

**STATE OF MINNESOTA  
IN COURT OF APPEALS**

Court of Appeals No.: A09-598

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Peter Freeman and James D'Angelo,

Respondents,

v.

Janette J. Swift,

Appellant.

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**APPELLANT'S BRIEF**

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## STATEMENT OF THE ISSUES

**1. Did the Trial Court err in holding, as a matter of law, that the protections of the state anti-SLAPP law, Minn. Stat. § 554.01, et seq. are inapplicable to statements of a citizen activist opposing a project because her comments were “not directed to the appropriate governmental bodies?”**

*The Trial Court held that the statute only applies to communications made directly to government bodies.*

### **Apposite Authorities:**

Minn. Stat. § 554.02, et seq.

*Marchant Inv. & Management Co. Inc. v. St. Anthony West Neighborhood Organization, Inc.*, 694 N.W.2d 92 (Minn. Ct. App. 2005);

*Special Force Ministries v. WCCO Television*, 584 N.W.2d 789 (Minn. Ct. App. 1998);

*American Iron and Supply Co., Inc. v. Dubow Textiles, Inc.*, 1999 WL 326210 (Minn. Ct. App. 1999 ) (unpublished) App. 129-133.

**2. Did the Trial Court err in holding that statements that were rhetorical figures of speech or opinions constituted "clear and convincing" evidence of defamation to overcome immunity under the anti-SLAPP law?**

*The Trial Court held that certain statements made by Appellant were "clear and convincing" evidence of defamation.*

**Apposite Authorities:**

*Schlieman v. Gannett Broadcasting Minnesota, Inc.*, 637 N.W.2d 297  
(Minn. Ct. App. 2001)

*Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn.  
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*Beatty v. Ellings*, 285 Minn. 293, 173 N.W.2d 12 (Minn. 1969)

*Capan v. Daugherty*, 402 N.W.2d 561 (Minn. Ct. App. 1987)

## **STATEMENT OF THE CASE**

This case concerns efforts by a citizen activist, Janette J. Swift, who spearheaded a campaign by a group of neighbors to prevent the expansion and relocation of a juvenile sex offender treatment facility in Onamia, Minnesota. Appellant Swift appeared at many hearings of public bodies, wrote e-mails to inform others of the opposition to the project and to enlist their support, and published a blog on her website as part of this resistance movement.

The facility in question is owned by Nexus, Inc. Two of its principals, Peter Freeman, a member of its Board of Directors, and James D'Angelo, its Executive Director, sued Swift in Hennepin County District Court for defamation. Freeman claimed that a pair of e-mails that Swift sent to his colleagues on the faculty of the University of St. Thomas criticizing his involvement in the project were defamatory. D'Angelo based his claim on postings on Swift's website critical of his conduct in connection with the expansion and relocation project.

Swift asserted that the statements were not libelous and also raised a defense under the Minnesota anti-SLAPP law, Minn. Stat. § 554.01, *et seq.* The statute immunizes citizens who are engaged in “public participation,” which is defined as attempts aimed “in whole or in part” to

prove favorable government action unless there is “clear and convincing” evidence of a tort.

Swift brought a Motion to dismiss the case under the statute and, in the alternative, for Summary Judgment on grounds that her comments constituted rhetorical figures of speech and Constitutionally-protected opinions that were not defamatory as a matter of law. Respondents opposed the Motion and also sought discovery from her.

The Trial Court, The Honorable Marilyn Brown Rosenbaum, held that the anti-SLAPP Law did not apply, as a matter of law, because Swift's e-mails and web site/blogs were “not directed to appropriate governmental bodies.” She also held that the statements made by Swift constituted “clear and convincing evidence” of defamation, which overcomes any statutory immunity. The Judge did not rule on the alternative Motion for Summary Judgment whether the statements were not defamatory as a matter of law.

Swift appeals the determinations that the anti-SLAPP Law does not apply because her comments were not specifically directed to “appropriate governmental bodies” and that her comments comprised “clear and convincing evidence” of defamation.

## STATEMENT OF THE FACTS

### A. Public Controversy Over Sex Offender Facility

This case arises out of a controversial proposal to relocate and expand a sex offender treatment facility for juveniles in the City of Onamia, about 80 miles north of the Twin Cities in Mille Lacs County. The facility's owner, Nexus, Inc., sought to move it from a small location in Onamia to an enlarged 38-acre location in Swift's hometown of Bradbury Township, which would then be annexed to Onamia and rezoned for this use. *District Court Order and Memorandum (hereinafter "Order/Memo") App. 330.*<sup>1</sup>

The project generated considerable controversy, particularly the plan for the City of Onamia to absorb the land in the adjoining Township, rezone it, and grant various construction permits. *Affidavit of Janette J. Smith (hereinafter "Swift. Aff. I") App. 39-40, 46-77.* Two of the principals of the Sex Offender facility are Peter Freeman, a University of St. Thomas faculty member who is on the Nexus Board of Directors, and James D'Angelo, who was its Executive Director. *Order/Memo, App. 330.*

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<sup>1</sup> The term "*App.* \_\_\_\_\_" refers to the Appendix attached hereto.

