

Does Maryland's Anti-SLAPP Statute Achieve Its Intended Purpose?

September 16, 2024

By Sarah M. Sawyer and Mark Dimenna



"Originally published in the Maryland Bar Journal, Vol. 6, Issue 2, Summer 2024."

An anti-SLAPP law is designed to prevent strategic litigation against public participation (SLAPP), which is litigation that, in its essence, seeks to chill protected speech. Thirty-three states and the District of Columbia have anti-SLAPP laws. Maryland, which promulgated its anti-SLAPP Statute in 2004, is included in this group, but despite being in effect for 20 years, the Statute has only been successfully invoked twice. Courtney Fix is one of those who found relief under this Statute.

When Courtney Fix posted "be careful of the tequila in Baltimore, only drink from who you know personally" to her 16,000 Instagram followers in early April 2021, she had no idea that the events that would follow would dramatically change her life. This post, which was vague to many, had a specific meaning - a friend confided in her that she was sexually assaulted by a then-emerging Baltimore restaurateur who gave her a "special" tequila. Courtney did not anticipate the number of women that would contact her directly asking if that post was about the very same restaurateur.

As those direct messages came in, Courtney felt the need to do something, and so she confronted the restaurateur directly. He denied any wrongdoing, but nevertheless, Courtney, who believed the women that contacted her, posted a warning to women on her Instagram to avoid associating with this individual.

After Courtney's "warning" post, she began receiving hundreds of direct messages from women detailing incidents of sexual violence, abuse and misconduct committed by various men who primarily worked in the restaurant and hospitality industry in the Baltimore area. While Courtney did not know the women who were messaging her, she felt a responsibility to listen and help. A common thread amongst these messages were requests for Courtney to share their stories as well and to disclose other men who committed wrongful acts.

Wanting to help the women messaging her, Courtney decided to honor their requests and share their stories to her 16,000 followers. She posted screenshots of the direct messages, while withholding the identity of those who contacted her. Notably, Courtney only shared survivors' stories if she received multiple messages from different people that showed a similar pattern of behavior committed by any alleged perpetrator. While Courtney did not actually author any content that detailed allegations of criminal or other sexual misconduct, she posted content that included her own commentary and opinions of the individuals identified by her posts.

Courtney's posts were met with intense reactions. On the one hand, many people applauded and celebrated her efforts for giving a voice to victims and for outing the men responsible for causing harm. On the other hand, there were people who dismissed her as being "crazy", "reckless", or "neurotic." Included in this camp were people who targeted her small business, Full Circle Doughnuts, which was located in Baltimore's Hampden neighborhood. Others submitted complaints to Instagram

regarding her posts, which caused Courtney's account to be disabled. Unfazed, Courtney created another Instagram account and resumed posting until that account was also disabled. Then she started posting to her business's Instagram page, which was disabled as well.

There were also the reactions of the individuals that were named in Courtney's posts, which led to three defamation lawsuits being filed against Courtney and her business in June 2021. Because her business was named as a Defendant, Courtney was provided with defense coverage pursuant to her business insurance policy, but by the time the carrier responded to the lawsuits, all three cases were in vastly different procedural posture – one matter had a pending motion for default judgment and sanctions; another had other pending discovery issues; and the third, *Joshua Harris v. Courtney Fix, et al.*, had not been served.

By November 2021, the Harris lawsuit was at a standstill despite there already having been two motions for temporary restraining orders, which were heard and denied by the Circuit Court for Baltimore City. Joshua, a former candidate for multiple elected offices, including the 2018 Maryland House of Delegates District 40 election and the 2016 Baltimore mayoral election, labeled him as a “psychopath womanizer”, “scammer”, “narcissist and manipulator”, “abuser”, “sexual predator”, and “classic fuck boy.”^[1]

In response to these allegations, Courtney moved to dismiss the Harris complaint. Courtney's motion argued that pursuant to Section 230(c)(1) of the Communications Decency Act of 1996, she could not be treated as a publisher or speaker of the screenshots she posted, and that any commentary that she authored was opinion speech protected by the First Amendment. Additionally, Courtney's motion argued that the Harris suit was a “SLAPP suit” requiring dismissal under Maryland's Anti-SLAPP Statute.

