No. A09-2060

STATE OF MINNESOTA
IN COURT OF APPEALS

Nexus, a Minnesota nonprofit corporation,

Respondent,

-vs-

Janette J. Swift,

Appellant.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 3

Background of the Nexus Project 3
Background of The Current Lawsuit 4

SUMMARY OF ARGUMENT 6

SCOPE OF REVIEW 7

ARGUMENT 8

I. THE TRIAL COURT CONSTRUED AND APPLIED CHAPTER 554 IN SUCH A WAY AS TO AVOID CONSTITUTIONAL PROBLEMS 8

A. The trial court's pronouncements on constitutionality are hypothetical 9

II. THE TRIAL COURT PROPERLY FOUND THAT NEXUS HAD STATED A CLAIM FOR DEFAMATION FOR WHICH THE JURY COULD AWARD DAMAGES 12

A. The "immunity" of Chapter 554 is twofold and can be destroyed by a showing of no public participation or a tort . 12

B. The trial court properly found that Nexus had made the proper showing of tort 16

C. Nexus presented clear and convincing evidence of defamation even if the trial court did not use that phrase 21

D. Other legal issues relating to defamation 23

III. ARGUMENTS BASED ON STATUTES AND CASE LAW FROM OTHER STATES ARE NOT ILLUMINATING 25

IV. THE IMMUNITY CREATED BY SECTION 554.03 IS ILLUSORY 29

CONCLUSION 33

TABLE OF AUTHORITIES

Cases

American Iron and Supply Company, Inc. v. Dubow Textiles, Inc., (C1-98-2150) (unpublished Minnesota Court of Appeals May 25, 1999) 15-17

Bauer v. State, 511 N.W.2d 447, 449 (Minn. 1994) 29

Carradine v. State of Minnesota, 511 N.W.2d 733 (Minn. 1994) 29

Diesen v. Hessburg, 437 N.W.2d 705 (Minn.App. 1989), reversed 455 N.W.2d 446 (Minn. 1990) 18

Freeman v. Swift, ___N.W.2d ___ (Minn.App. 2009) (A09-598, filed December 29, 2009) 4, 14-15, 25-26

Halley's Custom Homes, Inc. v. Levine and Ramey, Hennepin County District Court File No. 95-9126, decision of Judge Justman dated September 18, 1995 . 26

Jadwin v. Minneapolis Star and Tribune Company, 367 N.W.2d 476 (Minn. 1985) 24

Lee v. Pennington, 830 So.2d 1037 (La.App. 2002) 27

Marchant Investment & Management Co., Inc. v. St. Anthony West Neighborhood Organization, Inc., 694 N.W.2d 92 (Minn.App. 2005) 7, 10-11, 15, 21

Maset v. Nusbaum, Hennepin County District Court File No. 98-3110, decision of Judge Porter dated November 16, 1996 26

Middle-Snake-Tamarac Rivers Watershed District v. Stengrim, (A08-0825) (Minn.App. unpublished February 17, 2009) 15

Moreno v. Crookston Times Printing Co., 610 N.W.2d 321 (Minn. 2000) . . 24-25

Phipps v. Clark Oil & Refining Corporation, 396 N.W.2d 588 (Minn.App. 1986), affirmed 408 N.W.2d 569 (Minn. 1987) 17-18

Rehn v. Fischley, 557 N.W.2d 328 (Minn. 1997) 29-30

Special Force Ministries v. WCCO Television, 584 N.W.2d 789 (Minn.App. 1998) 7, 15, 21

Swanlund v. Shimano Industrial Corporation, Ltd., 459 N.W.2d 151 (Minn.App. 1990) 7, 21

Secondary Authority

Minn. Stat. Chapter 554 . . . . . 1, 6, 8-12, 15, 23, 28, 30-32

Minn. Stat. § 554.01, subd. 6 . . . . . 8, 13

Minn. Stat. § 554.02 8

Minn. Stat. § 554.02, subd. 2(3) 8, 21

Minn. Stat. § 554.03 . . . . . 8, 13-14, 21, 28-29, 32

Minn. Stat. § 554.05 32

Minnesota Constitution Article I, Sec. 3 9

Minnesota Rule of Civil Procedure 57 31

Prosser, The Law of Torts, § 116 (5th Ed.) 18

U.S. Constitution, Amendment I 8

STATEMENT OF THE CASE

This is a defamation suit by Nexus, a Minnesota nonprofit corporation, against Janette J. Swift for defamatory statements she made about Nexus before the City Council of Onamia, Minnesota, in entries posted to her two blogs, and in a video that was available to the entire world for some period of time on the entertainment website "YouTube." Nexus operates residential treatment facilities for juveniles with serious behavior problems including sex offenders. One of those treatment centers has been located in leased space in downtown Onamia, Minnesota for the past 18 years. The context of this lawsuit is a project to build a new residential treatment facility in Onamia and move the Nexus operations from downtown Onamia to a location on the edge of town, approximately two miles away from its former site and two miles closer to Swift's home.