1. *Swift leads the public opposition.*

Swift is a long-time resident of the Onamia area. Retired from teaching at the College of St. Benedict, she has run a small music publishing business. For two years, she has been in the forefront of opposition to the project and organized and led the opposition group, known as Onamia Area Citizens for Responsible Growth (OACRG). *Swift Aff. I, App. 39-40.*

Seeking to convince government officials to reject the proposal, Swift and others made numerous appearances and presentations at local governmental bodies, including the Onamia City Council, Bradbury Township Board, and the Mille Lacs County Board expressing opposition to the proposed facility and governmental actions to facilitate its relocation in Onamia. *Id., App. 40-41, 46-63, 74-75.*

2. *Swift's Actions and Statements*

Swift prepared a Petition signed by citizens in the community and presented it to the Onamia City Council in early May, 2007, opposing municipal annexation of the land in Bradbury Township, where the enlarged Sex Offender facility was to be located. *Id., App. 40, 48-49.* She also appeared at a special Meeting of the Onamia City Council later that month, stating that “while she does see a need for the treatment, *she just doesn't want the facility right there.*” *Id., App. 51 (emphasis*

*supplied*). She also prepared a list of questions challenging the project and the Council's proposed actions that was distributed at the City Council meeting. *Id.*, *App.* 53-60.

Swift expanded on her advocacy in an article in the local newspaper, the *Mille Lacs Messenger*, explaining that she and her followers

...feel we were blindsided. Our voices were not even considered let alone heard. We thought citizens had an opportunity to be involved with decisions that affect their lives directly. That opportunity was denied.

*Id.*, *App.* 64.

Swift later appeared at a meeting of the Onamia City Council, admonishing elected officials that "the city was sacrificing a small neighborhood for the good of the whole community without care or concern for their feelings, adding that they now feel like sacrificial lambs." *Id.*, *App.* 67.

Swift subsequently attended a June 13, 2007 Public Hearing by the Onamia City Council on the proposed annexation, where she repeated her opposition to any governmental annexation and acquisition of the land for the Sex Offender Facility, stating that, according to the League of Minnesota Cities, the annexation was not proper, that the city had no comprehensive plan, that there was an incompatibility of land use,

irresponsible zoning projections and that the annexation petition was faulty and inaccurate. *Id.*, *App.* 61, 70.

She again was quoted in an August 29, 2007, article in *The Mille Lacs Messenger* newspaper stating that “a sex offender treatment facility should not be in a residential area,” and further complaining about the lack of fairness of the process. *Id.*, *App.* 72. She appeared at another Onamia City Council meeting later that autumn regarding a proposed tax abatement for the sex offender facility. *Id.*, *App.* 74. She stated that she had found discrepancies in the representations by the Sex Offender Facility and asked for time to review the County’s taxing system. *Id.*, *App.* 76.

Swift also expressed her views on a website she created, a blog, and in various e-mails. Her statements include a debunking of D’Angelo’s assertion that juveniles housed at the existing Sex Offender Facility had presented no public safety problems in the past. *Id.*, *App.* 98-121.

## **B. Swift's Criticisms of Nexus Officials**

### *1. The Freeman e-mails*

Swift's efforts to persuade government officials to halt the project extended to criticisms of Freeman, a member of the Nexus’ Board of Directors. Because Freeman was, at that time, on the faculty of the University of St. Thomas, Swift sent e-mail correspondence to his

colleagues at the school seeking to inform them about the project and enlist their support in opposing the relocated facility. In an e-mail written on October 1, 2007, to the Dean of the Department of Social Work, where Freeman taught, Swift referred to her own experience with being a representative of a universities mission, complained of Freeman's "unethical, immoral, and possibly even illegal behavior" in facilitating the efforts by Nexus "to bully its way into our neighborhood regardless of our objections." *Complaint, App. 6-7.*

Swift also labeled Freeman "[e]xtremely unprofessional [and] exceptionally rude" for hanging up on a telephone call from her. She further stated that what "he and Nexus are doing is wrong." She metaphorically likened him to "the fellow who – in between sips of coffee – pushes the button that launches the missile which destroys the village" and then disclaims responsibility. *Id.*

The hallmark of Swift's correspondence was her complaint that Freeman's involvement in the project belied standards instilled and taught at St. Thomas and "the values stated in your [St. Thomas'] mission statement." She believed that Freeman was not acting to "advance the common good," refused to have "responsible engagement with the local community as well as with the national and global communities in which we live," was not fostering "meaningful dialogue

directed toward the flourishing of human culture,” failed to “respect the dignity of each person,” and was not fostering “a caring culture that supports the well-being of each member.” *Swift Aff. I, App. 44, 122.* Swift sent a second e-mail a couple of weeks later to the Dean and two dozen other faculty members reiterating those view and including a copy of the prior e-mail. *Complaint, App. 9-11.*

Swift had multiple purposes in sending the e-mails to St. Thomas personnel. One goal was to point out how Freeman’s “actions on the board of directors of the proposed facility were in conflict with the mission statement of the University...” *Swift Aff. I, App. 44.* Another equally important objective was "to educate as many people as possible to our point of view so that others might join us in procuring favorable government action with respect to our position." *Id., App. 43.*

The e-mails to Freeman's colleagues were part of Swift's effort to educate those individuals to these problems and, hopefully,

...educate those individuals to these problems and, hopefully, enlist their assistance in trying to stop the relocation project from proceeding. I felt that if they knew about some of these problems, they may join forces with others who opposed the relocation.

*Id., App. 281.*

## 2. *The Website Criticisms of D'Angelo*

Swift also posted criticisms of D'Angelo, the Nexus Executive Director, on her website blog. In one, labeled "Editorial," she called him "a predator, one who preys on the elderly and infirmed." *Id.*, *App.* 95. She further described him as a "pathological liar," and stated that he "lies," has "lied," and is a "chronic liar." *Id.*, *App.* 82-83.

