Anti-SLAPP Statutes Lower Public Expenses and Save Money

I. Anti-SLAPP Statutes Reduce Caseload and Judicial Burden
   a. Anti-SLAPP statutes are like super motions to dismiss. When an action is only at the pleading stage, an Anti-SLAPP motion can dispose of the entire action without lengthy discovery – something that can last years on a court docket and occupy the time of discovery commissioners.
   b. Nevada's Courts have a long-standing backlog from Clark County to Washoe County.[7] This problem is especially acute in Southern Nevada, where courts have already taken emergency actions to ameliorate the backlog of open cases.[8]

II. Anti-SLAPP Statutes Have a Track Record of Working
   a. California's Anti-SLAPP statute is 20 years old this year and has served the state well in that time.[9]
   b. Washington's Anti-SLAPP statute was first adopted in 1989, and its scope has only been broadened since its inception.[10]
   c. By 2010, 26 states had passed Anti-SLAPP statutes.[11] States with Anti-SLAPP statutes include Texas, Oregon, California, Washington, and the District of Columbia. More states keep adding Anti-SLAPP statutes, while less-protective federal legislation is proposed.[12]

III. Anti-SLAPP Statutes Apply in Federal Cases, Reducing Case Burdens Across-the-Board.
   a. Substantive Anti-SLAPP statutes like the one proposed to the legislature can apply in federal court.[13]
   b. This reduces the gamesmanship of trying to force Nevadans to litigate in more formal Federal court in order to avoid the Anti-SLAPP statute's application.
   c. This also ensures that Nevadans, or non-residents haled into Nevada's Federal courts, receive the benefit of the state's Anti-SLAPP protections, including the requirement for out-of-state plaintiffs to post a bond in support of their action or abandon it entirely.

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[7] *Nevada Judges Struggle to Keep Up With Backlog*, Las Vegas Sun (Feb. 17, 2004), *available at* http://www.lasvegassun.com/news/2004/feb/17/nevada-judges-struggle-to-keep-up-with-backlog/ (*last accessed* Mar. 24, 2013).

[8] Order Regarding Civil Case Filings, Order No. 11-03 (Mar. 2, 2011), *available at* http://www.clarkcountycourts.us/clerk/rules/JCAO-1103.pdf (*last accessed Mar.* 24, 2013).

[9] http://www.casp.net/uncategorized/2012-marks-20-years-of-protections-against-slapps/

[10] R.C.W. § 4.24.510.

[11] David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, Loyola L.R., Vol. 43:373 at 394 n. 81 (2010).

[12] James J.S. Holmes, *Anti_SLAPP Statutes Spread Across the Nation*, Media Law Bulletin (Nov. 2011), *available at* http://www.sdma.com/anti-slapp-statutes-spread-across-the-nation-11-10-2011/ (*last accessed* Mar. 24, 2013).

[13] *Newsham v. Lockheed Missiles and Space Company* 190 F.3d 963 (9th Cir. 1999).

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The Anti-SLAPP Statute: A New Defense For Developers?

0 24

By Daniel P. Dain (http://pview.findlaw.com/view/2521885_1) of Goodwin Procter LLP (http://pview.findlaw.com/view/2625194_1)

A little noticed Superior Court decision in December may have broad implications for developers of real estate. In dismissing a lawsuit filed by members of the community against a real estate developer in Pierce v. Mulhern, [1] the Superior Court recognized apparently for the first time in Massachusetts that real estate developers are afforded the protections of the Massachusetts anti-SLAPP statute. [2] As the realities of real estate development in the Commonwealth mandate active public engagement by developers, through hearings with governmental agencies or meetings with community groups, the decision in Pierce largely shields such activity from direct legal action.

"SLAPP" is an acronym for "strategic litigation against public participation," and the law is meant to protect those who participate in a public process from retaliatory litigation, typically alleging causes of action such as defamation or tortious interference with contractual relations/prospective business opportunity, that itself may be meritless, but the defense against which may be very costly. The anti-SLAPP law has historically been the domain of those petitioning against, not proponents of, development. Indeed, the Supreme Judicial Court, in the leading case interpreting the anti-SLAPP statute, wrote, "The typical mischief that the legislature intended to remedy was lawsuits directed at individual citizens of modest means for speaking publicly against development projects." [3] The Supreme Judicial Court identified a single case as the "impetus" for the introduction of the anti-SLAPP legislation in 1994 in Massachusetts. In that case, a developer sued 15 citizens of Rehoboth who, ostensibly concerned with the protection of wetlands, had signed a petition against a permit for the construction of six single-family residences. The suit was eventually dismissed, but not before the 15 citizens had incurred thousands of dollars in legal fees defending against the action.

The anti-SLAPP law works this way: The target of a SLAPP suit files a "special motion to dismiss." The movant must show that the claims in the suit are solely "based on" the exercise of the "right of petition under the constitution of the United States or of the commonwealth." [4] The statute defines "petitioning activity" broadly to include just about any public statement concerning an issue pending before a governmental body. If the initial showing is made, then the burden shifts to the party who brought the suit to establish (1) that the petitioning activity "was devoid of any reasonable factual support or any arguable basis in law"; and (2) that the petitioning activity caused actual injury to the party who brought the lawsuit. [5] This burden shifting imposes a high hurdle: to prove, without the benefit of discovery, the total lack of merit of the petitioning activity. Failure to meet this burden subjects the party who brought the lawsuit to paying the target's legal fees and costs. [6]

In the recent Superior Court case, Pierce, members of the community appealed a special permit issued by the Winchester Zoning Board of Appeals to the developer of a proposed assisted living facility. The Superior Court vacated the special permit on procedural grounds and remanded the matter back to the Zoning Board of Appeals. The developer, however, rather than returning to the ZBA to try to secure another special permit that the members of the community likely would just appeal again, asked the ZBA to sponsor Warrant Articles for Town Meeting to amend the Town's by-laws in such a way that a special permit would not be necessary to proceed with the proposed facility. The members of community filed a contempt complaint against the developer, its principals and attorney, the ZBA and the Town, alleging that the failure to return to the ZBA for a new special permit violated the remand order.

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The developer filed a special motion to dismiss under the anti-SLAPP statute arguing that the contempt complaint was based solely on the petitioning activity to the Town Meeting. The members of the community filed an opposition brief arguing that the developer was trying to turn the anti-SLAPP statute on its head, that the "intention" of the statute was to "protect the rights of individual members of the public," not big developers.

The Superior Court disagreed with this concern, finding nothing in the statute to limit its protections only to private citizens. [7] The court found that the developer had made its initial showing that the contempt complaint was based solely on the petitioning activity. With the burden then shifted to the members of the community, the court found that they had not established the lack of a factual or legal basis for the petitioning activity. The court observed that "As a result of what [the developer] perceived as ambiguities in the Town's zoning bylaws, the [developer] sought to clarify or change those bylaws through proposed Warrant Articles that would accommodate the Project." [8] The Superior Court dismissed the lawsuit.

To get projects built in the Commonwealth, developers are compelled to participate in a variety of public forums. The Superior Court's decision in Pierce protects developers from direct attacks against that public participation.

Footnotes

1. Civil Action No. 2001-2825-C.
2. M.G.L. c. 231, § 59H.
3. Duracraft Corp. v. Holmes Products Corp., 427 Mass. 156, 161 (1998).
4. M.G.L. c. 231, § 59H; Duracraft, 427 Mass. at 165.
5. M.G.L. c. 231, § 59H.
6. Id.
7. Memorandum and Order at 5.
8. Id. at 7.

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THE WALL STREET JOURNAL
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JUNE 1, 2010, 9:48 AM ET

Online Venters Rejoice: Federal Anti-SLAPP Law Taking Shape

That airline lose your luggage (again)? A rental-truck outfit overcharge you unjustifiably? That bedbug exterminator spray everywhere except where the bedbugs roam?

In a fit of pique, you might be inclined to take your complaints online, to create an "Acme BugsAway Stinks!" group on Facebook or maybe even film your own Howard Beale-like tirade and put it up on YouTube.

If you do, know that a complaint from the object of your ire might soon be on its way. And maybe a lawsuit.

The NYT on Tuesday has a story on the trend of companies fighting back against consumers who vent online, mostly in the form of defamation suits.

According to the story, those who vent online may often be protected by the First Amendment. But the Constitution doesn't always carry the day — the threat of a suit is often enough to get angry consumers to pull down their remarks.

Many states have what are called anti-SLAPP laws — laws that ban these types of suits. (SLAPP stands for "Strategic Lawsuit Against Public Participation.) Congress is thinking about passing its own.

The bill, in the House Subcommittee on Courts and Competition Policy, would, according to the NYT, enable a defendant who believes he is being sued for speaking out or petitioning on a public matter to seek to have the suit dismissed.

Under the proposed law, if a case is dismissed for being a SLAPP suit, the plaintiff would have to pay the other side's legal fees.

"Just as petition and free speech rights are so important that they require specific constitutional protections, they are also important enough to justify uniform national protections against Slapps," said Mark Goldowitz, director of the California Anti-Slapp Project, which helped draft the bill.

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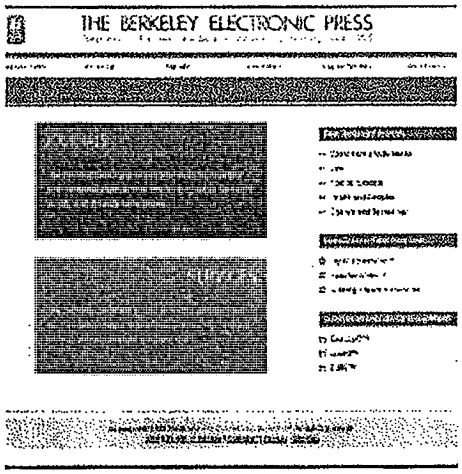
Measuring the Impact of Anti-SLAPP Legislation on Monitoring and Enforcement

Posted by Evan Mascagni in Recent SLAPP News | 0 comments



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The B.E. Journal of Economic Analysis & Policy published an article measuring the impact of anti-SLAPP legislation on regulator monitoring and enforcement, using US data on monitoring and enforcement activity under the Clean Air Act from 1978-2005.

The main findings: "We find strong evidence that anti-SLAPP laws are associated with increases in regulator monitoring and enforcement activity under the Clean Air Act. In fact, we find that state inspections increase by almost 50% after a state passes anti-SLAPP legislation and that the ratio of findings of noncompliance to inspections more than doubles in the presence of anti-SLAPP legislation." (p. 1.)

The article concludes that "Anti-SLAPP laws drive real changes in regulator behavior in environmental enforcement, even in settings with low citizen involvement in the form of civil suits" and that anti-SLAPP legislation "is good for air quality." (p. 14.) It also discusses plans for future related research.

You can download the full article by Bevin Ashenmiller (Occidental College) and Catherine Shelley Norman (Johns Hopkins University) here:
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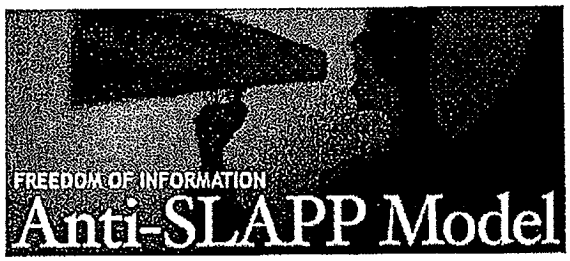

A Uniform Act Limiting Strategic Litigation Against Public Participation: Getting It Passed
Society Of Professional Journalists Baker and Hostetler LLP
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Introduction | SLAPPs: A Statement of the Problem | Building A Broad Coalition | A Uniform Act Limiting Strategic Litigation Against Public Participation

Fifteen years have passed since the first anti-SLAPP statute was passed in Washington State, and as of spring 2004, 21 states have some type of anti-SLAPP legislation in place. These facts will both benefit and hinder us as we bring our Model Act out into the world. On one hand, we are able to learn from the experiences of others in drafting and passing these statutes, and we have years of anti-SLAPP success stories to draw upon when making our cases. On the other hand, opponents of the legislation will be well equipped to highlight so-called "abuse" of these statutes – which may include, in their views, large media entities using anti-SLAPP motions to fight defamation lawsuits.

In light of this latter point, it is crucial that the journalism community thoughtfully considers the role it will assume in pushing for the future enactment of anti-SLAPP legislation. Without a doubt, media entities and press organizations, as among the more well-heeled and well-respected advocates of these statutes, must use their influence with the public and the government to gain recognition and support of the legislation. However, to the extent it is still possible given the countless examples of anti-SLAPP statutes benefiting the media, these groups need to downplay any personal interest in the legislation and focus on its capacity for empowering the "little guy" and the First Amendment in general.

As we keep our goals and roles in mind, we can also benefit from these tips, which several anti-SLAPP experts – including California Anti-SLAPP Project director Mark Goldowitz and Tom Newton, counsel for the California Newspaper Publishers Association – have offered.

Enlist An Influential Government Supporter. Particularly in governments that are very pro-business or otherwise disinclined to support anti-SLAPP legislation, such legislation is likely to stall without the push of at least one powerful government leader who is strongly invested in its success. In California, Senator Bill Lockyer, a democrat from Alameda County and then-head of the state Judiciary Committee, was inspired by Pring's and Penelope Canan's seminal article on SLAPPs and made it a mission of sorts to enact an anti-SLAPP law in California. A similar role was played by democratic Senator James J. Cox in Louisiana. In Washington State, then-Governor Booth Gardner and his attorney general, Kenneth Eikenberry, pushed for introduction of legislation.

In those cases, the lawmakers initiated the legislation, but we can try to jump-start the efforts in other states by honing in on effective champions for our cause. In the state legislatures, members of the judiciary committees are likely candidates, especially those who have an intellectual bent or have shown themselves to be strong supporters of First Amendment interests. Senator Lockyer was one such man, a former schoolteacher who strongly believed in freedom of thought. Another approach might be to pinpoint some powerful examples of citizens being victimized by SLAPPs (see "Tell A Good Story" below) and target those citizens' representatives, or other legislators who might be particularly affected by their stories.

On the executive front, if it is not possible to engage the governor or another powerful official

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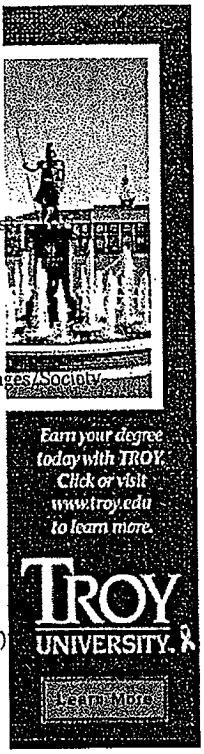

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directly, it might be fruitful to bring the issue to a potentially interested agency or even a citizen advisory group that has access to agency officials. In Oregon, the idea for an anti-SLAPP statute originated with the citizen involvement advisory committee to the Department of Land Conservation and Development. The committee made a recommendation to the Land Conservation and Development Commission, the Department's public policy decision-making body, and the Commission directed an investigation and appropriate action. Ultimately, the Department drafted a proposal for the legislation and sought sponsors.

Enunciate The Problem. Both in enlisting government support and building a coalition (see "Build A Coalition" below), it is important that we effectively explain what SLAPPs are and why something must be done. Attached as an appendix is a sample "Statement of the Problem," adapted from one prepared by the Communications and Public Affairs Program of the Oregon Department of Land Conservation and Development. It will be most effective if we personalize our "Statements," bearing in mind each state's unique composition and challenges.

Build A Coalition. The single most important lobbying strategy, cited by all the experts, was building the broadest possible coalition to push for passage of the legislation. Media, environmental and civil rights groups are the most frequent supporters of anti-SLAPP legislation, but groups defending the rights of women and the elderly are also potentially strong advocates, as are municipalities and neighborhood and civic associations. Appendix B, which lists the supporters of the California statute, shows the great variety of groups that are sympathetic to anti-SLAPP legislation.

Several states found it useful to develop more formal coalitions, providing organizational structure to harness the power of the myriad supporters. The California Anti-SLAPP Project began as such a coalition and has continued as the lead proponent of improvements to the California statute. New Mexico also had a formal coalition, the NoSLAPP Alliance, which coordinated the statewide media and lobbying campaign.

Finally, in addition to recognizing potential allies, it is important for anti-SLAPP proponents to recognize their likely opponents. Developers and building industry associations are the No. 1 opponents of anti-SLAPP legislation, not surprising given that the quintessential SLAPP involves a developer suing a citizen for his criticism of a development project. Representatives of business, including chambers of commerce, also tend to oppose anti-SLAPP legislation, as did the Trial Lawyers Association in California, though there are certainly arguments as to why anti-SLAPP legislation would benefit its constituency.

Tell A Meaningful Story. Politicians are politicians, and they will be most likely to get behind legislation that makes them look compassionate. Therefore, it is crucial to set off on the lobbying trail with some good stories about SLAPP victims, stories that will outrage lawmakers in their injustice and present them with possible "poster children" for the new legislation. Even more effective is to enlist the victims themselves to tell their own stories.

In California, Senator Lockyer was swayed by the story of Alan LaPointe, a Contra Costa County man who led community opposition to a proposed waste-burning plant. LaPointe spoke against the plant at district meetings and before a grand jury, and was the lead plaintiff in a taxpayer's action filed in 1987 based on an allegedly improper use of public funds for feasibility studies for the proposed plant. The sanitation district cross-complained against LaPointe personally for interference with prospective economic advantage.

In Washington State, the anti-SLAPP legislation was named "The Brenda Hill Bill" after a woman who reported her subdivision developer to the state for failure to pay its tax bill. The developer filed foreclosure proceedings on Hill's home and sued her for defamation, seeking $100,000. Her story swayed both the governor and the legislator who brought the bill, Holly Myers.

In a related matter, point out specific examples of how the current system is insufficient. In New York, legislators passed the anti-SLAPP statute out of frustration over how the legal system was addressing SLAPPs, which were common especially in the real estate context. For example, a developer sued nine Suffolk County homeowner groups and sixteen individuals after they had testified against town approval of a proposed housing development. The developer alleged various tort claims and sought more than $11 million in damages. More than three years later, the case was finally dismissed on appeal.

Channel Your Power Effectively. Media and journalism groups are essential participants in

Anti-SLAPP: Protect Free Speech
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– University of Wyoming will make presidential finalists public, despite new law (http://blogs.spjnetwork.org/foi/2013/02/23/university-of-wyoming-will-make-presidential-finalists-public-despite-new-law/)
– Utah city makes 'confidential' settlement in Taser death suit (http://blogs.spjnetwork.org/foi/2013/01/07/utah-city-makes-confidential-settlement-in-taser-death-suit/)

FOI Committee
This committee is the watchdog of press freedoms across the nation. It relies upon a network of volunteers in each state organized under Project Sunshine. These SPJ members are on the front lines for assaults to the First Amendment and when lawmakers attempt to restrict the public's access to documents and the government's business. The committee often is called upon to intervene in instances where the media is restricted.

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the anti-SLAPP movement, says Goldowitz, because they are a commonly SLAPPed group with a relatively large bank of resources and a significant amount of influence. However, it is crucial that these groups know when and how to use their power. Because of their resources and contacts, media groups should probably play a key role in coalition-building, but the media would probably do best to step back and let their allies tell their own SLAPP stories. The tale of a poor woman fighting a big developer will almost always have more resonance than the travails of a large newspaper facing a baseless libel suit – even by the same developer.

The exception to the hands-off approach should be in running editorials and op-ed pieces. Newspapers and other media have an unmatched ability to reach large numbers of people, and such outreach is crucial to a successful anti-SLAPP campaign. For example, in California, more than two dozen newspapers published editorials in favor of the anti-SLAPP legislation. Op-ed pieces written by coalition allies or SLAPP victims are also powerful. The key is to emphasize the First Amendment benefits of anti-SLAPP legislation while downplaying the possibility that it could be exploited by the media itself.

Play The Politics. Even in situations fairly conducive to the passage of anti-SLAPP legislation, the political stars have to align. In California, two situations having nothing to do with SLAPPs boosted the anti-SLAPP effort immeasurably. First, on the second attempt to pass the legislation, it was merged with another bill that made permanent liability protections for volunteer officers and directors of non-profit organizations. Support for the bill more than doubled, with organizations such as the Red Cross, the United Way, and dozens of local chambers of commerce joining. Increased pressure from all sides contributed to Governor Pete Wilson's decision to sign the bill in 1992 on its third attempt.

Second, when the democrats took control of both houses of the California legislature in 1997, certain anti-SLAPP allies, such as the ACLU and environmental groups, saw a boost in their lobbying influence. This contributed in part to the California coalition's ability to push through an amendment to the anti-SLAPP statute clarifying that its provisions should be interpreted broadly.

Certainly we as political outsiders are limited in the amount of maneuvering we can achieve – and politicians are limited ethically in the steps they can take. But it is always worth using our imaginations and keeping an eye out for situations that may improve the climate for passage of anti-SLAPP legislation.

Be Patient. It can take time to pass anti-SLAPP legislation. In California and Pennsylvania, it took three tries to generate enough momentum and support to achieve success. A first attempt can be effective, even if it doesn't lead to a law, if it gets the issue on the radar screens of lawmakers and citizens. Sometimes, we might have to wait until one political party makes an exit, or the right sponsor comes along.

Be Willing to Compromise. A little bit of give-and-take is essential in the legislative process. In California, in exchange for Governor Wilson's signature on the anti-SLAPP bill, Senator Lockyer agreed to introduce remedial legislation to make mandatory a permissive provision for awarding attorney's fees and costs to a plaintiff who prevailed on a motion to strike. (The remedial legislation has not passed.) In New Mexico, the bill was on the verge of dying in the Senate when a last-minute compromise was brokered which, among other things, changed the definition of what speech would be immunized.

As in New Mexico or Pennsylvania – where the statute was greatly watered down before passage – the results of compromise may be harsh. But keep in mind that where passage of the desired language does not seem possible, it might be better to get some kind of statute on the books. Once that happens, some of the opposing pressure may lift and it may be easier to pass amendments that will bring the statute in line with our goals.

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Appendix A
SLAPPs: A Statement of the Problem

What is a SLAPP Suit?

The essence of a SLAPP suit is the transformation of a debate over public policy – including such local issues as zoning, environmental preservation, school curriculum, or consumer protection – into a private dispute. A SLAPP suit shifts a political dispute into the courtroom, where the party speaking out on the issue must defend his or her actions. Although SLAPP suits may arise in many different contexts, they share a number of features:

1. The conduct of the targets that are sued is generally constitutionally protected speech intended to advance a view on an issue of public concern. In most cases, a SLAPP suit is filed in retaliation for public participation in a political dispute. The plaintiff is attempting to intimidate a political opponent and, if possible, prevent further public participation on the issue by the person or organization.

2. Targets typically are individuals or groups that are advancing social or political interests of some significance and not acting solely for personal profit or commercial advantage.

3. The filers are individuals or groups who believe their current or future commercial interests may be negatively affected by the targets' actions. Though developers and other commercial entities are the most common SLAPP plaintiffs, they are not the only ones. For example, in Oklahoma, a group supporting tort reform was the subject of a class action libel suit filed by trial lawyers, and in California, county officials filed a $42 million SLAPP against a local citizen because of his opposition to a proposed incinerator project.

4. The actions tend to be based on one or more of the following torts: defamation (libel or slander); business torts (interference with contract, business relationships or economic advantage, or restraint of trade); misuse of process (abuse of process or malicious prosecution); civil rights violations (due process, takings, or equal protection); or conspiracy to commit one or more of the above acts.

5. Damages sought are often in the millions of dollars. According to a study by the Denver Political Litigation Project, the average demand was for $9.1 million. See Penelope Canan and George Pring, SLAPPs: Getting Sued for Speaking Out 217 (Philadelphia: Temple University Press, 1996).

6. Almost all SLAPP suits are eventually dismissed or decided in favor of the defendants. Canan and Pring reported that targets win dismissals at the very first trial court appearance in about two-thirds of the cases. Id. at 218. By all accounts, the number of SLAPP suits has increased during the past 30 years. Examples of SLAPP suits from around the country reveal the extent of the practice:

– In Rhode Island, a woman filed comments on proposed groundwater rules, raising concerns about possible contamination from a local landfill. The landfill operators sued her for defamation and tortious interference with prospective business contracts, seeking both compensatory and punitive damages.

– In Pennsylvania, a couple wrote letters to their United States Senator, state health officials, and CBS News complaining about conditions at a local nursing home. The state investigated and eventually revoked the nursing home's license. The nursing home then sued the couple, the Senator, and a state health department official.

– In Minnesota, a retired United States Fish and Wildlife Service employee mobilized his neighbors against a proposed condominium development on a small lake. After the rezoning request was rejected, the developer sued him, alleging he had made false statements that damaged the developer's business reputation.

-- In Texas, a woman confined to her home by illness spoke out publicly against a nearby landfill. In response, the landfill owners filed a $5 million defamation suit against the woman and her husband.

– In California, a group of small cotton farmers bought newspaper advertising opposing a proposed ballot measure supported by the nation's largest cotton agribusiness. The corporation sued the farmers for libel, requesting $2.5 million in damages.

– In California, a $63 million lawsuit was filed by a developer who claimed that the Beverly Hills League of Women Voters had unlawfully stymied his 10-acre project.

-- In Washington, The Nature Conservancy was sued for $2.79 million by seaweed farm developers after it had inventoried potential natural areas in San Juan County, identified lands that should be preserved (including the plaintiffs'), and turned the study over to the county as a recommendation.

Isn't Action Involving Public Participation And Petition Already Protected By The Constitution? Why Is A Special Anti-SLAPP Provision Needed?

Two constitutional doctrines, both founded on the First Amendment, protect the sort of speech and conduct that is targeted by SLAPPs. The first, the New York Times v. Sullivan doctrine, provides that a person cannot be found liable for a false statement about a public figure on a matter of public concern unless the statement was made with "actual malice," that is, with knowledge that it was false or with reckless disregard for its truth or falsity. The second, the Noerr-Pennington doctrine, provides that petitioning activity is shielded from liability as long as it is genuinely aimed at procuring favorable government action.

Under both these doctrines, a defendant seeking to promptly dispose of a lawsuit files a motion to dismiss, in which the defendant argues that the plaintiff's allegations in the complaint do not state a viable claim. The burden of persuasion lies with the defendant, and the facts alleged are presumed to be true, though later inquiries will be intensely fact-specific. For those reasons, and because the right to sue is itself constitutionally protected, a judge generally will not dismiss a lawsuit at this stage. Most often, the judge will allow the plaintiff to proceed with discovery, including depositions during which the plaintiff's attorney may question the defendant's knowledge, beliefs, and motives.

The problem with the current legal framework is that it takes too long to get SLAPP suits dismissed. According to Dr. Pring, the average SLAPP suit proceeds for 40 months – more than three years. During this time, the suit inflicts massive emotional and financial harm on the defendant, and often the defendant withdraws completely from action involving public participation and petition. By the time the SLAPP suit is dismissed, the plaintiff has thus achieved its goals of retaliation and silencing protected speech.

What Will Anti-SLAPP Legislation Do?

Essentially, anti-SLAPP legislation identifies the speech and conduct that should be protected – defined as "action involving public participation and petition" – and provides a procedure for speedy review of lawsuits that are filed as a result of such protected action. In particular, the proposed legislation permits a suspecting SLAPP victim to file a special motion to strike, which must be heard within 60 days. At the hearing, the SLAPP must be dismissed unless the filer establishes a probability of prevailing. The proposed legislation also states that discovery will be stayed pending a decision on the motion to strike. A prevailing victim is entitled to his attorney's fees and costs, and a court may issue other sanctions to deter similar conduct in the future by the filer or others similarly situated.

The proposed legislation also features protections for those who file legitimate suits and find themselves the subject of special motions to strike. The court will not dismiss a suit if the filer produces substantial evidence to support a prima facie case. Furthermore, the filer is entitled to his attorney's fees and costs if the court finds that the motion to strike was frivolous or filed in bad faith.

Although arguments can be made against anti-SLAPP legislation, such statutes represent a legislative decision that, even though citizen communications may at times be self-interested or incorrect, public participation and petition are essential to our democratic process and must be protected from the threat of SLAPP suits.

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Appendix B
Building A Broad Coalition: Anti-SLAPP Proponents In California
American Civil Liberties Union
American Lung Association of California
Bar Association of San Francisco
California Association of Nonprofits
California Association of Professional Liability Insurers
California Association of Zoos and Aquariums
California Common Cause (good government group)
California First Amendment Coalition
California First Amendment Project (predecessor of CASP)

California League of United Latin American Citizens
California Legislative Council For Older Americans
California Newspaper Publishers Association
California School Employees Association
California Thoracic Society
Center for Law in the Public Interest
City and County of Los Angeles
City of Napa
City of San Diego
City of San Francisco
City of San Mateo
Complete Equity Markets, Inc. (professional insurance company)
Concerned Citizens for Environmental Health
Consumers Union
Friends of the River (statewide river conservation organization)
Golden State Manufactured-Home Owners League
Greenlining Coalition (multi-ethnic community leaders)
Land Utilization Alliance
Neighborhood and civic associations
Planning and Conservation League (California environmental org.)
Public Advocates (public-interest law firm)
Queen's Bench (women's lawyers association in San Francisco)
Sierra Club, Ventana Chapter
Women Lawyers of Alameda County

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A Uniform Act Limiting Strategic Litigation Against Public Participation

PREFATORY NOTE

The past 30 years have witnessed the proliferation of Strategic Lawsuits against Public Participation ("SLAPPs") as a powerful mechanism for stifling free expression. SLAPPs defy simple definition. They are initiated by corporations, companies, government officials, and individuals, and they target both radical activists and typical citizens. They occur in every state, at every level in and outside of government, and address public issues from zoning to the environment to politics to education. They are cloaked as claims for defamation, nuisance, invasion of privacy, and interference with contract, to name a few. For all the diversity of SLAPPs, however, their unifying features make them a dangerous force: They are brought not in pursuit of justice, but rather to ensnare their targets in costly litigation that distracts them from the controversy at hand, and to deter them and others from engaging in their rights of speech and petition on issues of public concern.

To limit the detrimental effects of SLAPPs, 21 states have enacted laws that authorize special and/or expedited procedures for addressing such suits, and ten others are considering or have previously considered similar legislation. Though grouped under the "anti-SLAPP" moniker, these statutes and bills differ widely in scope, form, and the weight they accord First Amendment rights vis-a vis the constitutional right to a trial by jury. Some "anti-SLAPP" statutes are triggered by any claim that implicates free speech on a public issue, while others apply only to speech in specific settings or concerning specific subjects. Some statutes provide for special motions to dismiss, while others employ traditional summary procedures. The burden of proof placed on the responding party, whether discovery is stayed pending consideration, and the availability of attorney's fees and damages all vary from state to state. Perhaps as a result of the confusion these variations engender, anti-SLAPP measures in many states are grossly under-utilized.

The Uniform Act Limiting Strategic Litigation Against Public Participation seeks to remedy these flaws by enunciating a clear process through which SLAPPs can be challenged and their merits evaluated in an expedited manner. The Act sets out the situations in which a special motion to strike may be brought, a uniform timeframe and other procedures for evaluating the special motion, and a uniform process for setting and distributing attorney's fees and other damages. In so doing, the Act ensures that parties operating in more than one state will face consistent and thoughtful adjudication of disputes implicating the rights of speech and petition.

Because often conflicting constitutional considerations bear on anti-SLAPP statutes, the Act is in many respect an exercise in balance. The triggering "action involving public participation and petition" is defined so that the special motion to strike may be employed against all true SLAPPs without becoming a blunt instrument for every person who is sued in connection with the exercise of his or her rights of free speech or petition. To avoid due process concerns, the responding party's burden of proof is not overly onerous, yet steep enough to weed out truly baseless suits. Finally, to reduce the possibility that the specter of an anti-SLAPP motion will deter the filing of valid lawsuits, the fee-shifting structure is intended to ensure proper compensation without imposing purely punitive measures. In these ways and more, the Act serves both the citizens' interests in free speech and petition and their rights to due process.

SECTION 1. FINDINGS AND PURPOSES

(a) FINDINGS. The Legislature finds and declares that

(1) there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances;

(2) such lawsuits, called "Strategic Lawsuits Against Public Participation" or "SLAPPs," are typically dismissed as groundless or unconstitutional, but often not before the defendants are put to great expense, harassment, and interruption of their productive activities.

(3) the costs associated with defending such suits can deter individuals and entities from fully exercising their constitutional rights to petition the government and to speak out on public issues;

(4) it is in the public interest for citizens to participate in matters of public concern and provide information to public entities and other citizens on public issues that affect them without fear of reprisal through abuse of the judicial process;

(5) an expedited judicial review would avoid the potential for abuse in these cases.

(b) PURPOSES. The purposes of this Act are

(1) to strike a balance between the rights of persons to file lawsuits and to trial by jury and the rights of persons to participate in matters of public concern;

(2) to establish an efficient, uniform, and comprehensive method for speedy adjudication of SLAPPs;

(3) to provide for attorney's fees, costs, and additional relief where appropriate.

Comment

The findings bring to light the costs of baseless SLAPPs – their harassing and disruptive effect and financial burdens on those forced to defend against them, and the danger that such lawsuits will deter individuals and entities from speaking out on public issues and exercising their constitutional right to petition the government. The stated purposes make clear that that drafters also recognize important interests opposing the speedy disposal of lawsuits, particularly the right of an individual to due process and evaluation of his or her claim by a jury of peers. Thus, the primary intent of the Act is not to do away with SLAPPs, but to limit their detrimental effects on the First Amendment without infringing on citizens' due process and jury trial rights.

Though a statement of findings and purposes is not required in many states (only about half of the anti-SLAPP laws in effect have them), several states have put such statements to good use. They can be invaluable in helping courts interpret the reach of the statute. This has been particularly evident in California, the epicenter of anti-SLAPP litigation. For example, in 1999, the United States Court of Appeals for the Ninth Circuit found the legislative findings crucial to its holding that the statute may properly be applied in federal court. See United States ex rel. Newsham v. Lockheed Missiles and Space Co., 190 F.3d 963, 972-73 (9th Cir. 1999). If the statute were strictly procedural, the court noted, choice-of-law considerations would likely deem it inapplicable in federal court. However, because of California's "important, substantive state interests furthered by anti-SLAPP statute," which are enunciated in Cal. Civ. Proc. Code 425.16(a), the court held that the anti-SLAPP statute should be applied in conjunction with the Federal Rules of Civil Procedure. Id.

The Supreme Court of California also has deemed the legislative findings useful in determining many of the most important questions that have arisen from application of the anti-SLAPP

statute. In Briggs v. Eden Council for Hope and Opportunity, the Court examined whether a party moving to strike a cause of action arising from a statement made before, or in connection with an issue under consideration by, a legally authorized official proceeding was required to demonstrate separately that the statement concerned an issue of public significance. 969 P.2d 564, 565 (Cal. 1999). The court found that the 425.16(a) findings evinced an intent broadly to protect petition-related activity; to require separate proof of the public significance of the issue in such cases would result in the exclusion of much direct petition activity from the statute's protections, contrary to the clear legislative intent. Id. at 573-74. In Equilon Enterprises, LLC v. Consumer Cause, Inc., the same court found that requiring a moving party to demonstrate that the action was brought with an "intent to chill" speech would contravene the legislative intent by lessening the statute's effectiveness in encouraging public participation in matters of public significance. 52 P.2d 685, 689 (Cal. 2002).

The benefits of statements of findings and purposes have been seen outside California as well. In Hawks v. Hinely, an appellate court in Georgia cited the General Assembly's stated findings in holding that statements made in a petition itself – not just statements concerning the petition – trigger the safeguards of the anti-SLAPP statute. 556 S.E.2d 547, 550 (Ga. App. 2001). In Globe Waste Recycling, Inc. v. Mallette, the Supreme Court of Rhode Island found that legislative intent, as recorded in the statute, indicated that statements for which immunity is claimed need not necessarily be made before a legislative, judicial, or administrative body under the terms of the statute. 762 A.2d 1208, 1213 (R.I. 2000). Finally, in Kauzlarich v. Yarbrough, an appellate court in Washington held that the legislative findings indicated that the Superior Court Administration is an "agency," and thus communications to that entity trigger the immunity protection and other benefits of the anti-SLAPP statute. 20 P.3d 946 (Wash. App. 2001).

SECTION 2. DEFINITIONS

As used in this Act,

(a) "Claim" includes any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing requesting relief;

(b) "Government" includes a branch, department, agency, instrumentality, official, employee, agent, or other person acting under color of law of the United States, a state, or subdivision of a state or other public authority;

(c) "Moving party" means a person on whose behalf the motion described in Section 4 is filed seeking dismissal of a claim;

(d) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity.

(e) "Responding party" means a person against whom the motion described in Section 4 is filed.

Comment

Most SLAPPs present themselves as primary causes of action, with the moving party as the defendant to the original SLAPP suit and the responding party as the plaintiff. However, "claim," "moving party," and "responding party" are defined so the protections of the statute extend to other, less common situations. For example, the moving party may be a plaintiff in the underlying action if the SLAPP claim is a counter-claim. See, e.g., Simmons v. Allstate Ins. Co., 92 Cal. App. 4th 1068 (Cal. Ct. App. 2001); Wilcox v. Superior Court, 27 Cal. App. 4th 809 (Cal. Ct. App. 1994). Alternatively, the moving and responding parties may be co-defendants or co-plaintiffs in the underlying action if the SLAPP claim is a cross-claim.

Similarly, while the quintessential SLAPPs are brought by corporate entities against individuals, the definition of "person" in the Act is not so limited. A "person" eligible to be a moving or responding party under the Act may be an individual or a wide range of corporate or other entities. Thus, the evaluation of a SLAPP claim is properly focused on the substance of the claim rather than peripheral matters such as the status of the parties. With the same purpose in mind, "government" is defined broadly to ensure that action in furtherance of the right of petition is not construed to include only interaction with administrative agencies.

SECTION 3. SCOPE; EXCLUSION

(a) SCOPE. This Act applies to any claim, however characterized, that is based on an action involving public participation and petition. As used in this Act, an "action involving public participation and petition" includes

(1) any oral statement made, or written statement or other document submitted, in a legislative, executive, or judicial proceeding or other proceeding authorized by law;

(2) any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other proceeding authorized by law;

(3) any oral statement made, or written statement or other document submitted, that is reasonably likely to encourage, or to enlist public participation in an effort to effect, consideration or review of an issue in a legislative, executive, or judicial proceeding or other proceeding authorized by law;

(4) any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern; or

(5) any other conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.

(b) EXCLUSION. This Act shall not apply to any action brought by the attorney general, district attorney, or city attorney, acting as a public prosecutor, to enforce laws aimed at public protection.

Comment

This section is the core of the statute, defining what First Amendment activities will trigger the protections stated herein. First, the claim must be "based on" an action involving public participation and petition. The existing California statute uses the terminology "arising from," but in response to confusion over that language, the California Supreme Court has held that "the critical point is whether the plaintiff's cause of action itself was based on an act in furtherance of the defendant's right of petition or free speech." City of Cotati v. Cashman, 52 P.3d 695 (Cal. 2002). The use of "based on" in this Act is designed to omit that confusion and clarify that there must be a real – not simply temporal – connection between the action involving public participation and petition and the legal claim that follows.

The term "action involving public participation and petition" is modeled after the defining language in the existing New York and Delaware anti-SLAPP statutes and is designed to reinforce the model statute's main focus: to protect the public's right to participate in the democratic process through expression of their views and opinions. This terminology is also designed to avoid the confusion engendered by the existing California statute – which is triggered by a cause of action arising from an "act in furtherance of person's right of petition or free speech . . . in connection with a public issue" – over whether the statute only applies to activity addressing a matter of public concern. As discussed below, this statute is not so limited.

The first three subsections contain no requirement that the statements made relate to a matter of public concern. This is consistent with the California Supreme Court's holding in Briggs v. Eden Council for Hope and Opportunity, 969 P.2d 564 (Cal. 1999). In that case, two owners of residential rental properties sued a nonprofit corporation over statements made by employees of the defendant in connection with the defendant's assistance of a tenant in pursuing an investigation of the plaintiffs by the Department of Housing and Urban Development. The California Supreme Court held that the section "broadly encompasses participation in official proceedings, generally, whether or not such participation remains strictly focused on Ôpublic' issues." Id. at 571.

Subsection (4) is drawn from the existing California statute and its progeny and offers protection for statements made in a place open to the public or a public forum in connection with an issue of public concern. The statute does not attempt to define "a place open to the public" or "a public forum," out of concern that such a definition would be unintentionally restrictive. This provision clearly encompasses those spaces historically considered public forums – such as parks, streets, and sidewalks Ð but on the fringes, there has been more confusion. In particular, courts have disagreed on whether a publication of the media constitutes a public forum, such that a lawsuit stemming from a media publication would be subject to an anti- SLAPP motion. Compare Zhao v. Wong, 48 Cal. App. 4th 1114 (Cal. Ct. App. 1996) (holding

private newspaper publishing falls outside concept of public forum), and Lafayette Morehouse, Inc. v. Chronicle Publishing Co., 37 Cal. App. 4th 855 (Cal. Ct. App. 1995) (same), with Baxter v. Scott, 845 So. 2d 225 (La. Ct. App. 2003) (holding professor's website is public forum), Seelig v. Infinity Broadcasting Corp., 97 Cal.App.4th 798 (Cal. Ct. App. 2002) (holding radio talk show is public forum), M.G. v. Time Warner, 89 Cal.App.4th 623 (Cal. Ct. App. 2001) (holding magazine is public forum), and Damon v. Ocean Hills Journalism Club, 85 Cal.App.4th 468 (Cal. Ct. App. 2000) (holding residential community newsletter is public forum). Courts are encouraged to consider this and related issues with an eye toward the purposes of the statute and the intent that it be construed broadly (see Section 8 below).

Finally, Subsection (5) is designed to capture any expressions of the First Amendment right of free speech on matters of public concern and right of petition that might not fall under the other categories. This includes all such conduct, such as symbolic speech, that might not be considered an oral or written statement or other document. This provision resembles the corresponding provision in the existing California statute, which covers "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." See Cal. Code Civ. Proc. ¤ 425.16(e)(4). However, this provision has been modified to make clear that conduct falling within the right to petition the government need not implicate a matter of public concern. This broad provision has been held to include speech published in the media, and is intended to do so here. See M.G. v. Time Warner, 89 Cal.App.4th at 629.