After service of initial pleadings and discovery to Swift, she responded by bringing a motion to dismiss under Chapter 554, thereby suspending her obligation to respond to the discovery which Nexus served.

Hennepin County District Court, the Honorable Judge John Sommerville, denied the motion to dismiss by Order dated October 2, 2009 in Appellant's Addendum at page 1. Judge Sommerville did not address the issue of public participation, but denied the motion on the grounds that Nexus had presented a showing that Swift had committed a tort, i.e., that Swift had defamed Nexus. The

judge directed that the case proceed and that Swift answer the outstanding discovery.

STATEMENT OF THE FACTS

Background of the Nexus Project

The Nexus treatment facility is located in the City of Onamia. The project involved buying 38 acres from the existing owners, rezoning it to permit the facility, extending utility service lines to the 38 acres, and building the new facility. The land purchase went through. The previous owners were ready and willing to sell. All of the above steps that required city approval following public hearing took place with proper procedures. Ms. Swift appeared at many, if not all, of the public hearings and expressed her views on the project. She is opposed to the project and did not hesitate to make that view known to the government of Onamia. She expresses her views on the project in forceful and vituperative terms. She purports to represent an organization called Onamia Area Citizens for Responsible Growth (OACRG). She is certainly the leader and spokeswoman, if not the sole member, of that organization. She lives in Bradbury Township near the 38 acres but does not directly adjoin them. The City of Onamia approved the project, and construction of the new facility began in 2008 and is now complete. Nexus occupied the new facility in August 2009.

Swift maintains two separate blogs known as the *Bradbury Buzzz* and *Mille Lacs News*. The addresses are: (http://bradburybuzzzblogspot.com) and

(http://www.millelacsnews.com). The Nexus relocation project is the primary, if not the sole, topic of interest on those blogs. Swift does not restrict her ire to Nexus but includes the government of Onamia, many of the citizens of Onamia – in short, anyone who disagrees with her.

The authority for the above background facts is this court's decision in Freeman v. Swift, ___N.W.2d ___ (Minn.App. 2009). There is no dispute about these background matters.

Background of The Current Lawsuit

Swift appeared at a meeting of the Onamia City Council on March 3, 2008. At that meeting, she raised the topic of the death of T.W. at the Mason City, Iowa facility operated by Gerard Treatment Programs, a Nexus affiliate which provides treatment for juveniles with mental health issues, not sex offenders. She demanded to know whether the city council was aware of those facts and concluded her remarks by claiming that Nexus was "getting away with murder." She posted the same comments on her blog *Bradbury Buzzz* (http://bradburybuzzzblogspot.com) in March. She posted an obituary for the juvenile on her other blog, *Mille Lacs News*, (http://www.millelacsnews.com). She made a video of her performance before the city council replete with scrolling

graphics accusing Nexus of getting away with murder, and posted it on YouTube. It appears that that video is no longer available on YouTube.

Swift admits doing all of the above in her Affidavit, ¶ 12. (App. 21)

After the undersigned counsel for Nexus wrote to Swift demanding that she cease and desist from her defamatory utterances, she reposted the blog entry making the same accusations in May 2008. That blog entry is still on her blog, millelacsnews.com, and is in the record as Exhibit D to the Affidavit of the undersigned dated July 24, 2009.

The facts relating to the death of T.W. are that he was a resident at the Gerard residential treatment facility in Mason City operated by an organization which Swift referred to as Gerard of Iowa, an affiliate of Nexus. The details of the affiliation are not in the record because Swift does not know them, and this was her motion on the pleadings. In 2001, T.W. acted out in such a way as to call for a restraint. Employees of the facility applied that restraint. T.W. died. No one intended to cause the death. The county medical examiner called it homicide in his autopsy report. The county attorney charged it out as child endangerment, not homicide, against one of the two people involved in the restraint. A year later, the county attorney dismissed the case altogether for lack of evidence supporting the

elements. Documentation supporting the above statements are attached to the same Affidavit of the undersigned in the district court file as Exhibits A, B and C.

SUMMARY OF ARGUMENT

The trial court's Order and Memorandum is a masterful opinion construing Chapter 554 in such a way as to avoid constitutional problems. The trial court did not actually hold that any portion of the chapter is unconstitutional, only that it would be unconstitutional if it were to be applied in a certain way. The trial court narrowly construed the provisions of the chapter to avoid having to find that the chapter violates the Constitution. The trial court then denied appellant's motion to dismiss on the grounds that Nexus had made the requisite showing of a tort, leaving the civil case to move forward in the ordinary fashion, i.e., with appellant obligated to answer discovery, the same as any civil litigant.

Chapter 554 purports to create an immunity, but a defamation plaintiff can defeat whatever immunity may exist by a disjunctive showing of either no intent to influence the government **or** a showing of defamation or some other tort. The trial court here did not specifically rule on public participation. He did not need to because he found that Nexus had alleged evidence of a tort which would justify a jury in awarding damages. The trial court did not explicitly state that he found clear and convincing evidence of a tort, but that is unnecessary in view of Swift's

admissions that she made and published the statements which are in writing or recorded. Whatever remains is a matter of arguments of the inferences that the jury may reasonably draw from the admitted facts or legal arguments of counsel.

