named in the bid. In support of their Motion the Scripps Defendants have provided emails between Defendant Wang and representatives of those entities wherein each entity confirmed either that they never worked with Jogan Health, LLC or that they have no record of any contract with Jogan Health, LLC. Plaintiffs assert that they did not hide anything because SMS was shown to be the project manager on the projects listed in the bid. Further, they argue, because Jogan didn't exist when the clinical experience was gained, it was clear that Jogan was relying on SMS's experience and that Jogan was not attempting to conceal anything. However, the Court finds important the fact that the bid does not make any mention of the fact that Jogan had been in existence for only two months, and that Jogan repeatedly and throughout the bid simply refers to *its* divisions' experience and history. Such statements clearly imply that Jogan itself had the experience represented, a fact that is patently untrue. Also, nowhere within the bid does Jogan state that SMS, or any other contractor, will be Jogan's partner on this proposal. The Court finds that Plaintiffs' arguments do not provide a reasonable likelihood, based on clear and convincing evidence, of establishing that Defendants' published statements questioning Jogan's experience relative to its bid for the CDPHE contract were false. The Scripps Defendants' special motion to dismiss this claim is GRANTED.

2. Publications Related to Wage Complaints

Jogan claims that multiple statements made by the Scripps Defendants on three separate dates defamed them by falsely stating that employees were not being paid by Jogan.

On December 23, 2021, the Scripps Defendants published an article that included statements from a nurse working for Jogan who claimed, *inter alia*, that she was owed

approximately \$4,000 from Jogan. Complaint, ¶¶ 45-49. On February 4, 2022, the Scripps Defendants published another article in which they reported that a former Jogan employee claimed that "a lot of people aren't getting paid", Complaint, ¶ 58-59, 62, 71; that "[Jogan] started taking away things that they promised us in our contracts...", Complaint, ¶ 74; and, that "Dietrich admitted that paying for expenses was a problem." Complaint, ¶ 77. On October 14, 2022, the Scripps Defendants published an article in which they reported that "Jogan Health intentionally falsified wage records and willfully violated wage law, state investigation reveals". Complaint, ¶ 101, 105.

The Scripps Defendants assert that the "fair report" privilege is a defense to Plaintiffs' claims and warrant dismissal of the action. Motion, p. 11-13. "[U]nder the common law doctrine of fair report, reports of in-court proceedings containing defamatory material are privileged if they are fair and substantially correct, or are substantially accurate accounts of what took place." *Tonnessen v. Denver Pub. Co.*, 5 P.3d 959, 964 (Colo. App. 2000).

Exhibit 13 of the Scripps Defendants' Motion is a citation from the Colorado Department of Labor and Employment ("CDLE"). The document describes a wage claim made against Jogan, and CDLE's determination that Jogan willfully failed to pay the employee within 14 days of a valid written demand for wages. Motion, Ex. 13, p. 1. Although the fair report privilege was initially applied only to reports of judicial proceedings, it has now been recognized to apply in many more circumstances. *See, Wilson v. Meyer*, 126 P.3d 276, 279-280 (Colo. App. 2005) ("We agree with these courts that the fair report doctrine protects media reports of defamatory statements made in other public proceedings.) The Court finds that media reporting of findings of a Colorado governmental agency is covered by the fair report doctrine, and that publication of this information was privileged.

Even if the fair report doctrine did not apply, certainly the substantial truth of the matter

reported precludes Plaintiffs' claims. "A defendant asserting truth as a defense in a libel action is not required to justify every word of the alleged defamatory matter; it is sufficient if the substance, the gist, the sting, of the matter is true. The question, a factual one, is whether there is a substantial difference between the allegedly libelous statement and the truth; or stated differently whether the statement produces a different effect upon the reader than that which would be produced by the literal truth of the matter." *Gomba v. McLaughlin*, 504 P.2d 337, 339 (Colo. 1972).

