

NO. A09-598

State of Minnesota
In Court of Appeals

Peter Freeman and James D'Angelo,

Respondents,

v.

Janette J. Swift,

Appellant.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Appellant Janette J. Swift ("Swift") was engaged in "public participation" within the meaning of the Anti-SLAPP statute, Minn. Stat. § 554.01 *et seq.*, when she wrote a pair of letters to colleagues of Respondent Peter Freeman at the University of St. Thomas Department of Social Work and published a blog regarding Respondent James D'Angelo. Her aim was, at least in part, to attempt to obtain favorable action by government bodies presiding over the ongoing controversy concerning relocation of the juvenile sex offender facility into her residential neighborhood in Bradbury Township.

Because Swift aimed her e-mails and blog, at least in part, at procuring favorable government action, she was engaged in "public participation" within the meaning of the Anti-SLAPP statute. Minn. Stat. § 554.01, subd. 6. Therefore, the statutory immunity applies. There is no "clear and convincing" evidence, or any evidence at all, that Swift committed libel which would negate statutory immunity under subd. 2. Therefore, the ruling below should be reversed and the lawsuit dismissed.

II. THE ITEMS IN QUESTION, THE TWO E-MAILS AND BLOG, WERE AIMED, AT LEAST IN PART, AT PROCURING FAVORABLE GOVERNMENT ACTION

A. The Breadth of the Minnesota Statute

The parties, despite their differences, agree on several matters:

- That the relocation of the Sex Offender facility in Onamia was a matter of, in Respondents' words, "considerable public interest." *Respondents' Brief*, p. 5.
- That Swift was "vociferous in her opposition" to the project and expressed it on many different occasions and ways. *Id.*
- That the principal issue in this case is the scope of the statutory immunity under the anti-SLAPP law or, as Respondents phrase it: "How far the statutory immunity extends" under the statute. *Id.*, p. 15.
- That this question constitutes a legal issue subject to *de novo* review. *Id.*, p. 9.

In addition to agreeing on these matters, the parties also agree on another item: that the Anti-SLAPP statute does not apply to whatever anyone says, "anywhere, anytime, to anyone." See *Respondents' Brief*, p. 17. Appellant concurs with the obvious, that there are limits to the applicability of the statute.

The point of departure is that, as a matter of law, those limits were not exceeded. Because Appellant's activities were aimed, "in

whole or in part,” at procuring favorable government action, her communications fall within the purview of the statute. See Minn. Stat. § 554.03.

Respondents’ position is that the pair of e-mails and single blog that are at issue in this case are not covered by the statute because the two e-mails had “no connection” to the dispute over the relocation of the sex offender facility and the blog was “not aimed at anyone in particular.” *Id.*, p. 11. This is essentially what the trial court concluded, that the two e-mails and the blog were not statutorily-protected because they were “directed at non-governmental participants and/or to the world in general.” *App.* 327. Both Respondents and the trial court are wrong.

Respondents assertion that this is a case of first impression because “[t]his court has never determined the scope of public participation” under the anti-SLAPP law is also fallacious. *Id.*, p. 13. On several occasions, this court has construed the statute, declaring its purpose to “protect citizens and organizations from lawsuits that would chill their right” to engage in advocacy regarding issues pending before government bodies. *Marchant Inv. & Management Co., Inc. v. St. Anthony West Neighborhood*

Organization, Inc., 694 N.W.2d 92, 94 (Minn. Ct. App. 2005). In *Special Force Ministries v. WCCO Television*, 584 N.W.2d 789 (Minn. Ct. App. 1998), this court applied the statute to a “commercial” television broadcast directed to the public at large, not government decision-makers. In *American Iron and Supply Co., Inc. v. Dubow Textiles, Inc.*, 1999 WL 326210 (Minn. Ct. App. 1999) (unpublished), the anti-SLAPP law applied to a letter to residents living in the area surrounding a proposed metal shredder site subject to governmental regulation.¹ In fact, the record in both cases does not even indicate that government officials ever saw the television broadcast in *Special Force Ministries* or were aware of the letter in *American Iron*.

