IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY SCHMIDT,

Appellant,

v.

BEN KIECKHEFER,

Respondent.

Supreme Court Case No. 66528

District Court Case No. CV14-01227

RESPONDENT'S ANSWERING BRIEF

MICHAEL PAGNI (#6444)
ADAM HOSMER-HENNER (#12779)
McDONALD CARANO WILSON LLP
100 West Liberty Street, 10th Floor, P.O. Box 2670, Reno, NV 89505
Telephone: (775) 788-2000; Fax: (775) 788-2020
mpagni@mcdonaldcarano.com
ahosmerhenner@mcdonaldcarano.com

Attorneys for Respondent

NRAP 26.1 DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, Ben Kieckhefer affirms that he is an individual who is a resident of Nevada and represented by undersigned counsel.

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ROUTING STATEMENT

NRAP 17 does not specify a presumptive assignment for interlocutory appeals brought pursuant to NRS 41.670(4). The Supreme Court should retain jurisdiction of this appeal under either NRAP 17(a)(3) as a case involving an "election question" or alternately NRAP 17(a)(14) as this case raises "as a principal issue a question of statewide public importance." The qualifying issue here is the interpretation of recent statutory amendments concerning the liability of 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." NRS 41.660.

STATEMENT OF THE ISSUES

This Court has already dismissed that portion of Appellant Gary Schmidt's appeal relating to the temporary restraining order. (*Schmidt v. Kieckhefer,* Case No. 66528, Doc. No. 15-04905, Order Dismissing Appeal In Part, February 13, 2015.) Accordingly, there is only one issue presented.

(1) Whether the District Court appropriately denied Gary Schmidt's Special Motion to Dismiss, finding that Ben Kieckhefer had established a probability of prevailing on his defamation claims.

STATEMENT OF THE CASE

Ben Kieckefer ("Sen. Kieckhefer") and Gary Schmidt ("Schmidt") were opponents in a 2014 Republican primary election for Nevada State Senate District 16. (Appellant's Opening Brief "Br." 1.) On June 6, 2014, Sen. Kieckhefer filed a Complaint against Schmidt for defamation and defamation per se related to Schmidt's advertisements stating that Sen. Kieckhefer "endorsed and supported Harry Reid for senate in 2010." (AA, Ex. 2, p. 000003.) The same day, Sen. Kieckhefer filed an Ex Parte Motion for Temporary Restraining Order and Request for Preliminary Injunction. (RA000001-39.) This motion was heard by

Judge Flanagan of the Second Judicial District Court who, after receiving argument from Schmidt, granted the requested temporary restraining order. (AA, Ex. 14, p. 000042) (ordering Schmidt to "immediately withdraw all advertisements expressing or implying that Ben Kieckhefer has endorsed or supported Harry Reid").

On June 9, 2014, one day prior to the primary election, Schmidt filed an Answer and Counterclaim against Sen. Kieckhefer for defamation and defamation per se related to separate campaign advertisements by Sen. Kieckhefer. (AA, Ex. 1, p. 000080.) Schmidt requested a "temporary restraining order, preliminary injunction, and a permanent injunction that enjoins" Sen. Kieckhefer from publishing certain statements concerning Schmidt. (*Id.* at p. 000087.) Schmidt amended his counterclaim on July 9, 2014 wherein he alleged that Sen. Kieckhefer was liable for defamation and defamation per se by publishing "false and defamatory television, internet and radio advertisements, press releases and other communications." (Respondent's Appendix "RA" RA000040-66.) Sen. Kieckhefer filed a motion to dismiss against Schmidt's Counterclaims on August 1, 2014. (RA000067-96.) The district court issued an order on September 24,

2014 granting and denying in part Sen. Kieckhefer's motion to dismiss. (RA000204-212.)

Schmidt then filed a special motion to dismiss on August 4, 2014, which came before Judge Polaha of the Second Judicial District Court at a hearing on August 13, 2014.[1] (AA, Ex. 9, p. 000090.) Judge Polaha denied the special motion to dismiss and an order was entered on September 5, 2014 from which Schmidt appealed to this court. (AA, Ex. 13, p. 000230.)

This Court issued an Order to Show Cause on November 24, 2014 requiring Schmidt to defend his appeal of the moot temporary restraining order. (*Schmidt v. Kieckhefer,* Case No. 66528, Doc. No. 14-38535, Order to Show Cause, November 24, 2014.) On February 13, 2015, this Court then dismissed the part of Schmidt's appeal relating to the temporary restraining order. (*Schmidt v. Kieckhefer,* Case No. 66528, Doc. No. 15-04905, Order Dismissing Appeal In Part, February 13, 2015.)

[1] Schmidt misleadingly states that Sen. Kieckhefer "failed twice to appear before the court to submit to examination." (Br. 9, 14.) Sen. Kieckhefer was not required to appear at either hearing; no hearing or trial subpoena was issued to Sen. Kieckhefer.

STATEMENT OF THE FACTS[2]

In early June 2014, Sen. Kieckhefer was the incumbent State Senator for Nevada State Senate District 16. (Br. 5) (citing AA, Ex. 2 at p. 000005.) Schmidt challenged Sen. Kieckhefer in the 2014 Republican primary election. (*Id.*)

Before the primary election of June 10, 2014, one of Schmidt's staff members "discovered an October 31, 2010 article published in the Las Vegas Sun." (Br. 6) (citing AA, Ex. 9 at p. 000125.) Based on this article, Schmidt began airing a "political campaign advertisement for Schmidt" that included the statement that Sen. Kieckhefer "endorsed and supported Harry Reid for Senate in 2010." (Br. 7) (citing AA, Ex. 9 at p. 000127.) The Las Vegas Sun article is the sole support identified by Schmidt for the factual basis of the advertisements. (Br. 7); (AA, Ex. 9, p. 000119-120.) Schmidt testified that before running the advertisements, his investigation was limited to "Googl[ing]" the Las Vegas Sun article and seeing that "no comments" appear on article's

[2] Counsel for Appellant did not comply with the "duty to confer and attempt to reach an agreement concerning a possible joint appendix." NRAP 30(a). Accordingly, Respondent has prepared a separate appendix that contains documents "which should have been but were not included in the appellant's appendix" in compliance with NRAP 30(b)(4). Appellant's Appendix is referred to herein as "AA" while Respondent's Appendix is referred to as "RA."

webpage. (AA, Ex. 11, Hearing Tr. 17:15-24.) At no time did Schmidt verify whether Sen. Kieckhefer did, in fact, endorse or support Senator Reid.