SCOPE OF REVIEW

The issue is whether Nexus presented a prima facie case of defamation by clear and convincing evidence. This court reviews the trial court's decision thereon de novo. Swanlund v. Shimano Industrial Corporation, Ltd., 459 N.W.2d 151, 155 (Minn.App. 1990). This court "makes an independent assessment of whether the evidence is sufficient to present a fact question to the jury." Id. This court and the trial court make that determination based on the evidence presented by Nexus without any consideration of evidence put on my Swift. Id. at 154. A defamation plaintiff has the burden of showing by clear and convincing evidence that the defendant's conduct is not immune because it amounts to a tort. Special Force Ministries v. WCCO Television, 584 N.W.2d 789, 792 (Minn.App. 1998). All reasonable inferences are to be drawn in favor of the party opposing the motion to dismiss. Marchant Investment & Management Co., Inc. v. St. Anthony West Neighborhood Organization, Inc., 694 N.W.2d 92, 97 (Minn.App. 2005).

ARGUMENT

I. THE TRIAL COURT CONSTRUED AND APPLIED CHAPTER 554 IN SUCH A WAY AS TO AVOID CONSTITUTIONAL PROBLEMS.

The legislature enacted Chapter 554 of Minnesota statutes in 1994. The chapter may apply in claims arising out of "public participation" defined as "speech or lawful conduct that is genuinely aimed in whole or in part at procuring favorable government action." Minn. Stat. § 554.01, subd. 6. If a citizen has spoken out before a government body on an issue of public interest, and has gotten sued because of that action, § 554.02 allows the defendant to make a motion to dismiss on the pleadings. The ensuing lawsuit is usually, but not necessarily, a defamation claim. The chapter allows a district court to dismiss the lawsuit unless the opposing party (usually a defamation plaintiff) produces "clear and convincing evidence that the acts of the moving party are not immunized from liability under Section 554.03. . . ." Section 554.02, subd. 2(3). Section 554.03 provides that "lawful conduct or speech that is genuinely aimed in whole or in part at procuring favorable government action is immune from liability, unless the conduct or speech constitutes a tort or a violation of a person's constitutional rights."[1]

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[1] There is a consensus that Minnesota's Chapter 554 and other comparable state statutes (collectively referred to as anti-SLAPP laws) exist for the purpose of vindicating a citizen's constitutional right to petition the government. U.S. Constitution, Amendment I. Specifically, the First Amendment provides

In the present case, appellant Swift spoke out before the government of Onamia and further memorialized her commentary on her blogs and a YouTube video. Nexus heard and read that commentary which was published to the entire world. It brought this claim for defamation. Swift brought a motion to dismiss under Chapter 554. Judge Sommerville's ruling thereon and then this appeal ensued.

A. The trial court's pronouncements on constitutionality are hypothetical.

Nexus does not claim that Chapter 554 is unconstitutional on its face.[2] The unconstitutionality would lie in an improper application of the chapter which Judge Sommerville avoided. The statute can be applied as written in a constitutional manner in the proper case. Perhaps the chapter is even a salutary

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"Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Constitution, Amendment I. There is no comparable right in the Minnesota Constitution. The nearest equivalent is Minnesota Constitution Article I, Sec. 3, which reads:

> The liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, **being responsible for the abuse of such right**. (Emphasis added)

[2] Nexus provided proper notice of the constitutional issue to the Attorney General in both the district court and this court.

measure that produces substantial justice in proper cases. But this is not a proper case.

A perfect example of how the statute should operate, and a proper case for its application, is Marchant Investment & Management Co., Inc. v. St. Anthony West Neighborhood Organization, Inc., 694 N.W.2d 92 (Minn.App. 2005). The purported defamation in Marchant was a letter from the neighborhood organization to the Minneapolis Planning Department stating that the organization had met with the developers and "They have refused to listen to our concerns, . . ." 694 N.W.2d at 94. This court affirmed dismissal based on Chapter 554 on the grounds that there was no clear and convincing evidence of defamation. This is manifestly correct. The statement that the developer was not listening to or paying attention to the concerns of the neighborhood is not defamatory on any standard. The lawsuit against the neighborhood organization was simple harassment to get them to shut up – or so the court might reasonably infer. Under these circumstances, it is salutary to have a statutory mechanism in place for rapid disposition of the claim. Without Chapter 554, the neighborhood organization could have brought a motion for dismissal early in the proceedings, but it is likely that any judge would deny the motion and tell the parties to come back with

summary judgment motions after discovery. Chapter 554 saved the organization at least some attorney's fees.

The present case is quite unlike Marchant. In Marchant, there was a complete absence of a defamatory statement. The neighborhood group opposed the plans of the developer. The city no doubt had its own views on the question. The developer cannot possibly please everyone. Whatever the developer does, somebody will accuse it of not listening to that party. How that could possibly tend to diminish the esteem of the developer in the community is anybody's guess. In short, a defamation claim requires a defamatory statement. A defamation plaintiff without a defamatory statement can expect the claim to fail sooner or later.