This statutory breadth is consistent with the views of commentators, who note that the Anti-SLAPP laws in jurisdictions like Minnesota are construed broadly to

...expand the definition of protected activity to include not only oral or written statements made to government bodies or as part of government proceedings, but also

¹ Although it is an unpublished, non-precedential decision, *American Iron* is persuasive here because of its similarity to the facts at bar, i.e., communications sent to non-government officials. See *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. Ct. App. 1993) (unpublished opinions may be persuasive if similar factual pattern to present case).

communication made in connection with any issue under consideration or review by government body.”

See Note, “*Protecting Informed Public Participation: ANTI-SLAPP Law and the Media Defendant*,” 41 Val. U. L. Rev. 1235, 1253-54, (Spring, 2007) (emphasis supplied).

Case law in other jurisdictions is in accord. Two states with Anti-SLAPP laws comprised of wording similar to the Minnesota statute have applied their immunities to individuals whose communications were directed to non-government officials in connection with controversial government activities. See *Plante v. Wylie*, 824 N.E. 2d 461 (Mass. App. Ct. 2005) (communications between private citizens); *Schelling v. Lindell*, 942A.2d, 1226 (Me., 2008) (letter to the newspaper).

Respondents’ attempt to justify the trial court’s narrow reading of the statute, limiting it to communications “directed to the appropriate government bodies,” by asserting that the two e-mails about Nexus Board member Freeman and blog concerning Nexus CEO D’Angelo were not “narrowly tailored to reach the audience that may reasonably be expected to care about the controversy.”

Respondents' Brief, p. 14. This distinction is convenient, but not compelling for several reasons:

- First, it is not true. The e-mails to Freeman's colleagues in the Social Work Department at the University of St. Thomas urged them to learn more about the controversy and invited them "to visit our website for more information." *App.* 7. This was part of Swift's effort to "educate those individuals and, hopefully, enlist their assistance in trying to stop the relocation project from proceeding . . . [expecting] that if they know more about some of these problems they may join force with others who opposed the relocation." *App.* 281. The blog, too, was an effort to reach out for public support — and it worked, enlisting the advocacy of another citizen opposed to the project. School teacher Jacqueline Schmidt, after reading the blog "felt personally compelled" to report her objections to municipal officials. *App.* 283-84.
- Second, it is contrary to the case law in Minnesota and elsewhere. See *Special Force Ministries v. WCCO Television*, *supra* ("commercial" television broadcast to

general public covered by Anti-SLAPP law); *American Iron and Supply Co., Inc. v. Dubow Textiles, Inc.*, *supra* (letters to area residents covered). *App.* 129-133. See also *Plante v. Wylie*, *supra* (letters to other non-governmental participants fall within purview of Anti-SLAPP law); *Schellin v. Lindell*, *supra*, (letters to newspaper editor protected by ANTI-SLAPP law).

- Third, it also countermands the “plain meaning” of the Minnesota Anti-SLAPP law, which is broadly drafted to cover any activity “in whole or *in part*” aimed at procuring favorable government action. All that is required to trigger the statute is action that “materially relates” to a matter before a government body. *Middle-Snake-Tamarac Rivers Watershed Dist. v. Stengrin*, 2009 WL 367286 at *2 (*Minn. Ct. App.* 2009) (*unpublished*). *App.* 325-328.
- Fourth, Respondents’ position, as adopted below, would undercut the explicit wording (and interest) of § 554.01 by adding a new provision that the communication must be directed “to” government decision makers or bodies. This restrictive limitation is contained in versions of Anti-

SLAPP statutes in other states, but not Minnesota. E.g., Missouri law: “conduct or speech available or made in connection with the public hearing or meeting.” V.A.M.S. § 537.528 (2004); Hawaii law: “testimony submitted or provided to a government body . . .,” Haw. Rev. Stat. § 634F-1 (2002). In contrast, the Minnesota law is much broader and looks to whether the goal or “aim” of the defendant’s actions is “in whole or *in part*” at procuring favorable government action. § 554.01, subd. 6 (emphasis added).

