

NO. A09-2060

State of Minnesota
In Court of Appeals

Nexus, a Minnesota non-profit corporation,
Respondent,

v.

Janette J. Swift,

Appellant.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The Trial Court made “constitutional rulings” concerning the impermissibility of the anti-SLAPP law and refused to pass on the merits of the issue raised by Appellant Swift. Respondent Nexus, Inc. asserts that the Trial Court found “clear and convincing evidence” of defamation, despite the Court's explicit statement that it found none. Both the Court below and Nexus are wrong, and the decision below should be reversed.

The anti-SLAPP law, Minn. Stat. § 554.01, *et. seq.*, provides important protection for citizens expressing their views on controversial subjects pending before government bodies. The immunity furnished by the statute can be overcome only by “clear and convincing evidence” of a tort. Minn. Stat. § 554.02, subd. 2(3). The defamation claim by Nexus against citizen activist Swift now hangs by a slender reed: “whether it is well pled,” even though it is not established by the statutorily required “clear and convincing evidence.”

The Trial Court made no finding of “clear and convincing evidence,” as Nexus claims. *Respondent's Brief*, pp. 6-7. Rather, the Trial Court said it was “unable . . . to determine whether [there was] defamation” at all, which falls short of any evidence, let alone “clear and convincing.”¹

¹ “Add ___” refers to the Trial Court's Memorandum Opinion attached to Appellant's Brief. “App. ___” refers to Appellant's Appendix.

Nexus acknowledges that the Trial Court made no such finding, and it makes no attempt to achieve that heightened evidentiary level. Rather than satisfy the “clear and convincing” standard, or even trying to, it simply asserts that it has “pled” the elements of defamation. The position posited by Nexus is not only contrary to the statutory terms, but also would emasculate the law.

II. THE COURT RULED ON CONSTITUTIONAL GROUNDS

The assertion by Nexus that the Trial Court’s decision was “masterful” in avoiding any constitutional rulings is myopic. *Respondent’s Brief*, p. 6. The Court expressly ruled upon the constitutionality of the statute, explicitly describing its decision as entailing “constitutional rulings.” *Id.* 9. The assertion by Nexus that the court did not pass upon the constitutionality of the statute is belied by the explicit language used by the court below “in makings [sic] it [sic] constitutional rulings” *Id.*

Those “constitutional rulings” by the Trial Court are plainly wrong. *See Appellant’s Brief*, pp. 25-31. Nexus does not even try to support those “constitutional rulings.” It makes only a passing reference, in a footnote no less, to a pair of Trial Court rulings deeming the statute unconstitutional. These lower court decisions are not precedential or persuasive, especially in view of the overwhelming – and unrefuted – case law to the contrary. *See Respondent’s Brief*, p. 6.

The record in this case reflects that: 1) the Trial Court made “constitutional rulings” in holding that the law is unconstitutional under the Due Process clause of the 14th Amendment to the U.S. Constitution and the right to a jury trial under the Minnesota Constitution; 2) Swift has pointed out that such “rulings” clash with well-established case law and not correct; and (3) Nexus has not, except for a passing footnote, defended the lower court's “constitutional rulings.” In light of the above, 1 + 2 + 3 = reversal of the Trial Court’s decision on the supposed constitutional infirmities of the anti-SLAPP statute.²

III. NEXUS HAS NOT ESTABLISHED “CLEAR AND CONVINCING EVIDENCE” OF DEFAMATION

Having abandoned its claim that the anti-SLAPP statute is unconstitutional, which it advocated below, Nexus fares no better with its new argument: it wants to revise the statute by striking the “clear and convincing” language in it. *See* Minn. Stat. § 554.02, subd. 2(3).

Nexus creates a new criterion for overcoming the anti-SLAPP statute, claiming that “a well pled” complaint defeats any statutory immunity claim. *Respondent's Brief*, p. 33. This is in keeping with the Trial Judge’s view that Nexus trumped the statute because it “*alleged* the appropriate elements of defamation.” *Add. 10*. (emphasis added).

² The brief by Nexus is flawed in other respects as well. It blatantly introduces new evidence that it candidly admits is not in the record below. *Respondent's Brief*, pp. 5, 19-20. It is also replete with the subjective views of counsel.

In short, the Trial Court found, and Nexus concurs, that the standard for overcoming statutory immunity under the anti-SLAPP law is whether an actionable tort, defamation in this case, is properly pled, not whether it is supported by “clear and convincing evidence,” as the statute requires.

