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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-598

Peter Freeman, et al.,
Respondents,

vs.

Janette J. Swift,
Appellant.

Filed December 29, 2009
Affirmed
Stoneburner, Judge

Hennepin County District Court
File No. 27CV089585

Victor Lund, Mark J. Manderfeld, Mahoney, Dougherty and Mahoney, P.A., 801 Park Avenue, Minneapolis, MN 55404 (for respondents)

Marshall H. Tanick, Stephen H. Parsons, Mansfield, Tanick & Cohen, P.A., 1700 U.S. Bank Plaza South, 220 South Sixth Street, Minneapolis, MN 55402-4511 (for appellant)

Considered and decided by Lansing, Presiding Judge; Stoneburner, Judge; and Johnson, Judge.

S Y L L A B U S

Allegedly defamatory speech is not immune from liability under Minn. Stat. § 554.03 (2008) if the nature, purpose and intended audience of the speech demonstrate that the speech is not genuinely aimed in whole or in part at procuring favorable government action.

University, is a volunteer member of the Nexus board of directors and was involved in relocation efforts.

Appellant Janette J. Swift is a resident of Bradbury Township and the founder and leader of Onamia Area Citizens for Responsible Growth (OACRG), a citizen-based group in Onamia that vigorously opposed the relocation of the Nexus treatment facility to Bradbury Township. Swift and other members of OACRG attended meetings and presented petitions to government bodies involved, and engaged in other activities directed at preventing the relocation. Swift expressed strong views opposing the relocation. Swift communicated with her state representatives, local and state government offices and departments, and local and state officials, expressing the problems relocation would cause in the neighborhood. Swift was quoted in news articles on the admitted controversy surrounding the relocation, and her letters to the editor were published in the Mille Lacs Messenger newspaper. Swift also established a website and a blog on which she commented about the controversy and how the controversy affected her personally.

D'Angelo and Freeman sued Swift in November 2007 for defamation they allege was published by Swift in specific blog entries about D'Angelo on September 1, 2007, and November 10, 2007, and an email about Freeman sent to a dean of the University of St. Thomas on October 1, 2007, and republished to the dean and St. Thomas faculty members on October 16, 2007. On December 29, 2007, after the complaint was served, Swift reposted the September 1, 2007, blog entry about D'Angelo.

ANALYSIS

I. The anti-SLAPP[1] statute

Swift sought summary judgment dismissing the defamation complaint, asserting that the challenged statements are immune from liability under Minn. Stat. § 554.03 (the anti-SLAPP statute). The anti-SLAPP statute protects citizens' public participation in government. *Marchant Inv. & Mgmt. Co. v. St. Anthony West Neighborhood Org., Inc.*, 694 N.W.2d 92, 94 (Minn. App. 2005). The anti-SLAPP statute "applies to any motion in a judicial proceeding to dispose of a judicial claim on the grounds that the claim materially relates to an act of the moving party that involves public participation." Minn. Stat. § 554.02, subd. 1 (2008).

Public participation is 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 (2008). The statute protects public participation by providing immunity from liability for "[l]awful conduct or speech that is genuinely aimed in whole or in part at procuring favorable government action . . . unless the conduct or speech constitutes a tort or a violation of a person's constitutional rights." Minn. Stat. § 554.03.

A district court must grant a motion to dismiss an action under this section "unless the court finds that the responding party [who has the burden of persuasion on the motion] has produced clear and convincing evidence that the acts of the moving party are not immunized from liability under section 554.03." Minn. Stat. § 554.02, subds. 2, 3

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[1] SLAPP is the acronym for "Strategic Lawsuit Against Public Participation." *Marchant Inv. & Mgmt. Co. v. St. Anthony West Neighborhood Org., Inc.*, 694 N.W.2d 92, 94 (Minn. App. 2005).

favorable government action that is not solely determined by post-litigation statements in which the speaker asserts subjective intent that the speech was to procure such action.

"Aimed" is defined, in relevant part, as "[t]o direct toward . . . an intended goal or mark." *Id.* at 37. And "procuring" is defined, in relevant part, as "[t]o get by special effort," "[t]o bring about; effect." *Id.* at 1444. We conclude that the statute is unambiguous and can be construed based solely on the plain language used in the statute.