It is likely that most situations which the proposed statute is designed to address will be addressed by the five subdivisions discussed above. However, as written, the list is not exclusive. A court has jurisdiction to find that the protections of this Act are triggered by a claim based on actions that do not fall within these subdivisions, if the court deems that the claim has the effect of chilling the valid exercise of freedom of speech or petition and that application of the Act would not unduly hinder the constitutional rights of the claimant.

Subsection (b) provides that enforcement actions by the government will not be subject to anti-SLAPP motions. This exclusion is intended to ensure that the statute's protections do not hinder the government's ability to enforce consumer protection laws. In People v. Health Laboratories of North America, 87 Cal. App. 4th 442 (Cal. Ct. App. 2001), the Court of Appeals of California upheld a similar provision in the California statute against an equal protection challenge. The court noted that the exclusion is consistent with the purposes of the statute, as a public prosecutor is not motivated by retaliation or personal advantage, and it held that the provision is rationally related to the legitimate state interest of ensuring the government may pursue actions to enforce its laws uniformly. The language from the existing California statute has been modified to make clear that the exception does not apply only to civil enforcement actions initiated in the name of the people of the state.

SECTION 4. SPECIAL MOTION TO STRIKE; BURDEN OF PROOF

(a) A party may bring a special motion to strike any claim that is based on an action involving public participation and petition, as defined in Section 3.

(b) A party bringing a special motion to strike under this Act has the initial burden of making a prima facie showing that the claim against which the motion is based on an action involving public participation and petition. If the moving party meets this burden, the burden shifts to the responding party to establish a probability of prevailing on the claim by presenting substantial evidence to support a prima facie case. If the responding party meets this burden, the court shall deny the motion.

(c) In making a determination under subsection (b), the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(d) If the court determines that the responding party has established a probability of prevailing on the claim,

(1) the fact that the determination has been made and the substance of the determination may not be admitted into evidence at any later stage of the case; and

(2) the determination does not affect the burden of proof or standard of proof that is applied in the proceeding.

(e) The Attorney General's office or any government body to which the moving party's acts were directed may intervene to defend or otherwise support the moving party.

Comment

Section 4 sets out the expedited process through which "a claim that is based on an action involving public participation and petition" may be evaluated. Subsection (a) states that a party subject to such a claim may file a special motion to strike that claim. Many existing anti-SLAPP statutes provide for adjudication through motions to dismiss or motions for summary judgment. This Act mimics the existing California statute in choosing terminology that makes clear that this Motion is governed by special procedures that distinguish it from other dispositive motions.

Subsection (b) delineates the allocation of the burden between the moving and responding parties. The moving party first must make a prima facie showing that the claim is based on an action involving public participation and petition, as defined in Section 3. The moving party need not show that the action was brought with the intent to chill First Amendment expression or has such a chilling effect, though such a showing might be necessary if the action does not fit into one of the five specified categories in Section 3.

If the moving party carries its burden, the responding party must establish a probability of prevailing on its claim. This standard is higher than the standard of review for a traditional motion to dismiss; in addition to stating a legally sufficient claim, the responding party must demonstrate that the claim is supported by a prima facie showing of facts that, if true, would support a favorable judgment. See Briggs v. Eden Council for Hope and Opportunity, 969 P.2d 564 (Cal. 1999); Matson v. Dvorak, 40 Cal. App. 4th 539 (Cal. Ct. App. 1995). In so doing, the responding party should point to competent, admissible evidence.

In evaluating whether the responding party has put forth facts establishing a probability of prevailing, the court shall also consider defenses put forth by the moving party. As Subsection (c) makes clear, at all stages in this examination the court must consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

Existing and proposed state statutes that allocate a similar burden of proof to the responding party have faced constitutional challenges. In New Hampshire in 1994, a senate bill modeled on the existing California statute was presented to the state Supreme Court, which found that it was inconsistent with the state's constitution. See Opinion of the New Hampshire Supreme Court on an Anti-SLAPP Bill, 641 A.2d 1012 (1994). The court found that the statute's provision for court consideration of the pleadings and affidavits denied a plaintiff who is entitled to a jury trial the corresponding right to have all factual issues resolved by a jury. In the face of similar concerns, the Rhode Island General Assembly amended its statute in 1995 to do away with the "special motion to dismiss" provision and its "preponderance of the evidence" standard. See Hometown Properties, Inc. v. Fleming, 680 A.2d 56 (R.I. 1996).

The opinion of the New Hampshire Supreme Court evinces a misunderstanding of a court's role in evaluating a motion to strike and response. The court does not weigh the parties' evidence at this preliminary stage, but rather determines whether the responding party has passed a certain threshold by pointing to the existence of evidence that creates a legitimate issue of material fact. See Lafayette Morehouse, Inc. v. Chronicle Publishing Co., 37 Cal. App. 4th 855 (Cal. Ct. App. 1995); Dixon v. Superior Court, 30 Cal. App. 4th 733 (Cal. Ct. App. 1994); see also Lee v. Pennington, 830 So. 2d 1037 (La. Ct. App. 2002) ("The only purpose of [the state statute] is to act as a procedural screen for meritless suits, which is a question of law for the court to determine at every stage of a legal proceeding."). The court's analysis is not unlike that which it would undertake in examination of a summary judgment motion. Furthermore, the court may permit a responding party to conduct discovery after the filing of a special motion to strike if the responding party needs such discovery to establish its burden under the Act. See Section 5, infra.

Subsection (d) provides that if a responding party is successful in defeating a special motion to strike, its case should proceed as if no motion had occurred. The evaluation of a special motion to strike is based on the examination of evidence, the veracity of which is assumed at this preliminary stage but has not been established. Thus, the survival of a motion to strike is not a reflection of the validity of the underlying claim, and evidence of the survival of a motion to strike is inadmissible as proof of the strength of the claim. Likewise, the special motion to strike should in no way alter the burden of proof as to the underlying claim.

A variation of subsection (e) is included in almost every existing anti-SLAPP statute and

provides that the attorney general's office or the government body to which the moving party's acts were directed may intervene to defend or otherwise support the moving party. Many of the most troubling SLAPPs are brought by a powerful party against a relatively powerless individual or group. Though the government's role is purely discretionary, this provision is designed to grant more targets of SLAPPs the resources needed to fight baseless lawsuits.

SECTION 5. REQUIRED PROCEDURES

(a) The special motion to strike may be filed within 60 days of the service of the most recent complaint or, in the court's discretion, at any later time upon terms it deems proper. A hearing shall be held on the motion not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(b) All discovery and any pending hearings or motions in the action shall be stayed upon the filing of a special motion to strike under Section 3. The stay of discovery shall remain in effect until the entry of the order ruling on the motion. Notwithstanding the stay imposed by this subsection, the court, on motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted.

(c) Any party shall have a right of expedited appeal from a trial court order on the special motion or from a trial court's failure to rule on the motion in a timely fashion.

Comment

The procedures set out in Section 5 are designed to facilitate speedy adjudication of anti-SLAPP motions, one of the main goals of this Act. Subsection (a) states that unless the court deems it proper to appoint a later deadline, a special motion to strike must be filed within 60 days of service of the most recent amended complaint – or the original complaint, if it has not been amended. The motion must be heard by the court within 30 days of service of the motion to the opposing party, unless the docket conditions of the court require a later hearing. The court may not delay the hearing date merely for the convenience of one or both parties.

Subsection (b) provides for a stay of discovery and all other pending motions from the time a special motion to strike is filed until the entry of the order ruling on the motion. This stay is designed to mitigate the effects of SLAPP suits brought for the purpose of tying up the SLAPP victim's time and financial resources. However, it is also understood that in some situations the party opposing the special motion to strike will need discovery in order to adequately frame its response to the motion, and restricting discovery in these situations might raise constitutional concerns. In addition, there will be times when a stay on all other pending motions will be impractical.

Thus, the court is permitted, on motion and for good cause shown, to permit limited discovery and/or the hearing of other motions. Relevant considerations for the judge when evaluating "good cause" include whether the responding party has reasonably identified material held or known by the moving party that would permit it to demonstrate a prima facie case, see Lafayette Morehouse Inc. v. Chronicle Publishing Co., 37 Cal. App. 4th 855, 868 (Cal. Ct. App. 1995), and whether the materials sought are available elsewhere, see Schroeder v. City Council of City of Irvine, 97 Cal. App. 4th 172 (Cal. Ct. App. 2002). The requirement for a timely motion is intended to be enforced; responding parties will not be permitted to raise the issue for the first time on appeal or when seeking reconsideration. See Evans v. Unkow, 38 Cal. App. 4th 1490 (Cal. Ct. App. 1995).

Subsection (c) makes clear that an order granting or denying a special motion to strike is immediately appealable. This provision is modeled after the 1999 amendment to the existing California statute that was intended to give the moving party -- the party the statute was designed to protect D- the same ability as the responding party to challenge an adverse trial court ruling. Originally, the California statute permitted the responding party to appeal the grant of a motion to strike, while the moving party could only challenge the denial through petition for a writ in the court of appeals, a process that is disfavored and rarely successful.

SECTION 6. ATTORNEY'S FEES, COSTS, AND OTHER RELIEF

(a) The court shall award a moving party who prevails on a special motion to strike made under Section 3, without regard to any limits under state law:

(1) costs of litigation and any reasonable attorney's fees incurred in connection with the motion; and

(2) such additional relief, including sanctions upon the responding party and its attorneys or law firms, as the court determines shall be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

(b) If the court finds that the special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award reasonable attorney's fees and costs to the responding party.

Comment

The attorney's fee provisions are a central feature of the Uniform Act, designed to create the proper incentives for both parties considering lawsuits arising out of the First Amendment activities of another, and parties pondering how to respond to such lawsuits. Subsection (a) sets out the costs, fees, and other relief recoverable by a moving party who succeeds on a special motion to strike under this statute. It provides that a prevailing movant is entitled to recover reasonable attorney's fees and costs, and that the court should issue such other relief, including sanctions against the responding party or its attorneys, as the court deems necessary to deter the responding party and others from similar suits in the future. Subsection (b) counterbalances (a) by providing mandatory fee-shifting to the responding party if the court finds that the special motion to strike is frivolous or brought with intent to delay.

Nearly every state anti-SLAPP statute includes a section providing for mandatory or discretionary fee-shifting for the benefit of a prevailing movant. The main purpose of such provisions is to discourage the bringing of baseless SLAPPs by "plac[ing] the financial burden of defending against so-called SLAPP actions on the party abusing the judicial system." Poulard v. Lauth, 793 N.E.2d 1120, 1124 (Ind. Ct. App. 2003); see also Ketchum v. Moses, 17 P.3d 735, 745 (Cal. 2001). Another important purpose of such provisions is to encourage private representation of parties defending against SLAPPs, even where the party might not be able to afford fees. See id. Thus, fees are recoverable even if the prevailing defendant is represented on a pro bono basis, see Rosenaur v. Scherer, 88 Cal. App. 4th 260, 287 (Cal. Ct. App. 2001).

By "reasonable attorney's fees," the statute refers to those fees that will adequately compensate the defendant for the expense of responding to a baseless lawsuit. See Robertson v. Rodriguez, 36 Cal. App. 4th 347, 362 (Cal. Ct. App. 1995). The statute permits the use of the lodestar method for calculating reasonable fees. The lodestar method provides for a baseline fee for comparable legal services in the community that may be adjusted by the court based on factors including (1) the novelty and difficulty of the questions involved; (2) the skill displayed by the attorneys; (3) the extent to which the nature of the litigation precluded other employment of the attorneys; and (4) the contingent nature of the fee award. See Ketchum, 17 P.3d at 741. Even if the lodestar method is not followed strictly, the court may take those and other factors – such as a responding party's bad-faith tactics – into account in determining "reasonable" fees.

Much confusion has arisen in the application of California's anti-SLAPP statute over what constitutes a "prevailing" defendant or moving party, particularly where the responding party voluntarily dismisses the underlying case prior to a court's ruling on the special motion to strike. The authors of this statute agree with the majority of California courts that proper disposition of these situations requires the court to make a determination of the merits of the motion to strike. See Pfeiffer Venice Properties v. Bernard, 107 Cal. App. 4th 761, 768 (Cal. Ct. App. 2002); Liu v. Moore, 69 Cal. App. 4th 745, 755 (Cal. Ct. App. 1999). If the court finds that the moving party would have succeeded on its motion to strike, it shall award the moving party reasonable attorney's fees and costs. This interpretation does not provide a disincentive for responding parties to dismiss baseless lawsuits, because if the responding party timely dismisses, the moving party will likely have incurred less in fees and costs than it would have if the responding party pursued its lawsuit to a ruling on the motion to strike.

One California court has held that where the responding party voluntarily dismisses prior to a ruling on the special motion to strike, the responding party could prove it prevailed by showing "it actually dismissed because it had substantially achieved its goals through a settlement or other means, because the [moving party] was insolvent, or for other reasons unrelated to the probability of success on the merits." Coltrain v. Shewalter, 66 Cal. App. 4th 94, 107 (Cal. Ct. App. 1998). This analysis is flawed because it places impoverished moving parties in the position of having to fight baseless SLAPP suits out of their own pockets because the responding party

can at any time dismiss the SLAPP on the grounds that the moving party is insolvent and thereby avoid paying attorney's fees.

Another question that has arisen in the interpretation of the California statute is how the fee award is to be assessed if the moving party's victory is partial or limited in comparison to the litigation as a whole. In such cases, the prevailing movant is entitled to a fee award reduced by the court to reflect the partial or limited victory. See ComputerXpress, Inc. v. Jackson, 93 Cal. App. 4th 993, 1019 (Cal. Ct. App. 2001). Finally, the government, if it prevails on a special motion to strike, is entitled to recover its fees and costs just as a private party would. See Schroeder v. City Council of City of Irvine, 99 Cal. App. 4th 174, 197 (Cal. Ct. App. 2002).

Subsection (a)(2), which gives the court discretion to apply additional sanctions upon the responding party, is modeled after a provision in Guam's anti-SLAPP statute. Several state statutes (though notably not California's) provide for additional sanctions beyond fees and costs in various circumstances, with most requiring a showing that the responding party brought its lawsuit with the intent to harass. See, e.g., 10 Delaware Code ¤ 8138(a)(2); Minnesota Statutes ¤ 554.04(2)(b). Such intent-based provisions are ineffective because they place a heavy burden of proof on moving parties when, in fact, most SLAPP lawsuits by definition are brought with an intent to harass. The provision in this Act lifts the heavy burden from the moving party but at the same time makes clear that additional relief is not to be applied in every case Ð only when the court finds that an extra penalty would serve the purposes of the Act.

Just as subsection (a) is designed to deter the filing of baseless SLAPPs, subsection (b) is intended to deter parties who find themselves on the receiving end of valid lawsuits from filing special motions to strike that have no chance of success and show some evidence of bad faith on the part of the movant. The court should grant reasonable attorney's fees to the responding party when, for example, the moving party cannot in good faith maintain that the underlying conduct constitutes "action involving public participation and petition." See Moore v. Shaw, 116 Cal. App. 4th 182, 200 (Cal. Ct. App. 2004).

As a final matter, a moving party who prevails on a special motion to strike under this Act will recover attorney's fees and costs related to a successful appeal on the issue. Dove Audio, Inc. v. Rosenfeld, Meyer & Susman, 47 Cal. App. 4th 777, 785 (Cal. Ct. App. 1996); Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 659 (Cal. Ct. App. 1996). In addition, a moving party may recover reasonable fees in connection with an appeal even when the responding party does not pursue the appeal to a final determination. Wilkerson v. Sullivan, 99 Cal. App. 4th 443, 448 (Cal. Ct. App. 2002).

SECTION 7. RELATIONSHIP TO OTHER LAWS

Nothing in this Act shall limit or preclude any rights the moving party may have under any other constitutional, statutory, case or common law, or rule provisions.

SECTION 8. UNIFORMITY OF APPLICATION AND CONSTRUCTION

This Act shall be applied and construed liberally to effectuate its general purpose to make uniform the law with respect to the subject of this Act among States enacting it.

SECTION 9. SEVERABILITY OF PROVISIONS

If any provision of this Act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 10. SHORT TITLE

This Act may be cited as the Uniform Act Limiting Strategic Litigation Against Public Participation.

SECTION 11. EFFECTIVE DATE

This Act takes effect ..... .

[Top]

Las Vegas Sun

Nevada judges struggle to keep up with backlog

Tuesday, Feb. 17, 2004 | 11:38 a.m.

CARSON CITY -- District Court judges in Clark County lost a little ground last year in their battle to keep up with a backlog of cases.

The 33 District Court judges decided 78,064 cases in the 2003 fiscal year, which ended June 30. That was 840 fewer cases than the previous year.

Still they managed to stay ahead of the 77,136 new cases, up 14 percent from the previous year.

"We're busy. We're trying to stay on top of this," Chief District Judge Michael Douglas said. He said the public, the Nevada Supreme Court and the Legislature want the judiciary to be accountable and that's what the judges in Clark County are striving for.

The numbers were part of an annual report on the state's judiciary released today that said that District Court judges statewide disposed of 105,154 cases last fiscal year, an increase of 8,809 from fiscal 2002. The report measured rulings on nontraffic cases.

Even though Clark County courts lost some ground, they outpaced their counterparts in Washoe County per capita by 61 percent, the study showed.

The 78,064 cases, an average of 2,366 per judge, was 61 percent more than the 17,609 in Washoe County, or 1,467 cases on average for each of the 12 judges.

"If they had more filing, they would have disposed of more cases," Douglas said of Washoe County judges.

In Washoe County the 17,609 cases disposed of compared with 8,892 in the previous year or nearly doubled. Ron Longtin, administrator for the court in Washoe County, said the judges disposed of a big backlog.

The report shows Nevada has fewer District Court judges per 100,000 population than seven other Western states. While California has 4.3 judges in what is called Superior Court, per 100,000 population, there are just 2.7 in Nevada.

But the report also shows there are 1,501 cases filed per Superior Court judge in California, compared to the 1,375 for District Court judges in Nevada.

The Nevada Supreme Court, according to the report, decided 1,889 cases last fiscal year, down from the 1,906 in the prior fiscal year. It was the lowest number of ruling in the last four years. It breaks down to an average of 269 decisions per justice.

But the backlog of cases also declined to 1,426, the lowest number in the last four years. The report said Nevada has more cases filed per justice, at 258, than most other appellate courts, based on figures from the National Center for State Courts.

The study noted that Nevada is one of 11 states that does not have an intermediate court of appeals, something the Nevada Supreme Court has been pushing. The 2003 Legislature approved a proposed constitutional amendment to allow creation of an intermediate court of appeals. It would have to be approved by the 2005 Legislature and then placed on the 2006 ballot for ratification by the voters.

Justice Deborah Agosti, who was chief justice when the annual report was finalized, said the courts in Nevada "are productive, proactive and constantly striving to improve the effective delivery of justice to our citizens."

Ron Titus, chief of the administrative office of the court, said computerized case management systems in many courts have improved the ability to track and report caseloads.

Titus reported there were 114,540 new cases filed last fiscal year in the district courts, more than 8,000 from fiscal 2002. Criminal filings actually decreased from 12,191 in 2002 to 12,001 in fiscal 2003. New civil suits increased from 24,143 to 28,077; family court cases rose from 43,885 to 52,258 and juvenile nontraffic cases inched up to 22,2043 from 22,148.

The report said there were 182,671 new nontraffic cases filed in the justice courts in the state. It said 48,228 were disposed of. But the number of decisions did not include the Las Vegas Justice Court, where there were 104,889 new cases but there was no report available on the number of decisions made.

In addition there were 416,505 traffic and parking violations filed with 353,548 cases disposed of in justice courts.

There were 314,159 cases filed in the municipal courts in Nevada, with decisions made in 301,193.

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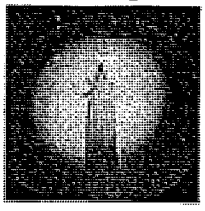

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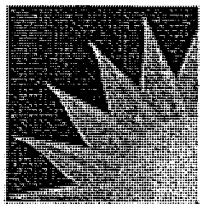

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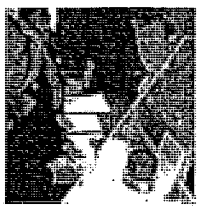

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JUNE 2007 (2 OF 2)

CALIFORNIA ANTI-SLAPP STATUTE APPLIES TO ROUTINE ADMINISTRATIVE MANDAMUS PETITIONS

An Analysis Of The Holding And Effect Of Vergos v. McNeal

By Michael P. Stone
and Marc J. Berger

A dramatic example of legislative intentions gone astray can be derived in a line of recent California appellate decisions culminating in the case of *Vergos v. McNeal* (2007) 146 Cal. App. 4th 1387. Based on *Vergos* and a few other recent cases, it now appears that nearly all petitions for administrative mandamus are subject to the anti-SLAPP motion procedure, with no limiting principle whatsoever. The case law developments that led to the *Vergos* holding stand as a monument to the futility of legislation as a remedy for power imbalances among the economic strata of society.

The anti-SLAPP statute was enacted in 1992 to deter the type of litigation for which its acronym stands: "Strategic lawsuits against public participation." This acronym referred to a growing tendency for powerful land development interests to bring defamation actions against environmental activists to deter the activists from exercising their legal rights to challenge large-scale development plans. It was widely perceived that these powerful real estate interests were using their financial resources to impose intolerable litigation costs on activists, so as to intimidate them from participating in the public proceedings where the developers' plans were under consideration.

To accomplish the purpose of the statute, the legislature authorized a "Special Motion to Strike" any complaint or cause of action that seeks to impose liability for statements made or

actions taken in an exercise of constitutionally-protected speech or the First Amendment right to petition the government for redress of grievances. The Special Motion to Strike is filed as the defendant's first responsive pleading. If the motion shows that the complaint seeks to impose liability for a statement made or action taken in an exercise of the right of free speech or petition, then the complaint or cause of action will be immediately stricken, with a mandatory award of attorney fees in favor of the defendant, unless in opposition the plaintiff demonstrates a probability of prevailing on the merits of the claim.

This statute was thought to be an effective deterrent against the lawsuits it targeted, because in those suits, developers were bringing claims against activists without a goal of prevailing on the merits, but for the collateral purpose of discouraging political opposition by forcing the opponent to incur intolerable litigation expenses. So, imposing a requirement of showing minimal merit acted as a precaution against suits that have financial intimidation as their only goal, while shifting responsibility for attorney fees would deprive the developers of the greatest single benefit they otherwise receive from the tactic of bringing litigation for the sole purpose of financial intimidation.

While the legislature primarily intended to attach consequences to the tactics of powerful developers and other corporate interests, the statute as drafted contained no limitation of the classes of plaintiffs who could be subject to an anti-SLAPP motion, and no limit on the size or power of the defendants who could bring the motion. Instead, the Special Motion to Strike could be filed by any defendant who could establish that the conduct on which the alleged liability is based is protected by the First Amendment rights of free speech and petition. And, there is no statutory requirement governing the size or power of the plaintiffs against whom the motion can be filed. Any defendant whose alleged liability arose from constitutionally protected speech or petitioning, no matter how powerful, could bring an anti-SLAPP motion against any plaintiff, no matter how weak and powerless the plaintiff might be.

The anti-SLAPP statute, originally designed as a tool to protect weak interests from being intimidated by powerful interests, has now itself become a tool by which powerful institutions and interests can in some cases intimidate economically weak and relatively powerless individuals. Combined with a

concurrent trend in federal law, which has eliminated constitutional protection for the work-related speech of public employees, while creating a doctrine of "free speech" protection for the government itself, the new interpretations of the anti-SLAPP statute have vastly eroded the ability of public employees to obtain hearing and evidentiary review of disciplinary sanctions imposed on them by their employers. The new interpretation rendered in the *Vergos* opinion will apparently make all actions for administrative mandamus subject to a Special Motion to Strike. This would vastly erode the ability of public employees to obtain hearing and evidentiary review of disciplinary sanctions imposed on them by their employers. It would seem to similarly affect administrative mandamus petitions seeking to challenge governmental decisions to revoke or suspend professional licenses. It may subject a private employee's action for wrongful termination to a Special Motion to Strike, if the private employer claims that the act of terminating the employee was an exercise of free speech.

In *Vergos*, counsel for the Regents of the University of California devised the idea of using the anti-SLAPP statute to protect employers from administrative mandamus. Exploiting a few recent precedents that treat the government as a "person" for First Amendment purposes, the Regents persuaded the Court of Appeal to recognize that the act of terminating or disciplining a public employee for cause is an exercise of free speech by the government, and consequently, an employee who cannot make a preliminary showing of a probability of prevailing on the merits of the claim can be required to pay the employer's attorney fees.

I. *VERGOS v. McNEAL* HOLDS THAT THE ANTI-SLAPP STATUTE PROTECTS A HEARING OFFICER SUED FOR DENYING A GRIEVANCE.

In *Vergos*, the plaintiff brought an action against Julie McNeal, the Director of Operations and Maintenance at University of California at Davis, for sex harassment and failure to prevent sex harassment. Defendants also included the harasser and the Regents, but the Court of Appeal only reviewed the denial of McNeal's anti-SLAPP motion.

Plaintiff Randy Vergos was an inspector, planner and estimator, working under Allen Tollefson, who worked under McNeal. Vergos filed an internal grievance, alleging sex harassment against Tollefson. McNeal, acting as hearing officer for Vergos' grievance, denied the grievance, and wrote to Tollefson that it was more likely that Vergos' allegations did not occur. McNeal refused to take any action

to protect McNeal from Tollefson. 146 Cal. App. 4th at 1390-1391.

McNeal was named as an individual defendant in Vergos' cause of action based on 42 USC § 1983. The pleading alleged that McNeal, acting as agent for the Regents and under color of state law, denied Vergos' grievance, thus violating Vergos' right to be free of discrimination and harassment, and that the Regents did not properly train McNeal in acting as a hearing officer to decide grievances. *Id.* at 1391-1392.

McNeal filed an anti-SLAPP motion challenging the § 1983 claim, alleging that the Complaint arose from her activities of hearing, processing and deciding plaintiff's grievances, in furtherance of her own First Amendment right of petition and free speech. *Id.* at 1392. McNeal's anti-SLAPP motion alleged that she permissibly delegated the investigation of Vergos' sex harassment claims, received a report that the claims were unsubstantiated, had no reason to believe the investigator was biased, was not biased herself, and communicated the results of the investigation to Vergos, who then failed to appeal the denial through available further steps of the grievance process. *Id.* at 1392-1393.

The trial court denied the anti-SLAPP motion on the grounds the claim was based on McNeal's hearing, processing and deciding of Vergos' grievance, and was "not based on the content of what Defendant stated in any proceeding or the exercise of the right to petition...." *Id.* at 1394.

The Court of Appeal reversed and remanded with instructions to grant the anti-SLAPP motion and award attorney fees to McNeal. The appellate court agreed with McNeal that her "statements and communicative conduct in handling plaintiff's grievances ... are protected" by the anti-SLAPP statute, "because they (1) were connected with an issue under review by an official proceeding authorized by law; and (2) furthered the right to petition of plaintiff and similarly situated employees." *Id.*

The court reasoned that *Code of Civil Procedure*, § 425.16(e)(2) authorized an anti-SLAPP motion where the action arises from "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." *Id.* at 1395, italics omitted. Also taking into account sub § (e)(1), authorizing an anti-SLAPP motion where the action arises from "any written or oral

statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law," the appellate court held that neither § (e)(1) nor (e)(2) "require the defendant to show a public issue or issue of public interest." *Id.* at 1395, citing *Briggs v. Eden Council* (1999) 19 Cal. 4th 1106, 1116-1117, 1123. The court stated that for communications made in official proceedings, "it is the context or setting itself that makes the issue a public issue." *Id.*

The plaintiff argued that an action does not "arise" from petitioning or speech activity merely because it follows such activity, and that here, he was suing McNeal for aiding and abetting harassment. *Id.* at 1396. But the court observed that plaintiff's own pleading complained of McNeal's hearing, processing and deciding of plaintiff's grievances. *Id.* Noting that the trial court had denied the motion on the basis that the claim against McNeal was based on McNeal's conduct, not the content of her statements, the appellate court disagreed, since "hearing, processing and deciding of the grievances ... are meaningless without a communication of the adverse results." *Id.* at 1397.

II. *SAN RAMON v. CONTRA COSTA COUNTY:* GOVERNMENT ACTION IS NOT PROTECTED BY SLAPP IF IT DOES NOT IMPLICATE FREE SPEECH AND PETITION

The appellate court distinguished *San Ramon v. Contra Costa County Employees' Retirement Assn.* (2004) 125 Cal. App. 4th 343, which held that an action seeking judicial review of the decision of a public entity is not subject to an anti-SLAPP motion merely because the decision is taken by a vote after discussion at a public meeting. The court in *San Ramon* observed that the public entity's action (of increasing required contributions to a pension fund) was not in itself an exercise of the right of free speech or petition.

The court in *Vergos* noted that plaintiffs relied on *San Ramon* because it "recognized that government bodies may invoke § 425.16 where appropriate, just like any private litigant, and its holding was based on the conclusion that the Board's act [i.e. the change in pension contributions] did not implicate free speech or the right to petition." *Id.* at 1063. The court in *Vergos* rejected plaintiff's argument because *San Ramon* disavowed deciding any issue concerning suits against individuals. *Id.*

The foregoing observation in *Vergos* means (1) the court appears to agree that government bodies may invoke the anti-SLAPP statute the

same as individuals; and (2) an individual acting on behalf of the government is entitled to invoke the anti-SLAPP statute. The court concluded, "We agree with McNeal that a narrow reading of the statute in plaintiff's favor could result in public employees' reluctance to assume the role of hearing officer in such cases, and thus thwart the petitioning activities of employees with grievances." *Id.*

Finally, the court also agreed with defendant "that she acted in furtherance of the right to petition within the meaning of § 425.16 even though it was not her own right to petition at stake." *Id.* The court elaborated that the anti-SLAPP statute "does not require that a defendant moving to strike ... demonstrate that its protected statements or writings were made on its own behalf (rather than, for example, on behalf of its clients or the general public)." *Id.*, citation omitted.

The court specifically declined to recognize an exception to the anti-SLAPP statute and reasoned that "Hearing officers in official proceedings deserve the protection of the anti-SLAPP statute." *Id.*

The *San Ramon* opinion dodges both of the broader propositions' implications of extending the anti-SLAPP statute to protect the government. The court noted that amicus briefs had argued that the government itself has no First Amendment free speech rights, but since the case before it required only a ruling that the particular act of increasing pension contributions did not implicate free speech, the court was not reaching the larger question posed, as to whether the First Amendment protects the government itself. The opinion also acknowledges that dicta in *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal. App. 4th 713, in finding the civil damages action before it to be a SLAPP suit, had noted that a petition for administrative mandamus would be the "proper" remedy, thus implying that such a petition would not be a SLAPP suit. But contrary to that court's view, the fact that administrative mandamus is the proper remedy does not exempt it from the anti-SLAPP statute, since it is well-established that an administrative mandamus petition can be found subject to the anti-SLAPP statute. See, e.g., *Moraga-Orinda Fire Protection Dist. v. Weir* (2004) 115 Cal. App. 4th 477.

III. THE GOVERNMENT IS NOW RECOGNIZED AS A "PERSON" FOR FIRST AMENDMENT PURPOSES.

The interpretation of the anti-SLAPP statute found in *Vergos* thus has its roots in *Mission Oaks*, *Moraga-Orinda*, and *Schroeder v. Irvine*

City Council (2002) 97 Cal. App. 4th 174. *Mission Oaks* recognizes in passing that administrative mandamus is the proper remedy to challenge a denial of a land development permit, 65 Cal. App. 4th at 730, but does not say that this exempts a petition from the reach of the anti-SLAPP statute. *Schroeder*, ironically, recognizes that "SLAPP suits are brought to obtain an economic advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff." 97 Cal. App. 4th at 182. Yet the court resoundingly endorsed the government's right to invoke the anti-SLAPP statute, rejected an argument by amicus curiae that the government has no First Amendment rights, and held that a government official's act of voting is an act of free speech. *Id.* at 192, fn. 3.

Moraga-Orinda acknowledges that the anti-SLAPP statute was intended to apply to large corporations that can provoke prolonged litigation, not to an individual's relatively simple mandamus petition. But the court held that no such limitation appears on the face of the statute, and legislative history is irrelevant because the statute is unambiguous, and in any event, the history shows the statute is to be broadly applied. 115 Cal. App. 4th at 482 and fn. 4.

The newly-broadened judicial interpretation of the anti-SLAPP statute now imposes a major risk on any employee contemplating whether to seek judicial review of termination or other employment discipline. Can the employee avoid the anti-SLAPP statute by refraining from suing for damages, and limiting the remedy to reinstatement? No, because SLAPP has already been applied to petitions for civil harassment, which do not seek damages. *Thomas v. Quintero* (2005) 126 Cal. App. 4th 635, 642.

Can the employee avoid the anti-SLAPP statute by filing the mandamus petition against the governmental body only, without naming any officials? No, because the *San Ramon* and *Vergos* decisions hold that the government itself has a constitutional right of petition, which it would be exercising every time it takes disciplinary action against an employee.

The *Vergos* decision, by granting the government a constitutional freedom of speech and petition, has now extended the anti-SLAPP statute to the point where it applies to every petition for administrative mandamus, and probably to every suit that challenges a government decision. In that sense, *Vergos* takes another step in the readjustment of the balance of power between individuals and

government that was recently signaled by the United States Supreme Court in *Garcetti v. Ceballos* (2006) 126 S.Ct. 1951. The *Ceballos* decision took away an individual's constitutional protection for job-related speech, by recognizing it as speech of the government, in which the individual has no interest. *Ceballos* tells individual government employees they must say only what the employer wants them to say, or be terminated and replaced with someone who will. Decisions such as *Vergos* complete the transfer of power by recognizing that the constitutional freedom of speech, which previously protected the employee making the communication, now fully protects the government entity that dictates the content of what its employees may express in their job-related communications.

Thus the *Vergos* decision protects a hearing officer from liability for a decision against the employee, but *Ceballos* leaves the hearing officer with no protection against the employer for making a decision in favor of the employee. Under this scheme, it seems unlikely that any hearing officer would dare decide a case contrary to a governmental employer's interests. And of course, *San Ramon* protects not only the hearing officer, but also the governmental employer itself, in an administrative mandamus action.

IV. ROUTINE ADMINISTRATIVE MANDAMUS PETITIONS ARE NOW SUBJECT TO THE ANTI-SLAPP STATUTE.

It therefore seems that in view of the *San Ramon* and *Vergos* decisions, all employers served with petitions for administrative mandamus challenging employment decisions, are entitled to file an anti-SLAPP motion on the basis of § 425.16(e)(1), as a "written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;" and (2) as a "written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." The employee must then make a preliminary showing of likelihood of prevailing on the merits, or the petition is summarily stricken with an award of attorney fees to the employer.

It is not entirely certain that *Vergos* will trigger a flood of anti-SLAPP motions to counter administrative mandamus petitions. The rule is a windfall that public employers do not really need, and as a practical matter, the government will not often be in a position to be able to execute a judgment for attorney fees against a terminated employee.

From the perspective of judicial economy, an anti-SLAPP motion to challenge a petition for administrative mandamus is quite wasteful, requiring the judge to rule on the same evidence twice: first under the probability of prevailing standard, then under the applicable substantive standard, be it independent judgment or substantial evidence. Where the matter is to be decided by the judge sitting without a jury (*Code of Civil Procedure*, § 1094.5), the preliminary showing of probability to prevail on the merits is equal to the final showing: the court merely predicts what the court will do, then does it.

There are actually at least two procedural advantages an employer would receive from filing an anti-SLAPP motion to strike a mandamus petition. First, if the governmental entity is able to drag its feet in preparing the hearing transcripts, so they are not available in time for the anti-SLAPP motion to be heard, the court can strike the petition on the basis that plaintiff failed to show a probability of prevailing, that the anti-SLAPP statute places the burden on plaintiff to immediately demonstrate the requisite probability of prevailing, and the court is not required to go beyond the pleadings and any declarations then available to make its ruling (CCP §§ 425.16(b)(2) and 425.16(g)). This may sound draconian, but no more so than the underlying rule of *Vergos* itself.

But even assuming the hearing transcript is available, an anti-SLAPP motion unilaterally gives the employer a free dress rehearsal for its defense, which the employee is incidentally forced to finance. If the employer prevails on the motion, the case is over and the employee owes attorney fees. But if the employee survives the motion under the "probability" standard, the ruling will educate the employer as to where it needs to improve its arguments. The anti-SLAPP motion thus gives the employer a second chance to present its legal arguments, a luxury the employee never receives.

It is difficult to predict how widespread the use of anti-SLAPP motions will be against mandamus petitions. Some governmental bodies will not want to bother chasing their fired employees for attorney fees. Others will want to use the tactic for its intimidating effect. When this happens, the anti-SLAPP regime will have come full circle, as a weapon for the government to intimidate individuals who seek to use the courts to question its decisions.

That the government itself has a right to freedom of speech is a perverse twist of

constitutional construction. It does not follow from treating the government as a fictitious "person" for some purposes, that the government itself has a right to claim the benefit of the constitutional freedom of speech. It is the government's raw power to silence an individual that makes it necessary, and even possible, to recognize a freedom of speech. The constitutional freedom of speech specifically means a protection against being silenced by the government. It means the government is restricted from prohibiting, punishing, or imposing burdens on, expressive communication of individuals. The only effect of recognizing a freedom of speech is to restrict the government from doing something it has the raw power to do. It is because of this raw governmental power to silence individuals that the body politic has deemed a constitutional protection necessary and appropriate. Governmental speech does not need this constitutional protection, which would amount to protection from itself. The anomaly of the outcome that flows from the recognition of a governmental right of free speech is compounded by treating the termination of an employee as an act of communication. It is true that the termination is communicated to the employee. But the termination is not effected by telling the employee about it, the termination is effected by no longer paying the employee or accepting a tender of work performance. Even if the First Amendment may protect an employer's statement that the employee is fired, it should not protect the official conduct involved in separating the employee from the position.

To put it simply: the employer has a constitutional right to tell the employee, "You're fired," but that statement does not fire the employee any more than a murderer can be executed by telling him, "You're dead."

Stay safe!

Michael P. Stone is the firm's founding partner and principal shareholder. He has practiced almost exclusively in police law and litigation for 27 years, following 13 years as a police officer, supervisor and police attorney.

Marc J. Berger is the firm's senior law and motion and writs and appeals specialist. He has been associated with Michael P. Stone since 1986.

JUSTICE COURT, LAS VEGAS TOWNSHIP

CLARK COUNTY, NEVADA

FILED

IN THE ADMINISTRATIVE MATTER REGARDING CIVIL CASE FILINGS

ORDER # 11-03

BY

WHEREAS, Rule 6.5(b) of the Justice Court Rules for the Las Vegas Township (JCRLV) requires the Chief Judge to "[a]ssure quality and continuity of services necessary to the operation of the court" and to "[s]upervise the court's calendar"; and

WHEREAS, during the last few months of last year, the Court was faced with a heightened backlog of civil cases to be processed due to significant staff shortages and budgetary constraints, along with a difficult conversion to a new case management system; and

WHEREAS, the backlog was so severe that former Chief Judge Ann Zimmerman previously authorized the temporary closure of the Civil Customer Service Counter in order for staff to focus on eliminating that backlog; and

WHEREAS, it has come to the Court's attention that many civil cases during the applicable time period were not processed with sufficient time for attorneys to be able to comply with the dictates of JCRCP 4(i); and

WHEREAS, JCRCP 4(i) declares that if service of the summons and complaint is not made upon a defendant "within 120 days after the filing of the complaint," the action must be dismissed as to that defendant without prejudice upon the court's own initiative; and

WHEREAS, the rule further contemplates that a party may file a motion to enlarge the time for service, based upon a showing of good cause why such service was not made within the 120-day period; and

WHEREAS, the rule declares that "[u]pon a showing of good cause, the court shall extend the time for service and set a reasonable date by which service should be made"; and

WHEREAS, the Court believe that all affected cases during the applicable time period should be granted an extension of time for service based upon the "good cause" related to the prior backlog in the Civil Division; therefore,

IT IS HEREBY ORDERED that, for all civil cases filed during the period of **July 1, 2010, through December 31, 2010,** plaintiffs will be entitled to an extension of time to serve the summons and complaint, without having to file a motion to request that extension of time; and

IT IS HEREBY ORDERED that the civil cases governed by this Order shall be those cases set forth at Exhibit "A," which is a lengthy separate document that is on file with the Las Vegas Justice Court Clerks' Office and available for public inspection; and

IT IS HEREBY ORDERED that the extension of time granted by this Order shall remain in effect until **June 15, 2011;** and

IT IS FURTHER ORDERED that if a civil case was filed during the period of July 1, 2010, through December 31, 2010, and that case was subsequently dismissed for failure to comply with JCRCP 4(i), this Order may be cited as a basis for a Motion to Set Aside the Dismissal; and

IT IS FURTHER ORDERED that all civil cases encompassed by this Order may be subject to future dismissal under JCRCP 4(i) if service of the summons and complaint is not made within the extension of time granted by this Order; and

IT IS FURTHER ORDERED that this Order shall be effective immediately and shall remain in effect unless amended or rescinded by a subsequent administrative Order.

Dated this 2nd **day of** March, **2011.**

KAREN BENNETT-HARON

CHIEF JUDGE OF THE LAS VEGAS JUSTICE COURT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LARRY JOE DAVIS, JR., an individual,

Plaintiff,

v.

AVVO, INC., a Washington corporation, d/b/a Avvo.com,

Defendants.

CASE NO. C11-1571RSM

ORDER ON SPECIAL MOTION TO STRIKE, PURSUANT TO RCW 4.24.535

This matter is before the Court for consideration of a special motion to strike filed by defendant Avvo, Inc. ("Avvo"). Dkt. # 47. This motion is brought pursuant to Washington's "anti-SLAPP" law, RCW 4.24.525.[1] Plaintiff has opposed the motion. After careful consideration of the record and the parties' memoranda, the Court has determined for the reasons set forth herein that the motion shall be granted.

