

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAYMOND DELUCCHI and
TOMMY HOLLIS,

Appellants,

v.

PAT SONGER,

Respondent.

_____ /

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APPELLANTS' OPENING BRIEF

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1 **DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1**

2 The undersigned counsel of record certifies that the following are persons
3 and entities as described in NRAP 26.1(a) and must be disclosed. These
4 representations are made an order that the Justices of this Court may evaluate
5 possible disqualification or recusal.

6 1. Daniel Marks, Esq. and Adam Levine, Esq. of the Law Office of Daniel
7 Marks. There are no parent corporations.

8 Attorneys of Record for Appellants Raymond Delucchi and Tommy Hollis.
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1 **JURISDICTIONAL STATEMENT**

2 This appeal is from a final judgment pursuant to NRAP 3A(b)(1). The
3 district court filed the Order of Dismissal on September 15, 2015. (APP Vol. VII
4 at 1646-1647). The Notice of Entry was filed on September 24, 2015. (APP Vol.
5 VII at 1649-1650). Notice of Appeal was filed October 9, 2015 (APP Vol. VII at
6 1655-1656).

7 **ROUTING STATEMENT**

8 This appeal should remain in the Supreme Court because it raises issues of
9 statewide public importance regarding the scope and construction of Nevada's
10 changing/amended Anti-SLAPP statutes NRS 41.635 et seq.

11 **STATEMENT OF ISSUES ON APPEAL**

12 1. Do the protections of Nevada's Anti-SLAPP statutes apply to
13 Respondent Songer who was acting in the role of a contractor/vendor and not as a
14 citizen exercising his right to petition the government or free speech?

15 2. Did the district court err in determining that Respondent Songer's
16 Report constituted a "Good faith communication in furtherance of the right to
17 petition or the right to free speech in direct connection with an issue of public
18 concern" within the meaning of NRS 41.637?

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1 3. Did the district court err in refusing to apply issue preclusion to the
2 arbitrator's findings in connection with its consideration of Songer's Special
3 Motion To Dismiss?

4 4. Did the district court err in concluding that Appellants could not
5 demonstrate a probability of prevailing on their claims?

6 5. Does the 2015 enactment of NRS 41.655 return Nevada to the
7 summary judgment standard when evaluating Special Motions to Dismiss
8 pursuant to NRS 41.660?

9 **STATEMENT OF THE CASE**

10 Appellants Raymond Delucchi and Tommy Hollis filed their Complaint for
11 defamation against Respondent Pat Songer on June 4, 2014. (APP Vol. I at 1-7).
12 Respondent Songer filed a Special Motion to Dismiss pursuant to NRS 41.660.
13 (APP Vol. I at 19-51). This matter was originally appealed in Docket No. 66858.
14 However, on June 1, 2015 this Court ordered that appeal dismissed as premature
15 concluding that the district court's order of November 19, 2014 did not constitute
16 a final judgment. (APP Vol. VII at 1615-1616). Thereafter, the district court
17 issued a new Order of Dismissal on September 15, 2015. (APP Vol. VII at 1646-
18 1647).

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Firefighter/Paramedic Raymond Delucchi and Firefighter/EMT Tommy Hollis were employed by the Town of Pahrump through its Pahrump Valley Fire & Rescue Services (“PVFRS”). (APP Vol. II at 251, 254-255). At approximately 1:00 AM on May 25, 2012 Delucchi and Hollis, were traveling back from Las Vegas to Pahrump in an ambulance (Medic 3) when almost run off the road by another vehicle on an isolated and dark stretch of Highway 160. (APP Vol. I at 278-279; Vol. II at 302-303). Delucchi made the decision to pull the ambulance over to the side of the road and turned on the emergency lights. The other vehicle pulled in behind Medic 3, and the driver exited his vehicle and ran up to the window of Medic 3. (APP Vol. II at 303). The area was dark, rural, and in a radio dead zone. (APP Vol. II at 303).

Firefighters/Paramedic/Emergency Medical Technicians are instructed that scene safety as their first priority. (APP Vol. II at 385-386).

3

1 Once the driver had sufficiently moved away from Medic 3, Delucchi and
2 Hollis cautiously exited the vehicle. Because ambulances do carry narcotics and
3 are subject to robbery, Delucchi and Hollis were on a heightened state of alert.
4 (APP Vol. II at 306).

5 The other vehicle was still running. After Delucchi and Hollis exited Medic
6 3, the driver ran back to his vehicle and got back in the driver's seat. This caused
7 Delucchi and Hollis' unease to increase because if the intent of the driver was to
8 solicit their assistance with the passenger, they would have expected the driver to
9 open the passenger door to give them access. (APP Vol. II at 437-439).

10 Delucchi and Hollis stayed five (5) to ten (10) feet back from the other
11 vehicle. They shouted across the distance through the open window on the
12 passenger side of the vehicle attempting to get the driver to calm down. (APP Vol.
13 II at 306-307). They shouted that they would be willing to transport the occupants
14 of the vehicle to Desert View Hospital in Pahrump, Nevada. The driver yelled
15 "Fuck Desert View", dropped his vehicle into gear, and sped off. (APP Vol. II at
16 307-312). The entire encounter lasted approximately 60 seconds. (APP Vol. II at
17 371).