The Minnesota statute is broadly-phrased, indicative of the legislature’s intent to provide substantial protection to citizens, beyond simply communications directly with government officials or statements made at government meetings, although Appellant Swift did both and much more.

B. Appellant’s conduct was “aimed,” at least in part, at procuring favorable action

Respondents place excessive reliance upon the language of the statute, and so does Appellant – another matter of agreement.

Respondents' Brief, pp. 13-14. They disagree, however, on what the words mean.

The statute expressly protects action or conduct that is “aimed” in whole or in part at procuring favorable government action. By focusing on the “aim” of the message, the text directs attention to the *intent of the communicator*. In this case, Appellant Swift, the communicator, clearly took at least partial aim at procuring favorable government action. She sent the e-mails to Respondent Freeman’s colleagues, to “educate those individuals to [the] problems” surrounding the sex offender facility and “hopefully enlist their assistance in trying to stop the relocation project from proceeding.”² *App. 281*.

This reflects that her intent, at least in part, was aimed at procuring favorable government action. Respondents’ contention that those letters had “no connection with the public controversy in Onamia” is plainly wrong. *Respondents' Brief*, p. 11. The e-mails

² Respondents’ claim that the portion of Swift’s second Affidavit pointing out her intent to “educate” the recipients of the letters contradicts her first Affidavit is inaccurate. *Respondents' Brief*, p. 18. The second Affidavit, which addresses her intent, supplements her first Affidavit, but does not clash with it.

were written solely *because* of that “public controversy,” and they explicitly invited the recipients to “visit our website for more information.” *App.* 7.

The blog, which is the sole target of D’Angelo’s claim, also was aimed, at least in part, at procuring favorable government action. Respondent characterizes the blog as “devoted primarily, if not exclusively, to the topic” of the Sex Offender facility. *Respondents’ Brief*, p. 6.

The court below erred in not considering Swift’s intent, relying solely upon the premise that the e-mails and blogs were not specifically “directed” to government officials. This court has pointed out that the standard for determining applicability of the Anti-SLAPP law, is whether the contested communication “materially relates” to a controversy pending before a government body. See *Middle-Snake-Tamarac Rivers Watershed Dist. v. Stengrim*, *supra*. There can be no question that the each of the two e-mails sent by Swift to Freeman’s colleagues “relates” to the controversial Sex Offender facility. The letters refer to the way, in Swift’s view, Freeman’s participation in the relocation project

clashes with the “values” and “mission” of the institution. *App.* 44, 122.

The blog that bothers D’Angelo, while clearly uncomplimentary, also “relates” to the Sex Offender relocation brouhaha. As Respondents recognize, the blog is devoted almost “exclusively” to that public controversy. *Respondents’ Brief*, p. 6. It was, in fact, created for the sole purpose of advancing the interests of the people opposing the relocation of the sex offender facility by lobbying to procure favorable government action. *App.* 43-45, 280.

This brings the argument full circle, returning to the basic issue of the scope of the statutory immunity under the Anti-SLAPP law. The authorities, cases, interpretations in other jurisdictions, the broad language of the Minnesota statute, and the undisputed intent of Appellant to have an impact upon governmental decision makers all dictate a determination that she was acting, at least in part, if not wholly, to affect government decision-making. This conclusion is consistent with the role that e-mails and blogs play in the process of trying to affect government decision making, often by enlisting outsiders to join in the cause, as Swift did here. Citizen activists corroborate the propriety and validity of this approach.

App. 285-295. Swift does not maintain that she, or anyone else, is entitled to defame anyone else willy-nilly, simply because a controversy is pending before a government body. But, when a communication “materially relates” to that controversy, as her e-mails and blogs do here, and when the communicator intends, at least in part, to disseminate those views as a means of affecting government action, as Swift did here, the statute applies. There are, to be sure, limits to the scope of immunity under the statute, but Swift’s conduct falls well within those boundaries.