BACKGROUND

[1] "SLAPP" in the statutory context is an acronym for Strategic Lawsuits Against Public Participation. In passing RCW 4.24.525, the legislature expressed a concern over lawsuits "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." RCW 4.24.525, Notes, 2010 c 118. The statute provides for the rapid resolution of a special motion, filed by the defendant, to strike the SLAPP.

Plaintiff Larry Joe Davis, Jr., is a Florida attorney, board-certified in Health Law. According to the website of the Florida State Bar Association, board certification is a program by which licensed attorneys may become recognized for special knowledge, skill and proficiency in a designated area of practice.[2] The certification process involves earning a passing grade on an examination, peer review assessment, and satisfaction of the certification area's continuing legal education requirements. A Florida attorney who is board certified may use the designation "Board Certified," "Expert," or "Specialist." *Id.*

Defendant Avvo operates a website that provides profiles of many lawyers, doctors, and dentists in the U.S., including area of practice or specialty, disciplinary history, experience, peer endorsements, and client or patient reviews. The lawyer section of the website is searchable by area of practice and location.[3] The information is gathered from publicly available material, including state bar associations, state courts, and lawyers' and firms' websites. Declaration of Joshua King, Dkt. # 9, Exhibit 16. The profile contains an Avvo numerical rating (zero to ten), calculated mathematically from information in the lawyer's profile, including years in practice, disciplinary actions, professional achievements, and industry recognition. *Id.*, Exhibit 25. The rating is intended to guide the public in finding a suitable qualified lawyer. *Id.*, Exhibit 3. An attorney cannot change his rating by request to Avvo, but he or she may register on the Avvo website, "claim" his or her profile, and update information regarding work experience, practice areas, and professional achievements, any of which may change the rating. *Id.* Clients may submit reviews, which may also change the rating.

Plaintiff filed this action for libel and violation of two Florida statutes in Florida state court on August 26, 2010. Dkt. # 2. He asserted in that complaint that he first learned of his Avvo profile and rating on August 19, 2010, when a prospective client called him to ask for help with an employment issue involving a hostile environment claim. Complaint, Dkt. # 2, ¶ 9. She told plaintiff she called him because he was the "lowest rated employment lawyer" and she assumed he would be "desperate for

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[2] http://www.floridabar.org/divcom/pi/certsect.nsf/certifications, accessed on March 22, 2012.

[3] http://www.avvo.com/find-a-lawyer?ref=homepage accessed on March 22, 2012.

employment." *Id.*, ¶ 11.

Plaintiff informed the caller that he was not a "low-ranking employment lawyer" but rather a Board Certified health law attorney, and declined to represent her. *Id.*, ¶ 12. After concluding the telephone call, plaintiff visited the Avvo.com website and saw that his practice area was depicted by a "pie chart" which stated "100% employment/labor law." He then went to log on to his profile page and "attempt to correct the misinformation, which included an incorrect business address and blatantly incorrect practice area." *Id.*, ¶ 14. He alleges that after "participating in the Avvo.com website," he saw his rating go from 4.3 to 5.0. *Id.*, ¶ 15. Then, over the next several days, he attempted to "delist" himself from the website entirely, but was unable to do so. *Id.*, ¶ 16. As a result of his efforts, according to plaintiff, his rating dropped to 3.7, accompanied by a "caution" in red letters. *Id.* Plaintiff has provided "screen shots" of other attorneys' profiles, but none of his own to demonstrate these changes. Declaration of Larry Joe Davis, Jr., Dkt. # 20, Exhibits 1, 2, 3. The Court notes that at this time, plaintiff's profile page displays no photograph, and shows a rating of 4.4, a "concern" in red letters, together with the statement, also in red, that "this lawyer has been disciplined by a state licensing authority," together with a link to more information regarding the disciplinary action.[4] Plaintiff's area of practice is still listed on his profile as "100% employment/labor" despite the fact that he has the power to change that entry. There are two very positive five-star client reviews.

Plaintiff filed an amended complaint shortly after filing the original, and served a copy on defendant on September 14, 2010. Dkt. # 3. The amended complaint changed the date that plaintiff learned of his Avvo profile and low rating to August 17, 2010, deleted the causes of action for libel, and added a claim of invasion of privacy/false light. Dkt. # 3. The action was removed to the United States District Court for the Middle District of Florida on October 19, 2010, on the basis of the parties'

[4] http://www.avvo.com/attorneys/33701-fl-larry-davis-1295960.html accessed on March 22, 2012.

diversity.[5] Dkt. # 1.

After defendant filed a motion to dismiss for failure to state a claim pursuant to Fed.R.Civ.Proc. 12(b)(6), plaintiff filed a Second Amended Complaint. Dkt. ## 8, 12. The Second Amended Complaint was stricken by the court for failure to obtain leave of court before filing, as required by Fed.R.Civ.P. 15(a)(2). Dkt. # 14. Defendant then moved pursuant to 28 U.S.C. § 1404(a) to transfer the action to this district pursuant to a forum selection clause on the Avvo.com website, and other factors. Dkt. # 15. Before the court ruled on the motion to transfer, plaintiff sought leave to amend his complaint a third time. Dkt. # 21. The motion was granted, and plaintiff filed his Third Amended Complaint on April 25, 2011. Dkt. # 26. The Third Amended Complaint, which is now the operative complaint in this case, asserts three causes of action under Florida law regarding the alleged misrepresentation of plaintiff's address and practice area, and the use of his photograph in his profile. He does not challenge his rating or the mention of disciplinary action.

After the Third Amended Complaint was filed, defendant filed, in rapid succession, a motion to strike designated paragraphs of the Third Amended Complaint (Dkt. # 30), a motion to dismiss for lack of subject matter jurisdiction and/or failure to state a claim (Dkt. # 31), and a renewed motion to transfer venue to the Western District of Washington (Dkt. # 32). The motion to transfer was granted and the case was transferred to this Court on September 29, 2011. Dkt. ## 43, 44. The Florida district court specifically found that plaintiff, a licensed and board-certified attorney, agreed to the Terms of Use on the Avvo.com website, including the forum selection clause, when he registered and logged in to update his profile. Order, Dkt. # 43, p. 7.

After transfer, defendant did not renew the previously-filed motion to strike and motion to dismiss for lack of subject matter jurisdiction in this Court. Instead, on November 2, 2011, defendant

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[5] Although the amended complaint did not plead a sum certain as damages, defendant met the burden on removal of establishing that the jurisdictional amount of $75,000 has been met by pointing to a settlement demand for $145,000 (with an apology) or $175,000 (without an apology) presented by plaintiff after he filed suit. Notice of Removal, Dkt. # 1. A defendant may use the amount demanded by the plaintiff as settlement as evidence that the amount in controversy exceeds the jurisdictional minimum. *Conn v. Petsmart, Inc.*, 281 F. 3d 837, 840 (9th Cir. 2002). Plaintiff's demand was not clearly excessive in light of the fact that his amended complaint includes requests for actual damages, punitive and exemplary damages, and statutory attorneys fees on four separate claims. Dkt. # 3.

filed the motion to strike the complaint pursuant to RCW 4.24.525 that is currently before the Court for consideration. This Court has jurisdiction over the matter pursuant to 28 U.S.C. § 1332(a)(1).

DISCUSSION

I. Legal Standard

The Washington anti-SLAPP Act is intended to address lawsuits brought primarily to chill the valid exercise of the constitutional rights of free speech and petition for redress. The legislature found that it is in the public interest for citizens to participate in matters of public concern, and to provide information on public issues that affect them without fear of reprisal through abuse of the judicial process. RCW 4.24.525; Senate Bill 6395, Laws of 2010, Ch. 118, § 1.

The law provides, in relevant part, that "[a] party may bring a special motion to strike any claim that is based on an action involving public participation" as defined in the statute. RCW 4.24.525(4)(a). The section applies to "any claim, however characterized, that is based on an action involving public participation and petition." RCW 4.24.525(2). An action involving public participation includes "[a]ny oral statement made . . . in a place open to the public or a public forum in connection with an issue of public concern" and "other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern. . ." RCW 4.24.525(2) (d) and (e).

An anti-SLAPP law provides relief to a defendant which is in the nature of immunity from suit. *Batzel v. Smith*, 333 F. 3d 1018, 1025 (9th Cir. 2003) (addressing California's anti-SLAPP statute.) In passing the law, the Washington legislature noted concern regarding both the chilling effect on the valid exercise of the constitutional right of freedom of speech, and the chilling effect of "the costs associated with defending such suits." RCW 4.24.525, notes 2010 Ch. 118. The statute accordingly provides for an award of attorneys' fees and costs, plus a statutory award of $10,000, to a defendant who prevails on an anti-SLAPP motion. RCW 4.24.525(6)(a)(i), (ii). Conversely, if the Court finds that the anti-SLAPP motion to strike was frivolous or brought solely to cause unnecessary delay, costs, attorneys' fees, and $10,000 shall be awarded to the opposing party. RCW 4.24.525.(6)(b)(i), (ii). The special motion to strike is therefore not without risk to the moving party.

To prevail on the special motion to strike, the defendant bears the initial burden of showing, by a

preponderance of the evidence, that the plaintiff's claim is based on an action involving public participation or petition. If this burden is met, the burden shifts to the plaintiff to establish, by clear and convincing evidence, a probability of prevailing on the claim. If the plaintiff meets this burden, the motion to strike will be denied. RCW 4.24.525.(4)(b).

II. Analysis

The Court has no difficulty finding that the Avvo.com website is "an action involving public participation," in that it provides information to the general public which may be helpful to them in choosing a doctor, dentist, or lawyer. Further, members of the general public may participate in the forum by providing reviews of an individual doctor or lawyer on his or her profile page. The profile pages on the Avvo.com website constitute a "vehicle for discussion of public issues . . . distributed to a large and interested community." *New York Studio, Inc. v. Better Business Bureau of Alaska, Oregon, and Western Washington*, 2011 WL 2414452 at *4 (W.D.Wash. June 13, 2011). Therefore the burden shifts to plaintiff to show, by clear and convincing evidence, a probability of prevailing on his Florida state law claims.

Before turning to plaintiff's claims, the Court must consider his assertion that this motion is untimely. He contends that since the Third Amended Complaint was filed and served on April 25, 2011, the deadline to file this motion was June 26, 2011, pursuant to RCW 4.24.525(5)(a). The cited section states, in relevant part, "The special motion to strike may be filed within sixty days of the service of the most recent complaint, or, in the court's discretion, at any later time upon terms it deems proper." RCW4.24.525(5)(a). The use of the term "may" instead of the mandatory "shall" means that this is not a firm deadline to be applied in all cases. In light of the fact that the action was not transferred to this Court until September 20, 2011, the Court finds that the November 2, 2011 filing is timely.

Plaintiff's Third Amended Complaint asserts three causes of action under Florida law: (1) false advertising, in violation of Fla. Stat. § Section 817.41; (2) unauthorized use of a likeness for a commercial purpose, in violation of Fla. Stat. § 540.08; and (3) violation of the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.204 ("FDUTPA"). Third Amended Complaint, Dkt. # 26, pp. 10-12. Defendant asserts, in the first instance, that Washington law, not Florida law, applies to all

of plaintiff's claims, because he specifically agreed to that under the Terms of Use when he registered on the Avvo.com website.

The Terms of Use agreement states, in relevant part, that

> These Site Terms and your use of the Site shall be governed by and construed in accordance with the law of the State of Washington applicable to agreements made and to be entirely performed within the State of Washington (even if your use is outside the State of Washington), without resort to its conflict of law provisions. You agree that with respect to any disputes or claims . . . any action at law or in equity arising out of or relating to the Site or these Site Terms shall be filed only in the state and federal courts located in King County, Washington. . . .

Declaration of Joshua King, Dkt. # 16, ¶¶ 3-9, Exhibit 1. As noted above, the district court in Florida held that plaintiff is bound by the Terms of Use when it enforced the forum selection clause. The court also addressed the enforceability of the choice of law provision, noting that

> Washington and Florida courts review the enforceability of choice of law provisions under a standard similar to that set forth in Section 187 of the Restatement (Second) of Conflict of Laws (*i.e.*, whether a choice of law clause would violate the public policy of the state with the materially greater interest).

Order of Transfer, Dkt. # 46, p. 8 (*citing In re DirecTV Early Cancellation Litigation*, 738 F. Supp. 2d 1062, 1088-90 (C.D.Ca. 2010)). The court found that the Washington Consumer Protection Act, RCW 19.86.020 (WCPA), and the FDUTPA are "substantially similar," and that even if this Court were to apply the WCPA to plaintiff's claims, and "assuming that the WCPA is more restrictive than the FDUCPA," the enforcement of the forum selection clause would not deprive plaintiff of his day in court. *Id.*

This Court applies the choice-of-law principles of the transferor court. *Shannon-Vail Five, Inc., v. Bunch*, 270 F. 3d 1207, 1210 (9th Cir. 2001). Florida law holds that contractual choice of law provisions are presumptively valid. *Gaisser v. Portfolio Recovery Associates, LLC*, 593 F. Supp. 2d 1297, 1300 (S.D.Fla. 2009). "Florida enforces choice-of-law provisions unless the law of the chosen forum contravenes strong public policy." *Mazzoni Farms, Inc., v. E.I. DuPont de Nemours & Co.*, 761 So. 2d 306, 311 (Fla. 2000). Nowhere does plaintiff argue that analysis of his claims under Washington law would contravene strong public policy. He simply contends that "section 501.211 [of

the Florida Statues] is not waivable by any [Terms of Use]." Plaintiff's Response, Dkt. # 6.[6] That assertion is not responsive to the choice of law question. Further, the Florida district court's determination that the WCPA and FDUTPA are substantially similar,[7] and that application of Washington law would not be unfair to plaintiff, constitutes a finding that such application would not contravene strong public policy. This Court therefore finds that the choice-of-law clause is enforceable, and that the WCPA, not the FDUTPA shall apply to plaintiff's claims.[8]

The WCPA's citizen suit provision states that "[a]ny person who is injured in his or her business or property" by a violation of the act may bring a civil suit for injunctive relief, damages, attorney fees and costs, and treble damages. RCW 19.86.090. To prevail on a private WCPA claim, plaintiff must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to the plaintiff's business or property, and (5) causation. *Panag v. Farmers Insurance Co. of Washington* , 166 Wash. 2d 27, 37 (2009) (*citing Hangman Ridge Stables, Inc., v. Safeco Title Insurance Co.*, 105 Wn. 2d 778, 784 (1986). The causation element may be met by demonstrating that the deceptive acts "induced the plaintiff to act or refrain from acting," and the plaintiff's damages were "brought about by such action or failure to act." *Fidelity Mortgage Co. v. Seattle Times Co.*, 131 Wash. App. 462, 468-69 (2005).

In the Third Amended Complaint, plaintiff identifies the deceptive acts or practices as the misrepresentation of his practice area, together with the misappropriation of his image and placement on his profile page. He claims that his listing on the website was "deceptive to the public, to consumers, to

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[6]Section 501.211 provides a private right of action under the FDUTPA to "anyone aggrieved by a violation of this part." Fla.Stat. § 501.211(1).

[7] The court compared Fla.Stat. § 501.204(1), which prohibits "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce" with RCW 19.86, which prohibits "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Order of Transfer, Dkt. # 43, p. 8.

[8] Treating plaintiff's claims under the WCPA instead of the FDUTPA is not prejudicial to plaintiff in terms of the ruling on this motion to strike. The private right of action under the FDUTPA is tempered by a provision requiring the plaintiff to post a bond to indemnify the defendant for damages, including attorney's fees, in the event the action is found to be frivolous, lacking in legal or factual merit, or brought for the purpose of harassment. Fla.Stat. 501.211(3).

other lawyers, and specifically to the potential client referenced herein." Third Amended Complaint, Dkt. # 26, ¶ 43. He asserts that this misrepresentation of his practice area is an attempt by Avvo.com to "coerce lawyers by illegal and tortious conduct, on an epidemic scale, to correct mislistings" and is "an actionable trade practice." *Id.*, ¶ 41.

As noted by the Florida district court, both the WCPA and the FDUTPA require that the deceptive act occur in trade or commerce. This Court has previously held that Avvo.com does not engage in "trade" or "commerce." *John Henry Browne v. Avvo, Inc.*, 525 F. Supp. 2d 1249, 1254 (W.D.Wash. 2007).

> "Trade" and "commerce" are defined as "the sale of assets or services. . . . Avvo collects data from public sources, attorneys, and references, rates attorneys (where appropriate), and provides both the underlying data and the ratings to consumers free of charge. No assets or services are sold to people who visit the site in the hopes of finding a lawyer and no charge is levied against attorneys or references who choose to provide information. It is hard to imagine how an information clearinghouse and/or ratings service could be considered "commerce". . . . Instead, plaintiffs argue that Avvo's offer to sell advertising space to attorneys transforms all of defendants' activities into trade or commerce. The advertising program is separate and distinct from the attorney profiles that are the subject of plaintiffs' complaint.

Id. The Court ruled that "Avvo's publication of information and ratings based on available data is not 'trade or commerce' and cannot form the basis of a CPA claim." *Id.*

Plaintiff seeks to distance his claim from this result by asserting that "[i]n the *Browne* opinion, this Court stated at 1254 that the placement of paid advertising in a free listing of brokerage rates would make such list commercial speech." Plaintiff's Response, Dkt. # 50, p. 8 (*citing Fidelity Mortgage Corp. v. Seattle times Co.*, 131 Wash. App. at 470. This statement mischaracterizes the ruling in *Browne*. Referring to *Fidelity Mortgage*, the Court stated that "the court found that a newspaper's publication of mortgage rates from various lenders was not, in the absence of payment from the lenders, trade or commerce. On the other hand, the same rate chart could be considered trade or commerce if the newspaper accepted an advertising fee in exchange for including a lender in the chart." *Browne*, 525 F. Supp. 2d at 1254. The Court thus distinguished a hypothetical situation where a newspaper accepted a fee for "including a lender in the chart" from the Avvo.com website where the free attorney profiles and the advertising images on the right side of the webpage are "separate and distinct."

Plaintiff thus cannot assert a claim under the WCPA for the alleged misrepresentation of his practice area or the use of his image, as these are part of his profile which under *Browne* is not "trade or commerce." However, in his response to the motion to strike, he clarifies that his claim concerns a different "deceptive act or practice" that he contends is related to Avvo's business model. This argument arises from his allegation in the Third Amended Complaint at ¶ 41, noted above, that the misrepresentation of his practice area is an intentional act by Avvo to induce him to register on the website to correct the misrepresentation.[9] "This profile-based content-based ad space is on information and belief, one of two primary revenue generators for Defendants, the other being the Avvo Pro membership (to stop the targeted ads, of course.)" Plaintiff's Response, Dkt. # 50, p. 9. Plaintiff thus contends that lawyers are induced to apply for "Pro" membership to prevent competitor's ads from appearing on their profile pages. He states, "That is, in fact, apparently one of the primary selling points of the Avvo Pro membership." *Id.*, 8. The Court accepts this as plaintiff's statement of the deceptive act or practice which forms the basis of his WCPA claim.

Plaintiff has presented no evidence, let alone clear and convincing evidence, to demonstrate that there is any probablily of prevailing on his WCPA claim. He points to no evidence in the record to support the conclusory allegations regarding Avvo's advertisements. Indeed, he has provided no evidence at all; he has merely "verified" the allegations set forth in his Third Amended Complaint. Affidavit of Larry Joe Davis, Dkt. # 51. A complaint is not evidence. Plaintiff has submitted no separate declaration of facts within his personal knowledge which support his claims, as contemplated under RCW 4.24.525(4)(c) (In determining whether a party has established by clear and convincing evidence a probability of prevailing on a claim, "the court shall consider the pleadings and supporting and opposing affidavits stating the facts.") Instead of presenting an affidavit, plaintiff asserts in his response that "[i]f one were to search on Avvo for a particular well-known lawyer, such as a well-known Board Certified

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[9] This allegation of an intentional act to "coerce" lawyers contradicts the pleading at ¶ 38 that the mistake is simply the result of careless programming. "Avvo.com's computer program was not designed properly, and in a rush to list and rate '90% of lawyers in the United States' allowed the program to run rampant making reckless mistakes, as was the case here and with the other Board Certified lawyers mentioned herein." Third Amended Complaint, Dkt. # 26, ¶ 38.

Health Lawyer, when one is directed to that lawyer's page, one would likely see an advertisement for a competing lawyer, as Plaintiff did in August 2010, which competing lawyer has paid Avvo to have that ad placed on the listed lawyer's page." Plaintiff's Response, Dkt. # 50, p. 9. These speculations as to what "one would likely see," are not evidence. Nor has plaintiff alleged how this allegedly deceptive act of Avvo induced him to act or refrain from acting in some manner, so as to establish causation for his loss. *Fidelity Mortgage Co.*, 131 Wash. App. at 468. Finally, he has not alleged any actual damages caused by the deceptive act.

In his complaint, plaintiff pleads in general terms that "Defendant's actions have damaged Plaintiff individually, as well as many other lawyers in Florida, and Defendant's actions have misled consumers in Florida." Third Amended Complaint, Dkt. # 26, ¶ 51. He requests "actual damages" in addition to declaratory and injunctive relief, but nowhere in the complaint does he state what monetary loss he actually suffered. While plaintiff purports to represent the interests of other Florida attorneys and the general public in this matter, he may only request monetary damages for his own losses.

In his response to the motion to strike, he clarifies that he was "directly damaged by the time wasted on the phone with a potential client that had been misled by the Avvo.com site." Plaintiff's Response, Dkt. # 50, p. 11. He estimates his loss at one-half hour of his time, which he bills at $350 an hour, for a total of $175. He asserts there were other calls, so his damages are "not de minimus or speculative, especially on a massive scale." *Id.* The problem, however, is not that his loss is de minimus, but that it does not flow from the alleged deceptive act. According to the allegations of the complaint, the prospective client called him, and wasted his time, solely because of his profile; she erroneously thought he was a "low-ranking" attorney who practiced "100% employment law." Third Amended Complaint, Dkt. # 26, ¶ 22. Under *Browne*, information on the profile page cannot serve as the basis for a WCPA claim. Plaintiff is fully aware of this, as he seeks to distinguish his consumer fraud claim and escape the *Browne* bar by defining the alleged deceptive act as arising from the advertisements placed on the profile page. Yet he has alleged no damages flowing from that deceptive act. Indeed, it would be contrary to the allegations of the complaint for him to do so, as he alleges that the prospective client called him in spite of the advertisements of other attorneys on his page, not

because of them.

Plaintiff has failed to produce any evidence that would demonstrate a probability of prevailing on his WCPA claim. Nor has he brought forth any evidence to support his false advertising and misuse of his likeness claims, or argued any elements of these torts under Washington law. Plaintiff was put on notice by the Order of Transfer that he is bound by the Terms of Use, and as an experienced attorney he should have anticipated that this Court would find him bound by the choice of law provisions therein. Yet he chose to oppose the motion to strike solely under Florida law, and failed to come forward with any evidence to support his claims even under Florida law. As plaintiff has not produced clear and convincing evidence to demonstrate a probability of prevailing on any of his claims, the motion to strike under RCW 4.24.525 shall be granted as to all claims.

CONCLUSION

Defendant has met the burden under RCW 4.24.525(4)(b) of demonstrating that plaintiff's claims are based on an action involving public participation or petition in an issue of public concern. The burden therefore shifts to plaintiff to show, by clear and convincing evidence, a probability of prevailing on his claim. Plaintiff has failed to produce or point to such evidence. The special motion to strike (Dkt. # 47) is accordingly GRANTED as to all claims, and this action is DISMISSED.

Pursuant to RCW 4.24.525(6)(a)(I) and (ii), defendant as the prevailing party is entitled to costs of litigation and reasonable attorney's fees incurred in connection with each successful motion, together with a statutory award of ten thousand dollars. Defendant shall accordingly make application to the Court for reasonable attorney's fees incurred in bringing the motion to transfer venue (Dkt. # 32) and this motion (Dkt. # 47). Such application shall be filed within three weeks of the date of this Order, and shall be noted on the Court's calendar for the third Friday thereafter so plaintiff may have an opportunity to respond.

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Judgment shall be entered after the Court has determined the amount of reasonable attorney's fees and shall include such amount.

Dated this 28 day of March 2012.

RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

ASSEMBLY AGENDA

COMMITTEE ON JUDICIARY

Day Tuesday Date May 14, 2013 Time 8 a.m. Room 3138

Room 3138 of the Legislative Building, 401 S. Carson St., Carson City, NV.
Videoconferenced to Room 4401 of the Grant Sawyer State Office Building, 555 E. Washington Ave., Las Vegas, NV.

REVISED

Opening Remarks

S.B. 118	Revises provisions relating to forfeiture of property. (BDR 14-462)
S.B. 356	Revises provisions relating to real property. (BDR 9-824)
S.B. 389 (R1)	Revises provisions relating to real property. (BDR 9-601)
S.B. 424 (R1)	Revises provisions relating to foreclosures. (BDR 3-1113)

WORK SESSION

A work session is scheduled on previously heard measures, which may include the following:

S.B. 71	Revises provisions governing sentencing of certain criminal offenders and determining eligibility of certain prisoners for parole. (BDR 14-447)
S.B. 103 (R1)	Revises the period of limitation for crimes relating to the sexual abuse of a child. (BDR 14-177)
S.B. 106 (R1)	Revises various provisions relating to judicial administration. (BDR 14-509)
S.B. 169 (R1)	Revises provisions governing criminal penalties. (BDR 15-495)
S.B. 286 (R1)	Provides immunity from civil action under certain circumstances. (BDR 3-675)
S.B. 347	Requires the Advisory Commission on the Administration of Justice to consider certain matters relating to parole. (BDR S-1050)
S.B. 419	Revises provisions relating to marriage. (BDR 11-1107)
S.B. 432	Revises provisions governing the regulation of taxicabs. (BDR 58-1073)

Public comment.

Matters continued from a previous meeting.

Please note that testimony and exhibits submitted to the Senate committee at the first hearing will not be carried over for the hearing in the Assembly Committee on Judiciary. Materials for consideration by the Assembly committee must be resubmitted. Unless waived by the Chairman, proposed amendments, written testimony, and other documents for the record must be submitted electronically in PDF format to the Committee Manager at AsmJud@asm.state.nv.us no later than 5:00 p.m. the business day before the meeting. Proposed amendments must include the Bill and/or Resolution number, a statement of intent, and the name and contact information of the amendment sponsor. Please bring 20 copies of your prepared statements, proposed amendments, and handouts to the Committee meeting.

If you cannot attend the meeting, you can listen to it live over the Internet. The address for the legislative website is http://www.leg.state.nv.us. For audio broadcasts, click on the link "Calendar of Meetings/View."

Note: We are pleased to make reasonable accommodations for members of the public who are disabled and wish to attend the meeting. If special arrangements for the meeting are necessary, please notify the Assembly Committee on Judiciary at (775) 684-8566.

(R#) Indicates the reprint number of the bill/resolution being considered.

PLEASE PROVIDE 20 COPIES OF YOUR DOCUMENTS.

Meeting ID: 1128

MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Seventh Session
May 14, 2013

The Committee on Judiciary was called to order by Chairman Jason Frierson at 8:17 a.m. on Tuesday, May 14, 2013, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at nelis.leg.state.nv.us/77th2013. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman Jason Frierson, Chairman
Assemblyman James Ohrenschall, Vice Chairman
Assemblyman Richard Carrillo
Assemblywoman Lesley E. Cohen
Assemblywoman Olivia Diaz
Assemblywoman Marilyn Dondero Loop
Assemblyman Wesley Duncan
Assemblywoman Michele Fiore
Assemblyman Ira Hansen
Assemblyman Andrew Martin
Assemblywoman Ellen B. Spiegel
Assemblyman Tyrone Thompson
Assemblyman Jim Wheeler

COMMITTEE MEMBERS ABSENT:

None

Minutes ID: 1128

someone can apply for citizenship as opposed to the district attorney having too much work, I will jump to the side of the person applying for citizenship.

Assemblyman Ohrenschall:
The conceptual amendment is a change from the amendment in the work session, because it changes the limit from 365 days to 364 days. You would be limiting the group of people who might seek this type of relief. That would address some of the concern about caseload. If it is a meritorious claim for lowering it, nothing mandates the prosecutor to file or apply to oppose this. It is only when they feel it is unwarranted. We are talking about sentences that were already served. They are not looking at getting out of their sentence.

Chairman Frierson:
Is there any other discussion on the bill? I am seeking a motion to amend and do pass with the conceptual amendment. In a practical sense, we are talking about a day.

> ASSEMBLYWOMAN DIAZ MOVED TO AMEND AND DO PASS SENATE BILL 169 (1ST REPRINT).
>
> ASSEMBLYWOMAN SPIEGEL SECONDED THE MOTION.
>
> THE MOTION PASSED. (ASSEMBLYMEN DUNCAN, HANSEN, AND WHEELER VOTED NO.)

Ms. Spiegel will do the floor statement.

Next on our work session we have Senate Bill 286 (1st Reprint).

Senate Bill 286 (1st Reprint): Provides immunity from civil action under certain circumstances. (BDR 3-675)

Dave Ziegler, Committee Policy Analyst:
Senate Bill 286 (1st Reprint) was sponsored by Senator Jones. It was heard in this Committee on May 6, 2013. This bill relates to strategic lawsuits against public participation, also known as SLAPP suits. [Continued to read from work session document (Exhibit M).]

Chairman Frierson:
Is there any discussion on this bill? [There was none.]

ASSEMBLYMAN CARRILLO MOVED TO DO PASS SENATE BILL 286 (1ST REPRINT).

ASSEMBLYWOMAN DIAZ SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

Mr. Duncan will do the floor statement.

Next on our work session we have Senate Bill 347.

Senate Bill 347: Requires the Advisory Commission on the Administration of Justice to consider certain matters relating to parole. (BDR S-1050)

Dave Ziegler, Committee Policy Analyst:
Senate Bill 347 was sponsored by Senator Brower. It was heard in this Committee on April 29, 2013. This bill requires the Advisory Commission on the Administration of Justice to include on an agenda a discussion of items relating to parole. [Continued to read from work session document (Exhibit N).]

Chairman Frierson:
Is there any discussion on this bill? [There was none.]

ASSEMBLYMAN CARRILLO MOVED TO DO PASS SENATE BILL 347.

ASSEMBLYMAN OHRENSCHALL SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

Mr. Wheeler will do the floor statement.

Next on our work session we have Senate Bill 419.

Senate Bill 419: Revises provisions relating to marriage. (BDR 11-1107)

EXHIBITS

Committee Name: Committee on Judiciary

Date: May 14, 2013 **Time of Meeting:** 8:17 a.m.

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
S.B. 118	C	Brett Kandt	Letter in Support
S.B. 389 (R1)	D	Senator Segerblom	Proposed Amendment by Venicia Considine
S.B. 389 (R1)	E	Venicia Considine	Written Testimony
S.B. 389 (R1)	F	Mary Law	Written Testimony
S.B. 424 (R1)	G	Senator Segerblom	Pictures
S.B. 424 (R1)	H	Jennifer DiMarzio-Gaynor	Proposed Amendment
S.B. 71	I	Dave Ziegler	Work Session Document
S.B. 103 (R1)	J	Dave Ziegler	Work Session Document
S.B. 106 (R1)	K	Dave Ziegler	Work Session Document
S.B. 169 (R1)	L	Dave Ziegler	Work Session Document
S.B. 286 (R1)	M	Dave Ziegler	Work Session Document
S.B. 347	N	Dave Ziegler	Work Session Document
S.B. 419	O	Dave Ziegler	Work Session Document

S.B. 432	P	Dave Ziegler	Work Session Document

Committee Action:
Do Pass _____
Amend & Do Pass _____
Other _____

Assembly Committee on Judiciary

This measure may be considered for action during today's work session.

May 14, 2013

SENATE BILL 286 (R1)

Provides immunity from civil action under certain circumstances. (BDR 3-675)

Sponsored by:	**Senators Jones, Segerblom, Kihuen, et al.**
Date Heard:	**May 6, 2013**
Fiscal Impact:	**Effect on Local Government: No.**
	Effect on the State: No.

Senate Bill 286 relates to strategic lawsuits against public participation ("SLAPP suits"). The bill provides that a person who engages in 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 civil action for claims based on the communication.

With respect to a special motion to dismiss a SLAPP suit, if the moving party establishes that the suit is based on such good faith communication and that the moving party has a probability of prevailing, S.B. 286 requires the court to ensure that the determination is not entered into evidence in a subsequent proceeding, and to rule on the motion within seven judicial days after the motion is served on the plaintiff.

If a court grants a special motion to dismiss, the measure authorizes the court to award reasonable costs and attorney's fees and an amount up to $10,000 to the person against whom the action was brought. If the court denies a special motion to dismiss and finds that the motion was frivolous or vexatious, the measure provides that the prevailing party shall receive reasonable costs and attorney's fees and may be granted an amount up to $10,000 and any such additional relief as the court deems proper.

Amendments: None.

Assembly Committee: Judiciary
Exhibit: M Page 1 of 1 Date: 05/14/13
Submitted by: Dave Ziegler

NEVADA LEGISLATURE

Seventy-Seventh Session, 2013

SENATE DAILY JOURNAL

THE FORTIETH DAY

CARSON CITY (Friday), March 15, 2013

Senate called to order at 11:29 a.m.
President Krolicki presiding.
Roll called.
All present except Senator Denis, who was excused.
Prayer by Pastor Bob Chambers, First Baptist Church of Carson City.

Almighty God, we pause at the beginning of this Session to acknowledge you as the source of wisdom and understanding. We acknowledge that you have created us in Your image and given us gifts and talents with which we can use to serve each other. We thank You again for these who have chosen to live lives of service. I pray that they will feel the reward that comes by serving, especially in the affairs of government.

We think today of Senator Denis and his family and ask for your grace to be extended to them.

In the days ahead, many and important bills will be considered and voted upon here. I pray that You will give wisdom from above, and may each member have the courage to vote according to their own values. I pray that the laws enacted will benefit the people of this great State.

In the name of Him who gives us wisdom and courage.

AMEN.

Pledge of Allegiance to the Flag.

REMARKS FROM THE FLOOR

PRESIDENT KROLICKI:

We have a special treat this morning. Everyone is smiling because we have the Truckee River Dance Company in the Chamber in honor of St. Patrick's Day. Please help me welcome Christiana Cabrera, who is also a Nevada Youth Legislator, Hannah Myers and Sienna Shane who will perform for us now.

The President announced that under previous order, the reading of the Journal is waived for the remainder of the 77th Legislative Session and the President and Secretary are authorized to make any necessary corrections and additions.

Nevada Ethics in Government Law requires a finding by the Commission that the person acted in bad faith or with ill will, evil intent or malice, and with knowledge of the prohibition against the act or omission; authorizing the Commission to impose civil penalties and amounts equal to attorney's fees and other costs under certain circumstances; requiring an affirmative vote by two-thirds of the Commission for the finding of a willful violation of the Nevada Ethics in Government Law; and providing other matters properly relating thereto.

Senator Hardy moved that the bill be referred to the Committee on Legislative Operations and Elections.

Motion carried.

By Senators Hardy and Goicoechea:

Senate Bill No. 284—AN ACT relating to law enforcement; requiring a law enforcement agency in certain counties to adopt policies and procedures to govern the investigation of motor vehicle accidents in which peace officers employed by the law enforcement agency are involved; and providing other matters properly relating thereto.

Senator Hardy moved that the bill be referred to the Committee on Government Affairs.

Motion carried.

By Senator Hardy:

Senate Bill No. 285—AN ACT relating to emergency medical services; revising provisions governing the exemption of certain air ambulances and attendants from the provisions governing emergency medical services; limiting the scope of certain provisions governing the regulation of air ambulances; and providing other matters properly relating thereto.

Senator Hardy moved that the bill be referred to the Committee on Health and Human Services.

Motion carried.

By Senators Jones, Segerblom, Kihuen and Ford:

Senate Bill No. 286—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.

Senator Jones moved that the bill be referred to the Committee on Judiciary.

Motion carried.

NEVADA LEGISLATURE

Seventy-Seventh Session, 2013

SENATE DAILY JOURNAL

THE SEVENTY-FIFTH DAY

CARSON CITY (Friday), April 19, 2013

Senate called to order at 11:29 a.m.
President Krolicki presiding.
Roll called.
All present.
Prayer by Pastor Albert Tilstra, Seventh-day Adventist Church, Fallon.

Good morning Lord. I ask that You give the Senators today the provisions of Your grace. Provide them with the grace of Your comfort to cheer, Your wisdom to teach, Your counsel to instruct and Your presence to inspire.

Prosper the works of their hands as You direct their steps. Lord, show them what needs to be changed and give them the courage and wisdom to do what is right for the people they represent. In all the work You elected them to do, help them to strive to fulfill Your purpose for this day and for this Session.

We pray in the name of the Almighty.

AMEN.

Pledge of Allegiance to the Flag.

The President announced that under previous order, the reading of the Journal is waived for the remainder of the 77th Legislative Session and the President and Secretary are authorized to make any necessary corrections and additions.

REPORTS OF COMMITTEES

Mr. President:

Your Committee on Commerce, Labor and Energy, to which were referred Senate Bill Nos. 88, 208, 211, 267 and 496, has had the same under consideration, and begs leave to report the same back with the recommendation: Amend, and do pass as amended.

KELVIN ATKINSON, *Chair*

Mr. President:

Your Committee on Health and Human Services, to which were referred Senate Bill Nos. 410, 448 and 453, has had the same under consideration, and begs leave to report the same back with the recommendation: Amend, and do pass as amended.

JUSTIN C. JONES, *Chair*

The following amendment was proposed by the Committee on Judiciary.
Amendment No. 187.
Senator Kihuen moved the adoption of the amendment.
Remarks by Senator Kihuen.
Thank you, Mr. President. Amendment No. 187 to Senate Bill No. 286 clarifies that the court shall rule on the motion within seven judicial days after the motion is served upon the plaintiff. It also makes it permissive for the court to award an additional amount up to $10,000 under certain circumstances. Thank you.

Amendment adopted.
Bill ordered reprinted, engrossed and to third reading.

Senate Bill No. 297.
Bill read second time.
The following amendment was proposed by the Committee on Judiciary.
Amendment No. 406.
Senator Kihuen moved the adoption of the amendment.
Remarks by Senator Kihuen.
Thank you, Mr. President. Amendment No. 406 to Senate Bill No. 297 retains the current one year term of imprisonment for crimes committed against persons 60 years of age or older or against vulnerable persons. Thank you.

Amendment adopted.
Bill ordered reprinted, engrossed and to third reading.

Senate Bill No. 307.
Bill read second time.
The following amendment was proposed by the Committee on Judiciary.
Amendment No. 241.
Senator Kihuen moved the adoption of the amendment.
Remarks by Senator Kihuen.
Thank you, Mr. President. Amendment No. 241 to Senate Bill No. 307 provides a definition for "foreign jurisdiction" and "non-testamentary trust" in Chapter 132 of *Nevada Revised Statutes*. It provides a definition for "district court" be added in section 116 of Chapter 132 of *Nevada Revised Statutes*. Finally, based upon the amendments, Sections 8, 9 and 17 of the bill are deleted. Thank you.

Amendment adopted.
Bill ordered reprinted, engrossed and to third reading.

Senate Bill No. 312.
Bill read second time.
The following amendment was proposed by the Committee on Transportation.
Amendment No. 415.
Senator Manendo moved the adoption of the amendment.

NEVADA LEGISLATURE

Seventy-Seventh Session, 2013

SENATE DAILY JOURNAL

THE SEVENTY-EIGHTH DAY

CARSON CITY (Monday), April 22, 2013

Senate called to order at 12:01 p.m.

President Krolicki presiding.

President Krolicki asked that the Senate take a moment to reflect on the incident one week ago today, in Boston, at the Marathon and observe a moment of silence to support and consider those we lost and those who were so badly injured.

Roll called.

All present.

Prayer by Pastor Peggy Locke, Fountainhead Foursquare Church, Carson City.

Because Your loving-kindness is better than life, my lips will praise You. So I will bless You as long as I live; I will lift up my hands in Your name.

Please pray with me. O'God Most High, Creator, Sustainer and Giver of Life, as we gather together today, representing the people of our great State of Nevada, we ask for Your discernment, understanding and wisdom as this floor session begins.

We pray for families and friends who have been affected by the tragedy in Boston this last week. We pray for healing in our Nation, that we stay strong in faith in the midst of terror and the continuing onslaught of the enemy.

We give You thanks Lord, for Your abiding presence with us; that through the storms of life, You promise never to leave us nor forsake us. We pray for all those serving in harm's way—at home and abroad. Protect them and bless each one who strives for freedom and peace in our country.

We pray in Your most holy name.

AMEN.

Pledge of Allegiance to the Flag lead by Zoe Bertz.

The President announced that under previous order, the reading of the Journal is waived for the remainder of the 77th Legislative Session and the President and Secretary are authorized to make any necessary corrections and additions.

SENATOR FORD:

Thank you, Mr. President. I rise in support of Senate Bill No. 278 which provides for an expedited process for abandoned homes through the foreclosure process. It adds a strict definition of "abandoned home." I urge this Body's support. Thank you.

SENATOR JONES:

Thank you, Mr. President. I rise in support of Senate Bill No. 278. I applaud my colleague from Senate District No. 11 for his diligent efforts on this legislation. Too often while knocking on doors last year, I came across abandoned properties with overgrown or dead vegetation, homes stripped of all valuable contents or vacancy notices posted on the front door that were clearly months old.

My own next door neighbors abandoned their home leaving their pool so green with algae, we had to call the county to have it drained. Abandoned properties drive down the values of residents who remain in their homes; abandoned properties are also an attractive nuisance for criminal activity. Senate Bill No. 278 will benefit neighborhoods and homeowners throughout Senate District No. 9 and throughout the State. I urge your support. Thank you.