On or about June 5, 2014, Sen. Kieckhefer became aware that Schmidt was running the advertisement relating to Senator Reid. (AA, Ex. 1, p. 000023.) This advertisement aired on multiple television channels in Northern Nevada on the eve of the June 10, 2014 primary election. (Br. 7) (citing AA, Ex. 9, p. 000127.) Schmidt is the narrator in this advertisement and the statement was made by him personally. (AA, Ex. 1, p. 000081.)

On either June 5th or June 6th, Schmidt was informed that Sen. Kieckhefer's campaign objected to the advertisement and disputed the truth of Schmidt's statements. (AA, Ex. 11, Hearing Tr. 15:11-16:2) ("it was indicated to me [Schmidt] that somebody from his [Sen. Kieckhefer's] campaign was complaining about the ad"). In response, neither Schmidt nor his campaign did any investigation into whether Sen. Kieckhefer had actually supported or endorsed Harry Reid. (*Id.* at 17:15-19.) The only action taken was to double-down on the Las Vegas Sun article as support. (AA, Ex. 9, p. 000127.)

Schmidt has publicly admitted that his claim lacks factual support. (RA000029-31.) When asked for evidence for his statement by the Reno Gazette Journal, Schmidt responded only that it was "guilt by association" because Senator Kieckhefer had supported the late Senator Bill Raggio, who had been a supporter of Harry Reid in his 2010 U.S. Senate race against Sharron Angle. (RA000031.) Schmidt further stated that "the biggest secondary evidence" he has for this statement is that Sen. Kieckhefer did not support or endorse Sharron Angle in the 2010 U.S. Senate race. (*Id.*) Most tellingly, Schmidt offered to "pull the ad linking Kieckhefer to 'Republicans for Reid' on one condition . . . If he or you comes up with anything where he supported or endorsed or spoke favorably – during the campaign and after the primary for Sharron Angle [Senator Reid's Opponent] I'll pull that spot." (*Id.*); (AA, Ex. 11, Hearing Tr. 16:4-9) (confirming that Schmidt offered to pull the advertisement).

SUMMARY OF THE ARGUMENT

This appeal does not present a question of prior restraint, strict scrutiny, or any other type of constitutional issue. Instead, the sole question before this Court is purely procedural. A special motion to dismiss under NRS 41.660 is only proper if the plaintiff cannot demonstrate a probability of prevailing on the claim. Thus, the District Court's denial of Schmidt's Special Motion to Dismiss was correct unless Sen. Kieckhefer's claims were entirely meritless.

Sen. Kieckhefer filed claims for defamation and defamation per se against Schmidt based on a false statement by Schmidt that Sen. Kieckhefer "endorsed and supported Harry Reid for Senate in 2010." (AA, Ex. 9, p. 000127.) Two judges have already independently held that these claims have a probability of succeeding on the merits. Schmidt offers no reason to disturb these holdings but only reiterates his prior generic arguments without interpreting NRS 41.660 or substantively analyzing Nevada's defamation laws.

The constitutional questions with respect to these defamation claims have already been settled. Even statements uttered in the context of a political campaign can constitute defamation so long as

they satisfy the actual malice standard. Sen. Kieckhefer has presented evidence that Schmidt acted with reckless disregard for the truth, so there is certainly a probability of prevailing on the defamation claims. Even were this case situated for review on the merits rather than under NRS 41.660, it would not set a negative precedent for elections in Nevada. There is truly a distinctive fact pattern created here because Schmidt publicly stated that he had no idea if his statement was true or false and he offered to pull it if it any evidence was presented to disprove it. This fact alone demonstrates that Schmidt acted with reckless disregard for the truth.

Finally, Schmidt's prior actions completely undermine his arguments about the freedom of speech and demonstrate convincingly that the Special Motion to Dismiss is purely a litigation tactic. After Sen. Kieckhefer filed suit and the District Court entered a temporary restraining order, Schmidt did not immediately appeal nor file a special motion to dismiss. Instead, Schmidt filed mirror-image defamation claims against Sen. Kieckhefer and the day before the primary election, Schmidt sought injunctive relief enjoining Sen. Kieckhefer from running certain political advertisements before the primary election. In fact, Schmidt did not appeal the temporary restraining order until

September 2014, well after it had already expired. The Special Motion to Dismiss belatedly was filed at the end of the permissible statutory period on August 4, 2014, nearly two months after the Complaint. These actions are not consistent with a legitimate concern over the alleged harm done by the defamation claims, but rather with an attempt to benefit from tactical advantages provided by NRS 41.660. By filing the Special Motion to Dismiss and then this interlocutory appeal, Schmidt's goal is merely to stall and delay Sen. Kieckhefer's legitimate lawsuit while simultaneously causing harm to Sen. Kieckhefer's reputation.

Pursuant to NRS 41.660, Sen. Kieckhefer is not required to demonstrate that he will succeed on his defamation claims but only that he has a probability of doing so. As there was clear and convincing evidence supporting Sen. Kieckhefer's probability of prevailing, the District Court's decision was correct and should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

This Court held in *John v. Douglas County School District* that "the district court shall treat the special motion to dismiss as a motion for summary judgment" and therefore this Court "reviews de novo the

district court's order granting the [anti-Strategic Lawsuits Against Public Participation ("anti-SLAPP")] motion." 125 Nev. 746, 753, 219 P.3d 1276, 1281 (2009). This decision, however, was issued prior to the 2013 amendments to NRS 41.660, which deleted language treating a special motion to dismiss "as a motion for summary judgment." This standard was replaced with a "preponderance of the evidence" standard for determining good faith and a "clear and convincing evidence" standard for determining a "probability of prevailing on the claim." NRS 41.660(3). This Court has not yet had the opportunity to evaluate the proper standard of review for appeals based on this new language.