18 On May 30, 2012 PVFRS Chief Scott Lewis was informed that the Town
19 had received a telephonic complaint regarding the incident on Highway 160. Chief
20 Lewis returned the phone call and spoke with the occupants of the vehicle,

1 Brittnie Choyce and James Choyce. The Choyces claimed that Brittnie was having
2 a miscarriage of a stillborn child but the paramedics would not assist her except
3 for offering to drive them to a hospital in Pahrump. (APP Vol. II at 255-256).

4 Delucchi was the President of IAFF Local 4068 (“the Union”) and had
5 clashed with Chief Lewis and the Town on a number of issues. (APP Vol. II at
6 301-302, 330-333). Following an initial interview of Delucchi by the HR Director
7 and the Town Manager, Delucchi filed a complaint against Chief Lewis. The
8 Chief, in turn filed his own complaint against Delucchi. (APP Vol. II at 340-342).

9 Because of the complaints between Chief Lewis and President Delucchi, the
10 Town of Pahrump decided that the investigation into the allegations of the
11 Choyces would be handled by an outside third-party. On June 20, 2012 the Town
12 of Pahrump hired Pat Songer to conduct the investigation. (APP Vol. II at 264-
13 265). Songer was supervised by outside counsel Rebecca Bruch of Erickson,
14 Thorpe & Swainson (hereafter “ETS”). (APP Vol. I at 214, 216). Bruch assisted
15 Songer in writing by suggesting several changes. (APP Vol. I at 218-226).¹

16 Songer submitted his report to the Town through Rebecca Bruch. (APP Vol.
17 I at 228-241). The Report contained multiple false statements. The Report begins
18 on page 1 with the section entitled “Points of Interview with Complainants” which
19

20 ¹ Defendant ETS is not a party to this appeal under a settlement reached as a result
of the NRAP 16 settlement conference.

1 purported to summarize an interview with James and Brittne Choyce. However,
2 Songer did not conduct any such interview. In fact, he never attempted to
3 interview the Choyces. (APP Vol. I at 229).

4 Likewise, in his section entitled "Conclusions From Pahrump Valley Fire-
5 Rescue Services Investigation" Songer wrote "Brittney's (sic) statements recorded
6 by Lieutenant Moody, and witnessed by Chief Lewis, have a more believable and
7 plausible pattern to it." However, there were no recorded statements of Brittne
8 Choyce. Both she and her husband refused to give any recorded statements or
9 even so much as a written complaint. (APP Vol. I at 114-115). Similarly, Songer
10 never even attempted to interview the Choyces as they would not cooperate. (APP
11 Vol. I at 116-117).

12 Songer's Report accused Delucchi and Hollis of a "cover-up". (APP Vol. I
13 at 233, 235). The Report alleged that Delucchi and Hollis did not want to take
14 Brittne Choyce to Summerlin Hospital in Las Vegas "but instead to Desert View
15 Regional Medical Center" for Delucchi and Hollis' "personal convenience". (APP
16 Vol. I at 233, 235).

17 The Report recommended the termination of Delucchi for violating multiple
18 Town of Pahrump and PVFRS policies and rules including "Intimidation",
19 "Willful and flagrant disregard for reporting and documenting", and "Refusal of
20 Care". (APP Vol. I at 238-241). Among the offenses identified only by reference

1 to policy numbers included 11.1.111 was “Dishonesty” for “falsifying
2 documents”. (APP Vol. I at 46, 142-143).

3 Following the termination of their employment based upon Songer’s
4 Report, Delucchi, Hollis and their Union took the case to arbitration. Following a
5 four (4) day arbitration, Arbitrator Catherine Harris, Esq. issued her Opinion and
6 Award in AAA Case No. 79 390 00124 12 on January 5, 2014. Arbitrator Harris
7 found that Delucchi and Hollis did not refuse care. Rather, they acted reasonably
8 by taking one (1) or two (2) minutes to establish that there was a safe working
9 environment as required by PVFRS protocols. (APP Vol. II at 279, 282).
10 Arbitrator Harris found that Delucchi and Hollis were never given an opportunity
11 to assess Mrs. Choyce or provide treatment “because her husband placed the car in
12 drive, spun the tires and sped off in response to the Grievants’ unsuccessful efforts
13 to calm him.” (APP Vol. II at 281, 286).

14 The Arbitrator likewise rejected Songer’s accusation of a “cover-up”
15 writing:

16 The allegation that the failure to file the report was part of a cover-up
17 only makes sense if you accept that the Grievants callously and with
18 reckless disregard for Mrs. Choyce’s well-being failed to render
19 emergency services. As explained herein, the arbitrator does not
20 accept this interpretation. To the contrary, the Grievants, when faced
with a challenging and novel situation for which they had received no
training, acted reasonably and used their best judgment in an effort to
secure the scene before approaching the female passenger. The
refusal of the male driver Choyce to calm down (or get out from
behind the wheel of a running vehicle) and his decision to speed

1 away from the scene were circumstances beyond the control of the
2 Grievants. Thus, the arbitrator rejects Songer's unsubstantiated
3 theory that the Grievants failed to report the incident in order to
4 conceal wrongdoing.