Roll call on Senate Bill No. 278:

YEAS—21.

NAYS—None.

Senate Bill No. 278 having received a two-thirds majority, Mr. President declared it passed.

Bill ordered transmitted to Assembly.

Senate Bill No. 283.

Bill read third time.

Remarks by Senator Hardy.

Thank you, Mr. President. Senate Bill No. 283 revises the Nevada Ethics in Government Law. When resolving certain requests for opinion, the Commission on Ethics shall treat comparable situations similarly and shall ensure that disposition of a request reasonably relates to the severity of the violation. The Commission shall consider certain factors when determining the amount of any civil penalty, including the seriousness of the violation, a person's history of previous warnings or violations, mitigating factors and any other matter justice may require. The definitions of "intentionally" and "knowingly" are revised to require proof of intent or reckless disregard and knowledge of the prohibition against the conduct. A two-thirds vote is required to impose a finding that a violation was willful. Thank you.

Roll call on Senate Bill No. 283:

YEAS—21.

NAYS—None.

Senate Bill No. 283 having received a constitutional majority, Mr. President declared it passed.

Bill ordered transmitted to Assembly.

Senate Bill No. 286.

Bill read third time.

Remarks by Senator Jones.

Thank you, Mr. President. Senate Bill No. 286 modernizes our Anti-SLAPP laws in response to the Ninth Circuit Court of Appeals decision from last year. It found that the existing statutes were limited in scope.

Senate Bill No. 286 defines the right to free speech in direct connection with an issue of public concern to be in a place open to the public or in a public forum. A person who engages in such communication is immune from any civil action for claims based upon that communication. If a civil action is sought and the person who engaged in the communication files a special motion to dismiss, the measure adds a process for the court to follow and provides that a court ruling on the motion must be made within seven judicial days after the motion is served upon the plaintiff.

As a result of our antiquated Anti-SLAPP laws, businesses were not moving to the State of Nevada or were seeking to move out of the State. This bill passed unanimously out of the Senate Committee on Judiciary. I urge your support. Thank you.

Roll call on Senate Bill No. 286:

YEAS—21.

NAYS—None.

Senate Bill No. 286 having received a constitutional majority, Mr. President declared it passed.

Bill ordered transmitted to Assembly.

Senate Bill No. 297.

Bill read third time.

Remarks by Senator Brower.

Thank you, Mr. President. Senate Bill No. 297 adds an attempt or conspiracy to commit certain crimes against persons who are older or vulnerable to the list of crimes for which additional penalties must be imposed. This bill is effective on October 1, 2013. I would like to thank the Minority Leader for bringing this bill; it was a missing link in the statutes with respect to crimes against elderly and vulnerable people. I urge your support. Thank you.

Roll call on Senate Bill No. 297:

YEAS—21.

NAYS—None.

Senate Bill No. 297 having received a constitutional majority, Mr. President declared it passed.

Bill ordered transmitted to Assembly.

Senate Bill No. 307.

Bill read third time.

Remarks by Senator Jones.

Thank you, Mr. President. Senate Bill No. 307 makes changes to trusts, estates and probate. It changes the Trust of States and Probates, amends the definition of an "interested person" to include all persons who interest in an estate or trust will be materially affected by a decision of a fiduciary or a decision of the court. In addition, the measure revises provisions relating to wills, including clarification that if a declaratory judgment is entered during the lifetime of the decedent, declaring a document to be the valid will of the decedent, then the validity of that will is not subject to challenge after the death of the decedent.

The measure authorizes the waiver of an inventory or appraisal of the property upon unanimous written consent of each interested person. It enacts into statute certain duties of a fiduciary and adds to the powers of a trustee to combine or divide trusts and the power to change the name of a trust in certain circumstances. I urge your support. Thank you.

NEVADA LEGISLATURE

Seventy-Seventh Session, 2013

ASSEMBLY DAILY JOURNAL

THE ONE HUNDRED AND EIGHTH DAY

CARSON CITY (Wednesday), May 22, 2013

Assembly called to order at 12:05 p.m.

Madam Speaker presiding.

Roll called.

All present except Assemblywoman Pierce, who was excused.

Prayer by the Chaplain, Pastor Albert Tilstra, Seventh-Day Adventist Church, Fallon, Nevada.

The time is ticking by pretty fast as we are seeing the deadlines for this session of the Legislature. It is so easy to become confused and then live in cross-purposes to our central aims, and because of that, we are at cross-purposes with each other. Take us by the hand and help as to see things from Your viewpoint that we may see them as they really are. We come to choices and decisions with a prayer on our lips for our wisdom fails us. Give to these, Your servants, Your wisdom. We ask this in Your Name.

AMEN.

Pledge of allegiance to the Flag.

Assemblyman Horne moved that further reading of the Journal be dispensed with, and the Speaker and Chief Clerk be authorized to make the necessary corrections and additions.

Motion carried.

MOTIONS, RESOLUTIONS AND NOTICES

By Assemblymen Kirkpatrick, Aizley, Elliot Anderson, Paul Anderson, Benitez-Thompson, Bobzien, Bustamante Adams, Carlton, Carrillo, Cohen, Daly, Diaz, Dondero Loop, Duncan, Eisen, Ellison, Fiore, Flores, Frierson, Grady, Hambrick, Hansen, Hardy, Healey, Hickey, Hogan, Horne, Kirner, Livermore, Martin, Munford, Neal, Ohrenschall, Oscarson, Pierce, Spiegel, Sprinkle, Stewart, Swank, Thompson, Wheeler and Woodbury; Senators Denis, Atkinson, Brower, Cegavske, Ford, Goicoechea, Gustavson,

Senate Bill No. 286.

Bill read third time.

Remarks by Assemblyman Duncan.

ASSEMBLYMAN DUNCAN:

Thank you, Madam Speaker. Senate Bill 286 defines the right to free speech in direct connection with an issue of public concern to be in a place open to the public or in a public forum. A person who engages in such communication is immune from any civil action for claims based upon that communication. If a civil action is sought and the person who engaged in the communication files a special motion to dismiss, the measure adds a process for the court to follow and provides that a court ruling on the motion must be made within seven judicial days after the motion is served upon the plaintiff.

If a court grants a special motion to dismiss, the measure provides that in addition to reasonable costs and attorney's fees, the court may award an amount up to $10,000 to the person against whom the action was brought. If the court denies a special motion to dismiss and finds that the motion was frivolous or vexatious, the measure provides that the prevailing party shall receive reasonable costs and attorney's fees and may be granted an amount 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. Finally, the measure provides that if the court denies a special motion to dismiss, an interlocutory appeal lies to the Supreme Court. Thank you, Madam Speaker.

Roll call on Senate Bill No. 286:

YEAS—41.

NAYS—None.

EXCUSED—Pierce.

Senate Bill No. 286 having received a constitutional majority, Madam Speaker declared it passed.

Bill ordered transmitted to the Senate.

MOTIONS, RESOLUTIONS AND NOTICES

Assemblyman Horne moved that Assembly Bill No. 67 be taken from its position on the General File and placed at the top of the General File.

Motion carried.

GENERAL FILE AND THIRD READING

Assembly Bill No. 67.

Bill read third time.

Remarks by Assemblyman Frierson.

ASSEMBLYMAN FRIERSON:

Thank you, Madam Speaker. Assembly Bill 67 defines the crime of sex trafficking separately from the crime of pandering. It authorizes the court to order videotaped depositions of a victim of sex trafficking and establishes a rebuttable presumption that good cause exists for such an order. Assembly Bill 67 authorizes a victim of sex trafficking or human trafficking to bring a civil action against the person who caused or profited from the act of trafficking. The bill makes other related changes to the statutes on criminal procedure crimes and punishments and grants the Attorney General concurrent jurisdiction to prosecute any offense involving pandering and sex trafficking without leave of the court.

Amendment No. 187

Senate Amendment to Senate Bill No. 286 (BDR 3-675)
Proposed by: Senate Committee on Judiciary
Amends: Summary: No Title: No Preamble: No Joint Sponsorship: No Digest: Yes

ASSEMBLY ACTION	Initial and Date	SENATE ACTION	Initial and Date
Adopted ☐ Lost ☐		Adopted ☐ Lost ☐	
Concurred In ☐ Not ☐		Concurred In ☐ Not ☐	
Receded ☐ Not ☐		Receded ☐ Not ☐	

EXPLANATION: Matter in (1) ***blue bold italics*** is new language in the original bill; (2) ***green bold italic underlining*** is new language proposed in this amendment; (3) ~~red strikethrough~~ is deleted language in the original bill; (4) ~~purple double strikethrough~~ is language proposed to be deleted in this amendment; (5) orange double underlining is deleted language in the original bill that is proposed to be retained in this amendment; and (6) **green bold underlining** is newly added transitory language.

VMS/DY

Date: 4/9/2013

S.B. No. 286—Provides immunity from civil action under certain circumstances.
(BDR 3-675)

A SB286 187

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 ~~[requires,]~~ **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 ~~[, an]~~ **and may** award ~~[of]~~ **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.

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

~~[(c)]~~ *(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 ~~[shall]~~ may award, in addition to reasonable costs and attorney's fees awarded pursuant to paragraph (a), ~~[the]~~ 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 ~~[:~~

~~*(a) Reasonable]*~~ *reasonable costs and attorney's fees incurred in responding to the motion ~~[.~~*

~~*(b) The amount of]*~~

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 ; ~~[, not including reasonable costs and attorney's fees awarded pursuant to paragraph (a),]~~ and

~~[(c)]~~ (b) Any such additional relief as the court deems proper to punish and deter the filing of frivolous or vexatious motions.

~~[3.]~~ 4. If the court denies the special motion to dismiss filed pursuant to NRS 41.660, an interlocutory appeal lies to the Supreme Court.

EXHIBIT 4

EXHIBIT 4

REC'D & FILED

2013 NOV -8 PM 1:27

ALAN GLOVER

BY _____ CLERK
DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

-o0o-

ADAM LUIS,	**CASE NO. 13 TRT 00053 1B**
Plaintiff,	**DEPT. 2**
vs.	
STATE OF NEVADA, *ex rel.*, ITS DEPARTMENT OF CORRECTIONS, ROBERT HARTMAN, an individual, HARRY CHURCHWARD, an indivdual,	**ORDER GRANTING SPECIAL MOTION TO DISMISS**
Defendants.	

Adam Luis, an employee of the Nevada Department of Corrections (NDOC) filed this action for defamation and wrongful termination against NDOC and two of its employees (collectively, Defendants). Defendants filed a Motion for Judgment on the Pleadings, and Special Motion to Dismiss under NRS 41.635 et seq. This order addresses only the Special Motion to Dismiss.

Defendants request dismissal of Luis's claims under Nevada's anti-SLAPP statute, NRS 41.635 et seq. The first issue is whether the defendants have established, by a preponderance of the evidence, that the claim is based upon a good faith communication in furtherance of the right to free speech in direct connection with an issue of public concern. NRS 41.660(3)(a). "Good faith communication in furtherance of . . . 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 . . . action, result or outcome; or
> 2) communication of information or a complaint to a[n] . . . officer or employee of . . . this state, regarding a matter reasonably of concern to the respective governmental agency . . . ."

NRS 41.637.

Defendants point to the Nevada State Personnel Commission Hearing Officer's Findings of Fact, Conclusions of Law and Decision as evidence of the defendants' statements. The hearing officer's decision includes testimony of the defendants' statements during their investigation. The defendants' statements were aimed at procuring any governmental action, and also communication of information to an officer or employee of the state regarding a matter reasonably of concern to the respective governmental agency result or outcome, i.e., determining whether Luis violated provisions of the Nevada Administrative Code. Defendants have established, by a preponderance of the evidence, that the claim is based upon a good faith communication in furtherance of the right to free speech in direct connection with an issue of public concern.

The next issue is whether Luis has established by clear and convincing evidence a probability of prevailing on the claims. NRS 41.660(3)(b). Luis did not present any evidence. The only evidence presented by either party is the hearing officer's decision. The hearing officer's decision does not established by clear and convincing evidence a probability that Luis will prevail on his claims. Luis did not established by clear and convincing evidence a probability that he will prevail on his claims.

The court has considered Luis's arguments. They lack merit.

IT IS ORDERED:

Based on NRS 41.635 et seq. , and Luis's failure to establish, by clear and

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convincing evidence, a probability of prevailing on the claims, Luis's claims are dismissed with prejudice.

November 8, 2013.

James E. Wilson Jr.
District Judge

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the First Judicial District Court, and I certify that on this 8 day of November 2013 I deposited for mailing at Carson City, Nevada, or caused to be delivered by messenger service, a true and correct copy of the foregoing Order and addressed to the following:

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FILED
FIFTH JUDICIAL DISTRICT COURT
AUG 1 8 2014
NYE COUNTY DEPUTY CLERK
DEPUTY Sarah Westfall

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IN THE FIFTH JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF NYE

RAYMOND DELUCCHI and TOMMY HOLLIS,

Plaintiffs,

v.

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

Defendants.

CASE NO: CV35969
DEPT NO: 1

DEFENDANT PAT SONGER'S SUPPLEMENTAL BRIEF IN SUPPORT OF HIS SPECIAL MOTION TO DISMISS PURSUANT TO NRS § 41.660

Hearing Date: August 27, 2014
Hearing Time: 1:15 p.m.

Defendant, PAT SONGER, by and through his attorneys of record, the law firm of LIPSON, NEILSON, COLE, SELTZER & GARIN, P.C., hereby submit DEFENDANT PAT SONGER'S SUPPLEMENTAL BRIEF IN SUPPORT OF HIS SPECIAL MOTION TO DISMISS PURSUANT TO NRS § 41.660.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

The parties appeared for oral argument on August 4, 2014. The Court asked for additional briefing on:

> (1) The legislative history of Nevada's anti-SLAPP laws to determine whether application of the current statute was proper; and
>
> (2) Whether the quality of Mr. Songer's report still merited the protection under NRS § 41.650's immunity for good faith communications in furtherance of the right to free speech on an issue of public concern.

Regarding the first question, the legislative history shows that Nevada's intent in passing anti-SLAPP protection has always been understood to be a broad protection to encourage free speech and prevent unscrupulous parties from attempting to stifle the First Amendment. The 2013 Amendments offer *clarification* of the Legislature's intent to offer broad protection because of the incorrect narrow interpretation that the Ninth Circuit read into Nevada's anti-SLAPP protections. Thus, the 2013 statute is the proper statute to apply in this matter.

Second, the application of the Nevada anti-SLAPP protection requires the Court first make a finding that Mr. Songer's report was a good faith communication in furtherance of the right to free speech. Plaintiffs improperly argue that the Court should first weigh the merits of the report, rather than determine if it is a good faith communication in furtherance of the right to free speech. The two-step anti-SLAPP analysis requires that the Court first determine that the report *itself* is indeed a good faith communication in furtherance of the right to free speech as defined by the statute. Then, the burden shifts to Plaintiffs to show how they will prevail on their claims by clear and convincing evidence. Plaintiffs' failure to present any clear and convincing evidence shows that they cannot proceed with the case. Plaintiffs' failure to meet their burden is a substantial short falling and mandates dismissal of this SLAPP action.

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II. **The Legislative history shows that the intent in passing Nevada's anti-SLAPP laws was always to offer protection to Nevadans from lawsuits based on all forms of communication with the government and Mr. Songer is entitled to protection under those laws**

A review of the legislative history indicates that this Court should apply the current statute to this lawsuit. It is also well settled that in Nevada "[w]here a former statute is amended, or a doubtful interpretation of a former statute rendered certain by subsequent legislation, it has been held that *such amendment is persuasive evidence of what the Legislature intended by the first statute*." *See In re Estate of Thomas,* 116 Nev. 492, 495 (2000) (citing *Sheriff v. Smith*, 91 Nev. 729, 734, (1975) (emphasis added); *see also Pub. Emps. Benefits Program v. Las Vegas Metro. Police Dep't*, 124 Nev. 138, 157 (2008) ("when a statute's doubtful interpretation is made clear through subsequent legislation, we may consider the subsequent legislation persuasive evidence of what the Legislature originally intended"). Thus, the Court should apply the amended statute, which clarifies the former statute in order to give meaning to the legislative intent. *See, e.g. State v. First Judicial Dist. Court in & for Storey Cnty.*, 53 Nev. 386, 2 P.2d 129 (1931).

Here, a review of the legislative history on Nevada's anti-SLAPP laws makes clear that Nevada always intended to protect all free speech that was made in good faith on an issue of public concern. Thus, Mr. Songer's report falls into the protection of Nevada's anti-SLAPP laws and he has successfully shifted the burden to Plaintiffs, who have failed to present clear and convincing evidence of their probability of succeeding on their claims. Therefore, this lawsuit must be dismissed.

A. Overview of Nevada's anti-SLAPP Statute

1) *History of enacting the 1993 anti-SLAPP statute*

Nevada was amongst the first states to offer protection to all Nevadans from retaliatory lawsuits known as strategic lawsuits against public participation. NRS § 41.650 (1993); *see* attached Exhibit C, Complete Legislative History Digest of Senate Bill 405. The original statute provided immunity from civil liability based on good faith communications

regarding a matter of reasonable concern to the government entity. *Id.* The statute stated as follows:

> 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.

NRS § 41.650 (1993).

The 1993 Legislature intended NRS §41.650 to cover all forms of communication, not just petitions. In enacting the legislation, Senator Titus stated that the statute covered "all forms of communication which individuals have with governmental agencies, bodies and employees." *See,* Ex. C, Hearing on S.B. 405 Before the Senate Committee on Judiciary, 67th Leg. (Nev., May 26, 1993). In support of the legislation, Senator Titus also submitted a letter from Professors Penelope Canan and George Pring from the University of Denver. *See* Ex. C, Exhibit N from Hearing on S.B. 405 Before the Senate Committee on Judiciary, 67th Leg. (Nev., May 26, 1993). The letter explained that the "right to petition" was broad and covered all types of communications with the government. Exhibit N explained "Your right covers not only petitions, but **all forms of communication with government offices and employees**, including ... writing letters, criticizing government actions, policies, and officials, [and] reporting violations of law." *Id.* The letter further emphasized that all communication, was covered, not just good communication. Id. Rather, "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.*" *Id.* (emphasis added). Thus, the legislature fully understood that its legislation was going to cover broad communication, and the legislation was passed unanimously. *See*, Minutes from June 17, 1993.

The legislature also understood that the "good faith" requirement was aimed at protecting people who honestly convey communications, even if the communication turns out to be untrue or wrong, because the intent was to protect all free speech. *See*, Ex. C,

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Hearing on S.B. 405 Before the Senate Committee on Judiciary, 67th Leg. (Nev., May 26, 1993). Senator Adler stated that false information could be conveyed while acting in good faith and added a person should still be immune. *Id.* at 16. He stated "I think if you are going to err, you need to err in favor of free speech and communication. [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." *Id.*

Thus the 1993 Legislative history shows that the legislature intended to provide full immunity from civil liability for all free speech good faith communications with the government. The legislature clearly understood the implications of "right to petition" to mean broad communications, not just simply petitions, and that all communication–good, bad, and ugly–would be protected.

2) The 1997 Amendments added definitions and a procedural mechanism to eliminate SLAPP lawsuits quickly

The 1997 amendments primarily added a procedural mechanism for people to invoke the statute early in litigation and defined "good faith communication in furtherance of the right to petition." NRS § 41.637, 650, 660, and 670; Exhibit D, Complete Legislative History Digest of Assembly Bill 485, 1997. The Legislature attempted to delete the "good faith" language fearing that parties would use the language to continue with frivolous and costly lawsuits, but decided the "good faith" requirement was necessary and provided a definition. *Id.* The 1997 statute amended the immunity language to:

> A person who engages in a good faith communication in furtherance of the right to petition is immune from any civil action for claims based upon the communication.

NRS § 41.650(1997).

The Legislature debated the "good faith" requirement and asked former Legislative Counselor Frank Daykin to weigh in on the issue. *See*, Ex. D, Hearing on A.B. 485 Before the Assembly Committee on Judiciary, 69th Leg. (Nev., June 13, 1997). He stated that "'good faith' meant that an individual acted in good faith if he believed what he was saying

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and he would not communicate in good faith if he said something that he knew to be false." *Id.*

The Legislature understood that "good faith" encompassed the person's belief, and chose to leave the "good faith" language in and undefined on that basis. In fact, Assemblywoman Ohrenschall insisted on defining good faith "since it was a factual issue not an individual's belief" and was ultimately outvoted on the issue based on the amended statute. *Id.* at 7. Assemblywoman Ohrenschall had proposed "good faith" be defined as "Any person who, in good faith, engages in communication in furtherance of the right to petition is immune from civil liability for claims based upon the communication. (a) "Good faith" means that the communication was truthful or was made without knowledge of falsehood." *Id.* at Exhibit D. Ohrenschall's proposed amendment did not make any re-print of the statute, was never in any of the proposed statutes or in the final enrolled statute, thus suggesting that the legislature purposefully decided to not define "good faith" and chose to define "good faith in furtherance of the right to petition" only.

Ultimately, the legislature defined a "good faith communication in furtherance of the right to petition" as follows:

> Good faith communication in furtherance of the right to petition 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, which is truthful or is made without knowledge of its falsehood.

NRS § 41.637(1997).

Thus, the Legislature understood and approved the definition of "good faith communication in furtherance of the right to petition" because it specifically wanted to protect *all free speech* that met the proscribed definition and protect the public from costly

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lawsuits aimed at chilling that free speech. The Legislature purposefully chose broad language and chose to abandon any constricting language to ensure the meaning of the statute would be fulfilled. In other words, the Legislature intended all good faith communications in furtherance of the right to petition–*all free speech*–be protected so to not "censor, chill, intimidate or punish persons for involving themselves in public affairs." Enrolled A.B. 485, July 11, 1997. The anti-SLAPP laws remained unchanged until 2013.

3) *The 2013 Amendments were a reaction to the Ninth Circuit's mistaken narrow application and interpretation of Nevada's anti-SLAPP laws*

The Nevada Supreme Court's unpublished[1] decision in *Jensen v. City Of Boulder* is instructive and shows that the Court has already determined that the 2013 amendments were clarifying in nature. 2014 WL 495265 (Jan. 24, 2014). As the Nevada Supreme Court correctly noted, the 2013 amendments to Nevada's anti-SLAPP statutes were in direct response to the Ninth Circuit Court of Appeals' incorrect and narrow interpretation that Nevada's anti-SLAPP laws offered limited protection. *Id.*; *Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795, 799 (9th Cir. 2012). In *Metabolic Research,* the Ninth Circuit held that Nevada's anti-SLAPP statutes were narrow and did not allow for the right to appeal, did not provide complete immunity from a lawsuit or trial, and the purpose of Nevada's anti-SLAPP laws was merely to have a prompt review. 693 F.3d 795, 799 (9th Cir. 2012).

Given the unreasonable limitations that the Ninth Circuit read into Nevada's anti-SLAPP statutes the year before, the Legislature purposefully undertook the 2013 amendments to *clarify* the statue to be in line with the original intent of offering protection for all speech directly connected to matters of public concern. *See,* Exhibit E, Hearing on S.B. 286 Before the Senate Committee on Judiciary, 77th Leg. (Nev., March 28, 2013);

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[1] The Nevada Supreme Court looked at the issue of applying the amended statute to acts that occurred prior to the enacting of the statute in *Jensen v. City of Boulder.* However, generally SCR 123 provides that an unpublished case shall not be regarded as precedent and shall not be cited as legal authority. Mr. Songer does not rely on the case as precedent or legal authority, and merely brings up the unpublished opinion to the Court's attention because the Court indicated on August 4, 2014, that she wanted to review all available materials that would be on point, including slip opinions.

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Exhibit F, Hearing on S.B. 286 Before the Assembly Committee on Judiciary, 77th Leg. (Nev., April 5, 2013). The Legislative history shows the 2013 Amendments not only passed unanimously, but were passed because the prior version of the statute was interpreted too narrowly, which was not in line with the legislative intent in offering anti-SLAPP protection to the public for their exercising their First Amendment rights. *Id.*

Thus, the Nevada Legislature amended NRS § 41.637 to clarify that a "right to petition" included, as it had always intended, the right to free speech. NRS § 41.637 (2013). The current statute states and added "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" and added an additional definition. NRS § 41.637 (2013). This amendment clarified that the intent was a broad application, which is consistent with the legislative history of Nevada's anti-SLAPP laws. The statute now states that a good faith communication in furtherance of the right to petition or right to free speech in direct connection with an issue of public concern is as follows:

> 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;
>
> 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.

NRS § 41.637(2013).

The Court recognized the clarifying nature of the 2013 amendments in *Jensen v. City of Boulder*, 2014 WL 495265 (Jan. 24, 2014). In *Jensen*, the parties had fully briefed the underlying issue when the Legislature undertook the amendments. *Id.* at *1. The Court subsequently ordered additional briefing and determined that the 2013 amendments

were clarifying in nature based on the *Metabolic* decision. *Id.* at *2. The Legislature had not intended the narrow application and interpretation that the Ninth Circuit had applied. *Id.* Thus, the Court applied the 2013 statute which allowed the appeal and held that the lower court erred in not dismissing the anti-SLAPP lawsuit. *Id.* at *3.

Given the legislative history and the 2013 amendments' clarifying nature, this Court should apply the 2013 statute in this matter to ensure the legislative intent of offering protection for all free speech is met. Thus, because Mr. Songer's report was a good faith communication in furtherance of the right to free speech on an issue of public concern, Plaintiffs must show by ***clear and convincing evidence*** a probability of prevailing on the claim. NRS § 41.660(3)(b). Having failed to meet their burden, this Court must dismiss the case.

B. The proper statute to apply is the current state because it is clear that the Nevada Legislature intended for individuals such as Mr. Songer is to be immune based on their good faith communication in furtherance of the right to free speech and that Plaintiffs failed to meet their burden

The legislative history and the 2013 amendments show that the Nevada Legislature sought to protect individuals such as Mr. Songer who communicated in good faith with the Town of Pahrump on an issue of public concern, i.e. the Highway 160 incident. The Legislature's intent in enacting Nevada's anti-SLAPP laws was to protect all people from frivolous lawsuits aimed at punishing individuals for their involvement in public affairs and exercising their free speech. As stated Mr. Songer's Special Motion to Dismiss and Reply, Mr. Songer's report squarely falls into the definitions of NRS § 41.637(2) and (3). Mr. Songer has never argued that the report falls into subsection 4, which is what Plaintiffs have attempted to argue and mislead the Court. Given Plaintiffs' material failure in overcoming the clear and convincing burden, the case must be dismissed. If the Court is inclined to apply the 1997 statute, then the case must still be dismissed as there is no genuine issue of material fact that Mr. Songer's was not a good faith communication in furtherance of the right to petition on an issue of reasonable concern to Pahrump. Either way, Mr. Songer is entitled

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to the immunity under NRS § 41.650 and because Plaintiffs failed to meet their burden, the case must be dismissed.

1) *The 2013 statute applies in this matter because the amendments clarified the prior statute*

Mr. Songer's report is a good faith communication in furtherance of the right of free speech as both a "Communication of information [to a] political subdivision of this state, regarding a matter reasonably of concern to the respective governmental entity, and [a] written ...statement made in direct connection with an issue under consideration ...any other official proceeding authorized by law." The burden has been successfully shifted to Plaintiffs and they failed to meet their burden by clear and convincing evidence that they would prevail on their claims of defamation and intentional infliction of emotional distress. They did not even attempt to argue the merits of their case and ability to prevail, other than conclusory statements about the contents of Mr. Songer's report being "defamatory." Repeatedly claiming the statements are "defamatory" is a far cry from proving the ability to prevail on their defamation and intentional infliction of emotional distress claims.

2) *Plaintiffs' failed to present clear and convincing evidence to overcome the dismissal of this action*

Plaintiffs attack the application of the report under subsection 4, which is not at issue, and present this Court with inadmissible evidence to show their probability of prevailing on their claims. Plaintiffs have presented no admissible evidence, let alone, clear and convincing evidence that they would prevail on defamation or intentional infliction of emotional distress against Mr. Songer or ETS and thus the Court should dismiss this case. The Plaintiffs' sole argument for why they have demonstrated clear and convincing evidence is the private arbitrator made some unfavorable findings during a labor dispute arbitration. Nowhere in the Nevada evidence rules or civil procedure is it permitted for a private arbitration award, arbitration testimony, and the private arbitrator's opinions be considered as evidence in subsequent litigation, let alone be "clear and convincing evidence" of the probability to prevail in a claim. The arbitrator has no personal knowledge of any of the

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facts regarding the investigation and her hearsay opinions do not show clear and convincing evidence of being able to prevail on the claims.

It is a well-known concept that the intent of any arbitration is to provide a simplified procedure for obtaining a prompt and equitable resolution in a civil matter. Arbitration hearings are intended to be informal and expeditious. Rules of evidence and civil procedure are relaxed or not enforced and it is unclear if any discovery was permitted in the grievance dispute. Further, the private arbitrator in the case was not an elected judicial officer, accountable to the public. This Court will hear the evidence and this Court will enforce the Rules of Civil Procedure and the Rules of Evidence. Simply put, the arbitration award is irrelevant and should not be considered by this Court as evidence. Thus, Plaintiffs have failed to meet their burden of presenting clear and convincing evidence and the case should be dismissed.

3) ***Even if the Court were to apply the 1997 version, Mr. Songer is still protected because the Legislature understood "right to petition" to include all forms of communications with the government and Plaintiffs still failed to meet their burden***

Plaintiffs argue for the application of the 1997 statute and claim that immunization only exists for communications in "furtherance of the right to petition." Opposition, 5:24. As stated in Section II.(A)(1), *supra*, the "right to petition" always included all communications with the government, including reports. *See*, Ex. C and D. Thus, Plaintiffs' argument of Mr. Songer's report falling outside the scope of the 1997 statute is unavailing. Mr. Songer's report would squarely fall within the good faith communication in furtherance of the right to petition in both subsection 2 and 3. NRS § 41.673(2) and (3)(1997). Therefore, under the 1997 statute the burden has also been successfully shifted to Plaintiffs.

Should the Court decide to apply the 1997 statute rather than the proper 2013 statute, then Plaintiffs still carry the burden of showing a genuine issue of material fact exists as to whether the communication falls under the definitions of NRS § 41.637(1997) in order to survive the Special Motion to Dismiss. *John v. Douglas County Sch. Dist.*, 125 Nev. 746, 753, 219 P.3d 1276, 1281 (2009). As with any motion for summary judgment, the Court

must review the facts in the light most favorable to the non-moving party and Plaintiffs cannot overcome the special motion to dismiss "on the gossamer threads of whimsy, speculation and conjecture." *Id. Wood v. Safeway, Inc.*, 121 Nev. 724, 731 (2005). "[w]hen a motion for summary judgment is made and supported as required by NRCP 56, the non-moving party may not rest upon general allegations and conclusions, but must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine factual issue." *Id.* Under the Court's unpublished[2] *Davis v. Parks* decision, the Court explained that "when the burden shifted to the [nonmoving party] to establish a genuine issue of material fact, [the nonmoving party] failed to show that "the communications were not matters of reasonable concern to the defendant."" 2014 WL1677659, citing *John* at 762-63.

Even assuming Plaintiffs' argument that the summary judgment standard applies, Plaintiffs have still failed to provide specific facts and admissible evidence that a genuine issue of material fact exists. Plaintiffs incorrectly argue that "this case is before the Court on a Rule 12 motion where all of the allegations of Plaintiffs' complaint must be presumed to be true." *See*, Opposition to ETS' Special Motion to Dismiss, 7:3-4. The Arbitrator's opinions do not rise to the level of admissible evidence to demonstrate the existence of a genuine issue of material fact that Mr. Songer's report was not on a matter of reasonable concern to the Town of Pahrump or falls outside the definitions of NRS § 41.637(2) and (3). This Court cannot consider the arbitrator's regurgitated opinions in the Complaint as "true" and Plaintiffs have failed to provide a single piece of admissible evidence to show the existence of a genuine issue of material fact as to whether the report was a good faith communication as defined by the statute. There can be no dispute that the issue on Highway 160 was a matter of reasonable concern to Pahrump. Thus, even applying the

[2] The Nevada Supreme Court looked at the issue of anti-SLAPP burden shifting in *Davis v. Parks*. However, generally SCR 123 provides that an unpublished case shall not be regarded as precedent and shall not be cited as legal authority. Mr. Songer does not rely on the case as precedent or legal authority, and merely brings up the unpublished opinion to the Court's attention because the Court indicated on August 4, 2014, that she wanted to review all available materials that would be on point, including slip opinions.

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summary judgment standard, Plaintiffs have failed to meet their burden, there are no genuine issues of material fact, and the case must be dismissed.

Lastly, even looking at the facts in the light most favorable to Plaintiffs, it is important to note that the 2013 amendments went into effect in October 2013, well *after* Plaintiffs became aware of the report. It is believed that Plaintiffs received a copy of the report as *early* as September 2012, and they failed to take any action against Mr. Songer or ETS under the old statute. Plaintiffs were on notice of the effective change in the statute, had the opportunity to proceed under the 1997 statute, and instead chose to wait until after the statute went into effect. Therefore, Plaintiffs have waived the right to the application of the earlier statute and the 2013 statute should be applied.

III. The quality of Mr. Songer's investigation has no bearing on whether he is protected by NRS § 41.660 as the Court must first determine whether the speech itself is protected and only then can it determine if Plaintiffs met their burden by clear and convincing evidence, which they have not

On August 4, 2014, this Court asked for additional briefing on the issue of whether NRS § 41.660 covers all investigations, regardless of the quality of the investigation. Nevada anti-SLAPP cases show that the Court should apply a two-prong analysis of first determining if the speech is protected, like Mr. Songer's report is, and then determine if Plaintiffs have met their burden. *John v. Douglas County Sch. Dist.*, 125 Nev. 746, 753, 219 P.3d 1276, 1281 (2009). California decisions dealing with the quality of the underlying speech demonstrate that the quality of Mr. Songer's investigation has no bearing on whether the anti-SLAPP statutes can be applied because the speech itself–the report–must first be determined to be free speech as defined by the statute. Plaintiffs have not alleged that Mr. Songer conducted the investigation in bad faith or that it is not free speech as defined by the statute; they take umbrage with the contents of the report. While the report may not be as clear as Plaintiffs would like, that does not mean that the report is not a good faith communication in furtherance of the right to free speech as defined by NRS § 41.637(2) and (3). The quality of the report has no bearing on whether Mr. Songer successfully shifted the

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burden to Plaintiffs, which he did, and their ability to prove their claim by clear and convincing evidence.

A. California Courts analyze the application of the anti-SLAPP protection based on whether the speech is free speech, not on the quality of the free speech

Nevada's anti-SLAPP laws mirror the California laws. California protects and defines an act in furtherance of a person's right of petition or free speech under the United States as follows:

> (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law,
> (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law,
> (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or
> (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

Cal. Civ. Proc. Code § 425.16(e).

In applying the California's anti-SLAPP laws, the courts undergo a parallel two-prong test. Cal. Civ. Proc. Code § 425.16(b). Just like Nevada, the California Courts first determine whether the defendant made a threshold showing that the challenged cause of action is one arising out of acts done in furtherance of the defendant's exercise of a right to petition or free speech as defined in the statute and second whether the plaintiff has demonstrated a probability of prevailing on the claim. *Id.; Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal.4th 53, 67 (2002).

Again, like Nevada, once the defendant shows that the cause of action arose from acts done in furtherance of an exercise of free speech, it becomes the plaintiff's burden to establish that *the acts are not protected by the First Amendment. See, Navellier v. Sletten*, 29 Cal.4th 82, 94 (2002). "In opposing an anti-SLAPP motion, the plaintiff cannot rely on the allegations of the complaint, but must produce evidence that would be admissible at trial." *HMS Capital, Inc. v. Lawyers Title Co.*, 118 Cal. App. 4th 204, 212 (2d Dist. 2004); *Roberts v. Los Angeles County Bar Assn.*, 105 Cal. App. 4th 604, 617 (2d

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Dist. 2003) (Court stated that to demonstrate a probability of success, the plaintiff must adduce competent admissible evidence). Moreover, "*arguments about the merits of the claims are irrelevant to the first step of the anti-SLAPP analysis*." *Coretronic Corp. v. Cozen O'Connor*, 192 Cal. App. 4th 1381, 1388, 121 Cal. Rptr. 3d 254 (2d Dist. 2011) (emphasis added).

California courts are also clear that defendants may satisfy their burden to show that they were engaged in conduct in furtherance of their right of free speech under the anti-SLAPP statute even when the underlying conduct was allegedly unlawful or disfavored. *See, e.g., Taus v. Loftus*, 40 Cal. 4th 683, 706–07, 713, 727–729, 54 Cal. Rptr. 3d 775, 151 P.3d 1185 (2007) (defendants' investigation, including an interview that was allegedly fraudulently obtained, constituted protected activity under California's anti-SLAPP laws); *Hall v. Time Warner, Inc.*, 153 Cal. App. 4th 1337, 1343, 63 Cal. Rptr. 3d 798 (2d Dist. 2007) (same); *Lieberman v. KCOP Television, Inc.*, 110 Cal. App. 4th 156, 165–166, 1 Cal. Rptr. 3d 536 (2d Dist. 2003) (concluding that defendants' newsgathering, including the use of videotape recordings that were allegedly illegally obtained, constituted protected activity). So long as the free speech is covered by the statute's definition, then the defendant meets his burden and the burden shifts to the plaintiff.

Here, Mr. Songer has met his burden to establish that the report was a good faith communication in furtherance of the right to free speech and is plainly covered by NRS § 41.637(2) and (3). Instead of addressing the merits of their causes of action, Plaintiffs have attempted to shift the burden to Mr. Songer without showing how they will prevail on their claims. Plaintiffs have utterly failed to show clear and convincing evidence that they will prevail on all the elements of defamation or on all the elements of intentional infliction of emotional distress. Rather than address the merits of the claims, they obfuscate the real issue and attempt to have this Court determine the merits of the case ***before*** determining whether the report was a good faith communication in furtherance of the right to free speech. Mr. Songer is entitled to a factual determination from this Court that the report is indeed a good faith communication in furtherance of the right to free speech as defined by NRS

§ 41.637(2) and (3) *before* the Court determines if Plaintiffs have clear and convincing evidence to prevail on their claims. Plaintiffs, however, have completely failed to present any evidence, let alone admissible evidence, that they will prevail on their claims. Failure to address even the basic elements of their causes of action demonstrates the insufficiency of their claim and warrants dismissal for failing to meet their burden.

IV. Conclusion

There can be no doubt that the appropriate statute to apply in this matter is the 2013 statute. Likewise, there can be no dispute that Mr. Songer's report was a good faith communication in furtherance of the right to free speech in direct connection with an issue of public concern as defined by NRS § 41.637(2) and (3). First, the report is communication of information to a political subdivision of this state regarding a matter reasonably of concern to the respective governmental entity; in other words, Mr. Songer's report is a communication to the Town of Pahrump regarding a matter reasonably of concern to the Town regarding potential EMT misconduct in abandoning a woman during a life threatening situation. Second, the report is a written statement made in direct connection with an issue under consideration by an executive in a proceeding authorized by law; put simply, Mr. Songer's report is a written statement made in direct connection with Pahrump's disciplinary actions of Plaintiffs. With the report itself being a good faith communication in further of the right to free speech and right to petition as defined by NRS § 41.637(2) and (3), it was incumbent upon Plaintiffs to show by clear and convincing evidence their ability to prevail on their respective claims. The report itself, regardless of the quality, is by definition a good faith communication as defined by the

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Legislature. Because Plaintiffs failed to meet their burden, this Court must dismiss this matter and order fees and costs as required by NRS § 41.660.

DATED this 18th day of August, 2014.

LIPSON, NEILSON, COLE, SELTZER, GARIN, P.C.

By: _____

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AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document,

DEFENDANT PAT SONGER'S SUPPLEMENTAL BRIEF IN SUPPORT OF HIS SPECIAL MOTION TO DISMISS PURSUANT TO NRS § 41.660

filed in Case Number: 35969

■ Document does not contain the social security number of any person

- OR -

☐ Document contains the social security number of a person as required by:

☐ A specific state or federal law, to wit:

_____

(State specific law)

- or -

☐ For the administration of a public program or for an application for a federal or state grant.

- or -

☐ Confidential Family Court Information Sheet

(NRS 125.130, NRS 125.230 and NRS 125B.055)

Date: August 18, 2014

_____
(Signature)
Siria L. Gutierrez, Esq.

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of August, 2014, service of the foregoing **DEFENDANT PAT SONGER'S SUPPLEMENTAL BRIEF IN SUPPORT OF HIS SPECIAL MOTION TO DISMISS PURSUANT TO NRS § 41.660** was made by depositing a true and correct copy of the same in the United States mail, with postage fully prepaid, addressed to:

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EXHIBIT C

EXHIBIT C

1993

SB 405

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)

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.

405

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 an officer or employee of this state or of a political subdivision or to an officer or employee of the Federal Government regarding a matter reasonably of concern to the respective governmental agency 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 an officer or employee of this state or of a political subdivision regarding a matter reasonably of concern to the respective governmental agency, 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 an 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 an officer or employee of this state or of a political subdivision or to an officer or employee of the Federal Government regarding a matter reasonably of concern to the respective governmental agency 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.

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

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 land 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.

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,

"...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.

The next to testify was Ande Engleman, Nevada Press Association. Ms. Engleman stated the association "fervently 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
1207

* 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.

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7/91

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.

Associated Press

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 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 filed by local or school officials against ornery citizens or parents.

> "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*

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

Betty Blake moved to Wantagh 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.

ROBERT TRIPPETT—SIPA

Tilting at bulldozers: *Blake was sued while trying to save trees*

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 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., neighborhood 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 developer 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*

12186

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 farmers 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.

Reno 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

During 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.

CASE NO.

DEPT.

REC'D & FILED

'93 MAY 10 P3:56

BY P. HORTON

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

MOTION FOR PRELIMINARY INJUNCTION

Defendant. /

have filed a Complaint seeking, in addition to money damages, an injunction prohibiting the defendant from publishing false statements of facts concerning

Plaintiffs move for a preliminary injunction prohibiting the defendant from publishing false statements of facts concerning

This motion is made and based upon all pleadings and papers on file with the Court, the attached Points and Authorities and the attached Affidavit of

Attorney for Plaintiffs

POINTS AND AUTHORITIES

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

NRS 33.010 provides:

An injunction may be granted in the following cases:

> 1. When it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief or 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.