Under the narrow interpretation of the statute below, many individuals seeking to affect government action would be deterred from doing so for fear of being sued, a reaction that is precisely what the Anti-SLAPP law is intended to prevent. See Baruch, “*If I Had A Hammer*,” 3 Tex. Wes. L. Rev. 55, 56 (Fall, 1996). Whether it’s Thomas Payne, Susan B. Anthony, Dr. Martin Luther King, Jr., or this spring’s Tea Party Protestors, activists tend to use the means and media most available to them at the time of their actions. In today’s age, e-mails and blogs, beyond pamphlets and placards, are an effective way to affect government action, and Swift was within her rights in doing so.

The trial court's constrictive interpretation of the statute was wrong as a matter of law. The decision should be reversed, and the case dismissed.

III. THERE WAS NO "CLEAR AND CONVINCING" EVIDENCE OF A TORT

Because the Anti-SLAPP statute applies, the statements made in the two e-mails and blog are statutorily protected. The exception for tortious conduct is not applicable here because there was no "clear and convincing" evidence of defamation, as required to overcome the statutory protection under Minn. Stat. § 554.02, subd. 2(3) and § 554.03.

Because it held that the Anti-SLAPP statute did not apply, the trial court did not address the issue whether there was "clear and convincing" evidence of a tort. Because the statute does apply, that issue needs to be addressed and, when it is, Respondents come up empty.

Respondents barely make any effort to show any defamation, let alone by "clear and convincing" evidence. They basically assert that Appellant made statements, which are not disputed; that the statements were made to third parties, which also are not disputed;

and that the statements were deprecatory, which also is right. But they do not overcome the unassailable reality that the statements are Constitutionally-protected opinions.

A. Freeman's Claim is Fallacious

The two e-mails to Freeman's colleagues make a number of uncomplimentary statements about him. They assert that he was engaged in "unethical, immoral, and possibly even illegal behavior," that as a member of the board he was attempting to "bully" into the neighborhood, that he acted in an "unprofessional" way and was "rude" in hanging up on her, that his actions were responsible for "so much suffering," that he will "not take responsibility for the harm that he is causing," equating what he does to someone who pushes a button from afar that launches a missile and destroys a village while disclaiming any responsibility; and that what he is doing is "wrong."

The trial court did not specify which of these statements are defamatory, and neither has Respondent Freeman in this forum. Not a single one is defamatory as a matter of law. None of them are the types of statements that can be "proven true or false," which is necessary to sustain a defamation claim. See *Marchant, supra*, 694

N.W.2d at 95. They are all statements of “opinion, rhetoric, and figurative language,” which is generally “not actionable” as defamation. *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. Ct. App. 1986).

Event Freeman concedes that many of the statements made about him “probably” are not defamatory. *App.* 318. Perhaps the most colorful assertion, the “missile launching” metaphor is the least actionable of all. A hyperbolic figure of speech cannot be libelous. *Marchant, supra*, at 96. Swift’s concluding statement that Freeman’s conduct is “wrong,” is clearly an opinion, which she is entitled to have and communicate to others. *Capan v. Daugherty*, 402 N.W.2d 561 (Minn. Ct. App. 1997).

Because none of the statements about Freeman in the two e-mails is defamatory, there is no evidence of any tort against him, let alone “clear and convincing” evidence. The statutory immunity under the Anti-SLAPP law applies to his claims as a matter of law.

B. D’Angelo’s defamation claim should be denied

Similarly, Respondent D’Angelo cannot establish by “clear and convincing” evidence that he was defamed. The statements made

about him in the blog are, to be sure, even more uncomplimentary than those about Freeman. But that does not make them libelous. He is accused of being “dishonest,” a “liar,” a “person who lacks character,” and a “predator [who] . . . preys on the elderly and infirmed,” among other matters. All of those statements are Constitutionally-protected and cannot form the basis for a defamation claim. See *Appellant’s Brief*, pp. 37-39.³

Some of Swift’s statements, e.g., referring to an FBI investigation, “kinky” activities, and the like, are framed in rhetorical, imaginative, and speculative fashion, prefaced by the phrases such as “we like to think, one can dream,” and similar impressionistic phraseology. These terms alert reasonable readers that she is stating personal opinions, not provable facts. See *Capan, supra*, 402 N.W.2d at 564. See also *Marchant, supra*, 694 N.W.2d at 95-96.

