

Seattle Times Wins Summary Judgment in Surgeon's Libel Suit

By Jessica Goldman

Following more than 30 months of litigation, a federal judge in Seattle has granted summary judgment and dismissal of a \$26 million defamation lawsuit brought by neurosurgeon Dr. Johnny Delashaw against *The Seattle Times*. [Delashaw v. Seattle Times Co.](#), No. C18-0537JLR (W.D. Wash. Jan. 20, 2021).

Newspaper Reports on Multi-Year Investigation of Local Hospital

In February 2017, following more than a year of investigation, *The Seattle Times* published two lengthy articles about the troubling business, medical and personnel practices at the Swedish Neuroscience Institute (“SNI”) at a storied Seattle hospital. [The first article](#) traced the life, debilitating condition, neurosurgery, and tragic death of 23-year old Talia Goldenberg. Her surgery was performed by world-renowned neurosurgeon Johnny Delashaw. Despite ample post-surgical warnings over more than a day from Ms. Goldenberg and her family that she was having trouble breathing, the hospital was not prepared for the moment when she strained to yell: “I can’t breathe! Help me! I can’t breathe!” and then stopped breathing.

[The second article](#) detailed the internecine battles for surgical cases, money and power among various SNI neurosurgeons following Delashaw’s arrival at SNI in 2014. The newspaper reported that “[a] steady churn of high-risk patients undergoing invasive brain and spine procedures allowed [the hospital] to generate a half a billion dollars in net operating revenue in 2015 – a 39 percent increase from just three years prior.” SNI’s astounding financial success came at a high price. “[T]he aggressive pursuit of more patients, more surgeries and more dollars has undermined [the hospital’s] values – rooted in the nonprofit’s founding as a humble home where nuns served the poor – and placed patient care in jeopardy.”

The articles were based on the examination of more than 10,000 pages of records, analysis of federal and state databases containing millions of records, and interviews with more than 100 people, including more than 30 current and former hospital staff. The newspaper’s investigation concluded that “doctors in the neuroscience unit are incentivized to pursue a high-volume approach with contracts that compensate them for large patient numbers and complicated surgical techniques.” This volume was achieved, in part, through concurrent surgeries where the lead surgeon would leave a less-experienced doctor receiving specialized training to handle parts of a neurosurgery. Combined with this high-volume practice was a toxic work environment among SNI’s surgeons under Delashaw’s leadership.

The Seattle Times published two lengthy articles about the troubling business, medical and personnel practices at the Swedish Neuroscience Institute.

The Fallout

The articles had an immediate impact. The hospital's CEO [resigned](#). The new CEO publicly [apologized](#). Delashaw [resigned](#) by way of an agreement with the hospital that he would never again be employed there. State regulators [identified](#) numerous patient-safety issues at the hospital. Then, the Washington State medical board [suspended](#) Delashaw's license, finding that he posed an immediate risk to the public health and safety. The hospital [announced](#) a new policy that largely banned double-booked surgeries and required the attending surgeon to be present for the substantial majority of each case. And the hospital's Board of Trustees [apologized](#) to the community.

The USC Annenberg School for Communication and Journalism [awarded](#) *Seattle Times* reporters Mike Baker and Justin Mayo the prestigious Selden Ring Award for their investigative reporting about SNI.

In April 2018, Delashaw [sued](#) *The Seattle Times* and his former SNI colleague Dr. Charles Cobbs. Against the newspaper he alleged Consumer Protection Act, defamation, defamation by implication, and tortious interference claims. He claimed that the public had been deprived of his unique skill set in neurosurgical procedures for patients that he claimed few could treat. Delashaw alleged defamation, civil conspiracy and tortious interference against Cobbs. In a separate lawsuit Delashaw [sued](#) employees of the state medical board for defamation and other claims.

Court Dismissed All Claims Against the Newspaper

Federal District Court Judge James L. Robart, previously dubbed a ["so-called judge"](#) by Donald Trump, dismissed the claims against *The Seattle Times* in three orders over more than two years. During that period, the parties conducted extensive discovery. The newspaper engaged journalism, data analysis, damages, and neurosurgery experts to respond to those Delashaw hired. *The Seattle Times* successfully moved to exclude Delashaw's journalism expert. *Delashaw v. Seattle Times Co.*, No. C18-0537 JLR, 2020 WL 6375878 (W.D. Wash. Oct. 30, 2020).