Injunctive relief is an equitable remedy. Sherman v. Clark, 4 Nev. 138 (1886). The granting of an injunction is a matter of discretion. Coronet Homes, Inc. v. Mylan, 84 Nev. 435 (1968).

A party which establishes it has a reasonable likelihood of success on the merits and that defendant's conduct, if not enjoined, will result in irreparable harm for which compensatory damage is an inadequate remedy should be granted an injunction. Dixon v. Thacher, 103 Nev. 414 (1987).

Defendant has stated in no uncertain terms that plaintiffs have engaged in illegal conduct. (See the Transcript of Testimony, attached to the Affidavit of) This statement is an outright lie. Plaintiffs have not engaged in any illegal or unlawful conduct and will, therefore, succeed on the merits.

The defendant's conduct has already caused irreparable harm to plaintiffs and his continued defamation of plaintiffs will result in irreparable harm for which compensatory damage is an inadequate remedy. Claims before a public body that the plaintiffs are engaged in illegal and unlawful conduct clearly harm plaintiffs' business. The harm is irreparable because the harm is done when the false accusations are made. Further, the defendant is apparently judgment proof (has been unable to satisfy a $4,000 judgment) and so plaintiffs have no adequate remedy at law.

In Guion v. Terra Marketing of Nevada, Inc., 90 Nev. 237 (1974) the defendant attached signs to his car which he parked in front of the plaintiff's business. The sign bore the following statements:

> A Terracor representative threatened to kill me? What next, Rick Johnson. I regret having done business with a Terracor representative. Doing business with a Terracor representative introduced me to a new low in ethics.

The trial court found that the statements were false, malicious and tended to discourage prospective customers from doing business with the plaintiff. The trial court issued a preliminary injunction. In upholding the trial court's issuance of the injunction the Nevada Supreme Court at page 240 stated:

> Equity will, however, restrain tortious acts where it is essential to preserve a business or property interests and also restrain the publication of false and defamatory words where it is the means or an incident of such tortious conduct. (citation omitted). The right to carry on a lawful business without obstruction is a property right, and acts committed without just cause or excuse which interfere with the carrying on of plaintiff's business or destroy its custom, its credit or its profits, do an irreparable injury and thus authorize the issuance of an injunction. (citation omitted).

The defendant's conduct in publishing false and defamatory statements is interfering with the plaintiffs' right to carry on their lawful business without obstruction and is causing irreparable harm. Plaintiffs request an injunction be granted prohibiting the defendant from publishing false statements of facts concerning

Dated this 10th 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.

2. had a contract with 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.

4. Allegations made before a public body that a business

engages in illegal or unlawful acts, even if completely false, necessarily hurt that business. false statements concerning and me have a negative impact on our business and cause irreparable harm.

Dated this 10 day of May, 1993.

SUBSCRIBED AND SWORN to before me this 10 day of May, 1993.

NOTARY PUBLIC

NOTARY PUBLIC - NEVADA
CARSON CITY
My Appt. Expires March 12, 1996

CASE NO.

DEPT.

REC'D & FILED

'93 MAY 10 P3:56

BY P. HORTON

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

MOTION FOR PRELIMINARY INJUNCTION

Defendant. /

have filed a Complaint seeking, in addition to money damages, an injunction prohibiting the defendant from publishing false statements of facts concerning

Plaintiffs move for a preliminary injunction prohibiting the defendant from publishing false statements of facts concerning

This motion is made and based upon all pleadings and papers on file with the Court, the attached Points and Authorities and the attached Affidavit of

Attorney for Plaintiffs

1212

POINTS AND AUTHORITIES

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

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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.

Injunctive relief is an equitable remedy. Sherman v. Clark, 4 Nev. 138 (1886). The granting of an injunction is a matter of discretion. Coronet Homes, Inc. v. Mylan, 84 Nev. 435 (1968).

A party which establishes it has a reasonable likelihood of success on the merits and that defendant's conduct, if not enjoined, will result in irreparable harm for which compensatory damage is an inadequate remedy should be granted an injunction. Dixon v. Thacher, 103 Nev. 414 (1987).

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Dated this 10th day of May, 1993.

Plaintiffs

AFFIDAVIT OF _____

STATE OF NEVADA)
) ss.
CARSON CITY)

, under penalty of perjury, being first duly sworn deposes and says:

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2. had a contract with 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.

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4. Allegations made before a public body that a business

engages in illegal or unlawful acts, even if completely false, necessarily hurt that business. false statements concerning and me have a negative impact on our business and cause irreparable harm.

Dated this 10 day of May, 1993.

SUBSCRIBED AND SWORN to before me this 10 day of May, 1993.

NOTARY PUBLIC

NOTARY PUBLIC - NEVADA
CARSON CITY
My Appt. Expires March 12, 1996

1993 REGULAR SESSION (67th)

ASSEMBLY ACTION		SENATE ACTION		
Adopted	☐	Adopted	☐	Senate Amendment to Senate Bill No. 405 BDR 3-995 Proposed by Senators Callister and Titus
Lost	☐	Lost	☐	
Date: Initial:		Date: Initial:		
Concurred in	☐	Concurred in	☐	
Not Concurred in	☐	Not Concurred in	☐	
Date: Initial:		Date: 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.

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 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.

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Aug 09 2016 09:39 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

RAYMOND DELUCCHI and
TOMMY HOLLIS,

Appellants,

v.

PAT SONGER and ERICKSON
THORPE & SWAINSTON, LTD.

Respondents
_____/

Case No. 68994
District Court: CV35969

JOINT APPENDIX

VOLUME V OF VII

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

DANIEL MARKS, ESQ.
Nevada State Bar No. 002003
ADAM LEVINE, ESQ.
Nevada State Bar No. 004673
LAW OFFICE OF DANIEL MARKS
610 South Ninth Street
Las Vegas, Nevada 89101
(702) 386-0536: FAX (702) 386-6812
Attorneys for Appellants

JOSEPH P. GARIN, ESQ.
Nevada State Bar No. 006653
SIRIA L. GUTIERREZ, ESQ.
Nevada State Bar No. 011981
LIPSON, NEILSON, COLE
SELTZER, GARIN
9900 Covington Cross Dr. Suite 120
Las Vegas, Nevada 89144
(702) 382-1500; FAX (7020382-1512
Attorneys for Respondent

	Description	Volume(s)	Page(s)
1.	Answer to Complaint (Erickson, Thorpe & Swainston, Ltd.)	I	8 - 14
2.	Complaint	I	1 - 7
3.	Defendant Erickson, Thorpe & Swainston's Reply in Support of Special Motion to Dismiss	VI	1449 - 1470
4.	Defendant Erickson, Thorpe & Swainston's Supplemental Brief	IV & V	836 - 1173
5.	Defendant Pat Songer's Reply in Support of His Special Motion to Dismiss Pursuant to NRS § 41.660	III	678 – 687
6.	Defendant Pat Songer's Special Motion to Dismiss Pursuant to NRS § 41.660 Ruling Required Within Seven Judicial Days Per NRS 41.660	I	19 - 49
7.	Defendant Pat Songer's Supplemental Brief in Support of His Special Motion to Dismiss Pursuant to NRS § 41.660	V & VI	1174 - 1356
8.	Findings of Fact, Conclusions of Law and Order Granting Defendant Erickson, Thorpe & Swainston's Special Motion to Dismiss	VII	1525 - 1528
9.	Notice of Appeal	VII	1655 – 1663
10.	Notice of Entry of Order	VII	1529 - 1536
11.	Notice of Entry of Order of Dismissal	VII	1649 - 1654
12.	Notice of Entry of Order Granting Defendant Pat Songer's Special Motion to Dismiss Pursuant to § NRS 41.660	VII	1580 – 1585

CERTIFICATE OF SERVICE BY ELECTRONIC MEANS

I hereby certify that I am an employee of the Law Office of Daniel Marks and that on the 8th day of August, 2016, I did serve the above and forgoing JOINT APPENDIX, VOLUME V of VII by way of Notice of Electronic Filing provided by the court mandated E-Flex filing service, to the following:

Joseph P. Garin, Esq.
Siria L. Gutierrez, Esq.
LIPSON, NEILSON, COLE,
SELTZER, GARIN
Attorneys for Respondent

An employee of the
LAW OFFICE OF DANIEL MARKS

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.

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

~~[(c)]~~ *(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.

Bills

Search By: Bill Name Bill Text

'Enter' navigates directly to bill

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Assembly Bills
Senate Bills
SB1
SB2
SB3
SB4
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SB24
SB25
SB26

Committees

Budgets

Floor Sessions

BILLS \ SENATE \ SB286 \ VOTES

Final Passage

Assembly

Passed: Yes (Constitutional Majority)
Date: Wednesday, May 22, 2013

Votes:

All: 42
Yea: 41
Nay: 0
Excused: 1
Not Voting: 0
Absent: 0

Senate

Passed: Yes (Constitutional Majority)
Date: Monday, April 22, 2013

Votes:

All: 21
Yea: 21
Nay: 0
Excused: 0
Not Voting: 0
Absent: 0

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BILLS \ SENATE \ SB286 \ MEETINGS

Committee: Assembly Judiciary
Meeting: Tuesday, May 14, 2013 8:00 AM
Meeting Documents: Agenda
Minutes
Action(s): Do pass
Exhibit(s): Work Session Document - SB 286

Committee: Assembly Judiciary
Meeting: Monday, May 06, 2013 8:00 AM
Meeting Documents: Agenda
Minutes
Action(s): No action
Exhibit(s): Testimoy on SB 286 - James A. McGibney
Testimony on SB 286 - Marc Randazza

Committee: Senate Judiciary
Meeting: Friday, April 05, 2013 8:00 AM
Meeting Documents: Agenda
Minutes
Action(s): Amend, and do pass as amended
Exhibit(s): No Exhibits for this Bill

Committee: Senate Judiciary
Meeting: Thursday, March 28, 2013 9:00 AM
Meeting Documents: Agenda
Minutes
Action(s): No Action
Exhibit(s): Anti-SLAPP Letter SB 286
Marc Randazza Letter
SB 286 Hearing Material
Amendment to SB 286

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SENATE AGENDA

for the

COMMITTEE ON JUDICIARY

Day Thursday Date March 28, 2013 Start Time 9:00 a.m.* Room 2149

Room 2149 of the Legislative Building, 401 S. Carson St., Carson City, NV.
Videoconferenced to Room 4412 of the Grant Sawyer State Office Building, 555 E. Washington Ave., Las Vegas, NV.

All Senate meetings are available live over the Internet at http://www.leg.state.nv.us. Click on the link "Calendar of Meetings/View."

We are pleased to make reasonable accommodations for members of the public who are disabled and wish to attend the meeting. If special arrangements for the meeting are necessary, please notify the Senate Committee Manager at (775) 684-1438.

All documents, handouts and exhibits in support of your testimony must be submitted electronically in PDF format no later than 5 p.m. the day before the meeting to the Committee on Judiciary Committee Manager at SenJUD@sen.state.nv.us. In addition, please bring 25 copies of your documents, handouts, and exhibits to the meeting for distribution to the public. If you are planning to provide a PowerPoint or other electronic presentation, you are responsible for notifying the Committee Manager prior to the meeting and bringing your own electronic copy for presentation.

FIRST REVISED AGENDA

*Please note start time.

S.B. 286	Provides immunity from civil action under certain circumstances. (BDR 3-675) Senator Jones
S.B. 296	Limits the recovery of damages arising from a motor vehicle accident under certain circumstances. (BDR 3-825) Senator Roberson
S.B. 323	Revises provisions relating to incompetent defendants. (BDR 14-1063) Senator Hardy
S.B. 419	Revises provisions relating to marriage. (BDR 11-1107) Judiciary

Public Comment

At the Chair's discretion, items on this agenda may be taken in a different order than listed; two or more agenda items may be combined for consideration; an item may be removed from this agenda; or discussion of an item on this agenda may be delayed at any time. The Committee may vote to introduce Bills and Resolutions not on this agenda. Possible discussion, action or Work Session may occur on matters previously considered.

Interested parties may observe the meeting and/or provide testimony through simultaneous videoconference when available.

Public comment will be taken at appropriate times during the meeting. Because of time considerations, the period for public comment by each speaker may be limited, and speakers are urged to avoid repetition of comments made by previous speakers. No public comment or testimony will be taken on Bills/Resolutions being discussed during Work Sessions.

Proposed amendments must be submitted electronically in PDF format to the Committee at SenJUD@sen.state.nv.us no later than 5 p.m. the day before the meeting. The proposed amendment must include the Bill and/or Resolution number, a statement of intent, and the name and contact information of the amendment sponsor. Please bring 25 copies of the proposed amendment to the Committee meeting.

Electronic devices (e.g., cellular telephones, pagers, tablets and laptop computers) must be in silent mode or turned off while in the Committee room.

MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-Seventh Session
March 28, 2013

The Senate Committee on Judiciary was called to order by Chair Tick Segerblom at 9:05 a.m. on Thursday, March 28, 2013, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Tick Segerblom, Chair
Senator Ruben J. Kihuen, Vice Chair
Senator Aaron D. Ford
Senator Justin C. Jones
Senator Greg Brower
Senator Scott Hammond
Senator Mark Hutchison

GUEST LEGISLATORS PRESENT:

Senator Joseph P. Hardy, Senatorial District No. 12
Senator Michael Roberson, Senatorial District No. 20

STAFF MEMBERS PRESENT:

Mindy Martini, Policy Analyst
Nick Anthony, Counsel
Lynn Hendricks, Committee Secretary

OTHERS PRESENT:

Marc Randazza, Randazza Legal Group
Allen Lichtenstein, American Civil Liberties Union
Wayne Carlson, Executive Director, Nevada Public Agency Insurance Pool
Steve Balkenbush, Nevada Public Agency Insurance Pool
Rebecca Bruch, Nevada Public Agency Insurance Pool

Kenneth A. Carabello, Vice President Operations, Liberty Healthcare Corporation
Jayne Shale, Liberty Healthcare Corporation
Richard Whitley, M.S., Administrator, Division of Mental Health and Developmental Services, Department of Health and Human Services
Elizabeth Neighbors, Ph.D., Director, Mental Health Developmental Services, Lake's Crossing Center
Christy Craig, Office of the Public Defender, Clark County
Robert Compan, Farmers Insurance Group
David Goodheart, American Insurance Association
Jeanette K. Belz, Property Casualty Insurers Association of America
George Ross, Las Vegas Metro Chamber of Commerce
Tray Abney, The Chamber, Reno-Sparks-Northern Nevada
Mark C. Wenzel, President, Nevada Justice Association
Diana Alba, Clerk, Clark County
Nancy Parent, Chief Deputy Clerk, Washoe County
Margaret Flint

Chair Segerblom:
Today we have Senate Bill (S.B.) 286.

SENATE BILL 286: Provides immunity from civil action under certain circumstances. (BDR 3-675)

Senator Justin C. Jones (Senatorial District No. 9):
I am presenting S.B. 286. The First Amendment of the United States Constitution guarantees the right to petition the government for redress and is one of the most important rights the citizens possess. Nevada addresses, upholds and protects this right to petition. Chapter 41 of *Nevada Revised Statutes* (NRS) protects citizens from civil liability for claims based upon protected communication. Protected communication must be made in good faith and be truthful. The provisions of NRS 41 are meant to deter frivolous lawsuits commonly known as Strategic Lawsuits Against Public Participation (SLAPP). These SLAPP lawsuits are primarily used to stop someone from exercising his or her First Amendment rights. When a plaintiff files a SLAPP suit, NRS 41 allows the defendant to file a special motion to dismiss the lawsuit. If the court grants a special motion, it must also award attorney's fees to the defendant. The defendant may also file a new lawsuit for compensatory damages, punitive damages, and attorney's fees and costs. In a recent decision, the Ninth Circuit Court of Appeals held that Nevada's anti-SLAPP provision in NRS 41 only

protects communications made directly to a governmental agency. The Court also held that Nevada provisions only protect defendants from liability and not trial. Finally, the Ninth Circuit Court concluded that in Nevada, there is no right to immediately appeal an order denying a special motion to dismiss a SLAPP suit.

The purpose of S.B. 286 is to address concerns raised by the Ninth Circuit Court of Appeals with regard to NRS 41. Marc Randazza will address how this legislation is good for defendants as well as businesses wanting to move into Nevada. He will also propose additional language to strengthen S.B. 286.

I have submitted my written testimony (Exhibit C).

Marc Randazza (Randazza Legal Group):
As a First Amendment attorney who practices nationwide, I have much exposure to anti-SLAPP legislation. I have also had much exposure to victims of SLAPP litigation. I defend defamation suits and bring SLAPP suits as a plaintiff's attorney. Frivolous lawsuits must be eliminated. Lawsuits often bankrupt the defendant.

For example, I had a case involving a gentleman who wrote an online newspaper for his community. He wrote some articles about how he did not like the plants that the community had planted at the entrance. This article offended the person who ran the homeowners' association. He sued the author of the article for defamation. We did win this case and were granted attorney's fees. The article's author and I thought we were vindicated; however, the plaintiff dissolved his LLC. The $186,000 attorney's fee award is a nice trophy but has meant nothing because the newspaper author's bank account was depleted. The costs, monetarily and psychological, were significant.

Chair Segerblom:
Will this bill make us like California?

Mr. Randazza:
Yes. As it is written, S.B. 286 is a fantastic bill.

I have some proposed amendments which will improve it more. I have imported some provisions from other states with similar laws. For example, Florida has a presuit notice requirement before a defamation claim can be filed. This is not a

new concept; Florida Statute 770.01 has been in place for 50 or 60 years. This would help by adding a degree of alternative dispute resolution and, therefore, lessen a burden on the courts.

I have also suggested utilizing some portions of California Civil Procedure Code 1030, which allows the defendant to seek a bond from the plaintiff if he or she has a reasonable probability of prevailing in the anti-SLAPP motion.

As it stands, this a great bill.

Chair Segerblom:
Does a party have to initiate a lawsuit, and then this anti-SLAPP law comes into play? Or does the party being threatened with the lawsuit go into court with the claim of the threat of the SLAPP lawsuit and stop the suit before it starts?

Mr. Randazza:
This is a special motion to strike or to dismiss, so the plaintiff would still have to initiate the litigation.

Chair Segerblom:
For example, you, Mr. Randazza, are sued. You think this is a frivolous lawsuit because it is enacted to prevent you from expressing your First Amendment rights, and that is when your attorney initiates the anti-SLAPP litigation?

Mr. Randazza:
Correct. The lawyer would quickly initiate the anti-SLAPP law so that the First Amendment mettle of the case could be tested. Otherwise a motion to dismiss, if pleaded correctly, is easily achieved; then comes an expensive and long-standing discovery, and by the time the win comes to the defendant, it is a Pyrrhic victory.

Chair Segerblom:
Absolutely.

Senator Ford:
Why was that complaint about the plants considered a public concern?

Mr. Randazza:
It is a public concern if it is important to one's community. It was a matter of governance for his community.

Senator Ford:
Does caselaw define the issue of public concern for purposes of anti-SLAPP statutes?

Mr. Randazza:
Yes. Nevada's courts would be able to rely upon robust caselaw in California, Washington and Oregon in order to define those terms.

Senator Ford:
Is there a federal counterpart to anti-SLAPP?

Mr. Randazza:
Congressman Steve Cohen from Tennessee has proposed federal anti-SLAPP legislation. It has not passed. There may be issues of separation of powers with this federal legislation. Nevada should consider the benefit to business as well. Tech start-ups, for example, are not as attracted to Nevada as to California, Washington or Oregon because of these states' strong anti-SLAPP laws.

Senator Ford:
What is the definition of public concern relative to the caselaw definition?

Mr. Randazza:
Public concern is broadly defined. Public concern is a matter of interest to multiple people. It does not necessarily have to be a matter of governance. Public concern can even be said to be matters of local importance, local governments, local news. It would not be a narrow definition. Any statute needs to make the term public concern broad. There is caselaw in the handout I have provided to you (Exhibit D). I can also provide the Committee with follow-up research if that is something that concerns you.

Chair Segerblom:
In response to Senator Ford's questions, is this based on other states that have already enacted anti-SLAPP laws?

Mr. Randazza:
Right.

Senator Hutchison:
If the issue of public concern is defined so broadly, it seems that any lawsuit could be defined that way. For example, partner disputes in commercial litigation could be a matter of public concern, right? Then we are now modifying the motion to dismiss standards for almost anything. Will we now have a lot of cases under this definition?

Mr. Randazza:
This bill drafted with the proposed amendments is not so broad that it encompasses every method of conduct in the State. It will just encompass whether a citizen is exercising his or her First Amendment rights.

Senator Hutchison:
In exercising a citizen's First Amendment rights on an issue of public concern, you admit the definition is very broad?

Mr. Randazza:
Correct. If I am speaking out about how an investigation is going, of course that is a matter of public concern. If I am speaking about the lack of a traffic light at an intersection, that is a matter of public concern. If I am speaking out about how a neighbor can mow his or her lawn, then that is not a matter of public concern.

Senator Hutchison:
What about how I treat my partners in my law firm? Is that a matter of public concern? Could it be construed that way?

Mr. Randazza:
You may not have the privilege of making that a private matter. If it is a matter of internal politics at your law firm, that is a matter of private concern. However, if the *Las Vegas Sun* begins to report on a strike at your law firm and your associates are picketing in front of the building, then it has become a matter of public concern.

Senator Hutchison:
Why is there a clear and convincing evidence standard? For example, the moving party initially starts by preponderance of the evidence that in fact the claim is based on free speech-First Amendment rights. Then if the court determines the moving party has met that burden of proof, the court then has to determine by clear and convincing evidence a probability of prevailing on the claim. Now the burden shifts to the plaintiff. The defendant points out the First Amendment right demonstrated by preponderance of the evidence. Is that correct?

Mr. Randazza:
Correct.

Senator Hutchison:
The burden shifts now to the plaintiff who wants to win this lawsuit by clear and convincing evidence to the court in that early stage, which is a fraud standard—a very high standard in the law. What is the rationale for setting the standard that high?

Mr. Randazza:
The way it has worked in California, Washington and Oregon cases, the plaintiff needs to front load his or her case. The plaintiff needs to show this evidence is going beyond the motion-to-dismiss standard. It is a burden-shifting statute. But without that important element, defendants can be quieted and punished for exercising free speech rights simply by winning a case. That burden-shifting is important, necessary and proper.

Chair Segerblom:
Is the lawsuit for defamation? Or is the lawsuit characterized as being something designed to suppress First Amendment rights?

Mr. Randazza:
The lawsuit is anything designed to quash First Amendment rights. This proposed law will be most frequently used in defamation lawsuits. Possibly, this proposed law could also be used in intellectual property lawsuits. For example, the company Righthaven, which operates in southern Nevada, has over 200 cases on the federal docket. Some of the cases involved Righthaven suing bloggers for exercising their right to free speech.

Chair Segerblom:
So this anti-SLAPP law could be used against Righthaven?

Mr. Randazza:
Senate Bill 286 could have been used for those cases, yes.

Senator Jones:
Concerning section 3, subsection 3, paragraph (f) of S.B. 286, I received a request from District Judge Elizabeth Goff Gonzales that the rule be 7 days after notice. I agree with that. We do not want a circumstance in which motions are scheduled in the courts before someone has received notice of the motion.

If Nevada wants to attract tech start-up companies from other states, particularly California and Washington, S.B. 286 models those states that are properly using anti-SLAPP laws.

Mr. Randazza:
Texas has recently added anti-SLAPP legislation similar to those states on the West Coast. We are now competing with Texas as well to attract tech start-up companies for their business.

Senator Hutchison:
Can this law be narrowed to relate more specifically to the tech companies and what Nevada is trying to protect as opposed to the law being so broad concerning the definition of public interest?

Senator Jones:
We can discuss that.

Chair Segerblom:
Is there anyone else who would like to speak in support of S.B. 286?

Allen Lichtenstein (American Civil Liberties Union):
The question was raised of the public interest standard being so broad that that standard might swallow the rule. This issue was present when the ruling on *New York Times Co. v. Sullivan* 376 U.S. 254 (1964) became the standard for proving actual malice for public officials or public figures and matters of public interest. People dealing with these cases assumed that every defamation case would come under that ruling and require the actual malice standard. That has

not been the case. Far more of these cases are between particular individuals within a company or within a small business where the regular negligence standard does exist. I am less sanguine about the field of defamation law in general because it is so often used for the purpose of hurting a defendant with a lawsuit rather than having a real claim in the lawsuit. Senate Bill 286 progresses the lessening of using SLAPP lawsuits to hurt defendants—all of which amounts to an abuse of the court system. The public interest standard can be far-reaching and broad, but it is incorrect to say that that phrase swallows the entire rule.

Chair Segerblom:
Would anyone in opposition like to speak?

Wayne Carlson (Executive Director, Nevada Public Agency Insurance Pool):
With me are two attorneys who have defended anti-SLAPP cases, and they will both comment on S.B. 286.

Steve Balkenbush (Nevada Public Agency Insurance Pool):
Nevada Revised Statutes 41.635 through 41.670 have worked well. The NRS 41 requires that a special motion to dismiss be filed within 60 days. If the motion is granted, the case is over. Pursuant to the legislative history, that is the purpose for which this anti-SLAPP statute was crafted by the Legislature.

Chair Segerblom:
You are speaking from experience of defending a city or county?

Mr. Balkenbush:
Yes. As an attorney, I have defended a number of individuals who are public officials.

The NRS 41 has worked seamlessly. The concern is in regard to these shifting burdens of proof in amending this law. We do not have an objection if the Committee wants to expand NRS 41 to include the new provision to whom it relates. As it says in section 1, subsection 4 of S.B. 286: "Communication made in direct connection with an issue of public interest in a place open to the public or in a public forum."

The one objection we do have is having the $10,000 damage award which would be levied upon the defendant if he or she does not prevail in a motion to

dismiss. These motions to dismiss have been valuable tools in defending these lawsuits. This penalty would conflict with the idea of an anti-SLAPP statute. Anti-SLAPP statutes were created to provide the opportunity to extricate the defendant from the lawsuit at the very beginning of the case. This penalty would be a disincentive for filing these motions to dismiss. The provision in S.B. 286, section 4, subsection 2 should be removed from the bill.

I am concerned with how the courts will struggle with the shifting burdens of proof. Three cases have passed through the Nevada Supreme Court and the Justices have had no problems with any provisions in the existing statute. The Supreme Court had no problem interpreting the provisions and breadth of the statute. The Court has found no irregularities in the statute. If the statute works, keep it the way it is.

Senator Ford:
There is a clear and convincing standard in S.B. 286 that the defendant must meet to dismiss a SLAPP suit, is that correct?

Mr. Balkenbush:
Yes, that is correct. That is a confusing provision. Under existing statute, the defendant files a motion to dismiss and provides the proof to the court. Then the plaintiff provides proof to the court as a motion for summary judgment standard. Then the court decides the case.

The proposed change in the law is that the defendant files the motion to dismiss, which is treated as a motion for summary judgment. The court would determine whether there was a good faith communication, a matter of public concern. If so, as the law stands now, the defendant has won. Senate Bill 286 goes beyond that. The burden shifts to the plaintiff to prove that his or her case would be sustained on clear and convincing evidence standard. This unduly complicates NRS 41. Under S.B. 286, the plaintiff would have a higher burden of proof than he or she currently has. This whole provision becomes murky.

Senator Ford:
That is my question. If the plaintiff actually prevails upon the clear and convincing standard, which is a high standard, why should he or she not receive a $10,000 award if he or she won?

Mr. Balkenbush:
He or she would not get a reward just by proving through clear and convincing evidence. The motion to dismiss would be defeated. In order to get the $10,000 award, he or she would have to win the case. The provision of the clear and convincing evidence applies to the motion to dismiss at the beginning of the case. The defendant must prove his or her motion to dismiss; the plaintiff, in order to defeat that, must prove his or her case by clear and convincing evidence. That does not end the case, though. That is just the motion to dismiss. That is all this provision applies to: a special motion to dismiss. If the plaintiff proves by clear and convincing evidence a probability of prevailing on the claim, then the case will continue on to discovery. It may go to a trial. All that the clear and convincing evidence standard does is relate to the special motion to dismiss.

Senator Ford:
So if the plaintiff defeats the motion to dismiss on the clear and convincing evidence standard and ultimately wins the case, he or she can get $10,000?

Mr. Balkenbush:
That is correct.

Senator Ford:
But if the defendant wins on a special motion to dismiss, he or she gets $10,000?

Mr. Balkenbush:
That is correct. The defendant gets $10,000 if he or she wins on the motion to dismiss. There is a provision for attorney's fees and costs for the plaintiff, if he or she prevails.

Senator Ford:
But my question remains the same. If a defendant wins and proves that the plaintiff has brought a SLAPP lawsuit against the defendant, why should the defendant not get $10,000?

Mr. Balkenbush:
The defendant should get $10,000. We do not object to the defendant getting paid $10,000. This is what we object to: the defendant files the motion to dismiss and that motion is defeated; although the defendant does not lose the

case, yet the defendant is still subjected to a $10,000 award to the court because he or she lost the motion to dismiss.

That, however, is not the existing law. The concern is that S.B. 286 would be a disincentive for defendants to extricate themselves early in the case by filing these motions to dismiss.

Senator Brower:
This needs to be clear: are the lawsuits SLAPP suits and the Nevada statutes are anti-SLAPP statutes, right?

Mr. Balkenbush:
That is correct.

Senator Brower:
Can you give an example of a typical SLAPP lawsuit from your own experience?

Mr. Balkenbush:
I can. One case that I handled involved a former employee of a district attorney's office who did certain things involving drugs and alcohol. This employee was also working at a school as an intern to be a counselor. The district attorney learned of those problems and made those problems known to the school district. The district attorney was then sued by the former employee for defamation. I raised the concern of the anti-SLAPP statutes to the court. The district attorney had learned of this employee's problems and believed that these problems were issues of public concern, mainly, that a person with problems concerning drugs and alcohol was in a school studying to be a counselor. Those problems were raised as part of the defense to the defamation lawsuit.

Senator Brower:
The district attorney's response to the defamation lawsuit was to describe it as a SLAPP lawsuit?

Mr. Balkenbush:
That is correct.

Senator Brower:
And you utilized the anti-SLAPP statutes as the district attorney's defense?

Mr. Balkenbush:
That is correct. The district attorney said it was a matter of public concern. He believed these problems that the employee had were truthful or, at least, had no knowledge of their falsity. The judge agreed and granted the motion. The case went to the Nevada Supreme Court and the Justices affirmed the ruling.

Senator Brower:
Your view is that the current anti-SLAPP statute worked properly in this case?

Mr. Balkenbush:
That is correct. And the Supreme Court Justices have had no trouble with the current anti-SLAPP statute. Nor have they had any trouble applying NRS 41 in any of the cases in which I have used it. I have had two cases go to the Nevada Supreme Court, and the Court has affirmed both of the decisions. The Court has not had any trouble interpreting any of the provisions in NRS 41. Some of the provisions proposed in S.B. 286 are cumbersome.

Senator Brower:
Might the outcome of the case be different if it is an individual not working for a county who could hire a lawyer experienced with these anti-SLAPP litigations? Would the current statute be just as logical and workable as in the case you just described?

Mr. Balkenbush:
The statute would be just as logical. What the statute does not do now is cover these private individuals. That is an expansion of the language proposed in S.B. 286. We are not opposed to keeping the language covering private individuals. The rest of S.B. 286 seems unduly cumbersome by penalizing people who file motions to dismiss, if they do not prevail on the motions. It prolongs the amount of time required to litigate these cases. Legislative history says cases should not be unduly lengthy. The existing anti-SLAPP statute works well as a practical matter.

Rebecca Bruch (Nevada Public Agency Insurance Pool):
I was one of the attorneys on the *John v. Douglas Cnty. Sch. Dist.,* 125 Nev. 746, 219 P.3d 1276 (2009) case that went before the Supreme Court, and the statute was upheld.

Mr. John filed union grievances along with a lawsuit. Every time someone at various stages of the grievance level would offer testimony, Mr. John would amend the lawsuit and add new parties. He did this trying to intimidate those who would offer testimony.

I had come across the anti-SLAPP statute and knew that the *John v. Douglas County School District* was the perfect case. Mr. John was clearly trying to intimidate people from participating in the serious claims made against him. District Judge David R. Gamble ruled in our favor. It then went to the Nevada Supreme Court on the issue of whether Nevada's anti-SLAPP statutes could apply to federal claims in State court. The Court ruled and upheld the Ninth Judicial District Court's ruling.

There were attorney's fees awarded because of the existing NRS 41.670.

I join in Mr. Balkenbush's comments on the chilling effect of the $10,000 award. I often file the special motion to dismiss on behalf of large entities that can absorb the cost if they must. But a serious conversation takes place warning the clients that if the motion to dismiss is lost, it could cost them $10,000. That is still a lot of money. The chilling effect comes because of a provision in NRS 41.670 subsection 1 that: "the court shall award reasonable costs and attorney's fees."

The 7-day provision in S.B. 286 is also problematic for judges and their calendars. The idea is to speed along or, possibly, stop litigation from the beginning. That places an undue burden on the courts. In our case, the judges know they must rule within 30 days, and they request an excusal from that time limit.

Chair Segerblom:
So they work around that?

Ms. Bruch:
Yes.

Chair Segerblom:
Would you like to point out anything else?

Ms. Bruch:
There was a question regarding whether a federal caselaw equivalent exists. It is called the *Noerr-Pennington* doctrine. I refer to that on federal claims and when I am in federal court.

Senator Ford:
I am still stuck on the $10,000 award. Looking at S.B. 286, section 4, subsection 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"; that last phrase "finds that the motion was frivolous or vexations" makes a big difference. That makes the defendant more contemplative before they file a motion to dismiss. Those are hard standards to meet. The court seldom calls a motion frivolous or vexatious. The $10,000 award does not seem to be an automatic award just because the defendant does not win the motion to dismiss. The question now is why should the defendant not be penalized $10,000 for filing a motion to dismiss that was frivolous or vexatious?

Mr. Balkenbush:
You are correct. The frivolous and vexatious standard does exist in the proposed bill. But that standard exists regardless of S.B. 286. Under Rule 11 of the *Federal Rules of Civil Procedure*, a defendant cannot file frivolous and vexatious motions. There does not seem to be any other statute in Nevada law with a $10,000 penalty if the defendant loses the motion to dismiss. I agree that the frivolous and vexatious standard is a difficult standard. The $10,000 award is not a part of Nevada statute and can cause the defendant to pause moving forward with filing the special motion to dismiss.

Chair Segerblom:
What if S.B. 286 was amended to say "up to $10,000"?

Mr. Balkenbush:
I do not believe that $10,000 penalty should be levied on the defendant if he or she loses the motion to dismiss.

Chair Segerblom:
But the $10,000 award is only if the motion to dismiss is frivolous.

Mr. Balkenbush:
I understand.

Senator Brower:
I hear what you are saying, Mr. Balkenbush. Nowhere in the NRS or the *Nevada Rules of Civil Procedure* is a dollar amount penalty levied toward something someone does in litigation. This would be very unusual. Not to say that it should not be considered. There is still much work to be done on S.B. 286.

Senator Jones:
I am willing to work with Mr. Balkenbush and Ms. Bruch to resolve the concerns raised.

I do want to emphasize Senator Ford's point: the standard for award of attorney's fees on the plaintiff's side is clear and convincing evidence. On the defendant's side the standard is frivolous and vexatious. Both are very high standards.

With regard to Mr. Balkenbush's statement that NRS 41 has worked well in Nevada, I do not contest that. However, in light of the Ninth Circuit Court's decision last year, there is cause for concern. I echo Mr. Randazza's comments. If Nevada wants to compete for businesses which want to move in, we must compete with those states which have sufficient protection against SLAPP lawsuits: California, Washington and Texas.

Chair Segerblom:
Do these other states have the $10,000 award?

Senator Jones:
Senate Bill 286 came from the Washington statute. I will have to check with Mr. Randazza on that amount.

Mr. Balkenbush:
The $10,000 provision only exists in Washington. California, Oregon and Texas do not have this provision.

Chair Segerblom:
We will close the hearing on S.B. 286. Senator Hardy is presenting S.B. 323.

SENATE BILL 323: Revises provisions relating to incompetent defendants. (BDR 14-1063)

OPENING REMARKS FOR SENATE BILL 286

SENATOR JUSTIN C. JONES

Thursday, March 28, 2013

Senate Committee on Judiciary

- Good morning Mr. Chair and members of the Committee. I am Justin Jones representing Senate District No. 9 from Clark County.

- I am here today to present Senate Bill 286 for your consideration.

- As guaranteed by the First Amendment, the right to petition our government for redress is arguably one of the most important rights we have.

- Nevada recognizes this right and protects people who exercise their First Amendment right to petition.

- Specifically, Chapter 41 of *Nevada Revised Statutes* protects people from civil liability for claims based on protected communication.

- Generally speaking, protected communication must be made in good faith and be truthful, or at least made without knowing it is false.

- The provisions of Chapter 41 are meant to deter frivolous lawsuits, commonly known as a Strategic Lawsuit Against Public Participation, or SLAPP.

- A SLAPP is a meritless lawsuit that a plaintiff initiates primarily to stop someone from exercising their First Amendment rights.

EXHIBIT C Senate Committee on Judiciary
Date: 3-28-2013 Page: 1 of 3

- When a plaintiff files a SLAPP, Chapter 41 allows the defendant to file a special motion to dismiss the lawsuit.

- If the court grants a special motion, it must also award attorney's fee to the defendant.

- The defendant may also file a new lawsuit for:
  - Compensatory damages;
  - Punitive damages; and
  - Attorney's fees and costs for bringing the new lawsuit.

- In a recent decision, the 9th Circuit Court of Appeals held that the anti-SLAPP provisions of Chapter 41 only protect communications made directly to a governmental agency.

- The Court also held that the Nevada provisions only protect defendants from liability, not from trial.

- Finally, the 9th Circuit Court concluded that in Nevada there is no right to immediately appeal an order denying a special motion to dismiss a SLAPP.

- I am introducing Senate Bill 268 to resolve those limitations.

- Beginning with Section 1, the bill expands the type of protected communication to include the right to free speech if it is about an issue of public concern.

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- Section 1 also protects communications about an issue of public interest made in public places.

- Next, Section 2 expands the anti-SLAPP provisions to cover any civil action, not just liability.

- Section 3 specifies standards of proof for motions to dismiss a SLAPP, and requires the court to rule on those motions within seven days.

- If a court grants a motion to dismiss a SLAPP, Section 4 requires the court to grant the defendant, in addition to attorney's fees and costs, $10,000.

- If a court denies a motion to dismiss and finds that it was frivolous, the bill requires the court to grant the plaintiff:
  - Reasonable costs and attorney's fees for responding to the motion;
  - $10,000; and
  - Any additional relief the court thinks will punish and deter the filing of frivolous or vexatious motions.

- Finally, S.B 286 creates an immediate right to appeal if a special motion to dismiss is denied.

- Chair Segerbloom and Committee Members, I thank you for your time and I'd be happy to answer any questions.

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via Email or Fax

March 28, 2013

Nevada State Senate
Senate Chamber
Nevada State Legislative Building
401 S. Carson Street
Carson City, Nevada 89701

Re: Report to Senate on Proposed Changes to Nevada's Anti-SLAPP Laws

Dear Esteemed Senators:

Nevada stands among the states with largely ineffective Anti-SLAPP laws. NRS 41.635-670 (the "Anti-SLAPP Laws"). It stands in the shadows of California, Oregon, Washington, and Texas, which have passed far more effective legislation that acts not only to protect freedom of expression in those states, but which also act as an attraction to the establishment of business in those states.

Nevada's Anti-SLAPP Laws protects **only** "good faith communication in furtherance of the right to petition." NRS 41.650. This **limits** its scope to speech made to a government agency, or directly in connection with a matter under consideration by one of the government's arms. NRS 41.637. This is not enough.

With the dawn of the Internet's user-generated content era, individuals have found themselves in the crosshairs of SLAPPs brought over Constitutionally protected speech. Reviews on sites like Yelp! and Avvo beget crushingly expensive litigation by subjects of factual but unflattering reviews. These lawsuits primarily serve to harass and intimidate small defendants and the websites themselves while pummeling them with significant legal fees. Caught in the crossfire are Nevada's already backlogged and overburdened Courts, which must referee these one-sided fights.

Similarly, businesses have been faced with lawsuits over their own First Amendment protected activity, ranging from advertising and marketing practices to the management of their employees. This drives down the profits of these businesses and interferes with their ability to grow and hire new employees. Once again, Nevada's courts suffer the costs of these suits as well.

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Broadened Anti-SLAPP Laws serve numerous public services. First, it protects the public – individuals and businesses alike – from going broke fighting meritless claims. Meritorious claims will still proceed; new Anti-SLAPP Laws will not mean the end of defamation law in Nevada. Anti-SLAPP statutes have had no impact upon meritorious defamation cases in California, Oregon, Texas, or Washington. It will, however, mean that marginal cases are kept out of the courts – and if they are brought, the costs will fall on the plaintiff who filed suit.

Second, the proposed changes to Nevada's Anti-SLAPP Laws create new safeguards to ensure the laws have effect. At any time, a defendant may require a plaintiff to post a bond for the estimated value of his or her attorneys' fees, provided the defendant can show a reasonable possibility of succeeding on an Anti-SLAPP motion. If the plaintiff cannot post a bond, the case is dismissed. This ensures that defendants who win Anti-SLAPP motions do not merely obtain pyrrhic victories.

Expanding the scope of Nevada's Anti-SLAPP Laws to apply to *all* speech about matters of public concern – not merely speech seeking government action – will benefit individuals and Nevada's courts. Abusive uses of the judicial process will be resolved privately with these motions, rather than requiring the courts to exercise close control over every single case before it. Businesses will be able to truncate or at least significantly limit questionable litigation, making more funds available for expansion and hiring. While there are numerous factors affecting the technology sector's growth over the last 20 years, it is not an accident that social media companies such as Yelp, Avvo, Twitter, Zynga, Facebook, and others are based in California and Washington – states with robust Anti-SLAPP statutes that protect a wide range of speech.