De novo review is appropriate for the first step of determining "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." NRS 41.660(3)(a). Sen. Kieckhefer submits that abuse of discretion review is appropriate for the second step of determining "whether the plaintiff has established by clear and convincing evidence a probability of prevailing on the claim." NRS 41.660(3)(b).

At the hearing at the District Court, counsel for Schmidt called Schmidt to the stand and took live testimony under oath. (AA, Ex. 11.)

It seems contrary to this Court's precedent to evaluate that testimony de novo. *See Castle v. Simmons,* 120 Nev. 98, 103, 86 P.3d 1042, 1046 (2004) (holding that "we will not reweigh the credibility of witnesses on appeal; that duty rests within the trier of fact's sound discretion"). Accordingly, some deference to the decision of the District Court is warranted and an abuse of discretion standard is therefore appropriate with respect to at least the second step of the analysis. *See, e.g., Ransdell v. Clark Cnty.*, 124 Nev. 847, 854, 192 P.3d 756, 761 (2008) ("Issues of sovereign immunity under NRS Chapter 41 present mixed questions of law and fact. We review questions of statutory construction de novo, and we will not disturb the lower court's findings of fact when those findings are supported by substantial evidence.")

As this appeal primarily challenges the District Court's findings with respect to the sufficiency of the evidence for a "probability of prevailing," an abuse of discretion standard is applicable here.

II. THE DISTRICT COURT CORRECTLY APPLIED NRS 41.660 BY FINDING THAT SEN. KIECKHEFER HAD A PROBABILITY OF PREVAILING ON THE DEFAMATION CLAIMS.

Nevada has enacted anti-SLAPP legislation, NRS 41.635 *et seq.*, which permits a "defendant to file a special motion to dismiss in

response" to the filing of a SLAPP suit by a plaintiff against that defendant. *John*, 125 Nev. at 752. A special motion to dismiss (also known as an anti-SLAPP motion) can be granted only after a court makes a determination as to "whether the plaintiff has established by clear and convincing evidence a probability of prevailing on the claim." NRS 41.660(3)(b).[3] This Court has not yet analyzed this standard. Schmidt does not offer any analysis whatsoever of NRS 41.660. He does not cite to any cases that would assist the Court in interpreting the statute nor offer any opinion as to the meaning of "clear and convincing" or "probability of prevailing." Nevertheless, both Nevada's prior precedent and the interpretation of similar statutes in other states support a conclusion that NRS 41.660(3)(b) was only intended to apply to meritless or frivolous claims.

A. Special Motions To Dismiss Should Only Be Granted In Instances Of Meritless Lawsuits.

This Court has described the target of a special motion to dismiss as "a *meritless* lawsuit that a party initiates primarily to chill a

[3] Sen. Kieckhefer asserted two claims for defamation and defamation per se, but the Special Motion to Dismiss fails so long as Sen. Kieckhefer establishes a probability of prevailing on either claim. When a party demonstrates a prima facie case of prevailing on any part of a mixed cause of action, the anti-SLAPP motion fails. *Baral v. Schnitt*, 233 Cal. App. 4th 1423, 183 Cal. Rptr. 3d 615, 625 (2015).

defendant's exercise of his or her First Amendment free speech rights." *Stubbs v. Strickland*, 129 Nev. Adv. Op. 15, 297 P.3d 326, 329 (2013) (emphasis added); *see also John,* 125 Nev. at 752 (characterizing a SLAPP lawsuit as a "meritless lawsuit"). In *John*, the Court described the function of a special motion to dismiss as "for filtering frivolous claims from those having arguable merit." 125 Nev. at 757; *see also Foley v. Pont,* No. 2:11-CV-01769-ECR, 2012 WL 2503074, at *4 (D. Nev. June 27, 2012) (noting that the Nevada Legislature provided procedural relief "for defendants who face meritless SLAPP suits").

The State of Washington has a nearly identical provision in their anti-SLAPP legislation. RCW 4.24.525(4)(b) ("the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim") Courts in Washington have similar construed anti-SLAPP motions as proper only in cases of a "meritless suit filed primarily to chill a defendant's exercise of First Amendment rights." *City of Seattle v. Egan*, 179 Wash. App. 333, 337, 317 P.3d 568, 569 (2014).

"Nevada's anti-SLAPP statute was enacted in 1993, shortly after California adopted its statute, and both statutes are similar in purpose and language." *John*, 125 Nev. at 752. California's statute provides in

relevant part that a "cause of action . . . shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." *Soukup v. Law Offices of Herbert Hafif*, 39 Cal. 4th 260, 278, 139 P.3d 30, 41-42 (2006).[4] A California court thus "considers the pleadings and evidentiary submissions of both the plaintiff and the defendant [but] does not weigh the credibility or comparative probative strength of competing evidence." *Id.* (citations omitted). Additionally, the "plaintiff need only establish that his or her claim has minimal merit to avoid being stricken as a SLAPP." *Id.* (citations omitted). The Ninth Circuit described the probability of prevailing standard for an anti-SLAPP motion as a "low burden." *Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 425 (9th Cir. 2014) (interpreting California statute).

Here, the Court did "not find that Sen. Kieckhefer's lawsuit was meritless, frivolous, or vexatious." (AA, Ex. 13, p. 000233.) Schmidt has not presented any reason to disturb this conclusion.

[4] California's statute does not contain the "clear and convincing" language but as argued below, this language does not substantively affect the requirement of a plaintiff to show any probability at all of prevailing.

B. The Clear And Convincing Standard Does Not Materially Alter Sen. Kieckhefer's Procedural Burden.

While NRS 41.660(3)(b) uses the phrase "clear and convincing" evidence, it is far from clear what this phrase means in context. Clear and convincing is defined typically as "highly probable." *See, e.g., Wynn v. Smith*, 117 Nev. 6, 17, 16 P.3d 424, 431 (2001) (discussing a jury instruction). Substituting this definition though transforms NRS 41.660(3)(b) into a requirement that a plaintiff must establish a "[high probability of] a probability of prevailing on the claim."

