

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAYMOND DELUCCHI and  
TOMMY HOLLIS,

Appellants,

v.

PAT SONGER and ERICKSON  
THORPE & SWAINSTON, LTD.

Respondents

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Electronically Filed  
Case No. 68994 Aug 09 2016 09:38 a.m.  
District Court: Travis K. Lindeman  
Clerk of Supreme Court

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**JOINT APPENDIX**

**VOLUME IV OF VII**

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Appeal from the Fifth Judicial District Court  
Case. No. CV35969

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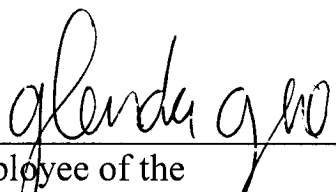
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1                   **CERTIFICATE OF SERVICE BY ELECTRONIC MEANS**

2           I hereby certify that I am an employee of the Law Office of Daniel Marks  
3 and that on the 2<sup>nd</sup> day of August, 2016, I did serve the above and forgoing JOINT  
4 APPENDIX, VOLUME IV of VII by way of Notice of Electronic Filing provided  
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An employee of the  
LAW OFFICE OF DANIEL MARKS

1 A. Yes, sir.

2 Q. And how did you decide to investigate  
3 the matter?

4 A. I advised Chief Lewis that the  
5 lieutenant that oversaw this, Lieutenant Moody, and  
6 him were to conduct an investigation, with  
7 Lieutenant Moody being the lead and Chief Lewis just  
8 assisting.

9 Q. Okay. And why do you want Chief Lewis  
10 to assist?

11 A. Because Lieutenant Moody was unsure of  
12 doing investigations, and he had stated that. And  
13 so I told him that Chief Lewis would sit in on it  
14 and help guide him.

15 Q. Okay. And to your knowledge, did  
16 Lieutenant Moody and Chief Lewis later interview  
17 both Mr. Hollis and Mr. Delucchi?

18 A. Yes, sir.

19 Q. Okay. When you first talked to Chief  
20 Lewis about this incident, other than the -- kind of  
21 the facts of the incident that you just referred to,  
22 did you have any further discussions about the  
23 incident?

24 A. I'm not sure of the question.

25 Q. Did you even know who it was at the

1 time, who the firefighters were, who the EMTs and  
2 drivers were?

3 A. Oh, no, sir.

4 Q. Because the complaint itself, the  
5 telephone call, didn't know who they were; right?

6 A. Correct, sir.

7 Q. So you tasked this investigation first  
8 without knowing who the -- who the driver and the  
9 passenger in the vehicle -- in the ambulance were.

10 A. Let me back up if I may. Chief Lewis  
11 explained to me who he -- the driver and -- who the  
12 firefighters were in the ambulance.

13 Q. Okay. So he knew by that time.

14 A. Yeah. When he came over to my office,  
15 he explained to me who was in the vehicle -- or who  
16 was in the ambulance, not the vehicle.

17 THE ARBITRATOR: Are we talking about a  
18 rescue truck or an ambulance?

19 THE WITNESS: Ambulance.

20 THE ARBITRATOR: All right.

21 BY MR. CAMPBELL:

22 Q. Did you sit in on any of those  
23 interviews between -- with Lieutenant Moody,  
24 Mr. Lewis, and Mr. Hollis included?

25 A. Yes, sir.

1 Q. And can you look at -- I think it's  
2 Exhibit 8 and 9 in the Town's binder.

3 A. Did you say 8 and 9, sir?

4 Q. I believe so. Excuse me. Yeah, 8  
5 and 9.

6 A. All right. I have 8 and 9. Got to  
7 learn how to operate this first. Hang on a minute.

8 (A discussion was held off the  
9 record.)

10 THE WITNESS: I have it. I'm on 8, sir,  
11 and I have 9.

12 BY MR. CAMPBELL:

13 Q. Without reading through there but just  
14 briefly, are these the official town reports in the  
15 town record regarding those investigations and  
16 interviews?

17 A. Appears to be, sir.

18 Q. Do you know the procedure was -- did  
19 Lieutenant Moody start the interview and -- because  
20 these are entitled Second Interview. Do you see the  
21 headings? Do you know why these are called the  
22 Second Interview?

23 A. It's my understanding that while I was  
24 given instructions to Chief Lewis, he contacted  
25 Lieutenant Moody by phone, explained to him what was



1 going on and that he would be conducting them.

2 Then I guess Chief -- well, I know Chief  
3 Lewis left my office, and once he got over there,  
4 Lieutenant Moody had already started the  
5 investigations, already started interviewing  
6 Mr. Hollis and Mr. Delucchi without Chief Lewis  
7 present.

8 Q. And it was your instructions to the two  
9 to do the interviews jointly?

10 A. Yes.

11 Q. So when you found out that Moody was  
12 doing them alone, that's not what you instructed.

13 A. Yes.

14 THE ARBITRATOR: So I take it these  
15 second interviews represent the interview that was  
16 restarted after the chief came on the scene and was  
17 participating with Moody in the interview.

18 THE WITNESS: Actually, ma'am, I believe  
19 they started -- the second interviews started when,  
20 yeah, Chief Lewis got over there. But then  
21 Mr. Delucchi had requested that myself and  
22 Mrs. Bostwick be present, which is the HR  
23 coordinator. So we went over to be part of them,  
24 ma'am.

25 THE ARBITRATOR: Okay. Thank you.

1 BY MR. CAMPBELL:

2 Q. And did Chief Lewis ever specifically  
3 ask you that he wanted to be part of the interview  
4 process, or did you task him to do it?

5 A. I tasked him to do it.

6 Q. And did you have any discussions at that  
7 time that -- that you were somehow blaming Delucchi  
8 for this matter because of his union activities?

9 A. No, sir.

10 Q. Now, it's my understanding that later  
11 on, an independent investigator was assigned to this  
12 incident; is that correct?

13 A. Yes, sir.

14 Q. Can you explain why you did that.

15 A. Upon seeing how the interviews went and  
16 then, shortly thereafter, Mr. Delucchi filed a  
17 verbal complaint with our HR, with Mrs. Bostwick, a  
18 harassment complaint on Chief Lewis, I didn't think  
19 it would be appropriate to have Chief Lewis involved  
20 in an investigation when Mr. Delucchi verbally filed  
21 a harassment complaint against Chief Lewis.

22 Q. Okay. Let's talk about the timing of  
23 that harassment complaint.

24 Do you know when Mr. Delucchi would have  
25 found out that a citizen had made a report involving

1 the incident up on the highway?

2 A. That morning when Lieutenant Moody  
3 called him in.

4 Q. And do you think -- do you remember that  
5 date?

6 A. I believe it was the 31st of May.

7 Q. Okay. Can you look at the -- I think in  
8 the exhibit binder, I think it the actually the  
9 Union's Exhibit C.

10 A. Yes, sir.

11 Q. Does that refresh your recollection as  
12 to --

13 A. Yeah. It was May 31.

14 Q. And does the time -- actually, can you  
15 flip back to the Union's Exhibit B first.

16 A. Exhibit B? Yes, sir.

17 Q. Okay. And so the Union's Exhibit B --  
18 what is that exhibit?

19 A. It's a complaint, Firefighter Ray  
20 Delucchi v Fire Chief Scott Lewis.

21 Q. Okay. And what's the time on that  
22 complaint?

23 A. 11:15 A.M., May 31, 2012.

24 Q. And this is on the same day, May 31?

25 A. Yes, sir.

1           Q.       Okay. And then if you go back to  
2 Exhibit C, are these the notes of the complaint  
3 involving Mr. Lewis by Mr. Delucchi?

4           A.       C is not, no, sir. B is. You said C,  
5 sir.

6           Q.       C, yeah.

7           A.       C is, I believe, what Chief Lewis wrote  
8 up.

9           Q.       Okay. But does it -- why don't you  
10 identify C for me. What is this in your  
11 information?

12          A.       C is a complaint, Fire Chief Scott F.  
13 Lewis v Firefighter Raymond Delucchi.

14          Q.       Okay. So that was the second complaint  
15 filed that day?

16          A.       Yes, yes. This appears to be the one  
17 filed by Chief Lewis.

18          Q.       Okay. So this was -- what's the time on  
19 that complaint?

20          A.       1330.

21          Q.       When you decided to do an independent  
22 investigation because of these -- of these  
23 complaints among Mr. Lewis and Mr. Delucchi, who did  
24 you contact?

25          A.       Donna Squires from ASC.

1           Q.       And can you explain to the arbitrator  
2 who that is.

3           A.       Donna Squires is the boss at the ASC,  
4 Alternative Services Concepts. They work for  
5 POOL/PACT, and POOL/PACT is our risk managers --  
6 risk management insurance. And they hire ASC so  
7 when complaints come in on towns or cities or  
8 municipalities or anybody that's under POOL/PACT,  
9 then the manager -- whoever is in charge of that  
10 operation contacts either Diane Evans in the south  
11 or Donna Squires in the north. I've always  
12 contacted Donna Squires because I was manager up  
13 north and I have a good rapport with her. So I  
14 contacted her to advise her that we have -- this is  
15 what we have and we need a third party to do the  
16 investigation. This is why, how, and blah, blah,  
17 blah, blah, blah.

18          Q.       And when you say the third party to do  
19 the investigation, you're referring to the  
20 investigation regarding the incident up on the  
21 highway, not the harassment claim?

22          A.       No. When I requested the third party  
23 through Donna, it was to do the investigation  
24 with -- against Mr. Hollis and Mr. Delucchi.

25          Q.       Okay. And again, why did you want a

1 third party to do that?

2 A. Because shortly thereafter the  
3 interviews, Mr. Delucchi filed a verbal complaint  
4 with Mrs. Bostwick, harassment on Fire Chief Scott  
5 Lewis. And again, it would be inappropriate for me  
6 to continue with Chief Lewis doing the investigation  
7 when the firefighter at hand just filed a harassment  
8 complaint against the fire chief.

9 THE ARBITRATOR: Could we identify  
10 Mrs. Bostwick for the record.

11 THE WITNESS: Mrs. Bostwick is the HR  
12 coordinator for the Town of Pahrump.  
13 B-O-S-T-W-I-C-K.

14 THE ARBITRATOR: Thank you.  
15 BY MR. CAMPBELL:

16 Q. Did you ever tell Mr. Hollis and  
17 Mr. Delucchi that you were going to task this with a  
18 third-party investigator?

19 A. I spoke with Mr. Delucchi about it.

20 Q. And what did you tell him?

21 A. I told him that since he had filed a  
22 complaint against the chief and obviously doesn't  
23 trust the chief, and I don't think he trusts me too  
24 well, that I'm going to turn this over to a third  
25 party and ask for a third party to come in and do

1 the investigation.

2 Q. So he knew about it?

3 A. He knew about it.

4 Q. Okay.

5 A. I did not speak to Mr. Hollis. You  
6 asked me if I spoke so Mr. Delucchi and Mr. Hollis,  
7 but I did not speak to Mr. Hollis about it.

8 Q. Thank you.

9 Do you know what the Donna Squires,  
10 then, next did as far as this investigation by a  
11 third party?

12 A. She contacted Miss Becky Bruch, attorney  
13 out of Reno, to handle the investigation.

14 Q. And do you know who ultimately did the  
15 investigation?

16 A. Mr. Pat Songer.

17 Q. And do you know how Mr. Songer was  
18 selected?

19 A. Through Mrs. Bruch.

20 Q. Did you have any involvement in the  
21 selection of Mr. Songer as a third-party  
22 investigator?

23 A. No, sir.

24 Q. Okay. Did you ever talk to Mr. Songer  
25 about his assignment to investigate this matter at

1 any time during -- during the time that he was  
2 assigned to do this investigation, during his  
3 investigation, or after his investigation?

4 A. After his investigation.

5 Q. Okay. And when did you talk to him  
6 after his investigation?

7 A. After Mrs. Bruch submitted the report to  
8 me -- Mr. Songer's report to me with his  
9 recommendations.

10 Q. Prior to that time, you had never even  
11 talked to him?

12 A. No, sir.

13 Q. Did you ever try to make any -- any --  
14 do anything to influence Mr. Songer's report?

15 A. No, sir.

16 Q. Did you ever tell Mrs. Bruch that you  
17 wanted someone that would be on the town's side to  
18 do this investigation?

19 A. No, sir.

20 Q. You truly wanted an independent  
21 investigation.

22 A. Correct, sir.

23 Q. Okay. After you did receive the report,  
24 you say you talked to Mr. Songer. What did you talk  
25 about at that point?



1 A. Just his recommendations.

2 Q. And the recommendations that are in the  
3 report that we'll see later?

4 A. Yes, sir.

5 Q. Okay. Did you ask him to change his  
6 recommendation? Did you tell him you didn't like  
7 the recommendations, anything like that?

8 A. No, sir.

9 Q. And you just -- did you ask him any  
10 questions as to why he reached certain conclusions?

11 A. At this time, I can't recall. I don't  
12 remember, to be honest.

13 Q. But you did review those conclusions in  
14 the report.

15 A. Yes. I read the whole report, actually.

16 Q. Okay. At that point, was it still your  
17 decision as Town manager to implement any  
18 disciplinary action against Mr. Hollis and  
19 Mr. Delucchi?

20 A. Yes, sir.

21 Q. And did you use the -- Mr. Songer's  
22 investigation to help you reach your conclusion?

23 A. Yes, sir.

24 Q. Did you also contact anybody else about  
25 the Songer investigation?

1 A. Yes, sir.

2 Q. And who is that?

3 A. Dr. Slaughter.

4 Q. Can you explain to the arbitrator who  
5 Dr. Slaughter is.

6 A. He's the Town of Pahrump medical  
7 director.

8 Q. Did the Town or the -- can you explain  
9 that position, what the Town of Pahrump medical  
10 director does.

11 A. Oversees the fire department, medical  
12 program, and authorizes the use of narcotics and  
13 stuff and signs off on licensing for the  
14 firefighters.

15 Q. Are you familiar with just generally  
16 what he does or any more detail on what you just  
17 testified?

18 A. Generally that's what he does.

19 Q. Okay. When you say that he authorizes  
20 the firefighters to do certain tasks, what did you  
21 mean by that?

22 A. It's my understanding that they work  
23 under his license in distributing medication and  
24 meds in -- in performing their job duties as far as  
25 medical performance, medical procedures.

1 Q. Is that the -- is that an integral part  
2 of what an EMT or an emergency medical person does  
3 that works for the Pahrump Valley Fire Department?

4 A. Can you repeat the question.

5 Q. Is that an integral part of what a  
6 firefighter/EMT would do for the Town of Pahrump?

7 A. Yes. EMT-I and a paramedic, yes.

8 Q. In fact, is prescribing medications and  
9 doing certain medical procedures in the job  
10 description for these two gentlemen?

11 A. I don't know if it's in the job  
12 description, to tell them what type of medical  
13 procedures, but it is in the job description that  
14 they have it perform medical procedures and stuff to  
15 that effect.

16 Q. Okay. After you contacted -- first of  
17 all, why did you contact Dr. Slaughter?

18 A. It was actually in the recommendation  
19 from Mr. Songer to speak to him.

20 Q. And what did you tell Dr. Slaughter?

21 A. I told him what had gone on, that we  
22 have a third-party report. I gave him the  
23 third-party report, and I set up an interview to  
24 talk with Dr. Slaughter about it.

25 Q. Tell me a little bit more about that

1 discussion.

2 A. It was an hour, hour and 15 minute  
3 discussion. He went over everything in the report.  
4 We talked about what possibly he saw on it and the  
5 outcome of what we should do.

6 Q. And what did he tell you? Did he make a  
7 recommendation to you as to what you should do?

8 A. At that point, no.. He stated that he  
9 would -- he's going to think -- think about it a  
10 little bit more, but basically, it was my -- that I  
11 had to terminate because it was a third-party  
12 ruling. He said my hands are tied basically; that,  
13 you know, you're going --

14 Right at the end -- we were talking. He  
15 looked at me and said, you know, you're going to  
16 have to terminate. It's a third-party report. You  
17 can't really go against a third-party report. We  
18 talked about that a little bit, and I said, well,  
19 are you going to pull the licensings or what? And  
20 he said he would discuss it. He would think about  
21 it. Not discuss it. Think about it.

22 Q. When he said you have to rely on the  
23 third-party report, do you believe that, as the Town  
24 manager, your hands were tied because you had to  
25 decide what a third-party recommended?

1           A.       99.99 percent of the time, yeah. A  
2 third-party report is exactly what we do. We send  
3 it out and get the third party. Now, if I looked at  
4 the report and saw it was, in my opinion, really  
5 grievously done, then I would have had a discussion  
6 with Mrs. Bruch or whatever attorneys overseeing  
7 that and say, you know, I can't justify going with  
8 this.

9           Q.       Okay. And you said Dr. Slaughter then  
10 told you that you were going to have a follow-up  
11 call with him. Did you?

12          A.       Yes.

13          Q.       And tell us about that call.

14          A.       Actually, Chief Lewis made it sitting in  
15 my office because he had him on his cell phone. He  
16 had speed dial on cell phone.

17          Q.       Tell me about that call. Chief Lewis  
18 was in the office, you were in the office, and  
19 you --

20          A.       He contacted Dr. Slaughter, and he  
21 talked to Dr. Slaughter and asked him if he was  
22 going to pull the licensing. And I did not hear  
23 Dr. Slaughter, what he was saying. But then Chief  
24 Lewis said, well, do you want our E-mails?

25                   And then he gave them the E-mails and

1     shortly thereafter, we got an E-mail from  
2     Dr. Slaughter stating he didn't feel comfortable or  
3     something to that effect. He was pulling their  
4     license.

5           Q.     So you were in the room when Chief Lewis  
6     was talking to Dr. Slaughter?

7           THE ARBITRATOR: I'm sorry. You said  
8     he's pulling their licensing. Do you mean he's  
9     pulling whatever permission he gives them to act  
10    under him?

11          THE WITNESS: Yes.

12          THE ARBITRATOR: 'Cause isn't the  
13    licensing something else?

14          THE WITNESS: Yeah.

15          THE ARBITRATOR: All right. I'm sure  
16    I'll hear more about that.

17          MR. CAMPBELL: That will be fleshed out.

18    BY MR. CAMPBELL:

19           Q.     So just back to this conversation, I  
20    just want to make the record clear. Chief Lewis was  
21    on the phone with Dr. Slaughter. You were in the  
22    office so you heard the conversation between at  
23    least what Chief Lewis was saying to Dr. Slaughter.

24           A.     Yes.

25           Q.     And in that conversation, did you ever

1 tell Chief Lewis to tell Dr. Slaughter what he  
2 needed to do or what recommendations he needed to  
3 make?

4 A. No, sir.

5 Q. Did you ever hear Chief Lewis ever try  
6 to influence Dr. Slaughter as to any type of  
7 recommendation he might make?

8 A. No, sir.

9 Q. And did Dr. Slaughter ultimately make a  
10 recommendation or a finding?

11 A. Yes, sir.

12 Q. And if you look in the exhibit binder, I  
13 believe it's Exhibit 25 in your binder.

14 A. Yes, sir. I'm here.

15 Q. And can you describe for the record what  
16 this exhibit is.

17 A. It is an E-mail from FasterDoc@Yahoo.com  
18 dated Thursday, September 13, 2012, 4:20 P.M. to  
19 Scott Lewis, CC myself, and it says subject  
20 reference -- there is no reference. It says:

21 "Due to the findings of the  
22 investigation of Tommy Hollis,  
23 EMT-I, and Raymond Delucchi,  
24 paramedic, I am no longer sponsor  
25 [sic] their licenses effective

1 9-13-12. Kevin T. Slaughter, DO,  
2 FACP, Medical Director, EMS  
3 Pahrump Valley Fire."

4 Q. As the Town manager, what did that mean  
5 to you, that Dr. Slaughter had sent this E-mail?

6 A. That means that they could not perform  
7 their jobs as described by -- as described in the  
8 job description.

9 Q. Okay. So did you have a subsequent  
10 conversation with either Mr. Hollis or Mr. Delucchi  
11 after you received Dr. Slaughter's E-mail?

12 A. Yes.

13 Q. Tell me when was the first time you  
14 talked to either one of those gentlemen about  
15 Dr. Slaughter's conclusions, if you recall.

16 A. I don't recall. Might have been step  
17 three grievance.

18 Q. You're familiar with the collective  
19 bargaining agreement in this town; right?

20 A. Yes.

21 Q. You helped negotiating some portions of  
22 it at least.

23 A. Yes.

24 Q. You're familiar that the collective  
25 bargaining agreement has kind of a step written



1 notice process; right?

2 A. Yes.

3 Q. And maybe this will help refresh your  
4 recollection. If you look at exhibits -- I believe  
5 they're 30 through 34.

6 MR. LEVINE: Exhibit 6?

7 MR. CAMPBELL: No. Exhibit 30.  
8 Starting with Exhibit 30.

9 MR. LEVINE: Oh, I'm sorry.

10 THE ARBITRATOR: I think he said 30  
11 through 34.

12 MR. LEVINE: I'm sorry. 6 is the  
13 collective bargaining agreement. I thought he was  
14 asking about the CBA. My mistake.

15 MR. CAMPBELL: Actually, excuse me.  
16 Starting with Exhibit Number 29. Okay.

17 BY MR. CAMPBELL:

18 Q. Does this refresh your recollection of  
19 how the process went as far as going about the  
20 disciplinary action against Mr. Hollis and  
21 Mr. Delucchi?

22 A. Yes.

23 Q. Okay. This Exhibit Number 29 is a  
24 letter to Mr. Delucchi, penned by yourself.

25 A. Uh-huh.

1           Q.       Prior to what's in this letter, did you  
2 have any meetings with Mr. Delucchi and/or  
3 Mr. Hollis, if you recall?

4           A.       I don't recall having any meetings  
5 until -- I think it was step three in the grievance  
6 process.

7           Q.       You don't recall anything before sending  
8 out the first letter? If you don't recall, that is  
9 fine.

10          A.       I don't recall, sir.

11          Q.       Okay. And then if you look to  
12 Exhibit 30, that's dated September 18, which is  
13 about six or seven days later.

14          A.       Okay.

15          Q.       And can you tell us what this exhibit  
16 is.

17          A.       I think there's two exhibits. Yeah,  
18 there's two exhibits in here. One is addressed to  
19 Mr. Delucchi. One is addressed to Mr. Hollis.  
20 They're both dated September 18. They're both from  
21 myself, and the subject is notice of intent to  
22 discipline.

23                   Basically, they're letters stating:

24                   "This letter is to notify  
25 you of the intent to terminate

1                   your employment effective  
2                   September 21, 2012 and is  
3                   intended to comply with all due  
4                   process and notice  
5                   requirements" --  
6                   Do you want me to read the whole thing?  
7           Q.       No, I don't want you to read it. Why  
8                   don't you just tell us what are the reasons that you  
9                   sent this notice of intent letter.  
10                  THE ARBITRATOR: Excuse me. May I just  
11                  clarify?  
12                  MR. CAMPBELL: Sure.  
13                  THE ARBITRATOR: Are they identical  
14                  except for the names?  
15                  THE WITNESS: Yes, ma'am.  
16                  THE ARBITRATOR: Okay. Thank you.  
17                  THE WITNESS: Your question, sir?  
18       BY MR. CAMPBELL:  
19           Q.       I'll repeat it.  
20                   What was the reason that you sent the  
21                   notice of intent letter -- intent to discipline  
22                   letters to these two gentlemen?  
23           A.       It's stated:  
24                   "The revocation of your  
25                   sponsorship by the medical

1 director, which allowed you to  
2 work for Pahrump Valley Fire  
3 Rescue Services (see attached  
4 E-mail from Dr. Slaughter) and  
5 the findings of the third-party  
6 investigative report conducted  
7 Mr. Pat Songer, director of EMS  
8 for the Humboldt General Hospital  
9 (see attached third-party  
10 report)."

11 Q. So it's my understanding that it was  
12 twofold, the notice. One was because of  
13 Dr. Slaughter's report, and two was because of  
14 the -- because of the investigative findings and  
15 conclusions in Mr. Songer's report?

16 MR. LEVINE: Objection. Foundation.  
17 Form. There was no report by Dr. Slaughter, just an  
18 E-mail.

19 THE WITNESS: Right. There was an  
20 E-mail.

21 BY MR. CAMPBELL:

22 Q. Excuse me.

23 A. Revocation by medical director  
24 Dr. Slaughter and a report by Mr. Songer, yes, sir.

25 Q. And you when you quote the personal

1 policy manual 3.23.2(3), what's your understanding  
2 of that policy manual and how it affected  
3 Dr. Slaughter's recommendation?

4 A. It states that:

5 "In the event the employee  
6 does not have a valid license,  
7 certificate, permit, or  
8 occupational certificate, s/he  
9 does not meet the job  
10 requirements."

11 And by Dr. Slaughter revoking his  
12 sponsorship of Mr. Delucchi and Mr. Hollis, they  
13 fell under section 3.23.2(3) because they didn't  
14 have the proper certificate or licensing to work  
15 under Dr. Slaughter's license.

16 Q. Okay. So that was one ground; right?

17 A. Yes.

18 Q. Okay. The second ground was Pat  
19 Songer's findings and his investigation.

20 A. Yes, sir.

21 Q. Okay. And you looked at those. You  
22 investigated, but it was still your decision; right?

23 A. Yes, sir.

24 Q. And your understanding, in the  
25 collective bargaining agreement, there's a step

1 process for discipline; right?

2 A. Yes, sir.

3 Q. Unless there's an action that you find  
4 or the collective bargaining agreement finds  
5 grievous enough to discharge the employee at that  
6 time; right?

7 A. I didn't understand the question. I'm  
8 sorry.

9 Q. Let's look at the collective bargaining  
10 agreement.

11 MR. LEVINE: I guess that's my cue to  
12 object to form.

13 BY MR. CAMPBELL:

14 Q. Let's look at Exhibit 6, the collective  
15 bargaining agreement.

16 A. All right. I'm there, sir.

17 Q. I believe if you look on -- look at  
18 article 22.

19 A. What page is that, please?

20 Q. Page 37.

21 A. Thank you, sir. Got it, sir.

22 Q. And if you look down to section 3, do  
23 you see section 3 there?

24 A. Yes.

25 Q. And you see at the bottom, it says:

1 "The Town shall first  
2 administer constructive and  
3 progressive discipline, in the  
4 following order, prior to  
5 discharging a post-probationary  
6 employee, except where his/her  
7 misconduct is so serious as to  
8 constitute an immediately  
9 dischargeable offense."

10 A. Yes, sir.

11 Q. In your own opinion, were the  
12 conclusions by Mr. Songer grievous enough to  
13 constitute an immediately dischargeable offense?

14 A. Yes, sir.

15 Q. And that was in your opinion alone.

16 A. Yes, sir.

17 Q. And Mr. Lewis never had any or Chief  
18 Lewis never had any input to tell you to terminate  
19 these people?

20 A. No, sir.

21 Q. Other than Dr. Slaughter's action as  
22 outlined in the exhibit and the conclusions from  
23 Mr. Songer, was there anything other thing that  
24 influenced your decision to terminate these two  
25 gentlemen?

1 A. Mr. Songer and Dr. Slaughter. No, sir.

2 Q. Okay. Later did you report this  
3 incident to the State of Nevada regulatory agency  
4 that's in charge of EMT licenses?

5 A. Yes, sir.

6 Q. Can you look at -- I think it's  
7 Exhibit 26.

8 A. Yes, sir.

9 MR. LEVINE: Did you say 26?

10 MR. CAMPBELL: Yes.

11 BY MR. CAMPBELL:

12 Q. Do you see that exhibit, Mr. Kohbarger?

13 A. Yes, sir.

14 Q. It looks like the original message was  
15 from a Brian or B. Sullivan. Do you see that?

16 A. Yes, sir.

17 Q. Who is B. Sullivan?

18 A. Bobbie Sullivan. She works for the  
19 Nevada State Health Division, Emergency Medical  
20 Systems.

21 Q. And this E-mail says I'm in receipt of a  
22 letter dated December 7, 2012. What letter are you  
23 talking about?

24 A. Well, she's talking about a letter that  
25 I forwarded to State EMS describing the incident and



1 describing Dr. Slaughter's revocation and  
2 Mr. Songer's report.

3 Q. Did you look for this letter?

4 A. Yes.

5 Q. Did you ever find this letter?

6 A. Well, I know it's someplace on the  
7 computer at the office, but due to an individual  
8 getting onto the computer and doing some stuff that  
9 they shouldn't have, I cannot locate it. It's  
10 someplace on the computer. It's on the hard drive.  
11 They swear up and down at the Town of Pahrump that  
12 it's there, but nobody can seem to locate any of my  
13 files that were on the hard drive.

14 Q. What's your recollection of what the  
15 letter had in it?

16 A. My recollection was that I detailed  
17 Mr. Songer's outcome, his recommendations, the  
18 violations that he stated in his report, that  
19 Dr. Slaughter revoked their licensing, and forwarded  
20 it up to them for their review. And when I mean  
21 "them," I mean State EMS.

22 THE ARBITRATOR: So I'm sorry. Was this  
23 letter in response to Bobbie Sullivan's letter or  
24 before Bobbie Sullivan's letter?

25 THE WITNESS: No, ma'am, it was before

1 Bobbie Sullivan's E-mail, ma'am, because he  
2 referenced our office is in receipt of the letter  
3 dated December 7, 2012, ma'am.

4 THE ARBITRATOR: I just wanted to make  
5 sure I understood. Thank you.

6 THE WITNESS: You're welcome.

7 BY MR. CAMPBELL:

8 Q. Just to be clear, the letter that's  
9 referenced in the E-mail was your lawyer notifying  
10 the state regulatory agency of this incident?

11 A. Yes, sir.

12 Q. And that was how the State became aware  
13 of it.

14 A. Yes, sir.

15 Q. And do you know where that investigation  
16 sits as we sit here today?

17 A. I received an E-mail three or four weeks  
18 ago -- it was actually five weeks was -- wait a  
19 minute. My last day was July 11, so actually I was  
20 here five years and 12 days, not four days.  
21 July 11. So it was shortly before July 11, we  
22 received an E-mail from Pat Irwin, I think. No,  
23 it's not Pat.

24 Q. Why don't you look at Exhibit 28,  
25 Mr. Kohbarger, and see if that refreshes your

1 recollection.

2 A. Yeah, it is Pat Irwin, yeah. It says:

3 "We wrapped this up and  
4 concluded all actions completed  
5 by the Town of Pahrump were  
6 appropriate and validated. We  
7 appreciate the hard work you did  
8 on resolving this issue swiftly  
9 and timely.

10 "We just had the one issue  
11 on state notification, and Chief  
12 Lewis implemented a process that  
13 was completely satisfactory."

14 Q. Have you ever heard anything more from  
15 the state, seen a final report or anything --

16 A. No, sir.

17 Q. -- other than this last E-mail?

18 A. I have not.

19 THE ARBITRATOR: And the last E-mail is  
20 number?

21 MR. CAMPBELL: That was Exhibit 28.

22 MR. LEVINE: I apologize. When you were  
23 asking -- when I was asked who I'm calling, I forgot  
24 to tell you I am calling telephonically the chief of  
25 the division tomorrow telephonically at 9:00.

1 MR. CAMPBELL: And that's pursuant to  
2 your subpoena?

3 MR. LEVINE: Yes.

4 MR. CAMPBELL: Has he produced any  
5 documents?

6 MR. LEVINE: No. As he will explain,  
7 the process is, if it's under investigation, they  
8 consider everything confidential. If they conclude  
9 an investigation and initiate discipline, they'll  
10 release it. If they conclude an investigation and  
11 find no basis, they'll release it. But until they  
12 do that, they won't give anything.

13 MR. CAMPBELL: Okay.

14 MR. LEVINE: I'll make that  
15 representation. He'll state it tomorrow on the  
16 record.

17 MR. CAMPBELL: That's fine.

18 THE ARBITRATOR: And I take it there's  
19 an agreement to do him telephonically as well?

20 MR. CAMPBELL: I hadn't heard that he  
21 was going to testify telephonically, but I have no  
22 problem.

23 THE ARBITRATOR: Okay.

24 MR. LEVINE: I just found out, and I  
25 think it would be reciprocal in return for --

1 MR. CAMPBELL: I have no problem.

2 MR. LEVINE: I didn't want to make him  
3 come to Carson to Las Vegas to Pahrump.

4 MR. CAMPBELL: My only concern is that  
5 if he produced documents --

6 THE ARBITRATOR: Let's go off the  
7 record.

8 (A discussion was held off the  
9 record.)

10 THE ARBITRATOR: Back on record.

11 Mr. Kohbarger, you're still under oath.

12 THE WITNESS: Yes, ma'am.

13 THE ARBITRATOR: You may proceed,  
14 Counsel.

15 BY MR. CAMPBELL:

16 Q. Mr. Kohbarger, earlier I asked you a  
17 little bit about the harassment charges that were  
18 leveled by Mr. Delucchi and Chief Lewis. Do you  
19 remember that testimony?

20 A. Yes.

21 Q. And was there an investigation done on  
22 those harassment charges too?

23 A. Yes, sir.

24 Q. And who did that investigation?

25 A. I again contacted Donna Squires from

1     ASC, turned it over to her and stated the Town is  
2     not going to be involved in this because it is a  
3     fire chief filing a complaint on the union president  
4     and the union president filing a complaint on the  
5     fire chief. You know, turn it over to third party.

6           Q.     Okay. And do you know who that third  
7     party was?

8           A.     Mrs. Becky Bruch.

9           Q.     And do you know how Miss Bruch assigned  
10    that investigation or who she assigned it to?

11          A.     I believe her name was Cindy Davis. She  
12    was an investigator from another law firm, I  
13    believe, in Reno.

14          Q.     And did you receive a copy of her  
15    findings of that investigation?

16          A.     Yes, I did.

17          Q.     Is that Exhibit 36 in the binder?

18          A.     It appears to the one -- yes, sir. It  
19    appears to be that.

20          Q.     Without going through a lot of detail,  
21    are you familiar with the findings that Miss Davis  
22    made as to this harassment investigation?

23          A.     Yes, sir.

24          Q.     What were those findings?

25          A.     She found that Mr. Delucchi was indeed

1 harassing Chief Lewis but Chief Lewis was not  
2 harassing Mr. Delucchi.

3 Q. And that's detailed in the report?

4 A. Yes, it was detailed in the report.

5 Q. Let's move back and ask you just a  
6 couple general questions.

7 As Town manager, were you responsible  
8 for negotiations on the collective bargaining  
9 agreement?

10 A. Yes, sir. I've been involved in it  
11 since 2008.

12 Q. And how many different head of the  
13 unions have you dealt with in the negotiations?

14 A. Three.

15 Q. And that would be who?

16 A. Tim Murray, Ray Delucchi, and Justin  
17 Snow.

18 Q. Mr. Kohbarger, how would you style your  
19 negotiation process as far as in these collective  
20 bargaining agreements?

21 A. My style?

22 Q. Yeah.

23 A. Aggressive but somewhat fun, depending  
24 on who you are.

25 Q. And why do you -- why do you say you're

1 aggressive?

2 A. I had to represent the Town, and you  
3 know, at this present time and over the last five  
4 years, the budget hasn't been all that great.

5 Q. So did some of the negotiations get  
6 heated about pay scale and step increase, anything  
7 like that?

8 A. Yeah, yes.

9 Q. And was that because of monetary issues?  
10 I mean, the Town's budget -- you said the Town's  
11 budgets?

12 A. Yes, the budget is -- it's still in bad  
13 shape, but it's starting to hopefully make a return.

14 Q. And as the chief negotiator for the  
15 Town, you were charged with trying to negotiate the  
16 best terms of the collective bargaining agreement  
17 and the pay scale for the firefighters?

18 A. Yes.

19 Q. During that negotiation, did you ever  
20 hold any personal animosity against any of the union  
21 members?

22 A. Mr. Murray and I have a love/hate  
23 relationship. We're cordial with each other outside  
24 and sometimes on the job, but we're also not so nice  
25 on the job and outside.



1           Q.       Do you hold any grudges against  
2 Mr. Murray or Mr. Delucchi or Mr. Snow as a result  
3 of what they have to do on their side of the  
4 bargaining table?

5           A.       No. All is fair in love and war. No,  
6 sir.

7           Q.       And you don't sit here today -- you  
8 don't have any personal animosity against either of  
9 these gentlemen because of what happened in the  
10 collective bargaining process?

11          A.       No, sir.

12          Q.       Just one final question: Are you  
13 familiar with the scene of where the Medic 3 was  
14 pulled over by the Choyces? Choyce is the name of  
15 the family.

16          A.       Yes, sir, I am familiar with that area.

17          Q.       And have you stopped and looked at it?

18          A.       On several occasions.

19          Q.       Do you know if there's cell service  
20 right there?

21          A.       There was last Monday when I tried.  
22 There was an accident up there in almost the exact  
23 same location, and I was on the phone to Chief  
24 Lewis, advising him of a vehicle accident.

25          Q.       Do you know if there's a dead zone for

1 the radios in the ambulances in that same area?

2 A. I personally do not because I have never  
3 operated the radios up through there.

4 Q. So you don't know where the dead zone  
5 might end?

6 A. I do not, sir.

7 Q. Do you know if they can call further  
8 down the road on the actual ambulance radio? You  
9 don't know anything about that?

10 A. I've never tested the radios from top of  
11 the mountain all the way in.

12 Q. Personally, you've made a cell phone  
13 call at or about that same location?

14 A. Yes, sir.

15 MR. CAMPBELL: That's all I have.

16 THE ARBITRATOR: All right. Well, we'll  
17 take our midmorning break, and then we'll -- to  
18 avoid having to interrupt the cross-examination, of  
19 course.

20 MR. LEVINE: Thank you.

21 THE ARBITRATOR: And so we'll be off the  
22 record for a short time.

23 (A recess was taken from 11:08  
24 to 11:21 A.M.)

25 THE ARBITRATOR: Back on the record

1 after our midmorning break.

2 Mr. Kohbarger, you're still under oath.

3 And Mr. Levine, you may proceed.

4 THE WITNESS: Yes, sir.

5

6 CROSS-EXAMINATION

7 BY MR. LEVINE:

8 Q. During direct examination, you were  
9 questioned as to what you were notified about your  
10 understanding as to what happened out on  
11 Highway 160; correct?

12 A. Yes, sir.

13 Q. And you were notified as to the nature  
14 of the complaint; correct?

15 A. Yes, sir.

16 Q. Who told you?

17 A. Again --

18 Q. Who gave that you notice?

19 A. It was the mother calling and left it on  
20 the voicemail, sir.

21 Q. Did you listen to that voicemail?

22 A. Yes.

23 Q. Okay. So you listened to it.

24 So on direct examination, you testified  
25 about -- you explained to the arbitrator the

1 complaint was that -- how the driver had driven up  
2 on the ambulance and how they refused to help. Do  
3 you remember giving that testimony?

4 A. I stated it -- yes, yeah.

5 Q. In fact, let's look at Exhibit 10.

6 A. Which book?

7 Q. The big book. Just so you know, 10 --  
8 numbers are management in the big book. Letters are  
9 the union in the small book.

10 A. Oh.

11 Q. That's the phone message; correct?  
12 Exhibit 10.

13 A. That's not the phone message that was on  
14 my recorder, sir.

15 Q. So you had a separate phone message?

16 A. Yes, sir, on my phone in my office.

17 Q. Okay. So she called you.

18 A. Yes, sir.

19 Q. Do you know what Exhibit 10 is? It  
20 says, "Phone message re: Customer complaint."

21 A. Uh-huh.

22 Q. This phone message, which is the one  
23 provided by management in the binder, this makes no  
24 mention of refusal to help, does it?

25 A. Let me read it, please.

1 Q. Okay.

2 A. Correct.

3 Q. All it says is, "My name is Vickie."

4 She gives a number. She identifies the medic,  
5 ambulance, and says, "They were coming back from  
6 Vegas, and my son-in-law stopped them. Anyway, I  
7 will explain it when you call me." Correct?

8 A. That's exactly what it states, yes, sir.

9 Q. It provides no detail; correct?

10 A. Correct.

11 Q. It doesn't contain the information that  
12 you relayed to the arbitrator on direct examination  
13 as to what the complaint was; correct?

14 A. That one does not, no, sir.

15 Q. Am I correct that you never spoke to  
16 this Vickie person?

17 A. Correct, sir, I did not.

18 Q. You did not speak to the son-in-law?

19 A. Correct, sir, I did not.

20 Q. You did not speak to the passenger, who  
21 I think has sometimes been referred to as Brittnie;  
22 correct?

23 A. Correct, sir, I did not.

24 Q. You testified on direct examination as  
25 to why Mr. Sonar was assigned to investigate this

1 matter. Do you recall that testimony?

2 A. Yes, sir.

3 Q. And you said it was because Mr. Delucchi  
4 filed a harassment complaint; correct?

5 A. I stated on the record, I believe, that  
6 Mr. Delucchi filed a complaint against Chief Lewis,  
7 that Chief Lewis filed a complaint against  
8 Mr. Delucchi. I contacted Donna Squires, ASC, and  
9 she contacted Becky Bruch. I did not contact Bob  
10 Songer -- Mr. Songer, and I didn't do it because  
11 Mr. Delucchi contacted me.

12 Songer came around in a long direction  
13 of me calling Donna Squires, Mrs. Squires calling  
14 Becky Bruch, and Becky Bruch following up and  
15 somehow getting Mr. Songer's name.

16 Q. Now, you were aware, then, based on that  
17 answer, that the fire chief filed a complaint  
18 against Mr. Delucchi as you -- alleging misconduct  
19 as union president; correct?

20 A. Yes, sir, harassment complaint.

21 Q. Harassment?

22 A. Yes, sir.

23 Q. In his capacity as union president;  
24 correct?

25 A. I believe so.

1 Q. And if you would take a look at union's  
2 Exhibit C.

3 A. Yes, sir.

4 Q. That is the fire chief's complaint  
5 against Mr. Delucchi; correct?

6 A. It appears to be, yes, sir.

7 Q. And it's dated May 31, 2012, which would  
8 be the same day you were notified of this so-called  
9 complaint from the Vickie person who was apparently  
10 the mother-in-law of the people in the car; correct?

11 A. Yes, sir.

12 Q. And if you take a look at the second  
13 page, the fire chief referenced -- in the first  
14 paragraph, it says "me tying an arbitration  
15 hearing." That's probably a typo, but you see  
16 reference to the arbitration hearing brought by the  
17 Union against the Town that was conducted on 5-30?

18 A. Uh-huh, yes, sir.

19 Q. And that would be, of course, one day  
20 before this complaint and one day before you were  
21 notified about the incident up on the hill; correct?

22 A. Yes, sir.

23 Q. You were familiar with that arbitration;  
24 correct?

25 A. Yes, sir.

1 Q. That is what is sometimes referred to as  
2 the Van Leuven arbitration; correct?

3 A. Yes, sir.

4 Q. And that was -- that got a little  
5 heated, didn't it?

6 A. Yes, sir.

7 Q. It got a little personal with the chief  
8 because it involved his personal and/or sexual  
9 relations; correct?

10 A. There was allegations made, yes, sir.

11 Q. Okay. The chief did not take that well,  
12 did he?

13 MR. CAMPBELL: Objection. I think that  
14 calls for speculation.

15 BY MR. LEVINE:

16 Q. To your perception.

17 THE ARBITRATOR: If he has any  
18 knowledge, he can answer. If he doesn't, he should  
19 say he doesn't know.

20 THE WITNESS: He was upset later.

21 BY MR. LEVINE:

22 Q. Okay. And he then charges that:

23 "It became readily apparent  
24 to me that Ray Delucchi was  
25 attempting to use his role as



1           IAFF Local 4068 president to  
2           thwart our ability and my  
3           authority to conduct an  
4           investigation of a serious  
5           external complaint."

6           That's what he wrote; correct?

7           A.       Yes, sir.

8           Q.       Now, if we go back to May 31, what  
9           happened was is that Mr. Delucchi asked that his  
10          interview be stopped and wanted a representative  
11          from human resources present; correct?

12          A.       I believe so, yes, sir.

13          Q.       Are you aware of anything else  
14          Mr. Delucchi did on the 31st that would thwart the  
15          chief's ability to do anything?

16          A.       He actually requested, from my  
17          understanding, myself and Mrs. Bostwick to be  
18          present at the investigation.

19          Q.       Have you spoken with Chief Lewis about  
20          his complaint?

21          A.       After the complaint was filed?

22          Q.       Yeah.

23          A.       Yes, sir.

24          Q.       Has he ever explained to you how  
25          Mr. Delucchi asking for a human resources

1 representative to be present in an investigatory  
2 interview is Mr. Delucchi using his role as  
3 president of the local to thwart an investigation?

4 A. No, sir. We didn't discuss it in detail  
5 because I turned it over to a third party and I  
6 didn't really want to be involved in it at all.

7 Q. No. My question was, has Chief Lewis  
8 ever explained to you how Mr. Delucchi --

9 A. No.

10 Q. No. Thank you.

11 When Mr. Delucchi asked you and/or  
12 Miss Bostwick to be present at the interview, he was  
13 doing so as a fighter, not the union president;  
14 correct?

