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Appeals Court Looks at When Politics on Social Media Is Not Protected Petitioning

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The Massachusetts Appeals Court recently decided *Lucey v. Kinnon*, which considered when comments on social media and local politics pages qualify as protected petitioning activity under the anti-SLAPP statute. Not all comments are protected, even when the discussion begins with a bona fide critique of government action.

See opinion here: Lucey v. Kinnon

The case arose from an exchange on the public forum of a Facebook group devoted to local politics. The defendant, a former Malden city councilor, posted criticism of the City Council for scheduling a zoning hearing at what he viewed as a strategically inconvenient time. That post looked like classic civic engagement. However, the lawsuit centered on a later comment in the same thread, where the defendant insulted the plaintiff, an attorney, by quipping that "someone must have taken the Bar exam for you."

The plaintiff sued for defamation. The Superior Court dismissed the claim under Rule 12(b)(6) as non-actionable rhetorical hyperbole, but also denied the defendant's special motion to dismiss under the anti-SLAPP statute, which would have awarded fees had it been allowed. Both sides appealed.

The Appeals Court affirmed the decision, and its anti-SLAPP analysis may be the more interesting part.

The defendant argued that because the exchange occurred in the context of a discussion about pending zoning legislation, his insult was protected petitioning activity. He claimed that because the anti-SLAPP statute defines petitioning broadly to include statements "made in connection with" issues under consideration by a legislative body or statements reasonably likely to enlist public participation, it fell within the protections of petitioning.

While acknowledging that the statute uses broad language, the Appeals Court emphasized that "in connection with" is not limitless.

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Here, the Court turned to the mostly defunct anti-SLAPP *Blanchard* cases.

Although portions of *Blanchard v. Steward Carney Hospital* which had previously described a cumbersome anti-SLAPP analysis were overruled in favor of a simpler approach, the Appeals Court found that *Blanchard*'s discussion of what qualifies as petitioning activity remains good law. In particular, *Blanchard* instructs that courts must look for a true nexus between the challenged statement and an effort to influence government action.

As the Appeals Court explained, drawing from *Blanchard*, statements intended to influence, inform, or at least reach a governmental body, even if indirectly, can qualify as petitioning. But statements that lack that objective indicia of such intent do not.

The Appeals Court in *Lucey* had little difficulty concluding that the Facebook insult did not qualify as petitioning activity. By the time the defendant made the challenged remark, the exchange in the thread had "veered off course." The comment did not mention the zoning hearing, the City Council, or any governmental issue at all. It was directed solely at a private individual, not a public official, and it served no discernible purpose in influencing governmental decision-making or public participation.

The fact that a conversation on social media may start as protected petitioning does not "throw an anti-SLAPP protective blanket" over everything that follows.

The litigant wading or being pulled into the swirling waters of defamation and protected speech must be wary.

For more on recent Anti-SLAPP changes see Has Anti-SLAPP Killed Malicious Prosecution and Abuse of Process Counterclaims?

Please contact Harley C. Racer at Rich May, P.C. with any relevant issues or questions.

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