Beginning with the Section 230 argument, “Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum. In specific statutory findings, Congress recognized the Internet and interactive computer services as offering a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”^[2] As a result, Section 230 creates immunity from defamation, when the defendant is 1) the provider or user of an “interactive computer service”; 2) the asserted claims treat the defendant as a publisher or speaker of that information; and 3) the challenged communication must be “information provided by another information content provider.” See 47 U.S.C. § 230(c)(1).

The screenshot posts of direct messages met these criteria. It was without dispute that Courtney was a “user” of an “interactive computer service” (i.e., Instagram), and that the Harris lawsuit treated her as the publisher of the posts. Through affidavit, Courtney affirmed that the content was indeed screenshots of direct messages from other users. As such, pursuant to Section 230, Courtney could not be the publisher of these statements.

As for Courtney's own commentary, which did include labeling Harris as a “womanizer” and “sexual predator”, Courtney's motion argued that these statements were not actionable because she was expressing loose, figurative or hyperbolic speech rather than objectively verifiable facts.^[3] Of all the appellations Courtney used herself, “sexual predator” was perhaps the most salacious. While Maryland courts have not addressed this term specifically, sister-state courts have explained that this is “opinion and thus not actionable.”^[4]

As for the Anti-SLAPP argument, Maryland's Anti-SLAPP statute provides that the court must dismiss lawsuits that are “1) brought in bad faith, 2) brought against a party who has made protected communications to a government body or the public on a matter within the authority of government body **or** on an issue of public concern, 3) materially related to the protected communications, and 4) intended to inhibit or to have inhibited the making of those protected communications. If all four criteria are satisfied, then the defendant is entitled to civil immunity if he or she acted ‘without constitutional malice’ when making the protected communications.”^[5]

Courtney argued that bad faith was evidenced by the relief that Harris sought: a request to chill Courtney's speech about him entirely such that she could never speak about him again, whether in public or private, other than a forced apology; a demand for compensatory damages in excess of \$75,000 and punitive damages in the amount of \$1 million; and a request requiring

Courtney to submit to a mental health examination in a motion for a temporary restraining order. Additionally, continued delays in service despite Courtney's counsel offering to accept service was also argued to be an act of bad faith.

Courtney argued further that all of her posts – whether third-party content (i.e., screenshots of direct messages) or her commentary on that content – were protected communications. Specifically, as already stated, Courtney's commentary was opinion speech protected by the First Amendment. Similarly, Courtney also argued that the First Amendment protects her right to exercise editorial control over her platform and distribute others' speech concerning issues of public concern. The Supreme Court has explained that "speech on public issues occupies the highest rung of the hierarchy of First Amendment value, and it is entitled to special protection"^[6], and this rule is not "restricted to the press, being enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers."^[7]

The issues of "public concern"^[8] relative to Courtney's posts about Harris were twofold. First, Harris was a candidate for multiple elected offices, and it was argued that Courtney's posts about him concerned his character and suitability for those offices. Second, Courtney's speech was inextricably linked to ongoing public discussions concerning sex, consent, morality and power (e.g., the "Me Too" movement).

It was clear and uncontested that Harris' lawsuit was materially related to Courtney's speech. The complaint also did not include a single allegation that Courtney made any statements with actual knowledge of their falsity, which could not be tested in any event.^[9]

The Honorable Jeffrey M. Geller heard arguments on March 30, 2022, and ruling from the bench, he granted Courtney's motion on every basis that was raised.^[10] It is believed that this is just the second time a party has prevailed under Maryland's Anti-SLAPP Statute.^[11] Joshua appealed this ruling, but his appeal was ultimately dismissed. This was a great outcome for Courtney, but it is easy to imagine that Maryland's appellate courts would have appreciated the opportunity to address this matter.