15 A. I just got a call to be over there. I  
16 have no clue, sir.

17 Q. Okay. Mr. Songer wasn't hired until --  
18 do you know when he was hired?

19 A. No, sir, I do not.

20 Q. Wasn't it about three weeks after the  
21 incident?

22 A. I don't know when he was hired, sir, so  
23 I can't answer that question.

24 Q. Okay. All right. Now, Mr. Delucchi at  
25 the time, of course, was the union president. The

1 union also had a vice president; correct?

2 A. I believe they did, yes.

3 Q. Okay. And you knew that if, for some  
4 reason, Mr. Delucchi, because of his personal  
5 involvement in the complaint that came in or was  
6 being investigated, if he had a personal  
7 involvement, you could always go to the vice  
8 president of the union to talk to the union;  
9 correct?

10 A. Repeat the question again.

11 Q. That was a poor question. Let me  
12 rephrase it.

13 A. I'm sorry.

14 Q. If Mr. Delucchi, as the union president,  
15 was somehow disqualified or recused from acting as  
16 the president of the local because of his  
17 involvement in an underlying incident, you could  
18 always go to the vice president; correct?

19 A. I believe that would be the correct  
20 protocol, yes, sir.

21 Q. All right. If I could have you turn to  
22 Exhibit 7.

23 A. I'm there, sir.

24 Q. All right. And they're not numbered  
25 but -- not page numbered, but about six pages in,

1 there is a rule and regulation that's entitled  
2 Discipline. It's guideline 2.04.

3 A. I'm there, sir.

4 Q. All right.

5 A. All right, sir. Go ahead.

6 Q. Normally, an investigation of a member  
7 of the department is going to be conducted by either  
8 the chief or a lieutenant; correct?

9 A. Yes, sir.

10 Q. And under this rule and regulation,  
11 certain officers are given certain authority to take  
12 certain disciplinary actions; correct?

13 A. Let me read it if you don't mind. Can I  
14 take a second to read it, please?

15 Q. Sure.

16 A. Which number?

17 Q. If I could direct you to 2.04.04 through  
18 2.04.06.

19 A. Starts with "department officers," and  
20 it has the rank, verbal warning, written reprimand,  
21 and temporary suspension under it, sir? Is that  
22 what you're talking about?

23 Q. Yes, and then 04, 05, and then more  
24 specifically and importantly 02.04.06.

25 A. Okay.

1 Q. Read that.

2 A. All right, sir. I've read it.

3 Q. 2.04.06 says that -- basically, it talks  
4 about temporary suspensions; right?

5 A. Yes, sir.

6 Q. And it requires a written report which  
7 shall include written statements from all parties  
8 involved, including witnesses; right?

9 A. That's what it says, sir.

10 Q. A description of the nature of the  
11 violations and what the rules and regulations or  
12 standard operating guidelines is alleged to have  
13 been violated; correct?

14 A. Correct, sir.

15 Q. And it says:  
16 "Upon completion, this  
17 report will immediately be  
18 forwarded to the fire chief, who  
19 will conduct a complete  
20 investigation into the matter."  
21 Correct?

22 A. Yes, sir.

23 Q. That actual procedure wasn't used in  
24 this case; correct? Because of the fire chief's  
25 involvement in the mutual complaints.

1           A.       In the beginning, he was involved, and  
2 then he was taken out of the loop.

3           Q.       Okay. So that actual procedure there  
4 wasn't followed; correct?

5           A.       Correct, sir.

6           Q.       And before you -- well, let me back up.  
7                    From having conducted multiple  
8 negotiations, per your prior testimony, you are  
9 aware that NRS 288.150.(2)(i) makes discharge and  
10 disciplinary procedure to be a subject of mandatory  
11 collective bargaining; correct?

12                   MR. CAMPBELL: I'm going to object to  
13 that. It may call for a legal conclusion.

14                   THE ARBITRATOR: He's asking if he's a  
15 aware of that. That's a little bit different  
16 question.

17                   MR. LEVINE: And then I will ask the  
18 arbitrator to take arbitral notice of it in a  
19 moment.

20                   THE ARBITRATOR: All right.

21 BY MR. LEVINE:

22           Q.       Were you aware of discharge and  
23 disciplinary procedure being the subject of  
24 mandatory bargaining even if you don't know the code  
25 section under the NRS?

1 A. Yes.

2 Q. And I would also be correct that you did  
3 not go to the vice president of the Union at the  
4 time, since Mr. Delucchi obviously would be  
5 implicated as the president, and you did not  
6 negotiate or attempt to prior negotiate what the  
7 procedure would be for utilizing an outside  
8 third-party investigator.

9 A. That's correct.

10 Q. And are you aware that what is referred  
11 to as a unilateral change to a subject of mandatory  
12 discipline is an unfair labor practice in this  
13 state?

14 A. If you state so. I don't have to -- I  
15 believe you.

16 Q. To make -- to shorten it up, the Union  
17 was not consulted as to either the selection of the  
18 third party or under what parameters he was going to  
19 operate; correct?

20 A. Correct.

21 Q. Now, you ultimately got Mr. Songer's  
22 report; correct?

23 A. Yes, sir.

24 Q. And let's find Mr. Songer's report. I  
25 believe it is Exhibit 4 in the binder.

1 A. I'm there, sir.

2 Q. Okay. You indicated on direct  
3 examination that you did not recall how Mr. Songer  
4 reached his conclusions. Do you recall that  
5 testimony?

6 A. I don't recall that, no, sir.

7 Q. Did I write it down wrong, or do you  
8 know how he reached his conclusions?

9 A. What he -- he put it all in the report,  
10 sir.

11 Q. Okay. Did he --

12 A. Wait a minute. I'm sorry. I don't  
13 understand the question.

14 Q. That's fair enough.

15 If you take a look at the report,  
16 specifically the last four pages, Mr. Songer  
17 identifies a laundry list of alleged rules -- or  
18 rules and regulations that were allegedly violated.  
19 Do you see that?

20 A. Yes, sir. The first part says number 3,  
21 "In accordance with," and it's bottom of page 2;  
22 correct?

23 Q. Okay.

24 A. And then page 2, 3, 4, and 5. Is that  
25 what you're referring to, sir?



1 Q. Yes.

2 A. Yes, sir, I see that.

3 Q. And they're identical for both  
4 Mr. Delucchi and Mr. Hollis; correct?

5 A. I believe so, yes, sir.

6 Q. Did you go or -- ask Mr. Songer how he  
7 reached his conclusion that each particular  
8 regulation was violated? Did you go through it in  
9 that sort of detail with him?

10 A. We talked about the report, but I don't  
11 believe we went in detail line item per line item  
12 per line item, no.

13 Q. If I were to ask you how he reached a  
14 particular -- or do you know how he reached a  
15 particular conclusion, you wouldn't be able to tell  
16 us that; correct?

17 A. No, sir.

18 Q. That's a question better left for  
19 Mr. Songer.

20 A. Yes, sir.

21 Q. Okay. You, however, decided to accept  
22 Mr. Songer's report and recommendation; correct?

23 A. Yes, sir.

24 Q. Did you know, at the time that you  
25 decided to accept Mr. Songer's report, that the --

1 both the driver of the vehicle on Highway 160 and  
2 the passenger had not given a recorded statement as  
3 requested by the chief? Did you know that?

4 A. No, sir, I did not know that.

5 Q. Did you know that they had declined to  
6 give a written statement?

7 A. No, sir, I did not know that.

8 Q. Did you know that Mr. Songer had not  
9 spoken with them when you accepted and adopted his  
10 report?

11 A. No, sir, I did not know that.

12 Q. So sitting here today, is that the first  
13 time that you were made aware that neither Brittnie  
14 nor James Choyce spoke with Mr. Songer?

15 A. I believe so, yeah. I thought they did.

16 Q. Did you ever see a transcript -- well,  
17 did you ever see a written statement from them?

18 A. Not to my recollection.

19 Q. Did you ever see a transcript of an  
20 interview much like we saw in Exhibits 8 and 9 for  
21 Ray Delucchi and Tommy Hollis?

22 A. I thought Chief Lewis had one, but I  
23 don't -- I can't recall, sir. I'm going to have to  
24 say I can't recall if I've seen one or not.

25 Q. You testified on direct examination that

1 after you got the report, you contacted  
2 Dr. Slaughter about it.

3 A. Yes, sir.

4 Q. Did you actually give the report to  
5 Dr. Slaughter, or did you only tell him about it?

6 A. I thought I gave the report to  
7 Dr. Slaughter.

8 Q. Okay. You indicated, in response to a  
9 question regarding your interactions with  
10 Dr. Slaughter, that after receipt of the report,  
11 that Ray and Tommy work under his license. That was  
12 your understanding. Do you recall that testimony?

13 A. Yes, sir.

14 Q. What is that understanding based on? Is  
15 there an NRS that you can -- are familiar with?

16 A. I asked that very question of the  
17 attorneys, and I was advised, yes, there is.

18 Q. Do you know what one it is?

19 A. No, sir, I do not off the top of my  
20 head.

21 Q. So it would be a fair statement that you  
22 didn't actually review it before proceeding?

23 A. No. I actually contacted the attorney,  
24 Mrs. Bruch, and she advised me that, yes, it is an  
25 NRS, and it is a good standard, so I took her word

1 for it.

2 Q. So you just relied on advice of counsel.  
3 You didn't look at it yourself to verify.

4 A. Correct, sir.

5 Q. You testified on direct that you didn't  
6 recall meeting with Tommy and Ray prior to  
7 suspending them without pay and pending termination;  
8 right?

9 A. I don't recall meeting with them before  
10 we gave them the letters.

11 Q. Okay. Would it surprise you that you  
12 had a meeting that lasted approximately 15 minutes  
13 with them?

14 A. Wouldn't surprise me at all.

15 Q. In light of the fact that you don't have  
16 a recollection of the meeting, I'd like to play the  
17 audio recording of it.

18 THE ARBITRATOR: Let's go off the record  
19 to discuss how we're going to conduct the playing of  
20 the audio.

21 (A discussion was held off the  
22 record.)

23 THE ARBITRATOR: Back on the record.

24 We've had some off-the-record  
25 discussion, and Counsel is going to identify the

1 video that he's going to play off the record in just  
2 a moment.

3 So go ahead.

4 MR. LEVINE: It's actually an audio.

5 THE ARBITRATOR: I'm sorry. Audio.

6 MR. LEVINE: And it is --

7 THE ARBITRATOR: I stand corrected.

8 MR. LEVINE: And it is the Union's  
9 Exhibit R as in Romeo.

10 THE ARBITRATOR: All right. So it's  
11 already in evidence.

12 MR. LEVINE: Yes. You have your copy.

13 THE ARBITRATOR: Off the record to hear  
14 the audio.

15 (An audio recording was  
16 played.)

17 THE ARBITRATOR: Let's go back on the  
18 record.

19 We have not heard the entire audio, but  
20 Counsel wishes to ask the witness a few questions  
21 before we proceed further.

22 Go ahead.

23 BY MR. LEVINE:

24 Q. At the request of the Town's attorney,  
25 who wanted you to identify the voices on the tape,

1 do you identify your voice on that tape I just  
2 played?

3 A. Yes, sir.

4 Q. And did you also identify the voices of  
5 Justin Snow, Tommy Hollis, Ray Delucchi, and I  
6 believe the fire Chief Lewis and one other person?

7 THE ARBITRATOR: Mrs. Bostwick, I  
8 believe.

9 THE WITNESS: Mr. Alexander and  
10 Mrs. Bostwick.

11 BY MR. LEVINE:

12 Q. And Mrs. Bostwick. Okay.

13 A. Yes, sir.

14 Q. And you recognize all those voices.

15 A. Yes, sir.

16 MR. LEVINE: I'm going to now proceed to  
17 play, I guess. Can we go back off?

18 THE ARBITRATOR: All right. Let's go  
19 off the record again.

20 (An audio recording was  
21 played.)

22 THE ARBITRATOR: We're back on the  
23 record, having listened to the audio, which is  
24 Exhibit R, and that's the audio of the September 14  
25 meeting.

1 MR. LEVINE: Yes, September 14, 2012.

2 BY MR. LEVINE:

3 Q. Mr. Kohbarger, you had an opportunity to  
4 listen to what you said on September 14, 2012;  
5 correct?

6 A. Yes, sir.

7 Q. And that was the meeting wherein you  
8 gave Ray Delucchi and Tommy Hollis what is in the  
9 big binder as Exhibit 29 for Mr. Delucchi and for  
10 Mr. Hollis -- there's going to be an a identical one  
11 for Mr. Hollis; correct?

12 A. Yes, sir.

13 Q. I think for Mr. Hollis, it is -- I don't  
14 know if it's in here, but they are identical;  
15 correct?

16 A. It's in here. Both of the letters are  
17 here on Exhibit 29.

18 Q. All right. They're both Exhibit 29.

19 Now, during that meeting, you stated at  
20 approximately the 5:53 mark that without  
21 Dr. Slaughter allowing you to work under his  
22 license, you cannot work in the Town of Pahrump.  
23 That was your statement; correct?

24 A. I believe so, yes, sir.

25 Q. You also stated at 9:24 that because

1 Dr. Slaughter took you out from underneath his  
2 licensing, as you see, we have no choice but to put  
3 you on admin leave pending notice of termination;  
4 correct?

5 A. Yes, sir.

6 Q. And I think again at 14 -- approximately  
7 14:59, you state -- when they're asking you how can  
8 you do this, you state that when he pulled his  
9 sponsorship of you two, our hands are tied. We  
10 can't do anything. He is the medical director. You  
11 recall that?

12 A. Yes, sir.

13 Q. Would it be a fair statement, then, that  
14 you were going to terminate Mr. Delucchi and  
15 Mr. Hollis regardless of the content of Pat Songer's  
16 report because Dr. Slaughter pulled what you  
17 referred to as the sponsorship?

18 A. No. It was in conjunction with.

19 Q. Let's just suppose that report hadn't  
20 issued and -- or you disagreed with the content of  
21 the report but Dr. Slaughter says I'm pulling my  
22 sponsorship. Would you still have to terminate  
23 them?

24 A. I have no clue because doctor --  
25 Mr. Slaughter -- Mr. Slaughter's report stated what



1 it is.

2 Q. Okay.

3 A. I didn't have a problem with  
4 Mr. Slaughter's report.

5 Q. I understand, but when we look at the  
6 notice of termination, which you issued to them  
7 shortly thereafter --

8 A. Exhibit 30.

9 Q. Exhibit 30. There's one for  
10 Mr. Delucchi and one for Mr. Hollis. Let's use the  
11 one for Mr. Delucchi, since they're identical. You  
12 actually list two reasons, the revocation of the  
13 sponsorship as one reason; correct?

14 A. Yes, sir.

15 Q. And then also the findings of Mr. Songer  
16 as the other reason; correct?

17 A. Yes, sir.

18 Q. With regard to the first reason, the  
19 revocation of the sponsorship, was that under your  
20 control or Dr. Slaughter's control?

21 A. Are you asking who has revocation  
22 powers?

23 Q. Yes.

24 A. That would be Dr. Slaughter, a medical  
25 doctor -- medical director.

1 Q. Would it be --

2 A. He's also a medical doctor too.

3 Q. Would it be a fair statement that with  
4 regard to this issue of sponsorship, which is the  
5 first stated reason, that Mr. Delucchi and  
6 Mr. Hollis did not get any sort of pre-revocation  
7 hearing in front of Dr. Slaughter?

8 A. Repeat the question, please. I'm sorry.

9 Q. Would it be correct that before  
10 Dr. Slaughter pulled his sponsorship, which is  
11 reason number one for termination per your testimony  
12 in your letter, neither Mr. Delucchi nor Mr. Hollis  
13 got a pre-revocation hearing in front of  
14 Dr. Slaughter?

15 A. I don't believe they did, no, sir.

16 Q. They never had an opportunity to point  
17 out any flaws in Mr. Songer's report to  
18 Dr. Slaughter; correct?

19 A. I believe so, yes, sir.

20 Q. They didn't have an opportunity to point  
21 out that the entire report was issued without any  
22 written or recorded statement from the alleged  
23 complaining parties; correct?

24 A. Yeah. If that's what they stated, yeah.  
25 I guess they can state anything, sir. I -- I don't

1 know what they're going to state.

2 Q. They didn't have an opportunity to  
3 invoke the discretion of Dr. Songer not to take the  
4 action which he did; correct?

5 A. Dr. Songer?

6 Q. Dr. Slaughter. I'm sorry.

7 A. Repeat the question, please.

8 Q. They never had an opportunity to invoke  
9 Dr. Slaughter's discretion not to take the action  
10 which he did before he did it; correct?

11 A. Correct.

12 Q. Now, if we go and take a look at the  
13 policy that you referenced in Exhibit 29, that  
14 policy you cite for taking the action which you did,  
15 you say, "Town of Pahrump personnel policy under  
16 3.23(3) of the license/occupational certification  
17 policy" --

18 A. Yes, sir.

19 Q. That policy is going to be found in a  
20 different exhibit. It's going to be Exhibit 5. If  
21 I could direct your attention to page 49.

22 A. Page 49?

23 Q. Page 49 on Exhibit 5.

24 A. I'm there, sir.

25 Q. All right. You cite in Exhibit 29

1 policy 3.23.3 as justification; correct?

2 A. 3.23.3, yes, sir.

3 Q. And if we actually take a look at 3.23.3  
4 on page 49, that deals with a prospective  
5 candidate -- a prospective employee's licensing;  
6 correct?

7 A. Yes, sir, it does.

8 Q. It says:

9 "If a prospective candidate  
10 for a position cannot obtain the  
11 required license, certificate,  
12 permit, or occupational  
13 certification required for the  
14 job, s/he will not be given any  
15 further employment consideration.  
16 Any job offer, offer of  
17 promotion, or offer of transfer  
18 previously made will be  
19 withdrawn."

20 A. Actually, it's a typo. It should be  
21 3.23.2(3) is the subsection.

22 Q. And that's the section directly above;  
23 correct?

24 A. Yes, sir.

25 Q. And that one says:

1                    "In the event the employee  
2                    does not have a valid license,  
3                    certificate, permit, or  
4                    occupational certification, s/he  
5                    does not meet the job  
6                    requirements. Failure to meet  
7                    the job requirements will result  
8                    in termination."

9                    That's the one you wanted to reference.

10            A.        That's the one I should have referenced,  
11            sir, yes. It was a typo. My fault.

12            Q.        But in fact, on September 14, 2012 when  
13            you put them on paid administrative leave,  
14            Mr. Delucchi and Mr. Hollis did have valid licenses  
15            and certificates to act as paramedics issued by the  
16            State of Nevada; correct?

17            A.        Yes, sir.

18            Q.        They were never taken away by the State  
19            of Nevada; correct?

20            A.        Correct, sir.

21            Q.        And in fact, if we could turn to  
22            Exhibit V for a moment -- actually, let's back up.  
23            I want you to look at something before you take a  
24            look at that.

25                    Turn to the contract, Exhibit 6 for a

1 moment.

2 A. Yes, sir.

3 Q. If you turn to page 8, which is  
4 article 4, section 9, which is on page 8 of the  
5 contract.

6 A. Okay.

7 Q. It says:

8 "The Town shall comply with  
9 all standards, laws, regulations,  
10 and ordinances relating to the  
11 fire department."

12 Correct?

13 A. That's what it states, sir.

14 Q. And there are statutes, NRS  
15 Chapter 450B, that govern EMTs and paramedics;  
16 correct?

17 A. Top of my head, I do not know.

18 Q. Okay.

19 A. If you say so, I believe you.

20 Q. All right. Well, let's take a look at  
21 Exhibit V as in Victor.

22 A. Okay.

23 Q. I'm showing you NAC, Nevada  
24 Administrative Code, Chapter 450B entitled Emergency  
25 Medical Services.

1 A. Uh-huh.

2 Q. And if I could direct your attention  
3 to --

4 A. Are we talking about an NAC or NRS?

5 Q. NAC.

6 A. Okay. Because previously you said NRS.

7 Q. There's an NRS 450B and an NAC 450.

8 A. Okay.

9 Q. You understand that NRS is a statute and  
10 NAC is a regulation?

11 A. Uh-huh.

12 Q. You do understand that?

13 A. Yes.

14 Q. And I don't mean to be rude but --

15 A. No. That's okay. Go ahead.

16 Q. -- when you nodded and made that noise,  
17 the court reporter can't take it down.

18 A. Yes. I'm sorry.

19 Q. I'm going to prompt you from time to  
20 time.

21 A. No problem.

22 Q. It's old habit with us.

23 A. Fine.

24 Q. Just like a reflex.

25 And under the contract that we reviewed,

1 the Town has to comply with not only the laws, the  
2 statutes, but also the regulations; correct?

3 A. I believe so, yes.

4 Q. Okay. And 450B -- if I could direct  
5 your attention to 450B.505, and that --

6 A. Did you say 505, sir?

7 Q. 450B.505, which is going to be on  
8 page 23 of 49, utilizing the pages in the upper  
9 right-hand corner.

10 A. 23 of 51?

11 Q. 23 of 49.

12 A. I've got 23 of 51, sir.

13 Q. Are you looking at an NRS or the NAC in  
14 Exhibit V as in Victor?

15 THE ARBITRATOR: I also have page 23 of  
16 51.

17 MR. LEVINE: Okay. Then if you're on  
18 23 -- may I take a look?

19 THE ARBITRATOR: That's Exhibit V?

20 MR. LEVINE: Yeah. That's the NACs.

21 THE ARBITRATOR: Yes.

22 MR. LEVINE: Yes, it is.

23 BY MR. LEVINE:

24 Q. Then you need to flip to 505.

25 A. Which is 24 of 51, sir.



1 Q. I'm one page off, I think, 'cause when I  
2 printed it a second time, they sometimes have a  
3 cover page. Okay.

4 Do you have 450B.505 in front of you?

5 A. 450B.505, NAC; correct, sir?

6 Q. Yes.

7 A. "Permit required; appointment, powers  
8 and duties of medical director."

9 Q. Yes.

10 A. Yes, sir.

11 Q. Okay. I'm going to represent to you  
12 that this is the regulation which the Town is  
13 required, under the contract, to comply with as it  
14 relates to medical director.

15 Let me direct your attention to  
16 subsection 4. Do you see, "A medical director of a  
17 service or firefighting agency" --

18 A. Yes, sir.

19 Q. Subsection B says the medical director  
20 may:

21 "Recommend to the Health  
22 Division the revocation of  
23 licensure of personnel who  
24 provide emergency care."

25 Correct?

1           A.       4(b) says:

2                   "Recommend to the Health  
3                   Division the revocation of  
4                   licensure of personnel who  
5                   provide emergency care."

6                   Yes, sir.

7           Q.       And then if we go down to subsection E,  
8           it says he also may:

9                   "Suspend an emergency  
10                  medical technician within that  
11                  service or firefighting agency  
12                  pending review and evaluation by  
13                  the Health Division."

14                  Correct?

15           A.       Suspend -- E; correct?

16           Q.       Yes.

17           A.       Yes, sir, that's what it says.

18           Q.       Okay. So if we're to follow this  
19           section per the contract, Dr. Slaughter can  
20           recommend to the State the revocation and can  
21           suspend the employees pending consideration of that;  
22           right?

23           A.       That's what it -- I believe it states  
24           that, yes.

25           Q.       Would you agree with me -- I mean the

1 arbitrator can read it for herself -- there's  
2 nothing within those powers designated for a medical  
3 director that permits pulling of -- or mentions  
4 anything about pulling of sponsorship so as to  
5 result in termination?

6 MR. CAMPBELL: Objection. I think that  
7 calls for a legal conclusion, and it's purely  
8 argumentative too.

9 BY MR. LEVINE:

10 Q. Do you see anything in --

11 THE ARBITRATOR: Okay. Well, the  
12 regulation is in evidence, so whatever it says or  
13 doesn't say, I can discern from the document.

14 MR. LEVINE: Okay.

15 THE WITNESS: So no, I don't answer that  
16 question?

17 THE ARBITRATOR: Correct.

18 THE WITNESS: Thank you.

19 BY MR. LEVINE:

20 Q. So we're clear, at no point before they  
21 were put on unpaid admin leave pending termination  
22 was their license or certificate ever revoked;  
23 correct?

24 A. Repeat that again, please.

25 Q. At no point prior to Mr. Delucchi or

1 Mr. Hollis being put on unpaid leave pending  
2 termination did the health division ever suspend --  
3 or ever suspend, much less revoke, their license.

4 A. Correct.

5 Q. Now, during the September 14, 2012  
6 meeting which we heard the recording of, it was  
7 pointed out to you at approximately the 11:44 mark  
8 by -- I believe it was Mr. Hollis that there was no  
9 protocol for what happened to them up on the road,  
10 being flagged down like that. Do you recall that?

11 A. I believe that's what he stated --  
12 said -- stated.

13 Q. And you also stated at 13:44 that this  
14 was a long process. We start at 8:30. We went  
15 through it page by page through every policy. Do  
16 you recall that?

17 A. Yes, I do.

18 Q. So your review page by page of every  
19 policy would have validated what Mr. Hollis was  
20 pointing out to you, that there was, in fact, no  
21 protocol adopted by the Town of Pahrump to address  
22 what they faced that evening up on the mountain;  
23 correct?

24 A. No, sir.

25 Q. There is a protocol for how to handle

1 being flagged down by a person?

2 A. No. You stated policy. Policy and  
3 protocol are two different things, sir. You asked  
4 if there was a policy on it, and Mr. Delucchi said  
5 there was no -- or Mr. Hollis said there was no  
6 protocol. Protocol and policy are two different  
7 things, sir.

8 Q. Okay. Notwithstanding the difference  
9 between policy and protocol, Mr. Hollis was correct.  
10 There was no protocol that has ever been adopted by  
11 the Town of Pahrump to address what they faced up on  
12 the mountain; correct?

13 A. There's no protocols for three quarters  
14 of what they address. If we wrote down a protocol  
15 for everything that a firefighter/EMT-I or a  
16 paramedic would come across, you'd be literally  
17 about a million-page manual at least, because there  
18 are protocols. There are different incidents that  
19 people go through on a daily basis that one  
20 firefighter may happen and another firefighter won't  
21 happen in his whole 30-year career. So if you want  
22 us to do protocols and write down every protocol, it  
23 would be literally a million pages long.

24 Q. Okay. So when two firefighters face an  
25 heretofore situation that they've never encountered

1 before and which they have no training, how are they  
2 to proceed?

3 A. Are you asking me, in my professional  
4 opinion, on how they proceed?

5 Q. It's discretionary. They're supposed to  
6 exercise judgment; correct?

7 A. Correct.

8 Q. And in fact, if you take a --

9 A. You didn't allow me to answer the  
10 question. You asked me a question.

11 Q. I think you answered it with "correct."

12 A. No. You asked me a question on how they  
13 should handle that, and I asked you are you asking  
14 me in a professional opinion on how they should have  
15 handled that.

16 Q. And then I said they're supposed to  
17 exercise discretion and good judgment, and you said  
18 correct.

19 A. Okay.

20 Q. Okay. In fact, that's what the rules  
21 and regulations provide for; correct?

22 A. You use your best judgment.

23 Q. Okay. It's discretion and --

24 A. It's discretion.

25 Q. Okay. And you are aware that the Town

1 has protocols regarding safety; correct?

2 A. Protocols or policies?

3 Q. Both.

4 A. Okay. Where are they at?

5 Q. Well, do you recall protocols regarding  
6 safety?

7 A. I'm sure there are some protocols  
8 involving safety.

9 Q. Do you know what Firefighter Hollis and  
10 Delucchi were taught or instructed with regard to  
11 the issue of their safety?

12 A. No, I do not.

13 Q. Would it surprise you that they are  
14 trained and it's reinforced that their personal  
15 safety comes first?

16 A. That probably would be good, correct.

17 Q. And if they ascertain that there is a  
18 threat to their personal safety, they are justified  
19 in holding back from a situation or retreating from  
20 a situation; correct?

21 A. That's a judgment call at the time. I  
22 can't make that judgment call.

23 Q. And that's a judgment call that has to  
24 be made by the people at the time at the scene;  
25 correct?

1 A. Uh-huh.

2 Q. Is that a yes?

3 A. Yes.

4 Q. And the people who are at the scene in  
5 the early morning hours of May 25 were Mr. Delucchi  
6 and Mr. Hollis; correct?

7 A. Yes.

8 Q. And per your prior testimony, you never  
9 saw any written or recorded statement by anybody  
10 else who was there; correct?

11 A. No. I stated that I heard the recording  
12 on my phone, but other than that, no, sir.

13 Q. Now, you were present on May 31, 2012  
14 when both Mr. Delucchi and Mr. Hollis were  
15 interviewed; correct?

16 A. The second time around, yes, sir.

17 Q. And that was, I think, Exhibit 8 and  
18 Exhibit 9, which you previously identified; correct?

19 A. Yes, sir.

20 Q. And in those interviews, they told you  
21 they were concerned for their safety; correct?

22 A. I'd have to go back and review it, sir.  
23 What page are you referring to?

24 Q. Would you like me to direct your  
25 attention to it? Am I correct, then, that you don't



1 have a specific recollection?

2 A. That was a while ago. There's a lot of  
3 stuff.

4 Q. Okay. That's fair.

5 A. If it's in here, sir, I would be glad to  
6 read it and say yes or no.

7 Q. That's fine. I'll find it for you.

8 A. Thank you.

9 Q. Turn to Exhibit 8, which is  
10 Mr. Delucchi's statement?

11 A. Yes, sir, I'm on.

12 Q. And on page 4 is where he recounts to  
13 you what occurred.

14 A. Page 4. I'm there, sir. Top of the  
15 page it, says "BK: Clear?"

16 Q. Yes.

17 A. Yes, sir.

18 Q. I'd like you to you go maybe a little  
19 bit down. You'll see "RD:" It begins with "okay,"  
20 and he explains what happens.

21 A. RD colon. Oh, yes, sir.

22 Q. Okay.

23 A. Starts with, "Okay. As I stated" --

24 Q. I don't think I need to read it out loud  
25 for the record, nor do you, but I'd like you to read

1 it silently.

2 A. All right. Sir, I read this first  
3 paragraph. Do you want me to read the second  
4 paragraph?

5 Q. Yes, sir.

6 A. Okay, sir. Done, sir.

7 Q. Okay. So does that refresh your  
8 recollection that he told you that first he thought  
9 that the driver of the car got so close to Medic 3  
10 that he feared it was going to hit Medic 3 and cause  
11 an accident?

12 A. Yes, sir.

13 Q. He also told you that after they pulled  
14 over and they turned on the lights, he saw somebody  
15 running up to the car, and at this point, he was  
16 starting to get nervous.

17 A. Uh-huh.

18 Q. For the benefit of the court reporter --

19 A. Yes, sir. Sorry.

20 Q. He told you that he put the window down  
21 a little bit and said, sir, back away from the  
22 vehicle and tried to calm the guy down; correct?

23 A. Yes, sir.

24 Q. He told you that they got out of the  
25 vehicle, walked onto the side, and they cautiously

1 approached the vehicle, staying five or ten feet  
2 away; correct?

3 A. Yes, sir.

4 Q. And then it says, "At that point, he had  
5 gotten in his" -- and I think that's a typo. It  
6 should be "car" as opposed to "care" -- "and started  
7 yelling again." Correct?

8 A. Yes, sir.

9 Q. You'd agree with me that's a typo and  
10 that that should be car?

11 A. I would hope so.

12 Q. And again he told you that they kept  
13 trying to calm him down; correct?

14 A. Yes.

15 Q. And that he kept dropping foul language  
16 and was screaming and yelling.

17 A. Yes, sir.

18 Q. And then he said:

19 "At that point, my partner  
20 and I took a few steps back  
21 because at that point, we felt it  
22 wasn't safe anymore."

23 Correct.

24 A. Yes, sir.

25 Q. And then he told you that the driver put

1 the car in gear and drove away; correct?

2 A. Yes, sir.

3 Q. And if that statement of facts is  
4 accurate, Mr. Hollis and Mr. Delucchi never had an  
5 opportunity to assess the person in the front seat;  
6 correct?

7 A. Yes, sir.

8 MR. CAMPBELL: Objection. I think  
9 that's argumentative.

10 THE ARBITRATOR: Your objection is  
11 noted. I'll consider it when I read the record.

12 Go ahead.

13 BY MR. LEVINE:

14 Q. In fact, you also were present when  
15 Mr. Hollis was interviewed; correct?

16 A. Correct, sir.

17 Q. Actually, before we get to Hollis, let's  
18 go to page 17?

19 A. By pages aren't numbered.

20 THE ARBITRATOR: Nor are mine.

21 MR. LEVINE: I had to hand number them  
22 because these were provided by the Town, so I hand  
23 numbered mine. It would be the third from the end.

24 THE WITNESS: Thank you.

25 MR. LEVINE: I have 19 pages total.

1 THE WITNESS: It starts with "SL: But  
2 you recognize" --

3 BY MR. LEVINE:

4 Q. Yes.

5 I'm going to wait for the arbitrator to  
6 get there.

7 A. Yes, sir.

8 Q. Now, if we go about three quarters of  
9 the way down the page, you asked Lieutenant Moody if  
10 Lieutenant Moody had any questions. Do you see  
11 that?

12 A. Yes. "BK: Okay. Lieutenant Moody, do  
13 you have any questions you'd like to ask?"

14 Q. And Lieutenant Moody followed up with:

15 "Just a few. Earlier when I  
16 interviewed you, you said you  
17 were nervous when the people came  
18 up to you, and then you said that  
19 you noticed two people in the  
20 vehicle, and then you stated that  
21 you were in fear for your life."

22 And then you were present when he  
23 answered the question to Lieutenant Moody; correct?

24 A. Correct.

25 Q. He said:

1 "When I was driving...when I  
2 was driving and when he got  
3 really close to me, I thought he  
4 was going to...I thought he was  
5 going to hit the medic unit, I  
6 said yes...I fear, and that's,  
7 and then I told my partner we're  
8 going to pull over. And then he  
9 came up, and I didn't know what  
10 to expect...who's in the car,  
11 what it was, are we going to get  
12 robbed, was it somebody that  
13 needed help, I had no idea what  
14 to expect."

15 That's what he told you was going  
16 through his mind; correct?

17 A. Yes, sir.

18 Q. And when you interviewed Mr. Hollis,  
19 Mr. Delucchi was not present; correct?

20 A. Repeat, please.

21 Q. When you interviewed Tommy Hollis,  
22 Mr. Delucchi was not present; correct?

23 A. Oh, correct, sir.

24 Q. And in that separate interview with  
25 Mr. Hollis, he recounted to you substantially the

1 same concerns and fears; correct?

2 A. If you say so. If it's in here, I  
3 believe you, sir.

4 Q. Okay. Just -- here, I'll make it easy  
5 on you. Take a look at page 1 and 2 of Mr. Hollis's  
6 interview in Exhibit 9.

7 A. I'm there, sir.

8 Q. Starting halfway down the page, TH,  
9 which Tommy Hollis which is all I can tell you and  
10 then please read through the end of page 2.

11 A. All right. Sir.

12 Q. Without having to walk through you  
13 through step-by-step, would you agree with me that  
14 Mr. Hollis also recounted to you that he was  
15 concerned for both of their safety?

16 A. Yes.

17 Q. He actually told you that he told Ray  
18 Delucchi to stay back at one point; correct?

19 A. Yeah. He said, "Be careful, we don't  
20 know what's going to happen here" as they were  
21 walking, at the top of page 2.

22 Q. Right.

23 A. Mr. Hollis had to convince Mr. Delucchi  
24 to pull over too.

25 Q. And he told you at the same time, line

1 safety and his life safety are the most important  
2 things until they figure out what's going on;  
3 correct?

4 A. Did you say line safety or life safety?

5 Q. It says life safety. I'm sorry. "My  
6 life safety and his life safety are the most  
7 important thing until we figure out what's going  
8 on." Right? About two thirds of the way down the  
9 page.

10 A. On the first page or second page, sir?

11 Q. Page 2.

12 A. Yes, sir. I found that. "My life  
13 safety and his life safety are the most important  
14 thing until we figure out what's going on." Yes,  
15 sir.

16 Q. And then he told you that the driver  
17 didn't give them an opportunity to and that the  
18 entire encounter lasted maybe only a minute or two  
19 before the driver put the car in gear and drove  
20 away.

21 A. Yeah, a minute or two, drove away, yes.

22 Q. Now, we've established already that you  
23 never spoke to James or Brittanie nor reviewed any  
24 written statement by them, or recording; correct?

25 A. Correct.



1 Q. You would acknowledge for us --

2 THE ARBITRATOR: Wait. I think he --

3 THE WITNESS: I said correct. It was  
4 turned over to a third party, and I was not  
5 involved.

6 MR. LEVINE: Right.

7 THE ARBITRATOR: Let's try not to  
8 overlap.

9 MR. LEVINE: I'm sorry.

10 BY MR. LEVINE:

11 Q. But even after you received Mr. Songer's  
12 report, he didn't provide you with any written  
13 statement or recorded statement; correct?

14 A. Not that I saw, sir.

15 Q. And you would acknowledge for us that  
16 many complaints made against the Town of Pahrump and  
17 its personnel and its firefighters are bogus;  
18 correct?

19 A. We get bogus complaints a lot, yes, sir.

20 Q. As a matter of fact, you acknowledged  
21 that in Mr. Hollis's interview; correct?

22 A. If you say so, I believe you. What page  
23 are you on?

24 Q. By my numbering, 10 out of 11.

25 A. Second to the last; is that correct?

1 Q. Second-to-the-last page?

2 A. How far down?

3 Q. "BK: Are most of them bogus? Yes." Do  
4 you see that?

5 A. Yes, most of them are bogus, yes.

6 Q. That was your statement that you made  
7 during the recorded interview.

8 A. Correct, sir.

9 Q. Just so the record is clear, the term  
10 "bogus" was used by you and not me. That was your  
11 term, "bogus."

12 A. You want me to read what I stated?

13 Q. I think we can all see it.

14 A. Okay.

15 Q. You made the decision to terminate at  
16 least with regard to the Songer report? Let me  
17 rephrase that.

18 You made the decision to follow the  
19 recommendations of the Songer report.

20 A. Yes.

21 Q. But you couldn't make a determination as  
22 to whether this complaint was bogus so as to  
23 determine whether to follow the Songer report if you  
24 didn't talk to the complainants or at least see a  
25 written or recorded statement; correct?

1 MR. CAMPBELL: Objection. That clearly  
2 is argumentative. I think that mischaracterizes his  
3 previous testimony.

4 THE ARBITRATOR: Yeah, I --

5 MR. LEVINE: All right. I'll withdraw  
6 it.

7 BY MR. LEVINE:

8 Q. You indicated or you were questioned  
9 during direct examination regarding the scene where  
10 Medic 3 was pulled over on Highway 160. Do you  
11 recall that?

12 A. Yes, sir.

13 Q. You indicated there was cell service as  
14 of last Monday. Do you recall that?

15 A. Yes, sir.

16 Q. Am I correct that you cannot testify as  
17 to what the cell service was for different providers  
18 in May of 2012?

19 A. I can testify on my behalf as to what  
20 the cell service was for Sprint in May.

21 Q. Okay. But do you know whether or not  
22 Tommy or Ray had Sprint?

23 A. I have no clue, sir.

24 Q. Okay. You also indicated that you never  
25 tested the radio so you don't know if it was in a

1 radio dead zone. Do you recall that testimony?

2 A. Yes, I did say that.

3 Q. Did you receive an interim report from  
4 the chief that addressed that subject?

5 A. I don't recall if I did show it, and  
6 I'll look at it.

7 Q. All right. Let me turn your attention  
8 to first Exhibit -- first take a look at Exhibit D  
9 as in dog.

10 A. Yes, sir, I'm here.

11 Q. Have you seen this document before?

12 A. Yes, sir.

13 Q. And this was prepared by Chief Lewis for  
14 you before you pulled him off the complaint and  
15 turned it over to Mr. Songer; correct?

16 A. I believe so, yes, sir.

17 Q. Okay. Please take a look at Exhibit E.

18 A. E?

19 Q. E, which is a June 7, 2012 external  
20 investigation status. Do you see that?

21 A. Yes.

22 Q. Is that a kind of a status report given  
23 to you by the chief? Let me assist you. It says:

24 "The investigation of the  
25 external complaint is about

1                   50 percent done so I will give  
2                   you a brief overview."

3                   You were the person who originally gave  
4                   direction to the chief to have this matter  
5                   investigated by Lieutenant Moody and himself;  
6                   correct?

7           A.       Was he speaking to me?

8           Q.       I'm asking you did you ever receive this  
9                   external investigation status report?

10          A.       I don't recall if I did or not, sir. It  
11                   doesn't look familiar.

12          Q.       Okay. Same printing and font as  
13                   Exhibit D, which you've acknowledged is the external  
14                   complaint document prepared by the chief; correct?

15          A.       I don't know. I'm not an expert on  
16                   fonts.

17          Q.       Okay. So you don't know whether you saw  
18                   this or not.

19          A.       I don't recall seeing this and I -- no.

20          Q.       Okay.

21          A.       It doesn't have my name anywhere in  
22                   here, and usually when Chief Lewis gives me stuff,  
23                   it's all laid out, and it's directed to me.

24          Q.       If we go back to Exhibit D, it doesn't  
25                   have your name on it, but you've already

1 acknowledged that you believe this was given to you  
2 by the chief; correct?

3 A. Yeah. Yes, I did make that statement  
4 but --

5 Q. Okay. Let's go to Exhibit E. I'd like  
6 you to read -- this is short -- out loud the very  
7 last sentence in Exhibit E.

8 A. Okay.

9 "They were likely about ten  
10 minutes outside of radio or cell  
11 phone range at the time of the  
12 incident."

13 Q. And in fact, Mr. Hollis told you in his  
14 interview that there were problems with the radio at  
15 that location; correct?

16 A. I believe he stated something to that  
17 effect, yes.

18 Q. Since you've acknowledged it, I won't  
19 make you go back and find it.

20 Mr. Songer, I'll represent to you,  
21 interviewed Mr. Hollis and Mr. Delucchi on July 31,  
22 2012. Now, using that date as a frame of reference,  
23 will you acknowledge for us that in the few weeks  
24 leading up to that, there were some very acrimonious  
25 exchanges in the press between you and Local 4068

1 and, in particular, Mr. Delucchi?

2 A. If you say so. I -- you know, show me  
3 what you're talking about, please.

4 Q. All right. If I could turn your  
5 attention to Exhibit G as in George.

6 A. I'm there, sir.

7 Q. Okay. On June 28, you wanted to reopen  
8 negotiations on the subject of wages; correct?

9 A. I don't know where it says June 28 on  
10 here.

11 Q. Take a look at the bottom.

12 A. Oh, at the bottom, yes, sir.

13 Q. Like most E-mails, sometimes the earlier  
14 ones start at the back and go forward.

15 A. Got it. I respectfully request -- yes,  
16 sir.

17 Q. Okay. And on July 3, Mr. Delucchi, as  
18 president, respectfully declined; correct?

19 A. Correct, sir.

20 Q. As of July 22, the IAFF and Mr. Delucchi  
21 put out a press release regarding what the Town was  
22 attempting to do, threatening layoffs; correct?

23 A. I don't.

24 Q. That would be Exhibit H.

25 A. Oh, Exhibit H. I believe this is what

1 they sent to the press, yes, sir.

2 Q. Okay. And two days -- three days later,  
3 you gave an interview to the Pahrump Valley Times;  
4 correct? Exhibit I.

5 A. Yes, sir.

6 Q. Okay. And in that, if we could go  
7 towards the bottom of the page -- actually, the last  
8 paragraph. If this article is accurate, you stated:

9 "Up to about April of this  
10 year, the fire department got a  
11 new union president who, by his  
12 own words, has been meeting with  
13 the union presidents in North  
14 Las Vegas and Las Vegas and is  
15 following their lead. To heck  
16 with the town, to heck with  
17 everybody else, we are the union.  
18 We're going to flex our muscles,  
19 and we're going to get what we  
20 want."

21 That was the quote attributed to you;  
22 correct?

23 A. That was the quote attributed to me.

24 Q. That was your quote; correct?

25 A. I don't know if that was my quote.



1 Q. But the new union president referenced  
2 there would be Mr. Delucchi; correct?

3 A. I believe so, yes, sir.

4 Q. Okay. As a matter of fact, if we go to  
5 the second page on Exhibit I, it says:

6 "Mr. Kohbarger was referring  
7 to IAFF Union President Ray  
8 Delucchi, who issued a press  
9 release on Sunday."

10 A. Yes, sir.

11 Q. Then you criticized, a little further  
12 down, Mr. Delucchi by name, saying:

13 "Kohbarger, meanwhile, said  
14 he believed that Delucchi is not  
15 at all interested in working with  
16 the town to try and resolve  
17 matters sensibly."

18 Right?

19 A. That's what it's written here.

20 Q. And then it gives you a quote:

21 "'In the three and a half  
22 months under his leadership, they  
23 have filed six grievances. The  
24 four years previous to that,  
25 there was six grievances filed.