The Scripps Defendants have provided exhibits upon which their report was based. These exhibits include emails from employees to Jogan regarding payroll problems, and emails from Dietrich acknowledging that problems with reimbursements and payroll existed. *See*, Motion, Ex. 6, 8 and 5, 10, respectively. These exhibits, and the fact that CDLE found that Jogan willfully violated Colorado labor and wage laws, establish the substantial truth of the matter reported. Because the Court finds that the reports substantially reported the truth regarding payroll issues, the Court also finds that Plaintiffs have not established a reasonable likelihood, based on clear and convincing evidence, of establishing that Defendant's statements related to the payroll issues were false. Therefore, the Scripps Defendants' special motion to dismiss this claim is GRANTED.

3. Publications Related to the Termination of Jogan's Contract

Plaintiffs' claims on this issue arise from two articles the Scripps Defendants published. The first was published on June 20, 2022, which Plaintiffs claim "improperly stated and implied that CDPHE had terminated Jogan's contract because Jogan had improperly performed the work." Complaint, ¶ 81. The Court's review of the article, which is attached to the Complaint as Exhibit 3, fails to yield the implication that Plaintiffs assert.

The article begins by asserting that CDPHE awarded the contract to Jogan without conducting a sufficient background investigation. The article then describes payroll issues and how money was spent by Jogan Health and other Dietrich entities before mentioning that CDPHE

"cut off the company from all new work as complaints flooded their offices." Complaint, Ex. 3. As set forth in their Complaint, the Response to the Motions, and in the August 7, 2023 hearing, Plaintiffs find the characterization of a *flood* of complaints particularly egregious and defamatory.

In support of their argument Plaintiffs have provided an email from CDPHE to Defendant Wang stating that it had received only 13 complaints involving Jogan during the first 9 months of the contract. Sur-Reply, Ex. D. Thus, Plaintiffs argue, the characterization of a flood of complaints "is such a dramatic over-statement that it constitutes defamation." Response, p. 20. To succeed on their defamation claim for the report that "complaints flooded [CDPHE]" Plaintiffs must establish by clear and convincing evidence that the substance or gist of the defamatory statement was false at the time it was published. *See*, C.J.I. Civ. 22:1. "A defendant asserting truth as a defense in a libel action is not required to justify every word of the alleged defamatory matter; it is sufficient if the substance, the gist, the sting, of the matter is true [] or stated differently whether the statement produces a different effect upon the reader than that which would be produced by the literal truth of the matter." *Gomba v. McLaughlin*, 504 P.2d 337, 339 (Colo. 1972) (internal cites omitted).

There is no specific number of complaints below which the court can state that the term *flooded* is per se defamatory, or above which the term is acceptable. The assignment of any such number would be impermissibly arbitrary. Instead, the court must look to the context of the matter to determine whether the use of the term is false. Here, an examination of the matter shows that CDPHE received "complaints from multiple sources and for multiple areas", "complaints about aggressive behavior from Jogan leadership [] on the heels of the recent allegations made against Jogan about the mistreatment of staff" (Motion, Ex. 9, p. 2-3) and that "the complaints are piling up" (Motion, Ex. 16). The Court finds that in context the use of the term *flooded* was not defamatory.

Additionally, the Scripps Defendants argue that the *flooded* statement was rhetorical hyperbole. Reply, p. 7, fn.3. "[T]he Supreme Court has endorsed a line of prior cases which 'provide[] protection for statements that cannot reasonably [be] interpreted as stating actual facts' about an individual. This provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." *NBC Subsidiary (KCNC-TV), Inc. v. Living Will Ctr.*, 879 P.2d 6, 12 (Colo. 1994)(citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20, 110 S.Ct. 2695, 276 (1990)). The Court agrees that the use of the term *flooded* was figurative and hyperbolic. No reasonable reader would construe the statement as anything else. The term "neither contains or implies a verifiable fact nor can it reasonably be understood as an assertion of actual fact." *Id.* The Court finds that the use of the term *flooded* in this context is not actionable.

Plaintiffs also claim that the Scripps Defendants published articles that falsely stated that CDPHE cancelled Jogan's contract. On June 20, 2022, the Scripps Defendants published an article with the headline "No reference checks done on company that Colo. Paid \$72 million before cutting off their work". Complaint, ¶¶ 81-82, 90 Ex 3. Plaintiffs' Complaint also asserts that the June 20, 2022 article contains the following statement: "Work was halted from Jogan Health amid growing concerns months before their contract was supposed to end in June." Complaint, ¶ 90, referencing Ex. 3, at 1. A careful reading of Exhibit 3 of the Complaint shows that no such statement is made within the article.