5 (APP Vol. II at 286).

6 The Arbitrator's Award further contained scathing criticism of Songer and
7 his Report. Arbitrator Harris found that Report contained "material
8 misrepresentations", and Songer documented his report to "falsely reflect" that a
9 recorded statement had been obtained from Brittnie Choyce. (APP Vol. II at 267-
10 268). The Arbitrator found that Songer's report "intentionally misrepresents that
11 Ms. Choyce's statement was recorded by Lieutenant Moody and that Mr. Choyce
12 was interviewed", and that the Report "covertly relies on hearsay statements" and
13 could "hardly be deemed a fair and objective report by a disinterested third party."
(APP Vol. II at 282).

14 Based upon the fact-finding contained within the Award, Delucchi and
15 Hollis initiated an action against Songer for Defamation and Intentional Infliction
16 of Emotional Distress ("IIED"). (APP Vol. I at 1-7). Songer filed a Special
17 Motion to Dismiss Pursuant To NRS 41.660 (hereafter the "Special Motion").
18 (APP Vol. I at 19-49).

19 The district court concluded that Songer's Report met the definition of a
20 "Good faith communication in furtherance of the right to petition or the right to

1 free speech in direct connection with an issue of public concern” within the
2 meaning of NRS 41.637 (2) and (3). (APP Vol. VII at 1514). Following an award
3 of \$21,707.50 in attorney’s fees to Songer pursuant to NRS 41.670 (APP Vol. VII
4 at 1642-1644), Delucchi’s and Hollis’ Complaint was dismissed.

5 **SUMMARY OF ARGUMENT**

6 Songer’s Special Motion to Dismiss should have been denied. The purpose
7 of anti-SLAPP statutes such as NRS 41.635 through NRS 41.670 are to protect
8 citizens against retaliation for the good faith exercise of their U. S. Constitution,
9 First Amendment rights of free speech and to petition the government.

10 Respondent Pat Songer was not exercising his First Amendment right as a
11 citizen when he submitted his Report containing defamatory statements about
12 Raymond Delucchi and Tommy Hollis. Rather, that Report was prepared in
13 connection with his being hired, and paid, by the Town of Pahrump to conduct an
14 investigation. Accordingly, the Report does not meet the definition of a “Good
15 faith communication in furtherance of the right to petition or the right to free
16 speech in direct connection with an issue of public concern” within the meaning
17 of NRS 41.637.

18 While the fact that Songer was not engaged in communications in
19 furtherance of the right to petition or the right to free speech should be outcome

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1 dispositive, in order to meet the definition of a “Good Faith communication” the
2 statements must also be “truthful” or “made without knowledge of its falsehood”.

3 An arbitrator, examining Songer’s investigation which resulted in the
4 termination of Delucchi and Hollis, found that Songer’s Report contained
5 “material misrepresentations”, and that he documented his report to “falsely
6 reflect” that a recorded statement had been obtained from Brittne Choyce. (APP
7 Vol. II at 267-268). The arbitrator found that Songer’s report “intentionally
8 misrepresents that Ms. Choyce’s statement was recorded by Lieutenant Moody
9 and that Mr. Choyce was interviewed”, and that the Report “covertly relies on
10 hearsay statements” and could “hardly be deemed a fair and objective report by a
11 disinterested third party.” (APP Vol. II at 282).

12 Issue preclusion (formerly known as collateral estoppel) applies to
13 arbitration proceedings. The district court erred in refusing to afford Arbitrator
14 Harris’ findings issue preclusive effect. Because issue preclusion would prevent
15 Songer from re-litigating whether the statements within his Report were truthful
16 or made without knowledge of their falsehood, the district court erred in
17 concluding that Songer had met the threshold showing that he engaged in a “Good
18 faith communication in furtherance of the right to petition or the right to free
19 speech...” within the meaning of NRS 41.637.

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1 Similarly, the district court erred in concluding that Delucchi and Hollis did
2 not meet their burden of establishing a probability of prevailing on their claim
3 under NRS 41.660(3)(b). While issue preclusion should prevent Songer from
4 contesting the claim, even in the absence of issue preclusion the transcripts of the
5 arbitration testimony attached to Delucchi and Hollis' Opposition to the Special
6 Motion to Dismiss was sufficient to demonstrate a probability of success under
7 NRS 41.660(3)(b).

8 STANDARD OF REVIEW

9 Arbitral awards may not be set aside by a court unless arbitrary and
10 capricious. *Clark County Education Association v. Clark County School District*,
11 122 Nev. 337, 131 P.3d 5 (2006). Issues of law are reviewed de novo. *Nevada*
12 *Service Employees Union/SEIU Local 1107 v. Orr*, 121 Nev. 675, 119 P.3d 1259
13 (2005).