In another blog posting, Swift said D'Angelo "doesn't have a suicidal kind of personality," is "too egocentric ... too arrogant," equated him with "a snake," termed him "way too narcissistic ... [and] cold blooded," and called him an "insensitive numbskull ... without a clue." The blog went on to call him "dishonest" and "a liar" who "lacks character." It further stated

[t]hat can lead to trouble. Maybe he'd mismanaged 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*).

*Id.*, *App.* 43, 84-85.<sup>2</sup>

Referring to herself as "Hannabelle," she proceeded, in her advocacy website, to state:

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<sup>2</sup> These statements, from a blog entitled "*Can You Hear Me Now?*" were made after Swift was misinformed that D'Angelo had committed suicide. *Id.*

Hannabelle 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 lawsuits.

*Id.*, App. 194.

**C. Swift's "Public Participation" Purpose.**

All of Swift's activities and statements were directed toward advocating on behalf of herself and other concerned homeowners in the community with the goal of securing favorable government action barring relocation and expansion of the Sex Offender facility. As Swift explains:

The reason I made those statements is in order to advance the interests of those who oppose the proposed sex offender facility and are seeking to procure favorable governmental action with respect to our position. I wanted *to educate as many people as possible about our point of view* and the facts so that others *might join us in procuring favorable governmental action* with respect to our position.

*Id.*, App. 43 (emphasis supplied).

In addition to trying to gain support from Freeman's colleagues at St. Thomas with her two e-mails, Swift used her website and blog criticism of D'Angelo as "part of the overall effort to stop the relocation project through educating the public and enlisting support for our position." *Swift Aff. II*, App. 281.

The efforts seemed to be effective. Another opponent of the expanded site, Jacqueline Schmidt, a teacher, recognized the value of Swift's blog in the overall campaign to stop the site. Swift's website alerted her and other activists to scheduled government meetings and what occurred at them and kept them so "informed" that she "felt personally compelled to speak" and contacted government officials with her own opposing views. *Schmidt Aff., App. 283-284.*

#### **D. Swift's Blogging And E-Mails**

The centrality of the blogging and e-mails to Swift's overall campaign to prevent the Sex Offender site from relocating and expanding was corroborated by other veteran citizen activists. In an affidavit submitted in support of Swift's motions, Jan Karpel, an experienced community organizer, pointed out that blogs and e-mails, as done here by Swift, "are a foremost tool for those seeking to participate in government decision-making" by educating supporters (and even opponents) and enlisting their support "in a more efficient, effective, and broader manner" than traditional efforts like letter to the editor, phone calls, pictures, door-to-door solicitation. *Karpel Aff., App. 293.*

In another supporting affidavit, activist Attorney Pamela Elliott notes that she has "used blogs . . . as part of an overall effort to influence government action." She went on to explain that "blogs and internet

action sites have been an essential part of activities . . . [in] efforts to affect government decision-makers.” *Elliot Aff., App. 295*. As a social activist, Elliott uses these devices to reach the general public “for the same purpose . . . [as a] very valuable and essential tool for those seeking to influence policy and government decision-makers.” *Id.*

In a third supporting affidavit, Paula Maccabee, another social activist, former St. Paul City Council member, and attorney for activist groups concurred in the vital role that these electronic devices, blogs, and e-mails play in efforts to influence or persuade public officials, as Swift did here. She views them as “important tools for education, organizing, and citizen engagement to achieve favorable governmental action.” *Maccabee Aff., App. 287*.

### **E. The Litigation**

Freeman and D'Angelo sued Swift in Hennepin County District Court, asserting a single claim of defamation. The basis of the lawsuit was the two e-mails sent by Swift to Freeman's faculty colleagues and the blog "Editorial" comment and two other website postings about D'Angelo. *Complaint, App. 1-11*.

Swift denied liability and asserted that her statements were immune from liability under the anti-SLAPP Law, Minn. Stat. § 554.01. *et seq.* because her comments constituted "public participation" aimed in

whole or in part at procuring favorable government action under the statute. She also maintained that her comments were Constitutionally-protected opinions that are not actionable as defamation under the First Amendment of the U.S. Constitution and the parallel provision of Article I, § 3 of the Minnesota State Constitution. *Answer, App. 12-15.*

Swift brought a Motion to Dismiss the case under the anti-SLAPP statute and, alternatively, a Motion for Summary Judgment on grounds that her statements were non-actionable opinions and rhetorical figures of speech. *Defendant's Notice of Motion and Motion, App. 16-17.* Freeman and D'Angelo's discovery requests to Swift were deferred under the statutory provision that bars discovery during the pendency of an anti-SLAPP motion to dismiss or appeals. Minn. Stat. § 555.04, subd. 2(1). Freeman and D'Angelo brought a Cross Motion to compel discovery.

The Cross Motions were heard by The Honorable Marilyn Brown Rosenbaum. On March 5, 2009, the Trial Court issued an Order denying Swift's Motion under the anti-SLAPP Law, reasoning that Swift's e-mails and blogs were not statutorily-protected "public participation" because they were "directed at non-governmental participants and/or to the world in general." *Order/Memo, App. 327.* The Trial Court went on to assert that Swift's e-mails to Freeman's colleagues did not fall within the statute because they were "aimed at audiences having no connection with the

public project and controversy." *Id.*, *App.* 328. The website blogs concerning D'Angelo also were not statutorily-protected, the Judge reasoned, because they "were not directed to anyone in particular, and were not directed to the appropriate governmental bodies." *Id.*, *App.* 329. After denying the Motion to Dismiss, the Judge deemed the Motion to Compel Discovery moot, and the case was, therefore, directed to proceed. The Judge did not pass upon Swift's alternative Motion for Summary Judgment that the statements were not defamatory as a matter of law.