1 Out of those six grievances  
2 recently filed, three of them are  
3 already scheduled to go to  
4 arbitration. In the past, only  
5 two went to arbitration. Former  
6 union president Tim Murray came  
7 into office, sat down, and  
8 discussed a lot of this stuff.  
9 This current president just wants  
10 to flex muscles and say the heck  
11 with the town,' he said."  
12 That was your quote; correct?  
13 A. That's what's written in the paper, sir.  
14 Q. Okay. Are you disputing that you made  
15 comments like that and to that effect?  
16 A. No, I'm not disputing -- the last  
17 sentence, I don't know. "This current president  
18 just wants to flex muscles and say the heck with the  
19 town" -- I don't recall saying that. And also I  
20 believe it was seven grievances that I stated, not  
21 six.  
22 Q. In fact, you actually went on TV and  
23 reiterated those same accusations, didn't you?  
24 A. Probably, yes, I did, actually,  
25 Channel 46.

1 Q. Okay. I'd like to -- that's the video  
2 I'd like to play.

3 THE ARBITRATOR: All right. Let's go  
4 off the record to play the video.

5 (A video recording was played.)

6 THE ARBITRATOR: Back on the record.

7 We've just all seen and heard the video,  
8 which is which exhibit?

9 MR. LEVINE: That is Exhibit P as in  
10 Paul.

11 THE ARBITRATOR: Thank you. Please  
12 proceed.

13 BY MR. LEVINE:

14 Q. Those were your comments; correct?

15 A. Except for the heck with the town, yes.

16 Q. Okay. You accused Mr. Delucchi publicly  
17 of making decisions unilaterally without even  
18 involving the rest of the union; correct?

19 A. Yes, sir.

20 Q. You criticized Mr. Delucchi for the  
21 filing of grievances; correct?

22 A. Yes, sir.

23 Q. You understand that the union has a duty  
24 of fair representation to pursue grievances they  
25 determine to be meritorious?

1 A. Yes, sir.

2 Q. So why would you criticize Mr. Delucchi  
3 for filing grievances, which is the union's  
4 responsibility?

5 A. Because in the past, as I stated,  
6 Mr. Murray had no problem coming in and sitting down  
7 and talking about all these issues to try and work  
8 them out before he went to the grievance process.

9 Q. You didn't like the way that  
10 Mr. Delucchi handled himself as president of  
11 Local 4068; correct?

12 A. I didn't like the way he kept filing  
13 grievance after grievance after grievance after  
14 grievance, no, sir, I did not.

15 Q. And in fact, prior to your termination  
16 or, actually, prior to putting Mr. Delucchi and  
17 Mr. Hollis on paid admin leave pending --

18 THE ARBITRATOR: I thought it was  
19 unpaid. Was it paid?

20 MR. LEVINE: I'm sorry. Unpaid.  
21 Unpaid. I apologize.

22 BY MR. LEVINE:

23 Q. Unpaid admin leave pending termination,  
24 in fact, there was a vote of no confidence issued by  
25 Local 4068 of the fire chief; correct?

1 A. Yes, sir.

2 Q. If you could turn Exhibit L, there is a  
3 document dated September 4 and a document dated  
4 September 6, which is three pages in?

5 A. Okay.

6 Q. This was sent to you; correct?

7 A. Yes, sir.

8 Q. And it was a vote of no confidence by  
9 the union of the fire chief; correct?

10 A. That's what it states.

11 Q. And this was -- September 6 is eight  
12 days before you put Mr. Delucchi on unpaid leave  
13 pending termination; correct?

14 A. I believe so.

15 MR. LEVINE: Arbitrator's indulgence.  
16 May I have a quick break to consult with my clients  
17 to make sure I haven't missed anything?

18 THE ARBITRATOR: All right. We'll be  
19 off the record for a moment.

20 (A discussion was held off the  
21 record.)

22 THE ARBITRATOR: Back on the record.  
23 Does the Union have any additional  
24 questions?

25 MR. LEVINE: None for Mr. Kohbarger.

1 THE ARBITRATOR: And will there be any  
2 redirect?

3 MR. CAMPBELL: Yes, there will. We ask  
4 for the arbitrator's indulgence and the court  
5 reporter's indulgence to try to finish this right  
6 now. Mr. Kohbarger has to get back to work in North  
7 Las Vegas.

8 THE ARBITRATOR: I think that's a  
9 reasonable request.

10 MR. LEVINE: I have no problem.

11 THE ARBITRATOR: Let's see if we can  
12 finish it.

13  
14 REDIRECT EXAMINATION

15 BY MR. CAMPBELL:

16 Q. Mr. Kohbarger, during the  
17 cross-examination by Mr. Levine, he tried to paint  
18 you in the corner about some unfair labor practices.  
19 Do you remember that, those questions?

20 A. Yes.

21 Q. Okay. To your knowledge, did the union  
22 ever file any unfair labor practices with the  
23 employees management relations board during your  
24 tenure?

25 A. No, sir.

1 Q. About any of this stuff?

2 A. No, sir.

3 Q. Can you look at Exhibit Number 11.

4 A. Yes, sir.

5 Q. Who is Toni Glines?

6 A. She was an administrative assistant for  
7 Chief Lewis and the fire department.

8 Q. Have you seen this document also?

9 A. I believe I saw this at the beginning of  
10 the -- of the investigation.

11 Q. Okay. And it has a lot more detail  
12 about the telephone call when Toni Glines called the  
13 mother-in-law back; right?

14 A. Yes, sir.

15 Q. Okay. And this is an official town  
16 record, to your knowledge?

17 A. I believe so.

18 Q. Okay. And then you said you also -- you  
19 also listened to a separate telephone message from  
20 the mother-in-law.

21 A. Yes, sir.

22 Q. Okay. And so that -- between -- it  
23 wasn't just Exhibit Number 10 that was the extent of  
24 the breadth of the knowledge on the initial call.  
25 It was -- it was Exhibit Number 11 and your own

1 personal --

2 MR. LEVINE: Objection to form.

3 Leading.

4 THE ARBITRATOR: I think he's just  
5 trying to go fast so that we can all go to lunch.

6 MR. LEVINE: Fair enough.

7 THE WITNESS: Yes, sir.

8 BY MR. CAMPBELL:

9 Q. Can you look at Exhibit Number 18,  
10 please.

11 A. 8 or 18?

12 Q. 18.

13 A. 18. Yes, sir.

14 Q. And this is -- this is the interview  
15 notes of the actual interviews that Lieutenant Moody  
16 and Fire Chief Lewis conducted with the  
17 complainants, the Choyces, in this matter; right?

18 A. I believe so, yes, sir.

19 Q. And I'm not going to ask you to read  
20 through that --

21 MR. LEVINE: I'm sorry. Which exhibit  
22 is it?

23 MR. CAMPBELL: It's Exhibit Number 18.

24 MR. LEVINE: Could you ask that question  
25 again.



1 MR. CAMPBELL: Yeah.

2 BY MR. CAMPBELL:

3 Q. These are the interview notes from  
4 Lieutenant Moody and Chief Lewis?

5 A. Interview notes or investigative notes.

6 Q. Well, very good. I have notes. It  
7 actual -- it talks about actually interviewing the  
8 Choyces too; right?

9 A. Yes.

10 Q. Okay. And so those notes -- these notes  
11 would have been part of the file available to  
12 Mr. Songer?

13 A. Yes, sir.

14 Q. And without asking you in great detail  
15 and reading through every single sentence, as in  
16 your cross-examination, would you agree with me that  
17 these interview notes reflect a far different story  
18 as to what happened up on that mountain at the time  
19 of this incident as opposed to what Mr. Delucchi and  
20 Hollis said in their interviews?

21 MR. LEVINE: I'll stipulate that it does  
22 to speed things up.

23 MR. CAMPBELL: Okay.

24 THE ARBITRATOR: Okay.

25 THE WITNESS: Thank you.

1 BY MR. CAMPBELL:

2 Q. Mr. Levine asked you a question about  
3 how would you have handled the situation. What  
4 would your interpretation of how to handle the  
5 situation was, and you were cut off; right? You  
6 remember that?

7 A. Yes, sir.

8 Q. You were a trained police person for a  
9 while; right?

10 A. Yes.

11 Q. How long?

12 A. Eight years.

13 Q. And I know that as a police officer, you  
14 encounter a lot of situations involving your safety.

15 A. Yes, sir.

16 Q. Based on that experience, if you were  
17 truly concerned about your safety because of an  
18 incident like this, would you call for backup or  
19 call some third party to report it?

20 A. Yes, sir.

21 Q. That would be standard protocol,  
22 wouldn't it?

23 A. Yes, sir.

24 Q. And if there was no cell phone range --  
25 if there was no cell phone or mobile service until

1 you got ten minutes down the road, would you call  
2 that ten minutes later?

3 A. Repeat the question, please.

4 Q. Yeah. If there was no cell phone  
5 service when you wanted to make that call for  
6 backup, would you drive down the road and make that  
7 call ten minutes later when there was cell phone  
8 service?

9 A. I would have continued operating the  
10 vehicle until I got cell service or radio service,  
11 yes, sir.

12 Q. We've heard about these -- listened to  
13 the news interview and the articles and seen all the  
14 papers and things. This was about the time that Pat  
15 Songer was doing his report; right?

16 A. Yes, sir.

17 Q. Did you ever call up Pat Songer and say,  
18 oh, by the way, I've got a real problem with  
19 Delucchi, make sure you write this report so that we  
20 terminate him?

21 A. No, sir.

22 Q. Did you ever call Dr. Slaughter and say,  
23 hey, I got a real problem with Ray Delucchi acting  
24 as union president, I think you should pull your  
25 sponsorship of his license?

1           A.       No, sir.

2           Q.       Wouldn't it be easier, if you really had  
3 a vendetta against Delucchi, to have done this  
4 investigation by yourself and with Chief Lewis as  
5 your investigator?

6           A.       It would have been easier if I would  
7 have done it myself, yes.

8                   MR. CAMPBELL: That's all I have.

9                   THE ARBITRATOR: Anything further?

10                  MR. LEVINE: Very briefly.

11

12                               RECROSS-EXAMINATION

13 BY MR. LEVINE:

14           Q.       This phone message you claim you  
15 listened to that has more detail than Exhibit 10.  
16 You did not preserve that for the investigation, did  
17 you?

18           A.       No, sir. I had contacted -- if I may, I  
19 contacted Chief Lewis and asked him, hey, I got a  
20 message. He goes, I got the exact same message. It  
21 was from the lady. And I go, yes, it is. And it  
22 wasn't the exact same, I found out later, so I  
23 deleted it.

24           Q.       Okay. When we --

25           A.       My mistake.

1 Q. When we take a look at Exhibit --  
2 I think this might be one where we  
3 duplicate. I had it as Exhibit D, and I think you  
4 had a different one, Rick.

5 A. 18.

6 Q. Is that 18?

7 A. Yes, sir.

8 Q. We'll use 18 for the moment. They're  
9 duplicated.

10 You were shown this, and he directed  
11 your attention to what the Choyces purportedly said;  
12 correct?

13 A. Repeat -- what who said, please.

14 Q. I'm sorry. Mr. Campbell directed you to  
15 some statements that allegedly the Choyces made;  
16 correct?

17 A. I didn't read 'cause you stipulated to  
18 it.

19 Q. Okay. Would you concede that what's in  
20 Exhibit 18, then, is not the Choyces' words, it's  
21 the chief's words?

22 A. I didn't read it all because you  
23 stipulated.

24 Q. Fair enough. The chief is going to be a  
25 witness. I'll ask him.

1 A. Thank you, sir.

2 Q. You offered brief testimony as to how  
3 you would have handled the situation. That would be  
4 as a peace officer, a cop; correct?

5 A. Yes, sir, I was a police officer.

6 Q. And as a police officer, you are armed;  
7 correct?

8 A. Yes, sir.

9 Q. The firefighters are not; correct?

10 A. Well, some of them are. Some of them  
11 aren't.

12 Q. On duty?

13 A. Yes, sir.

14 Q. Do they carry service weapons as part of  
15 the regular course of duty?

16 A. You asked firefighters. As a Lincoln  
17 Heights manager in Lincoln Heights, Ohio, my  
18 firefighters were trained -- cross-trained, and yes,  
19 they did carry.

20 Q. Okay.

21 A. So you asked firefighters. You didn't  
22 ask Pahrump firefighters, sir.

23 Q. I think you know we're interested in  
24 Pahrump firefighters.

25 A. You didn't say that.

1           Q.       The Pahrump firefighters -- Mr. Delucchi  
2           and Mr. Hollis are not armed; correct?

3                   THE ARBITRATOR: I'm sorry. Are you  
4           saying they served in dual capacity as police  
5           officers and firefighters?

6                   THE WITNESS: They were cross-trained,  
7           yes, ma'am.

8                   THE ARBITRATOR: So they were actually  
9           doing kind of a hybrid job classification?

10                  THE WITNESS: Yes.

11                  THE ARBITRATOR: Thank you.

12           BY MR. LEVINE:

13                  Q.       But that is not the case with  
14           Mr. Delucchi and Mr. Hollis; correct?

15                  A.       Correct.

16                  Q.       They are not trained as peace officers;  
17           correct?

18                  A.       To my knowledge, neither of them are.

19                  Q.       They're not POST certified, peace  
20           officer standard and training.

21                  A.       Again, to my knowledge, they are not.

22                  Q.       And to your knowledge, they're not  
23           armed.

24                  A.       To my knowledge they are not armed.

25                  MR. LEVINE: Nothing further.

1 THE ARBITRATOR: Anything further?

2 MR. CAMPBELL: I'm done.

3 THE ARBITRATOR: All right. Thank you  
4 very much and have a safe trip back to North  
5 Las Vegas.

6 We'll be off the record for lunch.

7 (A luncheon recess was taken at  
8 1:06 P.M.)

9 \* \* \* \* \*

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## **EXHIBIT “2”**

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Meet the Authors Behind the Words

in·ves·ti·gate

verb \in-'ves-tə-'gāt\

: to try to find out the facts about (something, such as a crime or an accident) in order to learn how it happened, who did it, etc.

: to try to get information about (someone who may have done something illegal)

in·ves·ti·gat·ed in·ves·ti·gat·ing

Full Definition of INVESTIGATE

g+1

Like

transitive verb

: to observe or study by close examination and systematic inquiry

intransitive verb

: to make a systematic examination; *especially* : to conduct an official inquiry

- in·ves·ti·ga·tion *noun*
- in·ves·ti·ga·tive *adjective*
- in·ves·ti·ga·tor *noun*
- in·ves·ti·ga·to·ry *adjective*

See investigate defined for English-language learners »  
See investigate defined for kids »

Examples of INVESTIGATE

The police are still *investigating* the murder.The accident was thoroughly *investigated*.The manager promised to *investigate* when we pointed out an error on our bill.He was *investigated* for his involvement in the incident.

Origin of INVESTIGATE

Latin *investigatus*, past participle of *investigare* to track, investigate, from *in-* + *vestigium* footprint, track

First Known Use: circa 1510

Related to INVESTIGATE

Synonyms

delve (into), dig (into), examine, inquire (into), explore, look (into), probe, research

[+] more

STAY CONNECTED

1 Case No. CV35969

2 Dept. No. 1

FILED  
FIFTH JUDICIAL DISTRICT COURT

AUG 15 2014

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3  
4  
5  
6 IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
7 IN AND FOR THE COUNTY OF NYE  
8

9 RAYMOND DELUCCI and TOMMY  
HOLLIS,

10 Plaintiff,

Case No. CV35969

11 v.

Dept. No. 1

12 PAT SONGER and ERICKSON, THORPE  
13 & SWAINSTON, LTD.,

14 Defendants.  
15

16 **DEFENDANT ERICKSON, THORPE & SWAINSTON'S SUPPLEMENTAL BRIEF**

17 Defendant ERICKSON, THORPE & SWAINSTON, LTD. ("ETS"), by and through its  
18 attorneys, Lemons, Grundy & Eisenberg, hereby provides its Supplemental Brief, as requested  
19 by this Court in a hearing on August 4, 2014.

20 At August 4, 2014 hearing, this Court specifically requested supplemental briefing on  
21 two issues. The first issue concerned the court's questions as to which version of Nevada's  
22 anti-SLAPP law should apply to the action at bar. The second arena of inquiry questioned  
23 whether a "flawed investigation" could still be protected under Nevada's anti-SLAPP laws.  
24 ETS notes that Plaintiffs have yet to respond to its Motion to Dismiss in any way, and ETS  
25 reserves the right to reply if and when a timely and appropriate Opposition is filed.

26 1. **The 2013 revision to Nevada's anti-SLAPP law should apply to this case.**

27 The Court requested supplemental briefing on which version of Nevada's anti-SLAPP  
28 statute should apply to this case, specifically in reference to the statute's legislative history. In

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1 the interests of responding to the Court's request, the notes pertaining to the anti-SLAPP  
2 statutes' 1993 adoption, as well as those from the 1997 amendments, and finally the 2013  
3 amendments, are included herewith as **Exhibits 1, 2 and 3**, respectively. Documents are Bates-  
4 stamped "LH," such abbreviation referring to "legislative history."

5 While there is no specific reference in any of the legislative records directly addressing  
6 the intent of the legislature concerning "retrospective" versus "prospective" application, the  
7 Court does not have to venture far to conclude that the 2013 amendments must apply. In this  
8 Supplemental Brief, ETS will direct the Court to analysis and certain portions of the record  
9 which may assist in rendering the requested determinations.

10 The 2013 amendments, in particular, were designed to quickly and efficaciously clear  
11 dockets clogged with vexatious SLAPP suits, and to attract business to this State (weak anti-  
12 SLAPP legislation was making Nevada less attractive than sister States). Thus, as defendants  
13 will demonstrate below, the 1997 version of this statute became extinct *on the day the 2013*  
14 *amendments went into effect.*

15 Throughout the course of the 2013 legislative history of the statute, and in keeping with  
16 the amendments' stated purposes, the record is replete with references to the legislative goal of  
17 expanding the scope of the immunity provided, as well as expediting procedures for more rapid  
18 treatment of anti-SLAPP suits. (*See, e.g.*, LH0120 "Digest" prepared for legislature.) Various  
19 reasons are offered for both the expansion of First Amendment rights as well as the more  
20 expedited procedures. (*See*, LH0140-54.) Requests for more rapid disposition of existing cases  
21 included evidence of this State's courts' struggles with a backlog of cases. (LH0206.) In  
22 observing evidence that "almost all SLAPP suits are eventually dismissed or decided in favor  
23 of the defendants," the legislature clearly conveyed its observation that a number of these  
24 backlog cases comprised vexatious SLAPP suits. (LH0266.)

25 Much of the record is devoted to a belief that strong, workable anti-SLAPP laws assist  
26 domestic businesses. (*See, e.g.*, LH0075, comments by Mr. Randazza.) In keeping with this  
27 belief, efforts were being made within the legislature to bring Nevada's statutory scheme more  
28 into line with similar legislation in California, Washington, Oregon, and Texas. These states

1 were believed to have strong anti-SLAPP protections, and hence to be succeeding in drawing  
2 business to their locales. (*See, e.g.*, LH0075, comments by Mr. Randazza.) Bringing Nevada's  
3 statute in line with these other jurisdictions would have the additional benefit of allowing  
4 Nevada courts to rely upon "robust case law" developed within those states. (LH0075,  
5 comments by Mr. Randazza.) This would, of course, assist with interpretation of future anti-  
6 SLAPP issues. The Nevada legislators approved of and found workable the California and  
7 Washington versions of anti-SLAPP laws, since these states were attracting "tech" companies.  
8 (LH0078.) The law of these jurisdictions supports Defendant's position that the 2013  
9 amendments apply to this suit.

10 California applies anti-SLAPP changes to ongoing suits. *See, Robertson v. Rodriguez*,  
11 36 Cal.App.4th 347, 356-57 (1995) (statute does not operate retroactively merely because some  
12 of the facts or conditions upon which its application depends came into existence prior to its  
13 enactment). Washington has determined that the version of anti-SLAPP which existed at the  
14 time the SLAPP suit is initiated is that which controls. *See, Harris v. City of Seattle*, 302  
15 F.Supp.2d 1200, 1202, n. 1 (2004). Application of the version of the law which existed at the  
16 time suit was filed makes sense, since it is the SLAPP suit itself which is in the cross-hairs of  
17 anti-SLAPP legislation. The SLAPP suit is the situation sought to be allayed by the remedy.  
18 Plaintiff's contention that First Amendment conduct which occurred years before the SLAPP  
19 suit was initiated should serve as the accrual date of the action is nonsensical. There is no  
20 cause of action until the suit is filed, and the SLAPP suit at bar was filed in 2014, after the 2013  
21 amendments had gone into effect.

22 The entire purpose of the 2013 amendment was to *quickly* and inexpensively dispose of  
23 a multitude of frivolous and vexatious SLAPP suits. The retaliatory, thoughtlessly conceived,  
24 vexatious, spiteful, and frivolous matter brought against these Defendants is squarely and  
25 plainly within the parameters of anti-SLAPP. Moreover, in effecting the 2013 amendments, the  
26 legislature was well aware that California had extended anti-SLAPP protection to employment  
27 grievance officers. (*See, e.g.*, LH0215, discussing *Vergos v. McNeal*, 146 Cal.App.4th 1387  
28 (2007) (issues under review per official proceeding authorized by law were protected, also

1 grievance officer's actions furthered the right to petition of both the plaintiff filing the SLAPP  
2 suit as well as similarly-situated employees).

3 Plaintiffs' argument that the "2012" version of Nevada's anti-SLAPP statute should  
4 apply to this case is without merit. First, a facial examination of the language in either version  
5 of the statute reveals that, whether it affords immunity from "civil liability" or from a "civil  
6 action" (the 2013 amendment), it is only when the "action is brought," *i.e.*, the SLAPP suit is  
7 filed, that the remedies afforded by the anti-SLAPP legislation come to fruition. *See*, NRS  
8 41.650; NRS 41.660(1)(a). When the protected First Amendment activity occurred is simply  
9 not relevant as to which version of anti-SLAPP to apply. This was the conclusion reached in  
10 California. In *Robertson v. Rodriguez, supra*, the Court reasoned that since anti-SLAPP was a  
11 "procedural screening mechanism," its application to a cause of action which had accrued  
12 before its enactment, but which was yet currently being pursued, was *prospective* application in  
13 relation to such claim. "A statute does not operate retroactively merely because some of the  
14 facts or conditions upon which its application depends came into existence prior to its  
15 enactment." *Id.* at 356; *See also, John v. Douglas County Sch. Dist.*, 125 Nev. 746, 753, 219  
16 P.3d 1276, 1281 (2009) (noting similarity in both purpose and language utilized in California's  
17 and Nevada's respective anti-SLAPP statutes).

18 Secondly, and dispositively, the issue is resolved due to Nevada's "2013 Amendments"  
19 version of the anti-SLAPP statute being applied to ongoing disputes which accrued with the  
20 filing of the SLAPP suit before the advent of these amendments. In *Grand Canyon Skywalk*  
21 *Dev., LLC v. Cieslak*, 2014 WL 2123255 (D. Nev. May 21, 2014), the federal court applied the  
22 2013 version of anti-SLAPP to the ongoing dispute, in light of a recent unpublished Nevada  
23 Supreme Court decision which, after protracted analysis of the underlying reasons for the 2013  
24 amendments, deemed such amendments to be merely "clarifying," and thus applicable to  
25 ongoing suits. *Id.* at \*5, n.27, *citing Jensen v. City of Boulder*, 2014 WL 495265 (Nev. Jan. 24,  
26 2014) (Unpublished disposition/non-precedential as per SCR 123).

27 Finally, with the application of the 2013 statute, any claim or argument that an ordinary  
28 summary judgment standard, whereby "evidence is viewed in a light most favorably to the

1 nonmoving party” must be applied (*see, Opp.* p. 4, ll.5-6), is dispelled by the language of the  
2 statute itself. In this “special” version of a motion to dismiss, the movant must first establish  
3 “by a preponderance of the evidence” that the claim is based on protected speech. The plaintiff  
4 must then establish by “clear and convincing evidence” a probability of prevailing on the claim.  
5 *See, NRS 41.660(3)(a) & (b).* This burden-shifting places Nevada in a category more akin to  
6 those jurisdictions which, although applying a “summary judgment-like” standard, view the  
7 evidence in a light most favorable to the *movant* in the anti-SLAPP context. *See e.g, Morse*  
8 *Bros. v. Webster*, 772 A.2d 842, 849 (Me. 2001).

9 In light of these observations and arguments, Defendants respectfully request that this  
10 Court properly apply the 2013 amendments to this ongoing action, which was filed in 2014,  
11 long after the amendments had taken effect.

12 **2. A “flawed investigation” is entitled to anti-SLAPP protection.**

13 Initially, Defendant ETS strongly disagrees that Mr. Songer’s investigation was flawed.  
14 If anything, Mr. Songer gave Mr. Delucchi and Mr. Hollis the benefit of the doubt by  
15 interviewing them in addition to his review of other available sources and information.  
16 Ultimately, Mr. Songer concluded and opined that what the EMTs reported did not make any  
17 sense. Although Mr. Songer was not able to interview James and Brittnie Choyce as part of his  
18 investigation (because James had since committed suicide and Brittnie declined to speak with  
19 anyone), he determined that such unavailability of witnesses did not preclude him from  
20 rendering opinions as to the impropriety of the conduct on the part of Mr. Delucchi and Mr.  
21 Hollis. Notwithstanding the unavailability of James and Brittnie Choyce for interview, Mr.  
22 Songer determined that the stories proffered by Mr. Delucchi and Mr. Hollis were, by  
23 themselves, not logical based on Mr. Songer’s vast experience as both an EMT and a  
24 supervisor of hundreds of EMTs.

25 Notwithstanding whether the investigation was flawed, the Court has asked for briefing  
26 as to whether an investigation which was believed to be flawed would still be entitled to anti-  
27 SLAPP protection. The answer to the question is yes. Such a conclusion makes perfect sense  
28 when one looks at the purpose of this type of legislation. Entities need to be encouraged to

1 undertake investigations without fear of lawsuits; otherwise, they will be hesitant to engage in  
2 self-assessment and evaluation for fear of the very thing which occurred in this case.

3 In an anti-SLAPP special motion to dismiss, the moving party bears the initial burden of  
4 production. *John v. Douglas County Sch. Dist.* 125 Nev. 746, 754, 219 P. 3d 1276, 1282  
5 (2009). This burden requires the defendants to “make a threshold showing that the lawsuit is  
6 based on ‘[g]ood faith communication[s made] in furtherance of the right to petition’ the  
7 government.” *Id.* (quoting NRS 41.650). This burden can be met by merely showing that the  
8 communications were made in the furtherance of an investigation. *Id.* at 762, 219 P.3d at 1287  
9 (documents showing communications to school district were in the context of an investigation  
10 was enough to shift the burden to plaintiff, who must then meet “clear and convincing”  
11 standard). Any statements aimed at procuring government action, result or outcome, qualify as  
12 “good faith communications.” *John*, 125 Nev. at 762, 219 P.3d at 1287.

13 Once the burden has shifted, Plaintiffs must illustrate, by clear and convincing  
14 evidence, that this firm proceeded with actual knowledge that the investigation in issue  
15 contained falsehoods and was in fact a “sham” investigation. Reckless disregard for truth or  
16 falsity is not enough. *Adelson v. Harris*, 973 F.Supp 2d 467, 498-504 (S.D.N.Y. 2013). Mere  
17 failure to *allege* knowledge of falsity within the complaint is grounds for dismissal. *Id.* at 503.

18 *Adelson* was a defamation action in which the United States District Court for the  
19 Southern District of New York applied Nevada’s anti-SLAPP statute and relied extensively on  
20 *John*. *Id.* at 496-500. The *Adelson* Court considered whether the allegedly defamatory  
21 statements were made in good faith and whether there was any evidence to the contrary. *Id.* at  
22 501-03. It concluded that an alleged failure to investigate the truth of the communications and  
23 reliance upon unreliable sources in making the communications are insufficient to show that  
24 such communications were not made in good faith. *Id.* at 502. Rather, under Nevada’s anti-  
25 SLAPP statute, a plaintiff is required to allege and prove the communicator’s actual knowledge  
26 of the falsity of the communicated information. *Id.* at 502-03. Furthermore, as noted above,  
27 such a showing must now be made by clear and convincing evidence. NRS 41.660(3)(b).

28 In accordance with *Adelson*, Plaintiffs’ contention that Mr. Songer’s investigation was



1 flawed is irrelevant. Even if, as Plaintiffs allege, Mr. Songer relied upon unreliable sources and  
2 failed to investigate the truth of his sources, his communications are still protected because  
3 Plaintiffs cannot show that Mr. Songer or ETS had actual knowledge of the alleged falsity of  
4 Mr. Songer's reports. Hence, Plaintiffs' attacks on the investigator's allegedly faulty report  
5 lack relevant effect or meaning.

6 It is also important to note that Plaintiffs' reliance on the Arbitrator's decision is  
7 misplaced. The Arbitrator's opinion about Mr. Songer's investigation and report is not  
8 relevant. The Arbitrator's opinion, quite simply, cannot be considered as evidence in this case.  
9 The investigator rendered his decision with the evidence available, and without the subpoena  
10 power of the court, testimony under oath, or means of forcing the production of evidence or  
11 testimony. The investigator was not an attorney versed in the rules of evidence nor was he  
12 required to be.

13 Moreover, there is no such thing as a cause of action for "negligent investigation" under  
14 Nevada law. *Goldyn v. Clark County*, 2007 WL 2592797, \*8 (D.Nev. 2007). Investigators are  
15 customarily afforded near plenary discretion in conducting their work, which is upheld absent  
16 clear proof of sham or lack of independence. *Schmidt v. Magnetic Head Corp.*, 97 A.D. 2d  
17 151, 163, 468 N.Y.S. 2d 649, 657 (1983) (refusing to impose particular procedural  
18 requirements on investigation, and rejecting claim that investigation was a sham as a matter of  
19 law because investigating counsel did not interview parties to the dispute but merely examined  
20 various papers and affidavits); *McMahon v. Delta Airlines*, 830 F.Supp. 2d 674, 681 (D. Minn.  
21 2011) (labor board has broad discretion in how to conduct its investigation).

22 In the First Judicial District Court, in *Luis v. State of Nevada*, Case No. 13 TRT  
23 000531B, Judge Wilson faced a similar situation where an employee of the Department of  
24 Corrections was terminated following an investigation. As in this case, the employee in *Luis*  
25 was ultimately reinstated by a hearing officer who took issue with the integrity of the  
26 investigation. See *Luis Court Order, Exhibit 4*. In granting the Special Motion to Dismiss,  
27 Judge Wilson noted, "The hearing officer's decision does not establish by clear and convincing  
28 evidence a probability that Luis will prevail on his claims."

1 If the investigation of these EMTs is somehow flawed, which Defendants do not believe  
2 it was, still such putative flaw does not justify this lawsuit. To allow litigation such as this to  
3 proceed would be tragic. The end effect would be to chill any motivation that any public entity  
4 would have to investigate the competence and performance of its employees, lest an outside  
5 arbiter might later deem it lacking in some respect, and be subjected to the rigors of litigation.  
6 That end result would be particularly tragic in the context of employees such as EMTs, where  
7 mistakes can cost lives.

8 This suit is vindictive, it is vexatious, and it is frivolous and should have never been  
9 brought. If this Court allows these claims to stand, why would any public entity ever undertake  
10 such investigative duty? EMT work is necessarily and truly a matter of life and death. Those  
11 tasked with maintaining standards in the profession must not fear such reprisal when others  
12 simply disagree with their decisions made in good faith, and whether some other person might  
13 have conducted the investigation differently, or reached a different conclusion.


### 14 **3. Conclusion**

15 For the above reasons, the 2013 amendments to Nevada's anti-SLAPP statute apply in  
16 this action, thus requiring that Plaintiffs' SLAPP suit must be dismissed if they cannot meet the  
17 heightened "clear and convincing evidence" standard.

18 As also set forth above, while ETS strongly disagrees that Mr. Songer's investigation  
19 was flawed, even a flawed investigation is entitled to anti-SLAPP protections. To survive a  
20 special motion to dismiss, Plaintiffs would be required to present clear and convincing evidence  
21 that Mr. Songer and ETS had actual knowledge of the falsity of Mr. Songer's opinions as to the  
22 propriety of the EMTs' conduct. Because Plaintiffs fall drastically short of meeting this heavy  
23 burden, ETS's Special Motion to Dismiss should be granted.

24 **The undersigned does hereby affirm that the preceding document does not contain**  
25 **the social security number of any person.**

26 Dated: August 14, 2014.

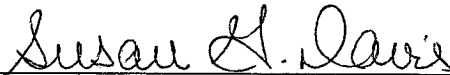
27 By:   
28 Todd R. Alexander, Esq.  
Attorneys for Defendants

**CERTIFICATE OF MAILING**

Pursuant to NRCP 5(b), I certify that I am an employee of Lemons, Grundy & Eisenberg and that on August 14, 2014 I deposited in the United States Mail, with postage fully prepaid, a true and correct copy of the within **DEFENDANT ERICKSON, THORPE & SWAINSTON'S SUPPLEMENTAL BRIEF**, addressed to the following:

Daniel Marks, Esq.  
Adam Levine, Esq.  
610 South Ninth Street  
Las Vegas, Nevada 89101

Joseph Garin, Esq.  
Siria Gutierrez, Esq.  
Lipson, Neilson, Cole, Seltzer & Garin, P.C.  
9900 Covington Cross Drive, Ste. 120  
Las Vegas, Nevada 89144

  
\_\_\_\_\_  
Susan G. Davis

# ***EXHIBIT 1***

# ***EXHIBIT 1***

N E L I S

DETAIL LISTING  
FROM FIRST TO LAST STEP

TODAY'S DATE: July 21, 1993  
TIME : 11:10 am  
LEG. DAY IS: 111  
PAGE : 1 OF 1

1993

SB 405 By Titus WHISTLEBLOWERS

Revises provisions governing immunity from civil action for certain communications made in good faith to governmental entity and clarifies law governing witness in legislative proceeding. (BDR 3-995)

SB 405

Fiscal Note: Effect on Local Government: No. Effect on the State or on Industrial Insurance: No.

04/15 52 Read first time. Referred to Committee on Judiciary. To printer.  
04/16 53 From printer. To committee.  
04/16 53 Dates discussed in Committee: 5/26, 6/3 (A&DP)  
06/14 93 From committee: Amend, and do pass as amended.  
06/14 93 (Amendment number 759.)  
06/15✓ 94 Read second time. Amended. To printer.  
06/16 95 From printer. To engrossment.  
06/16 95 Engrossed. First reprint.  
06/17✓ 96 Read third time. Passed, as amended. Title approved, as amended. (21 Yeas, 0 Nays, 0 Absent, 0 Excused, 0 Not Voting.) To Assembly.  
17 97 In Assembly.  
17 97 Read first time. Referred to Committee on Judiciary. To committee.  
06/17 97 Dates discussed in committee: 6/22 (A&DP)  
06/29 108 From committee: Amend, and do pass as amended.  
06/29 108 (Amendment number 1049.)  
06/29 108 Placed on Second Reading File.  
06/29✓ 108 Read second time. Amended. To printer.  
06/30 109 From printer. To re-engrossment.  
06/30 109 Re-engrossed. Second reprint.  
06/30 109 Placed on General File.  
06/30✓ 109 Read third time. Passed, as amended. Title approved, as amended. (35 Yeas, 6 Nays, 0 Absent, 0 Excused, 1 Not Voting.) To Senate.  
06/30 107 In Senate.  
07/01 108 Assembly amendment concurred in. To enrollment.  
07/06 0 Enrolled and delivered to Governor.  
07/13 0 Approved by the Governor. Chapter 653.  
Additional Committee Information.  
7/1-After passage discussion, concur, Senate Judiciary.  
(\* = instrument from prior session)

NEVADA LEGISLATURE  
SIXTY-SEVENTH SESSION  
1993

SUMMARY OF LEGISLATION

PREPARED BY  
RESEARCH DIVISION  
LEGISLATIVE COUNSEL BUREAU

### **S.B. 405 (Chapter 653)**

Senate Bill 405 provides immunity from civil liability for claims based upon a good faith communication to a legislator, officer, or employee of the State or Federal Government. If a civil action is brought against such a person, the Attorney General or other legal representative of the governmental entity to whom the communication is made is authorized to provide a defense for the person.

In addition, the bill entitles the prevailing party in such an action, including a governmental agency if that agency provided the defense, to reasonable costs and attorneys' fees.

Finally, the bill clarifies that a witness is absolutely privileged to publish defamatory matter as part of or preliminary to a legislative proceeding, if the matter has some relation to the proceeding. To knowingly misrepresent a fact, however, constitutes a misdemeanor.

Senate Bill 405 provides protection from strategic lawsuits against public participation, known as "SLAPP" suits. The initiation or threat of a SLAPP suit is used to discourage a person's efforts to communicate information to a governmental agency.

**Referred to Senate Committee on Judiciary**

**SENATE VOTE: 21-0-0**

**Referred to Assembly Committee on Judiciary**

**ASSEMBLY VOTE: 35-6-1**

**Effective July 13, 1993**

## SENATE BILL NO. 405—SENATORS TITUS, CALLISTER, GLOMB AND BROWN

APRIL 15, 1993

Referred to Committee on Judiciary

SUMMARY—Provides immunity from civil action for communication made in good faith to governmental agency. (BDR 3-995)

FISCAL NOTE: Effect on Local Government: No.  
Effect on the State or on Industrial Insurance: No.EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to actions concerning persons; providing immunity from civil action for a communication made in good faith to a governmental agency; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE  
AND ASSEMBLY, DO ENACT AS FOLLOWS:

- 1 Section 1. Chapter 41 of NRS is hereby amended by adding thereto the
- 2 provisions set forth as sections 2 to 5, inclusive, of this act.
- 3 Sec. 2. *As used in sections 2 to 5, inclusive, of this act, "political subdivi-*
- 4 *sion" has the meaning ascribed to it in NRS 41.0305.*
- 5 Sec. 3. *A person who in good faith communicates a complaint or informa-*
- 6 *tion to an officer or employee of this state or of a political subdivision or to an*
- 7 *officer or employee of the Federal Government regarding a matter reasonably*
- 8 *of concern to the respective governmental agency is immune from civil liabil-*
- 9 *ity on claims based upon the communication.*
- 10 Sec. 4. *In any civil action brought against a person who in good faith*
- 11 *communicated a complaint or information to an officer or employee of this*
- 12 *state or of a political subdivision regarding a matter reasonably of concern to*
- 13 *the respective governmental agency, the attorney general or other legal*
- 14 *representative of the state or the legal representative of the political subdivi-*
- 15 *sion may provide for the defense of the action on behalf of the person who*
- 16 *communicated the complaint or information. If the legal representative of a*
- 17 *political subdivision does not provide for the defense of such an action*
- 18 *relating to a communication to an officer or employee of the political subdivi-*
- 19 *sion, the attorney general may provide for the defense of the action.*
- 20 Sec. 5. 1. *Except as otherwise provided in subsection 2, the party prevail-*
- 21 *ing in an action brought against a person who in good faith communicated a*
- 22 *complaint or information to an officer or employee of this state or of a*
- 23 *political subdivision or to an officer or employee of the Federal Government*
- 24 *regarding a matter reasonably of concern to the respective governmental*
- 25 *agency is entitled to reasonable costs and attorney's fees.*



- 2 -

- 1' 2. If a legal representative of this state or of a political subdivision  
2 provides the defense in such an action, the state or political subdivision:  
3 (a) If the legal representative prevails, is entitled to reasonable costs and  
4 attorney's fees; or  
5 (b) If the legal representative does not prevail, must pay reasonable costs  
6 and attorney's fees.

20



Senate Committee on Judiciary  
May 26, 1993  
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is attached as Exhibit M. She referred to that statement and reviewed each section of the bill.

Following an explanation of the bill, Senator McGinness asked for a further explanation of section 8 regarding attorney compensation. Ms. Zunino explained there are two ways income withholding can be accomplished: a district attorney can do income withholding; or a private attorney may do a wage assignment. She said in the Nevada statutes dealing with district attorneys, they are allowed to do an income assignment against industrial insurance compensation, but that privilege is not extended to private attorneys. Senator McGinness asked what would happen in the case of a large award to the children of a deceased parent with respect to attorney fees. Senator Adler answered an ad litem guardianship would have to be established on behalf of the child, in which case the attorney would receive a court-approved fee.

Ms. Zunino indicated any money collected by the district attorney's office is given to the family and none is retained as attorney's fees.

There was no further testimony on A.B. 492. The hearing was opened on Senate Bill (S.B.) 405.

SENATE BILL 405: Provides immunity from civil action for communication made in good faith to governmental agency.

Senator Dina Titus explained the background of the legislation to the committee:

The bill is designed to protect well-meaning individuals who petition government for some cause from being hit by retaliatory "SLAPPS" (Strategic Lawsuits Against Public Participation).

Senator Titus provided the committee with an informational packet regarding "SLAPPS," set forth herein as Exhibit N. She indicated "'SLAPPS' relate to our right to petition government," which is protected by the First Amendment to the United States Constitution. Senator Titus stated this includes all forms of communication which individuals have with governmental agencies, bodies and employees. She indicated people who engage in petitioning of government "...are more and more finding themselves being sued for such actions." Senator Titus stated the suits are primarily filed by developers and businesses involved in environmental and consumer protection issues.

Senator Titus stated most "SLAPPS" lawsuits are thrown out and very few are won in court, but the fact the cases are filed has a "very chilling effect" on people's participation in the governmental process. She said the lawsuits "intimidate other citizens who may

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think about speaking out." Senator Titus added the filing of such suits "moves political disputes from a public forum to the private judicial arena...derails public debate and stifles legitimate political expression."

Senator Titus referred to material contained in Exhibit N and said a study conducted in Colorado tracked "hundreds of cases" and found the average case asked for \$9 million in damages and took approximately 36 months before it was finally thrown out of court. She said seven states have now actively considered "SLAPPS" legislation and 13 other states are contemplating such legislation.

Senator Titus quoted a statement by Robert Richards, Professor of Law, Penn State University:

As more courts recognize the 'SLAPPS' problem, the situation may improve. Yet courts are constrained by civil procedure and expanding tort doctrine. The burden is therefore upon state legislatures to step in and safeguard the rights of their citizens to speak out on public issues and in the process, help thaw the chill of intimidation brought on by 'SLAPPS.'

Senator Titus urged the committee to follow Professor Richards' advice and pass S.B. 405. She said it was her intent "to protect all forms of petition" but indicated the bill may be drawn too narrowly and will need amendment to be certain it includes testimony before publicly elected bodies, such as the legislature and county commissions.

Senator Adler stated his support for the bill and indicated he knew of three instances during the present session wherein parties have not testified or relayed information to the legislature because of fear of lawsuits. He continued:

When this type of thing starts happening...when we cannot get information from citizens because of fear of lawsuits, something needs to be done. It is an outrageous situation. ...Even if the things they are going to tell us aren't exactly accurate...I think we are in a position to sort out what is true and what is not...and make a decision. Everyone should have an opportunity to present their side of the story to the legislature, county commissioners, or anyone else they wish to testify in front of....

Senator Titus indicated there were persons present who had testified at a legislative hearing and have been "hit with a 'SLAPPS.'" She introduced Edwin Durand, who testified as follows:

Some of you may have seen my name in the newspapers last week with Lewis E. Laughlin and his attorney, James Wilson, going public making false and exaggerated claims to discredit me...and the facts which I had already presented to the legislature, using Laughlin's own quotes and writings.

I am normally a private person with my own opinions. However, I have found myself among hundreds of people harmed by the actions and false claims made by Laughlin Associates, Incorporated, who have intimidated everyone with their unauthorized, illegal, manual entries into personal credit files with never confirming any corporation named in their endless run of suing everyone. Not even the federal government or the IRS can input negative data in the credit files without a court order.

This morning I seriously considered remaining silent in fear of my family's safety, because our lives have been turned upside down with "SLAPPS" suits...being stalked. I have had retired police friends park a 40-foot motor home in front of my home to protect us...

Laughlin Associates, Incorporated is nothing more than an alter ego corporation with Lewis E. Laughlin and his mother, Dorothy J. Laughlin, listed as the only officers with the secretary of state of Nevada. Along comes a Mr. Harley Laughlin throwing his weight around and the two attorneys, James Wilson and Steven Stucker...questioning me for one hour about my assets...like where do my children live...where does my grandson live...where do we shop for groceries?

I think you can get the point...that is for us to take flight rather than fight, which I am told the Laughlins bank on. I should note I am the only person to be put through this 'Order for Examination of Judgment Debtor' in the hundreds of Laughlin suits. My wife told Cheryl Lau...in the secretary of state's office...following my being served...on May 3...with this Order...if one thing happened to physically harm us...they were on notice who to look to.