14 ARGUMENT

15 Nevada's anti-SLAPP statute is intended to protect "well-meaning citizens
16 who petition [the] government and then find themselves hit with retaliatory suits".
17 *Johnson v. Douglas County School District*, 125 Nev. 746, 753, 219 P.3d 1276
18 (2009). The purpose of the anti-SLAPP is to protect "good-faith communications
19 in furtherance of the right to petition" it also provide immunity from liability for

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1 “those who petition all departments of the government for redress”. *Id.*; NRS
2 41.637. As emphasized by this Court:

3 More importantly, the anti-SLAPP statute only protects citizens who
4 petition the government from civil liability arising from *good-faith*
5 *communications to a government agency*. NRS 41.637. Thus,
6 Nevada’s anti-SLAPP statute is not an absolute bar against federal
7 substantive claims; rather, it bars claims from persons who seek to
8 abuse other citizens’ rights to petition their government, and it allows
9 meritorious claims against citizens who do not petition the
10 government in *good faith*.

11 *Id.* (emphasis in original). Thus, to fall within the protections of the statute in
12 2012 the communication must have been a “good faith communication in
13 furtherance of the right to petition”. 125 Nev. at 752.

14 At the time that Songer submitted his Report to the Town of Pahrump in
15 2012 resulting in the termination of the Appellants, NRS 41.637 only protected
16 the right to *petition* the government in good faith. After the Report was submitted,
17 and Appellants terminated, the statute was amended in 2013 to expand it to
18 include good faith “free speech in direct connection with an issue of public
19 concern”.² In its 2013 form the statute stated:

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² There was much argument before the district court as to whether the 2013
amendments should have been applied retroactively to a report which was
published in 2012. However, as set forth below, the 2015 legislative amendments
through the adoption of NRS 41.665 rendered this issue moot.

1 "Good faith communication in furtherance of the right to petition or
2 the right to free speech in direct connection with an issue of public
concern" means any:

3 1. Communication that is aimed at procuring any
4 governmental or electoral action, result or outcome;

5 2. Communication of information or a complaint to a
6 Legislator, officer or employee of the Federal Government,
7 this state or a political subdivision of this state, regarding a
8 matter reasonably of concern to the respective
9 governmental entity;

10 3. Written or oral statement made in direct connection
11 with an issue under consideration by a legislative,
12 executive or judicial body, or any other official proceeding
authorized by law; or

13 4. Communication made in direct connection with an
14 issue of public interest in a place open to the public or in a
15 public forum, which is truthful or is made without
16 knowledge of its falsehood.

17 Under NRS 41.660 a moving party may file a "Special Motion to Dismiss".
18 The defendant bears the burden of demonstrating that the speech at issue
19 constituted "Good faith communication in furtherance of the right to petition or
20 the right to free speech in direct connection with an issue of public concern". NRS
41.660(3)(a).

If the court determines that the moving party has met the burden pursuant to
paragraph (3)(a), the court must then determine whether the plaintiff has
demonstrated with prima facie evidence a probability of prevailing on the claim.

1 The manner in which Special Motions to Dismiss are to be treated, and the
2 quantum of proof necessary in connection with such Motions, have been changed
3 by both the 2013 and 2015 amendments. As of 2012 when Songer submitted his
4 Report, the Motion was to be treated as a motion for summary judgment. *Johnson*
5 *v. Douglas County School Dist.*, 125 Nev. at 753. Accordingly, all of the evidence
6 must be viewed in a light most favorable to the Plaintiffs. *Wood v. Safeway, Inc.*,
7 121 Nev. 724, 121 P.3d 1026 (2005).

8 Under the 2013 amendments, the summary judgment approach was
9 abandoned. The moving party was required to demonstrate that the speech fell
10 within NRS 41.637 by a preponderance of the evidence. If the moving party were
11 able to establish by preponderance of the evidence that the speech fell within the
12 statute, the plaintiff was required to establish “by clear and convincing evidence a
13 probability of prevailing on the claim”.

14 In the most recent 2015 legislative session, the statute was amended yet
15 again. The clear and convincing evidence standard was abandoned and NRS
16 41.665 was adopted which states at subsection (2):

17 When a plaintiff must demonstrate a probability of success of
18 prevailing on a claim pursuant to NRS 41.660, the Legislature intends
19 that in determining whether the plaintiff “has demonstrated with
20 prima facie evidence a probability of prevailing on the claim” the
 plaintiff must meet the same burden of proof that a plaintiff has been
 required to meet pursuant to California’s anti-Strategic Lawsuits
 Against Public Participation law as of June 8, 2015.

1 **I. COMMUNICATIONS UNDER A CONTRACT OF HIRE FALL**
2 **OUTSIDE THE PROTECTIONS OF NRS 41.637.**

3 It will not actually be necessary for this Court to decide whether the 2013
4 statutory amendments should be applied to statements made by Songer and his
5 2012 Report, or whether the 2015 statutory amendments should be applied. This is
6 because Songer's Report did not fall within the scope of NRS 41.637.

7 The protections of Nevada's anti-SLAPP statute are intended to protect
8 citizens in the exercise of their First Amendment right to "petition the
9 government" (under the statute as it existed prior to the 2013 amendment), or who
10 exercise their First Amendment right to "free speech in direct connection with an
11 issue of public concern" (under the 2013 amendment). Regardless as to which
12 version of the statute is applied, the speech must be made in the capacity as a
13 citizen exercising their constitutional right.