While Courtney prevailed, it was a Pyrrhic victory. The fact of the matter is that once the lawsuits were filed, her speech was chilled entirely. Courtney did make a few posts about the litigation once it was filed, but as soon as some litigants started incorporating that into their filings, she stopped altogether. There was also the damage caused by the allegations against her that painted her as a liar. She never really had an opportunity to defend against these allegations either, and even if she did have that chance, it is unclear if it would have mattered or if the court of public opinion had already judged her.

Critically, Courtney's business also suffered. She closed Full Circle Doughnuts in November 2021, just four years after it opened. Shortly after that, Courtney moved away from Baltimore. There is no doubt that the burden of the litigation was a critical factor in her decision to close her business and move.

Courtney's reality begs the question of whether Maryland's Anti-SLAPP Statute is a paper tiger. For example, the Statute does not include an attorneys' fee provision. The practical effect of this is that even a party eligible for relief under this Statute will still be burdened by the commencement of a SLAPP Suit. For Courtney, because her company was a co-defendant, she had no choice but to hire counsel. Additionally, the requirement to show "bad faith" does not necessarily distinguish the Statute from Rule 1-341 – Bad Faith – Unjustified Proceeding.

No matter the damage the litigation caused Courtney, her strength and resolve will carry her through. She will tell her story one day, and it will be an incredible one. Until that day, the hope is that her case sets a precedent that will protect others that are as courageous as she was.

^[1] Mr. Harris also alleged that Courtney was responsible for posts concerning him that appeared on a website known as "outyourabusers" despite having nothing more than speculation that she was behind that content. These allegations were addressed through an affidavit from Courtney where she affirmed that she was not responsible for the website. This affidavit was not countered.

^[2] See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (internal quotations and citations omitted).

^[3] See *Thacker v. City of Hyattsville*, 135 Md. App. 268, 313 (2000), *cert. denied*, 363 Md. 206 (2001) (explaining that if a statement is not provable as false or is not reasonably interpretable as stating facts, then it cannot form the basis of a defamation suit) (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18, 110 S.Ct. 2695, 2705 (1990)).

^[4] See *Mogged v. Lindamood*, No. 02-18-00126-CV, 2020 WL 7074390, at *16 (Tex. App. Dec. 3, 2020), *review denied* (June 11, 2021) (holding that the label “sexual predator” is “mere opinion”); see also *Rosado v. Daily News, L.P.*, No. 157674/13, 2014 WL 883648, at *3 (N.Y. Sup. Ct. Jan. 31, 2014) (holding that being labeled a “sex predator” is not actionable). See also *Burgoon v Delahunt*, 2000 WL 1780285 (Minn. App) (reasonable person could apply “sexual predator” to inappropriate touching and offensive sexual comments); *Terry v Davis Community Church*, 131 Cal App 4th 1534, 1555 (2005) (inappropriate relationship with minor)

^[5] See *MCB Woodberry Developer, LLC v. Council of Owners of Millrace Condominium, Inc.*, 253 Md. App. 279, 297 (2021).

^[6] See *Snyder v. Phelps*, 562 U.S. 443, 452, 131 S. Ct. 1207, 1215, 170 L.Ed. 2d 172 (2011)

^[7] See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 574, 115 S. Ct. 2338, 2347, 132 L. Ed. 2d 487 (1995).

^[8] In *Woodberry*, the Appellate Court of Maryland explained that “First Amendment jurisprudence in the context of actions for defamation ... establish that a matter of ‘public concern’ means ‘fairly considered as relating to any matter of political, social, or other concern to the community’.” See 253 Md. App at 304.

^[9] See *Batson v. Shiflett*, 325 Md. 684, 728 (1992) (explaining that constitutional malice “is established by clear and convincing evidence that a statement was made ‘with knowledge that it was false or with reckless disregard of whether it was false or not.’”) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964)).

^[10] The motion also argued that the complaint failed to state a claim upon which relief could be granted.

^[11] Shortly after this ruling, the other lawsuits pending against Courtney were resolved.