I was physically threatened by Laughlin's manager...in the office at 1000 East Williams on March 7, 1991...with a contract thrown at me and in placing a '357' on his desk, saying, 'I would pay or else on this false suit...'.  
...

I mistakenly and under duress signed my name to a document called a 'Staff Contract Office Package Agreement' concerning Arbuckle Construction, Incorporated, dated March 27, 1989...I attended a Laughlin tax seminar in Anaheim, California. When I heard of the Laughlin tax scam to sell the assets of a Nevada corporation...at an inflated value with usury interest of 24 percent per annum compounded monthly...I told Robert Van Arsdel of Laughlin Associates that neither I nor Arbuckle Construction, Incorporated, wanted anything to do with Laughlin. Moreover, I wanted my money back, which he said was up to the Laughlins. The \$355 tax seminar was supposed to have a money-back guarantee.

...

The basis of fraud is to be deceived and I was deceived by Laughlin Associates Incorporated. Lewis E. Laughlin claims everyone using his tax lessons will never pay state taxes. However, in California there is an \$800 minimum tax...even if a corporation has no profit. Secondly, no one can run a corporation from one pocket to the other without becoming joint. When California or other states' tax man catches up, the penalties and fines are staggering...

Appraisal of assets which do not have an established market value by independent authorities shall be required in order to arrive at a market value. Therefore, in claiming a bulldozer...from \$50,000 to \$300,000, as claimed by Lewis Laughlin and Robert Van Arsdel, would be deceptive fraud to both the state and all parties...as a basis to avoid taxes or creating a false write-off in deductions.

When I first appeared before the legislative subcommittee on Thursday, May 22, around 7:30 p.m.,...I gave testimony based on my opinion and experience with Laughlin Associates, Incorporated, that there should be regulations controlling resident agent activities beyond process of service as detailed in Nevada Revised Statutes (NRS) 78.090. While no legal transcript of this testimony has been made by the legislature to date, Laughlin has filed suit, claiming to have a true and correct transcript of my statement. The Laughlin complaint, filed May 10, makes claims that I made false statements...guilty of oppression, fraud and/or malice, etc. Under a motion for preliminary injunction, Laughlin Associates, Inc., doing business as Lewis Laughlin and Harley Laughlin, Plaintiffs, request an injunction prohibiting me as a defendant from publishing false statements of facts concerning Laughlin Associates, Incorporated.

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Page 14

The Laughlins seek for me to stop dealing in facts and just shut up, contrary to the First Amendment of the Bill of Rights to the Constitution of the United States.

There is nothing professional about Laughlin Associates, Incorporated, especially the five essential parts of a contract, which are consideration, time frame, good faith, performance or intent. There is a Nevada statute dealing with unfair trade practices....

In addition to my experience with credit abuse...insider trading against my corporations...credit collection from out-of-state, unlicensed...[Credit Management Services/ Nevada], I have found the abuse of the Sherman Anti-Trust Act.

The Laughlins file suit every 2 to 3 1/2 days against people who do not want any part of their way of doing business...

What I have said is 100 percent fact. It is only part of the story to come out...with Laughlin's [words] about being sued, 'None of us are exempt from the attack of the greedy and insensitive...or go ahead, sue me...you will be able to say that to just about anyone without the slightest fear. You will also be able to do business without paying any state income tax. Your chances of having your assets and your life work wiped out by a large judgment in favor of some lawsuit-happy yoyo is greater than ever before. It's no longer if you are sued, it is when you are sued. Fair is fair, but enough is enough...justice is great. Losing everything you have over a frivolous lawsuit ramrodded by a sharp lawyer is not.' These are Laughlin's writings.

These written statements are made from a man who with his attorney, both paid lobbyists, sat in this building on May 3 at 10:15 a.m...responding to the legislative subcommittee saying, 'Everyone has the right to invest in space alien corporations and that there were many space aliens walking around the earth today...apparently known to Lewis Laughlin personally.

Not only did Laughlin destroy a \$500,000 personal line of credit to me in the building of quality homes by Arbuckle

Construction at Lake Mead...Laughlin has attempted through his resident agency and insider trading to harm another corporation I have been involved with....

Mr. Durand indicated he and his wife have been married less than one year and she has been summoned by Laughlin Associates, Inc. to give testimony regarding her assets. He stated, "Through their suit-happy harassment they are demanding she show a list of every check she has written since 1990...we didn't even know each other then." Mr. Durand stated Laughlin has "financially, physically and mentally abused myself, as well as my family...this is nothing more than malicious harassment because I spoke up, telling the truth." He concluded:

I have spoken up against this resident-agency tax-scam marketing because of the many people already harmed with many more to follow, unless business scams are stopped...I hope for the good of all citizens that S.B. 405 is enacted to allow people to come forward without being intimidated....

Senator Adler asked Mr. Durand if the suit filed against him was after he had testified before the Assembly Committee on Judiciary. Senator Adler also asked how Mr. Durand knew the injunction which was filed was the result of his testimony. Mr. Durand answered, "It was pretty obvious...because I got up and spoke." He also indicated the injunction was served upon him at the legislature when he later appeared to testify at another hearing.

Mr. Durand's wife, Madeline Durand, approached the committee to answer Senator Adler's questions. She stated the complaint filed against Mr. Durand contains a copy of his testimony before the assembly committee.

Senator Adler asked what the office of the Secretary of State did when they were advised of the actions of Laughlin Associates, Inc., a resident agent. Mr. Durand replied that office "felt this was wrong" but did not take any action.

The next to appear was Senator Matthew Q. Callister, cosponsor of S.B. 405. Senator Callister provided a copy of the Motion for Preliminary Injunction filed in Mr. Durand's case, with names removed (Exhibit Q). He said he believed it was "long overdue" that testimony before the legislature, as well as testimony before any government body, "...should be just as protected a form for free, unfettered speech... as you have in a courtroom." Senator Callister submitted an amendment to S.B. 405, which is set forth as Exhibit P. He discussed the provisions of that amendment with the committee, saying it was clear what it meant, i.e., "For us to make accurate policy assessments here, we need public involvement...we need testimony before the legislature." Senator Callister reiterated the bill would prohibit the bringing of a lawsuit against someone who, in good faith,

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"...comes before us in response to our invitation to the public and gives us information...thinking the result of that participation in the policy-making process will not lead to a lawsuit."

Senator James asked if the legislation would provide immunity from lawsuits regarding communication to third parties, and Senator Callister answered it would not. Senator Callister stated it would not protect someone "from the worst kind of intentional acts of slander." Senator James indicated he understood the "good faith" standard which would apply but asked, "Should there be something in here saying [a person] should be truthful...you should not protect false communications where they are intentionally false." Senator James continued, "What about the situation...of reckless disregard of the truth or falsity, which under the law a lot of times would not arise into bad faith necessarily...should we deal with that?" Senator Callister answered it was his recollection there was a standing rule in both houses "...that you are considered to be sworn whenever you appear...." He added anything formally submitted to a committee "comes with traditional notions of perjury sanctions if it is intentionally false." Senator Callister stated, "A good faith standard...is not an absolute immunization...it does not protect you from acts of intentionally dishonest conduct...."

Senator James stated he agreed with the intent of the bill but added, "I am trying to decide whether or not legally the good faith standard is the correct one to use...maybe you can lie or provide false information and still be in good faith." Senator Adler agreed false information could be conveyed while acting in good faith and added a person should still be immune. He continued, "I think if you are going to err, you need to err in favor of free speech and communication." Senator Adler said there are people "who honestly convey things they think are true which turn out not to be true...I don't think they should be subject to suit for that." He said he believed the legislators and other public officials "could separate that out...before [they] act."

Senator James stated, "What we want to do is facilitate the free flow of truthful, helpful communication, not false information." Senator Callister said:

From my point of view, the sanction for a lobbyist who doesn't tell the truth is...he loses his credibility. I haven't seen many actions brought by one lobbyist against another. I have seen too far too many threatened and now increasingly brought by a large institutional entity against some individual who dares speak out against the system.



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The next to testify was Ande Engleman, Nevada Press Association. Ms. Engleman stated the association "ferverently supports this legislation, with the amendment." She continued:

Sometimes what people call a malicious lie is only a word that is open to interpretation. For instance, if [a person] were sitting next to me and I said to you, 'She is far richer than I'...[that person] might not think she is rich...because she knows how much money she has...but to me, that might be a lot of money. So, the word 'rich' can have a different meaning to different people. It doesn't mean I am lying...these are the kinds of things that are called 'malicious lies...slander or defamation'...and that people try to bring suit upon.

Ms. Engleman said she believed the legislation would give the average person who may be threatened with lawsuits a sense of security if someone is trying to prevent them from speaking. She continued, "They can stand up for what they believe in without having to risk total financial ruin."

Testifying next was Madelyn Shipman, Chief Deputy City Attorney, City of Reno, Nevada. Ms. Shipman stated she believed the concept of the bill was good but wished to clarify "...whether this is a discretionary assumption of defense or not...since the phrase used in section 4 is 'may provide'." Senator James answered he understood the word 'may' allowed for discretion. Ms. Shipman said the City of Reno was involved in a "SLAPPS" lawsuit at the present time. She indicated an individual was named in the suit "for filing a complaint with the City of Reno 'as a conspirator with Reno'...." Ms. Shipman stated such a lawsuit was extremely costly and added, "An entity undertaking a defense is going to be assuming a major expense."

Senator James asked Senator Callister to respond to the following question, "You couldn't write a slanderous letter about somebody...send it to private people then copy it to a government agency...to cloak it with a privilege, could you?" Senator Callister answered he believed "good faith" language would be clearly violated because the effort was not to primarily communicate with a governmental entity. Senator Titus said a safeguard for that type of situation existed in section 3 which states, "...the communication regards a matter reasonably of concern to that agency."

There was no further testimony on S.B. 405; the chairman closed the hearing on the bill and opened the work session on Senate Bill (S.B.) 45, Senate Bill (S.B.) 178, and Senate Bill (S.B.) 423.



UNIVERSITY of DENVER

Colorado Seminary

College of Law

What every American needs to know about

CITIZENS' RIGHTS - COMMUNICATING WITH GOVERNMENT - AND "SLAPPS"

\* The "Right to Petition" the government is one of the most protected freedoms Americans have. It is guaranteed by the First Amendment of the U.S. Constitution and a host of other laws.

\* It is also the foundation of our representative form of democracy. Public participation or citizen involvement in government has been encouraged by our system for over 200 years. The reason is simple: if citizens cannot communicate with government, government cannot represent them.

\* Your right covers not only petitions, but all forms of communication with government offices and employees, including:

- writing letters
- calling officials
- criticizing government actions, policies, and officials
- speaking out at a public meeting
- reporting violations of law
- giving testimony
- campaigning on issues
- demonstrating, picketing, and boycotting
- filing agency appeals
- filing public-issue lawsuits

\* It applies to all 3 branches of government (legislative, executive, and judicial) and to all government levels (federal, state, and local).

\* The protection is not limited to truthful, public-spirited, good ideas. It covers error, self-interest, even bad ideas - provided the goal was to influence legitimate government decision or action, not just to injure someone else.

\* Can you still be sued for exercising these rights? Yes. The Political Litigation Project at the University of Denver has studied hundreds of cases where thousands of citizens and groups have been sued for dollars for speaking out to government:

- by developers, for testifying against rezoning for their projects,
- by teachers, for complaining about their competence to the board of education,
- by businesses, for reporting their violations to environmental and consumer authorities,
- even by governments, public officials and employees themselves, for criticizing their projects or policies.

\* WE CALL THESE SUITS "SLAPPS" - "STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION." (continued)

EXHIBIT N

13 -

LH - 0015

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\* The good news: SLAPPs are virtually all thrown out of court. Courts usually see them as a blatant attempt to "chill" citizens' First Amendment political participation rights. SLAPPs are also seen as an attempt by one side of a political dispute to transform a public, political-arena issue into a private, judicial-arena issue, from a forum that can resolve the debate to one that suppresses it.

\* WHAT TO DO IF A SLAPP IS THREATENED OR FILED:

1. Legal help: Immediately contact an attorney. Specifically say your First Amendment "Right to Petition" is being attacked. You may wish to contact your local branch of the American Civil Liberties Union, or Ralph Nader or related-issue groups which have provided legal support in other SLAPPs.

2. Our help: Advise your attorney to contact us for our information packet and expert assistance.

3. Court help: Consider an early motion to dismiss (demurrer, summary judgment, etc.) based on federal or state constitutional/civil rights, state "privilege," "immunity," "anti-SLAPP" statutes, etc. These prove highly successful.

4. "SLAPPback": Consider a counterclaim/suit for violation of your constitutional/civil rights, malicious prosecution, abuse of process, political and emotional injury, outrageous conduct, etc. These have been very successful and resulted in multi-million dollar jury awards to the citizens who were SLAPPED. SLAPPbacks help others, too, by sending a clear message to those considering filing SLAPPs that they are "costly," illegal, and a public relations nightmare.

\* Above all, do not let the SLAPP work in the real world. Do not let it "chill" your advocacy or sap support from your cause. Then censorship wins, and America loses.

You have the right. Use it and protect it.

THE POLITICAL LITIGATION PROJECT

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7/91

14

# Intimidation lawsuits chill public activism

## 'SLAPPs' target pocketbook, seek to nip opposition

By Julia Rubin  
Associated Press

Citizens who crusade against local polluters or new developments in their neighborhoods are increasingly likely to be hit with lawsuits, say two University of Denver professors who are mapping the trend.

They call the lawsuits "SLAPPs" — Strategic Lawsuits Against Public Participation. The suits are unconstitutional and are putting a chill on public participation in the United States, they said.

Some SLAPP victims, however, are SLAPPING back.

Vic Monia's is a textbook case.

Monia headed a Saratoga, Calif., environmental and homeowners group that helped persuade local voters in 1980 to limit development on surrounding hillsides.

Monia, his organization, and other leaders of the slow-growth campaign immediately were sued for \$40 million by a developer who charged defamation.

The case never made it to court. Nine years later, Monia, a computer engineer, won \$200,000 in a countersuit when a jury ruled he was the victim of malicious prosecution.

In the meantime, however, the developer's lawsuit had had an effect. Intimidated city council members exempted the developer from some of the new restrictions, and many local homeowners' groups disbanded, Monia said.

"I saw the impact of the lawsuit in the community: a lot less participation. People were talking about, 'You've got to be careful. You speak out, someone's gonna sue you.'"

As for himself, Monia said, "I got so preoccupied, I ended up leaving my job. I thought about moving out of the state."

"My daughters at the time were quite young, we'd just moved into a new home, the payments were pretty good-sized. And my wife said, 'Are you sure you haven't risked everything we've worked for?' It really began to weigh very heavily on me."

Now, he said, he will think twice before participating in local politics again.

Vic Monia had been SLAPPED.

His is one of hundreds of such cases tracked by DU law professor George Pring and sociology professor Penelope Canan as part of a 2½-year study funded by the National Science Foundation.

There are thousands more, and the numbers have been growing since the 1970s, Pring and Canan.

Such lawsuits aren't just expensive and traumatic — they're a violation of the right to petition guaranteed by the First Amendment, said Pring and Canan.

Among other SLAPPs they have studied: ■ A Louisville woman circulated petitions opposing plans for a housing development on nearby farmland, and was sued by the developer.

■ A Sutton, W.Va., blueberry farmer told federal authorities that operators of a nearby coal mine had polluted a river and killed fish in it. He was SLAPPED with a \$200,000 slander lawsuit by the coal mine operator.



DU law professor George Pring tracks cases where citizens are sued for crusades.

■ A group of citizens of Washington and Warren counties, N.Y., went to court to block a planned trash incinerator and were countersued by the counties for \$1.5 million.

■ The League of Women Voters in Beverly Hills, Calif., supported a ballot initiative to stop a condominium project and wrote two letters to a local newspaper criticizing it. The developer SLAPPED the league for \$63 million.

"SLAPPs inevitably tear everybody out of the public political arena where problems get solved and try to shift them over to private judicial arenas where the problems really can't get solved," said Pring. "The court can't decide the real issue, it can only say yes, you slandered, or no, you didn't."

SLAPPs aren't meant to be won; they're meant to intimidate.

They usually don't even get to court, and once there, more than 90% are lost by the parties filing them, Pring said. But by that time, the citizen opposition often is scared off or into compromise, the professors said.

"Hundreds of people we've talked to are literally terrified at the thought of losing their homes under multimillion-dollar lawsuits," said Pring.

The average SLAPP asks for \$9 million in damages and lasts 36 months before being resolved, Pring and Canan said.

And SLAPPs dissuade people who merely hear about them from participating in politics, they said.

"We think we know that in the majority of cases, there will be negative (participatory) political futures for these people — not only for those sued, but for a much wider group of people who hear about these cases," said Pring.

The professors stress that the threat of SLAPPs shouldn't deter people from public participation. "If people know about and use

the First Amendment, they are almost guaranteed of getting out of the problem," said Canan.

State authorities around the nation are starting to take action against SLAPPs. A legislative proposal in New York, for example, would limit the ability of developers to file SLAPPs without proving actual malice on the part of citizen opponents, said Nancy Stearns of the New York Attorney General's Environmental Protection Bureau, in Albany.

"There are more of these cases recently and people are becoming aware of them as a problem," said Stearns.

"It's troublesome. Particularly in the environmental arena, citizen participation is really key. The law relies on the involvement of citizens in the environmental process. It's not just exercising rights, but being a responsible citizen."

New York Attorney General Robert Abrams recently decelerated the use of SLAPPs against citizens who complain about the environment, and said his office may try to help such defendants by filing friend-of-the-court briefs, for example, and supporting the proposed anti-SLAPP legislation.

Stearns said the rise of SLAPPs in the last 10 or 15 years may be due to rising citizen concern about the environment — the so-called NIMBY, or Not-In-My-Backyard, movement that makes it harder for developers to get projects approved.

Pring and Canan said they found SLAPPs everywhere they looked, but the greatest concentration is in areas with a high quality of life and many educated newcomers — especially California, New York and Colorado.

The rise of SLAPPs may also be the result of a generally more litigious society, they said, noting that many SLAPPs have nothing to do with the environment but are

"Hundreds of people we've talked to are literally terrified at the thought of losing their homes under multimillion-dollar lawsuits."

George Pring  
DU law professor

filed by local or school officials against ornery citizens or parents.

SLAPPs include a recent case in suburban Denver, for example, in which a teacher accused by fundamentalist Christian parents of teaching witchcraft sued the parents for slander.

They include numerous cases of police officers suing citizens who complain about their behavior, Pring and Canan said, or elected officials who claim defamation when ornery citizens call for their jobs.

"The right to tell our elected government representatives what we think and what we want them to do for us is the most basic right we have," said Pring. "What is more basic than parents going to school with complaints about their children's education?"

Increasingly, SLAPP victims such as Vic Monia aren't turning the other cheek.

They are filing "SLAPP-backs," and winning.

Monia stewed about the "injustice" of the lawsuit filed against him for about 10 months after it was dismissed, and then decided to sue the developer and the developer's attorney for malicious prosecution. In addition to the \$200,000 jury award from the developer last year, Monia won an out-of-court settlement with the attorney.

In a more prominent California case last year, a group of Kern County farmers who successfully fought off a SLAPP by agribusiness giant J.G. Boswell Co. in a water dispute countersued and won a judgment of \$13.5 million against Boswell for infringing on their constitutional rights.

The court ruled that Boswell tried to intimidate the farmers so they would not support a state proposition when it sued them for libel in 1982.

"Unlike SLAPPs, many SLAPP-backs are succeeding," said Pring, who testified on behalf of the farmers.

"It used to be filers could file these cases with impunity. There was no downside. If it works, it works. Now, I have to counsel would-be filers and their attorneys they may be walking themselves into a multimillion-dollar action."

Still, Pring said, the farmers told him they will never participate in politics again.

Monia, who said he was lucky enough to be able to weather nine years of legal bills and survive, hopes his victory "gives encouragement to people. And I hope that they can feel that if they go after individuals or companies who misuse the judicial system for political purposes, that they can win."

"Only one-half of 1% of the population probably gets out there on the streets and gets involved politically," Monia said.

"What happens if that half of 1% doesn't get out there? Hell, the rest of us probably wouldn't get out and vote because we wouldn't understand the issues."

# SLAPPING the Opposition

## How developers and officials fight their critics

**B**etty Blake moved to Wamtagh Woods, N.Y., 30 years ago because she loved the stately oak and beech trees that shaded the suburban Long Island neighborhood. "An inspiration," she called them. In 1987, when Terra Homes announced plans to cut some of them down for a new development across the street, she rallied her neighbors. They tied red ribbons around their trees, met at candlelight vigils and petitioned the town for a rezoning to protect the greenery. Blake even hung a spray-painted bedsheet on her lawn declaring, "This neighborhood will not be Terra-ized." The bulldozer came anyway, and she jogged alongside, swatting it with a piece of debris. Terra's response: a \$6.56 million harassment lawsuit against Blake and six other protesters.

Blake was SLAPPED—hit with what is known as a Strategic Lawsuit Against Public Participation. Frustrated by tenacious opposition to big-ticket projects, real-estate developers, corporate executives and elected officials are hauling critics to court in alarming numbers. Those doing the SLAPPING almost always lose; the First Amendment generally protects activists like Betty Blake, whose case is pending. But multimillion-dollar lawsuits, even those dismissed or successfully defended, can be a chilling experience, depleting organizers of time, money and commitment. Some legal experts familiar with SLAPPs say they are more a political muzzle than a legal remedy. "The purpose is to shut environmentalists or other public-interest groups up," says Oakland attorney Joe Brecher, who has defended SLAPP cases. "Another purpose is to teach a lesson to gadflies and make sure they don't speak up again."

SLAPPs began to proliferate in the early 1980s as local environmental, consumer and community groups aggressively pursued their various causes, often under the rhetorical battle cry of NIMBY (not in my backyard). Their targets—local governments, real-estate companies, manufacturers—began to strike back, couching their retaliation in sometimes questionable claims of defamation or conspiracy. The SLAPP phenomenon has grown large



Tilting at bulldozers: Blake was sued while trying to save trees

enough to attract scholarly attention. University of Denver professors George Pring and Penelope Canan, who coined the acronym and have cataloged more than 250 cases so far, believe hundreds, perhaps thousands of such lawsuits are being filed annually. "We're looking at a very big bottom of the iceberg," says Pring.

SLAPPs aren't limited to fights between developers and neighborhood groups—and they don't always conform to good-guy/bad-guy scenarios. Donald Barnett and Ardis Williams, members of an advisory council at Mary M. Bethune Junior High School in south-central Los Angeles, wrote to local and state officials last year after they found the principal unresponsive to their concerns about poor reading and math scores. The principal, Peggy Selma, filed a \$1 million defamation suit and claimed Barnett was using the school as a political base. The suit was settled out of court.

Some SLAPPs are targeted against unsympathetic victims: Klan members, religious zealots, fringe environmentalists. "The point is they have a right to express themselves," Pring says. SLAPPs are damaging, he argues, because they derail public debates, transforming them into drawn-out civil litigation that may settle grudges but rarely makes good public policy.

That's why the most harmful SLAPPs involve politicians attacking their constituents. An Agoura Hills, Calif., neighbor-

hood association that tried to recall several city council members—for alleged violations of the state's open-meetings law—found itself facing a \$1 million defamation suit from one of the officials. The action stalled a petition drive, and the organizers never gathered enough signatures for an

election. (The case is pending.) Two Hudson Falls, N.Y., citizen groups who went to court last February to stop construction of a \$74 million trash incinerator were countersued by Washington and Warren counties for \$1.5 million. Officials contend that the opposition drove off prospective buyers of bonds to finance the project, hiking costs. Warren County Attorney Thomas Lawson added an intimidating touch by announcing that the defendants risked losing their homes. The suit was dismissed by a state appellate court in January.

Some business executives argue that the courts are a last defense against "anti-growth" activists skilled at obstructing projects. "You keep churning up money on 500 pages of technical information, and soon you don't have any [money] to build with," says New York develop-

er Thomas Stephens, who spent two years trying to build homes near a nature conservancy in Westchester County. He finally sued the Dover Planning Board for \$3.8 million last spring, charging a "conspiracy" to hold up his project. He lost the case.

"Like a monster": For SLAPP defendants, winning can still mean losing. Grass-roots groups once united in common cause can find themselves in disarray when the litigation starts. "A lawsuit is like a monster that moves in with the family," says Rick Sylvester, who was sued by Perini Land and Development Co. in 1986. The company claims he broke an agreement not to publicly oppose a 540-room condo and golf complex near his Squaw Valley, Calif., home. Although Sylvester is independently wealthy, the enormous expense of the case (\$1 million in legal fees) has driven away activists who sided with him earlier.

Is there a way to lessen the pernicious effects of SLAPPs? Pring says defendants exercising First Amendment rights need to have their cases fast-tracked for summary judgment. Some SLAPP targets, like Betty Blake, are countersuing. Citizens in Washington and Warren counties are readying a civil-rights action. It means more time and expense, but it may compel others to think twice before slapping down someone for speaking up.

Bill Turquet with Lynda Wright in Los Angeles and Stephen Power in New York

# Huge award sends 'very clear signal'

By JEANIE BORBA  
Bee staff writer

They're called Strategic Lawsuits Against Public Participation (SLAPPS) and three Kern County farmers' countersuit against the J. G. Boswell Co. is a classic example, according to an expert witness who testified during the recent trial.

George Pring, a law professor at the University of Denver, has studied 100 such lawsuits across the country and is embarking on a new study of 100 more to determine how the recent litigation trend started and how it has affected people who are politically active.

Pring said he believes the jury's verdict awarding the farmers a total \$13.5 million in actual and punitive damages is the largest ever awarded in this type of litigation.

"The size of this jury verdict ... sends a very, very clear signal and precedent all over the country. The verdict exceeds all previous ones in cases like this and sends a signal to people that would file lawsuits to chill political opposition that the cost of that strategy is very high," Pring said after the trial in a telephone interview from his Denver home.

He said that previously the highest verdict was \$5 million against the Shell Oil Co. in a case in which the company sued a union attorney for reporting to authorities that a Shell product contained cancer-causing chemicals.

Pring testified at the Bakersfield trial on behalf of Ken Wegis and Jack and Jeff Thomson, three farm-

ers who sued the Boswell company after Boswell's libel suit against them was thrown out of court.

The six-year legal battle stemmed from controversy over the Peripheral Canal, a project that would have brought more Northern California water to the valley and Southern California.

The Boswell company spent \$1.1 million to defeat the measure. Wegis and the Thomsons contributed to an advertisement favoring the canal that appeared in two newspapers a month before the election.

Boswell officials claimed that the farmers' advertisement was libelous because it accused the company of engaging in illegal price-fixing of farm commodities. The lawsuit was thrown out of court.

Pring said such lawsuits masquerade as libel or defamation cases or suits to stop business interference, but their real purpose is to silence political opposition.

He described SLAPP cases as a trend that began developing in the early 1970s in which "people take a public political dispute and one side tries to transform it into a private courtroom dispute."

"It's a scary phenomenon, and very few of the targets — only 15 percent — ever fight back. But of those who do fight back, most win," Pring said.

The cases Pring has studied ranged from disputes over local zoning issues to those involving statewide elections or ballot issues. Very often they involve a citizen reporting misconduct by a public official, he said.

REMO PAPER  
4-22-93

OWNERS TO MAKE SUBSTANTIAL

## Measure helping whistle-blowers merits passage

**Civil liability immunity:** Legislation designed to slow down company intimidation suits

**D**uring the last session of the Nevada Legislature, a measure was passed to protect government workers who tell investigators about alleged improprieties of agency directors. The law was long overdue, and represented an important tool in cleaning up government.

Now a similar bill — an extension of the 1991 protection for workers — is under study in the state Senate. It too merits approval.

SB405 would prevent companies that have been sued by the government from suing the person who tipped off authorities. The legislation is largely a response to SLAPP (Strategic Lawsuits Against Public Participation) suits against environmental organizations.

Typically, such suits are designed to deter whistle-blowers by forcing them to pay huge court fees to defend themselves, even though it is almost certain they'll win their cases. In effect, these suits are aimed

at intimidating people. It is common for companies to sue whistle-blowers for libel, slander, trespassing or interference in economic activity. Environmental experts say the companies don't plan to win such cases — and rarely do — but the suits certainly send a message to potential whistle-blowers.

Two states, seeing the ugliness of this type of litigation, have given whistle-blowers immunity from SLAPP suits. Twenty other states have similar bills in the works.

Nevada's bill, sponsored by Sen. Dina Titus, D-Las Vegas, would give whistle-blowers immunity from civil liability if they file complaints in good faith. In some cases, those named in the suits could get the state to defend them.

Nevada should move forward with this kind of progressive legislation. In addition to protecting Nevadans, it also will cut down on the number of lawsuits. And that is big plus in itself.

1 CASE NO.

2 DEPT.

REC'D & FILED

93 MAY 10 P356

NOTED  
BY P. HORTON  
BPPGTY

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5 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
6 IN AND FOR CARSON CITY  
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11 MOTION FOR PRELIMINARY  
12 INJUNCTION  
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14 Defendant. /

15  
16 have filed a Complaint seeking, in addition to money damages, an  
17 injunction prohibiting the defendant from publishing false  
18 statements of facts concerning —

19 Plaintiffs move for a  
20 preliminary injunction prohibiting the defendant from publishing  
21 false statements of facts concerning  
22

23 This motion is made and based upon all pleadings and papers  
24 on file with the Court, the attached Points and Authorities and  
25 the attached Affidavit of  
26  
27  
28

Attorney for Plaintiffs



1. 54

POINTS AND RECOMMENDATIONS

The defendant was a client of The  
defendant failed to pay the contract fee and  
sued the defendant and obtained a default judgment. (A copy  
of the Default Judgment is attached as Exhibit 1.) The  
defendant, in an apparent attempt to discredit and harm  
plaintiffs, has made written and oral statements before a public  
body in which he has stated the plaintiffs are guilty of illegal  
and unlawful conduct. (See attached Affidavit of  
Exhibit 2, and documents attached thereto). These statements are  
false and are having the desired effect of hurting plaintiffs.  
Plaintiffs request an injunction prohibiting the defendant from  
publishing false statements of facts concerning

15 NRS 33.010 provides:

16 An injunction may be granted in the following cases:

17 1. When it shall appear by the complaint that the  
18 plaintiff is entitled to the relief demanded, and such  
19 relief ~~on any~~ part thereof consists in restraining the  
commission or continuance of the act complained of, either  
for a limited period or perpetually.

2. When it shall appear by the complaint or affidavit that the commission or continuance of some act, during the litigation, would produce great or irreparable injury to the plaintiff.

3. When it shall appear, during the litigation, that the defendant is doing or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual.

26 Injunctive relief is an equitable remedy. Sherman v. Clark,  
27 4 Nev. 138 (1886). The granting of an injunction is a matter of  
28 discretion. Coronet Homes, Inc. v. Mylan, 84 Nev. 435 (1968).

1 A party which establishes it has a reasonable likelihood of  
2 success on the merits and that defendant's conduct, if not  
3 enjoined, will result in irreparable harm for which compensatory  
4 damage is an inadequate remedy should be granted an injunction.  
5 Dixon v. Thatcher, 103 Nev. 414 (1987).

6 Defendant has stated in no uncertain terms that plaintiffs  
7 have engaged in illegal conduct. (See the Transcript of  
8 Testimony, attached to the Affidavit of )

9 This statement is an outright lie. Plaintiffs have not engaged  
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11 on the merits.

12 The defendant's conduct has already caused irreparable harm  
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16 plaintiffs are engaged in illegal and unlawful conduct clearly  
17 harm plaintiffs' business. The harm is irreparable because the  
18 harm is done when the false accusations are made. Further, the  
19 defendant is apparently judgment proof ( has  
20 been unable to satisfy a \$4,000 judgment) and so plaintiffs have  
21 no adequate remedy at law.

22 In Guion v. Terra Marketing of Nevada, Inc., 90 Nev. 237  
23 (1974) the defendant attached signs to his car which he parked in  
24 front of the plaintiff's business. The sign bore the following  
25 statements:

26 A Terracor representative threatened to kill me? What  
27 next, Rick Johnson. I regret having done business with  
28 a Terracor representative. Doing business with a Terracor  
representative introduced me to a new low in ethics.

1 The trial court found that the statements were false,  
2 malicious and tended to discourage prospective customers from  
3 doing business with the plaintiff. The trial court issued a  
4 preliminary injunction. In upholding the trial court's issuance  
5 of the injunction the Nevada Supreme Court at page 240 stated:

6 Equity will, however, restrain tortious acts where it is  
7 essential to preserve a business or property interests and  
8 also restrain the publication of false and defamatory  
9 words where it is the means or an incident of such  
10 tortious conduct. (citation omitted). The right to carry  
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22 facts concerning

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Dated this 10<sup>th</sup> day of May, 1993.

Plaintiffs

AFFIDAVIT OF

STATE OF NEVADA     )  
                              ) ss.  
CARSON CITY            )

, under penalty of perjury, being first duly sworn deposes and says:

1. I am the Chief Executive Officer of Inc. and a plaintiff in this action.

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breached that contract by failing to pay pursuant to the terms of the contract.

sued for breach of contract and on April 25, 1991 Judge Michael R. Griffin entered a Default Judgment in favor of and against . A true and correct copy of that Default Judgment is attached hereto. To date has been unable to collect any sum from to satisfy the judgment.

3. submitted the attached letter "To whom it may concern" to members of the Judiciary Subcommittee concerning AB 387 of the Nevada State Legislature. A true and correct copy of the letter is attached. On April 22, 1993, made a statement to the Judiciary Subcommittee. A true and correct transcript of his statement is attached. statements allege that have committed illegal or unlawful acts. These allegations are absolutely false.

and I have not committed any illegal or unlawful acts.

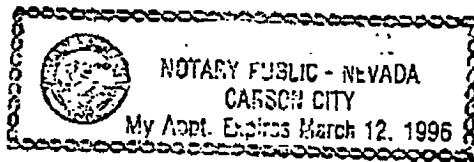
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1 engages in illegal or unlawful acts, even if completely false,  
2 necessarily hurt that business. false statements  
3 concerning and me have a  
4 negative impact on our business and cause irreparable harm.

5 Dated this 10 day of May, 1993.

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8 SUBSCRIBED AND SWORN to before  
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10 ~~NOTARY PUBLIC~~



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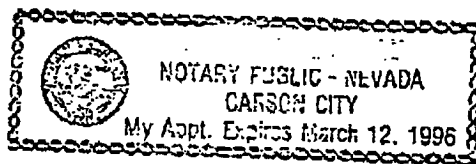
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1993 REGULAR SESSION (67th)

ASSEMBLY ACTION		SENATE ACTION		Senate Amendment to Senate Bill No. 405 BDR 3-995 Proposed by Senators Callister and Titus
Adopted	<input type="checkbox"/>	Adopted	<input type="checkbox"/>	
Lost	<input type="checkbox"/>	Lost	<input type="checkbox"/>	
Date:		Date:		
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Concurred in	<input type="checkbox"/>	Concurred in	<input type="checkbox"/>	
Not Concurred in	<input type="checkbox"/>	Not Concurred in	<input type="checkbox"/>	
Date:		Date:		
Initial:		Initial:		

Amendment  
No. 571

Amend sec. 3, page 1, by deleting line 6 and inserting:

*"tion to a legislator, officer or employee of this state or of a political subdivision, or to a legislator,".*

Amend sec. 3, page 1, line 7, by inserting an italicized comma after

*"Government".*

Amend sec. 3, page 1, line 8, by deleting "agency" and inserting "entity".

Amend sec. 4, page 1, line 11, by deleting "an" and inserting "a legislator,".

Amend sec. 4, page 1, line 13, by deleting "agency," and inserting "entity,".

Amend sec. 4, page 1, line 18, by deleting "an" and inserting "a legislator,".

Amend sec. 5, page 1, line 22, by deleting "an" and inserting "a legislator,".

Amend sec. 5, page 1, by deleting line 23 and inserting:

*"political subdivision, or to a legislator, officer or employee of the Federal Government,".*

Amend sec. 5, page 1, line 25, by deleting "agency" and inserting "entity".

Amend the title of the bill, second line, by deleting "agency;" and inserting "entity;".

Amend the summary of the bill, second line, by deleting "agency." and inserting "entity;".

Drafted by: SJC:mrw

Date: 5/24/93

S.B. No. 405—Provides immunity from civil action for communication made in good faith to governmental entity.

EXHIBIT P

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LH - 0033

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MINUTES OF THE  
SENATE COMMITTEE ON JUDICIARY

Sixty-seventh Session  
June 3, 1993

The Senate Committee on Judiciary was called to order by Chairman Mark A. James, at 4:00 p.m., on Thursday, June 3, 1993, in Room 224 of the Legislative Building, Carson City, Nevada. Exhibit A is the Meeting Agenda. Exhibit B is the Attendance Roster.

COMMITTEE MEMBERS PRESENT:

Senator Mark A. James, Chairman  
Senator R. Hal Smith, Vice Chairman  
Senator Lawrence E. Jacobsen  
Senator Mike McGinness  
Senator Raymond C. Shaffer  
Senator Ernest E. Adler

COMMITTEE MEMBERS ABSENT:

Senator Dina Titus

STAFF MEMBERS PRESENT:

Dennis Neilander, Senior Research Analyst  
Marilyn Hofmann, Committee Secretary

Senator James announced the purpose of the meeting was to conduct a work session on the following bills: Senate Bill (S.B.) 192, Senate Bill (S.B.) 405, Senate Bill (S.B.) 478, Senate Bill (S.B.) 479 and Assembly Bill (A.B.) 492.

SENATE BILL 192: Provides enhanced penalty for crimes committed against minors.

Senator James indicated the bill includes immunity for school district board of trustees for any release of registration data acquired pursuant to statute but does not give them immunity for failure to release such data. He said the legislation has been amended to state that immunity.

SENATOR SHAFFER MOVED TO AMEND AND DO PASS S.B. 192.

SENATOR SMITH SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR TITUS WAS ABSENT FOR THE VOTE.)

\* \* \* \* \*

Senate Committee on Judiciary  
June 3, 1993  
Page 2

SENATE BILL 478: Broadens basis for exercising jurisdiction over party in civil action.

SENATOR ADLER MOVED TO DO PASS S.B. 478.

SENATOR MCGINNESS SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR TITUS WAS ABSENT FOR THE VOTE.)

\* \* \* \* \*

SENATE BILL 479: Expands original jurisdiction of justices' courts and municipal courts in certain counties to include proceedings concerning juveniles charged with minor traffic offenses.

The chairman discussed an amendment which would make it optional for the juvenile or family court to refer minors charged with minor traffic offenses to the jurisdiction of the justices' or municipal courts.

SENATOR ADLER MOVED TO AMEND AND DO PASS S.B. 479.

SENATOR JACOBSEN SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR TITUS WAS ABSENT FOR THE VOTE.)

\* \* \* \* \*

ASSEMBLY BILL 492: Makes various changes relating to support for dependent children.

SENATOR ADLER MOVED TO DO PASS A.B. 492.

SENATOR SMITH SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR TITUS WAS ABSENT FOR THE VOTE.)

\* \* \* \* \*

SENATE BILL 405: Provides immunity from civil action for communication made in good faith to governmental agency.

Senator James discussed the amendment to the bill which would add the language, "...a legislator...." He indicated this was a bill sponsored by Senator Titus; and although she was not present, he would ask for a motion at this time.

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SENATOR ADLER MOVED TO AMEND AND DO PASS S.B. 405.

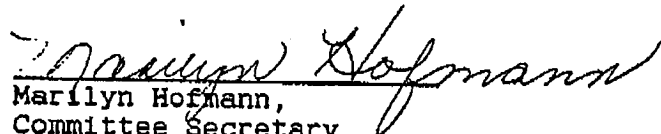
SENATOR SHAFFER SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR TITUS WAS ABSENT FOR THE VOTE.)

\* \* \* \* \*

There was no further business to come before the committee and the meeting was adjourned.

RESPECTFULLY SUBMITTED:

  
Marilyn Hofmann,  
Committee Secretary

APPROVED BY:

\_\_\_\_\_  
Senator Mark A. James, Chairman

DATE: \_\_\_\_\_

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Amend sec. 30, page 9, by deleting lines 29 and 30 and inserting: "with the secretary of state nor later than the first Wednesday in July."

Senator O'Connell moved the adoption of the amendment.

Remarks by Senators O'Connell and Neal.

Amendment adopted.

Bill ordered reprinted, engrossed and to third reading.

Senate Bill No. 405.

Bill read second time.

The following amendment was proposed by the Committee on Judiciary:  
Amendment No. 759.

Amend sec. 3, page 1, by deleting line 6 and inserting: "*tion to a legislator, officer or employee of this state or of a political subdivision, or to a legislator,*".

Amend sec. 3, page 1, line 7, by inserting an italicized comma after "Government".

Amend sec. 3, page 1, line 8, by deleting "agency" and inserting "entity".

Amend sec. 4, page 1, line 11, by deleting "an" and inserting "a legislator,".

Amend sec. 4, page 1, line 13, by deleting "agency," and inserting "entity,".

Amend sec. 4, page 1, line 18, by deleting "an" and inserting "a legislator,".

Amend sec. 5, page 1, line 22, by deleting "an" and inserting "a legislator,".

Amend sec. 5, page 1, by deleting line 23 and inserting: "*political subdivision, or to a legislator, officer or employee of the Federal Government,*".

Amend sec. 5, page 1, line 25, by deleting "agency" and inserting "entity".

Amend the title of the bill, second line, by deleting "agency;" and inserting "entity;".

Amend the summary of the bill, second line, by deleting "agency." and inserting "entity.".

Senator Titus moved the adoption of the amendment.

Remarks by Senator Titus.

Amendment adopted.

Bill ordered reprinted, engrossed and to third reading.

Senate Bill No. 508.

Bill read second time.

The following amendment was proposed by the Committee on Judiciary:  
Amendment No. 782.

Amend sec. 2, page 2, line 17, by deleting "10" and inserting "[10] 6".

Amend sec. 2, page 2, line 18, by deleting "\$10,000," and inserting "\$[10,000,] \$5,000,".





(REPRINTED WITH ADOPTED AMENDMENTS)  
FIRST REPRINT S.B. 405

SENATE BILL NO. 405—SENATORS TITUS, CALLISTER, GLOMB AND BROWN

APRIL 15, 1993

Referred to Committee on Judiciary

SUMMARY—Provides immunity from civil action for communication made in good faith to governmental entity. (BDR 3-995)

FISCAL NOTE: Effect on Local Government: No.  
Effect on the State or on Industrial Insurance: No.

EXPLANATION—Matter in italics is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to actions concerning persons; providing immunity from civil action for a communication made in good faith to a governmental entity; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE  
AND ASSEMBLY, DO ENACT AS FOLLOWS:

- 1 Section 1. Chapter 41 of NRS is hereby amended by adding thereto the  
2 provisions set forth as sections 2 to 5, inclusive, of this act.  
3 Sec. 2. *As used in sections 2 to 5, inclusive, of this act, "political subdivi-*  
4 *sion" has the meaning ascribed to it in NRS 41.0305.*  
5 Sec. 3. *A person who in good faith communicates a complaint or informa-*  
6 *tion to a legislator, officer or employee of this state or of a political subdivi-*  
7 *sion, or to a legislator, officer or employee of the Federal Government,*  
8 *regarding a matter reasonably of concern to the respective governmental*  
9 *entity is immune from civil liability on claims based upon the communication.*  
10 Sec. 4. *In any civil action brought against a person who in good faith*  
11 *communicated a complaint or information to a legislator, officer or employee*  
12 *of this state or of a political subdivision regarding a matter reasonably of*  
13 *concern to the respective governmental entity, the attorney general or other*  
14 *legal representative of the state or the legal representative of the political*  
15 *subdivision may provide for the defense of the action on behalf of the person*  
16 *who communicated the complaint or information. If the legal representative of*  
17 *a political subdivision does not provide for the defense of such an action*  
18 *relating to a communication to a legislator, officer or employee of the politi-*  
19 *cal subdivision, the attorney general may provide for the defense of the*  
20 *action.*  
21 Sec. 5. 1. *Except as otherwise provided in subsection 2, the party prevail-*  
22 *ing in an action brought against a person who in good faith communicated a*  
23 *complaint or information to a legislator, officer or employee of this state or of*  
24 *a political subdivision, or to a legislator, officer or employee of the Federal*

- 1 Government, regarding a matter reasonably of concern to the respective
- 2 governmental entity is entitled to reasonable costs and attorney's fees.
- 3 2. If a legal representative of this state or of a political subdivision
- 4 provides the defense in such an action, the state or political subdivision:
- 5 (a) If the legal representative prevails, is entitled to reasonable costs and
- 6 attorney's fees; or
- 7 (b) If the legal representative does not prevail, must pay reasonable costs
- 8 and attorney's fees.

⑩

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Senate Bill No. 230.

Bill read third time.

Roll call on Senate Bill No. 230:

YEAS—21.

NAYS—None.

Senate Bill No. 230 having received a constitutional majority, Madam President declared it passed, as amended.