While this is a clunky phrase, it fits with the interpretation of NRS 41.660. Thus, the court must be convinced that there is a high probability that a plaintiff has any probability at all of prevailing. Importantly, Nevada did not choose to use the phrase "reasonable probability" or any other modifier to heighten the standard. *See Kirksey v. State,* 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996) (noting that in the criminal context, a "reasonable probability is a probability sufficient to undermine confidence in the outcome") (quotations omitted). Requiring a plaintiff to only show a probability of prevailing, no matter how slight, conforms with the judicial interpretation of the anti-SLAPP statutes as applying to only thoroughly meritless claims.

Additionally, this interpretation of "clear and convincing evidence" avoids significant constitutional right issues. Courts in Washington have considered constitutional challenges to the identical provision in that state. *Dillon v. Seattle Deposition Reporters, LLC*, 179 Wash. App. 41, 89, 316 P.3d 1119, 1142 (2014). In order to prevent the anti-SLAPP statute from infringing upon "the rights of persons to file lawsuits and to trial by jury," the court held that "a summary judgment-like analysis [should] determine whether the plaintiff has shown, by clear and convincing evidence, a probability of prevailing on the merits." *Id.* Only in this way can constitutional issues be avoided as trial by jury is not mandatory "where no issue of fact was left for submission to, or determination by, the jury." *Id.* "Thus, in analyzing whether the plaintiff has shown, by clear and convincing evidence, a probability of prevailing on the merits, the trial court may not find facts, but rather must view the facts and all reasonable inferences therefrom in the light most favorable to the plaintiff." *Id.* at 89-90.

Although Sen. Kieckhefer did not request trial by jury, the potential constitutional issues with Nevada's statute would still prevent a facial interpretation of NRS 41.660 where the court had to find facts. By comparison, Sen. Kieckhefer filed a motion to dismiss Schmidt's

defamation counterclaims. (RA000067-96.) The District Court found that just "as this Court indicated that Plaintiff had a probability of succeeding on its own defamation and defamation per se claims, Defendant here too has the same likelihood of prevailing." (RA000207.) At such an early stage of litigation, it would be incongruous to permit Schmidt's claims to proceed under the motion to dismiss standard but dismiss Sen. Kieckhefer's claims under NRS 41.660. While NRS 41.660 does require some showing of merit that a N.R.C.P. 12(b)(5) motion does not, it should not be interpreted to prevent meritorious lawsuits from proceeding.

Accordingly, this type of reverse-summary judgment analysis should be applied to the new language in NRS 41.660. This is also the same analysis used by this Court when the statute specifically referenced summary judgment prior to the 2013 amendments. *See John*, 125 Nev. at 752 (finding that a "district court can only grant the special motion to dismiss if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law"). Consequently, the existence of *any* genuine issue of material fact requires the denial of Schmidt's Special Motion to Dismiss.

C. All Evidence Should Be Construed In Favor Of Sen. Kieckhefer.

In an appeal of the denial of a special motion to dismiss, this Court should "neither weigh credibility [nor] compare the weight of the evidence. Rather, [a court should] accept as true the evidence favorable to the plaintiff . . . and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." *See Greater Los Angeles Agency on Deafness, Inc.*, 742 F.3d at 425 (citations omitted). In making a determination as to whether a plaintiff has a probability of prevailing, it is the "court's responsibility to accept as true the evidence favorable to the plaintiff." *Soukup*, 39 Cal. 4th at 278.

If all of the evidence submitted by Sen. Kieckhefer is accepted as true, as the case-law requires, then Sen. Kieckhefer can state a claim for defamation as a matter of law. Schmidt may dispute the interpretation of some evidence, but cannot truthfully claim that Sen. Kieckhefer has failed to offer evidence in support of his claims. Although the defamation claims are explored in greater depth below, the elements are recapped briefly here with citations to primary, but not exhaustive, factual support. *See Pegasus v. Reno Newspapers, Inc.*,

118 Nev. 706, 718, 57 P.3d 82, 90 (2002) (outlining the elements of defamation).

- Schmidt's statement was false. (RA000021) (stating that Sen. Kieckhefer has never endorsed Harry Reid).
- Schmidt's statement was defamatory. (RA000024)(describing the harm to reputation that could result to a Republican politician from an endorsement of Harry Reid).
- Schmidt's statement was published to third parties. (Br. 7) (citing AA, Ex. 9 at p. 000127) (acknowledging that the advertisement aired on various television stations).
- Schmidt's statement was made with a reckless disregard for the truth. (RA000031) (stating that Schmidt offered "pull the ad linking Kieckhefer to 'Republicans for Reid' on one condition . . . If he or you comes up with anything where he supported or endorsed or spoke favorably – during the campaign and after the primary for Sharron Angle [Senator Reid's Opponent] I'll pull that spot."); *see also* (AA, Ex. 11, 16:4-9).
- Sen. Kieckhefer suffered damages. (RA000021) (stating that Sen. Kieckhefer's character, political endorsement decisions,

and conservative credentials would be harmed by Schmidt's advertisements); (RA000024).

The above evidence must be accepted as true and in the light most favorable to Sen. Kieckhefer. Consequently, because this evidence presents, at a minimum, genuine issues of material fact, Schmidt's Special Motion to Dismiss was correctly denied.

D. NRS 41.660 Should Be Interpreted To Require Only A Minimal Evidentiary Showing Because Of The Early Stage Of Proceedings And Stayed Discovery.