Secondly, the facts of Marchant do not involve the internet, blogs, or YouTube. The alleged defamatory statement appeared in an exchange of letters to the Minneapolis Planning Department copied to the mayor, the city council, the plaintiff and another development company. 694 N.W.2d at 94. In other words, defendant sent the letter to the persons most closely involved in making the decision, i.e., to the government itself.

In the present case, Judge Sommerville held that the statute would violate due process and the right to jury trial if it required the court to dismiss the case

even if the court were of the view that the matter should proceed to discovery. (Addendum 8-9) However, the court avoided these potential constitutional difficulties by denying the motion to dismiss on the grounds that Nexus had made a proper showing of a tort.

The undersigned is of the view that Judge Sommerville was plainly correct – the chapter would violate the Constitution if it were to be applied in the manner that the judge foresaw. Having foreseen those difficulties, and having construed the statute in such a way as to avoid them, the trial court deferred the potential constitutional problems to another day. In light of this, those substantial portions of Swift's brief devoted to arguing that the courts of other states have concluded that those states' comparable statutes do not violate their constitutions are nothing more than interesting reading.

II. THE TRIAL COURT PROPERLY FOUND THAT NEXUS HAD STATED A CLAIM FOR DEFAMATION FOR WHICH THE JURY COULD AWARD DAMAGES.

A. The "immunity" of Chapter 554 is twofold and can be destroyed by a showing of no public participation or a tort.

Swift's brief first addresses the issue of public participation, taking the position that Swift's activities did indeed amount to public participation as defined; and then moves on to the issue of defamation, taking the position that her

statements were not defamatory. Her brief then assails the judge for supposedly not deciding the matter on the merits while finding the statute unconstitutional. None of these arguments is correct. The judge did decide the matter on the merits – the merits of the defamation claim. Having made that decision, there was no occasion to address the issue of public participation. The judge simply applied the statute as written.

As the trial court noted, Minn. Stat. § 554.03 involves three inquiries: 1) whether the speech is "lawful;" 2) whether it is genuinely aimed at procuring favorable government action; and 3) whether it amounts to a tort. As the court further noted, factors 1 and 3 are the same thing. (Addendum at 7) Lawful speech is not defamatory, and defamation is not lawful speech. Whether the speech is lawful is the first factor in the statute, so the trial court considered it first. The immunity of the statute can be defeated by either a showing of unlawful speech or defamation, or lack of public participation. Having found a jury issue as to the tort, there was no need for the judge to further discuss public participation.

Swift devotes a significant portion of her brief (Section I, pp. 11-24) to arguments that her conduct was public participation within the meaning of Section 554.01, subd. 6. The trial court did not rule on that issue so there is nothing for this court to review on that point. Nor is there occasion for this court to remand

for a finding thereon. The finding that Nexus stated a tort is a sufficient basis to deny Swift's motion. At that point, whether or not she was engaged in public participation is a hypothetical question.

The undersigned wishes that the trial court had ruled on the issue of public participation, because there was no case law on the scope of the immunity of § 554.03 until this court's decision in the related case of Freeman v. Swift, A09-598, filed December 29, 2009. From the Freeman opinion, we know that there are limits on the immunity. Statements can be so attenuated from the public controversy that the court may conclude that public participation is absent even if the controversy provided the occasion to create a blog. In short, it is now clear that the legislature did **not** intend to give anybody a license to say anything about anybody in any format as long as there is some controversy pending before some government body. It is a matter of drawing a line at some reasonable place. The Freeman decision is the only one providing any guidance on where to draw that line. In this case, we may reasonably doubt whether the legislature intended the immunity to extend as far as venues such as YouTube which exists primarily for the purpose of entertainment,[3] particularly where YouTube did not exist when the

[3] As of this writing, the most frequently viewed video on YouTube is Mariah Carey's comical, bumbling, incoherent, and disjointed acceptance speech at some award ceremony.

legislature first enacted the chapter in 1994. YouTube was not at issue in the Freeman matter. However, in the absence of a ruling by Judge Sommerville on the issue of public participation, this case is not the appropriate one in which to further develop that theme.

Swift cites to four decisions of this court arguing that this court has consistently found that the anti-SLAPP statute applies. (Swift's Brief at 15) The argument omits to mention that in two of the cases[4] this court found public participation, but permitted the defamation claim to go forward because the plaintiff had stated a prima facie case of defamation. The purported immunity can be destroyed by either a showing of no public participation or a showing of a tort. Either suffices as a basis for the district court to deny the motion to dismiss. There is no requirement for the court to rule on both issues. If the court finds sufficient

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[4] American Iron and Supply Company, Inc. v. Dubow Textiles, Inc., (C1-98-2150) (Minn.App. May 25, 1999) (App. 176) and Special Force Ministries v. WCCO Television, 584 N.W.2d 789 (Minn.App. 1998).