My law firm represents a large number of journalists and tech startups. Despite the fact that we are headquartered in Las Vegas, we reluctantly advise clients to organize or incorporate in California, Oregon, and Washington so that they can benefit from those states' Anti-SLAPP statutes. Most significantly, individuals will be spared from personal bankruptcy and financial destruction arising from all-consuming litigation against a more powerful party.

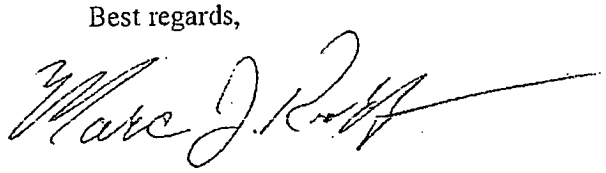
The trend of litigation against Constitutionally protected speech within Nevada cannot be denied. Military veterans have been sued for expressing opposition to a Las Vegas family law attorney's position on the disposition of military benefits upon divorce. Anonymous commenters have been brought into court, and sought to be deprived of their Constitutional right to anonymity, for comments left on *Las Vegas Review-Journal* online articles. Nevada's own Righthaven LLC filed more than 200 lawsuits in Nevada's courts – and whenever attorneys stepped forward to litigate the issue of "Fair Use," or whether the interests of the First Amendment trumped Righthaven's dubious copyright claims, Righthaven lost *every single time*.[1]

Broadening Nevada's Anti-SLAPP Laws serves multiple public interests. While an increasing number of state and federal lawsuits feature litigants who are *pro se*, or not represented by an attorney, new Anti-SLAPP Laws will encourage access to justice. Because of the proposed fee-

[1] Because the proposed amendments to Nevada's Anti-SLAPP Laws are substantive, rather than procedural, they will apply in the United States District Court for the District of Nevada – where Righthaven filed its actions – as well as Nevada's state courts.

shifting and bond provisions, attorneys will compete to take these cases and vindicate their clients' free speech rights, rather than accept it – and quarantine it – in their pro bono allotment for the year. Most importantly, though, it will memorialize to Nevadans and the nation this State's commitment to truly open debate, free expression, and the sacrosanct principles enshrined in the First Amendment of the United States Constitution and Article I of the Nevada State Constitution.

Best regards,



Marc J. Randazza

SUMMARY – Provides immunity from civil action under certain circumstances. (BDR 3-675)

FISCAL NOTE: Effect on Local Government: No.

Effect on the State: No.

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 s 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), 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), and 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 1 of this bill fixes the language of NRS 41.635 to accord with the changes proposed to NRS 41.637 to 41.670, inclusive, and incorporates the definition of "political subdivision" as it currently exists in NRS 41.640

Section 2 of this bill encapsulates all of these provisions into one all-encompassing Anti-SLAPP statute. Such a measure will bring Nevada's Anti-SLAPP statute in line with other states and ensure that it serves its intended purpose of providing the public, the judiciary, and the bar with a mechanism for swiftly disposing of and discouraging frivolous suits brought to harass and intimidate defendants for engaging in Constitutionally protected speech. Because of the importance of all the provisions within an Anti-SLAPP statute and how they interact, other states have endeavored to place them all together in one statute, so that important pieces would not go unobserved by judges or litigants. *See* Cal. Civil Procedure Code § 425.16; Rev. Code Wash. §

4.24.525; *see also* Texas Civil Procedure and Remedies Code Ch. 27; D.C. Code Title 16, Ch. 55. By consolidating every operative portion of Nevada's Anti-SLAPP statute within one statute, both the public's access to justice is maximized while the litigation of parties with more resources is maximized, ensuring outcomes that are protective of free speech, economically efficient, and limited in the use of judicial resources.

Nevada's existing Anti-SLAPP statute, Nev. Rev. Ann. § 41.660, provides inadequate remedies and rights to those seeking to exercise their constitutional rights and freedom of speech and petition for the redress of grievances when compared to the Anti-SLAPP statutes in several other states across the country. Adopting a stronger Anti-SLAPP statute, similar to those in Washington and California will infuse Nevada's economy by attracting business to the state and will strengthen the rights of those wishing to express their First Amendment Rights or on other matters of public concern. Furthermore, improving Nevada's Anti-SLAPP statute will combat litigation filed in an effort to chill the valid exercise of First Amendment rights. The following additions to Nevada's Anti-SLAPP statute would provide much-needed modifications to broaden the protections of the current law.

1. Pre-Suit notice prior to the filing of defamation claims (Fla. Stat. 770.01)

Fla. Stat. 770.01 provides that a plaintiff shall provide five days' pre-suit notice before filing an action for defamation. Instituting a similar pre-suit notice requirement in Nevada for all defendants in defamation claims would serve to curtail the number of unnecessary law suits filed, which contribute to a waste of financial and temporal resources within the court. If the statute requires plaintiffs to provide defendants with pre-suit notice, a defendant could mitigate damages suffered by the plaintiff by issuing a clarification or correction, or by simply removing the allegedly defamatory content from public display. Not only would this potentially reduce the

number of lawsuits filed, but it would also begin a dialogue between the two parties, which could lead to a more amicable resolution than litigating the matter in courts.

Furthermore, pre-suit notice encourages less savvy defendants to seek legal counsel to discuss the possible ramifications of the filing of a complaint. The interests of both plaintiff and defendant are best served when all parties have legal representation. When both sides have retained counsel, both the plaintiff and defendant will be able to make more informed legal decisions.

2. Request from defendant for plaintiff to post bond in event of filing of special Anti-SLAPP motion.

California Civil Procedure Code Section 1030 provides defendants in an action in which the plaintiff resides out of state or is a foreign corporation, with the ability to request an order from the court requiring that the plaintiff post a bond to secure an award of attorney's fees and cost that may be awarded in the action or special proceeding. A defendant must include an affidavit in support of the grounds for the motion, the nature and amount of the attorney's fees, and the costs that he expects he will incur.

Including this language in an anti-SLAPP statute would prevent SLAPP plaintiffs from driving up the costs of litigation and then refusing to pay an award or bankrupting themselves to render the award meaningless. This deters a plaintiff from filing a frivolous suit. Furthermore, if a defendant were assured that the plaintiff has the necessary funds to cover an anti-SLAPP special motion to dismiss if it is successful, defendants would be more likely to challenge unfair complaints rather than settle unnecessarily, effectively chilling their free speech rights.

However, such an addition could prove to be cost prohibitive to the plaintiff, which might prevent plaintiff from receiving redress for his grievances. The California courts have addressed

this issue with regard to their statute. In *Bank of America Nat. Trust & Sav. Ass'n v. Superior Court of Fresno County*, the court held that in forma pauperis motions were applicable to Cal. Code Civ. P. § 1030 requests. 255 Cal. App. 2d 575, 578, 63 Cal. Rptr. 366, 368 (App. 5 Dist. 1965); *sèe also Alshafie v. Lallande*, 89 Cal. Rptr. 3d 788, 171 Cal. App. 4th 421 (App. 2 Dist 2009); *Baltayan v. Estate of Getemyan*, 110 Cal. Rptr. 2d 72, 90 Cal. App. 4th 1427 (App. 2 Dist. 2001). Indigent plaintiffs are not the only ones who could receive relief; California courts also have reduced the amount of the security bond in situations where the plaintiff is of middle-income as well. *Alshafie*, 89 Cal. Rptr. 3d at 800-01.

Based on how the California courts have handled the reduction of the security bond based on the plaintiff's income level, it is unlikely that a bond requirement would prevent plaintiffs from pursuing valid claims in court. However, procedures should be in place to prevent a lack of access to Nevada's courts.

3. Broaden language to include not only the right to petition, but written or spoken acts involving "public participation." Rev. Code Wash. Section 4.24.525.

Washington's anti-SLAPP statute provides remedies for defendants who have made written or oral statements "in a place open to the public or a public forum in connection with an issue of public concern" or "lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern." Rev. Code. Wash. § 4.24.525(2)(d)-(e). California's statute contains similar language. In Nevada, at least one judge has stated that the anti-SLAPP statute not only is limited to defendants who exercise a right in furtherance to petition, but interpreted the statute to only protect those defendants making an appeal directly to a government agency. *Metabolic Research, Inc. v. Ferrell*, 2:09-cv-02453 (D. Nev. 2011).

Courts in both California and Washington have interpreted public forums very widely, even including Internet pages in the interpretation. *See Davis v. Avvo, Inc., 2012 WL 1067640* (W.D. Wash. 2012); *Barrett v. Rosenthal*, 40 Cal. 4th 33 (2006). In providing broad protection for defendants, the anti-SLAPP statutes further advance the purposes of these types of laws: to lessen the number of frivolous lawsuits thereby freeing up the courts and to prevent the chilling effect such lawsuits have on freedom of speech.

4. Add Protections for Anonymous Speakers Who May Be Unmasked by Subpoenas Issued Within Nevada's Courts.

California Civil Procedure Code Section 1987.1 allows a defendant whose personal identifying information is sought in connection with that individual's exercise of free speech rights via subpoena to move to quash that subpoena. Such protection is needed in Nevada. Often in SLAPP cases, a plaintiff will bring suit against an anonymous individual, naming him or her as a John or Jane Doe defendant in the lawsuit. Once suit is filed, the litigation's whole purpose is to identify the individual. Indeed, once the plaintiff knows the individual's name, the lawsuit has served its whole purpose. This species of litigation has already arrived in Nevada and targeted comments made on the website for the *Las Vegas Review-Journal* concerning a contentious political campaign. *Brown v. Doe*, Case No. A-12-658911-C (Clark County. Dist. Ct. 2012).

Anonymous speech is a central value to the United Sates Constitution, particularly on issues affecting politics and matters of public concern. *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995); *see generally The Federalist Papers*. Allowing anonymous speakers to move to quash subpoenas seeking to deprive them of this right ensures that an improved Anti-SLAPP statute will not expose the flanks of free speech and allow Constitutionally protected statements

by known individuals to enjoy its provisions, while requiring individuals speaking anonymously or through pseudonyms to lose their rights to do so before being able to use Anti-SLAPP remedies. Giving an anonymous defendant the ability to file such a motion to quash is necessary in an age of Internet anonymity. Obtaining personally identifying information is often itself the ultimate goal of SLAPP lawsuit, so that a plaintiff may use the courts to unmask a defendant – depriving him or her of the Constitutional right to anonymous speech – and hold him or her up to public scorn for engaging in First Amendment-protected conduct.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLEY, DO ENACT AS FOLLOWS:

Section 1. NRS 41.635 is hereby amended to read as follows:

41.635 **Definitions.** As used in NRS 41.635 and 41.637 [~~to 41.670~~], inclusive, unless the context otherwise requires, the words and terms defined in NRS 41.637 [~~and 41.640~~] have the meanings ascribed to them in those sections.

(a) "Political Subdivision" has the meaning ascribed to it in NRS 41.0305.

(b) "Personally Identifying Information" includes all of the information a Provider of Internet Service is required to keep confidential, pursuant to NRS 205.498.

Sec. 2. NRS 41.637 is hereby amended to read as follows:

41.637 1. If an action is brought against a person based upon a ~~good faith~~ communication, *including the making and submitting of any document or statement, involving public*

participation or petition that is protected under the United States Constitution or Nevada Constitution ~~in furtherance of the right to petition~~:

(a) The person against whom the action is brought may file a special motion to dismiss ***under this section***; 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) ***Evaluate the motion as one*** ~~Treat the motion as a motion~~ for summary judgment; ***and***

(b) Stay discovery pending:

(1) A ruling by the court ~~on~~ ***denying*** the motion ***in whole or in part***; 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 filed pursuant to subsection 2, the dismissal operates as an adjudication upon the ***dismissed claims'*** merits.

5. This Section applies to any claim, however characterized, that is based on an action involving communication involving public participation or petition. As used in this section, "communication, ***including the making and submitting of any document or statement,***

involving public participation or petition that is protected under the United States Constitution or Nevada Constitution" includes:

(a) any written or oral statement or writing made before a legislative, executive, municipal, administrative, or judicial proceeding, or any other official proceeding authorized by law;

(b) any communication made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;

(c) any communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial, or other governmental body;

(d) any communication made in a place open to the public or a public forum in connection with an issue of public interest, or in another governmental or official proceeding; or

(e) any other communication or conduct in furtherance of the exercise of the constitutional right of petition or the right of free speech in connection with a public issue or an issue of public interest under the United States Constitution or Nevada Constitution.

(f) The above are to be construed broadly, and it shall be presumed that speech that is of interest to a significant number of people is speech on a matter of public concern.

6. Before any civil action is brought for defamation or any other cause of action duplicative of defamation, the person or entity bringing such an action shall, at least five days before instituting such action, serve notice in writing on the defendant, specifying the article or broadcast and the specific statements therein which he or she alleges to be tortious. This notice must identify the statements at issue with sufficient particularity to allow a reasonable person to ascertain the specific facts the civil claimant contends are false. The notice shall further explain, with particularity, how the statements may be amended to reflect the truth. Any failure to comply with this subsection shall mandate immediate dismissal of the action,

and an award of the defendant's costs and reasonable attorney's fees incurred in obtaining such a dismissal.

7. Any order granting or denying a special motion to dismiss under this section, whether in whole or in part, shall be immediately appealable.

8. The defendant may (at any time) move the Court for an order requiring the plaintiff to provide an undertaking, which shall be held by the Court, to secure the movant's award of costs and attorney's fees that may be awarded in the special proceeding.

(a) The motion shall be made on the grounds that there is a reasonable possibility that the moving defendant will obtain judgment for costs and reasonable attorney's fees in the action or special proceeding. The motion shall be accompanied by an affidavit in support of the grounds for the motion and by a memorandum of points and authorities. The affidavit shall set forth the nature and amount of the costs and attorney's fees the defendant has incurred and expects to incur by the time the movant obtains a favorable judgment in the action.

(b) If the court determines that the grounds for the motion have been established after conducting a hearing on the motion, the court shall order that the plaintiff file the undertaking in an amount specified in the court's order as security for costs and attorney's fees.

(c) The plaintiff shall file the undertaking not later than 30 days after service of the court's order requiring it or within a greater time allowed by the court upon a showing of good cause. If the plaintiff fails to file the undertaking within the time allowed by the court, the plaintiff's action shall be dismissed without prejudice as to the defendant in whose favor the order requiring the undertaking was made.

(d) If the defendant's motion for an order requiring an undertaking is filed within 30 days after service of summons on the defendant, the court may stall all further proceedings in the action until 10 days after the motion for undertaking is denied or, if granted, until 10 days after the required undertaking has been filed with the court and notice of the same has been served on the moving defendant. The hearing on defendant's motion for an undertaking shall be held within 60 days after the summons and complaint in the action were served on the moving defendant. If the court grants the defendant's motion for an undertaking but the defendant files an objection to the undertaking's sufficiency, the court may in its discretion stay the proceedings not longer than 10 days after a sufficient undertaking has been filed and the defendant has been served with notice of the same.

(e) The court's determinations under this section have no effect on the determination of any issues on the merits of the action or special proceeding and may not be given in evidence nor referred to in the trial of the action or proceeding.

(f) An order granting or denying a motion for an undertaking under this section is not immediately appealable.

9. (a) If a subpoena requires the attendance of a witness or the production of books, documents, electronically stored information, or other things before a court, or at the trial of an issue therein, or at the taking of a deposition, the court, upon motion reasonably made by any person described in subdivision (b), or upon the court's own motion after giving counsel notice and an opportunity to be heard, may make an order quashing the subpoena entirely, modifying it, or directing compliance with it upon those terms or conditions as the court shall declare, including protective orders. In addition, the court may make any other order as may be appropriate to protect the

person from unreasonable or oppressive demands, including unreasonable violations of the right of privacy of the person.

(b) The following persons may make a motion pursuant to subdivision (9)(a):

(1) A party;

(2) A witness; or

(3) A person whose personally identifying information, as defined by NRS 205.498, is sought in connection with an underlying action involving that person's exercise of free speech rights.

(c) Nothing in this section shall require any person to move to quash, modify, or condition any subpoena duces tecum seeking personally identifying information, as defined by NRS 205.498.

(d) If a motion is filed for an order to quash or modify a subpoena from a court for personally identifying information, as defined by NRS 205.498, for use in an action arising from the moving party's anonymous exercise of free speech rights, and the respondent fails to submit evidence that would create a genuine question as to any material fact concerning the validity of the claims asserted against the anonymous party, the court shall award the movant the amount of the reasonable expenses incurred in making the motion, including the movant's costs and reasonable attorney's fees.

THE UNIVERSITY OF ARIZONA.

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25 March 2013

I write to support Nevada Senate Bill No. 286. The bill sensibly expands protections for free speech by the citizens of Nevada, while allowing meritorious legal claims to proceed unscathed. Moreover, a more speech-protective statute will encourage start-up firms to locate in Nevada, and will shield small businesses from expensive litigation that seeks to silence them, rather than to vindicate any legitimate legal position.

I am a law professor and practicing attorney. My research focuses on free speech concerns, and in particular on censorship and the First Amendment.[1] In addition, I have counseled dozens of start-up firms, and thus am keenly aware of the needs and concerns of today's entrepreneurs.

Existing Nevada law offers the state's citizens and businesses some protection against lawsuits designed to silence those who speak out on matters of public concern.[2] This valuable immunity, however, is limited to communication that relates to the freedom to petition one's government. Political speech is at the heart of American protections for free expression. However, other forms of protected speech are equally important, and may have greater effects on Nevada citizens' daily lives. Consider the Reno resident whose car is unfairly impounded by a local tow operator, or the Las Vegas patient who wants to complain about a bad experience with a chiropractor.[3] If they post a truthful, yet negative, review to an on-line forum such as Yelp or Angie's List, they may face a lawsuit for defamation or trade libel, with enormous potential damages. The sensible answer to such a threat is to remove the offending remarks – no matter how valuable and truthful they may be – and to remain silent in the future. Few of us can afford to hire an attorney to vindicate the truth of a consumer review. Taking a stand is noble, but economically irrational. Yet that outcome leaves us all poorer, and worse off: we will be the next ones victimized by over-aggressive towing, or a poor spinal adjustment. Nevada's current statute offers no protection to such watchdogs, whose speech is vital yet easily chilled. The expansion contemplated by S.B. 286 would shield this socially valuable expression against frivolous lawsuits.

Furthermore, the effects of speech protections, such as anti-SLAPP bills, on small businesses and start-up firms are vitally important, and underappreciated. Start-up companies are idea-rich and resource-poor. Often, they cannot afford legal representation even for core business needs such as drafting employment agreements, protecting their intellectual property portfolios, and forming corporate entities.[4] They certainly lack resources to combat lawsuits from better-funded competitors who seek to silence criticism or comparative advertising. A start-up in the field of

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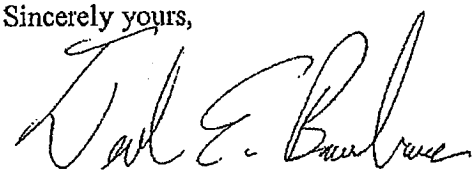
[1] *See, e.g.*, Derek E. Bambauer, *Orwell's Armchair*, 79 University of Chicago Law Review 863 (2012).
[2] Nev. Rev. Stat. § 41.635 et seq.
[3] *See* Dan Frosch, *Venting Online, Consumers Can Find Themselves in Court*, N.Y. Times, June 1, 2010, at A1.
[4] I spent four years working with start-up firms as part of Brooklyn Law School's Brooklyn Law Incubator & Policy (BLIP) clinic. At the University of Arizona, I am working to launch a similar clinic, and consult with Tech Launch Arizona, the university's effort to foster innovation and start-up companies. The BLIP clinic was launched with the express purpose of supporting Brooklyn's thriving "Silicon Alley" tech start-up sector. Many, if not most, Brooklyn start-ups sorely needed legal counsel, but were unable to afford an attorney.

nutrition supplements, for example, may amass evidence that a competitor's products pose a threat to consumers' health.[5] If that start-up uses this evidence in its own advertising, or to alert consumers to potential health risks, it likely faces a lawsuit that threatens to deplete its available capital – even if the evidence to support its position is overwhelming.[6] Faced with such risks, the firm may choose to remain silent – or, indeed, to locate in a state that offers it more comprehensive protection for engaging in truthful, useful communication with the public.[7] Legal protections matter greatly to start-up companies – this explains why Delaware is the state of choice for incorporation, and why California and Washington boast thriving technology industries. By augmenting its existing anti-SLAPP law, Nevada can create an environment in which start-up firms thrive, driving economic growth and leveraging the state's other resources.

In short, passing the amendments contained in S.B. 286 would redound to the benefit of both Nevada's citizens and economy. I urge the adoption of the bill. I would be happy to respond to any questions you might have. My contact information is listed at the top of this letter. Thank you for your consideration,

Sincerely yours,



Derek E. Bambauer

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[5] *Cf. Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795 (9th Cir. 2012).
[6] *See* Irina D. Manta, *Bearing Down on Trademark Bullies*, 22 Fordham Intell. Prop. Media & Ent. L.J. 853, 862-63 (2012).
[7] *See generally* Carson Hilary Barylak, Note, *Reducing Uncertainty in Anti-SLAPP Protection*, 71 Ohio. St. L.J. 845 (2012).

RANDAZZA LEGAL GROUP

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SB 286

Judiciary Committee Hearing

March 28, 2013, 9:00 AM

Room 2149, Legislative Building - 401 S Carson Street

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LARRY JOE DAVIS, JR., an individual,

Plaintiff,

v.

AVVO, INC., a Washington corporation, d/b/a Avvo.com,

Defendants.

CASE NO. C11-1571RSM

ORDER ON SPECIAL MOTION TO STRIKE, PURSUANT TO RCW 4.24.535

This matter is before the Court for consideration of a special motion to strike filed by defendant Avvo, Inc. ("Avvo"). Dkt. # 47. This motion is brought pursuant to Washington's "anti-SLAPP" law, RCW 4.24.525.[1] Plaintiff has opposed the motion. After careful consideration of the record and the parties' memoranda, the Court has determined for the reasons set forth herein that the motion shall be granted.

BACKGROUND

[1] "SLAPP" in the statutory context is an acronym for Strategic Lawsuits Against Public Participation. In passing RCW 4.24.525, the legislature expressed a concern over lawsuits "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." RCW 4.24.525, Notes, 2010 c 118. The statute provides for the rapid resolution of a special motion, filed by the defendant, to strike the SLAPP.

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Plaintiff Larry Joe Davis, Jr., is a Florida attorney, board-certified in Health Law. According to the website of the Florida State Bar Association, board certification is a program by which licensed attorneys may become recognized for special knowledge, skill and proficiency in a designated area of practice.[2] The certification process involves earning a passing grade on an examination, peer review assessment, and satisfaction of the certification area's continuing legal education requirements. A Florida attorney who is board certified may use the designation "Board Certified," "Expert," or "Specialist." *Id.*

Defendant Avvo operates a website that provides profiles of many lawyers, doctors, and dentists in the U.S., including area of practice or specialty, disciplinary history, experience, peer endorsements, and client or patient reviews. The lawyer section of the website is searchable by area of practice and location.[3] The information is gathered from publicly available material, including state bar associations, state courts, and lawyers' and firms' websites. Declaration of Joshua King, Dkt. # 9, Exhibit 16. The profile contains an Avvo numerical rating (zero to ten), calculated mathematically from information in the lawyer's profile, including years in practice, disciplinary actions, professional achievements, and industry recognition. *Id.*, Exhibit 25. The rating is intended to guide the public in finding a suitable qualified lawyer. *Id.*, Exhibit 3. An attorney cannot change his rating by request to Avvo, but he or she may register on the Avvo website, "claim" his or her profile, and update information regarding work experience, practice areas, and professional achievements, any of which may change the rating. *Id.* Clients may submit reviews, which may also change the rating.

Plaintiff filed this action for libel and violation of two Florida statutes in Florida state court on August 26, 2010. Dkt. # 2. He asserted in that complaint that he first learned of his Avvo profile and rating on August 19, 2010, when a prospective client called him to ask for help with an employment issue involving a hostile environment claim. Complaint, Dkt. # 2, ¶ 9. She told plaintiff she called him because he was the "lowest rated employment lawyer" and she assumed he would be "desperate for

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[2] http://www.floridabar.org/divcom/pi/certsect.nsf/certifications, accessed on March 22, 2012.

[3] http://www.avvo.com/find-a-lawyer?ref=homepage accessed on March 22, 2012.

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employment." *Id.*, ¶ 11.

Plaintiff informed the caller that he was not a "low-ranking employment lawyer" but rather a Board Certified health law attorney, and declined to represent her. *Id.*, ¶ 12. After concluding the telephone call, plaintiff visited the Avvo.com website and saw that his practice area was depicted by a "pie chart" which stated "100% employment/labor law." He then went to log on to his profile page and "attempt to correct the misinformation, which included an incorrect business address and blatantly incorrect practice area." *Id.*, ¶ 14. He alleges that after "participating in the Avvo.com website," he saw his rating go from 4.3 to 5.0. *Id.*, ¶ 15. Then, over the next several days, he attempted to "delist" himself from the website entirely, but was unable to do so. *Id.*, ¶ 16. As a result of his efforts, according to plaintiff, his rating dropped to 3.7, accompanied by a "caution" in red letters. *Id.* Plaintiff has provided "screen shots" of other attorneys' profiles, but none of his own to demonstrate these changes. Declaration of Larry Joe Davis, Jr., Dkt. # 20, Exhibits 1, 2, 3. The Court notes that at this time, plaintiff's profile page displays no photograph, and shows a rating of 4.4, a "concern" in red letters, together with the statement, also in red, that "this lawyer has been disciplined by a state licensing authority," together with a link to more information regarding the disciplinary action.[4] Plaintiff's area of practice is still listed on his profile as "100% employment/labor" despite the fact that he has the power to change that entry. There are two very positive five-star client reviews.

Plaintiff filed an amended complaint shortly after filing the original, and served a copy on defendant on September 14, 2010. Dkt. # 3. The amended complaint changed the date that plaintiff learned of his Avvo profile and low rating to August 17, 2010, deleted the causes of action for libel, and added a claim of invasion of privacy/false light. Dkt. # 3. The action was removed to the United States District Court for the Middle District of Florida on October 19, 2010, on the basis of the parties'

[4] http://www.avvo.com/attorneys/33701-fl-larry-davis-1295960.html accessed on March 22, 2012.

diversity.[5] Dkt. # 1.

After defendant filed a motion to dismiss for failure to state a claim pursuant to Fed.R.Civ.Proc. 12(b)(6), plaintiff filed a Second Amended Complaint. Dkt. ## 8, 12. The Second Amended Complaint was stricken by the court for failure to obtain leave of court before filing, as required by Fed.R.Civ.P. 15(a)(2). Dkt. # 14. Defendant then moved pursuant to 28 U.S.C. § 1404(a) to transfer the action to this district pursuant to a forum selection clause on the Avvo.com website, and other factors. Dkt. # 15. Before the court ruled on the motion to transfer, plaintiff sought leave to amend his complaint a third time. Dkt. # 21. The motion was granted, and plaintiff filed his Third Amended Complaint on April 25, 2011. Dkt. # 26. The Third Amended Complaint, which is now the operative complaint in this case, asserts three causes of action under Florida law regarding the alleged misrepresentation of plaintiff's address and practice area, and the use of his photograph in his profile. He does not challenge his rating or the mention of disciplinary action.

After the Third Amended Complaint was filed, defendant filed, in rapid succession, a motion to strike designated paragraphs of the Third Amended Complaint (Dkt. # 30), a motion to dismiss for lack of subject matter jurisdiction and/or failure to state a claim (Dkt. # 31), and a renewed motion to transfer venue to the Western District of Washington (Dkt. # 32). The motion to transfer was granted and the case was transferred to this Court on September 29, 2011. Dkt. ## 43, 44. The Florida district court specifically found that plaintiff, a licensed and board-certified attorney, agreed to the Terms of Use on the Avvo.com website, including the forum selection clause, when he registered and logged in to update his profile. Order, Dkt. # 43, p. 7.

After transfer, defendant did not renew the previously-filed motion to strike and motion to dismiss for lack of subject matter jurisdiction in this Court. Instead, on November 2, 2011, defendant

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[5] Although the amended complaint did not plead a sum certain as damages, defendant met the burden on removal of establishing that the jurisdictional amount of $75,000 has been met by pointing to a settlement demand for $145,000 (with an apology) or $175,000 (without an apology) presented by plaintiff after he filed suit. Notice of Removal, Dkt. # 1. A defendant may use the amount demanded by the plaintiff as settlement as evidence that the amount in controversy exceeds the jurisdictional minimum. *Conn v. Petsmart, Inc.*, 281 F. 3d 837, 840 (9th Cir. 2002). Plaintiff's demand was not clearly excessive in light of the fact that his amended complaint includes requests for actual damages, punitive and exemplary damages, and statutory attorneys fees on four separate claims. Dkt. # 3.

filed the motion to strike the complaint pursuant to RCW 4.24.525 that is currently before the Court for consideration. This Court has jurisdiction over the matter pursuant to 28 U.S.C. § 1332(a)(1).

DISCUSSION

I. Legal Standard

The Washington anti-SLAPP Act is intended to address lawsuits brought primarily to chill the valid exercise of the constitutional rights of free speech and petition for redress. The legislature found that it is in the public interest for citizens to participate in matters of public concern, and to provide information on public issues that affect them without fear of reprisal through abuse of the judicial process. RCW 4.24.525; Senate Bill 6395, Laws of 2010, Ch. 118, § 1.

The law provides, in relevant part, that "[a] party may bring a special motion to strike any claim that is based on an action involving public participation" as defined in the statute. RCW 4.24.525(4)(a). The section applies to "any claim, however characterized, that is based on an action involving public participation and petition." RCW 4.24.525(2). An action involving public participation includes "[a]ny oral statement made . . . in a place open to the public or a public forum in connection with an issue of public concern" and "other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern. . ." RCW 4.24.525(2) (d) and (e).

An anti-SLAPP law provides relief to a defendant which is in the nature of immunity from suit. *Batzel v. Smith*, 333 F. 3d 1018, 1025 (9th Cir. 2003) (addressing California's anti-SLAPP statute.) In passing the law, the Washington legislature noted concern regarding both the chilling effect on the valid exercise of the constitutional right of freedom of speech, and the chilling effect of "the costs associated with defending such suits." RCW 4.24.525, notes 2010 Ch. 118. The statute accordingly provides for an award of attorneys' fees and costs, plus a statutory award of $10,000, to a defendant who prevails on an anti-SLAPP motion. RCW 4.24.525(6)(a)(i), (ii). Conversely, if the Court finds that the anti-SLAPP motion to strike was frivolous or brought solely to cause unnecessary delay, costs, attorneys' fees, and $10,000 shall be awarded to the opposing party. RCW 4.24.525.(6)(b)(i), (ii). The special motion to strike is therefore not without risk to the moving party.

To prevail on the special motion to strike, the defendant bears the initial burden of showing, by a

preponderance of the evidence, that the plaintiff's claim is based on an action involving public participation or petition. If this burden is met, the burden shifts to the plaintiff to establish, by clear and convincing evidence, a probability of prevailing on the claim. If the plaintiff meets this burden, the motion to strike will be denied. RCW 4.24.525.(4)(b).

II. Analysis

The Court has no difficulty finding that the Avvo.com website is "an action involving public participation," in that it provides information to the general public which may be helpful to them in choosing a doctor, dentist, or lawyer. Further, members of the general public may participate in the forum by providing reviews of an individual doctor or lawyer on his or her profile page. The profile pages on the Avvo.com website constitute a "vehicle for discussion of public issues . . . distributed to a large and interested community." *New York Studio, Inc. v. Better Business Bureau of Alaska, Oregon, and Western Washington*, 2011 WL 2414452 at *4 (W.D.Wash. June 13, 2011). Therefore the burden shifts to plaintiff to show, by clear and convincing evidence, a probability of prevailing on his Florida state law claims.

Before turning to plaintiff's claims, the Court must consider his assertion that this motion is untimely. He contends that since the Third Amended Complaint was filed and served on April 25, 2011, the deadline to file this motion was June 26, 2011, pursuant to RCW 4.24.525(5)(a). The cited section states, in relevant part, "The special motion to strike may be filed within sixty days of the service of the most recent complaint, or, in the court's discretion, at any later time upon terms it deems proper." RCW4.24.525(5)(a). The use of the term "may" instead of the mandatory "shall" means that this is not a firm deadline to be applied in all cases. In light of the fact that the action was not transferred to this Court until September 20, 2011, the Court finds that the November 2, 2011 filing is timely.

Plaintiff's Third Amended Complaint asserts three causes of action under Florida law: (1) false advertising, in violation of Fla. Stat. § Section 817.41; (2) unauthorized use of a likeness for a commercial purpose, in violation of Fla. Stat. § 540.08; and (3) violation of the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.204 ("FDUTPA"). Third Amended Complaint, Dkt. # 26, pp. 10-12. Defendant asserts, in the first instance, that Washington law, not Florida law, applies to all

of plaintiff's claims, because he specifically agreed to that under the Terms of Use when he registered on the Avvo.com website.

> The Terms of Use agreement states, in relevant part, that
>
> These Site Terms and your use of the Site shall be governed by and construed in accordance with the law of the State of Washington applicable to agreements made and to be entirely performed within the State of Washington (even if your use is outside the State of Washington), without resort to its conflict of law provisions. You agree that with respect to any disputes or claims . . . any action at law or in equity arising out of or relating to the Site or these Site Terms shall be filed only in the state and federal courts located in King County, Washington. . . .

Declaration of Joshua King, Dkt. # 16, ¶¶ 3-9, Exhibit 1. As noted above, the district court in Florida held that plaintiff is bound by the Terms of Use when it enforced the forum selection clause. The court also addressed the enforceability of the choice of law provision, noting that

> Washington and Florida courts review the enforceability of choice of law provisions under a standard similar to that set forth in Section 187 of the Restatement (Second) of Conflict of Laws (*i.e.*, whether a choice of law clause would violate the public policy of the state with the materially greater interest).

Order of Transfer, Dkt. # 46, p. 8 (*citing In re DirecTV Early Cancellation Litigation*, 738 F. Supp. 2d 1062, 1088-90 (C.D.Ca. 2010)). The court found that the Washington Consumer Protection Act, RCW 19.86.020 (WCPA), and the FDUTPA are "substantially similar," and that even if this Court were to apply the WCPA to plaintiff's claims, and "assuming that the WCPA is more restrictive than the FDUCPA," the enforcement of the forum selection clause would not deprive plaintiff of his day in court. *Id.*

This Court applies the choice-of-law principles of the transferor court. *Shannon-Vail Five, Inc., v. Bunch*, 270 F. 3d 1207, 1210 (9th Cir. 2001). Florida law holds that contractual choice of law provisions are presumptively valid. *Gaisser v. Portfolio Recovery Associates, LLC*, 593 F. Supp. 2d 1297, 1300 (S.D.Fla. 2009). "Florida enforces choice-of-law provisions unless the law of the chosen forum contravenes strong public policy." *Mazzoni Farms, Inc., v. E.I. DuPont de Nemours & Co.*, 761 So. 2d 306, 311 (Fla. 2000). Nowhere does plaintiff argue that analysis of his claims under Washington law would contravene strong public policy. He simply contends that "section 501.211 [of

the Florida Statues] is not waivable by any [Terms of Use]." Plaintiff's Response, Dkt. # 6.[6] That assertion is not responsive to the choice of law question. Further, the Florida district court's determination that the WCPA and FDUTPA are substantially similar,[7] and that application of Washington law would not be unfair to plaintiff, constitutes a finding that such application would not contravene strong public policy. This Court therefore finds that the choice-of-law clause is enforceable, and that the WCPA, not the FDUTPA shall apply to plaintiff's claims.[8]

The WCPA's citizen suit provision states that "[a]ny person who is injured in his or her business or property" by a violation of the act may bring a civil suit for injunctive relief, damages, attorney fees and costs, and treble damages. RCW 19.86.090. To prevail on a private WCPA claim, plaintiff must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to the plaintiff's business or property, and (5) causation. *Panag v. Farmers Insurance Co. of Washington* , 166 Wash. 2d 27, 37 (2009) (*citing Hangman Ridge Stables, Inc., v. Safeco Title Insurance Co.,* 105 Wn. 2d 778, 784 (1986). The causation element may be met by demonstrating that the deceptive acts "induced the plaintiff to act or refrain from acting," and the plaintiff's damages were "brought about by such action or failure to act." *Fidelity Mortgage Co. v. Seattle Times Co.*, 131 Wash. App. 462, 468-69 (2005).

In the Third Amended Complaint, plaintiff identifies the deceptive acts or practices as the misrepresentation of his practice area, together with the misappropriation of his image and placement on his profile page. He claims that his listing on the website was "deceptive to the public, to consumers, to

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[6]Section 501.211 provides a private right of action under the FDUTPA to "anyone aggrieved by a violation of this part." Fla.Stat. § 501.211(1).

[7] The court compared Fla.Stat. § 501.204(1), which prohibits "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce" with RCW 19.86, which prohibits "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Order of Transfer, Dkt. # 43, p. 8.

[8] Treating plaintiff's claims under the WCPA instead of the FDUTPA is not prejudicial to plaintiff in terms of the ruling on this motion to strike. The private right of action under the FDUTPA is tempered by a provision requiring the plaintiff to post a bond to indemnify the defendant for damages, including attorney's fees, in the event the action is found to be frivolous, lacking in legal or factual merit, or brought for the purpose of harassment. Fla.Stat. 501.211(3).

other lawyers, and specifically to the potential client referenced herein." Third Amended Complaint, Dkt. # 26, ¶ 43. He asserts that this misrepresentation of his practice area is an attempt by Avvo.com to "coerce lawyers by illegal and tortious conduct, on an epidemic scale, to correct mislistings" and is "an actionable trade practice." *Id.*, ¶ 41.

As noted by the Florida district court, both the WCPA and the FDUTPA require that the deceptive act occur in trade or commerce. This Court has previously held that Avvo.com does not engage in "trade" or "commerce." *John Henry Browne v. Avvo, Inc.*, 525 F. Supp. 2d 1249, 1254 (W.D.Wash. 2007).

> "Trade" and "commerce" are defined as "the sale of assets or services. . . . Avvo collects data from public sources, attorneys, and references, rates attorneys (where appropriate), and provides both the underlying data and the ratings to consumers free of charge. No assets or services are sold to people who visit the site in the hopes of finding a lawyer and no charge is levied against attorneys or references who choose to provide information. It is hard to imagine how an information clearinghouse and/or ratings service could be considered "commerce". . . . Instead, plaintiffs argue that Avvo's offer to sell advertising space to attorneys transforms all of defendants' activities into trade or commerce. The advertising program is separate and distinct from the attorney profiles that are the subject of plaintiffs' complaint.

Id. The Court ruled that "Avvo's publication of information and ratings based on available data is not 'trade or commerce' and cannot form the basis of a CPA claim." *Id.*

Plaintiff seeks to distance his claim from this result by asserting that "[i]n the *Browne* opinion, this Court stated at 1254 that the placement of paid advertising in a free listing of brokerage rates would make such list commercial speech." Plaintiff's Response, Dkt. # 50, p. 8 (*citing Fidelity Mortgage Corp. v. Seattle times Co.*, 131 Wash. App. at 470. This statement mischaracterizes the ruling in *Browne*. Referring to *Fidelity Mortgage*, the Court stated that "the court found that a newspaper's publication of mortgage rates from various lenders was not, in the absence of payment from the lenders, trade or commerce. On the other hand, the same rate chart could be considered trade or commerce if the newspaper accepted an advertising fee in exchange for including a lender in the chart." *Browne*, 525 F. Supp. 2d at 1254. The Court thus distinguished a hypothetical situation where a newspaper accepted a fee for "including a lender in the chart" from the Avvo.com website where the free attorney profiles and the advertising images on the right side of the webpage are "separate and distinct."

Plaintiff thus cannot assert a claim under the WCPA for the alleged misrepresentation of his practice area or the use of his image, as these are part of his profile which under *Browne* is not "trade or commerce." However, in his response to the motion to strike, he clarifies that his claim concerns a different "deceptive act or practice" that he contends is related to Avvo's business model. This argument arises from his allegation in the Third Amended Complaint at ¶ 41, noted above, that the misrepresentation of his practice area is an intentional act by Avvo to induce him to register on the website to correct the misrepresentation.[9] "This profile-based content-based ad space is on information and belief, one of two primary revenue generators for Defendants, the other being the Avvo Pro membership (to stop the targeted ads, of course.)" Plaintiff's Response, Dkt. # 50, p. 9. Plaintiff thus contends that lawyers are induced to apply for "Pro" membership to prevent competitor's ads from appearing on their profile pages. He states, "That is, in fact, apparently one of the primary selling points of the Avvo Pro membership." *Id.*, 8. The Court accepts this as plaintiff's statement of the deceptive act or practice which forms the basis of his WCPA claim.

Plaintiff has presented no evidence, let alone clear and convincing evidence, to demonstrate that there is any probablily of prevailing on his WCPA claim. He points to no evidence in the record to support the conclusory allegations regarding Avvo's advertisements. Indeed, he has provided no evidence at all; he has merely "verified" the allegations set forth in his Third Amended Complaint. Affidavit of Larry Joe Davis, Dkt. # 51. A complaint is not evidence. Plaintiff has submitted no separate declaration of facts within his personal knowledge which support his claims, as contemplated under RCW 4.24.525(4)(c) (In determining whether a party has established by clear and convincing evidence a probability of prevailing on a claim, "the court shall consider the pleadings and supporting and opposing affidavits stating the facts.") Instead of presenting an affidavit, plaintiff asserts in his response that "[i]f one were to search on Avvo for a particular well-known lawyer, such as a well-known Board Certified

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[9] This allegation of an intentional act to "coerce" lawyers contradicts the pleading at ¶ 38 that the mistake is simply the result of careless programming. "Avvo.com's computer program was not designed properly, and in a rush to list and rate '90% of lawyers in the United States' allowed the program to run rampant making reckless mistakes, as was the case here and with the other Board Certified lawyers mentioned herein." Third Amended Complaint, Dkt. # 26, ¶ 38.