14 Songer is not entitled to the protections of Nevada's anti-SLAPP statute
15 because his communications were not in connection with his First Amendment
16 right to petition the government or free speech in a direct connection with an issue
17 of public concern. He was not acting as a "citizen" or seeking to have the Town of
18 Pahrump act on his behalf, or on behalf of another. Rather, he was hired and paid
19 by the Town to do a job. This falls outside of the protections of the anti-SLAPP
20 statutes.

1 Many states have anti-SLAPP statutes substantially similar to Nevada's.
2 The Massachusetts Supreme Court's decision under Massachusetts' anti-SLAPP
3 statute in *Kobrin v. Gastfriend*, 443 Mass. 327, 821 N.E.2d 60 (2005) is
4 illustrative and on point. In *Kobrin*, a psychiatrist was investigated in a
5 disciplinary action. In connection with that investigation an expert witness was
6 hired by the Board of Registration in Medicine to assist in the investigation and
7 render an expert opinion regarding the plaintiff's medical practices. 821 N.E.2d at
8 62.

9 Based upon a false affidavit submitted by the expert witness hired by the
10 Board, the Board summarily suspended the plaintiff's license. An administrative
11 law magistrate who later heard the evidence cleared the plaintiff. The plaintiff
12 subsequently filed suit against the defendant for expert witness
13 malpractice/negligence, defamation, malicious prosecution and interference with
14 contractual relations. *Id.* The defendant filed a special motion to dismiss under the
15 anti-SLAPP statute which was granted. *Id.* at 62-63.

16 The Supreme Judicial Court of Massachusetts *reversed*. The Supreme Court
17 recognized that the statute is "designed to protect overtures to the government by
18 parties petitioning in their status as the citizens. It is not intended to apply to those
19 performing services for the government as contractors." *Id.* at 64. The Court
20 concluded:

1 No definition of the phrase will encompass every case that falls within
2 the statute's reach, and some difficult factual situations will have to be
3 assessed on a case-by-case basis. What we seek to do is to limit the
4 statute's protection, in accordance with the legislative intent, to the
5 type of petitioning activity the Constitution envisions in which parties
6 petition their government as citizens, not as vendors of services.

7 821 N.E.2d 64 at fn 8.

8 Likewise, in *Fustolo v. Hollander*, 455 Mass. 861, 920 N.E.2d 837 (2010)
9 the Massachusetts Supreme Court reiterated that the protections under anti-
10 SLAPP would not apply to a print journalist sued for defamation because the
11 statements made in a journalistic capacity were not as a citizen petitioning the
12 government under the First Amendment. See also *Fleming v. City of Oceanside*
13 Not Reported in F.Supp.2d, 2010 WL 5148469 (S.D. Cal. 2010) (denying Motion
14 under California's anti-SLAPP statute where the statements were made pursuant
15 to their official duties as public employees and not citizens).

16 The recognition by the courts in *Kobrin*, *Fustolo*, and *Fleming* that anti-
17 SLAPP statutes are intended to protect people speaking in their capacity as
18 citizens is mirrored in this Court's decision in *John v. Douglas County School*
19 *District*, supra wherein this Court recognized "Nevada's anti-SLAPP statute is
20 predicated on protecting "well-meaning citizens who petition [the] government..",
and the statute "allows meritorious claims against citizens who do not petition the
government in good faith". 125 Nev. at 753, 219 P.3d at 1281. (Emphasis added).

1 Any communications by Songer to the Town of Pahrump relating to
2 Delucchi and Hollis were not made in the capacity of a citizen. Songer was hired
3 by the Town of Pahrump to conduct an investigation after it was determined that
4 PVFRS' Chief Lewis could not do so objectively. Because the false statements in
5 Songer's Report were made in his capacity as a paid contractor, and not as a
6 citizen exercising his First Amendment rights, he falls outside the protections of
7 NRS 41.637.

8 Where a moving party fails to establish that the speech at issue falls within
9 the scope of NRS 41.637, a plaintiff is under no obligation to establish a
10 likelihood of prevailing on the merits. Because Songer did not establish that the
11 contents of his Report fell within NRS 41.637, the Special Motion to Dismiss
12 should have been denied.

13 **II. EVEN IF SONGER HAD NOT BEEN ACTING IN THE CAPACITY**
14 **OF A CONTRACTOR, HIS REPORT DID NOT FALL WITHIN NRS**
15 **41.637(2) or (3).**

16 In determining that Songer's Special Motion to Dismiss should be granted,
17 the district court determined that NRS 41.637(2) and (3) applied to his Report.
18 (APP Vol. VII at 1514). Subsection (2) requires "Communication of information
19 or a complaint to a Legislator, officer or employee of the Federal Government,
20 this state or a political subdivision of this state, regarding a matter reasonably of
concern to the respective governmental entity". Subsection (3) requires a "Written

1 or oral statement made in direct connection with an issue under consideration by a
2 legislative, executive or judicial body, or any other official proceeding authorized
3 by law”.

