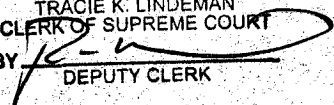


Docket Number 66528

In the
SUPREME COURT
For the
STATE OF NEVADA

FILED

APR 16 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

GARY SCHMIDT

Appellant,

v.

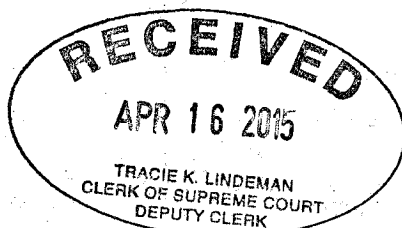
BEN KIECKHEFER

Respondent

Appeal from a Decision of the Second Judicial District of the State of Nevada,
Washoe County, Court Case No. CV14-01227

APPELLANT'S REPLY BRIEF

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15-11476

CORPORATE DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, Appellant GARY SCHMIDT ("Schmidt") hereby certifies that he is an individual person and therefore no corporate disclosure statement is necessary.

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I. KIECKHEFER HASN'T PROVIDED CLEAR AND CONVINCING EVIDENCE UNDER NRS 41.660.

Kieckhefer filed a lawsuit to derail Schmidt's political campaign. That was the appellee's obvious motive underlying his defamation lawsuit. The dispute is over a single statement. Yet, Kieckhefer has not provided clear and convincing evidence that supports his assertion that the statement was untrue.

Nevada Revised Statute 41.660 provides:

1. If an action is brought against a person based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern:

(a) The person against whom the action is brought may file a special motion to dismiss;

...

3. If a special motion to dismiss is filed pursuant to subsection 2, the court shall:

(a) Determine whether the moving party has established, by a preponderance of the evidence, that **the claim is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern;**

(b) If the court determines that the moving party has met the burden pursuant to paragraph (a), **determine whether the plaintiff has established by clear and convincing evidence a probability of prevailing on the claim;**

...

(d) Consider such evidence, written or oral, by witnesses or affidavits, **as may be material in making a determination** pursuant to paragraphs (a) and (b);

NRS 41.660 (emphasis added).

Schmidt has argued in his Opening Brief that serious doubt and reckless disregard is subjective, particularly with regard to actual malice required for Kieckhefer's defamation claim. The *Las Vegas Sun* article from which he bases his belief and statement that Kieckhefer "endorsed and supported Harry Reid" is rife with inference that Kieckhefer supports Raggio who supports Reid. Schmidt has cited to documentation of others' interpretations of the *Las Vegas Sun* article that corroborate his own. (Appellant's Appendix, Ex. 4 at pp. 000122, 000125, 000127.) Judge Flanagan recognized how Schmidt's interpretation would be plausible. (See Appellant's Appendix, Ex. 10 at p. 000064, lines 13 and 22.) As did Judge Polaha at the hearing on Schmidt's Special Motion to Dismiss.

Schmidt's exercise of his free speech was therefore made in direct connection with an issue of public concern, an ongoing political campaign. Schmidt has met his burden under NRS 41.660(3)(a), thus shifting the burden to KIECKHEFER to provide clear and convincing evidence of a probability of prevailing on his defamation claim. However, KIECKHEFER hasn't presented corroborating evidence as to the falsity of the statement that he "endorsed and

supported Harry Reid.” His TRO declaration is self-serving, unsupported, and ultimately unconvincing. (See Respondents’ Appendix, at p. RA000021.)

Appellee glosses over the evidentiary requirements in his Answering Brief by presenting arguments as to how the statement couldn’t be true, not that it was in fact not true. A statement is not defamation if it is or is not true, which is why “truth is an absolute defense to defamation.” (*Oracle USA, Inc. v. Rimini Street, Inc.*, 6 F. Supp. 3d 1108, 1131, 2014 U.S. Dist. LEXIS 112591, 56, 2014 WL 3956271 (D. Nev. 2014)). So then why won’t KIECKHEFER conclusively prove—with supporting evidence—that he did not support Harry Reid? His arguments and reliance on his self-serving declaration only cloud the waters, making what he calls evidence unclear. He seemingly does so in order to force summary judgment standards, thereby circumventing his evidentiary requirement.

KIECKHEFER has not presented this evidence despite multiple chances to do so. Twice KIECKHEFER failed to appear before the court to submit to examination. He didn’t issue a statement to the *Las Vegas Sun* to clarify his position on Reid. Kieckhefer didn’t contact Schmidt or his campaign to explain that the statement was false. This is KIECKHEFER’s proof burden, not Schmidt’s. The subject statement itself is not defamation, especially in the absence of supporting evidence contradicting its truth.

II. KIECKHEFER HAS NEITHER DISPROVEN THE STATEMENT THAT HE SUPPORTED HARRY REID NOR RAISED A TRIABLE ISSUE OF FACT.

Despite the clear requirements stated in NRS 41.660, KIECKHEFER requests that this Court enforce the burdens of a motion for summary judgment. Yet his self-serving declaration wouldn't create a triable issue of fact any more than it provides clear and convincing evidence. This is because the declaration of the type KIECKHEFER submitted is not evidence. A party who offers no evidence, other than a self-serving declaration containing "only conclusory allegations unsupported by evidentiary facts" does "not create a triable issue of fact." *Larsen v. City of Willits*, 1996 U.S. App. LEXIS 11764, 6 (9th Cir. Cal. May 7, 1996) (citing *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993)).