Health Lawyer, when one is directed to that lawyer's page, one would likely see an advertisement for a competing lawyer, as Plaintiff did in August 2010, which competing lawyer has paid Avvo to have that ad placed on the listed lawyer's page." Plaintiff's Response, Dkt. # 50, p. 9. These speculations as to what "one would likely see," are not evidence. Nor has plaintiff alleged how this allegedly deceptive act of Avvo induced him to act or refrain from acting in some manner, so as to establish causation for his loss. *Fidelity Mortgage Co.*, 131 Wash. App. at 468. Finally, he has not alleged any actual damages caused by the deceptive act.

In his complaint, plaintiff pleads in general terms that "Defendant's actions have damaged Plaintiff individually, as well as many other lawyers in Florida, and Defendant's actions have misled consumers in Florida." Third Amended Complaint, Dkt. # 26, ¶ 51. He requests "actual damages" in addition to declaratory and injunctive relief, but nowhere in the complaint does he state what monetary loss he actually suffered. While plaintiff purports to represent the interests of other Florida attorneys and the general public in this matter, he may only request monetary damages for his own losses.

In his response to the motion to strike, he clarifies that he was "directly damaged by the time wasted on the phone with a potential client that had been misled by the Avvo.com site." Plaintiff's Response, Dkt. # 50, p. 11. He estimates his loss at one-half hour of his time, which he bills at $350 an hour, for a total of $175. He asserts there were other calls, so his damages are "not de minimus or speculative, especially on a massive scale." *Id.* The problem, however, is not that his loss is de minimus, but that it does not flow from the alleged deceptive act. According to the allegations of the complaint, the prospective client called him, and wasted his time, solely because of his profile; she erroneously thought he was a "low-ranking" attorney who practiced "100% employment law." Third Amended Complaint, Dkt. # 26, ¶ 22. Under *Browne*, information on the profile page cannot serve as the basis for a WCPA claim. Plaintiff is fully aware of this, as he seeks to distinguish his consumer fraud claim and escape the *Browne* bar by defining the alleged deceptive act as arising from the advertisements placed on the profile page. Yet he has alleged no damages flowing from that deceptive act. Indeed, it would be contrary to the allegations of the complaint for him to do so, as he alleges that the prospective client called him in spite of the advertisements of other attorneys on his page, not

because of them.

Plaintiff has failed to produce any evidence that would demonstrate a probability of prevailing on his WCPA claim. Nor has he brought forth any evidence to support his false advertising and misuse of his likeness claims, or argued any elements of these torts under Washington law. Plaintiff was put on notice by the Order of Transfer that he is bound by the Terms of Use, and as an experienced attorney he should have anticipated that this Court would find him bound by the choice of law provisions therein. Yet he chose to oppose the motion to strike solely under Florida law, and failed to come forward with any evidence to support his claims even under Florida law. As plaintiff has not produced clear and convincing evidence to demonstrate a probability of prevailing on any of his claims, the motion to strike under RCW 4.24.525 shall be granted as to all claims.

CONCLUSION

Defendant has met the burden under RCW 4.24.525(4)(b) of demonstrating that plaintiff's claims are based on an action involving public participation or petition in an issue of public concern. The burden therefore shifts to plaintiff to show, by clear and convincing evidence, a probability of prevailing on his claim. Plaintiff has failed to produce or point to such evidence. The special motion to strike (Dkt. # 47) is accordingly GRANTED as to all claims, and this action is DISMISSED.

Pursuant to RCW 4.24.525(6)(a)(I) and (ii), defendant as the prevailing party is entitled to costs of litigation and reasonable attorney's fees incurred in connection with each successful motion, together with a statutory award of ten thousand dollars. Defendant shall accordingly make application to the Court for reasonable attorney's fees incurred in bringing the motion to transfer venue (Dkt. # 32) and this motion (Dkt. # 47). Such application shall be filed within three weeks of the date of this Order, and shall be noted on the Court's calendar for the third Friday thereafter so plaintiff may have an opportunity to respond.

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Judgment shall be entered after the Court has determined the amount of reasonable attorney's fees and shall include such amount.

Dated this 28 day of March 2012.

RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

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JUSTICE COURT, LAS VEGAS TOWNSHIP

CLARK COUNTY, NEVADA

FILED

IN THE ADMINISTRATIVE MATTER REGARDING CIVIL CASE FILINGS

ORDER #11-03

BY

WHEREAS, Rule 6.5(b) of the Justice Court Rules for the Las Vegas Township (JCRLV) requires the Chief Judge to "[a]ssure quality and continuity of services necessary to the operation of the court" and to "[s]upervise the court's calendar"; and

WHEREAS, during the last few months of last year, the Court was faced with a heightened backlog of civil cases to be processed due to significant staff shortages and budgetary constraints, along with a difficult conversion to a new case management system; and

WHEREAS, the backlog was so severe that former Chief Judge Ann Zimmerman previously authorized the temporary closure of the Civil Customer Service Counter in order for staff to focus on eliminating that backlog; and

WHEREAS, it has come to the Court's attention that many civil cases during the applicable time period were not processed with sufficient time for attorneys to be able to comply with the dictates of JCRCP 4(i); and

WHEREAS, JCRCP 4(i) declares that if service of the summons and complaint is not made upon a defendant "within 120 days after the filing of the complaint," the action must be dismissed as to that defendant without prejudice upon the court's own initiative; and

WHEREAS, the rule further contemplates that a party may file a motion to enlarge the time for service, based upon a showing of good cause why such service was not made within the 120-day period; and

WHEREAS, the rule declares that "[u]pon a showing of good cause, the court shall extend the time for service and set a reasonable date by which service should be made"; and

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WHEREAS, the Court believe that all affected cases during the applicable time period should be granted an extension of time for service based upon the "good cause" related to the prior backlog in the Civil Division; therefore,

IT IS HEREBY ORDERED that, for all civil cases filed during the period of **July 1, 2010, through December 31, 2010,** plaintiffs will be entitled to an extension of time to serve the summons and complaint, without having to file a motion to request that extension of time; and

IT IS HEREBY ORDERED that the civil cases governed by this Order shall be those cases set forth at Exhibit "A," which is a lengthy separate document that is on file with the Las Vegas Justice Court Clerks' Office and available for public inspection; and

IT IS HEREBY ORDERED that the extension of time granted by this Order shall remain in effect until **June 15, 2011;** and

IT IS FURTHER ORDERED that if a civil case was filed during the period of July 1, 2010, through December 31, 2010, and that case was subsequently dismissed for failure to comply with JCRCP 4(i), this Order may be cited as a basis for a Motion to Set Aside the Dismissal; and

IT IS FURTHER ORDERED that all civil cases encompassed by this Order may be subject to future dismissal under JCRCP 4(i) if service of the summons and complaint is not made within the extension of time granted by this Order; and

IT IS FURTHER ORDERED that this Order shall be effective immediately and shall remain in effect unless amended or rescinded by a subsequent administrative Order.

Dated this 2nd **day of** March, **2011.**

KAREN BENNETT-HARON

CHIEF JUDGE OF THE LAS VEGAS JUSTICE COURT

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LEGAL DEFENSE TRUST TRAINING BULLETIN

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JUNE 2007 (2 OF 2)

CALIFORNIA ANTI-SLAPP STATUTE APPLIES TO ROUTINE ADMINISTRATIVE MANDAMUS PETITIONS

An Analysis Of The Holding And Effect Of Vergos v. McNeal

By Michael P. Stone
and Marc J. Berger

A dramatic example of legislative intentions gone astray can be derived in a line of recent California appellate decisions culminating in the case of *Vergos v. McNeal* (2007) 146 Cal. App. 4th 1387. Based on *Vergos* and a few other recent cases, it now appears that nearly all petitions for administrative mandamus are subject to the anti-SLAPP motion procedure, with no limiting principle whatsoever. The case law developments that led to the *Vergos* holding stand as a monument to the futility of legislation as a remedy for power imbalances among the economic strata of society.

The anti-SLAPP statute was enacted in 1992 to deter the type of litigation for which its acronym stands: "Strategic lawsuits against public participation." This acronym referred to a growing tendency for powerful land development interests to bring defamation actions against environmental activists to deter the activists from exercising their legal rights to challenge large-scale development plans. It was widely perceived that these powerful real estate interests were using their financial resources to impose intolerable litigation costs on activists, so as to intimidate them from participating in the public proceedings where the developers' plans were under consideration.

To accomplish the purpose of the statute, the legislature authorized a "Special Motion to Strike" any complaint or cause of action that seeks to impose liability for statements made or

actions taken in an exercise of constitutionally-protected speech or the First Amendment right to petition the government for redress of grievances. The Special Motion to Strike is filed as the defendant's first responsive pleading. If the motion shows that the complaint seeks to impose liability for a statement made or action taken in an exercise of the right of free speech or petition, then the complaint or cause of action will be immediately stricken, with a mandatory award of attorney fees in favor of the defendant, unless in opposition the plaintiff demonstrates a probability of prevailing on the merits of the claim.

This statute was thought to be an effective deterrent against the lawsuits it targeted, because in those suits, developers were bringing claims against activists without a goal of prevailing on the merits, but for the collateral purpose of discouraging political opposition by forcing the opponent to incur intolerable litigation expenses. So, imposing a requirement of showing minimal merit acted as a precaution against suits that have financial intimidation as their only goal, while shifting responsibility for attorney fees would deprive the developers of the greatest single benefit they otherwise receive from the tactic of bringing litigation for the sole purpose of financial intimidation.

While the legislature primarily intended to attach consequences to the tactics of powerful developers and other corporate interests, the statute as drafted contained no limitation of the classes of plaintiffs who could be subject to an anti-SLAPP motion, and no limit on the size or power of the defendants who could bring the motion. Instead, the Special Motion to Strike could be filed by any defendant who could establish that the conduct on which the alleged liability is based is protected by the First Amendment rights of free speech and petition. And, there is no statutory requirement governing the size or power of the plaintiffs against whom the motion can be filed. Any defendant whose alleged liability arose from constitutionally protected speech or petitioning, no matter how powerful, could bring an anti-SLAPP motion against any plaintiff, no matter how weak and powerless the plaintiff might be.

The anti-SLAPP statute, originally designed as a tool to protect weak interests from being intimidated by powerful interests, has now itself become a tool by which powerful institutions and interests can in some cases intimidate economically weak and relatively powerless individuals. Combined with a

concurrent trend in federal law, which has eliminated constitutional protection for the work-related speech of public employees, while creating a doctrine of "free speech" protection for the government itself, the new interpretations of the anti-SLAPP statute have vastly eroded the ability of public employees to obtain hearing and evidentiary review of disciplinary sanctions imposed on them by their employers. The new interpretation rendered in the *Vergos* opinion will apparently make all actions for administrative mandamus subject to a Special Motion to Strike. This would vastly erode the ability of public employees to obtain hearing and evidentiary review of disciplinary sanctions imposed on them by their employers. It would seem to similarly affect administrative mandamus petitions seeking to challenge governmental decisions to revoke or suspend professional licenses. It may subject a private employee's action for wrongful termination to a Special Motion to Strike, if the private employer claims that the act of terminating the employee was an exercise of free speech.

In *Vergos*, counsel for the Regents of the University of California devised the idea of using the anti-SLAPP statute to protect employers from administrative mandamus. Exploiting a few recent precedents that treat the government as a "person" for First Amendment purposes, the Regents persuaded the Court of Appeal to recognize that the act of terminating or disciplining a public employee for cause is an exercise of free speech by the government, and consequently, an employee who cannot make a preliminary showing of a probability of prevailing on the merits of the claim can be required to pay the employer's attorney fees.

I. *VERGOS v. McNEAL* HOLDS THAT THE ANTI-SLAPP STATUTE PROTECTS A HEARING OFFICER SUED FOR DENYING A GRIEVANCE.

In *Vergos*, the plaintiff brought an action against Julie McNeal, the Director of Operations and Maintenance at University of California at Davis, for sex harassment and failure to prevent sex harassment. Defendants also included the harasser and the Regents, but the Court of Appeal only reviewed the denial of McNeal's anti-SLAPP motion.

Plaintiff Randy Vergos was an inspector, planner and estimator, working under Allen Tollefson, who worked under McNeal. Vergos filed an internal grievance, alleging sex harassment against Tollefson. McNeal, acting as hearing officer for Vergos' grievance, denied the grievance, and wrote to Tollefson that it was more likely that Vergos' allegations did not occur. McNeal refused to take any action

to protect McNeal from Tollefson. 146 Cal. App. 4th at 1390-1391.

McNeal was named as an individual defendant in Vergos' cause of action based on 42 USC § 1983. The pleading alleged that McNeal, acting as agent for the Regents and under color of state law, denied Vergos' grievance, thus violating Vergos' right to be free of discrimination and harassment, and that the Regents did not properly train McNeal in acting as a hearing officer to decide grievances. *Id.* at 1391-1392.

McNeal filed an anti-SLAPP motion challenging the § 1983 claim, alleging that the Complaint arose from her activities of hearing, processing and deciding plaintiff's grievances, in furtherance of her own First Amendment right of petition and free speech. *Id.* at 1392. McNeal's anti-SLAPP motion alleged that she permissibly delegated the investigation of Vergos' sex harassment claims, received a report that the claims were unsubstantiated, had no reason to believe the investigator was biased, was not biased herself, and communicated the results of the investigation to Vergos, who then failed to appeal the denial through available further steps of the grievance process. *Id.* at 1392-1393.

The trial court denied the anti-SLAPP motion on the grounds the claim was based on McNeal's hearing, processing and deciding of Vergos' grievance, and was "not based on the content of what Defendant stated in any proceeding or the exercise of the right to petition...." *Id.* at 1394.

The Court of Appeal reversed and remanded with instructions to grant the anti-SLAPP motion and award attorney fees to McNeal. The appellate court agreed with McNeal that her "statements and communicative conduct in handling plaintiff's grievances ... are protected" by the anti-SLAPP statute, "because they (1) were connected with an issue under review by an official proceeding authorized by law; and (2) furthered the right to petition of plaintiff and similarly situated employees." *Id.*

The court reasoned that *Code of Civil Procedure*, § 425.16(e)(2) authorized an anti-SLAPP motion where the action arises from "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." *Id.* at 1395, italics omitted. Also taking into account sub § (e)(1), authorizing an anti-SLAPP motion where the action arises from "any written or oral

statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law," the appellate court held that neither § (e)(1) nor (e)(2) "require the defendant to show a public issue or issue of public interest." *Id.* at 1395, citing *Briggs v. Eden Council* (1999) 19 Cal. 4th 1106, 1116-1117, 1123. The court stated that for communications made in official proceedings, "it is the context or setting itself that makes the issue a public issue." *Id.*

The plaintiff argued that an action does not "arise" from petitioning or speech activity merely because it follows such activity, and that here, he was suing McNeal for aiding and abetting harassment. *Id.* at 1396. But the court observed that plaintiff's own pleading complained of McNeal's hearing, processing and deciding of plaintiff's grievances. *Id.* Noting that the trial court had denied the motion on the basis that the claim against McNeal was based on McNeal's conduct, not the content of her statements, the appellate court disagreed, since "hearing, processing and deciding of the grievances ... are meaningless without a communication of the adverse results." *Id.* at 1397.

II. *SAN RAMON v. CONTRA COSTA COUNTY:* GOVERNMENT ACTION IS NOT PROTECTED BY SLAPP IF IT DOES NOT IMPLICATE FREE SPEECH AND PETITION

The appellate court distinguished *San Ramon v. Contra Costa County Employees' Retirement Assn.* (2004) 125 Cal. App. 4th 343, which held that an action seeking judicial review of the decision of a public entity is not subject to an anti-SLAPP motion merely because the decision is taken by a vote after discussion at a public meeting. The court in *San Ramon* observed that the public entity's action (of increasing required contributions to a pension fund) was not in itself an exercise of the right of free speech or petition.

The court in *Vergos* noted that plaintiffs relied on *San Ramon* because it "recognized that government bodies may invoke § 425.16 where appropriate, just like any private litigant, and its holding was based on the conclusion that the Board's act [i.e. the change in pension contributions] did not implicate free speech or the right to petition." *Id.* at 1063. The court in *Vergos* rejected plaintiff's argument because *San Ramon* disavowed deciding any issue concerning suits against individuals. *Id.*

The foregoing observation in *Vergos* means (1) the court appears to agree that government bodies may invoke the anti-SLAPP statute the

same as individuals; and (2) an individual acting on behalf of the government is entitled to invoke the anti-SLAPP statute. The court concluded, "We agree with McNeal that a narrow reading of the statute in plaintiff's favor could result in public employees' reluctance to assume the role of hearing officer in such cases, and thus thwart the petitioning activities of employees with grievances." *Id.*

Finally, the court also agreed with defendant "that she acted in furtherance of the right to petition within the meaning of § 425.16 even though it was not her own right to petition at stake." *Id.* The court elaborated that the anti-SLAPP statute "does not require that a defendant moving to strike ... demonstrate that its protected statements or writings were made on its own behalf (rather than, for example, on behalf of its clients or the general public)." *Id.*, citation omitted.

The court specifically declined to recognize an exception to the anti-SLAPP statute and reasoned that "Hearing officers in official proceedings deserve the protection of the anti-SLAPP statute." *Id.*

The *San Ramon* opinion dodges both of the broader propositions' implications of extending the anti-SLAPP statute to protect the government. The court noted that amicus briefs had argued that the government itself has no First Amendment free speech rights, but since the case before it required only a ruling that the particular act of increasing pension contributions did not implicate free speech, the court was not reaching the larger question posed, as to whether the First Amendment protects the government itself. The opinion also acknowledges that dicta in *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal. App. 4th 713, in finding the civil damages action before it to be a SLAPP suit, had noted that a petition for administrative mandamus would be the "proper" remedy, thus implying that such a petition would not be a SLAPP suit. But contrary to that court's view, the fact that administrative mandamus is the proper remedy does not exempt it from the anti-SLAPP statute, since it is well-established that an administrative mandamus petition can be found subject to the anti-SLAPP statute. See, e.g., *Moraga-Orinda Fire Protection Dist. v. Weir* (2004) 115 Cal. App. 4th 477.

III. THE GOVERNMENT IS NOW RECOGNIZED AS A "PERSON" FOR FIRST AMENDMENT PURPOSES.

The interpretation of the anti-SLAPP statute found in *Vergos* thus has its roots in *Mission Oaks*, *Moraga-Orinda*, and *Schroeder v. Irvine*

City Council (2002) 97 Cal. App. 4th 174. *Mission Oaks* recognizes in passing that administrative mandamus is the proper remedy to challenge a denial of a land development permit, 65 Cal. App. 4th at 730, but does not say that this exempts a petition from the reach of the anti-SLAPP statute. *Schroeder*, ironically, recognizes that "SLAPP suits are brought to obtain an economic advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff." 97 Cal. App. 4th at 182. Yet the court resoundingly endorsed the government's right to invoke the anti-SLAPP statute, rejected an argument by amicus curiae that the government has no First Amendment rights, and held that a government official's act of voting is an act of free speech. *Id.* at 192, fn. 3.

Moraga-Orinda acknowledges that the anti-SLAPP statute was intended to apply to large corporations that can provoke prolonged litigation, not to an individual's relatively simple mandamus petition. But the court held that no such limitation appears on the face of the statute, and legislative history is irrelevant because the statute is unambiguous, and in any event, the history shows the statute is to be broadly applied. 115 Cal. App. 4th at 482 and fn. 4.

The newly-broadened judicial interpretation of the anti-SLAPP statute now imposes a major risk on any employee contemplating whether to seek judicial review of termination or other employment discipline. Can the employee avoid the anti-SLAPP statute by refraining from suing for damages, and limiting the remedy to reinstatement? No, because SLAPP has already been applied to petitions for civil harassment, which do not seek damages. *Thomas v. Quintero* (2005) 126 Cal. App. 4th 635, 642.

Can the employee avoid the anti-SLAPP statute by filing the mandamus petition against the governmental body only, without naming any officials? No, because the *San Ramon* and *Vergos* decisions hold that the government itself has a constitutional right of petition, which it would be exercising every time it takes disciplinary action against an employee.

The *Vergos* decision, by granting the government a constitutional freedom of speech and petition, has now extended the anti-SLAPP statute to the point where it applies to every petition for administrative mandamus, and probably to every suit that challenges a government decision. In that sense, *Vergos* takes another step in the readjustment of the balance of power between individuals and

government that was recently signaled by the United States Supreme Court in *Garcetti v. Ceballos* (2006) 126 S.Ct. 1951. The *Ceballos* decision took away an individual's constitutional protection for job-related speech, by recognizing it as speech of the government, in which the individual has no interest. *Ceballos* tells individual government employees they must say only what the employer wants them to say, or be terminated and replaced with someone who will. Decisions such as *Vergos* complete the transfer of power by recognizing that the constitutional freedom of speech, which previously protected the employee making the communication, now fully protects the government entity that dictates the content of what its employees may express in their job-related communications.

Thus the *Vergos* decision protects a hearing officer from liability for a decision against the employee, but *Ceballos* leaves the hearing officer with no protection against the employer for making a decision in favor of the employee. Under this scheme, it seems unlikely that any hearing officer would dare decide a case contrary to a governmental employer's interests. And of course, *San Ramon* protects not only the hearing officer, but also the governmental employer itself, in an administrative mandamus action.

IV. ROUTINE ADMINISTRATIVE MANDAMUS PETITIONS ARE NOW SUBJECT TO THE ANTI-SLAPP STATUTE.

It therefore seems that in view of the *San Ramon* and *Vergos* decisions, all employers served with petitions for administrative mandamus challenging employment decisions, are entitled to file an anti-SLAPP motion on the basis of § 425.16(e)(1), as a "written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;" and (2) as a "written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." The employee must then make a preliminary showing of likelihood of prevailing on the merits, or the petition is summarily stricken with an award of attorney fees to the employer.

It is not entirely certain that *Vergos* will trigger a flood of anti-SLAPP motions to counter administrative mandamus petitions. The rule is a windfall that public employers do not really need, and as a practical matter, the government will not often be in a position to be able to execute a judgment for attorney fees against a terminated employee.

From the perspective of judicial economy, an anti-SLAPP motion to challenge a petition for administrative mandamus is quite wasteful, requiring the judge to rule on the same evidence twice: first under the probability of prevailing standard, then under the applicable substantive standard, be it independent judgment or substantial evidence. Where the matter is to be decided by the judge sitting without a jury (*Code of Civil Procedure*, § 1094.5), the preliminary showing of probability to prevail on the merits is equal to the final showing: the court merely predicts what the court will do, then does it.

There are actually at least two procedural advantages an employer would receive from filing an anti-SLAPP motion to strike a mandamus petition. First, if the governmental entity is able to drag its feet in preparing the hearing transcripts, so they are not available in time for the anti-SLAPP motion to be heard, the court can strike the petition on the basis that plaintiff failed to show a probability of prevailing, that the anti-SLAPP statute places the burden on plaintiff to immediately demonstrate the requisite probability of prevailing, and the court is not required to go beyond the pleadings and any declarations then available to make its ruling (CCP §§ 425.16(b)(2) and 425.16(g)). This may sound draconian, but no more so than the underlying rule of *Vergos* itself.

But even assuming the hearing transcript is available, an anti-SLAPP motion unilaterally gives the employer a free dress rehearsal for its defense, which the employee is incidentally forced to finance. If the employer prevails on the motion, the case is over and the employee owes attorney fees. But if the employee survives the motion under the "probability" standard, the ruling will educate the employer as to where it needs to improve its arguments. The anti-SLAPP motion thus gives the employer a second chance to present its legal arguments, a luxury the employee never receives.

It is difficult to predict how widespread the use of anti-SLAPP motions will be against mandamus petitions. Some governmental bodies will not want to bother chasing their fired employees for attorney fees. Others will want to use the tactic for its intimidating effect. When this happens, the anti-SLAPP regime will have come full circle, as a weapon for the government to intimidate individuals who seek to use the courts to question its decisions.

That the government itself has a right to freedom of speech is a perverse twist of

constitutional construction. It does not follow from treating the government as a fictitious "person" for some purposes, that the government itself has a right to claim the benefit of the constitutional freedom of speech. It is the government's raw power to silence an individual that makes it necessary, and even possible, to recognize a freedom of speech. The constitutional freedom of speech specifically means a protection against being silenced by the government. It means the government is restricted from prohibiting, punishing, or imposing burdens on, expressive communication of individuals. The only effect of recognizing a freedom of speech is to restrict the government from doing something it has the raw power to do. It is because of this raw governmental power to silence individuals that the body politic has deemed a constitutional protection necessary and appropriate. Governmental speech does not need this constitutional protection, which would amount to protection from itself. The anomaly of the outcome that flows from the recognition of a governmental right of free speech is compounded by treating the termination of an employee as an act of communication. It is true that the termination is communicated to the employee. But the termination is not effected by telling the employee about it, the termination is effected by no longer paying the employee or accepting a tender of work performance. Even if the First Amendment may protect an employer's statement that the employee is fired, it should not protect the official conduct involved in separating the employee from the position.

To put it simply: the employer has a constitutional right to tell the employee, "You're fired," but that statement does not fire the employee any more than a murderer can be executed by telling him, "You're dead."

Stay safe!

Michael P. Stone is the firm's founding partner and principal shareholder. He has practiced almost exclusively in police law and litigation for 27 years, following 13 years as a police officer, supervisor and police attorney.

Marc J. Berger is the firm's senior law and motion and writs and appeals specialist. He has been associated with Michael P. Stone since 1986.

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Anti-SLAPP saves the day

State laws protect journalists from unwieldy attorney fees

Feature *Page Number: 24*

Cristina Abello

From the Fall 2009 issue of *The News Media & The Law*, page 24.

Freelance journalist Susan Paterno's *American Journalism Review* story about Wendy McCaw's purchase of the *Santa Barbara News-Press* — and the subsequent wave of defections amongst the paper's seasoned editors and writers — mentioned several lawsuits McCaw had filed or threatened to file against her former and current employees and other publications like the *Santa Barbara Independent* and *Vanity Fair*.

What Paterno didn't know was that she would soon be the target of one.

"I was kind of surprised because it had been through so many layers of lawyers — my brother, a contracts attorney, couldn't believe it," said Paterno, a professor at California's Chapman University, recalling the day she received word of the suit. "From the very beginning I always knew she had nothing to sue me about. There was nothing libelous in the story."

Though McCaw's company, Ampersand Publishing, sued Paterno on multiple claims, it was mainly for allegedly libelous statements in the article. But thanks to California's law against Strategic Lawsuits Against Public Participation, or anti-SLAPP law, Paterno was able to obtain a prompt dismissal of the lawsuit last summer.

Anti-SLAPP statutes are meant to protect people from lawsuits of questionable merit that are often filed to intimidate speakers into refraining from criticizing a person, company, or project. Fighting these suits can be a time-consuming and expensive enterprise. Paterno thinks the anti-SLAPP statute saved her from mortgaging her house to pay legal bills, because it allowed her to recoup most of her attorney fees after the suit's dismissal.

"The law allowed me to avoid what could have been millions of dollars in legal fees," Paterno said. "I was blessed that *AJR* was amazing and they picked up every penny of this horrible, frivolous, revenge-driven lawsuit when it was going through the courts."

Paterno isn't the only journalist who has used anti-SLAPP laws to have lawsuits over their reporting dismissed. In April, the *Wareham Observer* in Massachusetts successfully used the state's anti-SLAPP law to dismiss a town police chief's defamation suit after the paper published articles and commentary critical of the chief's official duties.

According to Samantha J. Brown, the legislative director of the Federal Anti-SLAPP Project — a coalition of advocates who push for a federal law to supplement existing state laws — the attorney fees provision is the most important part of any anti-SLAPP legislation.

"The fee provision is what allows someone to even consider going to court in cases where they wouldn't have an attorney and otherwise would silence themselves immediately," Brown said.

Generally, anti-SLAPP laws are meant to protect the rights of freedom of speech and to petition the government for redress guaranteed by the First Amendment, and state-level statutes protect those rights to varying degrees.

States that have crafted them most broadly, including California, Illinois and Louisiana, apply the statutes to a wide variety of activities that qualify as petitioning. Louisiana's *Lake Charles American Press*, for example, was able to dismiss a suit that arose from its reporting on sales of contaminated fuel. In Illinois, anti-SLAPP laws can be invoked if a lawsuit arises from "any act or acts in furtherance of . . . rights of petition, speech, association, or to otherwise participate in

government."

By contrast, New York's anti-SLAPP law is narrower and applies only to suits by a plaintiff who is a "public applicant or permittee" seeking "a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body." The case must also show "action involving public petition and participation." New York's statute was used by a judge to dismiss former Democratic Rep. Richard Ottinger's libel suit against an anonymous commenter on a newspaper Web site. The commenter criticized both Ottinger and his wife after they were accused of bribery and filing fraudulent documents with a zoning board to get approval for a waterfront house.

Some advocates believe that more work must be done to expand the reach of anti-SLAPP legislation — including implementation of a federal law.

"Twenty-eight states have anti-SLAPP laws, of course, that means that 22 do not, and those protections that do exist vary widely," said Brown, the federal project's legislative director. "First Amendment rights are guaranteed to everyone, and they shouldn't vary according to where you speak out or where you are sued."

As for Paterno, she said she was happy that her case was quickly resolved and hoped it could serve as a reminder that trial judges should dismiss SLAPP suits as swiftly as possible.

"Hopefully in the future, the laws will allow other journalists, nonprofits, activists, and protestors to maybe avoid what I had to go through," Paterno said.

The News Media and The Law, Fall 2009

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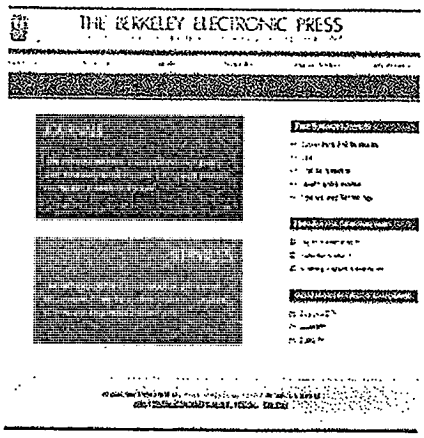
Measuring the Impact of Anti-SLAPP Legislation on Monitoring and Enforcement

Posted by Evan Mascagni in Recent SLAPP News | 0 comments



Nov 09, 11

The B.E. Journal of Economic Analysis & Policy published an article measuring the impact of anti-SLAPP legislation on regulator monitoring and enforcement, using US data on monitoring and enforcement activity under the Clean Air Act from 1978-2005.

The main findings: "We find strong evidence that anti-SLAPP laws are associated with increases in regulator monitoring and enforcement activity under the Clean Air Act. In fact, we find that state inspections increase by almost 50% after a state passes anti-SLAPP legislation and that the ratio of findings of noncompliance to inspections more than doubles in the presence of anti-SLAPP legislation." (p. 1.)

The article concludes that "Anti-SLAPP laws drive real changes in regulator behavior in environmental enforcement, even in settings with low citizen involvement in the form of civil suits" and that anti-SLAPP legislation "is good for air quality." (p. 14.) It also discusses plans for future related research.

You can download the full article by Bevin Ashenmiller (Occidental College) and Catherine Shelley Norman (Johns Hopkins University) here:
http://www.bepress.com/bejeap/vol11/iss1/art67/

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RLG 29

Las Vegas Sun

Nevada judges struggle to keep up with backlog

Tuesday, Feb. 17, 2004 | 11:38 a.m.

CARSON CITY -- District Court judges in Clark County lost a little ground last year in their battle to keep up with a backlog of cases.

The 33 District Court judges decided 78,064 cases in the 2003 fiscal year, which ended June 30. That was 840 fewer cases than the previous year.

Still they managed to stay ahead of the 77,136 new cases, up 14 percent from the previous year.

"We're busy. We're trying to stay on top of this," Chief District Judge Michael Douglas said. He said the public, the Nevada Supreme Court and the Legislature want the judiciary to be accountable and that's what the judges in Clark County are striving for.

The numbers were part of an annual report on the state's judiciary released today that said that District Court judges statewide disposed of 105,154 cases last fiscal year, an increase of 8,809 from fiscal 2002. The report measured rulings on nontraffic cases.

Even though Clark County courts lost some ground, they outpaced their counterparts in Washoe County per capita by 61 percent, the study showed.

The 78,064 cases, an average of 2,366 per judge, was 61 percent more than the 17,609 in Washoe County, or 1,467 cases on average for each of the 12 judges.

"If they had more filing, they would have disposed of more cases," Douglas said of Washoe County judges.

In Washoe County the 17,609 cases disposed of compared with 8,892 in the previous year or nearly doubled. Ron Longtin, administrator for the court in Washoe County, said the judges disposed of a big backlog.

The report shows Nevada has fewer District Court judges per 100,000 population than seven other Western states. While California has 4.3 judges in what is called Superior Court, per 100,000 population, there are just 2.7 in Nevada.

But the report also shows there are 1,501 cases filed per Superior Court judge in California, compared to the 1,375 for District Court judges in Nevada.

The Nevada Supreme Court, according to the report, decided 1,889 cases last fiscal year, down from the 1,906 in the prior fiscal year. It was the lowest number of ruling in the last four years. It breaks down to an average of 269 decisions per justice.

But the backlog of cases also declined to 1,426, the lowest number in the last four years. The report said Nevada has more cases filed per justice, at 258, than most other appellate courts, based on figures from the National Center for State Courts.

The study noted that Nevada is one of 11 states that does not have an intermediate court of appeals, something the Nevada Supreme Court has been pushing. The 2003 Legislature approved a proposed constitutional amendment to allow creation of an intermediate court of appeals. It would have to be approved by the 2005 Legislature and then placed on the 2006 ballot for ratification by the voters.

Justice Deborah Agosti, who was chief justice when the annual report was finalized, said the courts in Nevada "are productive, proactive and constantly striving to improve the effective delivery of justice to our citizens."

Ron Titus, chief of the administrative office of the court, said computerized case management systems in many courts have improved the ability to track and report caseloads.

Titus reported there were 114,540 new cases filed last fiscal year in the district courts, more than 8,000 from fiscal 2002. Criminal filings actually decreased from 12,191 in 2002 to 12,001 in fiscal 2003. New civil suits increased from 24,143 to 28,077; family court cases rose from 43,885 to 52,258 and juvenile nontraffic cases inched up to 22,2043 from 22,148.

The report said there were 182,671 new nontraffic cases filed in the justice courts in the state. It said 48,228 were disposed of. But the number of decisions did not include the Las Vegas Justice Court, where there were 104,889 new cases but there was no report available on the number of decisions made.

In addition there were 416,505 traffic and parking violations filed with 353,548 cases disposed of in justice courts.

There were 314,159 cases filed in the municipal courts in Nevada, with decisions made in 301,193.

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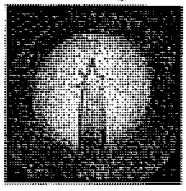

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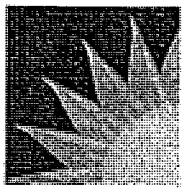

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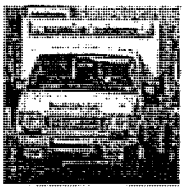

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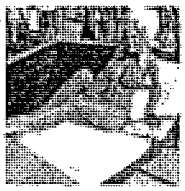

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RLG 31

Publications

Anti-SLAPP Statutes Spread Across the Nation

Media Law Bulletin

November 2011
By: James J.S. Holmes

Is it in the public interest for individuals, organizations and businesses to participate in our governmental process? To speak out about and investigate matters of public concern? To provide information to public entities and other citizens on public issues that affect them without fear of reprisal through abuse of the judicial process? Retaliatory lawsuits filed against one who exercises his or her free speech rights not only threaten the defendant with financial liability, litigation costs, destruction of a business, loss of a home, and other personal losses, but also seriously impact our government, interstate commerce, and individual rights by significantly chilling public participation in public debate, governmental issues and voluntary calls to action.

These lawsuits, called strategic lawsuits against public participation (SLAPP), are becoming more and more common with the increased access to comments, reviews, calls to action and other statements made online by individuals exercising their right to free speech. As a result, many states, including most recently Texas, have sought out the opportunity to pass laws that would prevent SLAPP lawsuits from going forward.

The irony of encroaching on a democratic exchange of ideas at a time when the ease to publish is at an all-time high, is what motivated us to try to get an anti-SLAPP statute passed in one of the most conservative states in the nation – Texas. California has long been the model for anti-SLAPP statutes – having a broad law that has been on the books since 1993. Many jurisdictions, including Illinois, Indiana, Louisiana, Washington and the District of Columbia, have followed California's lead and have recently adopted anti-SLAPP laws cover statements made outside the governmental setting. Still, there are many states that have narrow anti-SLAPP laws and many more that have no protection at all against SLAPP suits. In addition, there is currently no protection at the federal level against being retaliated against for exercising one's free speech rights. We believe, though, that every state in the Union can and should have an anti-SLAPP law. As demonstrated below, Texas can serve as a role model for other jurisdictions.

After more than two years of working to bring together a vast coalition

of supporters for the legislation, on June 17, 2011, the Texas Citizen Participation Act (also known as the Texas Anti-SLAPP statute) was signed into law by Gov. Rick Perry and went into effect immediately. The law is being heralded as one of the strongest anti-SLAPP statutes in the nation and parts of it are being considered for replication in the federal bill and other state proposals. The key provisions in the law codified at Texas Civil Practice & Remedies Code, Chapter 27 are:

- The statute allows a judge to dismiss frivolous lawsuits filed against one who speaks out about a "matter of public concern" within the first 60 days. "Matter of public concern" is defined expansively in the statute.

- The anti-SLAPP motion is supported by affidavits explaining to the court that the lawsuit is based on, relates to, or is in response to one's exercise of his or her right to free speech, right to petition or right of association.

- The burden of proof is initially on the party who files the anti-SLAPP motion to establish (by a preponderance of the evidence) that the lawsuit was filed in response to the exercise of his or her First Amendment rights. Then the burden shifts to the plaintiff to establish (by clear and specific evidence) a prima facie case for each essential element of the claim.

- The statute creates a stay of discovery in a lawsuit while an anti-SLAPP motion is pending and/or appealed. The court has discretion to order discovery pertaining to the motion if it feels it is necessary.

- That statute provides for mandatory fee shifting when a party wins an anti-SLAPP motion so that the person or entity wrongfully filing a lawsuit must pay the defense costs. There is a discretionary fee award if the court finds that the anti-SLAPP motion was frivolous or brought solely for the purpose of delaying the proceedings.

- The statute provides an immediate right to an expedited appeal if the anti-SLAPP motion is denied.

- The statute applies to lawsuits or "legal actions" (which includes claims and counterclaims that implicate First Amendment rights) filed on or after June 17, 2011.

- The exemptions contained in the statute are for enforcement actions brought by the state or law enforcement, for commercial speech and for wrongful death and bodily injury lawsuits.

This law has already been used to dismiss frivolous lawsuits in Texas and to award fees to the party who was the subject of the SLAPP suit. The goal is to chill meritless lawsuits, not discussion on matters of public concern.

On the federal front, the Public Participation Project is tirelessly working to get a federal anti-SLAPP law on the books so that an individual's rights are protected the same whether they are sued in federal or state court. Sen. Jon Kyl (R-Ariz.) has been leading the effort to draft a bipartisan bill in the Senate. In the House, the bill will be heard by the House Judiciary Committee, chaired by Rep. Lamar Smith (R-Texas). The current draft of the federal bill includes many of the attractive provisions of the state statutes, including a stay of discovery while the anti-SLAPP motion is pending, the right to an immediate interlocutory appeal, and the mandatory shifting of attorney's fees and costs when one prevails on an anti-SLAPP motion. Interestingly, it prohibits amendment of the claim subject to the anti-SLAPP motion after a motion has been filed–likely in an effort to prevent one from trying to plead around the motion. Finally, and perhaps most significantly, it also provides for the right to remove any state SLAPP suit to federal court so that individuals who are not fortunate enough to have a state anti-SLAPP statute can still get the same protection of their First Amendment rights wherever they are sued.

The coalition of supporters for anti-SLAPP legislation at both the state and the federal level have included open government groups, media organizations, trade associations, citizens rights groups (such as ACLU, Public Citizen), consumer organizations (such as Consumers Union), watchdog and government accountability organizations (such as Texas Watch), public interest law firms (such as the Institute for Public Justice), business watchdog organizations (such as the Better Business Bureaus) and electronic communication providers (such as Yelp!) that have been on the defensive end of many SLAPP suits simply for posting people's opinions or their evaluations of businesses. This strong bipartisan coalition has piqued the interest of lawmakers from both sides of the aisle and their members have provided countless examples of SLAPP victims among the constituents of those voting on anti-SLAPP legislation.

We are hopeful that what we were able to accomplish in Texas will help other states in expanding their laws and will assist in getting a federal anti-SLAPP statute passed so that a party cannot forum-shop in an effort to trample one's First Amendment rights. Anti-SLAPP legislation has a broad-based appeal because it protects the little guy, promotes judicial economy, provides for tort reform and advances the First Amendment rights of all citizens.

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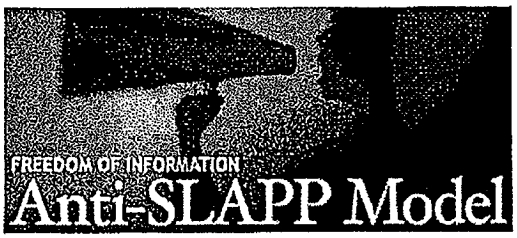

A Uniform Act Limiting Strategic Litigation Against Public Participation: Getting It Passed
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Fifteen years have passed since the first anti-SLAPP statute was passed in Washington State, and as of spring 2004, 21 states have some type of anti-SLAPP legislation in place. These facts will both benefit and hinder us as we bring our Model Act out into the world. On one hand, we are able to learn from the experiences of others in drafting and passing these statutes, and we have years of anti-SLAPP success stories to draw upon when making our cases. On the other hand, opponents of the legislation will be well equipped to highlight so-called "abuse" of these statutes – which may include, in their views, large media entities using anti-SLAPP motions to fight defamation lawsuits.