On October 14, 2020, the Scripps Defendants published an article which includes the following statement: "CDPHE halted all work with Jogan Health several months before the contract was supposed to end, amid mounting concerns, which included worries about the company's payroll practices." Complaint, Ex. 4.

Plaintiffs' argument is that CDPHE never cancelled the contract with Jogan. Rather, they

assert, CDPHE ended the COVID POD program entirely, thus affecting all vendors, and at most, merely stopped sending new work to Jogan. Jogan argues that the substance of the article is that Jogan was *fired* and that the reader would have been left with an entirely different impression had the article stated the literal truth. Response, pp. 15-16. Additionally, during the August 7, 2023 hearing Plaintiff repeatedly argued the inflammatory nature of the terms *fired* and *suspended* and that neither term accurately states the truth of the situation. The first problem with Plaintiffs' argument is that none of the articles attached as exhibits to Plaintiffs' Complaint include the terms *fired* or *suspended*.

The next problem with Plaintiffs' argument is that the June 20, 2022 article clearly stated that CDPHE "cut off the company from all *new* work as complaints flooded their offices" and "Jogan Health's contract with Colorado was supposed to end this month, but CDPHE cut off the company from all *new* work several months before." *See*, Complaint, Ex. 3 (emphasis added). According to Plaintiffs' Response and arguments these are truthful statements. The statements are, therefore, not defamatory.

Plaintiffs' arguments as applied to the October 14, 2022 article are addressed, even though Plaintiffs did not specifically plead them as a basis of their defamation claim. In support of their Motion, the Scripps Defendants have provided emails from CDPHE which establish:

- that beginning in January 2022 CDPHE chose "not to provide Jogan any *new* work" Motion, Ex. 9, p.1, (emphasis in original);
- As early as March 2022 CDPHE was "'no longer assigning work to Jogan Health Services,' therefore ending their work with us. Jogan only gets paid if work is performed." Motion, Ex. 11, p.2;
- "The Jogan Health Contract with the State of Colorado ended April 30, 2022." Motion, Ex. 12, p.1; and,

- CDPHE "began to see a pattern of behavior that eroded our confidence, which led us to end their contract." Reply, Ex. 16, p.1.

These emails establish that CDPHE ended work with Jogan prior to the expiration of Jogan's contract. The Court finds that Plaintiffs' arguments do not provide a reasonable likelihood, based on clear and convincing evidence, of establishing that Defendants' statements related to the premature end of its contract were false. The Scripps Defendants' special motion to dismiss this claim is GRANTED.

Plaintiffs Other Claims Against the Scripps Defendants

The parties agree that Colorado's anti-SLAPP statute applies to Plaintiffs' second claim for relief, intentional infliction of emotional distress; the third claim for relief, interference with business relationship; and the fifth claim for relief, the claim seeking injunctive relief. Plaintiffs orally withdrew their fourth claim for relief, trespass, at the August 7, 2023 hearing.

Because section 13-20-1101 applies to these claims, the analysis is the same. If Plaintiffs cannot establish, by clear and convincing evidence, a reasonable likelihood that the published statements were false, the claims must be dismissed. Based on the findings set forth above, the Court finds that Plaintiffs cannot meet their burden and the Court GRANTS the Scripps Defendants' special motion to dismiss.

Defendant McKibbin

Plaintiffs asserted a claim of defamation and seek injunctive relief against McKibbin. The claims are based on a single publication on July 21, 2022. Plaintiffs base these claims on the following statements: "DougCo extends contract with health company Colorado fired", Complaint, ¶ 111, "[m]eanwhile, state health officials suspended their contract with Jogan after questions surfaced about their application and learning ex-employees said the company failed to pay them", Complaint, ¶ 112, and "[n]ine months after the state awarded Jogan the contract, it stopped sending

the company work." Complaint, ¶ 116. The same standard set forth above applies to the claims presented against McKibbin. Additionally, Plaintiffs must establish that McKibbin acted with actual malice.