The ruling below, and Nexus in its brief to this Court, equates the test for immunity under the statute with the standard applicable to a Rule 12 Motion. *See* Rule 12, Minn.R.Civ.P.³ But this criterion diverges from the explicit statutory language, which reflects a legislative desire to enhance the rights of citizen advocates to have anti-SLAPP suits dismissed early in the litigation process. Minn. Stat. § 554.02, subd. 2. It provided that an anti-SLAPP suit must be dismissed unless there is “clear and convincing evidence” of a tort. The “clear and convincing evidence” standard is much higher than the minimal “well pled tort” theory espoused by Nexus and the similarly slight standard used by the trial court whether “appropriate elements” of a claim are “alleged.” A dismissal Motion under the anti-SLAPP law is intended to test whether a tort claim is represented by “clear and convincing evidence,” not whether it meets minimal pleading standards.

The legislature demanded more than merely a claim that satisfies nominal pleading muster. It imposes a high standard of “clear and convincing evidence.” It

³ The standard on a Rule 12 Motion is whether the claim, as pled, could support a claim for relief. Minn. R. Civ. P. 12.02; *Northern States Power Co. v. Franklin*, 265 Minn. 391, 395, 122 N.W.2d 26, 29 (1963). This vividly contrasts with the much higher “clearly and convincing” standard contained in the anti-SLAPP law. Minn. Stat. § 554.02, subd. 2(3).

does so to fortify the rights of citizen advocates to attempt to procure government action, which is the purpose of the anti-SLAPP statute. *Marchant Inv. & Mgmt. Co. v. St. Anthony West Neighborhood Org., Inc.*, 694 N.W.2d 92 (Minn. App. 2005). The goal is to “protect citizens and organizations from lawsuits that would chill their right to publicly participate” in challenging (or supporting) controversial issues pending before government bodies. *Id.* at 94. *See also* S. Hartzler, “Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant,” 41 VAL. U.L. REV. 1235, 1250 (Spring, 2007); C. Baruch “If I Had a Hammer: Defending SLAPP Suits in Texas,” 3 TEX. WESLEYAN L. REV. 55, 66 (Fall, 1996). Note “SLAPPING Around the First Amendment: An Analysis of Oklahoma’s SLAPP Statute and its Implications on the Right to Petition,” 60 OKLA. L. REV. 419, 429, (Summer, 2007).

To effectuate this important objective, consistent with the First Amendment as well as the State Constitutional Right to Freedom of Expression under Article 1, Section 3 of the Minnesota State Constitution, the legislature established an elevated criterion for a tort to overcome the statutory immunity: it must be shown by “clear and convincing evidence.” *See* Minn. Stat. § 544.02, subd. 2(3). It is not enough, as the Trial Court found, for a tort to be simply alleged or, in the words of Nexus, “well pled.” If that were the case, then any claim that satisfies minimal Rule 12 requirements, slight as they are, would eviscerate the anti-SLAPP statute, placing the

statute that seeks to prevent imposing a “chill” on citizen advocates into the deep-freeze.

Nexus mistakenly suggests that Swift's acknowledgment that she made the challenged statements in this case, suffices to establish defamation as a matter of law. *Respondent's Brief*, pp. 6-7. She has never admitted making any defamatory statement. Publication is only *one* element of defamation; the others are false statements of facts that cause harm to reputation. *Weinberger v. Maplewood Review*, 668 N.W.2d 667, 673 (Minn. 2003). Those elements, like all others, must be established under the anti-SLAPP law by “clear and convincing evidence,” as the statute commands.

It is not unusual for higher evidentiary criteria, “clear and convincing evidence,” to be used in certain circumstances. *Eg.*, Minn. Stat. § 253B.185, subd. 1 (civil commitment statute); *Johnson v. Johnson*, 272 Minn. 284, 292, 137 N.W.2d 840, 847 (1965) (oral agreement to transfer an interest in real property). Nor is it unusual, or Constitutionally suspect, for the determination of whether the clear and convincing standard is met to be determined by the court without a jury. For example, claims for punitive damages may not be asserted unless a court finds “clear

and convincing evidence” of serious wrong-doing. *See* Minn. Stat. § 549.20, subd. 1(a).⁴

Nexus admits that the Trial Court made no “clear and convincing” finding in this case. *See Respondent’s Brief*, pp. 6-7, 23. The absence of any “clear and convincing evidence” of defamation below is not the whole story. Not only did the Court eschew “clear and convincing evidence,” but it stated it was “unable on the record at this stage in the proceedings to determine whether [the] statement[s] does or does not constitute defamation.” *Add. 10*. In short, the Trial Court did not even decide whether defamation occurred, let alone whether it was established by the required statutory mandate of “clear and convincing evidence.” *See* Minn. Stat. § 554.02, subd. 2(3).

