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Adelson v. Harris, 133 Nev. Adv. Op. 67 (Sept. 27, 2017) (en banc)

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ORIGINAL PROCEEDING: FAIR REPORT PRIVILEGE;
ANTI-SLAPP APPLICABILITY

Summary

The Nevada Supreme Court (en banc) held that (1) a hyperlink to source material concerning a judicial proceeding may qualify as a report within the common law fair report privilege; and (2) Nevada’s anti-SLAPP statute, as effective prior to the 2013 amendment, reaches communication “aimed at procuring any governmental or electoral action,” even if it is not addressed to a government agency.

Background

In 2012, the Nevada Jewish Defense Counsel (NJDC) published an online petition asking then-candidate for U.S. President, Mitt Romney, to reject financial contributions from casino-owner Nathan Adelson. The petition states that Adelson supported and approved of prostitution taking place at a casino he owns in Macau, China. Specifically, the petition included a hyperlink to an article published by the Associated Press (AP), which discussed ongoing litigation in Nevada. The AP article summarizes an affidavit signed by a former CEO of Adelson’s casinos in Macau, and quotes that a “prostitution strategy had been approved by Adelson.”

Adelson sued the NJDC, and its CEO David Harris, in the Southern District of New York, alleging defamation. The District Court, after concluding that Nevada law applied, dismissed Adelson’s complaint, reasoning that the prostitution comment was a report of judicial proceedings and therefore merited protection by Nevada’s anti-SLAPP statute. Adelson appealed to the Second Circuit, which certified two questions of law to the Nevada Supreme Court.

Discussion

Predicated on the belief that “Nevada citizens have a right to know what transpires in public and official legal proceedings,”² the Court reiterated that Nevada “has long recognized a special privilege of absolute immunity from defamation given to the news media and general public to report newsworthy events in judicial proceedings.”³ The Court refers to this immunity by its commonly used name: fair report privilege.

Fair report privilege, the court emphasized, extends to media and non-media defendants equally, so long as that person “makes a republication of a judicial proceeding from material that is available to the general public.”⁴ The immunity flowing from fair report privilege is absolute—“preclud[ing] liability even if the defamatory statements are published with knowledge of their falsity and personal ill will toward the plaintiff.”⁵

¹ By David E. Chavez.

² *Lubin v. Kunin*, 117 Nev. 107, 114, 17 P.3d 422, 427 (2001) (internal quotation omitted).

³ *Sahara Gaming Corp. v. Culinary Workers Union Local 226*, 115 Nev. 212, 214, 984 P.2d 164, 166 (1999).

⁴ *Id.* at 215, 984 P.2d at 166.

⁵ *Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 60, 657 P.2d 101, 104 (1983).

Determining when a document, which draws upon a source summarizing judicial proceedings, falls within the fair report privilege

The court adopted the *Dameron* test, which extends fair report privilege to a document drawing upon a source summarizing judicial proceedings if the source’s specific attribution, or its overall context, allows an average reader to determine that the article “is quoting, paraphrasing, or otherwise drawing upon official documents or proceedings.”⁶

The hyperlink provides sufficient attribution to turn the petition into a privileged fair report

Noting that Adelson concedes that the underlying AP article is itself protected by fair report privilege, the Court must only determine whether the hyperlink in the petition attributes sufficiently to avail itself to fair report privilege. The Court states that the test is whether “a specific attribution makes it apparent to an average reader that a document draws from judicial proceedings[.]”

The Court explains that hyperlinks are prevalent online, permit direct access to a source, and are easy to use. A click on a hyperlink, the Court finds, can enable a reader to instantly determine whether the underlying source is drawing from judicial proceedings.

However, the Court warns that the utility of a hyperlink as an attributive device is lost if the average reader cannot identify, open, or understand its importance. To come within the reach of fair report privilege, a hyperlink must be sufficiently conspicuous.

Conspicuousness and textual explanation

The hyperlink in the petition was sufficiently conspicuous. In this case, the hyperlink, although not conspicuous in a general sense, was placed in the same sentence as the assertion it supported. Thus, the hyperlink’s footnote-like quality, the Court explained, rendered it sufficiently conspicuous of supporting the incendiary comments. Additionally, the particular sentence containing the easily-accessible hyperlink was written in a way to notify readers that the sentence was drawing from other sources. These qualities made the hyperlink sufficiently attributable to come within the protection of Nevada’s fair report privilege.

Nevada’s anti-SLAPP protections include speech that seeks to influence an election but is not addressed to a government agency

For the second question, the Court directs attention to the recently-decided *Delucchi v. Songer*⁷ case. There, the Court determined that the legislative history of Nevada’s anti-SLAPP statute evinces that, before and after the 2013 amendment, the statute did and continues to cover speech made in furtherance of inducing a government or electoral outcome, notwithstanding whether it was aimed at a government agency.⁸ However, said speech must be either “truthful or [] made without knowledge of its falsehood”⁹; the Court declined to address whether this was the case with the petition.

⁶ *Dameron v. Wash Magaine, Inc.*, 779 F.2d 736, 739 (D.C. Cir. 1985).

⁷ 133 Nev. Adv. Op. 42, 396 P.3d 826 830 (2017).

⁸ *Id.*

⁹ NEV. REV. STAT. § 41.637(1) (1997); *see Deluchi v. Songer*, 133 Nev. Adv. Op. 42, 396 P.3d 826 (2017).

Conclusion

The hyperlink's footnote-like quality renders it sufficiently conspicuous to put an average reader on notice that the petition is drawing from another source summarizing a judicial proceeding. Thus, the petition is immune from civil liability under Nevada's fair report privilege. Additionally, the anti-SLAPP statute, prior to its 2003 amendment, did indeed cover the NJDC petition insofar as it sought to influence governmental elections or actions without directly addressing a government entity.