This appeal ensued. Swift maintains that her statements are statutorily-protected under the anti-SLAPP Law because they were aimed, in whole or in part, at procuring favorable government action, and need not have been sent directly or specifically to government officials to invoke immunity under the statute. She also maintains that there is no "clear and convincing" evidence that she committed defamation in order to trump the immunity under § 554.03.<sup>3</sup>

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<sup>3</sup> The Court below did not pass upon Swift's alternative Motion for Summary Judgment on grounds that her statements were not defamatory as a matter of law. This Court declined Swift's Petition that it exercise Discretionary Review over that issue. A09-55 (April 28, 2009).

## THE STANDARD OF REVIEW

Whether the statements are protected by the anti-SLAPP Law constitutes a legal issue, and is subject to *de novo* review. *Marchant Inv. & Management Co., Inc. v. St. Anthony West Neighborhood Organization, Inc.*, 694 N.W.2d 92, 97 (Minn. Ct. App. 2005); *Kelly v. Campaign Finance and Public Disclosure Bd.*, 679 N.W.2d 178, 180 (Minn. Ct. App. 2004), (rev. denied, July 20, 2004); *Middle-Snake-Tamarac Rivers Watershed Dist. v. Stengrim*, 2009 WL 367286 (Minn. Ct. App. Feb. 17, 2009) (unpublished), *App.* 325-328. Under the statute, Freeman and D'Angelo, as responding parties, have the burden of proof going forward with the evidence and persuasion in opposition to the Motion to Dismiss, which requires showing by "clear and convincing evidence" that Swift's conduct is not immune because it constitutes the tort of defamation. Minn. Stat. § 554.02, subd. 2(2), (3).

The "clear and convincing" standard is a high standard, requiring more than a preponderance of evidence, but less than "proof beyond a reasonable doubt," equivalent to a showing that it is "highly probable." *State v. Grinder*, 2007 WL 2600782 at \*3 (Minn. Ct. App. 2007) citing *Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978), *App.* 125-128. The proof 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). See also *American Iron & Supply Co., Inc. v. Dubow Textiles, Inc.*, 1999 WL 326210 at \*2 (Minn. Ct. App. 1999) (unpublished), citing Black's Law Dictionary, p. 251 (6th Ed. 1990) *App.* 129-133.

### **SUMMARY OF ARGUMENT**

The statements made by Swift in her e-mails to Freeman's colleagues at the University of St. Thomas and on her website blogs concerning D'Angelo are statutorily-protected as “public participation” under the anti-SLAPP Law, Minn. Stat. § 554.01, *et seq.* Nor are they defamatory. The statute’s purpose is to protect individuals from being sued for making statements that are aimed, in whole or in part, at procuring favorable government action.

Swift was engaged in such conduct in this case. The Trial Court's reasoning that her e-mails and blogs were not immune under the statute is based on the flawed reasoning that the statute protects only communications directed “to” government decision-makers, as opposed to ones available to others as well as the decision-makers.

The Minnesota statute is broadly written and intended to provide extensive protection to Minnesota citizens, like Swift. Cases decided by this Court and in other jurisdictions under similar statutes extend broad protection to citizen activists like Swift, embracing communications that

are made outside of official channels and not sent directly to government officials. Those cases recognize, as do the expert affiants in this case, that efforts to effect government actions often require more than just attending government meetings or writing to government officials. To be effective, citizen activities often must try to educate others and enlist them to support the cause which the activist is promoting. The Trial Court's narrow reading of the statute would prohibit many citizen activists from engaging in standard activities that they normally do to try to influence government policy, including communications with the general public, as Swift did here.

Not only was Swift's conduct protected and statutorily immune under the anti-SLAPP law, but there is no "clear and convincing evidence," or any evidence at all, of the commission of a tort that would trump her statements' immunity under Minn. Stat. § 554.03, subd. 3. Swift's statements that Freeman and D'Angelo find offensive were, to be sure, harsh and uncomplimentary. But they were rhetorical flourishes, figures of speech, and opinions that are constitutionally-protected under the First Amendment and in Article 1, Section 3, of the Minnesota State Constitution.

There is, therefore, no "clear and convincing" evidence of the commission of a tort that would overcome the immunity to which Swift is

entitled under the anti-SLAPP Law. The ruling of the Trial Court should, accordingly, be reversed and the case dismissed.

In the alternative, the case should be remanded for a determination by the Trial Court whether Swift was generally engaged in "public participation" within the meaning of the anti-SLAPP Law. The Trial Court presumed, as a matter of law, without engaging in the type of detailed probing that this Court deems necessary under the anti-SLAPP statute, that her comments were not protected by the statute. Accordingly, if the Complaint is not dismissed, as it should be, the ruling below should be reversed and the case remanded for further proceedings to determine the applicability of the statute.

