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April 13, 2009

Frederick K. Grittner
Clerk of Appellate Courts
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Boulevard
St. Paul, MN 55155-6102

APR 14 2009

Re: Appellate Court File Nos.
A09-599 and A09-598
Our File No. 4568-32
Freeman, et al. v. Swift

Dear Mr. Grittner:

Enclosed herewith for filing are the following:

1. Original and four copies of Respondents' Memorandum in Opposition to Petition for Discretionary Review in Court File No. A09-599; and
2. Original and four copies of Respondents' Motion to Dismiss Appeal in Court File No. A09-598.

By a copy of this letter, the above documents are being served upon counsel for appellant.

Very truly yours,

MAHONEY, DOUGHERTY AND MAHONEY
Professional Association

Victor Lund

Victor Lund

VL/ma
Encls.

CC: Marshall H. Tanick
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Case No. A09-599

STATE OF MINNESOTA
IN COURT OF APPEALS

Peter Freeman and James D'Angelo,

Respondents,

-vs-

Janette J. Swift,

Appellant.

RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITION FOR DISCRETIONARY REVIEW

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TO: Frederick K. Grittner, Clerk of Appellate Courts, 305 Minnesota Judicial Center, 25 Rev. Dr. Martin Luther King, Jr. Boulevard, St. Paul, MN 55155:

Respondents Peter Freeman and James D'Angelo submit this memorandum in opposition to Janette J. Swift's petition for discretionary review of a decision of the Hennepin County District Court dated March 5, 2009.[1]

STATEMENT OF FACTS NECESSARY TO AN UNDERSTANDING OF THE ISSUES

James D'Angelo is the now retired former CEO of Nexus, which owns and operates a number of juvenile sex offender treatment centers in Minnesota and other states. Peter Freeman is a board member of Nexus. Nexus has operated a facility in Onamia, Minnesota since the early 1990s. Several years ago, Nexus decided to build a new facility in Onamia rather than incurring the expense of remodeling its existing building and bringing it up to code. The old location was in the middle of the town and visible from Highway 169. The new location is approximately two miles away and located in Bradbury Township where petitioner Janette J. Swift resides. Her land does not adjoin the Nexus property, but is perhaps a half mile removed.

Janette J. Swift has opposed the Nexus relocation project before the Onamia City Council and other government boards. She has expressed her opinion against the project vigorously and even caustically at public hearings. She does not confine her wrath to

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[1] The court's notice of case filing dated April 7, 2009 notes that petitioner has not yet paid the filing fee. The court should not consider this memorandum, or the petition, until it receives the filing fee.

Nexus but extends it to anyone who disagrees with her, including the city council of Onamia.

Swift maintains two separate blogs to disseminate her views to the entire world. Freeman, D'Angelo and Nexus do not particularly enjoy being the object of Swift's denunciations, but they have never quarreled with her First Amendment right to state her opinion on the subjects pending before the government of Onamia and to do so vigorously, metaphorically, caustically, and even vituperatively. However, D'Angelo sued her for defamation when her statements about him on her blog passed the bounds of what the First Amendment permits and became defamation. He sued when her blogs contained untrue and hurtful statements about him purporting to be the facts.

Swift first posted a blog entry with particularly defamatory statements about D'Angelo on September 1, 2007 under the title, "Can you hear me now?" She reposted that entire entry several months later on December 29, 2007, after she got served with the complaint.

That blog posting reads:

> He's dishonest. He's a liar. He lacks character. That can lead to trouble. Maybe he'd mis-managed his finances and was deep in debt. And when Nexus fired him recently, (we like to think he was fired,) and his wife probably left him (we think he's kinky) and the FBI investigated him (we think he's running a crooked company), and he was on his way to jail for racketeering (one can dream). . . .

A later blog entry on November 10, 2007 included the following:

> Hannabelle [Swift] doesn't take bribes. But imagine how different I might feel if Poopsie [D'Angelo] and Company had wined and dined me, spoken sweet and low, courted my favor, and sent me flowers and candy. . . .
>
> **instead of death threats and the law suits???**

Freeman sued when Swift sent defamatory e-mails to 20 of his colleagues on the faculties of St. Thomas and St. Catherine dealing with his role on the board of Nexus. Those e-mails accused Freeman of behavior that is "unethical, immoral and possibly even illegal . . ." and compared his actions to a person who pushes a button, thereby launching a missile which destroys an entire village and its occupants and then holds up his hands saying, "See? No blood on MY hands."