The statute requires that there be “clear and convincing evidence” of a tort to overcome statutory immunity. The Trial Court did not address whether the statutory immunity applies but determined, in its “constitutional rulings,” that the statute could not be applied. It then went on to determine that the elements of defamation were “alleged,” but did not find a tort by “clear and convincing evidence,” and did not

⁴ That a threshold determination for punitive damages purposes is made by the Court, not a jury, would be constitutionally suspect, perhaps impermissible, under the Trial Court’s analysis in the present case. But the punitive damages have been upheld as constitutional, including the “clear and convincing” criteria in the statute governing punitive damages. Minn. Stat. § 549.20, subd. 1(a); *GN Danavox, Inc. v. Starkey Labs., Inc.*, 476 N.W.2d 172, 176-77 (Minn. Ct. App. 1991).

even find a tort at all because it was “unable . . . to determine” whether what Swift stated to the City Council, posted on her blog, and placed on YouTube “does or does not constitute defamation.” *Add.* p. 10. This is a far cry from the “clear and convincing evidence” that the legislature mandated in order to set aside an immunity to the anti-SLAPP statute. In sum, the failure to find “clear and convincing evidence,” or any evidence of defamation at all, undercuts the Trial Court’s decision and warrants reversal of it.

IV. THERE WAS NO “CLEAR AND CONVINCING EVIDENCE” OF DEFAMATION

The Trial Court was right, and so was Nexus. There is no “clear and convincing evidence” of defamation.

The key statements that are targeted in this lawsuit are not defamatory. One is that a homicide occurred. The coroner in Iowa said so. *App.* 20-23, 60, 70. Although the prosecutor issued a charge under a different statute, the coroner’s description formed a legitimate basis for Swift to make the “homicide” remark. Swift’s reference to “homicide” does not necessary denote a crime; a homicide merely means that a person died at the hands of another, whether criminally or not. *See, e.g.,* Minn. Stat. § 609.08 (describing justification defense of duress); *State v. Johnson*, 719 N.W.2d 619, 629 (Minn. 2006) (describing the doctrine of self defense

in the context of a homicide charge). Thus, Swift's repetition of the coroner's "homicide" determination defames no one.⁵

Swift also did not commit defamation, as a matter of law, when she used the term "getting away with murder." She said so in the context of complaining about the City Council giving Nexus a large tax abatement. That phrase was used as a rhetorical flourish, a metaphor, not an accusation of criminality. *Appellant's Brief*, pp. 38-41. The idiom "getting away with murder" does not literally mean that a murder was committed. At best, it is ambiguous. Any phrase that reasonably be interpreted to have a non-defamatory meaning cannot be actionable as a matter of law. *See Hunter v. Hartman*, 545 N.W.2d 699, 707 (Minn. App. 1996). *See also Bose Corp. v. Consumers Union of U.S., Inc.*, 485 U.S. 440, 512-13 (1984); *Stokes v. CBS, Inc.*, 25 F. Supp. 2d 992, 997-98 (D. Minn. 1998).

In sum, the Court below did not find "clear and convincing evidence" of a tort as required by the anti-SLAPP statute. In fact, it did not find any defamation at all,

⁵ Because Nexus is a corporation, it is deemed to be a public figure for defamation purposes under Minnesota law, which essentially requires that it show "actual malice" within the meaning of the *New York Times* standard, consisting of knowing false or reckless disregard for the truth. *Jadwin v. Minneapolis Star and Tribune, Co.*, 367 N.W.2d 476, 486-87 (Minn. 1985). Nexus' claim that the "actual malice" standard does not apply here because it only extends to "media" defendants is incorrect. *Respondent's Brief*, p. 24. The challenged statements made by Swift in this case were disseminated on a blog and a widely-viewed video, which certainly are mass media. In fact, Nexus complains that the publication was too broad, *Id.*, while at the same time claiming it was not broad enough to invoke "media" protection. *Id.* Nexus cannot have it both ways, and should not have it neither way. As a blogger, and promulgator of video on widely-watched YouTube, Swift was acting as a modern-day member of the media, which invokes the "actual malice" rule under *Jadwin*. Nexus has made no showing, nor has it even attempted to show, that Swift acted with knowing reckless disregard for the truth when she relied upon statements made by the public record by a coroner about the "homicide" of the youth in Iowa. Therefore, on this ground alone, as well as others, the defamation claim is not actionable, and certainly falls short far short of the "clear and convincing" criteria required by the anti-SLAPP statute.

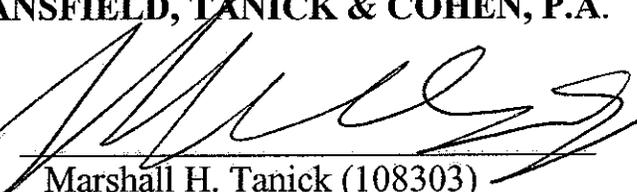
declaring it was “unable . . . to determine if defamation had occurred.” Absent any “clear and convincing” evidence of a tort, there is no basis to overcome statutory immunity. Therefore, denial of the Motion to dismiss the case under anti-SLAPP statute was erroneous, and the decision below should be reversed.

V. CONCLUSION

The decision of the Trial Court should be reversed and the case dismissed.

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