A special motion to dismiss must be filed within 60 days after the service of the complaint. NRS 41.660(2). Moreover, as soon as the special motion is filed, the court "shall . . . [s]tay discovery." NRS 41.660(3)(e). Consequently, it would be unreasonable to require a plaintiff to create a full evidentiary record given this narrow time window and mandatory stay of discovery. In *Overstock.com, Inc. v. Gradient Analytics, Inc.*, the court identified the problem with placing the burden on a plaintiff to prove up their claims while at the same time automatically staying discovery. 151 Cal. App. 4th 688, 699-700, 61 Cal. Rptr. 3d 29, 38 (2007). Thus, the court stated "[p]recisely because the statute (1) permits early intervention in lawsuits alleging

unmeritorious causes of action that implicate free speech concerns, and (2) limits opportunity to conduct discovery, the plaintiff's burden of establishing a probability of prevailing is not high." *Id.*

Here, the Special Motion to Dismiss was filed less than two months after Sen. Kieckhefer's complaint and it automatically stayed discovery. As Sen. Kieckhefer had essentially no opportunity to create a factual record, NRS 41.660 should only impose a low burden. The Verified Complaint, affidavits, documents, and testimony elicited at hearings is more than sufficient to satisfy this burden.

III. THE DISTRICT COURT CORRECTLY ANALYZED THE STANDARD FOR DEFAMATION CLAIMS BROUGHT BY A PUBLIC OFFICIAL.

The general elements of a defamation claim require a plaintiff to prove: "(1) a false and defamatory statement by [a] defendant concerning the plaintiff; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages." *Pegasus*, 118 Nev. at 718. Sen. Kieckhefer is undoubtedly a public official and therefore the "actual malice" standard applies and replaces the third element above. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Actual malice is defined as

"knowledge that it [the statement] was false or with reckless disregard of whether it was false or not." *Pegasus*, 118 Nev. at 719. Reckless disregard is in turn established by showing that the publisher of the statement acted with a "high degree of awareness of . . . [the] probable falsity of the statement or had serious doubts as to the publication's truth." *Id.* (citations omitted).

Sen. Kieckhefer provided clear and convincing evidence to satisfy each of the elements of defamation. The District Court properly accepted this evidence and found that Sen. Kieckhefer had a probability of prevailing on his defamation claims. Schmidt cannot ask this Court to reweigh that evidence in order reach a different conclusion.

A. Schmidt's Advertisement Contained A False And Defamatory Statement.

The statement in question is Schmidt's claim that Sen. Kieckhefer "endorsed and supported Harry Reid for Senate in 2010." (AA, Ex. 2, p. 000003.) The District Court found that "[b]ased on the evidence, including Sen. Kieckhefer's sworn denial and contrasting lack of credible evidence from Schmidt, the Court finds there is clear and convincing evidence that Sen. Kieckhefer has a probability of

showing the claim that Sen. Kieckhefer 'endorsed and supported Harry Reid for Senate in 2010' was false." (AA, Ex. 14, p. 000232.) Importantly, the District Court evaluated the credibility of Schmidt's purported evidence and therefore this finding should not be disturbed upon appeal except for an abuse of discretion. (*Id.*)

It is a matter of public record that Harry Reid defeated Sharron Angle in the 2010 U.S. Senate election. Endorsements are also matters of public record. *See* "endorsement," MERRIAM-WEBSTER.COM. Merriam-Webster, 2015, accessed on March 15, 2015 ("a public or official statement of support or approval"). Yet Schmidt still has not produced any credible evidence that Sen. Kieckhefer endorsed Harry Reid ever let alone in 2010.

Rather than adduce any evidence, Schmidt appears to argue that this statement was an opinion. (Br. 16) ("Schmidt's statement was based on an opinion drawn from information found within a reliable source; and the absence of any contrary evidence that Kieckhefer supported Sharron Angle which should have existed had he done so.") Schmidt states that he "and his campaign members believed the statement to be true." (*Id.*) This subjective belief, however, does not transform a clear statement of fact into a protected political opinion.

This Court has rejected Schmidt's exact argument when it was "contended that the 'bounced check' statement was merely a statement of Hernstadt's opinion that Allen had bounced a check. The argument is meritless; if such a contention were accepted, any statement of fact could be considered simply the opinion of its maker." *Nevada Indep. Broad. Corp. v. Allen*, 99 Nev. 404, 411, 664 P.2d 337, 342 (1983). Therefore, Schmidt cannot hide behind the argument that it was only his opinion that Sen. Kieckhefer endorsed Harry Reid. The statement that one politician endorsed another is as factual as saying that one politician voted for a bill. These actions can only be taken publicly, represent objective demonstrable fact, and can be proven or disproven with evidence.

Schmidt also challenges the defamatory nature of his statement despite not citing to a single part of the record or piece of evidence. Without support in law or fact, Schmidt asks a series of rhetorical questions in some attempt to show that his statements were not defamatory. (Br. 17) ("Does this really rise to the level of holding the subject up to contempt? Is this really the type of speech that need be unconstitutionally stifled and kept hidden from the public at large?").

First, a statement is defamatory if "[u]nder any reasonable definition[,] [it] would tend to lower the subject in the estimation of the community and to excite derogatory opinions against him and to hold him up to contempt." *Posadas v. City of Reno*, 109 Nev. 448, 453, 851 P.2d 438, 442 (1993) (citing *Las Vegas Sun v. Franklin*, 74 Nev. 282, 287, 329 P.2d 867, 869 (1958)). In reviewing an allegedly defamatory statement, "[t]he words must be reviewed in their entirety and in context to determine whether they are susceptible of a defamatory meaning." *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 484, 851 P.2d 459, 463 (1993).

The District Court found that the advertisements were "made in the context of a heated political campaign, and an analysis of those statements requires the Court to examine the atmosphere of the political situation as it existed prior to the primary election and from the perspective of a political conservative." (AA, Ex. 14, p. 000232.) Moreover, the "unrefuted evidence in the record indicates that the statement in question could be harmful to the reputation of a Republican politician." (*Id.*) Schmidt speculates that "having supported Harry Reid and not Sharron Angle in 2010 would enhance Kieckhefer's reputation." (Br. 17.) There is no evidence for this statement.