Bill ordered transmitted to the Assembly.

Senate Bill No. 303.

Bill read third time.

Roll call on Senate Bill No. 303:

YEAS—21.

NAYS—None.

Senate Bill No. 303 having received a constitutional majority, Madam President declared it passed.

Bill ordered transmitted to the Assembly.

Senate Bill No. 405.

Bill read third time.

Remarks by Senators Titus, Callister, Brown, Adler, Neal and James.

Senator Brown requested that the following remarks be entered in the Journal.

SENATOR TITUS:

Thank you, Madam President. I rise in support of Senate Bill No. 405. Basically, this bill is designed to protect well-meaning citizens who petition government and then find themselves hit with retaliatory suits known as SLAPPS which is an acronym for Strategic Lawsuits Against Public Participation. The right to petition government is protected by the first amendment to the Constitution. It includes all forms of communication with government officers and employees. That means letter writing, telephone calls, criticism, speaking out at meetings, whistle blowing and giving testimony. The problem is that often people who engage in those kinds of activities find themselves being sued as a result. Primarily, they are being sued by developers over rezoning issues or by big business in matters of environmental and consumer protection. The good news is that usually these SLAPPS don't work. They are thrown out of court and they are not successful. But they are traumatic. They take up a lot of time. They cost a lot of money and the result is that they have a chilling effect on public discourse. People are intimidated against speaking out.

A number of states have passed such legislation as Senate Bill No. 405 including Virginia, Maryland, Rhode Island, New Jersey, Washington, New York and California, and it is being considered in other states across the country because SLAPPS are becoming more and more common. As Robert Richards, a professor of law at Penn State University said, "the burden is upon state legislatures to step in and safeguard the rights of their citizens to speak out on public issues and in the process help to solve the chill of intimidation brought by SLAPPS."

Since this bill was introduced, it has been editorialized about in two local newspapers, both in favor of the bill. One newspaper said that the legislature should approve this bill. "Intimidation lawsuits are threatening to put a lid on legitimate public debate and that lid must be pried off." The other newspaper said that Nevada should move forward with this kind of progressive legislation. "In addition to protecting Nevadans, it also will cut down on the number of lawsuits. That, in itself, is a big plus."

SENATOR CALLISTER:

Thank you, Madam President. Just very briefly, I, too, rise in support. This is a

measure that both Senator Titus and myself had submitted legislation on. I can't think of a single more important measure this session than Senate Bill No. 405. I applaud the efforts of the Judiciary Committee and the chairman who accepted it and refined it even more to include those who come before us here in this legislative forum. As originally drafted, it was more focused towards the local-land-use planning arena in which many of these lawsuits have been brought. As an elected representative for an area of rapid growth in southern Nevada during the past eight years, it has been my unfortunate experience to see all too frequently, either the threat of litigation or actual litigation, utilized as a strategic device to, in effect, quell the opportunity for public dialogue on issues that are of paramount importance. There has been significant legislative efforts this session and in past sessions brought by the chairman of your Taxation Committee to focus on the whole nature of governmental taking of someone's property or property values. This legislation follows on the heels and focuses on that same issue. All too frequently we forget the decisions that are made in the legislative forum or in a municipal planning forum outside of a courtroom will have enormous implications on property values and property rights. We need to reconsider that. If we should have learned anything from the last round of national elections, it is that the public is fed up with government being nonresponsive to public involvement in the process and personal property rights. Senate Bill No. 405 guarantees those rights. It extends the same level of protection that has long been the case in the judicial arena to the legislative arena, to the land use decision making arenas at the local level. I urge your positive support.

SENATOR BROWN:

I, too, rise in support of Senate Bill No. 405. The term "SLAPPS don't work" is kind of a misnomer. I understand that they don't work in that people don't win them. However, they work in that they shut people up. The cost of litigation, the emotional as well as financial costs of litigation are hard on the individuals in our districts, the people without the big money, the people who are the victims of these suits. It does work to shut people up. We have to encourage people to participate in their government.

SENATOR ADLER:

I firmly support this measure. It came as a great shock to me this session that we actually had a lawsuit against someone who had testified on a certain measure on the Assembly side. In fact, I didn't really believe it. I made the individual bring in actual copies of the court documents because I found it unbelievable that that would occur in this legislative body. But, unfortunately, it did happen and there are actual court documents that show that did happen. There have been other threats this session against individuals if they testified before the legislature. I find that absolutely appalling that anyone would be threatened with litigation if they testified before any of the legislative committees here. It is absolutely necessary for the free flow of information and ideas in a democratic society that people be protected to come to the legislature and testify. I have heard some arguments, some came up in committee, that maybe some of these people are wrong or they are not telling the complete truth. That may be true. I am certain that we have had many instances where people have not told us the complete truth in committees. But I think that is for the legislative bodies to sort out and I think that most of us know who is telling the truth and who is not telling the truth. We can decide that in our deliberations. It is absolutely necessary that we receive all the information and opinions which are available so that we can make reasonable judgments on behalf of all the citizens of the State of Nevada. It is absolutely necessary in a democracy that everyone feel free to come forward and testify on any measure which they choose to testify upon. That is exactly what this bill does.

SENATOR NEAL:

I have just one question. Does the language on line 10, subsection 4, a person who in good faith communicates a complaint or information to a legislator or office or employee of this state or a political subdivision regarding a matter reasonably concerned to the respective governmental entity, is that language sufficient enough to keep someone from coming into a committee and slandering someone?

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SENATOR JAMES:

Thank you, Madam President. We examined just that issue pretty carefully in the committee. It was the committee's view and that gleaned from the witnesses that testified that this was the best language to deal with the situation of libel or slander. Slander or libel, to the extent that it is based upon an intentional misrepresentation, would not be in good faith. So, you would be outside the good faith standard. We considered whether that should be changed to a truthfulness standard, but then we would have the situation where someone was in good faith and they made an untrue statement. As the senator from Carson City indicated, it is for the tribunal or the body dealing with the person to decide whether they are telling the truth or not. But if you can show that it is intentional conduct which would be slander or libel, then that would be bad faith and this immunity would not extend to that situation. It is the same kind of qualified immunity that you have when you go into court and testify as a witness. This is to encourage people to be open and to speak about things. It is not to encourage them or give them immunity when they would intentionally or with malice defame someone or misrepresent the facts.

Roll call on Senate Bill No. 405:

YEAS—21.

NAYS—None.

Senate Bill No. 405 having received a constitutional majority, Madam President declared it passed, as amended.

Bill ordered transmitted to the Assembly.

Senate Bill No. 444.

Bill read third time.

Roll call on Senate Bill No. 444:

YEAS—21.

NAYS—None.

Senate Bill No. 444 having received a constitutional majority, Madam President declared it passed.

Bill ordered transmitted to the Assembly.

Senate Bill No. 508.

Bill read third time.

Roll call on Senate Bill No. 508:

YEAS—21.

NAYS—None.

Senate Bill No. 508 having received a constitutional majority, Madam President declared it passed, as amended.

Bill ordered transmitted to the Assembly.

Senate Bill No. 517.

Bill read third time.

Remarks by Senators Neal and Raggio.

Roll call on Senate Bill No. 517:

YEAS—21.

NAYS—None.

Senate Bill No. 517 having received a constitutional majority, Madam President declared it passed, as amended.

Bill ordered transmitted to the Assembly.

MINUTES OF THE  
ASSEMBLY COMMITTEE ON JUDICIARY

Sixty-seventh Session  
June 22, 1993

The Assembly Committee on Judiciary was called to order by Acting Chairman Bernie Anderson, at 8:15 a.m., on Tuesday, June 22, 1993, in Room 332 of the Legislative Building, Carson City, Nevada. Exhibit A is the Meeting Agenda. Exhibit B is the Attendance Roster.

COMMITTEE MEMBERS PRESENT:

Mr. Robert M. Sader, Chairman	Late/Excused
Mr. Gene T. Porter, Vice Chairman	Absent/Excused
Mr. Bernie Anderson	
Mr. John Bonaventura	
Mr. John C. Carpenter	
Mr. Tom Collins, Jr.	
Mr. James A. Gibbons	
Mr. William D. Gregory	
Mr. Ken Haller	
Mr. William A. Petrak	
Mr. John B. Regan	
Mr. Scott Scherer	
Mr. Mike Schneider	
Ms. Stephanie Smith	
Mr. Louis A. Toomin	

OTHERS PRESENT:

John Cummings, Nevada State Education Association  
Jim Endres, Nevada State Manager for ATT  
Phil Stout, Executive Director, Nevada Association  
of Independent Businesses  
Lucille Lusk, Nevada Coalition of Concerned Citizens  
Ande Engleman, Nevada Press Association  
David Sarnowski, Chief Deputy Attorney General,  
Criminal Division, Attorney General's office  
Lt. Jim Nadeau, Washoe County Sheriff's Office  
Mary Santini, Executive Director, Retailers' Association  
Ben Graham, Clark County District Attorney's Office  
Patricia Erickson, Attorneys for Criminal Justice

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OTHER LEGISLATORS PRESENT:

Senator Mark James, Senatorial District No. 8  
Senator Dina Titus, Senatorial District No. 7  
Senator Matthew Callister, Senatorial District No. 8  
Assemblyman Bob Price, Assembly District No. 17

Following roll call, Acting Chairman Anderson opened the hearing on SB 192.

SENATE BILL 192 - Provides enhanced penalty for crimes committed against minors.

Senator Mark James, Senatorial District No. 8, came forward to explain the original intent of SB 192 was to enhance the penalties on crimes committed against children in the state. He related the progress of the bill and indicated it had received an almost equal amount of support and opposition.

Although a registry of sex offenders was maintained in Nevada since 1962, Senator James said there was nothing which compelled registration and there certainly was no follow-up by the releasing entity.

Besides clarifying the requirements for registration, one additional change to the current sex offender registration law, Senator James explained, was to broaden the availability of information contained in the sex offender registration from only being available to law enforcement to being available to the Board of Trustees of a county school district in which the sex offender expected to reside. Discretion would be given to the Board of Trustees to release the information to whomever it deemed necessary in order to protect children in the area. The bill also provided an immunity provision relieving the Board of Trustees of liability for either releasing or not releasing the information unless it acted with gross negligence or intentional disregard.

Mr. Collins asked why the reporting provisions were not imposed on all felons, not just sex offenders. To this, Senator James replied the committee had tried to alleviate the fiscal impact as much as possible. More importantly, Senator James pointed out children were the least element of society able to make themselves aware through news reports, etc., of these kinds of crimes. Thus, children needed this kind of protection to a

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Dina Titus, Clark County Senatorial District 7, agreed with the explanation offered by Mr. Malkiewicz.

Mr. Haller questioned how people would be aware of the change in the language. In response, Mr. Malkiewicz pointed out there was a sample form shown in the Nevada Revised Statutes. He assured Mr. Haller and committee members prior declarations in the previous form would still be valid.

Discussion followed, with Mr. Malkiewicz explaining the Durable Power of Attorney and the Living Will.

Lucille Lusk, Nevada Coalition of Concerned Citizens, believed if any substantive changes were to be made, it should not be in a technical corrections bill. If there was an intent to make changes in the editorial comments, she asked for these to be separated out and dealt with more completely when people knew what they were dealing with.

Assemblyman Bob Price, Assembly District No. 17, appeared before the committee to speak regarding Section 34.5 dealing with the Nevada Tax Commission. He believed this presented a substantive change and asked the Judiciary Committee to refer the bill to the Taxation Committee before it went further. Chairman Sader agreed to amend it out of the bill and refer it to the Taxation Committee.

SENATE BILL 405 - Provides immunity from civil action for communication made in good faith to governmental entity.

Senator Titus again came forward to explain the bill and to submit Exhibit D dealing with "slapps. She said the bill was basically designed to protect well-meaning citizens who petitioned government, from being hit by retaliatory "slapps" which was an acronym for "strategic lawsuits against public participation." Senator Titus continued with a review of the exhibit. She said since SB 405 was introduced in the Senate, there had been two editorials in Nevada newspapers expressing support; these were attached in Exhibit D.

The Chairman questioned the concept of "good faith communication." He believed the good faith standard allowed a slapp lawsuit to be filed. Although the burden was high, the individual would still have to go through a costly litigation process. Senator Titus indicated the intent of writing the "good faith" standard into the bill was to discourage the notion



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that someone could come before a legislative body, deliberately not tell the truth and then be statutorily protected. However, Senator Titus said, if the "good faith" standard went against the main purpose of the bill, which was to stop slapp lawsuits, she invited suggestions to remedy this.

Mr. Price also indicated concern regarding the influence exerted on state employees to discourage them from testifying before the Legislature regarding their opinion on certain issues. Mr. Price submitted Exhibit E, a memo issued by Director James P. Weller early in the session, and discussed the implications of such supervisory involvement in employee activities.

Ms. Lusk declared her organization completely supported what Senator Titus was attempting to accomplish in SB 405. They did, however, have a concern regarding citizen testimony which related to some action on the part of an individual working within a governmental entity. Ms. Lusk said the situations mentioned by Mr. Price were not limited to public offices -- this occurred in the private sector as well.

Phil Stout, Executive Director, Nevada Association of Independent Businesses, submitted Exhibit F, a written copy of his testimony.

Ande Engleman, Nevada Press Association, indicated support of SB 405, however, she told the committee the Association's attorney preferred the simpler language of the previous bill, AB 719, over the language in SB 405. Referring to Assemblyman Price's remarks and Exhibit E, Ms. Engleman acknowledged a department head would want to know the content of testimony given before the Legislature by department employees, but when it came to agency heads trying to control private conversations with Legislators, she believed the Press Association would strongly oppose this proposition.

Senator Matthew Callister, Senate District 8, testified in support of SB 405. All too often in southern Nevada he said he saw the tendency for either the threat of litigation or actual litigation to be a devise in lieu of expressing opinion. He believed it was important to guarantee the public protection against unnecessary litigation, and urged the committee's support for the bill.

Chairman Sader requested Senator Callister's comments regarding the "good faith" provisions. Although he did not want to encourage false allegations, Senator Callister said he believed

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it was more appropriate to err on the side of encouraging public comment. He said he felt comfortable with the language in SB 405, but he did not make a direct comparison with AB 719. Senator Callister said if he had a preference, it would fault on the side of protecting people's right to participate. If the committee did not perceive SB 405 provided adequate protection, he urged the committee to take the necessary steps to make the bill clearer.

Mr. Scherer asked how this bill changed the existing common law with regard to communications to various agencies and government officials. Senator Callister said he hoped by codifying common law it would provide a clear expression of Legislative intent on the issue.

Further commenting on the question posed by Mr. Scherer, Chairman Sader explained clearly, SB 405 set up a "good faith" standard in all cases, and this was substantially lower than the threshold of the "restatement." If SB 405 was enacted, a lower standard would be created, which the Legislative Counsel believed was the current status of the law. Senator Callister acknowledged he had not had the benefit of Legislative Counsel discussions but if this was the case, he urged the committee to adopt the higher standard.

Supporting testimony was also heard from Joe Johnson, representing the Sierra Club. Although some members of the Sierra Club had been victims of this type of lawsuit, Mr. Johnson said the Club saw it more as discouraging people from participating in the public process.

Ed Pressley from the Home Rule Coalition, offered support for the bill.

The Chairman opened the hearing on SB 413.

SENATE BILL 413 - Makes various changes regarding civil actions.

The Chairman reviewed the progress of the bill. Paula Treat, representing the Nevada Judges' Association, submitted Exhibit G, a suggested amendment dated 6/17/93.

Explaining the bill, Senator Callister pointed out SB 413 would increase jurisdictional limits in both small claims court and justice court. The proposal was to increase the existing small claims cap from \$2,500 to \$3,500, and to increase the justice

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ASSEMBLYMAN SCHERER SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY BY THOSE PRESENT.

Ms. Smith was asked to handle the bill on the floor.

SENATE BILL 405 - Provides immunity from civil action for communication made in good faith to governmental entity.

Chairman Sader noted a preference for AB 719, which was currently on the Clerk's desk in the Assembly. He did not believe the provisions in AB 719 were inconsistent with the provisions in SB 405; but if AB 719 was not passed, Chairman Sader believed the Legislature would be creating a lower standard for protection of witnesses than that currently existing. He suggested the committee amend all three sections of AB 719 into SB 405, leave AB 719 on the Clerk's desk and let SB 405 go forward.

ASSEMBLYMAN GREGORY MOVED TO AMEND AND DO PASS SB 405.

ASSEMBLYMAN TOOMIN SECONDED THE MOTION.

Ms. Smith questioned whether anything would be added to SB 405 dealing with employees and agencies. Although not in disagreement, Chairman Sader said he would prefer not to place Mr. Price's amendment in SB 405 as it was an issue which presented a whole new set of questions which should more appropriately be addressed in the finance committees.

Mr. Carpenter expressed concern with AB 719 in that the interpretation could allow individuals to believe they could falsely testify before the Legislature.

THE MOTION CARRIED. (ASSEMBLYMEN CARPENTER AND SCHERER VOTED NO, ASSEMBLYMAN GIBBONS ABSTAINED FROM THE VOTE; ALL OTHERS VOTED YES.)

Chairman Sader said he would handle the bill on the floor.

SENATE BILL 413 - Makes various changes regarding civil actions.

ASSEMBLYMAN SCHERER MOVED TO INDEFINITELY POSTPONE SB 413.

ASSEMBLYMAN GIBBONS SECONDED THE MOTION.



SEN. TITUS  
FILE COPY

UNIVERSITY of DENVER  
Colorado Seminary

College of Law

What every American needs to know about

CITIZENS' RIGHTS - COMMUNICATING WITH GOVERNMENT - AND "SLAPPS"

\* The "Right to Petition" the government is one of the most protected freedoms Americans have. It is guaranteed by the First Amendment of the U.S. Constitution and a host of other laws.

\* It is also the foundation of our representative form of democracy. Public participation or citizen involvement in government has been encouraged by our system for over 200 years. The reason is simple: if citizens cannot communicate with government, government cannot represent them.

\* Your right covers not only petitions, but all forms of communication with government offices and employees, including:

- writing letters
- calling officials
- criticizing government actions, policies, and officials
- speaking out at a public meeting
- reporting violations of law
- giving testimony
- campaigning on issues
- demonstrating, picketing, and boycotting
- filing agency appeals
- filing public-issue lawsuits

\* It applies to all 3 branches of government (legislative, executive, and judicial) and to all government levels (federal, state, and local).

\* The protection is not limited to truthful, public-spirited, good ideas. It covers error, self-interest, even bad ideas - provided the goal was to influence legitimate government decision or action, not just to injure someone else.

\* Can you still be sued for exercising these rights? Yes. The Political Litigation Project at the University of Denver has studied hundreds of cases where thousands of citizens and groups have been sued for dollars for speaking out to government:

- by developers, for testifying against rezoning for their projects,
- by teachers, for complaining about their competence to the board of education,
- by businesses, for reporting their violations to environmental and consumer authorities,
- even by governments, public officials and employees themselves, for criticizing their projects or policies.

\* WE CALL THESE SUITS "SLAPPS" - "STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION." (continued)

\* The good news: SLAPPs are virtually all thrown out of court. Courts usually see them as a blatant attempt to "chill" citizens' First Amendment political participation rights. SLAPPs are also seen as an attempt by one side of a political dispute to transform a public, political-arena issue into a private, judicial-arena issue, from a forum that can resolve the debate to one that suppresses it.

\* WHAT TO DO IF A SLAPP IS THREATENED OR FILED:

1. Legal help: Immediately contact an attorney. Specifically say your First Amendment "Right to Petition" is being attacked. You may wish to contact your local branch of the American Civil Liberties Union, or Ralph Nader or related-issue groups which have provided legal support in other SLAPPs.

2. Our help: Advise your attorney to contact us for our information packet and expert assistance.

3. Court help: Consider an early motion to dismiss (demurrer, summary judgment, etc.) based on federal or state constitutional/civil rights, state "privilege," "immunity," "anti-SLAPP" statutes, etc. These prove highly successful.

4. "SLAPPback": Consider a counterclaim/suit for violation of your constitutional/civil rights, malicious prosecution, abuse of process, political--and emotional injury, outrageous conduct, etc. These have been very successful and resulted in multi-million dollar jury awards to the citizens who were SLAPPED. SLAPPbacks help others, too, by sending a clear message to those considering filing SLAPPs that they are "costly," illegal, and a public relations nightmare.

\* Above all, do not let the SLAPP work in the real world. Do not let it "chill" your advocacy or sap support from your cause. Then censorship wins, and America loses.

You have the right. Use it and protect it.

THE POLITICAL LITIGATION PROJECT

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7/91

# Intimidation lawsuits chill public activism

## 'SLAPPs' target pocketbook, seek to nip opposition

By Julia Rubin  
Associated Press

**C**itizens who crusade against local polluters or new developments in their neighborhoods are increasingly likely to be hit with lawsuits, say two University of Denver professors who are mapping the trend.

They call the lawsuits "SLAPPs" — Strategic Lawsuits Against Public Participation. The suits are unconstitutional and are putting a chill on public participation in the United States, they said.

Some SLAPP victims, however, are SLAPPING back.

Vic Monia's is a textbook case. Monia headed a Saratoga, Calif., environmental and homeowners group that helped persuade local voters in 1980 to limit development on surrounding hillsides.

Monia, his organization, and other leaders of the slow-growth campaign immediately were sued for \$40 million by a developer who charged defamation.

The case never made it to court. Nine years later, Monia, a computer engineer, won \$200,000 in a countersuit when a jury ruled he was the victim of malicious prosecution.

In the meantime, however, the developer's lawsuit had had an effect. Intimidated city council members exempted the developer from some of the new restrictions, and many local homeowners' groups disbanded, Monia said.

"I saw the impact of the lawsuit in the community: a lot less participation. People were talking about, 'You've got to be careful. You speak out, someone's gonna sue you.'"

As for himself, Monia said, "I got so preoccupied, I ended up leaving my job. I thought about moving out of the state."

"My daughters at the time were quite young, we'd just moved into a new home, the payments were pretty good-sized. And my wife said, 'Are you sure you haven't risked everything we've worked for?' It really began to weigh very heavily on me."

Now, he said, he will think twice before participating in local politics again.

Vic Monia had been SLAPPED.

His is one of hundreds of such cases tracked by DU law professor George Pring and sociologist professor Penelope Canan as part of a 2½-year study funded by the National Science Foundation.

There are thousands more, and the numbers have been growing since the 1970s, Pring and Canan.

Such lawsuits aren't just expensive and traumatic — they're a violation of the right to petition guaranteed by the First Amendment, said Pring and Canan.

Among other SLAPPs they have studied: ■ A Louisville woman circulated petitions opposing plans for a housing development on nearby farmland, and was sued by the developer.

■ A Sutton, W.Va., blueberry farmer told federal authorities that operators of a nearby coal mine had polluted a river and killed fish in it. He was SLAPPED with a \$200,000 slander lawsuit by the coal mine operator.



DU law professor George Pring tracks cases where citizens are sued for crusades.

■ A group of citizens of Washington and Warren counties, N.Y., went to court to block a planned trash incinerator and were counter-sued by the counties for \$1.5 million.

■ The League of Women Voters in Beverly Hills, Calif., supported a ballot initiative to stop a condominium project and wrote two letters to a local newspaper criticizing it. The developer SLAPPED the league for \$63 million.

"SLAPPs inevitably fear everybody out of the public political arena where problems get solved and try to shift them over to private judicial arenas where the problems really can't get solved," said Pring. "The court can't decide the real issue, it can only say yes, you slandered, or no, you didn't."

SLAPPs aren't meant to be won; they're meant to intimidate.

They usually don't even get to court, and once there, more than 90% are lost by the parties filing them, Pring said. But by that time, the citizen opposition often is scared off or into compromise, the professors said.

"Hundreds of people we've talked to are literally terrified at the thought of losing their homes under multimillion-dollar lawsuits," said Pring.

The average SLAPP asks for \$9 million in damages and lasts 36 months before being resolved, Pring and Canan said.

And SLAPPs dissuade people who merely hear about them from participating in politics, they said.

"We think we know that in the majority of cases, there will be negative (participatory) political futures for these people — not only for those sued, but for a much wider group of people who hear about these cases," said Pring.

The professors stress that the threat of SLAPPs shouldn't deter people from public participation. "If people know about and use

the First Amendment, they are almost guaranteed of getting out of the problem," said Canan.

State authorities around the nation are starting to take action against SLAPPs. A legislative proposal in New York, for example, would limit the ability of developers to file SLAPPs without proving actual malice on the part of citizen opponents, said Nancy Stearns of the New York Attorney General's Environmental Protection Bureau, in Albany.

"There are more of these cases recently and people are becoming aware of them as a problem," said Stearns.

"It's troublesome. Particularly in the environmental arena, citizen participation is really key. The law relies on the involvement of citizens in the environmental process. It's not just exercising rights, but being a responsible citizen."

New York Attorney General Robert Abrams recently decried the use of SLAPPs against citizens who complain about the environment, and said his office may try to help such defendants by filing friend-of-the-court briefs, for example, and supporting the proposed anti-SLAPP legislation.

Stearns said the rise of SLAPPs in the last 10 or 15 years may be due to rising citizen concern about the environment — the so-called NIMBY, or Not-In-My-Backyard, movement that makes it harder for developers to get projects approved.

Pring and Canan said they found SLAPPs everywhere they looked, but the greatest concentration is in areas with a high quality of life and many educated newcomers — especially California, New York and Colorado.

The rise of SLAPPs may also be the result of a generally more litigious society, they said, noting that many SLAPPs have nothing to do with the environment but are

"Hundreds of people we've talked to are literally terrified at the thought of losing their homes under multimillion-dollar lawsuits."

George Pring  
DU law professor

filed by local or school officials against ordinary citizens or parents.

SLAPPs include a recent case in suburban Denver, for example, in which a teacher accused by fundamentalist Christian parents of teaching witchcraft sued the parents for slander.

They include numerous cases of police officers suing citizens who complain about their behavior. Pring and Canan said, or elected officials who claim defamation when ordinary citizens call for their jobs.

"The right to tell our elected government representatives what we think and what we want them to do for us is the most basic right we have," said Pring. "What is more basic than parents going to school with complaints about their children's education?"

Increasingly, SLAPP victims such as Vic Monia aren't turning the other cheek.

They are filing "SLAPP-backs," and winning.

Monia stewed about the "injustice" of the lawsuit filed against him for about 10 months after it was dismissed, and then decided to sue the developer and the developer's attorney for malicious prosecution. In addition to the \$200,000 jury award from the developer last year, Monia won an out-of-court settlement with the attorney.

In a more prominent California case last year, a group of Kern County farmers who successfully fought off a SLAPP by agribusiness giant J.G. Boswell Co. in a water dispute countersued and won a judgment of \$13.5 million against Boswell for infringing on their constitutional rights.

The court ruled that the farmers tried to intimidate the farmers so they would not support a state proposition when it sued them for libel in 1982.

"Unlike SLAPPs, many SLAPP-backs are succeeding," said Pring, who testified on behalf of the farmers.

"It used to be filers could file these cases with impunity. There was no downside. If it works, it works. Now, I have to counsel would-be filers and their attorneys they may be walking themselves into a multimillion-dollar action."

Still, Pring said, the farmers told him they will never participate in politics again.

Monia, who said he was lucky enough to be able to weather nine years of legal battles and survive, hopes his victory "gives encouragement to people. And I hope that they can feel that if they go after individuals or companies who misuse the judicial system for political purposes, that they can win."

"Only one-half of 1% of the population probably gets out there on the streets and gets involved politically," Monia said. "What happens if that half of 1% doesn't get out there? Hell, the rest of us probably wouldn't get out and vote because we wouldn't understand the issues."

# SLAPPING the Opposition

## How developers and officials fight their critics

**B**etty Blake moved to Wampanoag Woods, N.Y., 30 years ago because she loved the stately oak and beech trees that shaded the suburban Long Island neighborhood. "An inspiration," she called them. In 1987, when Terra Homes announced plans to cut some of them down for a new development across the street, she rallied her neighbors. They tied red ribbons around their trees, met at candlelight vigils and petitioned the town for a rezoning to protect the greenery. Blake even hung a spray-painted bedsheet on her lawn declaring, "This neighborhood will not be Terra-ized." The bulldozer came anyway, and she jogged alongside, swatting it with a piece of debris. Terra's response: a \$6.56 million harassment lawsuit against Blake and six other protesters.

Blake was SLAPPED—hit with what is known as a Strategic Lawsuit Against Public Participation. Frustrated by tenacious opposition to big-ticket projects, real-estate developers, corporate executives and elected officials are hauling critics to court in alarming numbers. Those doing the SLAPPING almost always lose; the First Amendment generally protects activists like Betty Blake, whose case is pending. But multimillion-dollar lawsuits, even those dismissed or successfully defended, can be a chilling experience, depleting organizers of time, money and commitment. Some legal experts familiar with SLAPPs say they are more a political muzzle than a legal remedy. "The purpose is to shut environmentalists or other public-interest groups up," says Oakland attorney Joe Brecher, who has defended SLAPP cases. "Another purpose is to teach a lesson to gadflies and make sure they don't speak up again."

SLAPPs began to proliferate in the early 1980s as local environmental, consumer and community groups aggressively pursued their various causes, often under the rhetorical battle cry of NIMBY (not in my backyard). Their targets—local governments, real-estate companies, manufacturers—began to strike back, couching their retaliation in sometimes questionable claims of defamation or conspiracy. The SLAPP phenomenon has grown large



Titling at bulldozers: Blake was sued while trying to save trees

enough to attract scholarly attention. University of Denver professors George Pring and Penelope Canan, who coined the acronym and have cataloged more than 250 cases so far, believe hundreds, perhaps thousands of such lawsuits are being filed annually. "We're looking at a very big bottom of the iceberg," says Pring.

SLAPPs aren't limited to fights between developers and neighborhood groups—and they don't always conform to good-guy/bad-guy scenarios. Donald Barnett and Ardis Williams, members of an advisory council at Mary M. Bethune Junior High School in south-central Los Angeles, wrote to local and state officials last year after they found the principal unresponsive to their concerns about poor reading and math scores. The principal, Peggy Selma, filed a \$1 million defamation suit and claimed Barnett was using the school as a political base. The suit was settled out of court.

Some SLAPPs are targeted against unsympathetic victims: Klan members, religious zealots, fringe environmentalists. "The point is they have a right to express themselves," Pring says. SLAPPs are damaging, he argues, because they derail public debates, transforming them into drawn-out civil litigation that may settle grudges but rarely makes good public policy.

That's why the most harmful SLAPPs involve politicians attacking their constituents. An Agoura Hills, Calif., neighbor-

hood association that tried to recall several city council members—for alleged violations of the state's open-meetings law—found itself facing a \$1 million defamation suit from one of the officials. The action stalled a petition drive, and the organizers never gathered enough signatures for an

election. (The case is pending.) Two Hudson Falls, N.Y., citizen groups who went to court last February to stop construction of a \$74 million trash incinerator were countersued by Washington and Warren counties for \$1.5 million. Officials contend that the opposition drove off prospective buyers of bonds to finance the project, hiking costs. Warren County Attorney Thomas Lawson added an intimidating touch by announcing that the defendants risked losing their homes. The suit was dismissed by a state appellate court in January.

Some business executives argue that the courts are a last defense against "anti-growth" activists skilled at obstructing projects. "You keep churning up money on 500 pages of technical information, and soon you don't have any [money] to build with," says New York develop-

er Thomas Stephens, who spent two years trying to build homes near a nature conservancy in Westchester County. He finally sued the Dover Planning Board for \$3.8 million last spring, charging a "conspiracy" to hold up his project. He lost the case.

"Like a monster": For SLAPP defendants, winning can still mean losing. Grass-roots groups once united in common cause can find themselves in disarray when the litigation starts. "A lawsuit is like a monster that moves in with the family," says Rick Sylvester, who was sued by Perini Land and Development Co. in 1986. The company claims he broke an agreement not to publicly oppose a 540-room condo and golf complex near his Squaw Valley, Calif., home. Although Sylvester is independently wealthy, the enormous expense of the case (\$1 million in legal fees) has driven away activists who sided with him earlier.

Is there a way to lessen the pernicious effects of SLAPPs? Pring says defendants exercising First Amendment rights need to have their cases fast-tracked for summary judgment. Some SLAPP targets, like Betty Blake, are countersuing. Citizens in Washington and Warren counties are readying a civil-rights action. It means more time and expense, but it may compel others to think twice before slapping down someone for speaking up.

Bill Turque with Lynda Wright in Los Angeles and Stephen Pomper in New York

# Huge award sends 'very clear signal'

By JEANIE BORBA  
Bee staff writer

They're called Strategic Lawsuits Against Public Participation (SLAPPS) and three Kern County farmers' countersuit against the J. G. Boswell Co. is a classic example, according to an expert witness who testified during the recent trial.

George Pring, a law professor at the University of Denver, has studied 100 such lawsuits across the country and is embarking on a new study of 100 more to determine how the recent litigation trend started and how it has affected people who are politically active.

Pring said he believes the jury's verdict awarding the farmers a total \$13.5 million in actual and punitive damages is the largest ever awarded in this type of litigation.

"The size of this jury verdict ... sends a very, very clear signal and precedent all over the country. The verdict exceeds all previous ones in cases like this and sends a signal to people that would file lawsuits to chill political opposition that the cost of that strategy is very high," Pring said after the trial in a telephone interview from his Denver home.

He said that previously the highest verdict was \$5 million against the Shell Oil Co. in a case in which the company sued a union attorney for reporting to authorities that a Shell product contained cancer-causing chemicals.

Pring testified at the Bakersfield trial on behalf of Ken Wegis and Jack and Jeff Thomson, three farm-

ers who sued the Boswell company after Boswell's libel suit against them was thrown out of court.

The six-year legal battle stemmed from controversy over the Peripheral Canal, a project that would have brought more Northern California water to the valley and Southern California.

The Boswell company spent \$1.1 million to defeat the measure. Wegis and the Thomsons contributed to an advertisement favoring the canal that appeared in two newspapers a month before the election.

Boswell officials claimed that the farmers' advertisement was libelous because it accused the company of engaging in illegal price-fixing of farm commodities. The lawsuit was thrown out of court.

Pring said such lawsuits masquerade as libel or defamation cases or suits to stop business interference, but their real purpose is to silence political opposition.

He described SLAPP cases as a trend that began developing in the early 1970s in which "people take a public political dispute and one side tries to transform it into a private courtroom dispute."

"It's a scary phenomenon, and very few of the targets — only 15 percent — ever fight back. But of those who do fight back, most win," Pring said.

The cases Pring has studied ranged from disputes over local zoning issues to those involving statewide elections or ballot issues. Very often they involve a citizen reporting misconduct by a public official, he said.



REMO PAPER  
4-22-93

OWNERS TO MAKE SUGGESTIONS

## Measure helping whistle-blowers merits passage

**Civil liability immunity:** Legislation designed to slow down company intimidation suits

**D**uring the last session of the Nevada Legislature, a measure was passed to protect government workers who tell investigators about alleged improprieties of agency directors. The law was long overdue, and represented an important tool in cleaning up government.

Now a similar bill — an extension of the 1991 protection for workers — is under study in the state Senate. It too merits approval.

SB405 would prevent companies that have been sued by the government from suing the person who tipped off authorities. The legislation is largely a response to SLAPP (Strategic Lawsuits Against Public Participation) suits against environmental organizations.

Typically, such suits are designed to deter whistle-blowers by forcing them to pay huge court fees to defend themselves, even though it is almost certain they'll win their cases. In effect, these suits are aimed

at intimidating people. It is common for companies to sue whistle-blowers for libel, slander, trespassing or interference in economic activity. Environmental experts say the companies don't plan to win such cases — and rarely do — but the suits certainly send a message to potential whistle-blowers.

Two states, seeing the ugliness of this type of litigation, have given whistle-blowers immunity from SLAPP suits. Twenty other states have similar bills in the works.

Nevada's bill, sponsored by Sen. Dina Titus, D-Las Vegas, would give whistle-blowers immunity from civil liability if they file complaints in good faith. In some cases, those named in the suits could get the state to defend them.

Nevada should move forward with this kind of progressive legislation. In addition to protecting Nevadans, it also will cut down on the number of lawsuits. And that is big plus in itself.

EDITORIALS

## Your free speech is threatened by lawsuits

**Public meetings:** SB405 would guarantee your right to speak out to governmental bodies

**Y**ou go to a public hearing. You have important things to say. Maybe you want to oppose a development that is going to be built near your home. Maybe you think the mayor is too closely tied to big business. Maybe you've had a beef with the neighbor over a barking dog and you want tighter controls. Maybe you suspect that a utility is finagling its books in order to get more money out of your pocketbook. Whatever it is, you want to speak out.

But what happens if you know that the developer might sue, claiming that you have defamed him? What happens if you know that the mayor might sue — or the neighbor or the utility? What happens if you know that other people have been sued, and that they had to spend money they couldn't afford to hire an attorney? Or that they spent one sleepless night after another worrying about what was going to happen to them?

How free is your speech then? Not very. You might as well live in a dictatorship.

Yet this is precisely what is happening all around the country. There are actual cases where ordinary people have spoken out and found themselves in court. A man criticized a proposed subdivision; the developer sued, saying the man had his facts wrong and was being

malicious. Another man criticized a mayor for the way he was conducting city business. The mayor sued and won at the lower level; it was a long worrisome time before a higher court overruled that decision.

More and more often, huge companies are closing the mouths of American citizens with lawsuits and the threat of lawsuits — lawsuits they know they can afford and that the citizens can't. These assaults on free speech must be stilled.

But how? The answer is easy. Give this speech the same protection that is given to speech in the courts.

This is what Senate Bill 405 would do. It would give immunity to Nevadans who make "good faith" comments to public entities. This would include testimony to the Legislature and all other public bodies, as well as letters to the governor.

The giants of the world would be sufficiently protected. They could still sue if they could prove that the statements were intentionally false. But that is a far greater legal burden than they now face. And if they lost their case, they would have to pay all court costs.

The Legislature should approve this bill. Intimidation lawsuits are threatening to put a lid on legitimate public debate, and that lid must be pried off.

## Fair Share: What a difference two years make

**Friends in high places:** With Raggio in power, they're canceling the payback to Clark

**S**en. Bill Raggio is in our corner; he's got a position of power; and boy does that make a difference.

Two years ago Fair Share was roaring down upon us, shifting tax money from Washoe County to Clark County, and raising our taxes to pay for it. Democrats controlled the Senate, and Republican Raggio could only complain from the sidelines.

Today the GOP controls the Senate and Raggio is chairman of the Finance Committee and majority leader as well. That has to be a major reason that Washoe has fared better this session. When a bookkeeping error cost Churchill County \$1 million, the first thought was to take that money from Washoe

too. This attempt died. And now, far more important, Clark has agreed to halt its punitive raid on Washoe taxpayers. The Fair Share shift will remain in place, but Washoe will not be forced to pay Clark \$6.6 million that Clark felt it had lost to Washoe County in past years. The end of this payback would permit Washoe to cut its tax rate for two years.

That is terrific news. Whatever you might think about Fair Share, it was totally unjust to make Washoe citizens pay back-taxes to Clark when the original tax system was created by the Legislature itself, with strong support at that time from Clark lawmakers.

It sure pays to have friends in high places.

## This fee-hike business has gotten out of hand

**Legislature:** Now they want to charge us \$10 extra to renew car registration in person

**T**he insanity continues. The insanity over fees, that is. Granted, the state needs all the money it can get, and raising fees is one way to get it. But sometimes fair play is being tossed out the window.

Item: Legislators are considering a proposal to make

you pay \$10 more if you renew your car registration in person, as opposed to doing it by mail. They say this would reduce long DMV lines, especially in Las Vegas.

Sorry about those lines — but \$10 more for doing business in person? Give us a break.

### WHAT THEY SAY

*"It is unfair and quite candidly somewhat dishonest to increase this budget without addressing where the money is going to come from."*

Sen. Matt Callister, D-Las Vegas, about the Senate Finance Committee approval of a controversial state prison budget that includes \$16.1 million in new money for rural work camps.

# Slapping them down

## Corporations use courts to silence noisy gadflies

By Robert D. Richards  
Special to The Washington Post

Sometimes it doesn't pay to speak your mind about the environment.

That was what Annette Baecker discovered when she spoke out against a local builder's plan to develop luxury homes near Burbank, Calif., fearing damage to Cabrini Canyon's wetlands.

Albert MacDonald learned the same lesson after writing several letters to building officials in Washington state, claiming that a developer's land-clearing techniques caused flooding and erosion.

So did Frederic Sylvester, after writing a letter to the editor urging citizens to testify at a hearing against adding a golf course to a Squaw Valley, Calif., resort. Sylvester feared that filling in wetlands and using chemical fertilizers would pollute the area's water supply.

These citizens, along with more than 2,000 others, share a bond: They have been sued for speaking out against developers or other business enterprises.

The phenomenon, which pits the business community against ordinary citizens and activist organizations, has opened a relatively calm branch of First Amendment law — the petition clause. And it has even given rise to its own descriptive acronym: SLAPP — Strategic Lawsuits Against Public Participation.

SLAPP critics charge the suits are designed for only one purpose: to intimidate citizens from speaking out against developers or other businesses at public meetings, before governmental bodies and in letters to the editor. New York's Attorney General Robert Abrams put it this way: The object is to "stifle legitimate political expression."

Intimidation was evident in the lawsuit filed by Perini Land & Development Co. against Frederic Sylvester. The suit named not only Sylvester, but also 50 "John Does," a not-so-subtle warning to others that they, too, would be added if they followed Sylvester's advice and voiced their rage to local officials.

Business-plaintiffs, on the other hand, contend the activists are interfering with legitimate business relationships and harming their reputations in the process.

SLAPPs have captured the attention of state lawmakers and the courts. At least seven state legislatures have considered legislation to curb them. In each case, the rights of citizens to exercise their First Amendment rights have been considered paramount.

Yet, only two states — Washington and New York — have actually enacted any protection.

and California Gov. Pete Wilson recently vetoed such a measure.

The process is slow. New Jersey's measure died at the end of last session for lack of action, but it may be reintroduced. California's bill already has been Rhode Island's bill suffered a similar fate. Meanwhile, Maryland's SLAPP bill was reported unfavorably out of committee last March. In Virginia, Senate Bill 424, which establishes a procedure for summary dismissal of SLAPPs and awards damages the suit was brought maliciously, has been held over to its 1993 session.

Some courts hearing SLAPP cases have sided with citizen groups and, in the process, have begun to breathe new life in the petition clause of the First Amendment. Yet, the high cost of defending the suits make such decisions bitter-sweet victories at best.

The First Amendment prohibits the government from "abridging... the right of the people... to petition the government for redress of grievances." This notion, however, isn't unique American. In fact, the Magna Carta provided a basis for dressing grievances by petitioning the Crown.

The U.S. Supreme Court did not address the issue until its 1876 case of United States v. Cruikshank. The court then served that the "very idea of government, republican in form, implies a right on the part of citizens to meet peaceably for consultation in respect to public affairs and to petition the government for a redress of grievances."

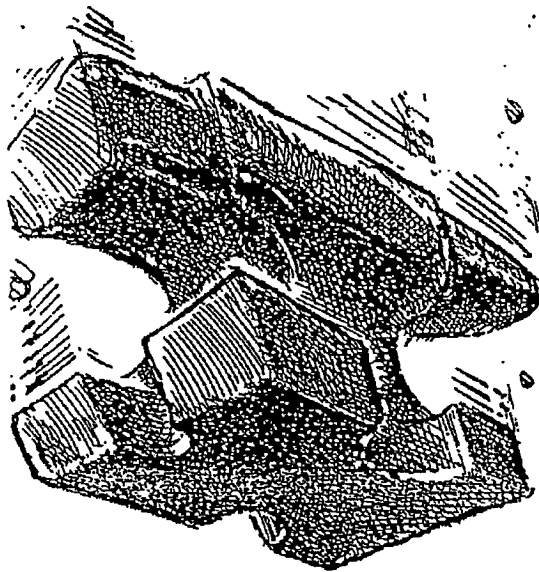
It took 63 years before high court recognized that petitioning clause applied equally to the states through Fourteenth Amendment.

Despite the Supreme Court interpretation of the right to petition, no comprehensive immunity from liability exists for comments made by citizens exercising that right. The court emphasized that point in 1979.

When David L. Smith, a North Carolina state judge, was on consideration for U.S. attorney Robert McDonald, who identified himself as a "staunch" Republican, wrote two letters to President Reagan and sent one to other members of the administration.

Smith alleged in his libel suit against McDonald that the latter "falsely accused" him of violating the civil rights of individuals while a "Soy Court judge," "acting with malice and conspiracy to commit extortion or blackmail," and "violations of professional ethics." Smith was not appointed a judge.

In federal court, McDonald won. Please see SU.