Plaintiffs assert that McKibbin's use of the terms *fired* and *suspended* are defamatory because they falsely imply that CDPHE prematurely stopped all of Jogan's work. Although McKibbin's article used these terms, the context in which they were used fairly conveys the truth of the situation. First, the term suspended is defined as "to cause to stop temporarily"¹ and "[t]o temporarily keep (a person) from performing a function."² Under either definition, the term conveyed the truth of the situation, as shown by the CDPHE emails contained in Exhibit 11 of the Scripps Defendant's Motion ("our decision to stop assigning them work was absolutely the right decision to make", "we are no longer assigning work to Jogan Health Services, therefore ending their work with us", and "[w]e have stopped some of their work, limiting their responsibilities"). The truth is that CDPHE did, in fact, suspend Jogan prior to the expiration of their contract.

The term *fired* is defined as "dismissed from a job"³ and "[t]o discharge or dismiss a person from employment."⁴ The use of this term is supported by CDPHE's email which stated: "we began to see a pattern of behavior that eroded our confidence, which led us to end their contract". Motion, Ex. 16.

Even if Jogan continued to do some work for the state, as Jogan asserts, the Court finds that, in context, there is no substantial difference between the allegedly libelous statements and the literal truth. *See, Gomba v. McLaughlin, supra*. Publishing the literal truth of the situation – that the state stopped providing new work to Jogan and limited their responsibilities prior to the

¹ <https://www.merriam-webster.com/dictionary/suspended>

² Black's Law Dictionary (11th ed. 2019)

³ <https://www.merriam-webster.com/dictionary/fired>

⁴ Black's Law Dictionary (11th ed. 2019)

expiration of their contract due to a number of concerns that eroded CDPHE's confidence – would have the same effect on the average reader as the term *fired*.

The Court finds that Plaintiffs' arguments have not provided a reasonable likelihood, based on clear and convincing evidence, of establishing that Defendant's statements related to the being suspended and fired were false.

Additionally, Plaintiff is required to establish that McKibbin published the alleged defamatory statements with actual malice. "A statement is published with actual malice if it is published with actual knowledge that it was false or with reckless disregard for whether it was true." *L.S.S. v. S.A.P.*, 523 P.3d at 1288. In defending against a special motion to dismiss under the anti-SLAPP statute, Plaintiffs "must establish a probability that they will be able to produce clear and convincing evidence of actual malice at trial." *Id.*

McKibbin asserts that he relied on the "well-sourced" June 2022 Denver7 report, which included CDPHE emails and statements regarding the suspension of Jogan. McKibbin Decl. ¶¶ 12-14, 22-23. "A publisher does not have to investigate personally, but may rely on the investigation and conclusions of reputable sources." *Reader's Digest Assn. v. Superior Court*, 37 Cal.3d 244, 259 (1984). Plaintiffs have failed to provide any reason that McKibbin could not reasonably rely on the investigation and reporting of Wang and Denver7. The Court finds that Plaintiffs have failed to establish by clear and convincing evidence a reasonable likelihood of prevailing on the element of actual malice.

CONCLUSION AND AWARD OF FEES AND COSTS

The Court, having considered the filings and the arguments presented at the August 7, 2023 hearing finds that Plaintiffs' claims are subject to a special motion to dismiss pursuant to Colorado's anti-SLAPP statute. As applicable to this case, that statute requires Plaintiffs to establish by clear and convincing evidence a reasonable likelihood that they will prevail on their claims that the

published statements were false and, as to McKibbin, that the statements were published with actual malice. The Court finds that Plaintiffs have failed to meet their burden on all claims. For the reasons set forth above, the Scripps Defendants' and McKibbin's special motions to dismiss are granted. All claims are dismissed with prejudice.

As required by C.R.S. section 13-20-1101(4)(a), Plaintiffs are ordered, jointly and severally, to pay the Defendants' reasonable attorney fees and costs related to the prosecution of the special motions to dismiss. Defendants are ordered to file, within 21 days of the date of this Order, their affidavit of attorney fees and costs, with supporting documentation. Plaintiffs shall file within 21 days thereafter any objection to the reasonableness of those fees and costs.

SO ORDERED this 15th day of August, 2023.

BY THE COURT

A handwritten signature in black ink, appearing to read "Ben Leungler". The signature is written in a cursive, flowing style.

District Court Judge