In contrast, the exact article from the Las Vegas Sun relied upon by Schmidt for his advertisements contains a quote from the then-Republican Party Chairman, Mark Amodei, stating that "I just don't know how you do that, support a Republican who supported Reid without the voters asking what the hell you're doing." (AA, Ex. 9, p. 000119-120.) The same article says that Raggio's endorsement of Reid "prompted calls from conservatives, the Clark County and Nevada Republican Party chairmen and others for a new GOP leader in the state's upper house" to replace Raggio. (*Id.*) Additionally, Sen. Kieckhefer submitted evidence from a former chairman of the Washoe County Republicans, Dave Buell, who stated that in his experience the endorsement of Senator Reid by a Republican would "cause strong negative feelings about a Republican candidate among some Republican voters." (RA000024.)

Finally, Schmidt's statements were defamatory per se because they "could have injured [a politician's] reputation as a candidate for public office." *Nevada Indep. Broad. Corp. v. Allen*, 99 Nev. 404, 409, 664 P.2d 337, 341 (1983) (following authorities holding that statements concerning a candidate constituted slander per se "if the words tend to cause persons not to vote for the candidate"). Thus, this Court need not

go further than a prima facie analysis as to the nature of Schmidt's statements.

B. Schmidt's Statements Were Published To Third Persons.

There is no dispute that Schmidt's defamatory statement was published to third persons. (Br. 5) ("On June 4, 2014, Schmidt began airing a television advertisement, stating in part that Kieckhefer "endorsed and supported Harry Reid for Senate in 2010.")

C. Schmidt Acted With Actual Malice.

The District Court summed this case up perfectly:

> "Once it was known that there was a protest to the content of the ad, you don't have to be an English major to reread [the Las Vegas Sun article] and say, 'Whoops, perhaps I did misread it and it doesn't say what I am saying it says. And yeah, it should have been pulled."

(AA, Ex. 11, 42:2-6.) This case really is all about a single October 31, 2010 Las Vegas Sun article. (AA, Ex. 9, p. 000119-120.) Schmidt misread that article in June 2014, continued to misread it at the August hearing in front of the District Court, and now has based his entire appeal on the same misreading. The District Court found that "Schmidt misread the article, which does not support a conclusion that Sen. Kieckhefer endorsed or supported Senator Harry Reid." (AA, Ex. 13, p. 00232.)

Actual malice is "proven when a statement is published with knowledge that it was false or with reckless disregard for its veracity. Reckless disregard for the truth may be found when the defendant entertained serious doubts as to the truth of the statement, but published it anyway." *Pegasus*, 118 Nev. at 722 (finding that "[r]ecklessness or actual malice may be established through cumulative evidence of negligence, motive, and intent").

The key piece of evidence relied upon by the District Court to find actual malice was a public statement made by Schmidt himself. When asked about his claim by the Reno Gazette Journal, Schmidt offered to "pull the ad linking Kieckhefer to 'Republicans for Reid' on one condition . . . If he or you comes up with anything where he supported or endorsed or spoke favorably – during the campaign and after the primary for Sharron Angle [Senator Reid's Opponent] I'll pull that spot." (RA000030-31.) The Court found that Schmidt's attitude of "if I'm wrong I'll pull it" showed a reckless disregard for the truth. (AA, Ex. 11, 51:15-17.)

While publishing a statement without support is not generally sufficient for a finding of actual malice, "deliberately avoiding information that may undermine a published story may be grounds for

a finding of malice." *Isuzu Motors Ltd. v. Consumers Union of U.S., Inc.*, 66 F. Supp. 2d 1117, 1125-26 (C.D. Cal. 1999). Similarly, once Schmidt had been informed that his claim was disputed and that his reading of the Las Vegas Sun article was incorrect, he cannot avoid liability for defamation by burying his head in the sand.

The sole basis for Schmidt's advertisement was the Las Vegas Sun article. (Br. 12.) That article does not say what Schmidt quotes it to say. The article is entitled, "Reid endorsement may put Raggio on the outs in GOP." (AA, Ex. 9, p. 000119-120.) The sentence at issue states: "Some Republicans who talked to the Las Vegas Sun said they support the longtime leader." (AA, Ex. 9, p. 000119.) Schmidt has consistently used brackets to replace "longtime leader" with Harry Reid (Br. 7), but given the context as a whole, this reading is implausible as the only possible meaning for "longtime leader" is Bill Raggio. (AA, Ex. 9, p. 000119-120.)

The only section of the article that discusses Sen. Kieckhefer is this:

> Raggio, first elected in 1972, and who turned 84 on Saturday, said he wasn't concerned with questions about who will lead the caucus. He said he was instead focused on getting control of the state Senate. He was, of course, curious about how the votes broke down.

> Some Republicans who talked to the Las Vegas Sun said the support the longtime leader.
>
> 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."

(AA, Ex. 9, p. 000119-120) (emphasis added). There is no explicit statement that Sen. Kieckhefer supported or endorsed Sen. Reid. Rather, from this passage and the article as a whole, it is obvious that Sen. Kieckhefer is being mentioned as a Republican legislator who supported *Bill Raggio*.

Because Sen. Kieckhefer need only establish a genuine issue of material fact, the competing interpretations of this article themselves demonstrate that Schmidt's Special Motion to Dismiss should have been denied. Should Sen. Kieckhefer's claims move forward, he could call as a witness the article's author, a grammatical expert, or any of the other politicians mentioned in the article. This level of effort, however, is absolutely unnecessary given the plain language of the article, which even if slightly confusing upon the first read, requires only slight analysis to reach the right conclusion. The initial confusion may come

from the two sentences taken, out of context, together: "Some Republicans who talked to the Las Vegas Sun said they support the longtime leader. Besides Raggio, the group includes . . . Ben Kieckhefer." (AA, Ex. 9, p. 000119-120.) Because Raggio is in the second sentence, at first glance it seems like he would not be the object in the first sentence. But this impression is wrong, because Raggio was a member of the "group," as he could vote for himself, which supported Raggio's leadership in the Nevada Senate. The following seven grammatical and textual points are presented to hammer home the magnitude of Schmidt's continued error, not to tip the balance on an equally weighted argument.