# Suits

From IF

removed for early dismissal of the suit, arguing the First Amendment's petition clause provided him absolute immunity. On appeal, the Supreme Court recognized that the First Amendment right to petition the government "is cut from the same cloth as other guarantees of that Amendment, and is an assurance of a particular freedom of expression," but it does not relieve citizens from liability arising out of it. States, meanwhile, are free to provide more protection to individual rights than the Constitution requires, and some cloak their citizens in privilege when addressing a governmental body. Moreover, despite the Supreme Court's explicit denial of immunity in petition-clause cases, lower courts across the country are focusing attention on the chilling effect of SLAPPs and have allowed, in some cases, early dismissal, sanctions and even SLAPP-backsuits filed by the defendants for abuse of process and malicious prosecution. The so-called SLAPP-back suits have found moderate success. Yet despite heightened judicial awareness of the impure motives of some businesses, recent changes in defamation law may give businesses added legal clout. For example, as a result of recent court decisions, the libel cause-of-action continues to expand. In 1990 the Supreme Court ruled in *Milkovich v. Lorain Journal Co.* there is no "whole-sale defamation exemption for anything that might be labeled opinion." The prerequisites for such a suit could be met if the facts the speaker relied on were incorrect, incomplete, or if the speaker's assessment of the facts was flawed. This case opened the door for more libel suits based upon various forms of criticism. What are called libel-by-implication cases have become a special cause for concern among First Amendment-watchers. Three cases can arise when a se-

*"The solution to stop such suits early or discourage the filing in the first instance."*

ries of true statements create a false impression that tarnishes an individual's or company's reputation or image.

Thus far, only a handful of courts have recognized libel-by-implication, and a few states have explicitly rejected it. Along with opinion libel, it has far-reaching ramifications for SLAPP suits.

Whatever the outcome of a libel suit filed as a SLAPP, these recent decisions may force judges to allow the lawsuits to proceed further into the litigation process — which translates into more attorney hours. And more attorney fees: SLAPPs have cost some defendants tens of thousands of dollars.

Some consumer groups have begun to establish defense funds for SLAPP targets, but this provides little consolation to citizens facing the stress of protracted litigation. The solution is to stop such suits early or discourage the filing in the first instance. —

As more courts recognize the SLAPP problem, the situation may improve. Yet courts are constrained by civil procedure and expanding tort doctrine. The burden is upon state legislatures to step in and safeguard the rights of their citizens, to speak out on public issues and, in the process, help thaw the chill of intimidation brought on by SLAPPs.

Robert Richards is an assistant professor of journalism and law at Penn State University and director of the Pennsylvania Center for the First Amendment.

M E M O R A N D U M

To: Deputy Directors  
Division Chiefs

From: James P. Weller  
Director

Date: January 22, 1993

Subject: Staff Conference

The purpose of this memo is to mention again the main points discussed at our recent staff conference.

Employees, including Chiefs, are not to go to the Legislature unless it is cleared with this office in advance. Likewise, if a contact is made, or documentation or testimony is requested by a legislator or their staff, this office should be notified immediately. In addition, I would like to know whenever a legislator comes to the building requiring assistance in private or legislative matters.

As mentioned at the conference, the purpose of this procedure is so that we can more effectively respond to requests during this legislative session, and so that the Department's position is known to anyone who is asked for information.

In addition to the legislative matters, media relations were also discussed. An internal policy will be developed in the near future and circulated to everyone.

Thank you all in advance for making this a smooth-running and positive legislative session.

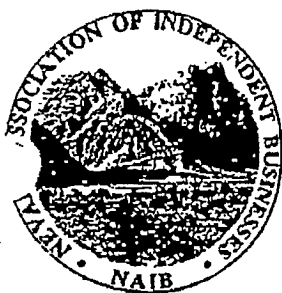
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EXHIBIT E

LH - 0058

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## Nevada Association of Independent Businesses

Phil Stout, Executive Director  
Henderson

June 21, 1993

The Honorable John Carpenter  
Member of the Assembly  
Carson City, Nevada

Subject: Senate Bill 405

Dear Assemblyman Carpenter:

As an association of over 600 independent business people, we know the importance of an open legislative process and the damages that a business can face if they are smeared by someone with no legitimate reason to do so. We believe that Senate Bill 405 addresses both of these concerns in a reasonable and fair manner and would therefore urge your support for the bill as it is currently written.

As you probably know, we have been involved in opposing certain other legislation dealing with this issue. The reason we have opposed Assembly Bill 719 is it would allow anyone to maliciously smear a business person and ruin their business. Even though that bill, as currently amended, makes knowingly false statements a crime, it leaves the ruined businessperson no opportunity to seek compensation for his or her damages. It would also leave anyone from school teachers to large corporate entities without remedy if someone makes knowingly false statements about them and damages them. It has been recognized in other areas of law that victims should have rights. Victims of knowingly false statements should have rights in this case, too.

Senate Bill 405 would give a person testifying before the legislature the confidence of knowing that he or she is protected so long as their statements are not malicious. On the other hand, if a person made malicious statements that damages someone, then the damaged party could seek compensation for the damage done by the perpetrator of the lie.

The damaged party would have a high burden to meet in court. A so-called "slap suit" would not happen and if it did, the person filing that suit would come out on the losing end by having to pay all of the costs of the person they took action against. In addition, if a person in Nevada files a frivolous lawsuit, current law already prescribes penalties against the attorney and the client who files the suit. Therefore, these suits would be very few and far between because of Senate Bill 405 and the bill would also ensure that suits would only be brought for good reason.

It is for these reasons that our association very much supports the passage of Senate Bill 405 as it currently reads.

Sincerely,

Phil Stout, Executive Director  
Nevada Association of Independent Businesses

PH/kdh

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cation of contested cases involving the issuance of letters of approval for health facilities and agencies.

5. The provisions of this chapter do not apply to:

(a) Any order for immediate action, including but not limited to quarantine and the treatment or cleansing of infected or infested animals, objects or premises, made under the authority of the state board of agriculture, the state board of health, the state board of sheep commissioners or any other agency of this state in the discharge of a responsibility for the preservation of human or animal health or for insect or pest control; or

(b) An extraordinary regulation of the state board of pharmacy adopted pursuant to NRS 453.2184.

Sec. 14. 1. This section and sections 2 to 8, inclusive, and 10 to 13, inclusive, of this act become effective on July 1, 1993.

2. Sections 1 and 9 of this act become effective at 12:01 a.m. on July 1, 1993."

Amend the title of the bill by deleting the first through fourth lines and inserting:

"An Act relating to administrative procedure; making various changes".

Amend the summary of the bill, first line, after "to" by inserting "Nevada".

Assemblyman Garner moved the adoption of the amendment.

Remarks by Assemblyman Garner.

Amendment adopted.

Bill ordered reprinted, engrossed and to third reading.

Senate Bill No. 376.

Bill read second time and ordered to third reading.

Senate Bill No. 391.

Bill read second time and ordered to third reading.

Senate Bill No. 405.

Bill read second time.

The following amendment was proposed by the Committee on Judiciary:

Amendment No. 1049.

Amend the bill as a whole by adding new sections designated sections 6 through 8, following sec. 5, to read as follows:

"Sec. 6. Chapter 218 of NRS is hereby amended by adding thereto a new section to read as follows:

*A witness is absolutely privileged to publish defamatory matter as part of a legislative proceeding in which he is testifying or in communications to a legislator preliminary to the proceeding, if the matter has some relation to the proceeding. It is unlawful to misrepresent any fact knowingly when testifying or otherwise communicating to a legislator.*

Sec. 7. The legislature hereby finds and declares that the privilege added by section 6 of this act is declaratory and not in derogation of the common law, and that this act is therefore a clarification of existing law.

Sec. 8. This act becomes effective upon passage and approval and

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applies to actions commenced before the effective date of this act if a final judgment has not been entered in the action.”.

Amend the title of the bill, second line, after “entity;” by inserting: “clarifying that a witness in a legislative proceeding has an absolute privilege to publish defamatory matter relevant to a proceeding;”.

Amend the summary of the bill to read as follows:

“Summary—Revises provisions governing immunity from civil action for certain communications made in good faith to governmental entity and clarifies law governing witness in legislative proceeding. (BDR 3-995)”.

Assemblyman Sader moved the adoption of the amendment.

Remarks by Assemblyman Sader.

Amendment adopted.

Bill ordered reprinted, re-engrossed and to third reading.

Senate Bill No. 427.

Bill read second time and ordered to third reading.

Senate Bill No. 490.

Bill read second time and ordered to third reading.

Senate Joint Resolution No. 27.

Bill read second time.

The following amendment was proposed by the Committee on Government Affairs:

Amendment No. 1107.

Amend the resolution, page 2, between lines 25 and 26, by inserting:

“RESOLVED, That the Legislature of the State of Nevada hereby urges the Congress of the United States to consent to the amendment of the ordinance of the Nevada constitution to remove the disclaimer concerning the right of the Federal Government to sole and entire disposition of the unappropriated public lands in Nevada; and be it further”.

Amend the resolution, page 2, by deleting line 31 and inserting: “Congressional Delegation; and be it further

RESOLVED, That this resolution becomes effective upon passage and approval, except that, notwithstanding any other provision of law, the proposed amendment to the ordinance of the constitution of the State of Nevada, if approved and ratified by the people of the State of Nevada, does not become effective until the Congress of the United States consents to the amendment or upon a legal determination that such consent is not necessary.”.

Assemblyman Garner moved the adoption of the amendment.

Remarks by Assemblyman Garner.

Amendment adopted.

Bill ordered reprinted, re-engrossed and to third reading.

GENERAL FILE AND THIRD READING

Senate Bill No. 462.

Bill read third time.

The following amendment was proposed by the Committee on Judiciary:



(REPRINTED WITH ADOPTED AMENDMENTS)  
SECOND REPRINT

S.B. 405

SENATE BILL NO. 405—SENATORS TITUS, CALLISTER, GLOMB AND BROWN

APRIL 15, 1993

Referred to Committee on Judiciary.

SUMMARY—Revises provisions governing immunity from civil action for certain communications made in good faith to governmental entity and clarifies law governing witness in legislative proceeding. (BDR 3-995)

FISCAL NOTE: Effect on Local Government: No.  
Effect on the State or on Industrial Insurance: No.

EXPLANATION—Matter in italics is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to actions concerning persons; providing immunity from civil action for a communication made in good faith to a governmental entity; clarifying that a witness in a legislative proceeding has an absolute privilege to publish defamatory matter relevant to a proceeding; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE  
AND ASSEMBLY, DO ENACT AS FOLLOWS:

- 1 Section 1. Chapter 41 of NRS is hereby amended by adding thereto the
- 2 provisions set forth as sections 2 to 5, inclusive, of this act.
- 3 Sec. 2. *As used in sections 2 to 5, inclusive, of this act, "political subdivi-*
- 4 *sion" has the meaning ascribed to it in NRS 41.0305.*
- 5 Sec. 3. *A person who in good faith communicates a complaint or informa-*
- 6 *tion to a legislator, officer or employee of this state or of a political subdivi-*
- 7 *sion, or to a legislator, officer or employee of the Federal Government,*
- 8 *regarding a matter reasonably of concern to the respective governmental*
- 9 *entity is immune from civil liability on claims based upon the communication.*
- 10 Sec. 4. *In any civil action brought against a person who in good faith*
- 11 *communicated a complaint or information to a legislator, officer or employee*
- 12 *of this state or of a political subdivision regarding a matter reasonably of*
- 13 *concern to the respective governmental entity, the attorney general or other*
- 14 *legal representative of the state or the legal representative of the political*
- 15 *subdivision may provide for the defense of the action on behalf of the person*
- 16 *who communicated the complaint or information. If the legal representative of*
- 17 *a political subdivision does not provide for the defense of such an action*
- 18 *relating to a communication to a legislator, officer or employee of the politi-*
- 19 *cal subdivision, the attorney general may provide for the defense of the*
- 20 *action.*
- 21 Sec. 5. 1. *Except as otherwise provided in subsection 2, the party prevail-*
- 22 *ing in an action brought against a person who in good faith communicated a*
- 23 *complaint or information to a legislator, officer or employee of this state or of*
- 24 *a political subdivision, or to a legislator, officer or employee of the Federal*

1 Government, regarding a matter reasonably of concern to the respective  
2 governmental entity is entitled to reasonable costs and attorney's fees.

3 2. If a legal representative of this state or of a political subdivision  
4 provides the defense in such an action, the state or political subdivision:

5 (a) If the legal representative prevails, is entitled to reasonable costs and  
6 attorney's fees; or

7 (b) If the legal representative does not prevail, must pay reasonable costs  
8 and attorney's fees.

9 Sec. 6. Chapter 218 of NRS is hereby amended by adding thereto a new  
10 section to read as follows:

11 A witness is absolutely privileged to publish defamatory matter as part of a  
12 legislative proceeding in which he is testifying or in communications to a  
13 legislator preliminary to the proceeding, if the matter has some relation to the  
14 proceeding. It is unlawful to misrepresent any fact knowingly when testifying  
15 or otherwise communicating to a legislator.

16 Sec. 7. The legislature hereby finds and declares that the privilege added  
17 by section 6 of this act is declaratory and not in derogation of the common  
18 law, and that this act is therefore a clarification of existing law.

19 Sec. 8. This act becomes effective upon passage and approval and applies  
20 to actions commenced before the effective date of this act if a final judgment  
21 has not been entered in the action.

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The following amendment was proposed by the Committee on Commerce:  
Amendment No. 1301.

Amend sec. 3, page 2, by deleting line 10 and inserting: "*include, without limitation beyond the provisions of this paragraph, the:*".

Amend sec. 3, page 2, between lines 15 and 16, by inserting: "*Supportive personnel shall not in any manner handle drugs listed on schedule II in or pursuant to chapter 453 of NRS.*".

Assemblyman Porter withdrew Amendment No. 1301 to Senate Bill No. 399.

Roll call on Senate Bill No. 399:

YEAS—41.

NAYS—Augustine.

Senate Bill No. 399 having received a constitutional majority, Mr. Speaker declared it passed, as amended.

Bill ordered transmitted to the Senate.

Senate Bill No. 405.

Bill read third time.

Remarks by Assemblymen Sader, Ernaut, Carpenter, Myrna Williams, Haller and Scherer.

Roll call on Senate Bill No. 405:

YEAS—35.

NAYS—Augustine, Carpenter, Ernaut, Hettrick, Humke, Tiffany—6.

Not voting—Heller.

Senate Bill No. 405 having received a constitutional majority, Mr. Speaker declared it passed, as amended.

Bill ordered transmitted to the Senate.

Senate Bill No. 421.

Bill read third time.

The following amendment was proposed by Assemblyman Price:

Amendment No. 1298.

Amend the bill as a whole by renumbering sec. 6 as sec. 7 and adding a new section designated sec. 6, following sec. 5, to read as follows:

"Sec. 6. NRS 202.2491 is hereby amended to read as follows:

202.2491 1. Except as otherwise provided in subsections 5 and 6, the smoking of tobacco in any form is prohibited [if done] in any:

(a) Public elevator.

(b) Public building.

(c) Public waiting room, lobby or hallway of any:

(1) Medical facility or facility for the dependent as defined in chapter 449 of NRS; or

(2) Office of any chiropractor, dentist, physical therapist, physician, podiatrist, psychologist, optician, optometrist, doctor of Oriental medicine or doctor of acupuncture.

(d) Hotel or motel when so designated by the operator thereof.

(e) Public area of a store principally devoted to the sale of food for human consumption off the premises, except in those areas leased to or operated by a person licensed pursuant to NRS 463.160.

SENATE BILL 4: Expands governmental immunity with regard to inspections. (BDR 3-459)

SENATOR ADLER MOVED TO CONCUR IN ASSEMBLY AMENDMENT NO. 1205 TO S.B. 4.

SENATOR SMITH SECONDED THE MOTION.

THE MOTION CARRIED. (SENATORS MCGINNESS, TITUS, AND SHAFFER WERE ABSENT FOR THE VOTE.)

\* \* \* \* \*

SENATE BILL 405: Provides immunity from civil action for communication made in good faith to governmental agency. (BDR 3-995)

SENATOR ADLER MOVED TO CONCUR IN ASSEMBLY AMENDMENT NO. 1049 TO S.B. 405.

SENATOR SMITH SECONDED THE MOTION.

THE MOTION CARRIED. (SENATORS MCGINNESS, TITUS, AND SHAFFER WERE ABSENT FOR THE VOTE.)

\* \* \* \* \*

SENATE BILL 421: Makes various changes relating to smoking of tobacco in public areas. (BDR 15-1683)

SENATOR SMITH MOVED TO CONCUR IN ASSEMBLY AMENDMENT NO. 1208 TO S.B. 421.

SENATOR JACOBSEN SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR TITUS WAS ABSENT FOR THE VOTE.)

\* \* \* \* \*

Sec. 9. 1. This section and section 8 of this act become effective on July 1, 1993.

2. Sections 1 to 7, inclusive, of this act become effective on October 1, 1993.

3. Sections 1 to 6, inclusive, of this act expire by limitation on July 1, 1995.

Senate Bill No. 405—Senators Titus, Callister, Glomb and Brown

CHAPTER 653

AN ACT relating to actions concerning persons; providing immunity from civil action for a communication made in good faith to a governmental entity; clarifying that a witness in a legislative proceeding has an absolute privilege to publish defamatory matter relevant to a proceeding; and providing other matters properly relating thereto.

[Approved July 13, 1993]

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE  
AND ASSEMBLY, DO ENACT AS FOLLOWS:

**Section 1.** Chapter 41 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 to 5, inclusive, of this act.

**Sec. 2.** *As used in sections 2 to 5, inclusive, of this act, "political subdivision" has the meaning ascribed to it in NRS 41.0305.*

**Sec. 3.** *A person who in good faith communicates a complaint or information to a legislator, officer or employee of this state or of a political subdivision, or to a legislator, officer or employee of the Federal Government, regarding a matter reasonably of concern to the respective governmental entity is immune from civil liability on claims based upon the communication.*

**Sec. 4.** *In any civil action brought against a person who in good faith communicated a complaint or information to a legislator, officer or employee of this state or of a political subdivision regarding a matter reasonably of concern to the respective governmental entity, the attorney general or other legal representative of the state or the legal representative of the political subdivision may provide for the defense of the action on behalf of the person who communicated the complaint or information. If the legal representative of a political subdivision does not provide for the defense of such an action relating to a communication to a legislator, officer or employee of the political subdivision, the attorney general may provide for the defense of the action.*

**Sec. 5. 1.** *Except as otherwise provided in subsection 2, the party prevailing in an action brought against a person who in good faith communicated a complaint or information to a legislator, officer or employee of this state or of a political subdivision, or to a legislator, officer or employee of the Federal Government, regarding a matter reasonably of concern to the respective governmental entity is entitled to reasonable costs and attorney's fees.*

**2.** *If a legal representative of this state or of a political subdivision provides the defense in such an action, the state or political subdivision:*

(a) If the legal representative prevails, is entitled to reasonable costs and attorney's fees; or

(b) If the legal representative does not prevail, must pay reasonable costs and attorney's fees.

**Sec. 6.** Chapter 218 of NRS is hereby amended by adding thereto a new section to read as follows:

*A witness is absolutely privileged to publish defamatory matter as part of a legislative proceeding in which he is testifying or in communications to a legislator preliminary to the proceeding, if the matter has some relation to the proceeding. It is unlawful to misrepresent any fact knowingly when testifying or otherwise communicating to a legislator.*

**Sec. 7.** The legislature hereby finds and declares that the privilege added by section 6 of this act is declaratory and not in derogation of the common law, and that this act is therefore a clarification of existing law.

**Sec. 8.** This act becomes effective upon passage and approval and applies to actions commenced before the effective date of this act if a final judgment has not been entered in the action.

## Senate Bill No. 347—Committee on Natural Resources

### CHAPTER 654

AN ACT relating to air pollution; making various statutory changes in compliance with the federal Clean Air Act; creating an account for the management of air quality; authorizing the referral of certain offenses to the attorney general or district attorney for prosecution; providing penalties; and providing other matters properly relating thereto.

[Approved July 13, 1993]

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE  
AND ASSEMBLY, DO ENACT AS FOLLOWS:

**Section 1.** Chapter 445 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 to 20, inclusive, of this act.

**Sec. 2.** "Hazardous air pollutant" means a substance designated as such by the commission pursuant to section 23 of this act.

**Sec. 2.5.** "Operating permit" means a permit signed and issued by the director approving, with conditions, the construction and operation of a source of any air contaminant.

**Sec. 3. 1.** The account for the management of air quality is hereby created in the state general fund, to be administered by the department.

2. Money in the account for the management of air quality must be expended only:

(a) To carry out and enforce the provisions of NRS 445.401 to 445.601, inclusive, and sections 2 to 4, inclusive, of this act, and of any regulations adopted pursuant to those sections, including without limitation, the direct and indirect costs of:

# ***EXHIBIT 2***

# ***EXHIBIT 2***

# History of SB331 - 1997

Versions: [As Introduced](#) [First Reprint](#) [Second Reprint](#) [Third Reprint](#) [As Enrolled](#)

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BDR 3-219

Introduced: 04/28/97

Introduced By: Neal

**Summary:** Changes effective date of Assembly Bill No. 485 of this session. (BDR S-219)

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- 04/28/97 Read first time. Referred to Committee on Judiciary. To printer.
- 04/29/97 From printer. To committee: 5/6; 5/13; 7/3
- 05/21/97 From committee: Amend, and do pass as amended.
- 05/22/97 Taken from Second Reading File. Placed on Second Reading File for next legislative day.
- ✓ 05/23/97 Read second time. Amended. To printer.
- ✓ 05/26/97 From printer. To engrossment. Engrossed. First reprint. ✓
- ✓ 05/28/97 Read third time. Passed, as amended. Title approved. To Assembly.
- 05/29/97 In Assembly. Read first time. Referred to Committee on Judiciary.  
To committee: 6/16; 6/30
- 07/01/97 From committee: Amend, and do pass as amended.
- 07/01/97 Placed on Second Reading File.
- ✓ 07/01/97 Read second time. Amended. To printer.
- 07/02/97 From printer. To re-engrossment. Re-engrossed. Second reprint. ✓
- 07/02/97 Placed on General File.
- ✓ 07/02/97 Read third time. Passed, as amended. Title approved, as amended. Preamble adopted. To Senate.
- ✓ 07/03/97 In Senate.
- 07/04/97 Assembly amendment not concurred in. To Assembly.
- 07/04/97 In Assembly.
- 07/05/97 Assembly amendment not receded from. Conference requested.
- 07/05/97 First Committee on Conference appointed by Assembly. To Senate.
- 07/05/97 In Senate.
- ✓ 07/06/97 First Committee on Conference appointed by Senate. To committee. From committee:  
Concur in Assembly amendment and further amend.
- 07/06/97 First Conference report adopted by Senate. ✓
- 07/06/97 First Conference report adopted by Assembly. ✓
- 07/06/97 To printer.
- 07/11/97 From printer. To re-engrossment. Re-engrossed. Third reprint. ✓
- 07/11/97 To enrollment.
- 07/14/97 Enrolled and delivered to Governor.
- 07/16/97 Approved by the Governor.
- 07/17/97 Chapter 546.
- 07/24/97 Effective July 16, 1997.

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BILL SUMMARY  
69th REGULAR SESSION  
OF THE NEVADA STATE LEGISLATURE

PREPARED BY  
RESEARCH DIVISION  
LEGISLATIVE COUNSEL BUREAU  
Nonpartisan Staff of the Nevada State Legislature

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SENATE BILL 331  
(Enrolled)

Senate Bill 331 amends Assembly Bill 485 from the 1997 Legislative Session to provide that A.B. 485 is effective on passage and approval, June 20, 1997. This measure also clarifies that A.B. 485 only applies to civil actions filed on or after June 20, 1997.

Senate Bill 331 is effective on July 16, 1997.

**Background Information**

As introduced, S.B. 331 and A.B. 485 both provided protection to individuals from Strategic Lawsuits Against Public Participation (SLAPP). Testimony indicated that these suits are intended to chill, stifle, and intimidate citizens who participate in governmental and public policy activities. The typical SLAPP occurs when a citizen makes a statement intended to influence public policy and is then sued for defamation, interference, or similar common law tort.

Assembly Bill 485 was passed first by the 1997 Legislature with an effective date of October 1, 1997. To avoid a potential flood of lawsuits filed between the end of the legislative session and October 1, 1997, the Legislature amended S.B. 331 to change the effective date of A.B. 485.

## SENATE BILL NO. 331-SENATOR NEAL

APRIL 28, 1997

## Referred to Committee on Judiciary

SUMMARY—Revises provisions governing liability of persons engaging in certain speech.  
(BDR 3-219)

FISCAL NOTE: Effect on Local Government: No.  
Effect on the State or on Industrial Insurance: No.

EXPLANATION - Matter in italics is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to actions concerning persons; revising the provisions governing the liability of a person engaging in certain speech; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN  
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

- 1 Section 1. Chapter 41 of NRS is hereby amended by adding thereto the
- 2 provisions set forth as sections 2 and 3 of this act.
- 3 Sec. 2. *As used in NRS 41.640 to 41.670, inclusive, and section 3 of*
- 4 *this act, unless the context otherwise requires, the words and terms defined*
- 5 *in NRS 41.640 and section 3 of this act have the meanings ascribed to them*
- 6 *in those sections.*
- 7 Sec. 3. "Protected speech" means a written or oral statement that is:
- 8 1. *Made in a place open to the public or in a public forum; and*
- 9 2. *Genuinely aimed at procuring favorable governmental action.*
- 10 Sec. 4. NRS 41.640 is hereby amended to read as follows:
- 11 41.640 [As used in NRS 41.640 to 41.670, inclusive, "political]
- 12 "Political subdivision" has the meaning ascribed to it in NRS 41.0305.
- 13 Sec. 5. NRS 41.650 is hereby amended to read as follows:
- 14 41.650 A person who [in good faith communicates a complaint or
- 15 information to a legislator, officer or employee of this state or of a political
- 16 subdivision, or to a legislator, officer or employee of the Federal
- 17 Government, regarding a matter reasonably of concern to the respective
- 18 governmental entity] *engages in protected speech* is immune from civil
- 19 liability on [claims] *a claim* based upon the [communication.] *protected*
- 20 *speech.*



1     Sec. 6. NRS 41.660 is hereby amended to read as follows:

2     41.660 In any civil action brought against a person [who in good faith  
3     communicated a complaint or information to a legislator, officer or  
4     employee of this state or of a political subdivision regarding a matter  
5     reasonably of concern to the respective governmental entity,] *because the*  
6     *person engaged in protected speech*, the attorney general [or other] , *another*  
7     legal representative of the state or the legal representative of [the] a political  
8     subdivision may provide for the defense of the action on behalf of the person  
9     who [communicated the complaint or information. If the legal representative  
10    of a political subdivision does not provide for the defense of such an action  
11    relating to a communication to a legislator, officer or employee of the  
12    political subdivision, the attorney general may provide for the defense of the  
13    action.] *engaged in the protected speech*.

14    Sec. 7. NRS 41.670 is hereby amended to read as follows:

15    41.670 1. Except as otherwise provided in subsection 2, the party  
16    prevailing in an action brought against a person [who in good faith  
17    communicated a complaint or information to a legislator, officer or  
18    employee of this state or of a political subdivision, or to a legislator, officer  
19    or employee of the Federal Government, regarding a matter reasonably of  
20    concern to the respective governmental entity] *because the person engaged*  
21    *in protected speech* is entitled to *recover* reasonable costs and attorney's  
22    fees.

23    2. If a legal representative of this state or of a political subdivision  
24    provides the defense in such an action, the state or political subdivision:

25    (a) If the legal representative prevails, is entitled to *recover* reasonable  
26    costs and attorney's fees; or

27    (b) If the legal representative does not prevail, must pay reasonable costs  
28    and attorney's fees.

29    Sec. 8. The amendatory provisions of this act apply to a civil action that  
30    is filed on or after October 1, 1997.



**MINUTES OF THE  
SENATE COMMITTEE ON JUDICIARY**

**Sixty-ninth Session  
May 6, 1997**

The Senate Committee on Judiciary was called to order by Vice Chairman Jon C. Porter, at 8:43 a.m., on Tuesday, May 6, 1997, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was opened as a subcommittee meeting because there were not enough members present to form a quorum at that time. Exhibit A is the Agenda. Exhibit B is the Attendance Roster.

**COMMITTEE MEMBERS PRESENT:**

Senator Jon C. Porter, Vice Chairman  
Senator Mike McGinness  
Senator Maurice Washington  
Senator Ernest E. Adler  
Senator Dina Titus  
Senator Valerie Wiener

**COMMITTEE MEMBERS ABSENT:**

Senator Mark A. James, Chairman (Excused)

**GUEST LEGISLATORS PRESENT:**

Senator Joseph (Joe) M. Neal, Jr., Clark County Senatorial District No. 4

**STAFF MEMBERS PRESENT:**

Allison Combs, Committee Policy Analyst  
Brad Wilkinson, Principal Deputy Legislative Counsel  
Maddie Fischer, Administrative Assistant  
Jo Greenslate, Committee Secretary

**OTHERS PRESENT:**

Ben Graham, Lobbyist, Clark County District Attorney, Nevada District Attorneys' Association

Senate Committee on Judiciary  
May 6, 1997  
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north functions under a group called the "Cog," who in turn appoints individual government members to its body, which is a requirement of federal law. EOB in the south has the same requirement, appointing individuals from the city and the county, as well as electing citizens to serve on the board.

Vice Chairman Porter asked what the problem was in passing S.B. 330. Senator Neal responded it was just an oversight, and now the CAAs want to be brought under this statute to limit their liability. Vice Chairman Porter asked if this bill would change the tax status of CAAs. Senator Neal answered the tax status would remain the same.

Vice Chairman Porter inquired whether this was the Comprehensive Employment Training Act (CETA) prior to EOB. Senator Neal clarified this was not CETA, CETA was another manpower-type program which at one time functioned under the arm of EOB, but that CETA is now a separate organization.

Senator McGinness queried what the name of the group was in the north. Senator Washington responded Community Service Agency (CSA).

Vice Chairman Porter asked whether this bill would include both agencies. Senator Neal asserted the two CAAs would both be covered under S.B. 330.

Vice Chairman Porter asked Senator Neal to continue on to the next agenda item, S.B. 331.

SENATE BILL 331: Revises provisions governing liability of persons engaging in certain speech. (BDR 3-219)

Senator Neal testified S.B. 331 is a bill aimed at Strategic Lawsuits Against Public Participation (SLAPP) suits. He stated last year in Las Vegas a couple of SLAPP suits occurred from people who bought homes which turned out to be somewhat shoddily built. The home buyers complained about the homes, and the builder sued them. This bill would permit people to make statements relative to any condition as long as it is made in a public forum and directed toward a public purpose. Senator Neal concluded, in his opinion, this bill is necessary because it allows individuals to speak out against what they consider to be wrong. He iterated as long as the genuine aim is geared to procuring favorable governmental action, speech is protected. Senator Neal referred to his handout relative to SLAPP suits (Exhibit E. Original is on file in the Research Library.), consisting of articles, case law, information on states with similar laws

on their books, information from the New York Law Review, an article from Rutgers Law Review which explains relevant suits, and an article from the American Bar Association Journal dated September 1996, addressing the price of speaking out. He remarked this information is provided as evidence that this is a problem in other states as well as Nevada, and there is a substantial body of law to cover these types of activities and this particular proposal.

Senator Washington pointed out free speech is covered under the First Amendment. Senator Neal suggested apparently it is not, because some people have been very successful in suing people who spoke out against them. He maintained the Legislature has to address the particular issues in terms of what they see as protected free speech as far as the public is concerned. Senator Neal referred to section 3, lines 7, 8, and 9, "'Protected speech' means a written or oral statement ...made in a ...open ...public forum; and ...Genuinely aimed at procuring favorable governmental action." He surmised this part of the bill was not covered in the First Amendment, and added hopefully this particular bill will cover it.

Senator Adler referred to page 2, section 6, the bracketed sentence, "who in good faith communicated a complaint or information to a legislator, officer or employee of this state or of a political subdivision regarding a matter reasonably of concern to the respective governmental entity," and asked if that language is now gone from the bill. Senator Neal replied yes, because when the bill drafters added the new language, they believed the bill was expanded, and the old language was no longer necessary. Senator Adler disagreed, replying in his opinion, this bill takes away rights, because it says, "'Protected speech' means a written or oral statement that is made in a place open to the public or in a public forum...", whereas the old language just says, "who in good faith communicated a complaint or information to a legislator, ..." which could apply to a private communication, such as a letter, as well. Senator Neal admitted Senator Adler might be right, but stated the bill drafters thought the change would broaden the statute, but added he has no problem with the committee including the deleted language.

Brad Wilkinson, Committee Counsel, Legal Division, Legislative Counsel Bureau, remarked the statute broadens where it opens it up to the public forum and covers a lot more types of statements. It does not include statements made in private, the way it is currently drafted. He continued the reason the language was deleted is because the standard for protected speech is being changed. He further stated the language of the bill could be reformulated to cover statements

Senate Committee on Judiciary  
May 6, 1997  
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made in private. Senator Adler pointed out sometimes a private letter later becomes public, and the author can then be sued for the originally private letter.

Senator Neal concluded this is why we have committees, to ferret these things out. He reiterated he has no problem with changing wording to "letters written to legislators" or "private conversation," being included in the bill.

Mr. Wilkinson inquired whether the language change would apply just to statements made to legislators or government officials. He explained right now, protected speech refers to statements made in a public forum to procure favorable governmental actions. He suggested the change expands it beyond just public officials, so if a statement is made to a newspaper, for example, that would be protected as well. He asked in doing this, would it be expanded to other entities as well. Senator Neal replied it would not apply to just anyone, and stated the bill is trying to avoid legalizing slander. He continued hopefully the bill will be written in a way that includes private communications, such as a letter, provided the letter went to a government official to secure some type of action. He concluded if the letter went to a lawyer, that is a whole different set of rules.

Vice Chairman Porter told of a situation where an individual wanted to sell his home back to the builder due to a defect. The builder tried to correct the problem, but the individual would not let the builder in to fix the defect. Vice Chairman Porter said the homeowner would not respond to letters attempting to correct the problem, but sent flyers all over the neighborhood, and went to the media to complain about the builder, who was trying to fix the problem. Vice Chairman Porter stated in the case of the disgruntled homeowner, the builder was able to stop the homeowner's action because the homeowner was defaming without legitimate grounds. Vice Chairman Porter expressed his concern of allowing unreasonable activity to continue.

Senator Adler remarked he understood the situation Vice Chairman Porter described, but said he has also seen instances of threatened action just because a person went to the Better Business Bureau. Vice Chairman Porter stated the situation he mentioned was malicious. Senator Adler agreed a person should not be allowed to be malicious, but should be able to talk to the city building department, the city councilman, or whoever would be appropriate to complain to about shoddy practices.

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Discussion ensued among the committee members. Mr. Wilkinson suggested changing the definition of protected speech to say, "A written or oral statement that is made in a place open to the public or in a public forum or made to a legislator, officer, or employee of the state, etc."

Senator McGinness asked if the language change would preclude the homeowner in Vice Chairman Porter's earlier example who passed out flyers, from setting up across from the model home and listing the problems he had with his home, or in another example, a car buyer setting up across the street from a car dealer from which he bought a lemon. He inquired if the individuals in these two cases would be protected too, or would they have that right under the First Amendment already, as long as they were just going through the litany of the problems they had, and did not slander the builder or the car dealer.

Senator Neal concluded the right to protest shoddy work would still be protected by the First Amendment, and if the person's aim was to have that situation corrected where the public benefits from it, that would be protected.

Senator Adler remarked that is one reason he would like to see the language "in good faith" communicates, remain in the statute, because the key is if it is in "good faith," whether it is malicious or good faith, the term is whether or not it is protected speech.

Mr. Wilkinson emphasized this bill actually changes the standard from saying something is done "in good faith and regarding matters reasonably of concern," to say, "it is genuinely aimed at procuring favorable governmental action." The good faith requirement is not actually the standard the United States Supreme Court has used, the "genuinely aimed at procuring favorable governmental actions" is the standard the United States Supreme Court uses. He said the issue is not so much a First Amendment right as a right to petition the government for redress, which is another constitutional provision. He maintained the committee does not want the language "in good faith" included in the statute because it is already covered under the definition of protected speech. He continued if it is not genuinely aimed at obtaining favorable governmental action, then it would not be "in good faith."

Senator Washington asked if the Better Business Bureau would be considered a political subdivision. Senator Adler replied it is not, which is a problem because a person could technically complain to the Better Business Bureau, and that complaint might generate a lawsuit. Senator Washington inquired what would



happen if he had a complaint and did not get results, say to a house developer who failed to rectify the situation, so he went to the newspaper to publish his complaint. Senator Neal replied Senator Washington could be sued under the present law, but S.B. 331 would protect him from being sued. Senator Adler clarified this bill would protect Senator Washington if he first went to the contractor's board and had them do an inspection, or talked to his local building official or legislator, or if he were part of a group that went to City Hall to complain about their houses; but stated if he took a full-page advertisement out in a newspaper, he might have a problem. Senator Washington again asked, hypothetically, if he followed the procedures for recourse, and got no results, what would happen if he went to a newspaper to complain about the builder. Senator Neal replied, in his understanding, presently, the builder could sue Senator Washington. He reiterated that is the meaning of SLAPP suit, it does not allow a person to go to the government and complain. He continued the intent of S.B. 331 is to allow a person recourse without fear of being sued.

Vice Chairman Porter asked Mr. Wilkinson to summarize the intentions of the committee on this bill. Mr. Wilkinson reiterated that he understood Senator Neal, in response to Senator Adler's concern, does not want to eliminate the current immunity provided for complaints made to public officials that are not in a public forum or in a place open to the public, such as a letter with the purpose of obtaining governmental action in some manner. He summarized Senator Neal does not want to take current immunity away, but wants it added to what the bill does now.

Vice Chairman Porter closed the hearing on S.B. 330 and S.B. 331, and opened the hearing on S.B. 339.

SENATE BILL 339: Provides that voluntary intoxication of defendant may not be considered in determining existence of requisite mental state of offense. (BDR 15-713)

Ben Graham, Lobbyist, Clark County District Attorney, Nevada District Attorneys' Association, commented the situation in front of the committee is an interesting one, dealing with various defenses that are sometimes available to individuals who commit crimes. He stated in previous discussion, mens rea was discussed. He clarified mens rea is an evil intent normally coupled with a physical act, the act and mens rea combining to equal, if a wrong or a harm occurs, a guilt for crime. He iterated in 1996, the United States Supreme Court looked at a Montana statute, a statute shared by a number of other states, and

SB 331

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MEMORANDUM

DATE: June 25, 1996  
TO:  
FROM: Juliann Jenson, Senior Research Analyst JKT  
SUBJECT: SLAPP Suits

You asked for information regarding Strategic Lawsuits Against Public Participation (SLAPP). Specifically, you referred to the enclosed articles in the *Las Vegas Sun* regarding this issue and requested background information on legislation that may adequately address this problem. In response to your request, the following provides an overview on SLAPP suits and highlights legislation in other states specific to such lawsuits.

**Overview of SLAPP Suits**

Strategic Lawsuits Against Public Participation suits are usually described as lawsuits that are intended to chill, stifle, and intimidate citizens who participate in governmental activity and public policy. The typical SLAPP occurs when a citizen makes a statement intended to influence public policy and is then sued for defamation, interference with contract, or similar common law tort. For example, SLAPP suits are often filed against citizens who complain about products or services to a governmental agency or in a public forum.

University of Denver law professor George Pring is considered an expert on SLAPP suits and has published material defining and describing such. In his definition, a SLAPP suit must be:

- A civil claim for money damages;
- Filed against nongovernmental individuals;
- Based on advocacy before a government official or the electorate; and
- On a substantive issue of some public or societal significance.

ORIGINALS ARE ON FILE IN  
THE RESEARCH LIBRARY

LH - 0079

EXHIBIT 10

Many professionals contend that SLAPPs are an abuse of the courts and are often frivolous. Further, it is argued that SLAPP suits stifle public debate by shifting the controversy to a two-party litigation. Additionally, SLAPP suits are thought to inhibit the First Amendment rights of free speech, freedom of expression, and petition. As such, it is argued that legal safeguards are needed in order for citizens to voice their opinions without the fear of intimidating lawsuits.

Enclosed for your review are University of Denver materials that provide an overview on SLAPP suits.

### **Nevada Law**

Nevada does not have specific anti-SLAPP legislation. However, if a SLAPP suit is filed in Nevada, *Nevada Revised Statutes* (NRS) 41.650 best relates to this kind of lawsuit. This statute provides immunity for a person who in good faith communicates a complaint or information to legislators or governmental employees.

However, it has been argued that this statute does not adequately cover SLAPP suits. For example, some Nevada attorneys have contended that if SLAPP suits go before a judge, the "in good faith" clause becomes the focus of debate. This causes the case to be weighed on the intentions and legitimacy of the defendant's actions, rather than addressing right to petition and free speech issues. Because of this, concerns have been expressed that Nevada law provides inadequate protection for defendants involved in SLAPP suits.

For your review, NRS 41.640 is attached.

### **Other State Legislation Regarding SLAPP Suits**

Arguing that SLAPP suits deny one's "right to petition," SLAPP suit legislation has been implemented in at least eight states. These states include: California, Delaware, Massachusetts, Minnesota, New York, Oklahoma, Rhode Island, and Washington. As you can see from the enclosed statutes, other states have language that better protects citizen participation, free speech, and the right to petition. Listed below are distinguishable and common features from other states' anti-SLAPP legislation:

- *Defining a person's right to petition and free speech.* While Nevada law addresses who a complaint can be addressed to for immunity purposes, it does not contain language explicitly defining "right to petition and free speech." For example, Massachusetts law defines "a party's exercise of its right to petition" as any written or oral statement submitted to a legislative, executive or judicial body, or any other governmental proceeding. This definition also covers statements or acts that are likely to enlist public participation, such as public forums. In contrast, Nevada law

neglects to include public forums as communication deemed immune from civil liability.

- *Motion to strike, motion to dismiss, summary judgment standards.* Another common element of anti-SLAPP legislation is language outlining conditions when a SLAPP suit can be dismissed. Nevada law does not address when or how a SLAPP suit would qualify for a prompt dismissal, motion to strike, or summary judgment.
- *Burden of proof to rest with plaintiff.* Many states require the plaintiff to provide clear and convincing evidence that the defendant intentionally defamed the plaintiff. Nevada does not have a provision placing the burden of proof on the plaintiff. As stated earlier, the "In good faith" clause in Nevada law often places the burden of proof on the defendant.
- *Recovery of damages.* Nevada law is similar to other states in that legal fees are incurred by the prevailing party.

#### **Model Anti-SLAPP Legislation**

The University of Denver Political Litigation Project has drafted model anti-SLAPP legislation, and copies are made available upon request. According to the staff of this project, an ideal anti-SLAPP law includes the following: 1) Form: Cover all communications to government regardless of form; 2) Forums: Cover all government agencies and agents; 3) Prevention: Send a clear, unambiguous signal warning against filing SLAPPS; and 4) Cure: Set up an effective, fair, and early review for filed SLAPPS.

#### **Concluding Remarks**

Prompt and effective solutions to SLAPP suits are being introduced in a number of states. From the enclosed newspaper article, it appears that the Nevada Press Association plans to lobby the 1997 Legislature for more comprehensive anti-SLAPP laws. I also understand that you are interested in a Bill Draft Request (BDR) on this issue. I will be happy to forward any BDRs to the Legal Division on your behalf. Please advise me on what elements you would like to include in the anti-SLAPP measure. Additionally, I will be glad to contact the University of Denver for a copy of their model legislation.

Again, please contact me if you need further assistance.

JK/Ven:61006.15  
Enc.

**MINUTES OF THE  
SENATE COMMITTEE ON JUDICIARY**

**Sixty-ninth Session  
May 13, 1997**

The Senate Committee on Judiciary was called to order by Vice Chairman Jon C. Porter, at 4:30 p.m., on Tuesday, May 13, 1997, in Room 2149 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster.

**COMMITTEE MEMBERS PRESENT:**

Senator Mark A. James, Chairman  
Senator Jon C. Porter, Vice Chairman  
Senator Mike McGinness  
Senator Maurice Washington  
Senator Ernest E. Adler  
Senator Dina Titus  
Senator Valerie Wiener

**GUEST LEGISLATORS PRESENT:**

Assemblywoman Genie Ohrenschall, Clark County Assembly District No. 12  
Senator Joseph (Joe) M. Neal Jr., Clark County Senatorial District No. 4

**STAFF MEMBERS PRESENT:**

Allison Combs, Committee Policy Analyst  
Brad Wilkinson, Committee Counsel  
Maddie Fischer, Administrative Assistant  
Jo Greenslate, Committee Secretary

**OTHERS PRESENT:**

Frank W. Daykin, Attorney, former Legislative Counsel  
Warren B. Hardy, Lobbyist, Desert Sportsmen Rifle and Pistol Club  
Ben Graham, Lobbyist, Clark County District Attorney, and Nevada District Attorneys' Association

Vice Chairman Porter opened the hearing on Assembly Bill (A.B) 292.