The other two cases which Swift cites are Marchant Investment & Management Co., Inc. v. St. Anthony West Neighborhood Organization, Inc., 694 N.W.2d 92 (Minn.App. 2005), discussed above, in which this court affirmed a finding of no defamation; and Middle-Snake-Tamarac Rivers Watershed District v. Stengrim, (A08-0825) (Minn.App. unpublished February 17, 2009) (App. 186) which simply holds that Chapter 554 applies to actions to enforce a previous settlement.

allegations of defamation to allow the claim to move forward, there is no reason to specifically address the issue of public participation.

B. The trial court properly found that Nexus had made the proper showing of tort.

The trial court found that Nexus "has alleged the appropriate elements of defamation and finds that facts could be introduced consistent with the pleading that would support granting the relief demanded." (Addendum at 10) This is manifestly correct. This court should affirm.

The allegations of defamation in this case are comparable to the allegations in American Iron and Supply Company, Inc. v. Dubow Textiles, Inc., (C1-98-2150) (unpublished Minnesota Court of Appeals May 25, 1999) (A176). Both matters involve allegations of crime. In Dubow, there was a crime and a conviction for that crime. However, the defamer got the crime wrong and named the wrong person as the perpetrator. This court allowed the defamation case to go forward even though there was a valid claim of public participation. (A179-80)

The present matter presents even stronger facts than Dubow. Here, there was a death and an accusation of crime. But Swift named the wrong crime. She said homicide and "murder," but the prosecutor charged it out as child endangerment. She named Nexus as the perpetrator which is not true. Unlike

Dubow, no one was convicted of anything (or even tried) in connection with the death of T.W. The prosecutor dropped all charges. Nexus has stated a claim for defamation which should proceed for resolution. The trial court properly so found whether or not Swift was engaged in public participation.

The present matter is also comparable to the case of Phipps v. Clark Oil & Refining Corporation, 396 N.W.2d 588 (Minn.App. 1986), affirmed 408 N.W.2d 569 (Minn. 1987) because the gist or sting of Swift's commentary is defamatory even if she got one or two of the facts correct. Phipps is the case which is familiar for the public policy exception to the rule of at-will employment. Phipps was the gas station attendant who refused to fill the customer's illegally modified gas tank with cheaper leaded gas because it would have violated the law. He got fired for his scruples and applied for unemployment benefits. Clark Oil defended on the grounds that they fired him because he was rude to the customers and failed to provide full service to a handicapped customer who just happened to be the one who asked for leaded gasoline. Phipps then sued Clark Oil for defamation. Clark Oil defended on the ground that the statement was true – Phipps did refuse to provide full service to the handicapped customer. Phipps responded that the implication of the statement was defamatory, i.e., that he was a bigot who did not like handicapped people and treated them poorly simply because of their handicap;

in other words, that the obvious implication of the statement was defamatory even if the statement did not say so in so many words. The supreme court agreed with Phipps. The court noted:

> In determining whether a statement is defamatory, the court must look to the nature and obvious meaning of the language in its plain and ordinary sense, construing it as a whole, including innuendos reasonably laid from the statement. 396 N.W.2d at 594.

Accordingly, Phipps was entitled to present his case to the jury even though the details of the statement were technically correct. If the true details are presented in such a way as to give rise to a false implication, the claim for defamation lies.

Professor Prosser has expressed the same rule. He writes:

> The rule that makes truth relevant to the "gist" or "sting" of the publication protects the defendant who has got the details wrong but the "gist" right; but it also works in reverse, to impose liability upon the defendant who has the details right but the "gist" wrong. Thus, if the defendant juxtaposes the series of facts so as to imply a defamatory connection between them, or creates a defamatory implication by omitting facts, he may be held responsible for the defamatory implication, unless it qualifies as an opinion, even though the particular facts are correct. Prosser, The Law of Torts, § 116 (5th Ed.), cited Diesen v. Hessburg, 437 N.W.2d 705, 709-10 (Minn.App. 1989), (emphasis omitted), reversed on other grounds at 455 N.W.2d 446 (Minn. 1990).

All the above case law applies in the present case. Swift tried to do what Clark Oil Company did except she didn't even get all the details correct. The facts

are that in 2001, T.W. was a resident of a Mason City, Iowa facility operated by a Nexus affiliate. Details of the affiliation are not in the record. T.W. acted out. Employees of the facility applied a restraint. T.W. died. No one intended the death. The county medical examiner called it a homicide in his autopsy report. No one else agreed with him, including the county attorney who charged the case out as child endangerment, not homicide. A year later, the county attorney dismissed the case altogether because he did not have enough evidence.

Based on the above, Swift broadcast to the entire world that Nexus is "getting away with murder." The implication of this statement is that the death of T.W. was a murder, that someone intended to bring about the death of T.W., that someone was an employee of Nexus, that Nexus deserves appropriate criminal punishment for homicide, and that Nexus has avoided that punishment by invidious means.

None of the above implications is true. All of the above implications are false. The only facts correctly stated by Swift are that T.W. died and that the medical examiner said it was homicide. The person accused of the supposed homicide was not Nexus. That person was not an employee of Nexus. No one else in the county criminal justice system thought it was homicide. The prosecutor

brought no homicide charge against anybody. There was never a trial or a conviction of anybody based on the prosecutor's decision to dismiss the case.

