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Delucchi v. Songer, 133 Nev. Adv. Op. 42 (June 29, 2017)

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Delucchi v. Songer, 133 Nev. Adv. Op. 42 (June 29, 2017)[1]

TORTS: APPEAL FROM FINAL JUDGMENT GRANTING MOTION TO DISMISS

Summary

The Court held that the portions of the Nevada anti-SLAPP statute's 2013 amendments that defined protected conduct resolved an ambiguity and apply retroactively. The Court further held that the portions of the 2013 amendments that changed the summary judgment standard of review to clear and convincing effected a substantive change and do not apply retroactively.

Background

In May 2012, appellants Raymond Delucchi and Tommy Hollis were involved in an incident on Highway 160 while working as Pahrump Valley Fire and Rescue Service paramedics. Delucchi and Hollis were driving their ambulance to Pahrump when they were flagged down by passing motorists James and Brittnie Choyce. Ms. Choyce had miscarried, and the couple stopped Delucchi and Hollis to request transport to a hospital in Las Vegas. For reasons that are still in dispute, Delucchi and Hollis did not transport Ms. Choyce to a hospital.

The Choyces made a complaint. In June 2012, the town of Pahrump ("Pahrump") investigated the incident through its outside counsel who retained Pat Songer, Director of Emergency Services at Humboldt General Hospital. Songer recommended that Delucchi and Hollis be terminated.

Delucchi, Hollis, and their union challenged the termination at a four-day arbitration hearing. The arbitrator found that there was not just cause for Delucchi's and Hollis's terminations and ordered reinstatement. The arbitrator concluded that Songer's report "lacked reliability, contained misrepresentations, and was not an adequate basis for termination."

In June 2014, Delucchi and Hollis filed a lawsuit against Songer and Pahrump's outside counsel, the law firm Erickson, Thorpe, & Swainston, Ltd. ("ETS")[2] alleging defamation and intentional infliction of emotional distress based on Pahrump's investigation and the Songer report. Songer filed a special motion to dismiss pursuant to Nevada's anti-SLAPP statutes. Delucchi and Hollis opposed and argued that "(1) the Songer report was unprotected conduct under Nevada's anti-SLAPP statutes; (2) under the pre-2013 version of the anti-SLAPP statute, Delucchi and Hollis demonstrated a genuine issue of material fact to defeat the motion; and (3) while the pre-2013 version should apply to Songer's 2012 conduct, they could nevertheless demonstrate by clear and convincing evidence a probability of prevailing on their claims."

The district court determined that the 2013 amendments clarified the legislative intent, and so applied the 2013 amendments retroactively in deciding Songer's motion to dismiss. The district court applied the statute's two-step analysis: (1) the defendant must demonstrate that the communication was protected, and (2) if so demonstrated, the burden

[1] By Krystina Butchart.

[2] ETS is no longer a party to this lawsuit.

shifts to the plaintiffs to show a probability of prevailing on their claims. "The district court found that Songer demonstrated by a preponderance of the evidence that his report was protected good faith communication in furtherance of the right to free speech on an issue of public concern under Nevada's anti-SLAPP statutes because (1) it was a communication of information to Pahrump regarding a matter reasonably of concern to Pahrump based on the incident, and (2) it was a written statement made in direct connection with an issue under consideration by Pahrump authorized by law in the disciplinary actions against Delucchi and Hollis."[3] The district court found that Delucchi and Hollis failed to meet their burden.[4] The district court granted Songer's special motion to dismiss. This appeal followed.

Discussion

Legislative amendments to Nevada's anti-SLAPP statutes

When the Legislature amends a statute, "[t]here is a general presumption in favor of prospective application."[5] When an amendment clarifies, rather than substantively changes a prior statute, the amendment has retroactive effect.[6]

The 2013 amendments were in response to a ruling from the Ninth Circuit Court of Appeals in *Metabolic Research, Inc. v. Ferrell*.[7] One amendment clarified that the anti-SLAPP protection's scope is not limited to a communication made directly to a governmental agency.[8] Therefore, the Court concluded that this amendment to NRS 41.637 was meant to clarify legislative intent in response to *Metabolic Research*, and thus, retroactive application of that statute is proper.[9]

The pre-2013 version of NRS 41.660 provided that special motions under Nevada's anti-SLAPP statutes were treated as motions for summary judgment.[10] Therefore, before the 2013 amendments, the party filing a special motion to dismiss had the "initial burden

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[3] *See* 2013 Nev. Stat., ch. 176, §§ 1 and 3.

[4] *See id.* §3(3)(b), 623–24. NRS 41.660(3)(b) was amended again in 2015, and under that amendment, a plaintiff must demonstrate "with prima facie evidence a probability of prevailing on the claim." However, under the 2013 version, a plaintiff had to establish "by clear and convincing evidence a probability of prevailing on the claim." 2013 Nev Stat., ch. 176.

[5] *See* McKellar v. McKellar, 110 Nev. 200, 203, 871 P.2d 296, 298 (1994).

[6] Fernandez v. Fernandez, 126 Nev. 28, 35 n.6, 222, P.3d 1031, 1035 n.6 (2010); *see also* In re Estate of Thomas, 116 Nev. 492, 495, 998 P.2d 560, 562 (2000) (explaining that "[w]here a former statute is amended, or a doubtful interpretation of a former statute rendered certain by subsequent legislation, it has been held that such amendment is persuasive evidence of what the Legislature intended by the first statute" (alteration in original) (quoting *Sheriff, Washoe Cty. V. Smith*, 91 Nev. 729, 734, 542, P.2d 440, 443 (1975)); 1A Norman J. Singer & J.D. Shambie Singer, Sutherland Statutory Construction §22.34 (7th ed. 2009) ("Where an amendment clarifies existing law but does not contravene previous constructions of the law, the amendment may be deemed curative, remedial and retroactive, especially where the amendment is enacted during a controversy over the meaning of the law.").

[7] 693 F.3d 795, 800–02 (9th Cir. 2012) (which held that Nevada's anti-SLAPP provisions only protect communications made directly to a governmental agency, and only protected defendants from liability, not from suit, and that there was no right to an immediate appeal from an order denying a special motion to dismiss).

[8] *See* 2013 Nev. Stat., ch. 176, § 1, at 623.

[9] *See* McKellar, 110 Nev. at 203, 871 P.2d at 298.

[10] NEV. REV. STAT. § 41.660 (1997).

of production and persuasion. This means the moving party must first make a threshold showing that the lawsuit is based on" a protected communication pursuant to NRS 41.637.[11]

The Court concluded that NRS 41. 637 and NRS 41.660 were the applicable statutes and applied each to the case in reviewing the district court's holdings. In so doing, the Court concluded that the Songer report was not a protected communication. The Court further concluded that Delucchi and Hollis presented sufficient evidence to defeat Songer's special motion under the summary judgment standard.

Conclusion

The 2013 amendments to NRS 41.637 were meant to clarify legislative intent, thus making retroactive application of the statute's amendments proper. The Court concluded that the district court erred in requiring Delucchi and Hollis to establish a probability of prevailing on the defamation and IIED claims by clear and convincing evidence based on the 2013 version of NRS 41.660. The Court further concluded that Delucchi and Hollis presented sufficient evidence to create a genuine issue of material fact, and the district court erred in granting Songer's special motion to dismiss. The Court reversed the district court's order granting Songer's special motion, and remanded to the district court to enter an order denying Songer's motion.

[11] John v. Douglas Cty. Sch. Dist., 125 Nev. 746, 754, 219 P.3d 1276, 1282 (2009).