Senate Committee on Judiciary  
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statutes and ordinances, a person is not a nuisance if in compliance with existing statutes and ordinances that are effective at this date; 3) The exact same change as in 2 above, with respect to a public nuisance.

SENATOR PORTER MOVED TO AMEND AND DO PASS S.B. 296.

THE MOTION WAS SECONDED BY SENATOR TITUS.

THE MOTION CARRIED UNANIMOUSLY.

\*\*\*\*\*

Chairman James referred to the next agenda item for the work session, S.B. 330.

SENATE BILL 330: Provides that community action agencies and their direct successors in interest are political subdivisions of this state for purposes of determining civil liability. (BDR 3-877)

SENATOR ADLER MOVED TO DO PASS S.B. 330.

THE MOTION WAS SECONDED BY SENATOR PORTER.

THE MOTION CARRIED UNANIMOUSLY.

\*\*\*\*\*

Chairman James opened the work session on S.B. 331.

SENATE BILL 331: Revises provisions governing liability of persons engaging in certain speech. (BDR 3-219)

Senator Titus inquired how this bill differs from the Strategic Lawsuits Against Public Participation (SLAPP) suit bill passed previously.

Senator Joseph (Joe) M. Neal Jr., Clark County Senatorial District No. 4, responded the bill passed previously only covered speaking to a public official. This bill would expand to cover any speech given in a public place, including the public official aspect. Section 3 was amended to cover all circumstances in

which a person speaks in public against some wrongdoing, which could lead to governmental correction. Chairman James asked where the buzz words "genuinely aimed at procuring favorable governmental action" were from. He asked if this was a term used elsewhere in the NRS for the extent of immunity. Senator Neal deferred to Brad Wilkinson, Committee Counsel, Legal Division, Legislative Counsel Bureau, for an answer.

Mr. Wilkinson replied that standard comes right out of the United States Supreme Court case regarding SLAPP litigation, City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365. Chairman James queried who had the burden of proving a speech made in public was "genuinely aimed at procuring favorable governmental action." Mr. Wilkinson answered it would be a defense that would be raised in a defamation suit. He added it could also be used as a defense against interference with contractual relations or prospective advantage in business torts. He continued if it was proven the speech was genuinely aimed at procuring favorable governmental action, the defendant would be immune; if not, the suit would proceed, and the principles of defamation, if it was a defamation tort, would come into play. Chairman James remarked NRS 41.640 to 41.670 means this just arises in the context of speech that was in some sense directed to a public body, such as a legislature or county commission meeting. Mr. Wilkinson replied currently it only covers situations where speech is made to a public body or a legislature. This statute would expand coverage to statements made in a public forum. He gave the example of a statement made to a newspaper, if it was the same statement made to a public body, as long as it was genuinely aimed at procuring favorable governmental action, would be immune.

Senator Titus clarified by means of an example, oftentimes in environmental issues, someone will speak out against putting in a nuclear power plant. The power plant then retaliates with a suit against the protester for either defamation or interference with commerce. She stated these suits are seldom won, but they have a chilling effect on public speech because fighting the suit is expensive and takes a lot of time, discouraging the person from saying anything in the first place. She concluded what this bill does is protect the speech of a person speaking against the power company and serves as a deterrent to keep the power company from filing suit against people who speak in public against them.

Chairman James remarked he understood that but was trying to figure out when it applied. He clarified the committee is taking out "in good faith communicates

to a legislator, officer," and said now the speaker just has to engage in protected speech which is speech made in an open place to the public or in a public forum, and is genuinely aimed at procuring favorable governmental action. Mr. Wilkinson remarked the "in good faith" requirement is covered by the "genuinely aimed" language, and then it is expanded to "procuring favorable governmental action." He clarified the current standard is "regarding a matter reasonably of concern to the respective governmental entity." Chairman James suggested the way to approach this amendment would be to say the committee's intention is that genuinely aimed at procuring favorable governmental action is bound up in the concept of good faith. He concluded the amendment is to put the "good faith" language back in and add the amendment on the green sheet, page 8 of Exhibit E, to this bill.

Senator Neal agreed with the changes Chairman James suggested and added the intention here of genuinely aimed at procuring favorable governmental action seems to suggest the complaint itself must have within it an ingredient by which action can be pursued in terms of correction. He continued it seems to suggest there must be some type of affirmative action that can be taken in reference to the complaint that is being made about the object that the complaint is about. For example, if a person makes a complaint about a shoddy building in public, and the building inspector should have caught the shoddy workmanship during his inspection, this would be aimed at some kind of correction. Chairman James elaborated the other side of Senator Neal's example would be someone merely making a false and defamatory statement which in no way was intended to have a governmental entity take action on it, and therefore, it would not be protected.

SENATOR TITUS MOVED TO AMEND AND DO PASS S.B. 331.

THE MOTION WAS SECONDED BY SENATOR ADLER.

THE MOTION CARRIED UNANIMOUSLY.

\*\*\*\*\*

Chairman James opened the work session on S.B. 339.

SENATE BILL 339: Provides that voluntary intoxication of defendant may not be considered in determining existence of requisite mental state of offense. (BDR 15-713)



## WORK SESSION DOCUMENT

### SENATE COMMITTEE ON JUDICIARY

May 13, 1997

#### SENATE BILL 296

Senate Bill 296 regulates the operational practices of shooting ranges. The measure requires that shooting ranges, as defined under Section 2, comply with the operational practices for such locations developed by the National Rifle Association of America (NRA). Senate Bill 296 also requires compensation for the cost of relocating a shooting range situated on property taken by eminent domain. Finally, S.B. 296 provides that a shooting range conforming to the NRA standards does not constitute a nuisance if it also complies with the statutes and ordinances regulating noise that were applicable at the time of its construction or initial operation.

#### *Testimony*

According to the testimony presented by Warren Hardy, only two shooting ranges in Nevada would qualify under the NRA standards. Mr. Hardy offered an amendment based on recommended language from the NRA which has been utilized by other western states, including California.

#### Proposed Amendments

- ☐ The attached yellow document contains the following amendments proposed by Mr. Hardy:
  - a. Delete Section 3 which requires compliance with the NRA standards.
  - b. Delete Section 4 which provides that a person who participates in sport shooting at a range that complies with the NRA standards assumes the risks that are obvious and inherent with the sport.
  - c. Replace Sections 6 and 7 with the language regarding nuisance actions contained in the yellow document. (Mr. Hardy's language is identical for each new section.)
- ☐ Require that a local government provide notice to builders of the existence of a shooting range. (Proposed by Senator Adler)
- ☐ Require that local governments include shooting ranges in their master plans. (Proposed by Robert Fuller, a professional engineer)
- ☐ Include a designated hazard zone for shooting ranges in the master plan. (Proposed by Senator Adler)
- ☐ Delete the "or greater than" language on page 2, line 21. (Proposed by Senator James)

SENATE BILL NO. 331

PROPOSED AMENDMENT by SENATOR NEAL

(Prepared by Bradley A. Wilkinson, Committee Counsel)

Amend sec. 3, page 1, line 8, by deleting "*forum*," and inserting:

*"forum or made to a legislator, officer or employee of this state, a political subdivision of this state or the Federal Government."*

[Under the existing provisions of SB331, immunity is extended to a person who makes a statement in a place open to the public or in a public forum, which would include a public statement made to a state, local or federal legislator, officer or employee. However, as currently drafted, SB331 eliminates the immunity that is provided under existing law for a person who makes a private statement to a state, local or federal legislator, officer or employee. This proposed amendment restores to SB331 the immunity that is provided under existing law to a person who makes a private statement to a state, local or federal legislator, employee or officer.]

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plea bargaining in certain circumstances; expanding the provisions relating to genetic marker testing of certain offenders; imposing a fee for genetic marker testing upon certain offenders; prohibiting the sealing of criminal records in certain circumstances; providing penalties; and providing other matters properly relating thereto."

Senator James moved the adoption of the amendment.

Remarks by Senator James.

Amendment adopted.

Senator James moved that Senate Bill No. 325 be re-referred to the Committee on Finance upon return from reprint.

Motion carried.

Bill ordered reprinted, engrossed and to the Committee on Finance.

Senate Bill No. 331.

Bill read second time.

The following amendment was proposed by the Committee on Judiciary: Amendment No. 363.

Amend sec. 3, page 1, line 8, by deleting "*forum*;" and inserting: "*forum or made to a legislator, officer or employee of this state, a political subdivision of this state or the Federal Government*;"

Amend sec. 5, page 1, by deleting line 14 and inserting: "41.650 A person who in good faith [communicates a complaint or"

Amend sec. 6, page 2, by deleting lines 2 through 6 and inserting: "41.660 In any civil action brought against a person who in good faith [communicated a complaint or information to a legislator, officer or employee of this state or of a political subdivision regarding a matter reasonably of concern to the respective governmental entity,] *engaged in protected speech*, the attorney general [or other] , *another*".

Amend sec. 7, page 2, by deleting lines 16 through 20 and inserting: "prevailing in an action brought against a person who in good faith [communicated a complaint or information to a legislator, officer or employee of this state or of a political subdivision, or to a legislator, officer or employee of the Federal Government, regarding a matter reasonably of concern to the respective governmental entity] *engaged*"

Senator James moved the adoption of the amendment.

Remarks by Senator James.

Amendment adopted.

Bill ordered reprinted, engrossed and to third reading.

Senate Bill No. 377.

Bill read second time.

The following amendment was proposed by the Committee on Judiciary: Amendment No. 370.

Amend section 1, page 2, line 29, after "*is*" by inserting "*a*".

Amend sec. 2, page 4, line 6, by deleting "*sentence*" and inserting: "*term of imprisonment*".

Amend sec. 6, page 7, line 20, by deleting "*pursuant to*" and inserting: "*as provided in*".

(REPRINTED WITH ADOPTED AMENDMENTS)

FIRST REPRINT

S.B. 331

SENATE BILL NO. 331-SENATOR NEAL

APRIL 28, 1997

Referred to Committee on Judiciary

SUMMARY—Revises provisions governing liability of persons engaging in certain speech.  
(BDR 3-219)

FISCAL NOTE: Effect on Local Government: No.  
Effect on the State or on Industrial Insurance: No.

EXPLANATION - Matter in italics is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to actions concerning persons; revising the provisions governing the liability of a person engaging in certain speech; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN  
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

- 1 Section 1. Chapter 41 of NRS is hereby amended by adding thereto the
- 2 provisions set forth as sections 2 and 3 of this act.
- 3 Sec. 2. *As used in NRS 41.640 to 41.670, inclusive, and section 3 of*
- 4 *this act, unless the context otherwise requires, the words and terms defined*
- 5 *in NRS 41.640 and section 3 of this act have the meanings ascribed to them*
- 6 *in those sections.*
- 7 Sec. 3. "Protected speech" means a written or oral statement that is:
- 8 1. *Made in a place open to the public or in a public forum or made to a*
- 9 *legislator, officer or employee of this state, a political subdivision of this*
- 10 *state or the Federal Government; and*
- 11 2. *Genuinely aimed at procuring favorable governmental action.*
- 12 Sec. 4. NRS 41.640 is hereby amended to read as follows:
- 13 41.640 [As used in NRS 41.640 to 41.670, inclusive, "political"]
- 14 "Political subdivision" has the meaning ascribed to it in NRS 41.0305.
- 15 Sec. 5. NRS 41.650 is hereby amended to read as follows:
- 16 41.650 A person who in good faith [communicates a complaint or
- 17 information to a legislator, officer or employee of this state or of a political
- 18 subdivision, or to a legislator, officer or employee of the Federal
- 19 Government, regarding a matter reasonably of concern to the respective
- 20 governmental entity] engages in protected speech is immune from civil



\* S B 3 3 1 R 1 \*

20

1 liability on [claims] a claim based upon the [communication.] *protected*  
2 *speech.*

3 Sec. 6. NRS 41.660 is hereby amended to read as follows:

4 41.660 In any civil action brought against a person who in good faith  
5 [communicated a complaint or information to a legislator, officer or  
6 employee of this state or of a political subdivision regarding a matter  
7 reasonably of concern to the respective governmental entity,] *engaged in*  
8 *protected speech*, the attorney general [or other] , *another* legal  
9 representative of the state or the legal representative of [the] a political  
10 subdivision may provide for the defense of the action on behalf of the person  
11 who [communicated the complaint or information. If the legal representative  
12 of a political subdivision does not provide for the defense of such an action  
13 relating to a communication to a legislator, officer or employee of the  
14 political subdivision, the attorney general may provide for the defense of the  
15 action.] *engaged in the protected speech.*

16 Sec. 7. NRS 41.670 is hereby amended to read as follows:

17 41.670 1. Except as otherwise provided in subsection 2, the party  
18 prevailing in an action brought against a person who in good faith  
19 [communicated a complaint or information to a legislator, officer or  
20 employee of this state or of a political subdivision, or to a legislator, officer  
21 or employee of the Federal Government, regarding a matter reasonably of  
22 concern to the respective governmental entity] *engaged in protected speech*  
23 is entitled to *recover* reasonable costs and attorney's fees.

24 2. If a legal representative of this state or of a political subdivision  
25 provides the defense in such an action, the state or political subdivision:

26 (a) If the legal representative prevails, is entitled to *recover* reasonable  
27 costs and attorney's fees; or

28 (b) If the legal representative does not prevail, must pay reasonable costs  
29 and attorney's fees.

30 Sec. 8. The amendatory provisions of this act apply to a civil action that  
31 is filed on or after October 1, 1997.

③



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Senate Bill No. 296.

Bill read third time.

Roll call on Senate Bill No. 296:

YEAS—20.

NAYS—None.

Excused—Wiener.

Senate Bill No. 296 having received a constitutional majority, Mr. President pro Tempore declared it passed, as amended.

Bill ordered transmitted to the Assembly.

Senate Bill No. 297.

Bill read third time.

Remarks by Senators Neal, James and Coffin.

Senator Coffin moved that Senate Bill No. 297 be taken from the General File and placed on the General File for the next legislative day.

Motion carried.

Senate Bill No. 331.

Bill read third time.

Roll call on Senate Bill No. 331:

YEAS—20.

NAYS—None.

Excused—Wiener.

Senate Bill No. 331 having received a constitutional majority, Mr. President pro Tempore declared it passed, as amended.

Bill ordered transmitted to the Assembly.

Senate Bill No. 377.

Bill read third time.

Remarks by Senators James, Neal and Raggio.

Roll call on Senate Bill No. 377:

YEAS—20.

NAYS—None.

Excused—Wiener.

Senate Bill No. 377 having received a constitutional majority, Mr. President pro Tempore declared it passed, as amended.

Bill ordered transmitted to the Assembly.

Senate Bill No. 380.

Bill read third time.

Roll call on Senate Bill No. 380:

YEAS—20.

NAYS—None.

Excused—Wiener.

Senate Bill No. 380 having received a constitutional majority, Mr. President pro Tempore declared it passed, as amended.

Bill ordered transmitted to the Assembly.

**MINUTES OF THE  
ASSEMBLY COMMITTEE ON JUDICIARY**

**Sixty-ninth Session  
June 16, 1997**

The Committee on Judiciary was called to order at 8:15 a.m., on Monday, June 16, 1997. Chairman Bernie Anderson presided in Room 3138 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Guest List.

**COMMITTEE MEMBERS PRESENT:**

Mr. Bernie Anderson, Chairman  
Ms. Barbara Buckley, Vice Chairman  
Mr. Clarence (Tom) Collins  
Ms. Merle Berman  
Mr. John Carpenter  
Mr. Don Gustavson  
Mr. Dario Herrera  
Mrs. Ellen Koivisto  
Mr. Mark Manendo  
Mr. Dennis Nolan  
Ms. Genie Ohrenschall  
Mr. Richard Perkins  
Mrs. Gene Segerblom

**COMMITTEE MEMBERS ABSENT:**

Mr. Brian Sandoval (Excused)

**GUEST LEGISLATORS PRESENT:**

Joseph Neal, Representative, Clark County Senatorial District 4  
Dina Titus, Representative, Clark County Senatorial District 7

**STAFF MEMBERS PRESENT:**

Donald O. Williams, Chief Principal Research Analyst  
Risa L. Berger, Committee Counsel  
Matthew Baker, Committee Secretary

OTHERS PRESENT:

Special Agent Larry Amaker, United States Secret Service  
Stephanie Anderson, Project Specialist, AT&T Wireless Services  
Brian Herr, Representative, Nevada Bell  
Bob Barengo, Representative, AT&T Wireless Services  
Helen Foley, Representative, 360° Communications  
Paula Berkley, Representative, Reno-Sparks Indian Colony  
Sue Newberry, Highway Safety Representative, Department of Motor  
Vehicles and Public Safety

Following roll call, testimony commenced on S.B. 331.

SENATE BILL 331 - Revises provisions governing liability of persons  
engaging in certain speech.

Sen. Joseph Neal, Clark County Senatorial District 4, addressed the committee. He explained S.B. 331 defined protected speech as a written or oral statement which was made in a public place or forum and that was genuinely aimed toward procuring favorable governmental action. The measure provided that the person who engaged in protective speech was immune from civil liability on a claim based on such speech. A civil action brought against a person because he engaged in protected speech allowed the Attorney General or a legal representative of the state or a political subdivision thereof to provide for that person's defense.

Sen. Neal supplied to the committee information relative to the bill, dealing with SLAPP (Strategic Lawsuits Against Public Participation) suits (see Exhibits C through N). He stated in the Clark County area, especially with the increase in population and housing, people had complained about their houses. Subsequently, the homebuilders would then file an action against those people and prevent them from speaking out. The bill would allow those people to speak out as long as their actions were directed towards some type of governmental action. That meant a person could not go out and make blanket statements about just anything. It would have to be directed at some type of governmental action.

Sen. Neal pointed out the law review articles (Exhibits C and D) he had submitted to committee were very helpful in stating why SLAPP suits were so effective and detrimental, making laws against them necessary. There were approximately ten states which had provided for some type of relief from SLAPP suits. Colorado, California, Delaware, Massachusetts, Minnesota, New York, Rhode Island, Oklahoma and Washington all had enacted recent legislation



which addressed the SLAPP suit problem. Sen. Neal noted the problems those states had been faced with were now affecting Nevada.

Assemblyman Collins questioned if the bill affected any government body? Sen. Neal explained the bill covered any type of speech that was made in a public forum, aimed at procuring some type of governmental action. A person who spoke to his legislative representative would also be protected under the provisions in the bill.

Assemblywoman Ohrenschall questioned if Sen. Neal had reviewed article 1, section 9, of the Nevada Constitution, in reference to the bill. It stated "every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right." This meant a person could not be given total immunity, under any circumstances. Sen. Neal explained the bill did not give total immunity. A restriction on the bill stated any public speech, relative to SLAPP suits, had to be directed towards proper governmental action. So there was no absolute immunity. It did not mean someone could go out and willfully slander someone and not be held responsible for that.

Assemblywoman Ohrenschall asked how SLAPP or libel suits would be stopped without going to a full trial on the merits, which were what caused the expense and time to the person being sued. Sen. Neal stated the bill was designed so that the trial stage would not be reached in the first place. He stated the lawsuit was what was used in preventing a person from speaking out against something that person seemed to think was wrong or found to be wrong. The bill stated the attorney general or district attorney would be the individual who would enforce the provisions in the bill.

Sen. Neal stated it was not the individual who would be confronted with all the motions to try and protect himself from the SLAPP suits. As long as the speech was directed to procuring governmental action, the speech was protected.

With no further testimony, the hearing was closed on S.B. 331.

Testimony commenced on S.B. 265.

**SENATE BILL 265** - Makes various changes to crimes related to unauthorized use of telephone.

Sen. Dina Titus, Representative, Clark County Senatorial District 7, addressed the committee. She stated the bill was an effort to put more "teeth" into Nevada's cellular phone fraud statutes. Section 1, subsections 5 and 7, added to the list of cellular fraud crimes the possession of a plan or kit and the

0031

# TIRED OF BEING SLAPPED AROUND: STATES TAKE ACTION AGAINST LAWSUITS DESIGNED TO INTIMIDATE AND HARASS

## I. INTRODUCTION

Irene Mansfield is a housewife confined to her home by illness. She suspects a nearby landfill caused her illness. She speaks out publicly against the landfill, labeling it a "dump."<sup>1</sup> The owners of the landfill respond by filing a \$5 million defamation suit against Mrs. Mansfield and her husband.<sup>2</sup> Although Mr. Mansfield did not criticize the landfill, the company sues him anyway because "he failed 'to control his wife.'"<sup>3</sup> A fictitious scenario? Unfortunately not. This case was actually brought against a Pearland, Texas couple.<sup>4</sup> It is just one example of the

ORIGINALS ARE ON FILE IN  
THE RESEARCH LIBRARY

Mar.-Apr. 1990, at

1. Eve Pell, *SLAPPING Civ* 6.
2. Many strategic lawsuits (SLAPPs) are filed and never pursued. Others are thrown out of court during pre-trial proceedings. When a SLAPP does proceed to trial, the defendant invariably wins. See *infra* note 10. It is very rare for SLAPP plaintiffs to appeal because it is unlikely they ever expected ultimate legal success. By filing suit, their goal has already been achieved. See *infra* notes 11-16 and accompanying text. Consequently, there are very few SLAPPs which are contained in official reporters or electronic databases—no doubt part of the reason that this abuse of the legal system has evaded detection for so long. This fact has been noted by other writers on the subject as well. See, e.g., John J. Fried, *Debate Rages Over Developers' Lawsuits To Hinder Public Participation*, CHI. TRIB., June 23, 1991, at G1 ("[M]any SLAPP cases are thrown out of court. Others just hang around, without being pursued. And some are simply withdrawn."). As Professor Penelope Canan, a prominent researcher of the SLAPP phenomenon, noted, "We will never know exactly how many of these lawsuits exist, because they are designed to mask their actual intent." Stacey Colino, *SLAPP Happy*, STUDENT LAW., Mar. 1990, at 18, 20.
3. Pell, *supra* note 1, at 6.
4. Eventually, this outrageous suit was dropped. Still, it took "almost three years of depositions, court appearances, and thousands of dollars in attorneys fees" before this ordeal ended. Tobi Lippin, *Uncivil Suits*, MASS. INST. TECH. ALUMNI ASS'N NEWSL., Apr. 1991, at 14. Legal dismissal of such a SLAPP is, at best, a Pyrrhic victory for its targets. As Mrs. Mansfield noted, "As far as the concern, the worry, the harassment, there's no amount of money that would repay what we have been through." 20/20: *Slapped Into Silence* (ABC television broadcast, May 25, 1990) [hereinafter 20/20]. Mr. Mansfield noted the absurdity of his inclusion in the suit by simply saying, "[I]f . . . not controlling your wife is a legal lawsuit, . . . I think a lot of us men, we're in trouble." *Id.* The landfill

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Rutgers Law Review  
vol 25: 2 1994 pgs 401-432

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Submitted to the Committee on Judiciary on 6-16-97  
by Sen. Joseph Neal, Clark County  
Senatorial District 4 EXHIBIT C

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# NEW YORK UNIVERSITY LAW REVIEW

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To Err Is Human, But Not Always Harmless:  
When Should Legal Error Be Tolerated?  
*Harry T. Edwards*

The Professionalism Paradigm Shift:  
Why Discarding Professional Ideology Will Improve  
the Conduct and Reputation of the Bar  
*Russell G. Pearce*

Take the Money and Stay: Industrial Location Incentives  
and Relational Contracting

Reforming SLAPP Reform: New York's Anti-SLAPP Statute

Unlocking Lock-In: Limited Liability Companies  
and the Key to Underutilization of Close Corporation Statutes

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December 1995

Number 6

Submitted to the Committee on Judiciary on 6-16-97  
by Sen. Joseph Neal, Clark County  
Senatorial District 2

EXHIBIT

0

LH - '0096

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## 941

# REFORMING SLAPP REFORM: NEW YORK'S ANTI-SLAPP STATUTE

MARNIE STETSON

## INTRODUCTION

Over the last two decades, the following hypothetical lawsuit has occurred in countless variations hundreds of times across the United States:

A developer proposes a subdivision in an area of a community that is currently zoned for open space.<sup>1</sup> The plan requires a change in zoning,<sup>2</sup> and much of the community opposes the change, spurring the creation of an ad hoc group of local citizens called Protect Our Town. In preparation for the zoning board hearing, members of the seventy-five person group write letters to the newspapers and to the mayor<sup>3</sup> and circulate petitions<sup>4</sup> voicing opposition to the loss of such a large portion of the town's open space. In one of the letters, the group asserts that the developer is an outsider and is motivated by profit, not by the best interests of the town.

Several days before the hearing the developer files a sixty-five-million-dollar lawsuit against every leader of the opposition group and 500 John Does<sup>5</sup> for libel. The activists either have to retain counsel and engage in pretrial preparation or enter into a settle-

<sup>1</sup> In one example of a suit filed in order to communicate to the government the need for open space, *Lange v. Nature Conservancy, Inc.*, 601 P.2d 963, 965 (Wash. Ct. App. 1979), cert. denied, 449 U.S. 831 (1980), private landowners brought suit after the Nature Conservancy included their property in a study to prioritize lands for acquisition to protect open space and presented the study to the San Juan County Commissioners.

<sup>2</sup> Two examples of suits brought against activists who opposed development proposals at zoning hearings are *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 616 (8th Cir. 1980) (affirming trial court's dismissal of developer's suit) and *Weiss v. Willow Tree Ass'n*, 467 F. Supp. 803, 819 (S.D.N.Y. 1979) (granting defendant's motion to dismiss).

<sup>3</sup> See, e.g., *Okun v. Superior Court*, 629 P.2d 1369, 1372-75 (Cal.), cert. denied, 454 U.S. 1099 (1981) (suing activists for defamation and conspiracy arising from letters written to local newspaper and mayor).

<sup>4</sup> See, e.g., *Westfield Partners, Ltd. v. Hogan*, 740 F. Supp. 523, 527 (N.D. Ill. 1990) (granting defendants' motion to dismiss against developer who sued defendants after they circulated petitions opposing developer's access road).

<sup>5</sup> See, e.g., *Putting a Stop to Unfair Suits*, S.F. Chron., Oct. 9, 1991, at A16 (editorial describing \$63-million lawsuit filed by condominium developer against League of Women Voters for letter-writing campaign in which there were 500 Doe defendants). Unnamed John Doe defendants are included so that the suing party can later add names of actual defendants. This practice effectively spreads the lawsuit's chill and discourages future activists from joining the cause.

December 1995]

SLAPP RE

ment with the plaintiff, agreeing to a settlement or dropping the lawsuit. Whether or she has a valid claim, the suit effectively petitioning their local government from doing the same.

This hypothetical presents a paradigm Public Participation (SLAPP) suit.<sup>6</sup>

SLAPP suits are problematic because they restrict a citizen's right to petition the government to the United States Constitution. This right to petition encompasses a citizen's right to prepare and circulate petitions, to write letters to newspapers to get their views on government action published.<sup>8</sup> Many believe that these rights are threatened by the proliferation of lawsuits against individuals or groups for speaking out

<sup>6</sup> Penelope Canan and George W. Pring, who coined the phrase "SLAPP suit" and have studied the phenomenon, see Penelope Canan, *The SLAPP from a Sociological Perspective* (1989); Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Methods* (1988) [hereinafter *Canan & Pring, Studying SLAPPs*]; George W. Pring, *Strategic Lawsuits Against Public Participation* (1989); George W. Pring & Penelope Canan, *SLAPPs: Strategic Lawsuits Against Public Participation* (1989). Professors Pring and Canan have also edited a recently published book: Penelope Canan & George W. Pring, *Speaking Out: The Art and Politics of Public Participation* (1996). See George W. Pring, *SLAPPs Against Public Participation* ("SLAPPs"): Standards, 12 Bridgeport L. Rev. 1153, 1153-54 (1987) [introduction to SLAPPs] (detailing existence and definition of SLAPP suits); George W. Pring & Penelope Canan, *SLAPPs: Strategic Lawsuits Against Public Participation*, 935 ALI-ABA 1 (1994), available in *W. Pring & Canan, Overview of SLAPPs* (same). See also notes 25-27.

<sup>7</sup> U.S. Const. amend. I.

<sup>8</sup> The constitutional right to petition the government is recognized by the Supreme Court in the antitrust context through the *Noerr-Pennington* doctrine. See *infra* notes 76-94 and accompanying text. The right to petition has been more broadly applied to protect the right to petition in *Stores, Inc. v. Associated Dry Goods Corp.*, 560 F.2d 1153, 1153-54 (9th Cir. 1977) (applying the *Noerr-Pennington* doctrine to describe First Amendment right to petition, 54 U. Cin. L. Rev. 1153, 1153-54 (1985) (constitutional right to petition); see also cases cited *supra* in connection with right to petition in SLAPP context).

<sup>9</sup> See Pring & Canan, *Introduction to SLAPPs* (1989) (discussion of people getting sued for speaking out); *High Gear*, Nat'l L.J., May 18, 1992, at 3 (same).

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New York University Law Review  
Dec 1995 vol. 70 no. 6  
pp 1324-1361

LH - 0097

**MINUTES OF THE  
ASSEMBLY COMMITTEE ON JUDICIARY**

**Sixty-ninth Session  
June 30, 1997**

The Committee on Judiciary was called to order at 7:48 a.m., on Monday, June 30, 1997. Chairman Bernie Anderson presided in Room 3138 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Guest List.

**COMMITTEE MEMBERS PRESENT:**

Mr. Bernie Anderson, Chairman  
Ms. Barbara Buckley, Vice Chairman  
Mr. Clarence (Tom) Collins  
Ms. Merle Berman  
Mr. John Carpenter  
Mr. Don Gustavson  
Mr. Dario Herrera  
Mrs. Ellen Koivisto  
Mr. Mark Manendo  
Mr. Dennis Nolan  
Ms. Genie Ohrenschall  
Mr. Richard Perkins  
Mr. Brian Sandoval  
Mrs. Gene Segerblom

**GUEST LEGISLATORS PRESENT:**

Sen. Mark James, Representative, Clark County Senatorial District 8  
Sen. Dina Titus, Representative, Clark County Senatorial District 7

**STAFF MEMBERS PRESENT:**

Risa L. Berger, Committee Counsel  
Juliann K. Jenson, Senior Research Analyst  
Matthew Baker, Committee Secretary

**OTHERS PRESENT:**

Mariah Sugden, Senior Deputy Attorney General, Attorney General's

The next bill to be discussed was S.B. 331.

SENATE BILL 331 - Revises provisions governing liability of persons engaging in certain speech.

Ms. Jenson, reading from the work session document (see page 2 of Exhibit E) gave a brief history of the bill and summarized pertinent information.

Chairman Anderson noted a bill by Assemblywoman Ohrenschall was a much stronger piece of legislation and spoke very clearly to the problem of SLAPP (Strategic Lawsuits Against Public Participation) suits. The issue had been placed before the legislature in previous sessions. He noted the measure proposed by Sen. Neal was not as strong as Assemblywoman Ohrenschall's.

Assemblywoman Ohrenschall noted Sen. Neal's bill only protected speech whereas her bill, A.B. 485, protected the entire right to petition. She commented both bills could pass separate of each other and still provide a workable framework within the statutes.

After a brief discussion by the committee concerning the similarities between A.B. 485 and S.B. 331, it was decided to amend S.B. 331 so as to incorporate into it some of the provisions already provided for in A.B. 485.

Chairman Anderson asked for a motion to be made on S.B. 331.

ASSEMBLYWOMAN OHRENSCHALL MOVED TO AMEND AND DO PASS  
S.B. 331.

ASSEMBLYMAN NOLAN SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY BY THOSE PRESENT.  
(ASSEMBLYMAN PERKINS AND ASSEMBLYWOMAN KOIVISTO AND  
BERMAN WERE ABSENT FOR THE VOTE.)

The floor assignment was given to Assemblywoman Ohrenschall.

The committee reopened the hearing on S.B. 402.

SENATE BILL 402 - Makes various changes concerning criminal justice system.

Ben Graham, Representative, Nevada District Attorney's Association, addressed the committee. He endeavored to answer the committee's concerns regarding

## WORK SESSION

### ASSEMBLY COMMITTEE ON JUDICIARY

JUNE 30, 1997

The following measures will be considered for action during the work session.

- **SENATE BILL 100** provides for involuntary civil commitment of sexually violent predators. (BDR 39-286 was requested by the Senate Committee on Judiciary and is a recommendation from the Legislative's Commission Subcommittee to Study the Treatment of Mentally Ill Offenders in the Criminal Justice System. [S.C.R. 59] ) Heard in committee on June 26 and was considered at the June 28 work session, but no action was taken.

#### Background Information

Senate Bill 100 authorizes civil commitment and alternative courses of treatment for sexually violent predators under programs administered by the Mental Hygiene and Mental Retardation (MH&MR) Division of the Department of Human Resources. The measure defines these predators as persons who have previously been convicted of a sexually violent offense, who suffer from a mental disorder, and who are dangerous to the public because they are likely to commit a sexually violent offense.

Questions were raised relative to the cost, facility and security of civilly committing certain sex offenders. Committee members also questioned why such offenders were not incarcerated for longer periods of time, rather than resorting to civil commitment.

#### Proposed Amendment

A committee member proposed to increase sentences for sex offenders and to provide civil commitment in certain situations. (See "Proposed Amendment to S.B. 100," prepared by Risa Berger, Committee Counsel.)

- **SENATE BILL 156** makes various changes concerning stepparents and stepchildren. (BDR 11-1130 was requested by Senator Adler.) Heard in committee on June 23 and was considered at the June 28 work session, but no action was taken.

#### Background Information

Testimony indicated that S.B. 156 makes various changes concerning stepparents and stepchildren. The measure authorizes a stepparent of a minor to petition a court to grant visitation rights under certain circumstances. Witnesses reported that a formalized procedure is needed to establish relationships with stepchildren after a

Submitted to the Committee on Judiciary on 6-30-97  
by Julianne Benson, Senior Research Analyst  
Legislative Counsel Bureau **EXHIBIT E 31**

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separation or divorce.

Although in agreement with the concept, a private attorney in a family law practice testified that the measure is confusing and addresses too many issues. She offered suggestions on how to strengthen the measure and Chairman Anderson directed her to work with Senator Adler and Committee Counsel on a proposed amendment. (See "Senate Bill No. 156, Proposed Amendment by the Assembly Judiciary Committee" prepared by Risa Berger, Committee Counsel.)

After reviewing the amendment at the last work session, a committee member raised a concern regarding objections by the natural parents for stepparent visitation. Chairman Anderson suggested that Senator Adler be contacted about the issue.

- **SENATE BILL 331** revises provisions governing liability of persons engaging in certain speech. (BDR 3-219 was requested by Senator Neal.) Heard in committee on June 16, but no action was taken.

#### **Background Information**

Senator Neal reported that S.B. 331 provides for a person who in good faith engages in protected speech to be immune from civil liability on a claim based upon such speech. He further stated that protected speech will include a written or oral statement that is made in public or to a legislator or government employee and is genuinely aimed at procuring favorable governmental action.

According to the testimony, S.B. 331 was requested to address the growing number of SLAPP suits (Strategic Lawsuits Against Public Participation). These suits are filed with the intention of intimidating citizens who participate in governmental activity and public policy. The typical SLAPP suit occurs when a citizen makes a statement intended to influence public policy and then is sued for defamation, interference with contract, or a similar common law tort. For example, SLAPP suits are often filed against citizens who complain about products or services to a governmental agency or in a public forum.

- **SENATE BILL 392** restricts certain advertising and certain sexually related forms of entertainment in certain circumstances and makes changes regarding certain acts relating to prostitution. (BDR 15-312 was requested by the Senate Committee on Judiciary.) Heard in committee on June 27, but no action was taken/

#### **Background Information**

Senator James requested this measure because of his concerns about children viewing suggestive advertising. Additionally, he voiced his displeasure about escort services and stated that these "outcall" agencies were often illegally employing prostitutes. He reported that this measure will better control such illegal operations and will provide a

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Assemblyman Perkins moved that Assembly Bills Nos. 183, 371, 584 be placed on the General File.

Motion carried.

Assemblyman Bache moved that the Assembly recess subject to the call of the Chair.

Motion carried.

Assembly in recess at 5:02 p.m.

ASSEMBLY IN SESSION

At 5:24 p.m.

Mr. Speaker presiding.

Quorum present.

SECOND READING AND AMENDMENT

Assembly Bill No. 632.

Bill read second time.

The following amendment was proposed by the Committee on Elections, Procedures, and Ethics:

Amendment No. 921.

Amend section 1, page 1, by deleting line 12 and inserting:

“(a) Appoint the director.”.

Amend section 1, page 1, line 15, after “auditor,” by inserting “legislative counsel,”.

Amend the bill as a whole by deleting sec. 2.

Amend the title of the bill to read as follows:

“An Act relating to the legislature; revising the provisions relating to the appointment of the legislative auditor, legislative counsel and research director of the legislative counsel bureau; and providing other matters properly relating thereto.”.

Amend the summary of the bill to read as follows:

“Summary—Revises provisions relating to appointment of legislative auditor, legislative counsel and research director of legislative counsel bureau. (BDR 17-976)”.

Assemblywoman Giunchigliani moved the adoption of the amendment.

Remarks by Assemblywoman Giunchigliani.

Amendment adopted.

Bill ordered reprinted, engrossed and to third reading.

Senate Bill No. 331.

Bill read second time.

The following amendment was proposed by the Committee on Judiciary: Amendment No. 1032.

Amend the bill as a whole by adding a preamble, immediately preceding the enacting clause, to read as follows:

“WHEREAS, The framers of the United States Constitution and the constitution of the State of Nevada, recognizing that participation by citizens

in government is an inalienable right which is essential to the survival of democracy, secured its protection by giving the people the right to petition the government for redress of grievances in the First Amendment to the United States Constitution and in section 10 of article 1 of the constitution of the State of Nevada; and

WHEREAS, The communications, information, opinions, reports, testimony, claims and argument provided by citizens to their government are essential to wise governmental decisions and public policy, the public health, safety and welfare, effective law enforcement, the efficient operation of governmental programs, the credibility and trust afforded government and the continuation of our representative form of government; and

WHEREAS, Civil actions are being filed against many citizens, businesses and organizations based on their valid exercise of their right to petition; and

WHEREAS, Such lawsuits, called "Strategic Lawsuits Against Public Participation," or "SLAPPs," are typically dismissed, but often not before the defendant is put to great expense, harassment and interruption of their productive activities; and

WHEREAS, The number of SLAPPs has increased significantly over the past 30 years; and

WHEREAS, SLAPPs are an abuse of the judicial process in that they are used to censor, chill, intimidate or punish persons for involving themselves in public affairs; and

WHEREAS, The threat of financial liability, litigation costs and other personal losses from groundless civil actions seriously affects governmental, commercial and individual rights by significantly diminishing public participation in government, in public issues and in voluntary service; and

WHEREAS, Although courts have recognized and discouraged SLAPPs, protection of this important right has not been uniform or comprehensive; and

WHEREAS, It is essential to our form of government that the constitutional rights of citizens to participate fully in the process of government be protected and encouraged; now, therefore,".

Amend sec. 3, page 1, by deleting lines 7 through 11 and inserting:

"Sec. 3. "Good faith communication" means any:

1. Communication that is aimed at procuring any governmental or electoral action, result or outcome;
2. Communication of information or a complaint to a legislator, officer or employee of the Federal Government, this state or a political subdivision of this state, regarding a matter reasonably of concern to the respective governmental entity; or
3. Written or oral communication made in direct connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law, which is made to further the right of the person making the communication to free speech or to petition and which is truthful or is made without knowledge of its falsehood."

Amend sec. 5, page 1 by deleting line 16 and inserting: "41.650 A person who [in] *makes a good faith* [communicates a complaint or]".

Amend sec. 5, pages 1 and 2, by deleting line 20 on page 1 and lines 1 and 2 on page 2 and inserting: "governmental entity] *communication* is immune from civil liability on [claims] *a claim* based upon the communication."

Amend sec. 6, page 2, by deleting lines 4 through 15 and inserting:

"41.660 [In any civil action brought against a person who in good faith communicated a complaint or information to a legislator, officer or employee of this state or of a political subdivision regarding a matter reasonably of concern to the respective governmental entity, the]

1. *If an action is brought against a person based upon a good faith communication:*

(a) *The person against whom the action is brought may file a special motion to dismiss; and*

(b) *The attorney general or [other legal representative of the state or the legal representative of] the chief legal officer or attorney of a political subdivision [may provide for the defense of the action on behalf] of this state may defend or otherwise support the person [who communicated the complaint or information.] against whom the action is brought. If the [legal representative of a political subdivision does not provide for the defense of such an action relating to a communication to a legislator, officer or employee of the political subdivision, the] attorney general [may provide for the defense of the action.] or the chief legal officer or attorney of a political subdivision has a conflict of interest in, or is otherwise disqualified from, defending or otherwise supporting the person, the attorney general or the chief legal officer or attorney of a political subdivision may employ special counsel to defend or otherwise support the person.*

2. *A special motion to dismiss must be filed within 60 days after service of the complaint, which period may be extended by the court for good cause shown.*

3. *If a special motion to dismiss is filed pursuant to subsection 2, the court shall:*

(a) *Treat the motion as a motion for summary judgment;*

(b) *Stay discovery pending:*

(1) *A ruling by the court on the motion; and*

(2) *The disposition of any appeal from the ruling on the motion; and*

(c) *Rule on the motion within 30 days after the motion is filed.*

4. *If the court dismisses the action pursuant to a special motion to dismiss, the dismissal operates as an adjudication upon the merits."*

Amend sec. 7, page 2, line 17, by inserting an open bracket before "1."

Amend sec. 7, page 2, line 19, by deleting the open bracket before "communicated".

Amend sec. 7, page 2, by deleting lines 22 through 29 and inserting: "concern to the respective governmental entity is entitled to] *If the court grants a special motion to dismiss filed pursuant to NRS 41.660:*

1. *The court shall award reasonable costs and attorney's fees [*

2. If a legal representative of this state or of a political subdivision provides the defense in such an action, the state or political subdivision:

(a) If the legal representative prevails, is entitled] to *the person against whom the action was brought, except that the court shall award* reasonable costs and attorney's fees [; or

(b) If the legal representative does not prevail, must pay reasonable costs and attorney's fees.] *to this state or to the appropriate political subdivision of this state if the attorney general, the chief legal officer or attorney of the political subdivision or special counsel provided the defense for the person pursuant to NRS 41.660.*

2. *The person against whom the action is brought may bring a separate action to recover:*

(a) *Compensatory damages;*

(b) *Punitive damages; and*

(c) *Attorney's fees and costs of bringing the separate action."*

Amend the title of the bill to read as follows:

"An Act relating to actions concerning persons; revising provisions governing the immunity granted to a person who makes certain communications concerning certain matters related to government; and providing other matters properly relating thereto."

Amend the summary of the bill to read as follows:

"Summary—Revises provisions governing immunity granted to person who makes certain communications concerning certain matters related to government. (BDR 3-219)".

Assemblyman Anderson moved the adoption of the amendment.

Remarks by Assemblyman Anderson.

Amendment adopted.

Bill ordered reprinted, re-engrossed and to third reading.

Senate Bill No. 368.

Bill read second time.

The following amendment was proposed by the Committee on Commerce:  
Amendment No. 1057.

Amend section 1, page 2, line 24, after "*notification*" by inserting: "*of a final written decision*".

Amend section 1, page 2, after line 33, by inserting:

"7. *As used in this section, "substantiated claims for wages" has the meaning ascribed to it in section 2 of this act."*

Amend sec. 2, page 3, lines 2 and 3, by deleting: "*notice and hearing*" and inserting: "*providing notice and conducting a hearing pursuant to the provisions of this chapter.*".

Amend the title of the bill to read as follows:

"An Act relating to contractors; requiring a contractor to file a bond or establish a deposit with the state contractors' board to cover payroll expenses under certain circumstances; requiring the labor commissioner to notify the board after making a final written decision relating to certain claims filed against a contractor; and providing other matters properly relating thereto."

(REPRINTED WITH ADOPTED AMENDMENTS)  
SECOND REPRINT

S.B. 331

SENATE BILL NO. 331—SENATOR NEAL

APRIL 28, 1997

Referred to Committee on Judiciary

SUMMARY—Revises provisions governing immunity granted to person who makes certain communications concerning certain matters related to government.  
(BDR 3-219)

FISCAL NOTE: Effect on Local Government: No.  
Effect on the State or on Industrial Insurance: No.



EXPLANATION - Matter in italics is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to actions concerning persons; revising provisions governing the immunity granted to a person who makes certain communications concerning certain matters related to government; and providing other matters properly relating thereto.