At the outset, Judge Robart granted the newspaper's FRCP 12(b)(6) motion to dismiss Delashaw's state Consumer Protection Act ("CPA") claim. *Delashaw v. Seattle Times Co.*, No. C18-0537 JLR, 2018 WL 4027078 (W.D. Wash. Aug. 23, 2018). The Washington CPA prohibits unfair or deceptive acts in the conduct of any trade or commerce. RCW 19.86.020. The court agreed with *The Seattle Times* that publication of an article is not "trade" or "commerce" for purposes of the CPA. "Dr. Delashaw's CPA claim is not based on the entrepreneurial aspects of journalism, despite Dr. Delashaw's assertion that the *Quantity of Care* articles 'earned the Times revenue.' Washington law does not support the logical

The newspaper's investigation concluded that "doctors in the neuroscience unit are incentivized to pursue a high-volume approach with contracts that compensate them for large patient numbers and complicated surgical techniques."

extension of that broad assertion – that all reporting is inherently commercial.” 2018 WL 4027078 at *15.

Nearly two years later, Judge Robart granted in part *The Seattle Times*’ [first summary judgment motion](#). Order on Defs.’ Mots. for Summ. J., Dkt No. 207 (July 14, 2020). The court dismissed Delashaw’s defamation and tortious interference claims arising from four sets of statements but denied summary judgment on the newspaper’s reporting about financial incentives at SNI to increase patient volume.

First, Delashaw claimed that the newspaper defamed him by reporting that he engaged in unnecessary surgeries. The court granted summary judgment as to these claims because of Delashaw’s “fatal flaw”: “he fails to argue that any of the statements that the Times wrote or that the various declarants did not make the statements that the Times claimed they made.” Instead, Delashaw argued that the newspaper omitted other facts about his surgical methods that would have painted him in a more accurate light. But he failed to show that any of the alleged omitted facts would contradict what *The Seattle Times* actually reported.

Second, Delashaw claimed that the reporting about concurrent surgeries implied that he abandoned his patients to maximize volume. Judge Robart rejected this claim because Delashaw “accuses the Times of making statements it did not make” while failing to argue that any of the statements actually made in the articles were false. There was ample, undisputed evidence that Delashaw participated in the kinds of simultaneous procedures about which the newspaper reported. A “defamation claim may not be based on the negative implication of true statements.”

Third, Delashaw asserted that he was defamed by the newspaper’s “interchangeable” reference of medical data to SNI and to the hospital as a whole. According to Delashaw, this alleged sleight of hand falsely implied that SNI had high complication rates below the neurosurgical norm. Judge Robart rejected these claims too because the newspaper made clear when it was referring to SNI and when to Swedish Hospital and Delashaw did not dispute the veracity of any of the data. “Merely omitting facts favorable to the plaintiff or facts that the plaintiff thinks should have been included does not make a publication false and subject to defamation liability.”

Fourth, the court rejected Delashaw’s claim that the articles as a whole falsely implied that he and SNI placed patients at risk or caused them harm. However, Delashaw did not point to a single statement in the articles that was demonstrably false. Moreover, he failed to identify any omitted facts that would contradict the impression left by the articles.

Delashaw argued that the newspaper omitted other facts about his surgical methods that would have painted him in a more accurate light. But he failed to show that any of the alleged omitted facts would contradict what The Seattle Times actually reported.

In a second summary judgment motion, the newspaper sought dismissal of the remaining defamation and tortious interference claims based on reporting that SNI surgeons were financially incentivized to pursue a high patient volume. In November 2020, Judge Robart [granted summary judgment](#) to *The Seattle Times* on these claims. The court agreed that the financial incentive statements were substantially true because they were about SNI surgeons as a whole, not Delashaw specifically. For example, one SNI surgeon testified that “the only way to make compensation goals is to see more patients or deliver more care.” Independently, Judge Robart ruled that Delashaw failed to establish that the statements caused him harm in a manner distinct from any harm caused by the articles’ non-defamatory statements. Am. Order on Defs.’ Mots. for Summ. J., Dkt No. 298 (Dec. 22, 2020).

Delashaw’s defamation claims against Cobbs are scheduled for trial in November 2021. In the meantime, the court granted *The Seattle Times*’ motion for entry of final judgment, *Delashaw v. Seattle Times Co.*, No. C18-0537 JLR, 2021 WL 197135 (W.D. Wash. Jan. 20, 2021), and Delashaw [appealed](#) to the Ninth Circuit.

Jessica L. Goldman, Christopher Wion, and Tanya Nesbitt of Summit Law Group, PLLC, represented Seattle Times Company. Johnny Delashaw was represented by Arthur Harrigan, Tyler Farmer, Kristin Ballinger, and Caitlin Pratt of Harrigan Leyh Farmer & Thomsen LLP.