4 The district court erred in concluding that Songer’s Report was a
5 communication of information, or a complaint, “regarding a matter reasonably of
6 concern to the respective governmental entity”. California’s Code of Civil
7 Procedure section 425.16 anti-SLAPP statute is virtually identical to Nevada’s
8 insofar as the definition of protected activity is concerned.

9 In *Talega Maintenance Corporation v. Standard Pac. Corporation*, 225
10 Cal. App. 4th 722, 170 Cal. Rptr. 3rd 453 (2014) the California Court of Appeals
11 addressed what is “an issue of public interest” or “a manner reasonably of concern
12 to the respective governmental entity” for purposes of anti-SLAPP. Rejecting an
13 overbroad construction of “public interest” the Court stated:

14 Courts have generally rejected attempts to abstractly generalize an
15 issue in order to bring it within the scope of the anti-SLAPP statute.
16 For example, in the context of subdivision (e)(3), where the statement
17 must concern an issue of public interest, the court in *World Financial*
18 *Group, Inc. v. HBW Ins. & Financial Services, Inc.* (2009) 172
Cal.App.4th 1561, 1570, 92 Cal.Rptr.3d 227, stated, “While employee
mobility and competition are undoubtedly issues of public interest
when considered in the abstract, one could arguably identify a strong
public interest in the vindication of any right for which there is a legal

19 remedy. ‘The fact that “a broad and amorphous public interest” can be
20 connected to a specific dispute is not sufficient to meet the statutory
requirements of the anti-SLAPP statute. [Citation.] By focusing on
society’s general interest in the subject matter of the dispute instead of

1 the specific speech or conduct upon which the complaint is based,
2 defendants resort to the oft-rejected, so-called 'synecdoche theory of
3 public issue in the anti-SLAPP statute,' where '[t]he part [is
4 considered] synonymous with the greater whole.' [Citation.] In
5 evaluating the first prong of the anti-SLAPP statute, we must focus on
6 'the specific nature of the speech rather than the generalities that
7 might be abstracted from it.'" Similarly, here, our focus is not on
8 some general abstraction that may be of concern to a governmental
9 body, but instead on the specific issue implicated by the challenged
10 statement and whether a governmental entity is reviewing that
11 particular issue. On the record before us, this requirement is not
12 satisfied.

13 170 Cal Rptr. 3d at 462. For conduct to constitute a matter of public interest it
14 must "impact a broad segment of society and/or that affect the community in a
15 manner similar to that a government entity". *Id.*

16 An investigation as to how Delucchi and Hollis responded to almost having
17 been run off the road by an agitated/hysterical James Choyce on May 25, 2012 is
18 not the sort of matter properly within the scope of NRS 41.637(2). The Town of
19 Pahrump was investigating *as an employer*, and not acting as the political
20 subdivision addressing a subject of concern to a broad segment of the community.

21 Likewise, Songer's Report was not a "Written or oral statement made in
22 direct connection with an issue under consideration by a legislative, executive or
23 judicial body, or any other official proceeding authorized by law". It was not a
24 Report to the Town Board acting in a legislative capacity. It was not a Report to
25 an "executive body". It was simply an outside investigation commission from

1 Songer by the Town Manager because the Chief of PVFRS had a conflict due to
2 reciprocal complaints between the Chief and IAFF Local 4068 President
3 Delucchi.

4 **III. DISTRICT COURT ERRED IN DETERMINING THAT DELUCCHI**
5 **AND HOLLIS DID NOT HAVE A PROBABILITY OF PREVAILING**
6 **ON THEIR CLAIMS.**

7 Despite the fact that Songer's Report did not fall within the scope of NRS
8 41.637, the district court further erred in determining that Delucchi and Hollis
9 failed to demonstrate a probability of prevailing on their claims.

10 **A. Appellants Are Entitled To The Benefits Of The 2015**
11 **Amendments Regarding The Burden Of Proof.**

12 The district court concluded that the 2013 legislative amendments to NRS
13 41.660 were applicable to the case such that Delucchi and Hollis had to
14 demonstrate a probability of prevailing on their claims by the clear and convincing
15 evidence standard. (APP Vol. VII at 1628). However, in 2015 the Legislature
16 enacted NRS 41.665 to eliminate the clear and convincing evidence standard.

17 NRS 41.665 became effective July 8, 2015 which was before the district
18 court entered its Order of Final Dismissal on September 15, 2015. Moreover,
19 where a statute is amended pending appeal of a case, the case "must be decided in
20 accordance with the terms of the most recent amendment, rather than the statute as
it existed when the trial court rendered its decision." *Seibring v. Parcell's, Inc.*,

1 151 Ill.App.3d 1003, 1004, 503 N.E.2d 1126, 1127 (1987). Accordingly, for
2 purposes of this appeal this Court must evaluate whether Delucchi and Hollis had
3 a probability of prevailing utilizing “same burden of proof that a plaintiff has been
4 required to meet pursuant to California’s anti-Strategic Lawsuits Against Public
5 Participation law as of June 8, 2015.” NRS 41.665.