## **ARGUMENT**

### **I. THE ANTI-SLAPP LAW APPLIES IN THIS CASE**

The Trial Court erred in concluding that the anti-SLAPP statute does not apply here. Appellant Swift has been a strenuous and vigorous activist in opposing the proposed Sex Offender facility. She has done so by appearing at numerous governmental meetings, including those of the Onamia City Council, in opposition to the approval of annexation and granting various permits that would allow the new facility to be built. She also organized the resistance group of citizens, OACRG, encouraged its members to oppose the offender facility and has attended many

official meetings to express her own and the group's opposition to it. Her activities are quintessentially the type that the anti-SLAPP law seeks to protect and, indeed, encourage.

#### **A. The Breadth of the Statute**

The courts in Minnesota and other states construe anti-SLAPP laws broadly to protect activities of this kind. The genesis of these laws dates back to the 1970's, when observers noted a disturbing and growing use of litigation by parties seeking government approval of their business activities or construction projects as a device to intimidate and silence their critics, including citizen activists who opposed their plans. See *SLAPPING BACK FOR DEMOCRACY*, 19 *Multinational Monitor*, No. 3, May 1998. *App.* 134-138.

Over the years, the concept of protecting citizens who speak out in opposition to these projects was adopted in varying forms in at least twenty-four states, including Minnesota. *Id.* The centerpiece of most of these statutes is "a requirement of early court review of the merits of lawsuits characterized as SLAPPs." BARUCH, "*If I Had a Hammer*": *Defending SLAPP Suits in Texas*, 3 *Tex. Wesleyan L. Rev.* 55, 66 (Fall 1996). Once a party moves to dismiss an action under §554.02, the

court must suspend discovery pending “final disposition of the motion, including any appeal.”<sup>4</sup>

The Minnesota law is intended to “protect citizens and organizations from lawsuits that would chill their right to publicly participate in government.” *Marchant, supra*, 694 N.W.2d at 94. To achieve this purpose, the statute permits a defendant like Swift to bring a dispositive motion on grounds that the lawsuit “materially relates to an act of the moving party [defendant] that involves public participation,” which 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 (emphasis supplied). The Motion must (“shall”) be granted unless the suing party demonstrates by “clear and convincing” evidence that the moving defendant’s conduct is not immune from liability under § 554.03 because it constitutes a violation of constitutional rights or a tort. Minn. Stat. § 554.02, subd. 2(2)(3) and § 554.03.

Swift’s activities meet the statutory definition. She has been the avatar in leading the opposition to the proposed relocation-expansion of the Sex Offender Facility, seeking to stop the annexation, rezoning, and

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<sup>4</sup> The court may, upon motion and a showing of good cause, allow specified and limited discovery pending resolution of the anti-SLAPP motion. Minn. Stat. §554.02, subd. 2(1).

issuance of building permits by municipal offices. The allegations made against her in this case relate to her “public participation” in attempting to procure favorable governmental action on her behalf and that of her supporters. The claims in this lawsuit relate to communications that she made to others to inform them in order to engage in “public participation” on the proposed Facility. As such, they fall within the broad definition of “public participation” under the anti-SLAPP law.

The Trial Court reasoned that the statute applies only to communications made directly to government decision-makers and no one else. It declined to apply the statute on one ground only: that the two e-mails about Freeman and the website blogs regarding D'Angelo were “not directed to the appropriate governmental bodies” because they were distributed to: a) Freeman's colleagues at the University; and b) the general public as to the website blogs critical of D'Angelo. *Order/Memo, App. 335*.<sup>5</sup>

This is a classic case for application of the anti-SLAPP law. Besides *Marchant*, two other decisions of this Court have involved anti-SLAPP motions to dismiss defamation actions: *Special Force Ministries v. WCCO Television*, 584 N.W. 2d 789, 791 (Minn. Ct. App. 1998) and *American*

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<sup>5</sup> The blog websites were available to anyone who might access them, including city officials in Onamia, Bradbury Township, and Mille Lacs County.

*Iron and Supply Co, supra.* They establish that statutorily-protected action to procure favorable government action may occur in forums other than at official governmental hearings or meetings.

In *Special Force Ministries*, a group home for the mentally retarded sued WCCO TV for broadcasting an undercover report on the home's alleged squalid conditions. WCCO's motion to dismiss under the anti-SLAPP law, was countered the facility's argument that the station's conduct was "not genuinely aimed in whole or in part a procuring government action" because it was "part of a commercial enterprise." *Special Force Ministries v. WCCO Television*, Hennepin County District Court no. MC 97-5062, Nov. 4, 1997. *App. 152.*

The trial court rejected that argument, stating:

Even if WCCO's primary motivation for airing the story was to boost its ratings, there was evidence in the record indicative of an *intent* on WCCO's part to generate a response from state regulators.

*Id. (emphasis supplied). App. 153*

The applicability of the anti-SLAPP law to WCCO's conduct was not appealed.

The same is true of Swift in this case. Her intent, in all of her activities and communications, was aimed at securing favorable

governmental action to stop or prevent establishment of the Sex Offender facility. Sending the e-mails to Freeman's co-workers was an effort to educate them about the issues, show how Freeman's behavior deviated from the institution's standards, and enlist their support in opposition to the project. *Swift Affidavit II, App. 280-281*. Her website and blogs about D'Angelo similarly were aimed at arousing general public opinion to halt the project, *Id.*, and they worked. (*Schmidt Affidavit, App. 283-284*).