Swift does not maintain that her statements were true in all particulars. Her argument is that the phrase "getting away with murder" is metaphoric and not susceptible to being shown or proven true or false. The point at this stage of the proceedings is that Nexus made a showing of falsity to which Swift responded, not with factual counter-averments but legal arguments about permissible inferences. Legal arguments about permissible inferences are for a later stage of the proceedings.

Arguments whether a phrase is metaphor or factual are more appropriate for summary judgment rather than a motion to dismiss at an early stage. The phrase "getting away with murder" often may be used as a metaphor, but it can also be used in a factual manner – as Swift did here by using the phrase in the next sentence after referencing the death of T.W. as fact and calling it a homicide as fact. Her submission to the district court includes a reference to a book titled *How I Helped O.J. Get Away With Murder: The Shocking Inside Story of Violence, Loyalty, Regret, and Remorse* (Regnery Publishing 2008), in which the author uses the phrase in a factual rather than metaphoric manner.[5]

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[5] Defendant's Reply Memorandum dated July 31, 2009 at 11.

C. Nexus presented clear and convincing evidence of defamation even if the trial court did not use that phrase.

The statute does require that the nonmoving party (Nexus) make showing of a tort by clear and convincing evidence. Minn. Stat. § 554.02, subd. 2(3). That is the Swanland standard cited in Special Force Ministries v. WCCO Television, 584 N.W.2d 789, 792 (Minn.App. 1998) which noted:

> The trial court must determine whether a jury could reasonably find *either* that the plaintiff proved his case by the quality and quantity of evidence required by the governing law *or* that he did not. Swanlund, 459 N.W.2d at 154.

The clear and convincing standard applies to the facts of defamation on a motion to dismiss under § 554.03. Inferences are drawn in favor of plaintiff. Marchant, 694 N.W.2d at 97.

That is the standard that Judge Sommerville applied and found even if he did not specifically call it clear and convincing evidence. The court found "that [Nexus] has alleged the appropriate elements of defamation and . . . that facts could be introduced consistent with the pleading that would support granting the relief demanded." (Addendum at 10) The judge plainly found that Nexus had put on evidence of defamation by Swift which, if believed by the jury, would permit the jury to make an award of money damages. Nexus' evidence, in the absence of contradicting evidence, would justify the jury in finding for Nexus. Nexus made

that showing and, therefore, satisfied the clear and convincing standard. We expect that at trial Swift will put on evidence and attempt to make arguments in opposition. Perhaps the jury will believe that evidence and those arguments and find in her favor. But that is a matter for a later stage of the proceedings. The trial court properly found that Nexus made enough of a showing at this stage to defeat Swift's motion.

The clear and convincing standard would apply better to a case of oral defamation with no written proof, where there may well be genuine issues of fact as to what exactly was said, or even who said it, and to whom. But that is a different case.

The clear and convincing standard does not apply particularly well to a case such as this one with documentary evidence of statements. They are Swift's own statements made to the city council, captured on videotape, and broadcast to the world on YouTube, and further appearing in her own blog. What she said, that she made the statements, that they refer to Nexus, and that she published them to the world at large is not only undisputed, but admitted. This plainly satisfies the clear and convincing evidence standard. What remains is for her attorney to make legal arguments about the import of those words, or for the jury to draw inferences from

her words. But legal arguments and inferences do not fall under the clear and convincing standard.

Judge Sommerville did not explicitly say that he made his findings as to defamation on a clear and convincing standard. This court could remand for Judge Sommerville to add the magic language, but that seems like a pointless exercise. The court's Order and Memorandum has enough to enable this court to conclude that the district court found that Nexus has satisfied the standard.

The trial court properly found that Nexus had presented a case of defamation that should go forward. Some portion of Swift's statements may have a grain of truth as to somebody, but not as to Nexus. Her distortions overwhelm the grain of truth that may be present. Her accusations are not a supportable interpretation of the facts.

Accordingly, Swift has no basis to claim an immunity under Chapter 554, and the court properly denied the motion to dismiss. The case should then move forward with Swift obligated to respond to the discovery which had been served a year before. This court should affirm.

D. Other legal issues relating to defamation.

Swift's brief makes short mention of other legal issues relating to the law of defamation and proof thereof which are not directly relevant in this appeal but

which call for brief response. Although the issue of malice is not before this court, Swift seeks to set the stage at the trial court level upon remand by asserting in a footnote that Nexus, as a corporate plaintiff, is considered a public figure and must show actual malice. Her brief cites in support Jadwin v. Minneapolis Star and Tribune Company, 367 N.W.2d 476, 487-88 (Minn. 1985). (Swift Brief at 33-34) Nexus intends to take the position at the trial court that Jadwin does not apply. The Jadwin court held:

> We hold, therefore, that corporate plaintiffs in defamation actions must prove actual malice **by media defendants** when the defendants establish that the defamatory material concerns matters of legitimate public interest **in the geographic area** in which the defamatory material is published, . . . Such a rule will encourage the media to probe the business world to the depth which is necessary. . . . Jadwin, 367 N.W.2d at 487-88. (Emphasis added)

Swift is not a media defendant. She might like to pretend that she is the media but that is as far as it goes. Furthermore, by posting commentary on blogs and YouTube, she published them to the entire world, far exceeding the geographic area in which the issue of the location of a Nexus facility is of legitimate public interest.