6 As of 2015, California utilized a “summary-judgment-like” test “accepting
7 as true the evidence favorable to the plaintiff in evaluating the defendant’s
8 evidence only to determine whether it defeats the plaintiff’s evidence as a matter
9 of law”. *Bentley Reserve L.P. v. Papaliolios*, 218 Cal. App. 4th 418, 425, 160 Cal.
10 4th 423, 428 (2013). As stated by a California Court of Appeals in *Young v. CBS*
11 *Broadcasting, Inc.*, 212 Cal. App. 4th 551, 558, 151 Cal.Rptr.3d 237, 243 (2012),
12 in response to an anti-SLAPP motion the “burden of proof is admittedly low,
13 requiring that [the plaintiff] introduce substantial evidence of each element on
14 which an ultimate verdict in her favor could be affirmed.” See also *Animal Legal*
15 *Defense Fund v. LT Napa Partners LLC* 234 Cal. App. 4th 1270, 184 Cal. Rptr.
16 3rd 759 (March 5, 2015) (“In order to establish a probability of prevailing for
17 purposes of Section 425.16, subdivision (b)(1), “ ‘the plaintiff “must demonstrate
18 that the complaint is both legally sufficient and supported by a sufficient prima
19 facie showing of facts to sustain a favorable judgment if the evidence submitted
20 by the plaintiff is credited.”).

1 Accordingly, the 2015 amendment adopting NRS 41.665 has returned
2 Nevada's anti-SLAPP statutes to the status existing prior to 2013 amendments,
3 and reintroduced the standard utilized by this court in *Johnson v. Douglas*
4 *County School District*, 125 Nev. 746, 753, 219 P.3d 1276 (2009). The burden is
5 the same as on a motion for summary judgment. Accordingly, Delucchi and Hollis
6 need only present evidence from which a reasonable trier of fact could return a
7 verdict in their favor.

8 **B. Delucchi And Hollis Should Have Prevailed Because The**
9 **Arbitrator's Award Was Entitled To Issue Preclusive Effect.**

10 The district court, when ruling upon the Special Motion to Dismiss,
11 expressed the opinion that if she reviewed this matter as the former employment
12 attorney she was prior to taking the bench, she would have found what Songer did
13 "absolutely appalling", and that "the Arbitrator arrived at the right decision."
14 (APP Vol. VII at 1512-1513). However, the court nevertheless granted the Special
15 Motion to Dismiss based upon her belief that while the investigation was flawed,
16 she believed that Songer "acted in good faith" and did not believe he went after
17 Delucchi and Hollis "maliciously". (APP Vol. VII at 1518-1519).

18 While, as addressed below, proof of malicious intent is not necessary to
19 defeat a Special Motion to Dismiss, the issue as to whether Songer acted in good
20 faith or not was not a decision for the district court to make. The actions of

1 Delucchi and Hollis, and the contents of Songer's Report, and already been the
2 subject of a four (4) day arbitration before Arbitrator Katherine Harris, Esq. (APP
3 Vol. II at 251). The Arbitrator determined that the accusations contained within
4 Songer's Report, such as Delucchi and Hollis had engaged in "Intimidation",
5 "patient abandonment", and a "cover-up", were false. Moreover, the Arbitrator
6 found that Songer's Report contained "material misrepresentations" which were
7 "intentional", and that he had written his report in any manner so as to suggest that
8 he had interviewed the Choyces when in fact he was "covertly" relying upon
9 hearsay in order to make credibility determinations against Delucchi and Hollis.
10 (APP Vol. II at 267-268, 282).

11 In *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 194 P.3d 709 (2008) the
12 Nevada Supreme Court set forth proper factors for "issue preclusion" formerly
13 known as "collateral estoppel":

14 "(1) the issue decided in the prior litigation must be identical to the
15 issue presented in the current action; (2) the initial ruling must have
16 been on the merits and have become final; ... (3) the party against
17 whom the judgment is asserted must have been a party or in privity
with a party to the prior litigation"; and (4) the issue was actually and
necessarily litigated.

18 124 Nev. at 1054, 194 P.3d at 713. Issue preclusion applies to arbitration
19 proceedings. *Int'l Assoc. Firefighters v. City of Las Vegas*, 107 Nev. 906, 911, 823
20 P.2d 877, 880 (1991).

1 All of the criteria for issue preclusion are met. First, the issue decided in the
2 arbitration is the same as presented in this case: The truth or falsity of the
3 accusations made by Songer against Deluchhi and Hollis. Second, the arbitrator's
4 ruling was on the merits and final.

5 Third, Songer was in privity with the Town of Pahrump in the arbitration
6 proceedings. There was a privity of contract whereby the Town hired Songer to
7 conduct its investigation and prepare its fact findings. The Town called Songer as
8 its primary witness and built its case upon his investigation, Report and testimony.
9 (APP Vol. I at 69-187).

10 Finally, the issue as to the truth or falsity of the accusations contained
11 within Songer's report was actually and necessarily litigated at the arbitration. In
12 any discharge arbitration, the Arbitrator evaluates whether the employer had "just
13 cause".