KIECKHEFER's declaration is just a self-serving representation without any evidence to back it up. He can't demonstrate one person who will support his statements. One would think there would be many witnesses to his assertions given that he was a virtually unopposed State Senatorial candidate who ran with those who did clearly supported Reid, such that he would have been the exception. One would think that he would have stated his contrary position somewhere publicly. But he hasn't identified any such person, statement or publication. Bear in mind that Schmidt did not state that Kieckhefer "publically" supported Reid.

Kieckhefer's support may very well have been "private" given his close association with various Republicans for Reid.

If KIECKHEFER supported Sharron Angle—and not Reid—in the election, given his position as a State Senator there would be some evidence to support this position, since the Reid/Angle U.S. Senate Race in 2010 this was the most important race of the cycle in 2010. KIECKHEFER donated to other Republican candidates, but not Sharron Angle. He never made any statement that he supported Ms. Angle at any time, nor can he point to any article, candidate, flyer, radio or television publication showing that he supported Angle. He never clarified with anyone that he did not support Reid after the *Las Vegas Sun* article was published. As analyzed below, the article at a minimum says he strongly supported Raggio and that Raggio supported Reid. Yet there's no disclaimer at any time from KIECKHEFER that he differed from Raggio and his associates on the Reid issue. Something is missing—something clear, something convincing: a donation, an endorsement, a statement of support, a corroborating witness stating that he supported Angle or a public statement that Kieckhefer disagreed with Raggio's support of Reid. But he submitted nothing.

III. SCHMIDT'S SUBJECTIVE INTERPRETATION OF THE *LAS VEGAS SUN* ARTICLE IS BOTH PLAUSIBLE AND SUPPORTED.

KIECKHEFER and his attorneys have given a lengthy analysis of how they find Schmidt's interpretation of the article implausible. Their argument suggests

there are multiple ways to interpret the article to establish an issue of fact that would overcome a motion for summary judgment. Even if Schmidt were to submit to this standard over the clear and convincing evidence requirement prescribed by statute, the proof-burden is on KIECKHEFER who has presented nothing more than a conclusory declaration that lacks supporting evidence. Schmidt, however, has provided corroborating evidence to support his interpretation, which was also shared by Ward, Hennessey, the airing television stations and even Judge Flanagan upon his initial reading. (See Appellant's Appendix, Ex. 10 at p. 000068, lines 7-17.) Schmidt submits the following analysis of said interpretation and basis for his belief based on the language of the article.

The second paragraph of the article states that Raggio endorsed Reid. (Appellant's Appendix, Ex. 4 at p. 000001.) The article goes on to say that a group of republicans supported Reid. (Appellant's Appendix, Ex. 4 at p. 000001.) Halfway through, the article, says: "Some Republicans who talked to the Las Vegas Sun said they support the longtime leader." (Appellant's Appendix, Ex. 4 at p. 000001.) The very next paragraph states that "Besides Raggio, the group includes Assemblyman Joe Hardy, R-Boulder City, who's running for state Senate' Ben Kieckhefer, a former spokesman for Gov. Jim Gibbons running for a seat in Reno' and Sen. Dean Rhoads, R-Tuscarora, who has also publicly backed Reid and is not up for re-election." (Appellant's Appendix, Ex. 4 at p. 000002.)

There's no word-magic here. A reasonable interpretation of this paragraph is that "the longtime leader" being referred to is Harry Reid, not Bill Raggio. Ben Kieckhefer is then included as one of several GOP politicians who support "the longtime leader", i.e. Harry Reid along with Bill Raggio. The logical flow of the article and its implications are clear enough to undermine the presence of actual malice. This is what freedom of the press is all about. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Schmidt's witnesses agreed, based on their reading of a reliable source of information. (See Appellant's Appendix, Ex. 10 at p. 000068, lines 7-17.) Where's the evidence of malice? How is supporting Reid defamatory per se without expert testimony that this was so toxic when many prominent GOP leaders in Nevada took this position? KIECKHEFER has not refuted the implications of the article or the statement at issue by conclusively denying that he supported Reid, aside from his self-serving representation which lacks evidentiary support. He simply has no evidence to survive Schmidt's Special Motion to Dismiss.

IV. DAMAGES ARE SPECULATIVE.

Schmidt maintains that the damages alleged are speculative given the nature and the timing of KIECKHEFER's lawsuit which he effectively brought for purposes of derailing Schmidt's campaign. The timing of the lawsuit is evident, as

are KIECKHEFER's repeated failures to refute the truth of the statement at issue with conclusive, convincing evidence.

V. CONCLUSION AND SUMMARY OF REQUESTED RELIEF

Wherefore, Schmidt respectfully requests that this Court vacate the District Court's denial of his NRS 41.660 Special Motion to Dismiss based on a lack of clear and convincing evidence in support of his claims.

VI. CERTIFICATE OF COMPLIANCE

I certify that I have read this reply brief, and that to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, including NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), the type style requirements of NRAP 32(a)(6) and the type-volume limitation set forth in NRAP 32(a)(7).

This brief uses a proportional typeface and 14-point font, contains 2171 words and does not exceed the page limit.

Pursuant to NRS 239B.030 the undersigned certifies no Social Security numbers are contained in this document.

DATED: April 15, 2015.

Respectfully Submitted by:



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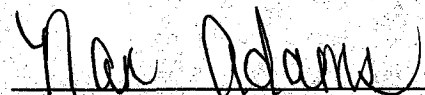
Gary Schmidt

CERTIFICATE OF SERVICE

I, Nan Adams, certify that on the 16th day of April 2015, I caused to be delivered by United States Postal Service first-class postage fully prepaid a true and correct copy of the within document **APPELLANT'S REPLY BRIEF** in the above-referenced case to:

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Dated this 16th day of April 2015.



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