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Recommended Citation

Brown, Andrew, "Rosen v. Tarkanian, 135 Nev. Adv. Op. 15 (December 12, 2019)" (2020). *Nevada Supreme Court Summaries*. 1276.

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Rosen v. Tarkanian, 135 Nev. Adv. Op. 15 (December 12, 2019)¹
TORT LAW: DEFAMATION

Summary

This issue was whether several of Jacky Rosen’s statements about Danny Tarkanian made during her political campaign constituted defamation. The Court determined that Rosen’s political statements were made in good faith and, therefore, the case was reversed and remanded with instructions for the district court to grant the special motion to dismiss.

Background

In 2016, Danny Tarkanian and Jacky Rosen ran against each other for a seat in the Nevada House of Representatives. During her campaign, Rosen uploaded an ad entitled “Integrity” to YouTube and other social media platforms. In the ad, Rosen makes three statements at issue. (1) “Danny Tarkanian made 13 fake charities that preyed on vulnerable seniors.” (2) “Seniors lost millions from the scams Danny Tarkanian helped set up.” (3) The charities Tarkanian set up were “fronts for telemarketing schemes.” The first two statements cite articles published in the *Las Vegas Review-Journal*, and the third statement is a direct quote from an article in the *Las Vegas Sun*.

Tarkanian sent Rosen a cease and desist letter. In the letter, Tarkanian noted that the statements in the ad were found to be defamatory in a prior case. The case Tarkanian referenced arose during his Senate race against Nevada State Senator Mike Schneider. During the race, Schneider said that Tarkanian “set up 19 fraudulent corporations for telemarketers.” A jury held that the statements constituted slander and libel per se.

Rosen continued to publish the ad online after she received the cease and desist letter. Furthermore, she filed an anti-SLAPP special motion to dismiss in accordance with NRS §41.660. The district court denied her motion. The district court held that she did not meet her burden under the first prong of the test to show that the statements were made in good faith. The district court also held that Tarkanian met his burden under the second prong of the test to show a probability of success for a prima facie case for defamation.

Discussion

The District Court erred in finding that Rosen’s statements were not made in good faith

Under the first prong of the anti-SLAPP statute, the party must show by a preponderance of the evidence that she made the statements in good faith. A party makes a statement in good faith when it “is truthful or is made without knowledge of its falsehood.”² In support of her motion to dismiss, Rosen submitted nine (9) newspaper articles that stated Tarkanian was a registered agent for at least thirteen (13) fraudulent telemarketing schemes that solicited millions of dollars from seniors. Four of the articles included direct admissions from Tarkanian. Rosen also submitted a letter from a former Assistant U.S. Attorney confirming the facts in the articles.

The Nevada Supreme Court held that Rosen’s statements were made in good faith because the “gist or sting” of the statements were substantially true. The problem in Tarkanian’s

¹ By Andrew Brown.

² Nev. Rev. Stat. § 41.673.

arguments was that he ignored the gist of the statements, and attempted to assess each individual word in the statements for truthfulness. This is the incorrect standard in a defamation case in which the determinative question is whether the “gist or sting” of the statements is true or false.”³

The district court erred in finding that Tarkanian met his burden in prong two of a probability of success for a prima facie claim for defamation

Rosen’s statements were substantially true, or at least made without actual malice. Therefore, Tarkanian cannot prove that Rosen made the statements with reckless disregard for the truth.

Conclusion

Rosen met her burden under the first prong of the anti-SLAPP statute. The “gist or sting” of her statements were substantially true or made without knowledge of their falsehood. Furthermore, Tarkanian failed to meet his burden under the second prong of the test because he failed to establish a prima facie claim for defamation. Therefore, the case is reversed and remanded with instructions for the district court to grant the special motion to dismiss.

Dissent

Rosen did not meet her burden of proving her statements were made in good faith. Rosen contends that she relied on statements made by Tarkanian in past defamation cases. However, Rosen’s statements are markedly different from the statements made in those cases. The majority erred in allowing these differences by stating the “gist or sting” of the statements were true.

Tarkanian met his burden under the second prong of the anti-SLAPP statute. Tarkanian presented sufficient evidence to establish a prima facie claim for defamation, specifically that Rosen’s statements were made with actual malice. Furthermore, Rosen had notice that her statements were actionably false because Tarkanian sent her a cease and desist letter. When viewed in a light most favorable to him, Tarkanian presented sufficient evidence for a prima facie claim for discrimination.

³ Oracle USA, Inc. v. Rimini St., Inc., 6 F. Supp. 3d 1108, 1131 (D. Nev. 2014).