Those e-mails state that she is sending them because she believes that Freeman had violated the code of conduct of faculty members. Her first affidavit dated March 14, 2008, ¶ 14 says the same thing – she contacted the faculty members because she thought Freeman's conduct was in violation of the Universities' mission statements. After respondents' memorandum in opposition was on file, she submitted a second affidavit dated August 8, 2008 taking the position that she sent the e-mails to the faculty members in the hope of somehow enlisting their assistance in stopping the project in Onamia. (Affidavit of Janette J. Swift dated August 8, 2008, ¶ 7.)

Swift responded to the complaint with a motion to dismiss under Minn. Stat. Ch. 554, popularly known as the anti-SLAPP law. Respondents oppose the motion. The motion came on for hearing the first time on August 18, 2008 before Judge Susan Burke.

She then recused herself because her law clerk was attending the St. Thomas Law School. Two other judges recused themselves for the same reason. The motion came on for hearing the second time on January 23, 2009. Judge Rosenbaum issued her decision on March 5, 2009 denying the motion to dismiss on the grounds that Swift's statements were not genuinely aimed at procuring favorable government action "but were instead intentionally aimed at audiences having no connection with the public project and controversy." (District Court decision, p. 6.) Secondly, Judge Rosenbaum found that plaintiffs made a prima facie showing by clear and convincing evidence that the statements were defamatory.

Swift now appeals. She has filed two separate appeals. She purports to appeal as of right from the trial court's decision on the immunity issue, and has filed a separate petition for discretionary review on the issue of whether her statements were defamatory. Freeman and D'Angelo separately move to dismiss the purported appeal as of right on the statutory issue and submit this memorandum in opposition to the petition for discretionary review.

ARGUMENT

I. THE COURT SHOULD REJECT THE PETITION TO REVIEW THE DECISION THAT SWIFT'S STATEMENTS WERE PRIMA FACIE DEFAMATORY.

Swift made the defamatory statements about respondents quoted above on pp. 3-4. The trial court found that respondents had made a prima facie showing that those

statements were defamatory, or that respondents are entitled to get to the jury on the question. Swift petitions this court to review that decision, i.e., she asks this court to accept review to decide that the statements are not defamatory as a matter of law. This court should reject her petition on the grounds that review would be a complete futility. There is nothing to review. Swift has admitted many of the elements of defamation in her answer or in her affidavits. The only element she has not admitted is whether the statements are defamatory, but the court can determine by reading them that many of the statements are defamatory per se. Swift accuses respondents of crime, corruption and deviant sexual practices. These statements are defamatory per se. A review of the district court's decision would accomplish nothing other than to affirm it.

Swift makes the additional argument that otherwise defamatory statements are not defamatory if the author shall include prefatory phrases such as, "We like to think," or "One can dream," or "Maybe," or "Probably." There is no support for this argument. Perhaps the right prefatory phrase in front of a particular defamatory statement under the right facts might transform defamation into non-defamation, but it would be entirely dependent upon the particular facts. There are no such facts in the record in this case. Respondents have not had an opportunity to do any discovery. Swift has not answered any interrogatories or appeared for a deposition. The motion to dismiss stayed all discovery. If the court were to adopt this particular argument, it would do so only on a

fully developed record rather than on discretionary review of an interlocutory decision before any discovery.

The bulk of Swift's petition is devoted to arguing that statements such as "He's a liar," or "He's a snake," are not sufficiently factual to be defamatory. That is probably true. Statements that are opinions or metaphorical are generally not sufficiently factual to support a defamation claim. However, those are not the defamatory statements that respondents sue over. One of the difficulties of Chapter 554 is that it stays all discovery until the court rules. One of the first interrogatories from a defamation defendant is to ask exactly what the defamatory statements are if the complaint does not provide enough detail. The plaintiff then is obligated to provide an answer. None of that happened here because Swift brought her motion.

If Swift had asked that interrogatory, the answer would have included the statements quoted above on pp. 3-4, i.e., statements that D'Angelo was in debt, had mismanaged his finances, was fired, his wife left him because he had kinky sexual practices, the FBI was investigating him for running a crooked company, he was on his way to jail for racketeering, he made death threats to her, and that he is a predator who preys on the elderly, as well as the e-mails to Freeman's colleagues. These are the statements that the trial court found were defamatory, or at least respondents were entitled to get to the jury on the question.