Under facts similar to those here, this Court has dealt with a letter distributed to residents living in areas surrounding a proposed metal shredder site. *American Iron, supra* at \*2. The letter-writer expressed his disapproval of the proposed installation to the municipal planning director, and, after receiving an unsatisfactory response, followed with a letter to nearby residents. The letter stated that the facility “has a history dating back 40 years of corruption and legal violations. Two of the owners of American Iron have spent time in prison for theft...and tax evasion.” The lower court determined that this letter, which was not

directed to government officials, was covered by the anti-SLAPP law, and that issue was not appealed. The same analysis governs this case.<sup>6</sup>

The rationale of the Court below why the statements made in e-mails to colleagues of Freeman and blogs about D'Angelo do not fall within the statute is erroneously premised on the flawed notion that the statute is restricted to communications that are directed “to” government officials and does not extend to communications aimed at “non-governmental participants and/or to the world in general.” *Order/Memo, App. 333*.

This reasoning misconceives the purpose of the anti-SLAPP statute. The law is intended to give broad protection to individuals who engage in "public participation," which is defined as activity that is "aimed in whole or in part at procuring favorable government action." Minn. Stat. § 554.01, subd. 6 (emphasis supplied). It is not necessary that statements be sent "to" a government entity, provided that the underlying activity is "aimed ... in part at procuring favorable government action." *Marchant, supra* at 95.

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<sup>6</sup> Because it is unpublished, *American Iron* is not precedential. See Minn. Stat. § 480A.08, subd. 3. But due to its similarity to the present case — both invoking letters written to non-government officials — it is persuasive here. *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. Ct. App. 1993) (unpublished opinions may be persuasive).

It is undisputed that Swift was in the vanguard, opposing the relocation and enlargement of the Sex Offender facility, and that she espoused that opposition before numerous government bodies as leader of the OACRE citizens group. Although Swift's website and blog were, as the Trial Court noted, "available to the entire world," they were done as part of her strategic efforts to influence governmental action. Her activities, blog, and e-mails were aimed at "seeking to procure favorable governmental action ... [and] to educate as many people as possible, to our point of view facts so that others might join us in procuring favorable government action with respect to our position." *Swift Affidavit I, App.* 43. The blog was "part of the overall effort to stop the relocation project through educating the public, and enlisting support for our position. *Swift Affidavit II, App.* 281. It worked because the blog attracted others to contact Onamia officials and protest the project. *Schmidt Affidavit, supra.*

The anti-SLAPP law is not narrowly confined to actions that are "directed to" government bodies, as the Trial Court held. At least twenty-four of these statutes have been enacted in the past two decades. They are broadly aimed at protecting individuals like Swift who are trying to affect government action, regardless of how they do so. See NOTE, *Slapping Around the First Amendment: An analysis of Oklahoma's Anti-*

*SLAPP Statute and Its Implications on the Right to Petition*, 60 Okla. L. Rev. 419, 429 (Summer, 2007).

Obviously, one way to affect government action is to direct comments directly to the government decision makers. But that is *not* the *only* way to influence government action. Gathering names on petitions, soliciting support from the community, sending letters-to-the-editor, distributing pamphlets, and, in today's electronic age, blogging and e-mails are other ways of doing so. *Macabee, Karpel, and Elliott Affidavits*, App. 285-295.

The two e-mails that Swift sent to Respondent Freeman's University colleagues were aimed, "at least in part," in procuring favorable government action. She sent those e-mails to those educational personnel because she felt that, if they knew what Freeman was doing, they might take action to oppose his position as inconsistent with the University's mission statement and support her and her citizens group's point of view:

The purpose of those e-mails was to point out the problems associated with relocation and how it deviates from the goals and mission statements of those educational institutions where Freeman works. One purpose for the e-mails was to educate those individuals to these problems and, hopefully, enlist their assistance in trying to stop the relocation project from proceeding. The distribution of these e-mails, therefore, was part of the overall effort to enlist support, and gather

momentum to convince government officials to prevent the relocation project.

*Swift Affidavit II, App. 281.*

Swift's e-mail also invited Freeman's faculty colleagues "to visit our websites," *App. 07*. This overture is further indicative of her desire to enlist them in her campaign to stop the project. Thus, Swift's blogging and e-mails were circulated, at least in part, in her "public participation" efforts. Consequently, they are covered by the statute. See Minn. Stat. §§ 554.01, subd. 6; § 554.03.

In the e-mails and blogging, Swift is acting as a modern-day pamphleteer, agitating for government action in much the same way that others before her have done so long before the internet. Thomas Paine and other revolutionaries, if they were living today, would probably be using e-mails and blogs, rather than distributing handbills or pamphlets, to agitate for governmental action. So, too, would Frederick Douglas and others who opposed slavery; as would Susan B. Anthony and women's suffragettes; Dr. Martin Luther King, Jr. and civil right supporters of the 1950's and 1960's; Viet Nam protestors of the 1960's and 1970's, and this spring's Tea Party protesters. Because Swift's blogs are attempts to enlist the public in supporting her agitation for favorable governmental action, her remarks are statutorily-protected.

Removing this type of activity from the protection of the anti-SLAPP law, as did the Trial Court, eviscerates the statute, which is intended to provide broad protection to individuals engaged in procuring government action. The statutory language recognizes this breath, protecting conduct that is aimed “in whole *or in part*” at procuring favorable government action. Minn. Stat. § 554.03; § 554.01, subd. 6. If any “*part*” of Swift's action was aimed at procuring government action, she is immunized under the statute. Her e-mail and blogging activity was clearly *part and parcel* of her efforts to influence government action by educating and enlisting others to support her cause and, therefore, is covered by the statute.