Secondly, Swift asserts that her comments before the city council are privileged under the case of Moreno v. Crookston Times Printing Co., 610 N.W.2d 321 (Minn. 2000). The citation is misplaced. Moreno was the police

officer's suit against an ordinary citizen, who said at a city council meeting that the police officer was selling drugs to children, and the newspaper that reported the accusation. However, the issue that went up on appeal involved the newspaper only, specifically, whether Minnesota would recognize a privilege for the benefit of media that publish fair reports on proceedings before government boards even if the material is defamatory. Nothing in Moreno mentions a privilege for the benefit of the citizen to defame.

III. ARGUMENTS BASED ON STATUTES AND CASE LAW FROM OTHER STATES ARE NOT ILLUMINATING.

Swift devotes a substantial portion of her brief to elaborate arguments based on statutes and case law from other states finding that their own anti-SLAPP statutes are constitutional, or finding that their anti-SLAPP statutes apply under the facts of those cases. All of this makes interesting academic reading but is not at all dispositive, controlling, or even particularly pertinent. Other states can do what they want and pass whatever laws they choose to vindicate the rights of their citizens. Minnesota is free to do the same.

The anti-SLAPP statutes from other states may not be as comparable to Minnesota's as Swift would have this court believe. The Freeman court discussed the same issue. The Freeman court found that a Pennsylvania anti-SLAPP statute

was reasonably comparable to Minnesota's, but that statutes from Maine and Massachusetts were not. Freeman, ___N.W.2d at ___. Furthermore, while none of the cases to which Swift cites have found that those foreign statutes were unconstitutional, two decisions from Hennepin County District Court, attached to the Affidavit of the undersigned, did so find.[6] To the extent that the case law from other jurisdictions discusses whether the activities of the parties there did or did not constitute public participation, such a discussion is beside the point as applied to the present case since Judge Sommerville did not rule on that issue. What other states have done with that issue sheds no light on the case before this court.

Swift concludes that section by discussing what Louisiana has done with its comparable statute. Louisiana found that its statute was constitutional and indeed indistinguishable from well-established civil procedures, such as summary judgment,[7] providing for adjudication of cases prior to a jury trial. The purpose of the early motion in Louisiana's statute is simply "to act as a procedural screen for

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[6] Halley's Custom Homes, Inc. v. Levine and Ramey, Hennepin County District Court File No. 95-9126, decision of Judge Justman dated September 18, 1995 (Exhibit E to Affidavit of Victor Lund); Maset v. Nusbaum, Hennepin County District Court File No. 98-3110, decision of Judge Porter dated November 16, 1996 (Exhibit F to Affidavit of Victor Lund).

[7] Although no doubt Louisiana has a different name than summary judgment.

meritless suits, which is a question of law for a court to determine at every stage of a legal proceeding." Lee v. Pennington, 830 So.2d 1037, 1043 (La.App. 2002), quoted in Swift's brief at 29.

That is exactly what the trial court did in this case, although Swift does not care for the decision because the trial court ruled against her. Swift's motion to Judge Sommerville called upon the court to determine whether or not Nexus' claim for defamation against Swift was meritless. The judge found that the claim of Nexus is anything but meritless; that Nexus had stated a claim for defamation for the jury to resolve. Therefore, the case should proceed to discovery, motion practice, and jury trial.

Of course, there is nothing unusual about court orders denying motions for summary judgment. Swift seems to argue that she is entitled to a dismissal simply because the legislature created a statutory mechanism for her to make the motion for dismissal. The district court does not exist for the sole purpose of rubber-stamping whatever Swift asks it to do. A party opposing dismissal has the right to make a showing that there is evidence of wrongful conduct, that the moving party is not entitled to judgment, and that there is something for the jury to decide. Nexus made that showing. The trial court considered the submissions of both sides, and denied the motion.

The trial court made the peculiar statement at the end of its Memorandum that "the Court is unable on the record at this stage in the proceedings to determine whether Plaintiff's [sic][8] statement does or does not constitute defamation." (Addendum at 10) This appears to misconstrue Chapter 554. No one maintains that § 554.03 directs the district court to make a final determination of the liability issue on the pleadings. Section 554.03 creates a screening mechanism to weed out mainly meritless cases at the beginning. The statute directs the court to determine whether there is a sufficient showing of a tort to permit the claim to go forward. Judge Sommerville made that precise determination – that Nexus had made a sufficient claim of defamation to permit the matter to go forward.

It is true, as Swift argues (on pp. 30-31 of her Brief) that immunity is typically the first issue to be decided in a case, and frequently decided by interlocutory appeals. That is why the parties are before this court now. Since Judge Sommerville found that Nexus had made a showing of the elements of defamation, that should be an end of the question. Since the trial court did not rule on public participation, the discussion about comparable statutes in other states and how far they may construe the concept of public participation has no bearing here.