The claim by Respondents that re-publication of the blog after the lawsuit was served somehow makes the blog defamatory is

³ The term “liar” is an opinion, not libelous. *Beatty v. Ellings*, 285 Minn. 293, 300, 173 N.W.2d 12, (1969). So, too, is the “predator” phrase. *Burgoon v. Delahunt*, 2000 WL 1780285 at *4 (Minn. Ct. App. 2000) (unpublished.)

erroneous. *Respondents' Brief*, p. 19. Respondents' assertion that there was no issue pending before any government body at the time of the re-publication is wrong. A number of governmental actions – all of which were prerequisites for completion of the proposed relocation and construction – were still pending and unresolved, including those of tax abatements from both the city and the county, zoning issues, conditional use permits, closings of two separate purchase agreements, and building permits. *App.* 280.

Since re-publication occurred after the Complaint was served, it cannot form the basis for the charges made in the Complaint, which antedated the re-publication. A party cannot be liable for committing libel **after** a suit is started, absent amendment of the complaint, which has not occurred here. In defamation cases, the alleged offensive language must be identified with specificity in the Complaint. *American Book Co. v. Kingdom Pub. Co., Inc.*, 71 Minn. 363, 366, 73 N.W. 1089, 1090 (1898); *Stead-Bowers v. Langley*, 636 N.W.2d 334, 342 (Minn. Ct. App. 2001); *Pope v. ESA Servs., Inc.*, 406 F.3d 1001, 1011 (8th Cir. 2005) (construing Minnesota law); *Glenn v. Daddy Rocks, Inc.*, 171 F. Supp. 2d 943, 947 (D. Minn. 2001) (construing Minnesota law). The Complaint in this case

obviously contains no allegation about the post-Complaint publication because that event had not yet occurred. The Complaint was never amended. Therefore, the re-publication should not have been considered by the trial court and that argument should not be considered here.

Finally, Respondents rely upon an unpublished case from Connecticut, *Matos v. American Federation of State, County and Mun. Employees*, 2001 WL 1044632 (Conn. Super. 2001) (unpublished) for the proposition that Swift's reference to a FBI investigation of D'Angelo is defamatory notwithstanding the speculative way the reference is phrased. The Connecticut case, as an unpublished decision, is not precedential in that state, let alone here. Moreover, it was decided by a trial court, and not even endorsed by an appellate tribunal. *Matos* is not persuasive, either.

By framing her statements as "we like to think," "one can dream," and the like, Swift clearly signaled readers that her assertions were personal opinions, not provable facts. See *Capan*, 402 N.W.2d at 564; *Marchant*, 694 N.W.2d at 95-96. There is ample case law in Minnesota that statements of this speculative type are not defamatory, and Respondents' attempt to reach out to

a non-precedential, unpublished trial court decision in Connecticut reflects the absence of supporting case law in Minnesota for their claim.⁴

Therefore, there is no evidence of any tort, defamation committed against D'Angelo, let alone the high standard of "clear and convincing" evidence – a showing of high probability – that is necessary to overcome the Anti-SLAPP law immunity to which Swift is entitled.⁵

Because there is no "clear and convincing" evidence of defamation, the Anti-SLAPP law applies, the lower court ruling was erroneous, the decision should be reversed, and the case dismissed.

⁴ Swift had reason to believe that there was an FBI investigation because an FBI agent interviewed her and her husband about the relocation project and allegations of conflicts of interest, bribery and other improprieties connected with it. *App.* 309 – 311.

⁵ To reach this elevated plateau, the evidence must be "unequivocal and uncontradicted, and intrinsically probable and credible." *Deli v. University of Minnesota*, 511 N.W.2d 46, 52 (Minn. Ct. App. 1994).

IV. CONCLUSION

For the above reasons, the ruling below should be reversed and the case dismissed.

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