### **B. The Case Law in Minnesota and Elsewhere**

The narrow and restrictive reading below restricting the statute’s protection only to communications “directed to” government officials is not only contrary to the broad language of the statute and the reality of activities by experienced social activists, but deviates from well-established case law in Minnesota and other jurisdictions. In both *Special Force Ministries* and *American Iron*, the anti-SLAPP law was deemed applicable, respectively, to television broadcasts and letters to citizens even though those communications were not primarily or exclusively directed “to” government officials.

Cases in other jurisdictions support the applicability of the anti-SLAPP law to communications made to persons other than government officials as part of an effort to influence or persuade government decision-makers. See Note, *Valpariso University Law Review*, “Protecting Informed Public Participation: Anti-SLAPP Law and The Media Defendant,” 41 Val. U. L. Rev. 1235 (Spring, 2007). As the commentator states, certain anti-SLAPP statutes:

...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 communications made in connection with any issue under consideration or review by a government body.*

*Id.* at 1253-54 (emphasis supplied).<sup>7</sup>

Similar to Minnesota, Massachusetts and Maine define “public participation” broadly in their anti-SLAPP statutes. In *Plante v. Wylie*, 824 N.E.2d 461, 465 (Mass. App. Ct. 2005), the Appeals Court of Massachusetts held the Massachusetts anti-SLAPP statute to extend to communication between private citizens involved in government proceedings, but not made in front of or to the government body:

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<sup>7</sup> The Trial Court here erroneously viewed Swift’s e-mails and blogs as having “no connection with the public project and controversy.” *Memo/Order*, App. 334. But they existed only because of the project and were aimed at stopping it.

The typical mischief that the legislation intended to remedy was lawsuits directed at individual citizens of modest means for speaking publicly against development projects.

*Id.* at 465.

The court found that the statements were made “in furtherance of the objective served by governmental consideration of the issue under review, ...” *Id.* at 468, and, therefore, were covered by the anti-SLAPP statute, which is similar to the Minnesota law. The same is true in this case because Swift’s blogs and e-mails were undeniably made in order to educate the public, even adversaries, and enlist public support in connection with stopping the Sex-Offender Facility relocation project. *Swift Affidavit II, App. 280-281; Schmidt Affidavit, App. 283-284.*

Similarly, in *Schelling v. Lindell*, 942 A.2d 1226 (Me., 2008), a letter to the editor of a newspaper fell within the purview of the Maine anti-SLAPP law, even though it was not directed to government decision makers. As did the Minnesota district court in *American Iron*, the Maine Supreme Judicial Court held that its anti-SLAPP statute applied because the letter was “designed to expand the public consideration of a controversial issue recently considered by the legislature.” 942 A.2d at 1231. The same is true in this case, in which Swift sought in her blog and e-mails to educate and inform the public and enlist their support. *Swift Affidavit II, App. 280-281; Schmidt Affidavit, App. 283-284.*

Some states, *but not Minnesota*, explicitly limit the type of speech protected by anti-SLAPP statutes. In Missouri the statute only extends to “conduct or speech undertaken or made in connection with the public hearing or public meeting.” V.A.M.S. § 537.528 (2004). Similarly, Hawaii defines “public participation” under its anti-SLAPP law as “oral or written testimony submitted or provided to a government body during the course of a governmental proceeding.” Haw. Rev. Stat. § 634F-1 (2002). In these states, statements made in blogs or e-mails outside of government meetings would not be protected.

The Minnesota statute does not contain the type of express restriction elicited in the Missouri and Hawaii measures. The lack of any such limitation in Minnesota makes the statute here comparable to those in Massachusetts and Maine, which have been construed to extend to communications made “in connection” with a disputed project, even if made to the general public and not directly to government decision makers. *See Schelling*, 942 A.2d at 1230-31; *Plante*, 824 N.E.2d at 467-68.

Because the language in the Massachusetts and Maine statutes are similar to the Minnesota statute, a similar result should follow here. Because the Minnesota statute is not restrictive, like the Missouri and

Hawaii statutes, the narrow view adopted by the Trial Court should be rejected.

The illogicity of the rejection by the Court below of the statute is magnified by this Court's recent ruling in *Middle-Snake-Tamarac Rivers Watershed District v. Stangrim*, *supra*, in which this Court reversed a determination by the lower court that the anti-SLAPP law did not apply to the breach of a settlement agreement. The Court's reasoning is persuasive here.<sup>8</sup> The basis for reversal was the trial court's failure to analyze whether the conduct at issue invoked "public participation ..." or whether the conduct "materially relates" to those actions. *Id.* at \*2. By failing to address these issues, the Trial Court "disregarded the plain meaning" of the statute. *Id.*

The same is true here. The statute plainly says it applies to any action that is "genuinely aimed at whole or in part" pursuing favorable government action. Swift's e-mails and website undisputedly were aimed at — and achieved — this purpose. While they were not her only efforts at procuring a favorable outcome, they were "part" of the process. As such, they are entitled to statutory protection.

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<sup>8</sup> Although unpublished and not precedential, the decision in *Stengrim* provides guidance in adjudicating the present case. See *Dynamic Air, Inc.*, *supra*.