First, the article taken as a whole unmistakably focuses on the election of a leader of the Republican caucus in the Nevada Senate and *not* on the election of Harry Reid. The title of the article is "Reid endorsement may put Raggio on the outs in GOP" and not "Here are some Republicans who support Senator Reid." Thus, the topic and subject matter of the article relates to whether the Republican members of the State Senate will retain Bill Raggio as the leader of the caucus. The article is not a story about Republicans who supported Harry Reid, but about Republicans in the State Senate who supported or opposed

Bill Raggio based on *Raggio's* support of Harry Reid. This is confirmed by what is essentially the topic sentence of the article: "[Raggio's endorsement of Sen. Reid] prompted calls from conservatives . . . for a new GOP leader in the state's upper house." (*Id.*)

Second, the sentence, "[s]ome Republicans who talked to the Las Vegas Sun said they support the longtime leader," grammatically can only refer to Bill Raggio. The preceding paragraph states that "Raggio, first elected in 1982, and who turned 84 on Saturday . . . was . . . curious about how the votes broke down." (*Id.*) If the term longtime leader is even considered ambiguous, which it is not, then it must take its meaning from the closest antecedent. There are no other nouns in between "Raggio" and "longtime leader" that could function as a plausible antecedent. Moreover, the only logical interpretation of this section is that the "longtime leader" refers to Raggio, whose longevity was mentioned in the previous paragraph. No indication of Senator Reid's political longevity is mentioned or hinted at in the article, even if it is widely known.

Third, the "group" to which Sen. Kieckhefer is assigned in the article clearly refers to Republican State Senators who are supporting Bill Raggio. After the section on "Republicans who . . . support the

longtime leader" is a corresponding section on Republicans "who also declined to address who'd they support for caucus leader (and thus possible votes against Raggio)." (*Id.*) The article is separated into three sections: Republicans who "support the longtime leader," "[o]thers who said they wouldn't discuss their choice until after the election," and "possible votes against Raggio." (*Id.*) It would make no sense whatsoever if the first section was interpreted as discussing support for Senator Reid, when the rest of the sections deal with State Senators who may be opposed to Bill Raggio.

Fourth, the interpretive principle of *expressio unius est exclusion alterius* demonstrates that Sen. Kieckhefer's "group" is one that supports Bill Raggio and not Harry Reid. The article 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." (*Id.*) Raggio is listed as a Republican State Senator who would obviously support himself for the caucus leader. Crucially though, Sen. Dean Rhoads, and *only* Dean Rhoads, is described as a State Senator "who has also publicly backed Reid." (*Id.*)

It would be redundant to list a group of Senators who support Senator Reid and then state that *one* member of that group "also" supports Reid. While all four members of this "group" support Raggio, by singling out Dean Rhoads as a State Senator who "also" supported Harry Reid, the article indicates that neither Joe Hardy nor Ben Kieckhefer supported Reid.

Fifth, the next sentence after the mention of Sen. Kieckhefer states that "Assemblyman James Settelmeyer, R-Minden, who is running for the Carson City Senate seat, is seen as a swing vote. He was disappointed Raggio endorsed Reid . . . [and said that] I don't know what will pan out . . . I imagine he (Raggio) will still be the leader." (*Id.*) The "swing vote" must refer to the election of Raggio as it would be implausible to believe that Settelmeyer was a swing vote for the state-wide election of a United States Senator. In order for this transition to make any sense, the preceding group must be defined in terms of whether they will support or oppose Bill Raggio. Otherwise, naming another State Senator and describing him as a swing vote would be a total non-sequitur.

Sixth, the math in the article indisputably shows Sen. Kieckhefer as a member of a group supporting Bill Raggio. The article states:

> "A poll of Republican state senators and contenders in competitive districts suggest the caucus is split on whether Raggio should be forgiven and allowed to continue leading them.
>
> Five said they support Raggio or think his leadership is inevitable, although most say they disagree with his Reid endorsement. Another three, when contacted wouldn't answer that question. And two candidates didn't return calls for comment."

(*Id.*)

The breakdown according to the article is thus:

The Five Senators or Contenders Supporting Raggio or Thinking His Leadership is Inevitable –

Raggio, Hardy, Kieckhefer, Rhoads, Settelmeyer (Id.)

The Three Senators or Contenders Who Would Not Answer the Question –

Cegavske, Gustavson, McGinness (Id.)

The Two Senators or Contenders Who Did Not Return Calls for Comment –

Halseth, Roberson (Id.)

As the article states, there "likely will be between seven and 10 Republicans . . . depending on the outcome of Tuesday's election." (*Id.*) The total of the three categories above is ten. Thus, each potential

Republican Senator is discussed in terms of whether they will or will not support Raggio.

Seventh, at the end of the article, Rep. Mark Amodei stated that "Raggio's endorsement has put his leadership post in jeopardy." (*Id.*) He went on to state that "I just don't know how you do that, support a Republican who supported Reid." (*Id.*) This language parallels the earlier sentence that "[s]ome Republicans who talked to the Las Vegas Sun said they support the longtime leader." (*Id.*) Accordingly, the article's focus and Rep. Amodei's quote confirms that the story is about which Republicans still supported Raggio, a longtime leader who supported Senator Reid.

Schmidt's interpretation of the article was not only wrong, it was reckless and indefensible. The article is not susceptible to any other interpretation than that Sen. Kieckhefer supported Bill Raggio for caucus leader. In a heated political campaign, Schmidt was looking for any mud that he could sling a few days before the primary election and he found a four-year old article that had the words "Reid" and "Kieckhefer" in the same story. His failure to accurately read the story is inexcusable and thus he acted with reckless disregard for the truth of his claims.

D. The District Court Correctly Found That Sen. Kieckhefer Had A Probability Of Showing Actual Or Presumed Damages.

The District Court found that Schmidt's statements "may damage Sen. Kieckhefer by way of loss of political capital, harm to political relationships, or loss of electoral support. The evidence also shows the statements affected Sen. Kieckhefer's trade, business, or profession and therefore damages may be presumed under the defamation per se analysis." (AA, Ex. 13, p. 000232.)