There is nothing to review on the question of whether respondents presented prima facie evidence of defamation. Swift admitted the following elements of defamation in her answer and in her various affidavits:

- That she made the statements;
- That they refer to respondents;
- That she published them to the entire world on her blogs;
- Or in the case of Freeman that she sent e-mails to his colleagues.

Admissions are even greater proof than clear and convincing evidence. There is nothing to review. The only question is whether the statements are defamatory, and many of them are defamatory per se.

Swift's petition for discretionary review spends most of its time arguing that general statements such as he's a liar or a snake are not defamatory. The court should reject the petition if for no other reason than that it does not address the real defamatory statements except in one paragraph on the last page. As to those statements, Swift argues that the phrases such as "Maybe" or "We'd like to think" or "One can dream" transform factual statements into mere non-actionable opinions. There is no law supporting that assertion. If that were the law, it would amount to an abolition of defamation as a cause of action and a license to everyone to say whatever they want as long as they preface groundless statements with a prefatory phrase such as, "Somebody really ought to investigate whether . . . ," or the like.

That is not the law of Minnesota. If it is to become the law of Minnesota, it should be done on full briefing, and a full record, following a jury trial. There is no reason for this court to consider such an issue in an interlocutory basis.

Another issue at trial may be whether either of the respondents is a public figure. The district court held that this issue should be addressed after full discovery. (District Court decision, p. 7.) That is manifestly correct. Issues relating to status as public figure or malice depend upon the facts. One of respondents' arguments of unconstitutionality of Chapter 554 was that it would be a violation of due process to compel a defamation plaintiff to respond to assertions about status as public figure or malice without the benefit of discovery, since these issues depend entirely upon the facts that would come out in discovery. The district court appropriately avoided that issue. This court has done the same under comparable circumstances. American Iron and Supply Company, Inc. v. Dubow Textiles, Inc., C1-98-2150 (Minn. App. May 25, 1999 at 5 ("The totality of the evidence standard requires that the plaintiff have the benefit of discovery before attempting to meet its burden [on malice].")

The court should deny the petition to review the decision of the district court. The district court held that respondents are entitled to their day in court to try to persuade the jury that statements accusing respondents of crime, corruption and deviant sexual practices are defamatory. Swift admits all but one of the elements of defamation. She argues that this court should review whether the statements are defamatory, but the

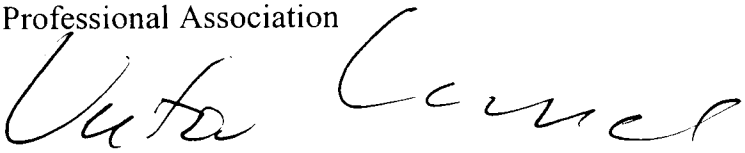
statements are plainly defamatory per se. There is nothing to review. This appeal would be an exercise in futility.

CONCLUSION

For all the above reasons, the court should deny the petition for discretionary review.

Dated: April 13, 2009.

MAHONEY, DOUGHERTY AND MAHONEY
Professional Association



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AFFIDAVIT OF SERVICE BY U.S. MAIL DELIVERY

STATE OF MINNESOTA

COUNTY OF HENNEPIN

APPELLATE COURT NO. A09-599

Peter Freeman and James D'Angelo v. Janette J. Swift

Mary Archambault, of the City of Minneapolis, County of Hennepin, State of Minnesota, being duly sworn on oath, deposes and says that on April 13, 2009, she served the annexed **RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITION FOR DISCRETIONARY REVIEW** on the following attorneys in this action, by mailing to them a copy thereof, enclosed in an envelope, postage prepaid, and by depositing the same in the post office at Minneapolis, Minnesota, directed to said attorneys at their last known address.

Marshall H. Tanick
Stephen H. Parsons
Attorneys for Appellant
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Mary Archambault

Subscribed and sworn to before me
on April 13, 2009.

Notary Public

VICTOR E. LUND
Notary Public-Minnesota
My Commission Expires Jan 31, 2010

Case No. A09-598

STATE OF MINNESOTA
IN COURT OF APPEALS

Peter Freeman and James D'Angelo,

Respondents,

-vs-

Janette J. Swift,

Appellant.

RESPONDENTS' MOTION TO DISMISS APPEAL

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Attorneys for Appellant

To: Frederick K. Grittner, Clerk of Appellate Courts, 305 Minnesota Judicial Center, 25 Rev. Dr. Martin Luther King, Jr. Boulevard, St. Paul, MN 55155:

MOTION

Respondents Peter Freeman and James D'Angelo above-named move the court for an order dismissing Janette J. Swift's purported appeal on the grounds that she appeals from a non-appealable interlocutory order, the appeal is premature, and this court is consequently without jurisdiction.