As the Supreme Court recognizes, “speech concerning public affairs is more than self-expression; it is the essence of self-government.” *Garrison v. State of La.*, 379 U.S. 64, 74-75, 85 S.Ct. 209, 216 (1964). The antedote for Freeman's and D'Angelo's dislike of the statements made by Swift is “more speech,” not to suppress her expressions. *Whitney v. California*, 274 U.S. 357, 377, 47 S.Ct. 641, 649 (1927) (Brandeis, J.) In sum, the statements made by Swift on her blog and in the e-mails were done at least “in part” to procure favorable government action, even if not submitted directly to government decision-makers. Accordingly, they constitute “public participation,” are statutorily protected, and cannot form the basis for this lawsuit. The ruling of the Trial Court, therefore, should be reversed and the case dismissed.

**II. THERE IS NO “CLEAR AND CONVINCING EVIDENCE” OF A TORT SUFFICIENT TO AVOID THE IMMUNITY UNDER THE ANTI-SLAPP STATUTE.**

In order to overcome dismissal under the anti-SLAPP law, Respondents must show by “clear and convincing evidence” that Swift's comments constitute a tort – in this case, defamation. See Minn. Stat. § 554.02, subd. 2 (3) and § 554.03. The “clear and convincing” standard is a high one, *State v. Grinder, supra*, and it cannot be satisfied here.

The Trial Court did not specify which of Swift's statements it deemed defamatory. But none of them on the blogs or in the e-mails constitute defamation. At a minimum, they are Constitutionally-protected opinion. To be defamatory, statements must be the type that can be "proven true or false." *Marchant, supra*, at 95. None of the statements ascribed to Swift falls within this category. As this Court recognizes: "Expressions of opinion, rhetoric, and figurative language are generally not actionable" as libel. *Jadwin v. Minneapolis. Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. Ct. App. 1986). Swift's statements are all subjective, metaphoric, or hypothetical and not provable as factually true or false.

#### **A. The Opinions About Freeman**

The statements made about Freeman, many of which even he acknowledges "probably" are not defamatory, are subjective opinions, not verifiable, as true or false.<sup>9</sup> Swift's e-mails to Freeman's colleagues at St. Thomas accused him of "unethical, immoral, and possibly even illegal behavior." These statements are non-actionable. These statements do not imply the existence of facts that can be proven true or false and,

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<sup>9</sup> In his opposition to Swift's Petition for Discretionary Review, Freeman concedes that many of the claimed libelous statements are "probably" not actionable. *App.* 318.

therefore, are not defamatory. *Schlieman v. Gannett Minnesota Broadcasting, Inc.*, 637 N.W.2d 297, 308 (Minn. Ct. App. 2001).

### **B. “Illegal or Immoral”**

The e-mails go on to accuse Freeman’s Nexus Board of being a “bully” and Freeman of being “unprofessional,” both of which are also subjective, non-actionable opinions. Swift uses a metaphor to compare him to an emotionless missile launcher, behavior that she believes is “wrong.” That “missile launching” metaphor is a hyperbolic figure of speech that is not libelous. *Marchant, supra*, at 96. Finally, her opinion that he is “wrong” is just that – an opinion.

### **C. The Criticisms of D'Angelo Are Non-Actionable Opinions**

The comments that D'Angelo finds offensive include the accusations that "he is a liar," or "lying." But such statements clearly constitute opinions under Minnesota law. *Beatty v. Ellings*, 285 Minn. 293, 300, 173 N.W.2d 12, 17 (Minn. 1969).

The statement that D'Angelo is a "predator" is equally subject to Constitutional protection as an opinion. The court in *Burgoon v. Delahunt*, 2000 WL 1780285 at \*4 (Minn. Ct. App. 2000), held the term “sexual predator” to be subject to multiple interpretations and not defamatory. *App.* 305-308. “Remarks on a subject lending itself to multiple interpretations’ cannot form the basis for a defamation action

because ‘no threshold showing of “falsity” is possible in such circumstances.’” *Id.* (quoting *Hunter v. Hartman*, 545 N.W.2d 699, 707 (Minn. Ct. App. 1996)). The statement that D’Angelo is a “predator,” which is certainly less heinous than “sexual predator,” is even more generic, and subject to multiple interpretations and thus cannot be defamatory as a matter of law. *Id.*

Swift cushioned many of her statements by stating that they are her own beliefs or her thoughts, such as “we like to think,” “one can dream,” and the like. Use of such phrases alerts readers that she is stating non-actionable personal opinions, not facts. *See Capan v. Daugherty*, 402 N.W.2d 561, 564 (Minn. Ct. App. 1987). *See also, Marchant, supra*, at 95-96.

Some of the other statements that Swift makes in the blog and e-mails are metaphorical or rhetorical and, therefore, not subject to liability for defamation. *See powerlineman.com, LLC v. Kackson*, , 2007 WL 3479562 at \*5, n. 13 (E.D. Cal. 2007), *App. 160-166* (metaphorical statements are not to be taken literally and cannot be actionable). For instance, Swift's statements that she might have acted differently had the Nexus personnel "wined and dined me," "spoken sweet and low," "courted my favor," and "sent me flowers and candy," are the types of metaphors that may not be taken literally and cannot be the subject of defamation.

Other metaphorical statements such as "we would like to think," and "one can dream" punctuate her blogs and e-mails; they do not represent factual statements, but any hypothetical musings.

### **III. CONCLUSION**

For the above reasons, the ruling below should be reversed and the lawsuit dismissed or, in the alternative, remanded for determination of the applicability of the anti-SLAPP Law.

Date: May 1, 2009

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