Applying a plain-language interpretation of the words "genuinely aimed in whole or in part at procuring favorable government action," as used in sections 554.01, subd. 6 and 554.03, to the specific speech at issue in this case leads us to conclude that the district court correctly held that Freeman and D'Angelo met their burden of proof by clear and convincing evidence that the challenged speech is not entitled to the immunity provided for public participation by the anti-SLAPP statute.

The defamation lawsuit involves three specific communications. Swift argues that these specific communications cannot be separated from all other conduct and speech she has engaged in during the controversy over the relocation of the Nexus facility and that they are immune because, in this context, the challenged statements are materially related to her public participation in the controversy. It is undisputed that Swift made the challenged communications in the context of her public participation, giving rise to an analysis under the anti-SLAPP statute because the communications are materially related to her public participation. But under the plain language of the statute, the mere fact that discrete communications are made in the context of public participation does not confer immunity. To be immune from liability, the involved speech must satisfy the conditions

agree with this reasoning and hold that Minnesota's anti-SLAPP statute covers communications addressed to third parties as well as communications addressed to a government entity, with the caveat that the determination of whether a communication is entitled to immunity under section 554.03 depends on the nature of the statement, the purpose of the statement, and the intended audience.

Swift argues that her statements are similar to statements found to be immune under similar anti-SLAPP statutes considered in *Schelling v. Lindell*, 942 A.2d 1226 (Me. 2008), and *Plante v. Wylie*, 824 N.E.2d 461 (Mass. App. Ct. 2005). We disagree.

In *Schelling*, the Supreme Judicial Court of Maine held that the challenged statement was contained in a letter to the editor that was "arguably intended to effect reconsideration of" recently enacted legislation. 942 A.2d at 1231. In contrast, here there is no basis for a determination that the challenged statements in Swift's email to the dean or the statements contained in the blog were made in the context of encouraging any government action.

In *Plante*, the challenged statement was made by an attorney on behalf of a conservation trust in the context of a settlement proposal. 824 N.E.2d at 464. The Massachusetts anti-SLAPP statute delineates specific categories of protected petitioning activities and includes "*any written or oral statement made in connection with an issue under consideration or review* by a [government entity]." *Id.* at 467 (citing Mass. Gen. Laws ch. 231, § 59H (2000)). The Appeals Court of Massachusetts construed this provision "to include statements made by one participant in a pending governmental proceeding to another in an effort to settle the controversy." *Id.* Because the specifically

attempting to turn Freeman's university colleagues against him, Swift hoped to procure favorable government action in the relocation controversy is too attenuated to meet the statutory requirement that the speech be "genuinely aimed" at procuring favorable government action.

Swift's September 2007 blog, in the context of expressing Swift's reaction at what she thought was a report of D'Angelo's suicide, contains numerous derogatory statements about D'Angelo with only a brief reference to the relocation controversy. The November 2007 blog that accuses D'Angelo of making death threats addresses the controversy only in terms of D'Angelo's alleged treatment of Swift. Although the blog audience may well include those who Swift could hope would take up her cause, the challenged statements plainly are not directed at bringing about any government action, but, like the email to the dean, are aimed at creating ill-will toward D'Angelo and cannot be said to have been "genuinely aimed" at procuring favorable government action in the relocation controversy.

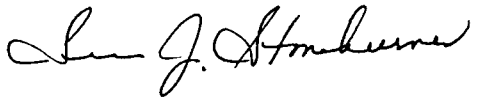
Swift's supporting affidavits assert the general usefulness of the internet and blogging to aid public participation in government, but none of the affiants opines that the challenged communications were genuinely aimed at procuring favorable government action. One affiant states that she followed Swift's blog and website for over a year and, as a result, was led to "speak up" on the controversy by posting statements on Swift's blog and writing to local government officials. But this affidavit does not specifically address the challenged blog entries and therefore is not relevant to analysis of whether the challenged blog entries were genuinely aimed at procuring favorable government action.

the correct standard in addressing this alternative basis for denying Swift's motion to dismiss under section 554.03.

DECISION

Because the nature, purpose, and intended audience of the challenged communications demonstrate that the involved speech is not genuinely aimed in whole or in part at procuring favorable government action, we conclude that D'Angelo and Freeman met their burden of proving by clear and convincing evidence that the challenged speech is not entitled to immunity under Minn. Stat. § 554.03.

Affirmed.



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