14 Under the widely utilized test for "just cause" articulated by Northwestern
15 University Professor and Arbitrator Carol R Daugherty in *In Re: Enterprise Wire*
16 *Co.* 45 LA 359 (1966) the following inquiries are made: (1) Whether the employer
17 gave the employee forewarning or foreknowledge of the possible or probable
18 disciplinary consequences of the employee's conduct? (2) Was the employer's
19 rule reasonably related to (a) The orderly, efficient, and safe operation of the
20 company's business and (b) The performance that the employer might properly

1 expect of the employee? (3) Did the employer, before administering discipline,
2 make an effort to discover whether the employee did in fact violate or disobey a
3 rule or order of management? (4) Was the employer's investigation conducted
4 fairly and objectively? (5) Was adequate evidence of the employee's guilt
5 obtained? (6) Has the employer applied its rules, orders, and penalties
6 evenhandedly and without discrimination to all employees? and (7) Was the
7 degree of discipline administered by the employer reasonably related to (a) The
8 seriousness of the employee's proven offense and (b) The record of the employee
9 in his service with the employer?

10 Tests numbers (3) through (5) require the arbitrator to evaluate the
11 adequacy of the investigation, and whether it obtained adequate evidence of the
12 employee's guilt. Arbitrator Catherine Harris in her Award concluded that Songer
13 did not obtain adequate evidence to support the statements in his Report, and it
14 could "hardly be deemed a fair and objective report by a disinterested third party."
15 (APP Vol. II at 282).

16 The district court was not entitled to substitute its judgment for that of the
17 Arbitrator with regard to Songer's report. The findings of the Arbitrator with
18 regard to Songer's Report were entitled to issue preclusive effect. Accordingly,
19 the Special Motion to Dismiss should have been denied.

20 ///

1 **C. Even In The Absence Of Issue Preclusion, Delucchi and Hollis**
2 **Presented Sufficient Evidence To Defeat The Special Motion To**
3 **Dismiss.**

4 Even without the application of issue preclusion resulting from the
5 Arbitrator's Award, Delucchi and Hollis presented sufficient evidence in the form
6 of the transcripts of testimony from the arbitration proceedings to defeat the
7 Special Motion to Dismiss.

8 First, nothing within NRS 41.637 defining "Good faith communication"
9 requires proof that a Defendant targeted a plaintiff maliciously as suggested by the
10 district court. Rather, the issue is whether the statements made are "truthful" or
11 "made without knowledge of its falsehood".

12 The accusation by Songer in his Report that Delucchi and Hollis had
13 engaged in "Intimidation" of the Choyces is a perfect example of a statement
14 which was not truthful, and/or made with knowledge of its falsehood. Under
15 cross-examination, Songer conceded he did not know where that charge came
16 from. (APP Vol. I at 141-142).

17 Where, as here, Songer interviewed two (2) subjects of the investigation
18 who provide a consistent version of events, and could locate no other witnesses
19 willing to provide a contrary version of events, a reasonable trier of fact could
20 conclude that Songer's accusations of "Intimidation", "Dishonesty", "Cover up",
 and "Refusal of Care" were false or made with knowledge of their falsehood.

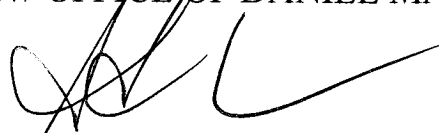
1 Given that under NRS 41.665, Delucchi and Hollis need only demonstrate a prima
2 facie case from which a reasonable jury could find in their favor, there is no
3 reason to believe that a trier of fact after reviewing the same evidence would not
4 come to the exact same conclusions that Arbitrator Harris did.

5 **CONCLUSION AND REMEDY REQUESTED**

6 For all of the reasons set forth above, the judgment of the district court
7 should be *reversed* and the matter remanded back to the district court for
8 discovery to proceed in connection with the Appellant's causes of action.³

9 DATED this 8th day of August, 2016.

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20 ³ Such a remedy will also require the award of attorney's fees which was the
subject of Songer's appeal in Docket No. 67414 be vacated.

1 **CERTIFICATE OF COMPLIANCE WITH**
2 **NRAP 28(e) AND NRAP 32(a)(8)**

3 I hereby certify that I have read this Opening Brief and to the best of my
4 knowledge, information and belief, it is not frivolous or interposed for any
5 improper purpose. I further certify that it complies with all applicable Nevada
6 Rules of Appellate Procedure, in particular, NRAP 28(e), which requires every
7 assertion in the Opening Brief regarding any material issue which may have been
8 overlooked to be supported by a reference to the page of the transcript or appendix
9 where the matter overlooked is to be found. I further certify that this Opening
10 Brief is formatted in compliance with NRAP 32(a)(4-6) as it has one (1) inch
11 margins and uses New Times Roman - font size 14, has 27 pages, double spaced,
12 and contains 6,110 words. I understand that I may be subject to sanction in the
13 event that the accompanying brief is not in conformity with the requirements of
14 the Nevada Rules of Appellate Procedure.

15 DATED this 5th day of August, 2016.

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