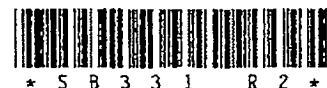
1 WHEREAS, The framers of the United States Constitution and the  
2 constitution of the State of Nevada, recognizing that participation by citizens  
3 in government is an inalienable right which is essential to the survival of  
4 democracy, secured its protection by giving the people the right to petition  
5 the government for redress of grievances in the First Amendment to the  
6 United States Constitution and in section 10 of article 1 of the constitution of  
7 the State of Nevada; and

8 WHEREAS, The communications, information, opinions, reports,  
9 testimony, claims and argument provided by citizens to their government are  
10 essential to wise governmental decisions and public policy, the public health,  
11 safety and welfare, effective law enforcement, the efficient operation of  
12 governmental programs, the credibility and trust afforded government and  
13 the continuation of our representative form of government; and

14 WHEREAS, Civil actions are being filed against many citizens, businesses  
15 and organizations based on their valid exercise of their right to petition; and

16 WHEREAS, Such lawsuits, called "Strategic Lawsuits Against Public  
17 Participation," or "SLAPPs," are typically dismissed, but often not before  
18 the defendant is put to great expense, harassment and interruption of their  
19 productive activities; and

20 WHEREAS, The number of SLAPPs has increased significantly over the  
21 past 30 years; and



\* 5 B 3 3 1 R 2 \*

1 WHEREAS, SLAPPs are an abuse of the judicial process in that they are  
2 used to censor, chill, intimidate or punish persons for involving themselves  
3 in public affairs; and

4 WHEREAS, The threat of financial liability, litigation costs and other  
5 personal losses from groundless civil actions seriously affects governmental,  
6 commercial and individual rights by significantly diminishing public  
7 participation in government, in public issues and in voluntary service; and

8 WHEREAS, Although courts have recognized and discouraged SLAPPs,  
9 protection of this important right has not been uniform or comprehensive;  
10 and

11 WHEREAS, It is essential to our form of government that the constitutional  
12 rights of citizens to participate fully in the process of government be  
13 protected and encouraged; now, therefore,

14  
15 THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN  
16 SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:  
17

18 Section 1. Chapter 41 of NRS is hereby amended by adding thereto the  
19 provisions set forth as sections 2 and 3 of this act.

20 Sec. 2. *As used in NRS 41.640 to 41.670, inclusive, and section 3 of*  
21 *this act, unless the context otherwise requires, the words and terms defined*  
22 *in NRS 41.640 and section 3 of this act have the meanings ascribed to them*  
23 *in those sections.*

24 Sec. 3. *"Good faith communication" means any:*

25 1. *Communication that is aimed at procuring any governmental or*  
26 *electoral action, result or outcome;*

27 2. *Communication of information or a complaint to a legislator, officer*  
28 *or employee of the Federal Government, this state or a political subdivision*  
29 *of this state, regarding a matter reasonably of concern to the respective*  
30 *governmental entity; or*

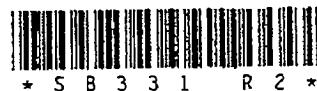
31 3. *Written or oral communication made in direct connection with an*  
32 *issue under consideration by a legislative, executive or judicial body, or any*  
33 *other official proceeding authorized by law,*  
34 *which is made to further the right of the person making the communication to*  
35 *free speech or to petition and which is truthful or is made without knowledge*  
36 *of its falsehood.*

37 Sec. 4. NRS 41.640 is hereby amended to read as follows:

38 41.640 [As used in NRS 41.640 to 41.670, inclusive, "political"]  
39 "Political subdivision" has the meaning ascribed to it in NRS 41.0305.

40 Sec. 5. NRS 41.650 is hereby amended to read as follows:

41 41.650 A person who [in] makes a good faith [communicates a  
42 complaint or information to a legislator, officer or employee of this state or  
43 of a political subdivision, or to a legislator, officer or employee of the  
44 Federal Government, regarding a matter reasonably of concern to the



1 respective governmental entity] *communication* is immune from civil liability  
2 on [claims] *a claim* based upon the communication.

3 Sec. 6. NRS 41.660 is hereby amended to read as follows:

4 41.660 [In any civil action brought against a person who in good faith  
5 communicated a complaint or information to a legislator, officer or  
6 employee of this state or of a political subdivision regarding a matter  
7 reasonably of concern to the respective governmental entity, the]

8 1. *If an action is brought against a person based upon a good faith*  
9 *communication:*

10 (a) *The person against whom the action is brought may file a special*  
11 *motion to dismiss; and*

12 (b) *The attorney general or [other legal representative of the state or the*  
13 *legal representative of] the chief legal officer or attorney of a political*  
14 *subdivision [may provide for the defense of the action on behalf] of this*  
15 *state may defend or otherwise support the person [who communicated the*  
16 *complaint or information.] against whom the action is brought. If the [legal*  
17 *representative of a political subdivision does not provide for the defense of*  
18 *such an action relating to a communication to a legislator, officer or*  
19 *employee of the political subdivision, the] attorney general [may provide for*  
20 *the defense of the action.] or the chief legal officer or attorney of a political*  
21 *subdivision has a conflict of interest in, or is otherwise disqualified from,*  
22 *defending or otherwise supporting the person, the attorney general or the*  
23 *chief legal officer or attorney of a political subdivision may employ special*  
24 *counsel to defend or otherwise support the person.*

25 2. *A special motion to dismiss must be filed within 60 days after service*  
26 *of the complaint, which period may be extended by the court for good cause*  
27 *shown.*

28 3. *If a special motion to dismiss is filed pursuant to subsection 2, the*  
29 *court shall:*

30 (a) *Treat the motion as a motion for summary judgment;*

31 (b) *Stay discovery pending:*

32 (1) *A ruling by the court on the motion; and*

33 (2) *The disposition of any appeal from the ruling on the motion; and*

34 (c) *Rule on the motion within 30 days after the motion is filed.*

35 4. *If the court dismisses the action pursuant to a special motion to*  
36 *dismiss, the dismissal operates as an adjudication upon the merits.*

37 Sec. 7. NRS 41.670 is hereby amended to read as follows:

38 41.670 [1. Except as otherwise provided in subsection 2, the party  
39 prevailing in an action brought against a person who in good faith  
40 communicated a complaint or information to a legislator, officer or  
41 employee of this state or of a political subdivision, or to a legislator, officer  
42 or employee of the Federal Government, regarding a matter reasonably of  
43 concern to the respective governmental entity is entitled to] *If the court*  
44 *grants a special motion to dismiss filed pursuant to NRS 41.660:*





- 1     1. *The court shall award reasonable costs and attorney's fees [.*  
2     2. *If a legal representative of this state or of a political subdivision*  
3     *provides the defense in such an action, the state or political subdivision:*  
4     (a) *If the legal representative prevails, is entitled] to the person against*  
5     *whom the action was brought, except that the court shall award reasonable* (  
6     *costs and attorney's fees [; or*  
7     (b) *If the legal representative does not prevail, must pay reasonable costs*  
8     *and attorney's fees.] to this state or to the appropriate political subdivision*  
9     *of this state if the attorney general, the chief legal officer or attorney of the*  
10    *political subdivision or special counsel provided the defense for the person*  
11    *pursuant to NRS 41.660.*  
12    2. *The person against whom the action is brought may bring a separate*  
13    *action to recover:*  
14    (a) *Compensatory damages;*  
15    (b) *Punitive damages; and*  
16    (c) *Attorney's fees and costs of bringing the separate action.*  
17    Sec. 8. *The amendatory provisions of this act apply to a civil action that*  
18    *is filed on or after October 1, 1997.*

30



\* S B 3 3 1 R 2 \*

7-2-97

— 47 —

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Assembly Bill No. 609.

Bill read third time.

Remarks by Assemblyman Krenzer.

Roll call on Assembly Bill No. 609:

YEAS—40.

NAYS—Collins.

Not voting—Krenzer.

Assembly Bill No. 609 having received a constitutional majority, Mr. Speaker declared it passed, as amended.

Bill ordered transmitted to the Senate.

Assembly Bill No. 518.

Bill read third time.

Remarks by Assemblyman Williams.

Roll call on Assembly Bill No. 518:

YEAS—42.

NAYS—None.

Assembly Bill No. 518 having received a constitutional majority, Mr. Speaker declared it passed.

Bill ordered transmitted to the Senate.

Senate Bill No. 455.

Bill read third time.

Remarks by Assemblyman Price.

Roll call on Senate Bill No. 455:

YEAS—42.

NAYS—None.

Senate Bill No. 455 having received a constitutional majority, Mr. Speaker declared it passed.

Bill ordered transmitted to the Senate.

Senate Bill No. 325.

Bill read third time.

Remarks by Assemblyman Gustavson.

Roll call on Senate Bill No. 325:

YEAS—42.

NAYS—None.

Senate Bill No. 325 having received a constitutional majority, Mr. Speaker declared it passed, as amended.

Bill ordered transmitted to the Senate.

Senate Bill No. 331.

Bill read third time.

Remarks by Assemblyman Ohrenschall.

Roll call on Senate Bill No. 331:

YEAS—42.

NAYS—None.

Senate Bill No. 331 having received a constitutional majority, Mr. Speaker declared it passed, as amended.

Bill ordered transmitted to the Senate.

Senate Bill No. 368.

Bill read third time.

Remarks by Assemblyman Herrera.

Roll call on Senate Bill No. 368:

YEAS—42.

NAYS—None.

Senate Bill No. 368 having received a constitutional majority, Mr. Speaker declared it passed, as amended.

Bill ordered transmitted to the Senate.

Senate Bill No. 446.

Bill read third time.

Remarks by Assemblyman Carpenter.

Roll call on Senate Bill No. 446:

YEAS—42.

NAYS—None.

Senate Bill No. 446 having received a constitutional majority, Mr. Speaker declared it passed, as amended.

Bill ordered transmitted to the Senate.

Senate Bill No. 50.

Bill read third time.

Remarks by Assemblyman Bache.

Roll call on Senate Bill No. 50:

YEAS—39.

NAYS—Freeman, Lambert, Parks—3.

Senate Bill No. 50 having received a constitutional majority, Mr. Speaker declared it passed.

Bill ordered transmitted to the Senate.

Senate Bill No. 429.

Bill read third time.

Remarks by Assemblyman Bache.

Roll call on Senate Bill No. 429:

YEAS—42.

NAYS—None.

Senate Bill No. 429 having received a constitutional majority, Mr. Speaker declared it passed.

Bill ordered transmitted to the Senate.

#### MOTIONS, RESOLUTIONS AND NOTICES

Assemblyman Buckley moved that Assembly Bill No. 541 be taken from the Chief Clerk's desk and placed on the General File.

Motion carried.

**MINUTES OF THE  
SENATE COMMITTEE ON JUDICIARY**

**Sixty-ninth Session  
July 3, 1997**

The Senate Committee on Judiciary was called to order by Chairman Mark A. James, at 4:31 p.m., on Thursday, July 3, 1997, on the Senate Floor of the Legislative Building, Carson City, Nevada. There was no Agenda. There was no Attendance Roster.

**COMMITTEE MEMBERS PRESENT:**

Senator Mark A. James, Chairman  
Senator Jon C. Porter, Vice Chairman  
Senator Mike McGinness  
Senator Maurice Washington  
Senator Ernest E. Adler  
Senator Dina Titus  
Senator Valerie Wiener

**STAFF MEMBERS PRESENT:**

Lynn Berry, Committee Secretary

Senator James requested committee concurrence on Assembly Amendment No. 1034 to Senate Bill (S.B.) 325.

**SENATE BILL 325:**      Revises certain provisions governing convicted persons and the criminal justice system. (BDR 14-76)

SENATOR PORTER MOVED TO CONCUR WITH ASSEMBLY AMENDMENT NO. 1034 TO S.B. 325.

SENATOR ADLER SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

\*\*\*\*\*

Senate Committee on Judiciary  
July 3, 1997  
Page 2

Senator James requested the committee not to concur with Assembly Amendment No. 1032 to Senate Bill (S.B.) 331.

SENATE BILL 331: Revises provisions governing liability of persons engaging in certain speech. (BDR 3-219)

SENATOR ADLER MOVED NOT TO CONCUR WITH ASSEMBLY AMENDMENT NO. 1032 TO S.B. 331.

SENATOR WIENER SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

\*\*\*\*\*

Senator James requested committee concurrence with Assembly Amendment No. 73 to Senate Bill (S.B.) 17.

SENATE BILL 17: Makes various changes relating to state board of parole commissioners. (BDR 16-180)

SENATOR PORTER MOVED TO CONCUR WITH ASSEMBLY AMENDMENT NO. 73 TO S.B. BILL 17.

SENATOR ADLER SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

\*\*\*\*\*

SENATE DAILY JOURNAL

7-6-97

— 20 —

Senator O'Donnell moved that the Senate do not concur in the Assembly amendment to Senate Bill No. 430.

Motion carried.

Bill ordered transmitted to the Assembly.

RECEDE FROM SENATE AMENDMENTS

Senator James moved that the Senate recede from its action on Assembly Bill No. 170.

Remarks by Senator James.

Motion carried.

APPOINTMENT OF CONFERENCE COMMITTEES

Mr. President appointed Senators James, McGinness and Wiener as a first Committee on Conference to meet with a like committee of the Assembly for the further consideration of Senate Bill No. 331.

Mr. President appointed Senators O'Connell, Rhoads and Regan as a first Committee on Conference to meet with a like committee of the Assembly for the further consideration of Senate Bill No. 424.

REPORTS OF CONFERENCE COMMITTEES

*Mr. President:*

The first Committee on Conference concerning Senate Bill No. 331, consisting of the undersigned members, has met, and reports that:

It has agreed to recommend that the amendment of the Assembly be concurred in. It has agreed to recommend that the bill be further amended as set forth in Conference Amendment No. 15, which is attached to and hereby made a part of this report.

Conference Amendment.

Amend the bill as a whole by deleting sections 1 through 8 and the preamble of the bill and adding new sections designated sections 1 through 3, following the enacting clause, to read as follows:

"Section 1. Section 8 of Assembly Bill No. 485 of this session is hereby amended to read as follows:

Sec. 8. The amendatory provisions of this act apply to a civil action that is filed on or after the effective date of this act.

Sec. 2. Assembly Bill No. 485 of this session is hereby amended by adding thereto a new section designated sec. 9, following sec. 8, to read as follows:

Sec. 9. This act becomes effective upon passage and approval.

Sec. 3. This act becomes effective upon passage and approval."

Amend the title of the bill to read as follows:

"An Act relating to actions concerning persons; changing the effective date of Assembly Bill No. 485 of this session; and providing other matters properly relating thereto."

Amend the summary of the bill to read as follows:

"Summary—Changes effective date of Assembly Bill No. 485 of this session. (BDR S-219)".

MARK JAMES  
MIKE MCGINNESS  
VALERIE WIENER

*Senate Committee on Conference*

BARBARA BUCKLEY  
DARIO HERRERA  
MERLE BERMAN

*Assembly Committee on Conference*

Senator James moved to adopt the report of the first Committee on Conference concerning Senate Bill No. 331.

Motion carried.

ASSEMBLY DAILY JOURNAL

7-6-97

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RECEDE FROM ASSEMBLY AMENDMENTS

Assemblywoman Chowning moved that the Assembly do not recede from its action on Senate Bill No. 430, that a conference be requested, and that Mr. Speaker appoint a first Committee on Conference consisting of three members to meet with a like committee of the Senate.

Motion carried.

APPOINTMENT OF CONFERENCE COMMITTEES

Mr. Speaker appointed Assemblymen Chowning, Amodei and Anderson as a first Committee on Conference to meet with a like committee of the Senate for the further consideration of Senate Bill No. 430.

REPORTS OF CONFERENCE COMMITTEES

*Mr. Speaker:*

The first Committee on Conference concerning Senate Bill No. 331, consisting of the undersigned members, has met, and reports that:

It has agreed to recommend that the amendment of the Assembly be concurred in. It has agreed to recommend that the bill be further amended as set forth in Conference Amendment No. 15, which is attached to and hereby made a part of this report.

BARBARA E. BUCKLEY

DARIO HERRERA

MERLE BERMAN

*Assembly Committee on Conference*

MARK A. JAMES

MIKE MCGINNESS

VALERIE WIENER

*Senate Committee on Conference*

Conference Amendment No. 15

Amend the bill as a whole by deleting sections 1 through 8 and the preamble of the bill and adding new sections designated sections 1 through 3, following the enacting clause, to read as follows:

“Section 1. Section 8 of Assembly Bill No. 485 of this session is hereby amended to read as follows:

Sec. 8. The amendatory provisions of this act apply to a civil action that is filed on or after the effective date of this act.

Sec. 2. Assembly Bill No. 485 of this session is hereby amended by adding thereto a new section designated sec. 9, following sec. 8, to read as follows:

Sec. 9. This act becomes effective upon passage and approval.

Sec. 3. This act becomes effective upon passage and approval.”

Amend the title of the bill to read as follows:

“An Act relating to actions concerning persons; changing the effective date of Assembly Bill No. 485 of this session; and providing other matters properly relating thereto.”

Amend the summary of the bill to read as follows:

“Summary—Changes effective date of Assembly Bill No. 485 of this session. (BDR S-219)”

Assemblywoman Buckley moved to adopt the report of the first Committee on Conference concerning Senate Bill No. 331.

Remarks by Assemblywoman Buckley.

Motion carried.

(REPRINTED WITH ADOPTED AMENDMENTS)  
THIRD REPRINT

S.B. 331

SENATE BILL NO. 331-SENATOR NEAL

APRIL 28, 1997

Referred to Committee on Judiciary

SUMMARY—Changes effective date of Assembly Bill No. 485 of this session. (BDR S-219)

FISCAL NOTE: Effect on Local Government: No.  
Effect on the State or on Industrial Insurance: No.

EXPLANATION - Matter in italics is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to actions concerning persons; changing the effective date of Assembly Bill No. 485 of this session; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN  
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

- 1     Section 1. Section 8 of Assembly Bill No. 485 of this session is hereby  
2     amended to read as follows:  
3         Sec. 8. The amendatory provisions of this act apply to a civil  
4         action that is filed on or after the effective date of this act.  
5     Sec. 2. Assembly Bill No. 485 of this session is hereby amended by  
6     adding thereto a new section designated sec. 9, following sec. 8, to read as  
7     follows:  
8         Sec. 9. This act becomes effective upon passage and approval.  
9     Sec. 3. This act becomes effective upon passage and approval.

(30)





resources and which benefit or result in cost avoidance for the health division.

4. The board of county commissioners of a county that creates the office of coordinator of services for veterans shall, on or before February 1 of each odd-numbered year, submit a report to the director of the legislative counsel bureau for distribution to each regular session of the legislature describing the efficiency and effectiveness of the office. The report must include, without limitation, the number, total value and average value of the benefits received by the office on behalf of veterans, their spouses and their dependents.

Sec. 32. 1. This section and sections 1 to 9, inclusive, 11 to 29, inclusive, and 33 of this act become effective on July 1, 1997.

2. Sections 10, 30 and 31 of this act become effective at 12:01 a.m. on July 1, 1997.

Sec. 33. In preparing the reprint of the Nevada Revised Statutes, the legislative counsel shall appropriately change any references to the:

1. "Nevada commissioner for veteran affairs" to refer to the "executive director for veteran affairs";

2. "Nevada deputy commissioner for veterans affairs" to refer to the "deputy executive director for veteran affairs"; and

3. "Nevada veterans' advisory commission" to refer to the "Nevada veterans' services commission,"

in any section which is not amended by this act or is further amended by another act.

Senate Bill No. 331-Senator Neal

CHAPTER 546

AN ACT relating to actions concerning persons; changing the effective date of Assembly Bill No. 485 of this session; and providing other matters properly relating thereto.

[Approved July 16, 1997]

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN  
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section 8 of Assembly Bill No. 485 of this session is hereby amended to read as follows:

Sec. 8. The amendatory provisions of this act apply to a civil action that is filed on or after the effective date of this act.

Sec. 2. Assembly Bill No. 485 of this session is hereby amended by adding thereto a new section designated sec. 9, following sec. 8, to read as follows:

Sec. 9. This act becomes effective upon passage and approval.

Sec. 3. This act becomes effective upon passage and approval.

# ***EXHIBIT 3***

# ***EXHIBIT 3***

# SB286

Introduced in the Senate on Mar 15, 2013.

By: (Bolded name indicates primary sponsorship)  
Jones, Segerblom, Kihuen, Ford

*Provides immunity from civil action under certain circumstances.  
(BDR 3-675)*

## Fiscal Notes

Effect on Local Government: No.  
Effect on State: No.

**Most Recent History** Chapter 176.

**Action:**  
(See full list below)

## Upcoming Hearings

## Past Hearings

Senate Judiciary	Mar 28, 2013 AM	09:00	<b>Agenda</b>	<b>Minutes</b>	No Action
Senate Judiciary	Apr 05, 2013 AM	08:00	<b>Agenda</b>	<b>Minutes</b>	Amend, and do pass as amended
Assembly Judiciary	May 06, 2013 AM	08:00	<b>Agenda</b>	<b>Minutes</b>	No action
Assembly Judiciary	May 14, 2013 AM	08:00	<b>Agenda</b>	<b>Minutes</b>	Do pass

## Final Passage Votes

Senate Final Passage	(1st Reprint)	Apr 22, 2013	Yea 21,	Nay 0,	Excused 0,	Not Voting 0,	Absent 0
Assembly Final Passage	(1st Reprint)	May 22, 2013	Yea 41,	Nay 0,	Excused 1,	Not Voting 0,	Absent 0

**Bill Text** As Introduced 1st Reprint As Enrolled

**Adopted Amendments** Amend. No. 187

## Bill History

**Mar 15, 2013**

- Read first time. Referred to Committee on Judiciary. To printer.

**Mar 18, 2013**

- From printer. To committee.

**Apr 19, 2013**

- From committee: Amend, and do pass as amended.
- Placed on Second Reading File.
- Read second time. Amended. (Amend. No. 187.) To printer.

**Apr 22, 2013**

- From printer. To engrossment. Engrossed. **First reprint.**
- Read third time. Passed, as amended. Title approved. (**Yeas: 21, Nays: None.**) To Assembly.

**Apr 23, 2013**

- In Assembly.
- Read first time. Referred to Committee on Judiciary. To committee.

**May 16, 2013**

- From committee: Do pass.
- Placed on Second Reading File.
- Read second time.

**May 17, 2013**

- Taken from General File. Placed on General File for next legislative day.

**May 18, 2013**

- Taken from General File. Placed on General File for next legislative day.

**May 20, 2013**

- Taken from General File. Placed on General File for next legislative day.

**May 21, 2013**

- Taken from General File. Placed on General File for next legislative day.

**May 22, 2013**

- Read third time. Passed. Title approved. (**Yeas: 41, Nays: None, Excused: 1.**) To Senate.

**May 23, 2013**

- In Senate. To enrollment.

**May 27, 2013**

- Enrolled and delivered to Governor.
- Approved by the Governor.
- Chapter 176.
- **Effective October 1, 2013.**

2013 77th Regular Session [change]

Overview Text Votes Fiscal Notes Meetings

## Bills

Search By: Bill Name Bill Text  
 Enter navigates directly to bill

Sponsored By  
 Assembly Bills  
 Senate Bills

SB1  
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 SB26

## Committees

## Budgets

## Floor Sessions

## BILLS \ SENATE \ SB286 \ OVERVIEW

## SB286

**Title:** AN ACT relating to civil actions; providing immunity from civil action for certain claims based on the right to petition and the right to free speech under certain circumstances; establishing the burden of proof for a special motion to dismiss; providing for the interlocutory appeal from an order denying a special motion to dismiss; and providing other matters properly relating thereto.

**Introduction Date:** Friday, March 15, 2013

**Summary:** Provides immunity from civil action under certain circumstances. (BDR 3-675)

**Fiscal Notes:** Effect on Local Government: No.  
 Effect on the State: No.

**Digest:** Existing law establishes certain provisions to deter frivolous or vexatious lawsuits (Strategic Lawsuits Against Public Participation, commonly known as "SLAPP lawsuits"). (Chapter 387, Statutes of Nevada 1997, p. 1363; NRS 41.635-41.670) A SLAPP lawsuit is characterized as a meritless suit filed primarily to discourage the named defendant's exercise of First Amendment rights. "The hallmark of a SLAPP lawsuit is that it is filed to obtain a financial advantage over one's adversary by increasing litigation costs until the adversary's case is weakened or abandoned." (Metabolic Research, Inc. v. Ferrell, 693 F.3d 795, 796 n.1 (9th Cir. 2012)) The Ninth Circuit Court of Appeals recently held that the provisions of NRS concerning such lawsuits only protect communications made directly to a governmental agency. The Ninth Circuit also held that, as written, these provisions of NRS provide protection from liability but not from trial. That distinction, when coupled with the lack of an express statutory right to an interlocutory appeal, led the court to conclude that these provisions of NRS do not provide for an immediate appeal of an order denying a special motion to dismiss a SLAPP lawsuit. (Metabolic, at 802) Existing law provides that a person who engages in good faith communication in furtherance of the right to petition is immune from civil liability for claims based upon that communication. (NRS 41.650) Section 2 of this bill expands the scope of that immunity by providing that a person who exercises the right to free speech in direct connection with an issue of public concern is also immune from any civil action for claims based upon that communication. Existing law defines certain communications, for purposes of statutory provisions concerning SLAPP lawsuits, as communications made by a person in connection with certain governmental actions, officers, employees or entities. (NRS 41.637) Section 1 of this bill includes within the meaning of such communications those that are made in direct connection with an issue of public interest in a place open to the public or in a public forum. Section 3 of this bill establishes the burden of proof for a dismissal by special motion of a SLAPP lawsuit. Section 3 reduces from 30 days to 7 judicial days the time within which a court must rule on a special motion to dismiss. Existing law requires, under certain circumstances, an award of reasonable costs and attorney's fees to the person against whom a SLAPP lawsuit was brought if a court grants a special motion to dismiss. (NRS 41.670) Section 4 of this bill authorizes, in addition to an award of costs and attorney's fees, an award of up to \$10,000 if a special motion to dismiss is granted. Section 4 also provides that if a court finds that a special motion to dismiss was frivolous or vexatious, the court shall award the prevailing party reasonable costs and attorney's fees and may award an amount of up to \$10,000 and any such additional relief as the court deems proper to punish and deter the filing of frivolous or vexatious motions. -

**Primary Sponsor(s):** Senator Justin Jones  
 Senator Tick Segerblom  
 Senator Ruben Kihuen

Co-Sponsor(s): Senator Aaron Ford

BILL HISTORY

3/15/2013

- Read first time. Referred to Committee on Judiciary. To printer.

3/18/2013

- From printer. To committee.

4/19/2013

- From committee: Amend, and do pass as amended.

4/19/2013

- Placed on Second Reading File.

4/19/2013

- Read second time. Amended. (Amend. No. 187.) To printer.

4/22/2013

- From printer. To engrossment. Engrossed. First reprint.

4/22/2013

- Read third time. Passed, as amended. Title approved. (Yeas: 21, Nays: None.) To Assembly.

4/23/2013

- In Assembly.

4/23/2013

- Read first time. Referred to Committee on Judiciary. To committee.

5/16/2013

- From committee: Do pass.

5/16/2013

- Placed on Second Reading File.

5/16/2013

- Read second time.

5/17/2013

- Taken from General File. Placed on General File for next legislative day.

5/18/2013

- Taken from General File. Placed on General File for next legislative day.

5/20/2013

- Taken from General File. Placed on General File for next legislative day.

5/21/2013

- Taken from General File. Placed on General File for next legislative day.

5/22/2013

- Read third time. Passed. Title approved. (Yeas: 41, Nays: None, Excused: 1.) To Senate.

5/23/2013

- In Senate. To enrollment.

5/27/2013

- Enrolled and delivered to Governor.

5/27/2013

- Approved by the Governor.

5/27/2013

- Chapter 176.

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Senate Bill No. 286—Senators Jones,  
Segerblom, Kihuen; and Ford

CHAPTER.....

AN ACT relating to civil actions; providing immunity from civil action for certain claims based on the right to petition and the right to free speech under certain circumstances; establishing the burden of proof for a special motion to dismiss; providing for the interlocutory appeal from an order denying a special motion to dismiss; and providing other matters properly relating thereto.

**Legislative Counsel's Digest:**

Existing law establishes certain provisions to deter frivolous or vexatious lawsuits (Strategic Lawsuits Against Public Participation, commonly known as "SLAPP lawsuits"). (Chapter 387, Statutes of Nevada 1997, p. 1363; NRS 41.635-41.670) A SLAPP lawsuit is characterized as a meritless suit filed primarily to discourage the named defendant's exercise of First Amendment rights. "The hallmark of a SLAPP lawsuit is that it is filed to obtain a financial advantage over one's adversary by increasing litigation costs until the adversary's case is weakened or abandoned." (*Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795, 796 n.1 (9th Cir. 2012))

The Ninth Circuit Court of Appeals recently held that the provisions of NRS concerning such lawsuits only protect communications made directly to a governmental agency. The Ninth Circuit also held that, as written, these provisions of NRS provide protection from liability but not from trial. That distinction, when coupled with the lack of an express statutory right to an interlocutory appeal, led the court to conclude that these provisions of NRS do not provide for an immediate appeal of an order denying a special motion to dismiss a SLAPP lawsuit. (*Metabolic*, at 802)

Existing law provides that a person who engages in good faith communication in furtherance of the right to petition is immune from civil liability for claims based upon that communication. (NRS 41.650) **Section 2** of this bill expands the scope of that immunity by providing that a person who exercises the right to free speech in direct connection with an issue of public concern is also immune from any civil action for claims based upon that communication.

Existing law defines certain communications, for purposes of statutory provisions concerning SLAPP lawsuits, as communications made by a person in connection with certain governmental actions, officers, employees or entities. (NRS 41.637) **Section 1** of this bill includes within the meaning of such communications those that are made in direct connection with an issue of public interest in a place open to the public or in a public forum. **Section 3** of this bill establishes the burden of proof for a dismissal by special motion of a SLAPP lawsuit. **Section 3** reduces from 30 days to 7 judicial days the time within which a court must rule on a special motion to dismiss.

Existing law requires, under certain circumstances, an award of reasonable costs and attorney's fees to the person against whom a SLAPP lawsuit was brought if a court grants a special motion to dismiss. (NRS 41.670) **Section 4** of this bill authorizes, in addition to an award of costs and attorney's fees, an award of up to \$10,000 if a special motion to dismiss is granted. **Section 4** also provides that if a court finds that a special motion to dismiss was frivolous or vexatious, the court shall award the prevailing party reasonable costs and attorney's fees and may award





an amount of up to \$10,000 and any such additional relief as the court deems proper to punish and deter the filing of frivolous or vexatious motions.

EXPLANATION - Matter in *bolded italics* is new; matter between brackets {omitted material} is material to be omitted.

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THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN  
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

**Section 1.** NRS 41.637 is hereby amended to read as follows:

41.637 "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" means any:~~

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

2. Communication of information or a complaint to a Legislator, officer or employee of the Federal Government, this state or a political subdivision of this state, regarding a matter reasonably of concern to the respective governmental entity; {~~or~~}

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

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

**Sec. 2.** NRS 41.650 is hereby amended to read as follows:

41.650 A person who engages in 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* is immune from any civil {~~liability~~} *action* for claims based upon the communication.

**Sec. 3.** NRS 41.660 is hereby amended to read as follows:

41.660 1. If an action is brought against 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:~~

(a) The person against whom the action is brought may file a special motion to dismiss; and

(b) The Attorney General or the chief legal officer or attorney of a political subdivision of this State may defend or otherwise support the person against whom the action is brought. If the Attorney General or the chief legal officer or attorney of a political subdivision has a conflict of interest in, or is otherwise disqualified from, defending or otherwise supporting the person, the Attorney General or the chief legal officer or attorney of a political



subdivision may employ special counsel to defend or otherwise support the person.

2. A special motion to dismiss must be filed within 60 days after service of the complaint, which period may be extended by the court for good cause shown.

3. If a special motion to dismiss is filed pursuant to subsection 2, the court shall:

(a) ~~{Treat the motion as a motion for summary judgment;}~~  
*Determine whether the moving party has established, by a preponderance of the evidence, 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;*

(b) *If the court determines that the moving party has met the burden pursuant to paragraph (a), determine whether the plaintiff has established by clear and convincing evidence a probability of prevailing on the claim;*

(c) *If the court determines that the plaintiff has established a probability of prevailing on the claim pursuant to paragraph (b), ensure that such determination will not:*

(1) *Be admitted into evidence at any later stage of the underlying action or subsequent proceeding; or*

(2) *Affect the burden of proof that is applied in the underlying action or subsequent proceeding;*

(d) *Consider such evidence, written or oral, by witnesses or affidavits, as may be material in making a determination pursuant to paragraphs (a) and (b);*

(e) Stay discovery pending:

(1) A ruling by the court on the motion; and

(2) The disposition of any appeal from the ruling on the motion; and

~~{(e)}~~ (f) Rule on the motion within ~~{30}~~ 7 judicial days after the motion is ~~{filed}~~ *served upon the plaintiff.*

4. If the court dismisses the action pursuant to a special motion to dismiss filed pursuant to subsection 2, the dismissal operates as an adjudication upon the merits.

Sec. 4. NRS 41.670 is hereby amended to read as follows:

41.670 1. If the court grants a special motion to dismiss filed pursuant to NRS 41.660:

~~{1-}~~ (a) The court shall award reasonable costs and attorney's fees to the person against whom the action was brought, except that the court shall award reasonable costs and attorney's fees to this State or to the appropriate political subdivision of this State if the



Attorney General, the chief legal officer or attorney of the political subdivision or special counsel provided the defense for the person pursuant to NRS 41.660.

~~{2.}~~ (b) *The court may award, in addition to reasonable costs and attorney's fees awarded pursuant to paragraph (a), an amount of up to \$10,000 to the person against whom the action was brought.*

(c) The person against whom the action is brought may bring a separate action to recover:

~~{(a)}~~ (1) Compensatory damages;

~~{(b)}~~ (2) Punitive damages; and

~~{(c)}~~ (3) Attorney's fees and costs of bringing the separate action.

2. *If the court denies a special motion to dismiss filed pursuant to NRS 41.660 and finds that the motion was frivolous or vexatious, the court shall award to the prevailing party reasonable costs and attorney's fees incurred in responding to the motion.*

3. *In addition to reasonable costs and attorney's fees awarded pursuant to subsection 2, the court may award:*

(a) *An amount of up to \$10,000; and*

(b) *Any such additional relief as the court deems proper to punish and deter the filing of frivolous or vexatious motions.*

4. *If the court denies the special motion to dismiss filed pursuant to NRS 41.660, an interlocutory appeal lies to the Supreme Court.*



SENATE BILL NO. 286—SENATORS JONES,  
SEGERBLOM, KIHUEN; AND FORD

MARCH 15, 2013

Referred to Committee on Judiciary

SUMMARY—Provides immunity from civil action under certain circumstances. (BDR 3-675)

FISCAL NOTE: Effect on Local Government: No.  
Effect on the State: No.

EXPLANATION – Matter in *bolded italics* is new; matter between brackets {*omitted material*} is material to be omitted.

AN ACT relating to civil actions; providing immunity from civil action for certain claims based on the right to petition and the right to free speech under certain circumstances; establishing the burden of proof for a special motion to dismiss; providing for the interlocutory appeal from an order denying a special motion to dismiss; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

1 Existing law establishes certain provisions to deter frivolous or vexatious  
2 lawsuits (Strategic Lawsuits Against Public Participation, commonly known as  
3 "SLAPP lawsuits"). (Chapter 387, Statutes of Nevada 1997, p. 1363; NRS 41.635-  
4 41.670) A SLAPP lawsuit is characterized as a meritless suit filed primarily to  
5 discourage the named defendant's exercise of First Amendment rights. "The  
6 hallmark of a SLAPP lawsuit is that it is filed to obtain a financial advantage over  
7 one's adversary by increasing litigation costs until the adversary's case is weakened  
8 or abandoned." (*Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795, 796 n.1 (9th  
9 Cir. 2012))

10 The Ninth Circuit Court of Appeals recently held that the provisions of NRS  
11 concerning such lawsuits only protect communications made directly to a  
12 governmental agency. The Ninth Circuit also held that, as written, these provisions  
13 of NRS provide protection from liability but not from trial. That distinction, when  
14 coupled with the lack of an express statutory right to an interlocutory appeal, led  
15 the court to conclude that these provisions of NRS do not provide for an immediate  
16 appeal of an order denying a special motion to dismiss a SLAPP lawsuit.  
17 (*Metabolic*, at 802)

18 Existing law provides that a person who engages in good faith communication  
19 in furtherance of the right to petition is immune from civil liability for claims based  
20 upon that communication. (NRS 41.650) Section 2 of this bill expands the scope of



\* S B 2 8 6 R 1 \*

21 that immunity by providing that a person who exercises the right to free speech in  
22 direct connection with an issue of public concern is also immune from any civil  
23 action for claims based upon that communication.

24 Existing law defines certain communications, for purposes of statutory  
25 provisions concerning SLAPP lawsuits, as communications made by a person in  
26 connection with certain governmental actions, officers, employees or entities. (NRS  
27 41.637) Section 1 of this bill includes within the meaning of such communications  
28 those that are made in direct connection with an issue of public interest in a place  
29 open to the public or in a public forum. Section 3 of this bill establishes the burden  
30 of proof for a dismissal by special motion of a SLAPP lawsuit. Section 3 reduces  
31 from 30 days to 7 judicial days the time within which a court must rule on a special  
32 motion to dismiss.

33 Existing law requires, under certain circumstances, an award of reasonable  
34 costs and attorney's fees to the person against whom a SLAPP lawsuit was brought  
35 if a court grants a special motion to dismiss. (NRS 41.670) Section 4 of this bill  
36 authorizes, in addition to an award of costs and attorney's fees, an award of up to  
37 \$10,000 if a special motion to dismiss is granted. Section 4 also provides that if a  
38 court finds that a special motion to dismiss was frivolous or vexatious, the court  
39 shall award the prevailing party reasonable costs and attorney's fees and may award  
40 an amount of up to \$10,000 and any such additional relief as the court deems  
41 proper to punish and deter the filing of frivolous or vexatious motions.

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THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN  
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 Section 1. NRS 41.637 is hereby amended to read as follows:

2 41.637 "Good faith communication in furtherance of the right  
3 to petition ~~{?}~~ *or the right to free speech in direct connection with*  
4 *an issue of public concern*" means any:

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

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

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

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

17 Sec. 2. NRS 41.650 is hereby amended to read as follows:

18 41.650 A person who engages in a good faith communication  
19 in furtherance of the right to petition *or the right to free speech in*  
20 *direct connection with an issue of public concern* is immune from  
21 any civil ~~{liability}~~ *action* for claims based upon the  
22 communication.



\* S B 2 8 6 R 1 \*

1       Sec. 3. NRS 41.660 is hereby amended to read as follows:

2       41.660 1. If an action is brought against a person based upon  
3 a good faith communication in furtherance of the right to petition {:-}  
4 *or the right to free speech in direct connection with an issue of*  
5 *public concern:*

6       (a) The person against whom the action is brought may file a  
7 special motion to dismiss; and

8       (b) The Attorney General or the chief legal officer or attorney of  
9 a political subdivision of this State may defend or otherwise support  
10 the person against whom the action is brought. If the Attorney  
11 General or the chief legal officer or attorney of a political  
12 subdivision has a conflict of interest in, or is otherwise disqualified  
13 from, defending or otherwise supporting the person, the Attorney  
14 General or the chief legal officer or attorney of a political  
15 subdivision may employ special counsel to defend or otherwise  
16 support the person.

17       2. A special motion to dismiss must be filed within 60 days  
18 after service of the complaint, which period may be extended by the  
19 court for good cause shown.

20       3. If a special motion to dismiss is filed pursuant to subsection  
21 2, the court shall:

22       (a) ~~{Treat the motion as a motion for summary judgment;}~~  
23 *Determine whether the moving party has established, by a*  
24 *preponderance of the evidence, that the claim is based upon a*  
25 *good faith communication in furtherance of the right to petition or*  
26 *the right to free speech in direct connection with an issue of public*  
27 *concern;*

28       (b) *If the court determines that the moving party has met the*  
29 *burden pursuant to paragraph (a), determine whether the plaintiff*  
30 *has established by clear and convincing evidence a probability of*  
31 *prevailing on the claim;*

32       (c) *If the court determines that the plaintiff has established a*  
33 *probability of prevailing on the claim pursuant to paragraph (b),*  
34 *ensure that such determination will not:*

35       (1) *Be admitted into evidence at any later stage of the*  
36 *underlying action or subsequent proceeding; or*

37       (2) *Affect the burden of proof that is applied in the*  
38 *underlying action or subsequent proceeding;*

39       (d) *Consider such evidence, written or oral, by witnesses or*  
40 *affidavits, as may be material in making a determination pursuant*  
41 *to paragraphs (a) and (b);*

42       (e) Stay discovery pending:

43       (1) A ruling by the court on the motion; and

44       (2) The disposition of any appeal from the ruling on the  
45 motion; and



\* S B 2 8 6 R 1 \*

1     ~~{(e)}~~ *(f)* Rule on the motion within ~~{30}~~ *7 judicial* days after the  
2 motion is ~~{filed}~~ *served upon the plaintiff*.

3     4. If the court dismisses the action pursuant to a special motion  
4 to dismiss filed pursuant to subsection 2, the dismissal operates as  
5 an adjudication upon the merits.

6     Sec. 4. NRS 41.670 is hereby amended to read as follows:

7     41.670 1. If the court grants a special motion to dismiss filed  
8 pursuant to NRS 41.660:

9     ~~{1-}~~ *(a)* The court shall award reasonable costs and attorney's  
10 fees to the person against whom the action was brought, except that  
11 the court shall award reasonable costs and attorney's fees to this  
12 State or to the appropriate political subdivision of this State if the  
13 Attorney General, the chief legal officer or attorney of the political  
14 subdivision or special counsel provided the defense for the person  
15 pursuant to NRS 41.660.

16     ~~{2-}~~ *(b)* *The court may award, in addition to reasonable costs*  
17 *and attorney's fees awarded pursuant to paragraph (a), an amount*  
18 *of up to \$10,000 to the person against whom the action was*  
19 *brought.*

20     ~~(c)~~ The person against whom the action is brought may bring a  
21 separate action to recover:

22     ~~{(a)}~~ *(1)* Compensatory damages;

23     ~~{(b)}~~ *(2)* Punitive damages; and

24     ~~{(c)}~~ *(3)* Attorney's fees and costs of bringing the separate  
25 action.

26     2. *If the court denies a special motion to dismiss filed*  
27 *pursuant to NRS 41.660 and finds that the motion was frivolous or*  
28 *vexatious, the court shall award to the prevailing party reasonable*  
29 *costs and attorney's fees incurred in responding to the motion.*

30     3. *In addition to reasonable costs and attorney's fees awarded*  
31 *pursuant to subsection 2, the court may award:*

32     ~~(a)~~ *An amount of up to \$10,000; and*

33     ~~(b)~~ *Any such additional relief as the court deems proper to*  
34 *punish and deter the filing of frivolous or vexatious motions.*

35     4. *If the court denies the special motion to dismiss filed*  
36 *pursuant to NRS 41.660, an interlocutory appeal lies to the*  
37 *Supreme Court.*

30



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CHAPTER.....

AN ACT relating to civil actions; providing immunity from civil action for certain claims based on the right to petition and the right to free speech under certain circumstances; establishing the burden of proof for a special motion to dismiss; providing for the interlocutory appeal from an order denying a special motion to dismiss; and providing other matters properly relating thereto.

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The Ninth Circuit Court of Appeals recently held that the provisions of NRS concerning such lawsuits only protect communications made directly to a governmental agency. The Ninth Circuit also held that, as written, these provisions of NRS provide protection from liability but not from trial. That distinction, when coupled with the lack of an express statutory right to an interlocutory appeal, led the court to conclude that these provisions of NRS do not provide for an immediate appeal of an order denying a special motion to dismiss a SLAPP lawsuit. (*Metabolic*, at 802)

Existing law provides that a person who engages in good faith communication in furtherance of the right to petition is immune from civil liability for claims based upon that communication. (NRS 41.650) **Section 2** of this bill expands the scope of that immunity by providing that a person who exercises the right to free speech in direct connection with an issue of public concern is also immune from any civil action for claims based upon that communication.

Existing law defines certain communications, for purposes of statutory provisions concerning SLAPP lawsuits, as communications made by a person in connection with certain governmental actions, officers, employees or entities. (NRS 41.637) **Section 1** of this bill includes within the meaning of such communications those that are made in direct connection with an issue of public interest in a place open to the public or in a public forum. **Section 3** of this bill establishes the burden of proof for a dismissal by special motion of a SLAPP lawsuit. **Section 3** reduces from 30 days to 7 judicial days the time within which a court must rule on a special motion to dismiss.

Existing law requires, under certain circumstances, an award of reasonable costs and attorney's fees to the person against whom a SLAPP lawsuit was brought if a court grants a special motion to dismiss. (NRS 41.670) **Section 4** of this bill authorizes, in addition to an award of costs and attorney's fees, an award of up to \$10,000 if a special motion to dismiss is granted. **Section 4** also provides that if a court finds that a special motion to dismiss was frivolous or vexatious, the court shall award the prevailing party reasonable costs and attorney's fees and may award