Schmidt argues that because Sen. Kieckhefer "won the election and is currently sitting as a Senator," there were no damages. (Br. 17.) First, this argument fails because damages are presumed for statements about a candidate for political office when they have the potential to affect voters' preferences regardless of the outcome of the election. *Allen*, 99 Nev. 404, 409, 664 P.2d 337, 341 (1983). Second, Sen. Kieckhefer can establish damages for "injury to his political reputation" as his political career does not end on election night. *Id.* at 346. The harm to political reputation could reduce Sen. Kieckhefer's changes for political appointments, committee assignments, or even re-election in the future. (RA000021, RA000024.) These are all damages that Sen. Kieckhefer has a probability of recovering.

Sen. Kieckhefer does not have to provide evidence at this stage that he has suffered damages, only that he has a probability of being able to establish damages in the future. This is not a meritless claim because the Las Vegas Sun article itself demonstrates the risk to a Republican politician of having people believe that he or she endorsed Sen. Reid. As Rep. Mark Amodei, stated, "I just don't know how you do that, support a Republican who supported Reid without the voters asking what the hell you're doing." (AA, Ex. 9, p. 000119-120.) Given this precedent, Sen. Kieckhefer was rightly concerned about Schmidt's false statement and the District Court was correct to find that there was a probability of damages.

IV. IN THIS APPEAL, SCHMIDT HAS NOT ASSERTED ANY DEFENSES OR PRIVILEGES THAT WOULD BAR SEN. KIECKHEFER'S DEFAMATION CLAIMS AS A MATTER OF LAW.

Anti-SLAPP motions may be granted when the defendant is absolutely privileged to engage in the conduct in question. *Feldman v. 1100 Park Lane Associates*, 160 Cal. App. 4th 1467, 1491, 74 Cal. Rptr. 3d 1, 20-21 (2008) (concluding "that the Feldmans failed to establish a probability of success on the merits" because their claims were

precluded "by the litigation privilege"). Here, Schmidt has raised no defenses or privileges that would defeat Sen. Kieckhefer's defamation claims.

V. SCHMIDT'S STATEMENTS WERE NOT MADE IN GOOD FAITH.

As an independent basis[5] for affirming the denial of the Special Motion to Dismiss, Sen. Kieckhefer submits that Schmidt's statement was not a "good faith communication." NRS 41.660(1). A "good faith communication" is defined under NRS 41.637(4) as one that is "truthful or made without knowledge of its falsehood." NRS 41.637. Because his statement was not truthful, in order to satisfy the first prong, Schmidt must have established "by a preponderance of the evidence" that he did not have knowledge of his statement's falsity.

The timing of Schmidt's advertisement is suspect. After a lengthy primary campaign, these advertisements only began airing on June 4, 2014. (AA, Ex. 11, 9:20-01:1.) The sole basis for the defamatory statement was an article from 2010 that was identified by a "volunteer

[5] *See Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. Adv. Op. 28, 321 P.3d 912, 916 (2014) (quoting *Ford v. Showboat Operating Co.*, 110 Nev. 752, 755, 877 P.2d 546, 548 (1994)) (holding that a "respondent may . . . without cross-appealing, advance any argument in support of the judgment even if the district court rejected or did not consider the argument").

on Schmidt's campaign." (Br. 6.) Additionally, there was a period of time prior to Sen. Kieckhefer's lawsuit, when Schmidt was aware that Sen. Kieckhefer denied the truth of Schmidt's allegations but continued to run the advertisements. (AA, Ex. 1, p. 000023.)

Thus, it is undisputed that Schmidt was on notice that his statements were challenged as untruthful. While he has averred that he believed the statement to be true at the time he ran the advertisements, Schmidt's continued conduct undermines this contention. Even now, after two judges have rejected his interpretation of the Las Vegas Sun article and the meaning of that article has been explained to him repeatedly in briefs and at hearings, Schmidt persists in inserting Senator Reid into the sentence: "Some Republicans who talked to the *Las Vegas Sun* said they support the longtime leader [Harry Reid]." (Br. 7.) This stubbornness does not show that Schmidt is clinging on to his good-faith belief, but that he is continuing to use the legal process to tarnish Sen. Kieckhefer's reputation.

Given the refusal to correctly read the Las Vegas Sun article, the attempt to employ guilt-by-association tactics, and his offer to pull the advertisement, Schmidt did not demonstrate by a preponderance of the evidence that his statement was made in good faith.

CONCLUSION

For all of the above reasons, Sen. Kieckhefer respectfully requests that this Court affirm the District Court's denial of Schmidt's Special Motion to Dismiss.

AFFIRMATION

The undersigned does hereby affirm that the preceding document does not contain the Social Security number of any person.

MCDONALD CARANO WILSON LLP

By: /s/ Adam Hosmer-Henner
Michael Pagni (#6444)
Adam Hosmer-Henner (#12779)
100 West Liberty Street, 10th Floor
Reno, NV 89511
mpagni@mcdonaldcarano.com
ahosmerhenner@mcdonaldcarano.com

Attorneys for Respondent

CERTIFICATION OF ATTORNEY

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century font.

I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 9,306 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this appellate brief, and 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, in particular NRAP 28(e)(1), which requires every assertion in the brief 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.

Respectfully submitted on March 16, 2015.

MCDONALD CARANO WILSON LLP

By: /s/ Adam Hosmer-Henner

Michael Pagni (#6444)
Adam Hosmer-Henner (#12779)
100 West Liberty Street, 10th Floor
Reno, NV 89511
mpagni@mcdonaldcarano.com
ahosmerhenner@mcdonaldcarano.com

Attorneys for Respondent

CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I hereby certify that I am an employee of McDONALD CARANO WILSON LLP and that on March 16, 2015, a true and correct copy of the foregoing RESPONDENT'S ANSWERING BRIEF was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system and by United States First-Class mail to all unregistered parties as listed below:

CHARLES KOZAK, ESQ
Kozak Law Firm
3100 Mill Street, Suite 115
Reno, NV 89502
chuck@kozaklawfirm.com

/s/ Jill Nelson
An Employee of McDonald Carano Wilson