ARGUMENT IN SUPPORT OF MOTION

Respondents adopt the statement of facts necessary to an understanding of the issues in their memorandum in opposition to petition for discretionary review served and filed contemporaneously herewith. Additionally, respondents make the following arguments in support of their motion to dismiss this appeal.

I. THERE IS NO RIGHT TO APPEAL FROM THIS ORDER.

Appellant Swift has purported to appeal from a March 5, 2009 decision of the Hennepin County District Court denying her motion to dismiss under Minn. Stat. § 554.03. She appeals the interlocutory decision on the theory that the statute creates an immunity and immunity decisions are always immediately appealable. She is almost correct. Immunity decisions are generally, but not invariably, immediately appealable. This court should dismiss this purported appeal on the grounds that it is premature and review would be futile.

Swift has filed two separate appeals. The other one, File No. A09-599, is a petition for discretionary review of the trial court's decision that statements she made about respondents are defamatory, or at least the jury is entitled to so find. Since the defamation issue is part of her other appeal, it is not part of this appeal. The issue in this appeal is she has an immunity under the statute. The statute provides:

> 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. . . . Minn. Stat. § 554.03.

The trial court found that Swift's blog entries and e-mails were not genuinely aimed at procuring favorable government action, and that respondents had presented clear and convincing evidence that her statements were defamatory. Those are the two grounds on which her supposed immunity could rest. Since the defamation issues are the subject of her petition for discretionary review, the only issues left for this appeal are whether her blogs and e-mails were genuinely aimed at procuring favorable government action.

This court should dismiss this appeal because the issue presents an absolute futility. If she did intend to influence the government, but also defamed respondents, then she has no immunity. If she did not defame respondents, then she has no liability whether or not she intended to influence the government. Whether or not she intended to influence the government has no impact upon the outcome of this case. The only issue that can determine the outcome is whether or not she defamed respondents. That is the subject of the separate petition for discretionary review. For all the reasons stated in

respondents' memorandum in opposition to the petition for discretionary review, this court should not accept that petition. If the court rejects that petition, then there is no reason to hear anything in this purported appeal as of right. The court would simply be issuing an advisory opinion on a matter that can have no bearing on proceedings in the district court.

In any event, immunity questions that depend upon disputed facts are not generally appealable. In Carter v. Cole, 526 N.W.2d 209 (Minn. App. 1995), this court considered an issue of qualified immunity of police officers. They arrested the plaintiff, Carter, who emerged from the episode with personal injuries. He said the officers punched him from behind without provocation when he was handcuffed. The officers denied hitting him. They moved for summary judgment based on their qualified immunity. Generally, police officers have a qualified immunity as long as they did not violate a clearly established constitutional right or could reasonably have believed that their actions were lawful. In Carter, the sole issue is whether the officers did what Carter alleged they did. If they had done what he said, they would have no immunity. If they did not do it, they would have no liability. There is no right not to be tried on the question of whether or not they did the act. 526 N.W.2d at 213. Consequently, the interlocutory appeal was beyond this court's jurisdiction. It was no different than any other case denying summary judgment.

This court should reject this purported appeal for the same reasons as above in the Carter case. Swift has no right to be free from a trial to decide whether she did the acts

which would destroy her asserted immunity. The court should treat this the same way as any other denial of summary judgment and reject the appeal as premature.

CONCLUSION

For all the above reasons, the court should grant relief as requested.

Dated: April 13, 2009.

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AFFIDAVIT OF SERVICE BY U.S. MAIL DELIVERY

STATE OF MINNESOTA

COUNTY OF HENNEPIN

APPELLATE COURT NO. A09-598

Peter Freeman and James D'Angelo v. Janette J. Swift

Mary Archambault, of the City of Minneapolis, County of Hennepin, State of Minnesota, being duly sworn on oath, deposes and says that on April 13, 2009, she served the annexed **RESPONDENTS' MOTION TO DISMISS APPEAL** on the following attorneys in this action, by mailing to them a copy thereof, enclosed in an envelope, postage prepaid, and by depositing the same in the post office at Minneapolis, Minnesota, directed to said attorneys at their last known address.

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Stephen H. Parsons
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Minneapolis, MN 55402-4511

Mary Archambault

Subscribed and sworn to before me
on April 13, 2009.

Notary Public

VICTOR E. LUND
Notary Public-Minnesota
My Commission Expires Jan 31, 2010