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[8] Obviously, the court intended to write "Defendant's statement."

IV. THE IMMUNITY CREATED BY SECTION 554.03 IS ILLUSORY.

The court may wonder what the purpose of the supposed "immunity" in Section 554.03 can possibly be, and whether the legislature properly called it an immunity. All other immunities apply to defeat liability, as well as the obligation to defend the claim at all, even where a tort has actually been committed. For example, government officials frequently receive an absolute immunity, the purpose of which is to enable the officials to do their jobs without having to worry about ensuing lawsuits. The threat of potential litigation might deter zealous discharge of the duties of office. Carradine v. State of Minnesota, 511 N.W.2d 733, 735 (Minn. 1994).

The supreme court discussed the distinction between immunities and affirmative defenses in Rehn v. Fischley, 557 N.W.2d 328 (Minn. 1997).[9] The court summarized the general policy basis for immunities by quoting Professor Keaton. The court said:

> The traditional basis for immunity is that "though the defendant might be a wrongdoer, social values of great importance require that the defendant escape liability." Rehn, 557 N.W.2d at 333 quoting Keaton, et al., Prosser and Keaton on Tort, § 131 at 1032 (5th Ed. 1984).

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[9] The court previously noted that immunity and defamation do not necessarily mesh. "But official immunity does not fit defamation." Bauer v. State, 511 N.W.2d 447, 449 (Minn. 1994).

Although the wrongdoer may have done wrong and injured someone, there are other reasons of social importance why the wrong should go unpunished and the injury should go uncompensated. But the "immunity" in Chapter 554 does not apply where there is a showing of tort. A showing of a tort defeats the immunity. Citizens petitioning the government do not have an immunity to commit torts without fear of liability. If they commit torts, they have no immunity. If there is a basis for liability, the claim will go forward. If the liability is proven, the citizen who petitioned the government and committed a tort in the process may become a judgment debtor. There is no immunity from the obligation to defend claims. If there is a showing of a valid tort, the citizen must defend or default.

Not all immunities are absolute. Many immunities can be defeated by the proper showing. But no other immunities in Minnesota law are defeated by a prima facie showing of a tort. The purpose of an immunity is to avoid liability, as well as the obligation to defend even where a tort is shown. An immunity that applies only in the absence of potential liability is no immunity. An immunity that disappears as soon as there is a plausible allegation of wrongful conduct is an illusory immunity. It would provide no protection against anything. A supposed immunity that defeats neither defense nor liability where there is a prima facie pleading of a tort is no immunity at all.

Under these circumstances, it might be that the best way to interpret the chapter is to declare that the legislature chose the wrong word when they called it an "immunity." Chapter 554 amounts to an encouragement by the legislature to the district court to consider motions on the pleadings without waiting for discovery: 1) if it is reasonably apparent that the claim arose in the context of the defendant exercising a right to petition the government, and 2) it is reasonably apparent that there is no tort. If this is what the chapter means, there is no reason to address questions of immunity or lack of immunity. It is simply a matter of encouraging the district courts to set aside their natural tendency to let cases develop through discovery before considering dispositive motions, but to seriously consider motions to dismiss. This is comparable to the invitation in Rule 57 MRCP to advance declaratory judgment matters on the calendar.

However, if there is an absence of a showing of either of the factors noted above – where it is not reasonably apparent that the defendant was exercising a right to petition, or where it is reasonably apparent that there is a genuine tort – then there is no reason why the matter should receive special treatment. Whatever

immunity there may have been disappears at that point, which probably means that it was never any immunity at all.[10]

Analyzing Chapter 554 this way eliminates conceptual difficulties involved in the concept of immunity and vindicates the legislature's statement in Section 554.05 that nothing in the chapter precludes any other rights any party has under the Constitution, statutes, case law or rules of court.

Applying this reasoning to the present case, Swift made her motion on the theory that her activities were done in the course of petitioning the government. Nexus submitted arguments in opposition to that claim, but the trial court never ruled. That makes no difference because the court found Nexus had stated a claim for defamation. The trial court did not say that he found clear and convincing evidence but that makes no difference either where the statements are written, or recorded, and Swift admits making them. Since the judge found a well-pleaded tort based on unsupported facts, he properly denied the motion to dismiss. At that point, the purpose of Chapter 554 is served, and the case should proceed like any

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[10] At best, the immunity in § 554.03 may amount to an immunity from frivolous tort claims with little or no factual support, but there are already procedures in place to dispose of such matters. Another way to regard the statute might be to infer that the legislature intended to create a rebuttable presumption of an immunity where the defamation defendant has made a showing of public participation. If so, the standard for rebutting the presumption is not particularly high.

other civil litigation. Assuming it makes sense to say that Swift ever had an immunity, it disappeared when the judge found a well-pleaded tort.

CONCLUSION

For all the above reasons, the court should affirm the district court in all respects and remand this matter for further proceedings.

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