In light of this latter point, it is crucial that the journalism community thoughtfully considers the role it will assume in pushing for the future enactment of anti-SLAPP legislation. Without a doubt, media entities and press organizations, as among the more well-heeled and well-respected advocates of these statutes, must use their influence with the public and the government to gain recognition and support of the legislation. However, to the extent it is still possible given the countless examples of anti-SLAPP statutes benefiting the media, these groups need to downplay any personal interest in the legislation and focus on its capacity for empowering the "little guy" and the First Amendment in general.

As we keep our goals and roles in mind, we can also benefit from these tips, which several anti-SLAPP experts – including California Anti-SLAPP Project director Mark Goldowitz and Tom Newton, counsel for the California Newspaper Publishers Association – have offered.

Enlist An Influential Government Supporter. Particularly in governments that are very pro-business or otherwise disinclined to support anti-SLAPP legislation, such legislation is likely to stall without the push of at least one powerful government leader who is strongly invested in its success. In California, Senator Bill Lockyer, a democrat from Alameda County and then-head of the state Judiciary Committee, was inspired by Pring's and Penelope Canan's seminal article on SLAPPs and made it a mission of sorts to enact an anti-SLAPP law in California. A similar role was played by democratic Senator James J. Cox in Louisiana. In Washington State, then-Governor Booth Gardner and his attorney general, Kenneth Eikenberry, pushed for introduction of legislation.

In those cases, the lawmakers initiated the legislation, but we can try to jump-start the efforts in other states by honing in on effective champions for our cause. In the state legislatures, members of the judiciary committees are likely candidates, especially those who have an intellectual bent or have shown themselves to be strong supporters of First Amendment interests. Senator Lockyer was one such man, a former schoolteacher who strongly believed in freedom of thought. Another approach might be to pinpoint some powerful examples of citizens being victimized by SLAPPs (see "Tell A Good Story" below) and target those citizens' representatives, or other legislators who might be particularly affected by their stories.

On the executive front, if it is not possible to engage the governor or another powerful official

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directly, it might be fruitful to bring the issue to a potentially interested agency or even a citizen advisory group that has access to agency officials. In Oregon, the idea for an anti-SLAPP statute originated with the citizen involvement advisory committee to the Department of Land Conservation and Development. The committee made a recommendation to the Land Conservation and Development Commission, the Department's public policy decision-making body, and the Commission directed an investigation and appropriate action. Ultimately, the Department drafted a proposal for the legislation and sought sponsors.

Enunciate The Problem. Both in enlisting government support and building a coalition (see "Build A Coalition" below), it is important that we effectively explain what SLAPPs are and why something must be done. Attached as an appendix is a sample "Statement of the Problem," adapted from one prepared by the Communications and Public Affairs Program of the Oregon Department of Land Conservation and Development. It will be most effective if we personalize our "Statements," bearing in mind each state's unique composition and challenges.

Build A Coalition. The single most important lobbying strategy, cited by all the experts, was building the broadest possible coalition to push for passage of the legislation. Media, environmental and civil rights groups are the most frequent supporters of anti-SLAPP legislation, but groups defending the rights of women and the elderly are also potentially strong advocates, as are municipalities and neighborhood and civic associations. Appendix B, which lists the supporters of the California statute, shows the great variety of groups that are sympathetic to anti-SLAPP legislation.

Several states found it useful to develop more formal coalitions, providing organizational structure to harness the power of the myriad supporters. The California Anti-SLAPP Project began as such a coalition and has continued as the lead proponent of improvements to the California statute. New Mexico also had a formal coalition, the NoSLAPP Alliance, which coordinated the statewide media and lobbying campaign.

Finally, in addition to recognizing potential allies, it is important for anti-SLAPP proponents to recognize their likely opponents. Developers and building industry associations are the No. 1 opponents of anti-SLAPP legislation, not surprising given that the quintessential SLAPP involves a developer suing a citizen for his criticism of a development project. Representatives of business, including chambers of commerce, also tend to oppose anti-SLAPP legislation, as did the Trial Lawyers Association in California, though there are certainly arguments as to why anti-SLAPP legislation would benefit its constituency.

Tell A Meaningful Story. Politicians are politicians, and they will be most likely to get behind legislation that makes them look compassionate. Therefore, it is crucial to set off on the lobbying trail with some good stories about SLAPP victims, stories that will outrage lawmakers in their injustice and present them with possible "poster children" for the new legislation. Even more effective is to enlist the victims themselves to tell their own stories.

In California, Senator Lockyer was swayed by the story of Alan LaPointe, a Contra Costa County man who led community opposition to a proposed waste-burning plant. LaPointe spoke against the plant at district meetings and before a grand jury, and was the lead plaintiff in a taxpayer's action filed in 1987 based on an allegedly improper use of public funds for feasibility studies for the proposed plant. The sanitation district cross-complained against LaPointe personally for interference with prospective economic advantage.

In Washington State, the anti-SLAPP legislation was named "The Brenda Hill Bill" after a woman who reported her subdivision developer to the state for failure to pay its tax bill. The developer filed foreclosure proceedings on Hill's home and sued her for defamation, seeking $100,000. Her story swayed both the governor and the legislator who brought the hill, Holly Myers.

In a related matter, point out specific examples of how the current system is insufficient. In New York, legislators passed the anti-SLAPP statute out of frustration over how the legal system was addressing SLAPPs, which were common especially in the real estate context. For example, a developer sued nine Suffolk County homeowner groups and sixteen individuals after they had testified against town approval of a proposed housing development. The developer alleged various tort claims and sought more than $11 million in damages. More than three years later, the case was finally dismissed on appeal.

Channel Your Power Effectively. Media and journalism groups are essential participants in

Anti-SLAPP: Protect
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– University of Wyoming will make presidential finalists public, despite new law (http://blogs.spjnetwork.org/foi/2013/02/23/university of-wyoming-will-make-presidential-finalists-public-despite-new-law/)
– Utah city makes 'confidential' settlement in Taser death suit (http://blogs.spjnetwork.org/foi/2013/01/07/utah-city-makes-confidential-settlement-in-taser-death-suit/)

FOI Committee
This committee is the watchdog of press freedoms across the nation. It relies upon a network of volunteers in each state organized under Project Sunshine. These SPJ members are on the front lines for assaults to the First Amendment and when lawmakers attempt to restrict the public's access to documents and the government's business. The committee often is called upon to intervene in instances where the media is restricted.

Freedom of Information Committee Chair

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the anti-SLAPP movement, says Goldowitz, because they are a commonly SLAPPed group with a relatively large bank of resources and a significant amount of influence. However, it is crucial that these groups know when and how to use their power. Because of their resources and contacts, media groups should probably play a key role in coalition-building, but the media would probably do best to step back and let their allies tell their own SLAPP stories. The tale of a poor woman fighting a big developer will almost always have more resonance than the travails of a large newspaper facing a baseless libel suit – even by the same developer.

The exception to the hands-off approach should be in running editorials and op-ed pieces. Newspapers and other media have an unmatched ability to reach large numbers of people, and such outreach is crucial to a successful anti-SLAPP campaign. For example, in California, more than two dozen newspapers published editorials in favor of the anti-SLAPP legislation. Op-ed pieces written by coalition allies or SLAPP victims are also powerful. The key is to emphasize the First Amendment benefits of anti-SLAPP legislation while downplaying the possibility that it could be exploited by the media itself.

Play The Politics. Even in situations fairly conducive to the passage of anti-SLAPP legislation, the political stars have to align. In California, two situations having nothing to do with SLAPPs boosted the anti-SLAPP effort immeasurably. First, on the second attempt to pass the legislation, it was merged with another bill that made permanent liability protections for volunteer officers and directors of non-profit organizations. Support for the bill more than doubled, with organizations such as the Red Cross, the United Way, and dozens of local chambers of commerce joining. Increased pressure from all sides contributed to Governor Pete Wilson's decision to sign the bill in 1992 on its third attempt.

Second, when the democrats took control of both houses of the California legislature in 1997, certain anti-SLAPP allies, such as the ACLU and environmental groups, saw a boost in their lobbying influence. This contributed in part to the California coalition's ability to push through an amendment to the anti-SLAPP statute clarifying that its provisions should be interpreted broadly.

Certainly we as political outsiders are limited in the amount of maneuvering we can achieve – and politicians are limited ethically in the steps they can take. But it is always worth using our imaginations and keeping an eye out for situations that may improve the climate for passage of anti-SLAPP legislation.

Be Patient. It can take time to pass anti-SLAPP legislation. In California and Pennsylvania, it took three tries to generate enough momentum and support to achieve success. A first attempt can be effective, even if it doesn't lead to a law, if it gets the issue on the radar screens of lawmakers and citizens. Sometimes, we might have to wait until one political party makes an exit, or the right sponsor comes along.

Be Willing to Compromise. A little bit of give-and-take is essential in the legislative process. In California, in exchange for Governor Wilson's signature on the anti-SLAPP bill, Senator Lockyer agreed to introduce remedial legislation to make mandatory a permissive provision for awarding attorney's fees and costs to a plaintiff who prevailed on a motion to strike. (The remedial legislation has not passed.) In New Mexico, the bill was on the verge of dying in the Senate when a last-minute compromise was brokered which, among other things, changed the definition of what speech would be immunized.

As in New Mexico or Pennsylvania – where the statute was greatly watered down before passage – the results of compromise may be harsh. But keep in mind that where passage of the desired language does not seem possible, it might be better to get some kind of statute on the books. Once that happens, some of the opposing pressure may lift and it may be easier to pass amendments that will bring the statute in line with our goals.

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Appendix A
SLAPPs: A Statement of the Problem

What is a SLAPP Suit?

The essence of a SLAPP suit is the transformation of a debate over public policy – including such local issues as zoning, environmental preservation, school curriculum, or consumer protection – into a private dispute. A SLAPP suit shifts a political dispute into the courtroom, where the party speaking out on the issue must defend his or her actions. Although SLAPP suits may arise in many different contexts, they share a number of features:

1. The conduct of the targets that are sued is generally constitutionally protected speech intended to advance a view on an issue of public concern. In most cases, a SLAPP suit is filed in retaliation for public participation in a political dispute. The plaintiff is attempting to intimidate a political opponent and, if possible, prevent further public participation on the issue by the person or organization.

2. Targets typically are individuals or groups that are advancing social or political interests of some significance and not acting solely for personal profit or commercial advantage.

3. The filers are individuals or groups who believe their current or future commercial interests may be negatively affected by the targets' actions. Though developers and other commercial entities are the most common SLAPP plaintiffs, they are not the only ones. For example, in Oklahoma, a group supporting tort reform was the subject of a class action libel suit filed by trial lawyers, and in California, county officials filed a $42 million SLAPP against a local citizen because of his opposition to a proposed incinerator project.

4. The actions tend to be based on one or more of the following torts: defamation (libel or slander); business torts (interference with contract, business relationships or economic advantage, or restraint of trade); misuse of process (abuse of process or malicious prosecution); civil rights violations (due process, takings, or equal protection); or conspiracy to commit one or more of the above acts.

5. Damages sought are often in the millions of dollars. According to a study by the Denver Political Litigation Project, the average demand was for $9.1 million. See Penelope Canan and George Pring, SLAPPs: Getting Sued for Speaking Out 217 (Philadelphia: Temple University Press, 1996).

6. Almost all SLAPP suits are eventually dismissed or decided in favor of the defendants. Canan and Pring reported that targets win dismissals at the very first trial court appearance in about two-thirds of the cases. Id. at 218. By all accounts, the number of SLAPP suits has increased during the past 30 years. Examples of SLAPP suits from around the country reveal the extent of the practice:

— In Rhode Island, a woman filed comments on proposed groundwater rules, raising concerns about possible contamination from a local landfill. The landfill operators sued her for defamation and tortious interference with prospective business contracts, seeking both compensatory and punitive damages.

— In Pennsylvania, a couple wrote letters to their United States Senator, state health officials, and CBS News complaining about conditions at a local nursing home. The state investigated and eventually revoked the nursing home's license. The nursing home then sued the couple, the Senator, and a state health department official.

— In Minnesota, a retired United States Fish and Wildlife Service employee mobilized his neighbors against a proposed condominium development on a small lake. After the rezoning request was rejected, the developer sued him, alleging he had made false statements that damaged the developer's business reputation.

— In Texas, a woman confined to her home by illness spoke out publicly against a nearby landfill. In response, the landfill owners filed a $5 million defamation suit against the woman and her husband.

— In California, a group of small cotton farmers bought newspaper advertising opposing a proposed ballot measure supported by the nation's largest cotton agribusiness. The corporation sued the farmers for libel, requesting $2.5 million in damages.

— In California, a $63 million lawsuit was filed by a developer who claimed that the Beverly Hills League of Women Voters had unlawfully stymied his 10-acre project.

— In Washington, The Nature Conservancy was sued for $2.79 million by seaweed farm developers after it had inventoried potential natural areas in San Juan County, identified lands that should be preserved (including the plaintiffs'), and turned the study over to the county as a recommendation.

Isn't Action Involving Public Participation And Petition Already Protected By The Constitution? Why Is A Special Anti-SLAPP Provision Needed?

Two constitutional doctrines, both founded on the First Amendment, protect the sort of speech and conduct that is targeted by SLAPPs. The first, the New York Times v. Sullivan doctrine, provides that a person cannot be found liable for a false statement about a public figure on a matter of public concern unless the statement was made with "actual malice," that is, with knowledge that it was false or with reckless disregard for its truth or falsity. The second, the Noerr-Pennington doctrine, provides that petitioning activity is shielded from liability as long as it is genuinely aimed at procuring favorable government action.

Under both these doctrines, a defendant seeking to promptly dispose of a lawsuit files a motion to dismiss, in which the defendant argues that the plaintiff's allegations in the complaint do not state a viable claim. The burden of persuasion lies with the defendant, and the facts alleged are presumed to be true, though later inquiries will be intensely fact-specific. For those reasons, and because the right to sue is itself constitutionally protected, a judge generally will not dismiss a lawsuit at this stage. Most often, the judge will allow the plaintiff to proceed with discovery, including depositions during which the plaintiff's attorney may question the defendant's knowledge, beliefs, and motives.

The problem with the current legal framework is that it takes too long to get SLAPP suits dismissed. According to Dr. Pring, the average SLAPP suit proceeds for 40 months – more than three years. During this time, the suit inflicts massive emotional and financial harm on the defendant, and often the defendant withdraws completely from action involving public participation and petition. By the time the SLAPP suit is dismissed, the plaintiff has thus achieved its goals of retaliation and silencing protected speech.

What Will Anti-SLAPP Legislation Do?

Essentially, anti-SLAPP legislation identifies the speech and conduct that should be protected – defined as "action involving public participation and petition" – and provides a procedure for speedy review of lawsuits that are filed as a result of such protected action. In particular, the proposed legislation permits a suspecting SLAPP victim to file a special motion to strike, which must be heard within 60 days. At the hearing, the SLAPP must be dismissed unless the filer establishes a probability of prevailing. The proposed legislation also states that discovery will be stayed pending a decision on the motion to strike. A prevailing victim is entitled to his attorney's fees and costs, and a court may issue other sanctions to deter similar conduct in the future by the filer or others similarly situated.

The proposed legislation also features protections for those who file legitimate suits and find themselves the subject of special motions to strike. The court will not dismiss a suit if the filer produces substantial evidence to support a prima facie case. Furthermore, the filer is entitled to his attorney's fees and costs if the court finds that the motion to strike was frivolous or filed in bad faith.

Although arguments can be made against anti-SLAPP legislation, such statutes represent a legislative decision that, even though citizen communications may at times be self-interested or incorrect, public participation and petition are essential to our democratic process and must be protected from the threat of SLAPP suits.

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Appendix B
Building A Broad Coalition: Anti-SLAPP Proponents In California
American Civil Liberties Union
American Lung Association of California
Bar Association of San Francisco
California Association of Nonprofits
California Association of Professional Liability Insurers
California Association of Zoos and Aquariums
California Common Cause (good government group)
California First Amendment Coalition
California First Amendment Project (predecessor of CASP)

California League of United Latin American Citizens
California Legislative Council For Older Americans
California Newspaper Publishers Association
California School Employees Association
California Thoracic Society
Center for Law in the Public Interest
City and County of Los Angeles
City of Napa
City of San Diego
City of San Francisco
City of San Mateo
Complete Equity Markets, Inc. (professional insurance company)
Concerned Citizens for Environmental Health
Consumers Union
Friends of the River (statewide river conservation organization)
Golden State Manufactured-Home Owners League
Greenlining Coalition (multi-ethnic community leaders)
Land Utilization Alliance
Neighborhood and civic associations
Planning and Conservation League (California environmental org.)
Public Advocates (public-interest law firm)
Queen's Bench (women's lawyers association in San Francisco)
Sierra Club, Ventana Chapter
Women Lawyers of Alameda County

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A Uniform Act Limiting Strategic Litigation Against Public Participation

PREFATORY NOTE

The past 30 years have witnessed the proliferation of Strategic Lawsuits against Public Participation ("SLAPPs") as a powerful mechanism for stifling free expression. SLAPPs defy simple definition. They are initiated by corporations, companies, government officials, and individuals, and they target both radical activists and typical citizens. They occur in every state, at every level in and outside of government, and address public issues from zoning to the environment to politics to education. They are cloaked as claims for defamation, nuisance, invasion of privacy, and interference with contract, to name a few. For all the diversity of SLAPPs, however, their unifying features make them a dangerous force: They are brought not in pursuit of justice, but rather to ensnare their targets in costly litigation that distracts them from the controversy at hand, and to deter them and others from engaging in their rights of speech and petition on issues of public concern.

To limit the detrimental effects of SLAPPs, 21 states have enacted laws that authorize special and/or expedited procedures for addressing such suits, and ten others are considering or have previously considered similar legislation. Though grouped under the "anti-SLAPP" moniker, these statutes and bills differ widely in scope, form, and the weight they accord First Amendment rights vis a vis the constitutional right to a trial by jury. Some "anti-SLAPP" statutes are triggered by any claim that implicates free speech on a public issue, while others apply only to speech in specific settings or concerning specific subjects. Some statutes provide for special motions to dismiss, while others employ traditional summary procedures. The burden of proof placed on the responding party, whether discovery is stayed pending consideration, and the availability of attorney's fees and damages all vary from state to state. Perhaps as a result of the confusion these variations engender, anti-SLAPP measures in many states are grossly under-utilized.

The Uniform Act Limiting Strategic Litigation Against Public Participation seeks to remedy these flaws by enunciating a clear process through which SLAPPs can be challenged and their merits evaluated in an expedited manner. The Act sets out the situations in which a special motion to strike may be brought, a uniform timeframe and other procedures for evaluating the special motion, and a uniform process for setting and distributing attorney's fees and other damages. In so doing, the Act ensures that parties operating in more than one state will face consistent and thoughtful adjudication of disputes implicating the rights of speech and petition.

Because often conflicting constitutional considerations bear on anti-SLAPP statutes, the Act is in many respect an exercise in balance. The triggering "action involving public participation and petition" is defined so that the special motion to strike may be employed against all true SLAPPs without becoming a blunt instrument for every person who is sued in connection with the exercise of his or her rights of free speech or petition. To avoid due process concerns, the responding party's burden of proof is not overly onerous, yet steep enough to weed out truly baseless suits. Finally, to reduce the possibility that the specter of an anti-SLAPP motion will deter the filing of valid lawsuits, the fee-shifting structure is intended to ensure proper compensation without imposing purely punitive measures. In these ways and more, the Act serves both the citizens' interests in free speech and petition and their rights to due process.

SECTION 1. FINDINGS AND PURPOSES

(a) FINDINGS. The Legislature finds and declares that

(1) there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances;

(2) such lawsuits, called "Strategic Lawsuits Against Public Participation" or "SLAPPs," are typically dismissed as groundless or unconstitutional, but often not before the defendants are put to great expense, harassment, and interruption of their productive activities.

(3) the costs associated with defending such suits can deter individuals and entities from fully exercising their constitutional rights to petition the government and to speak out on public issues;

(4) it is in the public interest for citizens to participate in matters of public concern and provide information to public entities and other citizens on public issues that affect them without fear of reprisal through abuse of the judicial process;

(5) an expedited judicial review would avoid the potential for abuse in these cases.

(b) PURPOSES. The purposes of this Act are

(1) to strike a balance between the rights of persons to file lawsuits and to trial by jury and the rights of persons to participate in matters of public concern;

(2) to establish an efficient, uniform, and comprehensive method for speedy adjudication of SLAPPs;

(3) to provide for attorney's fees, costs, and additional relief where appropriate.

Comment

The findings bring to light the costs of baseless SLAPPs – their harassing and disruptive effect and financial burdens on those forced to defend against them, and the danger that such lawsuits will deter individuals and entities from speaking out on public issues and exercising their constitutional right to petition the government. The stated purposes make clear that that drafters also recognize important interests opposing the speedy disposal of lawsuits, particularly the right of an individual to due process and evaluation of his or her claim by a jury of peers. Thus, the primary intent of the Act is not to do away with SLAPPs, but to limit their detrimental effects on the First Amendment without infringing on citizens' due process and jury trial rights.

Though a statement of findings and purposes is not required in many states (only about half of the anti-SLAPP laws in effect have them), several states have put such statements to good use. They can be invaluable in helping courts interpret the reach of the statute. This has been particularly evident in California, the epicenter of anti-SLAPP litigation. For example, in 1999, the United States Court of Appeals for the Ninth Circuit found the legislative findings crucial to its holding that the statute may properly be applied in federal court. See United States ex rel. Newsham v. Lockheed Missiles and Space Co., 190 F.3d 963, 972-73 (9th Cir. 1999). If the statute were strictly procedural, the court noted, choice-of-law considerations would likely deem it inapplicable in federal court. However, because of California's "important, substantive state interests furthered by anti-SLAPP statute," which are enunciated in Cal. Civ. Proc. Code 425.16(a), the court held that the anti-SLAPP statute should be applied in conjunction with the Federal Rules of Civil Procedure. Id.

The Supreme Court of California also has deemed the legislative findings useful in determining many of the most important questions that have arisen from application of the anti-SLAPP

statute. In Briggs v. Eden Council for Hope and Opportunity, the Court examined whether a party moving to strike a cause of action arising from a statement made before, or in connection with an issue under consideration by, a legally authorized official proceeding was required to demonstrate separately that the statement concerned an issue of public significance. 969 P.2d 564, 565 (Cal. 1999). The court found that the 425.16(a) findings evinced an intent broadly to protect petition-related activity; to require separate proof of the public significance of the issue in such cases would result in the exclusion of much direct petition activity from the statute's protections, contrary to the clear legislative intent. Id. at 573-74. In Equilon Enterprises, LLC v. Consumer Cause, Inc., the same court found that requiring a moving party to demonstrate that the action was brought with an "intent to chill" speech would contravene the legislative intent by lessening the statute's effectiveness in encouraging public participation in matters of public significance. 52 P.2d 685, 689 (Cal. 2002).

The benefits of statements of findings and purposes have been seen outside California as well. In Hawks v. Hinely, an appellate court in Georgia cited the General Assembly's stated findings in holding that statements made in a petition itself – not just statements concerning the petition – trigger the safeguards of the anti-SLAPP statute. 556 S.E.2d 547, 550 (Ga. App. 2001). In Globe Waste Recycling, Inc. v. Mallette, the Supreme Court of Rhode Island found that legislative intent, as recorded in the statute, indicated that statements for which immunity is claimed need not necessarily be made before a legislative, judicial, or administrative body under the terms of the statute. 762 A.2d 1208, 1213 (R.I. 2000). Finally, in Kauzlarich v. Yarbrough, an appellate court in Washington held that the legislative findings indicated that the Superior Court Administration is an "agency," and thus communications to that entity trigger the immunity protection and other benefits of the anti-SLAPP statute. 20 P.3d 946 (Wash. App. 2001).

SECTION 2. DEFINITIONS

As used in this Act,

(a) "Claim" includes any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing requesting relief;

(b) "Government" includes a branch, department, agency, instrumentality, official, employee, agent, or other person acting under color of law of the United States, a state, or subdivision of a state or other public authority;

(c) "Moving party" means a person on whose behalf the motion described in Section 4 is filed seeking dismissal of a claim;

(d) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity.

(e) "Responding party" means a person against whom the motion described in Section 4 is filed.

Comment

Most SLAPPs present themselves as primary causes of action, with the moving party as the defendant to the original SLAPP suit and the responding party as the plaintiff. However, "claim," "moving party," and "responding party" are defined so the protections of the statute extend to other, less common situations. For example, the moving party may be a plaintiff in the underlying action if the SLAPP claim is a counter-claim. See, e.g., Simmons v. Allstate Ins. Co., 92 Cal. App. 4th 1068 (Cal. Ct. App. 2001); Wilcox v. Superior Court, 27 Cal. App. 4th 809 (Cal. Ct. App. 1994). Alternatively, the moving and responding parties may be co-defendants or co-plaintiffs in the underlying action if the SLAPP claim is a cross-claim.

Similarly, while the quintessential SLAPPs are brought by corporate entities against individuals, the definition of "person" in the Act is not so limited. A "person" eligible to be a moving or responding party under the Act may be an individual or a wide range of corporate or other entities. Thus, the evaluation of a SLAPP claim is properly focused on the substance of the claim rather than peripheral matters such as the status of the parties. With the same purpose in mind, "government" is defined broadly to ensure that action in furtherance of the right of petition is not construed to include only interaction with administrative agencies.

SECTION 3. SCOPE; EXCLUSION

(a) SCOPE. This Act applies to any claim, however characterized, that is based on an action involving public participation and petition. As used in this Act, an "action involving public participation and petition" includes

(1) any oral statement made, or written statement or other document submitted, in a legislative, executive, or judicial proceeding or other proceeding authorized by law;

(2) any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other proceeding authorized by law;

(3) any oral statement made, or written statement or other document submitted, that is reasonably likely to encourage, or to enlist public participation in an effort to effect, consideration or review of an issue in a legislative, executive, or judicial proceeding or other proceeding authorized by law;

(4) any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern; or

(5) any other conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.

(b) EXCLUSION. This Act shall not apply to any action brought by the attorney general, district attorney, or city attorney, acting as a public prosecutor, to enforce laws aimed at public protection.

Comment

This section is the core of the statute, defining what First Amendment activities will trigger the protections stated herein. First, the claim must be "based on" an action involving public participation and petition. The existing California statute uses the terminology "arising from," but in response to confusion over that language, the California Supreme Court has held that "the critical point is whether the plaintiff's cause of action itself was based on an act in furtherance of the defendant's right of petition or free speech." City of Cotati v. Cashman, 52 P.3d 695 (Cal. 2002). The use of "based on" in this Act is designed to omit that confusion and clarify that there must be a real – not simply temporal – connection between the action involving public participation and petition and the legal claim that follows.

The term "action involving public participation and petition" is modeled after the defining language in the existing New York and Delaware anti-SLAPP statutes and is designed to reinforce the model statute's main focus: to protect the public's right to participate in the democratic process through expression of their views and opinions. This terminology is also designed to avoid the confusion engendered by the existing California statute – which is triggered by a cause of action arising from an "act in furtherance of person's right of petition or free speech . . . in connection with a public issue" – over whether the statute only applies to activity addressing a matter of public concern. As discussed below, this statute is not so limited.

The first three subsections contain no requirement that the statements made relate to a matter of public concern. This is consistent with the California Supreme Court's holding in Briggs v. Eden Council for Hope and Opportunity, 969 P.2d 564 (Cal. 1999). In that case, two owners of residential rental properties sued a nonprofit corporation over statements made by employees of the defendant in connection with the defendant's assistance of a tenant in pursuing an investigation of the plaintiffs by the Department of Housing and Urban Development. The California Supreme Court held that the section "broadly encompasses participation in official proceedings, generally, whether or not such participation remains strictly focused on 'public' issues." Id. at 571.

Subsection (4) is drawn from the existing California statute and its progeny and offers protection for statements made in a place open to the public or a public forum in connection with an issue of public concern. The statute does not attempt to define "a place open to the public" or "a public forum," out of concern that such a definition would be unintentionally restrictive. This provision clearly encompasses those spaces historically considered public forums – such as parks, streets, and sidewalks – but on the fringes, there has been more confusion. In particular, courts have disagreed on whether a publication of the media constitutes a public forum, such that a lawsuit stemming from a media publication would be subject to an anti- SLAPP motion. Compare Zhao v. Wong, 48 Cal. App. 4th 1114 (Cal. Ct. App. 1996) (holding

private newspaper publishing falls outside concept of public forum), and Lafayette Morehouse, Inc. v. Chronicle Publishing Co., 37 Cal. App. 4th 855 (Cal. Ct. App. 1995) (same), with Baxter v. Scott, 845 So. 2d 225 (La. Ct. App. 2003) (holding professor's website is public forum), Seelig v. Infinity Broadcasting Corp., 97 Cal.App.4th 798 (Cal. Ct. App. 2002) (holding radio talk show is public forum), M.G. v. Time Warner, 89 Cal.App.4th 623 (Cal. Ct. App. 2001) (holding magazine is public forum), and Damon v. Ocean Hills Journalism Club, 85 Cal.App.4th 468 (Cal. Ct. App. 2000) (holding residential community newsletter is public forum). Courts are encouraged to consider this and related issues with an eye toward the purposes of the statute and the intent that it be construed broadly (see Section 8 below).

Finally, Subsection (5) is designed to capture any expressions of the First Amendment right of free speech on matters of public concern and right of petition that might not fall under the other categories. This includes all such conduct, such as symbolic speech, that might not be considered an oral or written statement or other document. This provision resembles the corresponding provision in the existing California statute, which covers "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." See Cal. Code Civ. Proc. ¤ 425.16(e)(4). However, this provision has been modified to make clear that conduct falling within the right to petition the government need not implicate a matter of public concern. This broad provision has been held to include speech published in the media, and is intended to do so here. See M.G. v. Time Warner, 89 Cal.App.4th at 629.

It is likely that most situations which the proposed statute is designed to address will be addressed by the five subdivisions discussed above. However, as written, the list is not exclusive. A court has jurisdiction to find that the protections of this Act are triggered by a claim based on actions that do not fall within these subdivisions, if the court deems that the claim has the effect of chilling the valid exercise of freedom of speech or petition and that application of the Act would not unduly hinder the constitutional rights of the claimant.

Subsection (b) provides that enforcement actions by the government will not be subject to anti-SLAPP motions. This exclusion is intended to ensure that the statute's protections do not hinder the government's ability to enforce consumer protection laws. In People v. Health Laboratories of North America, 87 Cal. App. 4th 442 (Cal. Ct. App. 2001), the Court of Appeals of California upheld a similar provision in the California statute against an equal protection challenge. The court noted that the exclusion is consistent with the purposes of the statute, as a public prosecutor is not motivated by retaliation or personal advantage, and it held that the provision is rationally related to the legitimate state interest of ensuring the government may pursue actions to enforce its laws uniformly. The language from the existing California statute has been modified to make clear that the exception does not apply only to civil enforcement actions initiated in the name of the people of the state.

SECTION 4. SPECIAL MOTION TO STRIKE; BURDEN OF PROOF

(a) A party may bring a special motion to strike any claim that is based on an action involving public participation and petition, as defined in Section 3.

(b) A party bringing a special motion to strike under this Act has the initial burden of making a prima facie showing that the claim against which the motion is based on an action involving public participation and petition. If the moving party meets this burden, the burden shifts to the responding party to establish a probability of prevailing on the claim by presenting substantial evidence to support a prima facie case. If the responding party meets this burden, the court shall deny the motion.

(c) In making a determination under subsection (b), the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(d) If the court determines that the responding party has established a probability of prevailing on the claim,

(1) the fact that the determination has been made and the substance of the determination may not be admitted into evidence at any later stage of the case; and

(2) the determination does not affect the burden of proof or standard of proof that is applied in the proceeding.

(c) The Attorney General's office or any government body to which the moving party's acts were directed may intervene to defend or otherwise support the moving party.

Comment

Section 4 sets out the expedited process through which "a claim that is based on an action involving public participation and petition" may be evaluated. Subsection (a) states that a party subject to such a claim may file a special motion to strike that claim. Many existing anti-SLAPP statutes provide for adjudication through motions to dismiss or motions for summary judgment. This Act mimics the existing California statute in choosing terminology that makes clear that this Motion is governed by special procedures that distinguish it from other dispositive motions.

Subsection (b) delineates the allocation of the burden between the moving and responding parties. The moving party first must make a prima facie showing that the claim is based on an action involving public participation and petition, as defined in Section 3. The moving party need not show that the action was brought with the intent to chill First Amendment expression or has such a chilling effect, though such a showing might be necessary if the action does not fit into one of the five specified categories in Section 3.

If the moving party carries its burden, the responding party must establish a probability of prevailing on its claim. This standard is higher than the standard of review for a traditional motion to dismiss; in addition to stating a legally sufficient claim, the responding party must demonstrate that the claim is supported by a prima facie showing of facts that, if true, would support a favorable judgment. See Briggs v. Eden Council for Hope and Opportunity, 969 P.2d 564 (Cal. 1999); Matson v. Dvorak, 40 Cal. App. 4th 539 (Cal. Ct. App. 1995). In so doing, the responding party should point to competent, admissible evidence.

In evaluating whether the responding party has put forth facts establishing a probability of prevailing, the court shall also consider defenses put forth by the moving party. As Subsection (c) makes clear, at all stages in this examination the court must consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

Existing and proposed state statutes that allocate a similar burden of proof to the responding party have faced constitutional challenges. In New Hampshire in 1994, a senate bill modeled on the existing California statute was presented to the state Supreme Court, which found that it was inconsistent with the state's constitution. See Opinion of the New Hampshire Supreme Court on an Anti-SLAPP Bill, 641 A.2d 1012 (1994). The court found that the statute's provision for court consideration of the pleadings and affidavits denied a plaintiff who is entitled to a jury trial the corresponding right to have all factual issues resolved by a jury. In the face of similar concerns, the Rhode Island General Assembly amended its statute in 1995 to do away with the "special motion to dismiss" provision and its "preponderance of the evidence" standard. See Hometown Properties, Inc. v. Fleming, 680 A.2d 56 (R.I. 1996).

The opinion of the New Hampshire Supreme Court evinces a misunderstanding of a court's role in evaluating a motion to strike and response. The court does not weigh the parties' evidence at this preliminary stage, but rather determines whether the responding party has passed a certain threshold by pointing to the existence of evidence that creates a legitimate issue of material fact. See Lafayette Morehouse, Inc. v. Chronicle Publishing Co., 37 Cal. App. 4th 855 (Cal. Ct. App. 1995); Dixon v. Superior Court, 30 Cal. App. 4th 733 (Cal. Ct. App. 1994); see also Lee v. Pennington, 830 So. 2d 1037 (La. Ct. App. 2002) ("The only purpose of [the state statute] is to act as a procedural screen for meritless suits, which is a question of law for the court to determine at every stage of a legal proceeding."). The court's analysis is not unlike that which it would undertake in examination of a summary judgment motion. Furthermore, the court may permit a responding party to conduct discovery after the filing of a special motion to strike if the responding party needs such discovery to establish its burden under the Act. See Section 5, infra.

Subsection (d) provides that if a responding party is successful in defeating a special motion to strike, its case should proceed as if no motion had occurred. The evaluation of a special motion to strike is based on the examination of evidence, the veracity of which is assumed at this preliminary stage but has not been established. Thus, the survival of a motion to strike is not a reflection of the validity of the underlying claim, and evidence of the survival of a motion to strike is inadmissible as proof of the strength of the claim. Likewise, the special motion to strike should in no way alter the burden of proof as to the underlying claim.

A variation of subsection (e) is included in almost every existing anti-SLAPP statute and

provides that the attorney general's office or the government body to which the moving party's acts were directed may intervene to defend or otherwise support the moving party. Many of the most troubling SLAPPs are brought by a powerful party against a relatively powerless individual or group. Though the government's role is purely discretionary, this provision is designed to grant more targets of SLAPPs the resources needed to fight baseless lawsuits.

SECTION 5. REQUIRED PROCEDURES

(a) The special motion to strike may be filed within 60 days of the service of the most recent complaint or, in the court's discretion, at any later time upon terms it deems proper. A hearing shall be held on the motion not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(b) All discovery and any pending hearings or motions in the action shall be stayed upon the filing of a special motion to strike under Section 3. The stay of discovery shall remain in effect until the entry of the order ruling on the motion. Notwithstanding the stay imposed by this subsection, the court, on motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted.

(c) Any party shall have a right of expedited appeal from a trial court order on the special motion or from a trial court's failure to rule on the motion in a timely fashion.

Comment

The procedures set out in Section 5 are designed to facilitate speedy adjudication of anti-SLAPP motions, one of the main goals of this Act. Subsection (a) states that unless the court deems it proper to appoint a later deadline, a special motion to strike must be filed within 60 days of service of the most recent amended complaint – or the original complaint, if it has not been amended. The motion must be heard by the court within 30 days of service of the motion to the opposing party, unless the docket conditions of the court require a later hearing. The court may not delay the hearing date merely for the convenience of one or both parties.

Subsection (b) provides for a stay of discovery and all other pending motions from the time a special motion to strike is filed until the entry of the order ruling on the motion. This stay is designed to mitigate the effects of SLAPP suits brought for the purpose of tying up the SLAPP victim's time and financial resources. However, it is also understood that in some situations the party opposing the special motion to strike will need discovery in order to adequately frame its response to the motion, and restricting discovery in these situations might raise constitutional concerns. In addition, there will be times when a stay on all other pending motions will be impractical.

Thus, the court is permitted, on motion and for good cause shown, to permit limited discovery and/or the hearing of other motions. Relevant considerations for the judge when evaluating "good cause" include whether the responding party has reasonably identified material held or known by the moving party that would permit it to demonstrate a prima facie case, see Lafayette Morehouse Inc. v. Chronicle Publishing Co., 37 Cal. App. 4th 855, 868 (Cal. Ct. App. 1995), and whether the materials sought are available elsewhere, see Schroeder v. City Council of City of Irvine, 97 Cal. App. 4th 172 (Cal. Ct. App. 2002). The requirement for a timely motion is intended to be enforced; responding parties will not be permitted to raise the issue for the first time on appeal or when seeking reconsideration. See Evans v. Unkow, 38 Cal. App. 4th 1490 (Cal. Ct. App. 1995).

Subsection (c) makes clear that an order granting or denying a special motion to strike is immediately appealable. This provision is modeled after the 1999 amendment to the existing California statute that was intended to give the moving party -- the party the statute was designed to protect D- the same ability as the responding party to challenge an adverse trial court ruling. Originally, the California statute permitted the responding party to appeal the grant of a motion to strike, while the moving party could only challenge the denial through petition for a writ in the court of appeals, a process that is disfavored and rarely successful.

SECTION 6. ATTORNEY'S FEES, COSTS, AND OTHER RELIEF

(a) The court shall award a moving party who prevails on a special motion to strike made under Section 3, without regard to any limits under state law:

(1) costs of litigation and any reasonable attorney's fees incurred in connection with the motion; and

(2) such additional relief, including sanctions upon the responding party and its attorneys or law firms, as the court determines shall be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

(b) If the court finds that the special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award reasonable attorney's fees and costs to the responding party.

Comment

The attorney's fee provisions are a central feature of the Uniform Act, designed to create the proper incentives for both parties considering lawsuits arising out of the First Amendment activities of another, and parties pondering how to respond to such lawsuits. Subsection (a) sets out the costs, fees, and other relief recoverable by a moving party who succeeds on a special motion to strike under this statute. It provides that a prevailing movant is entitled to recover reasonable attorney's fees and costs, and that the court should issue such other relief, including sanctions against the responding party or its attorneys, as the court deems necessary to deter the responding party and others from similar suits in the future. Subsection (b) counterbalances (a) by providing mandatory fee-shifting to the responding party if the court finds that the special motion to strike is frivolous or brought with intent to delay.

Nearly every state anti-SLAPP statute includes a section providing for mandatory or discretionary fee-shifting for the benefit of a prevailing movant. The main purpose of such provisions is to discourage the bringing of baseless SLAPPs by "plac[ing] the financial burden of defending against so-called SLAPP actions on the party abusing the judicial system." Poulard v. Lauth, 793 N.E.2d 1120, 1124 (Ind. Ct. App. 2003); see also Ketchum v. Moses, 17 P.3d 735, 745 (Cal. 2001). Another important purpose of such provisions is to encourage private representation of parties defending against SLAPPs, even where the party might not be able to afford fees. See id. Thus, fees are recoverable even if the prevailing defendant is represented on a pro bono basis, see Rosenaur v. Scherer, 88 Cal. App. 4th 260, 287 (Cal. Ct. App. 2001).

By "reasonable attorney's fees," the statute refers to those fees that will adequately compensate the defendant for the expense of responding to a baseless lawsuit. See Robertson v. Rodriguez, 36 Cal. App. 4th 347, 362 (Cal. Ct. App. 1995). The statute permits the use of the lodestar method for calculating reasonable fees. The lodestar method provides for a baseline fee for comparable legal services in the community that may be adjusted by the court based on factors including (1) the novelty and difficulty of the questions involved; (2) the skill displayed by the attorneys; (3) the extent to which the nature of the litigation precluded other employment of the attorneys; and (4) the contingent nature of the fee award. See Ketchum, 17 P.3d at 741. Even if the lodestar method is not followed strictly, the court may take those and other factors – such as a responding party's bad-faith tactics – into account in determining "reasonable" fees.

Much confusion has arisen in the application of California's anti-SLAPP statute over what constitutes a "prevailing" defendant or moving party, particularly where the respouding party voluntarily dismisses the underlying case prior to a court's ruling on the special motion to strike. The authors of this statute agree with the majority of California courts that proper disposition of these situations requires the court to make a determination of the merits of the motion to strike. See Pfeiffer Venice Properties v. Bernard, 107 Cal. App. 4th 761, 768 (Cal. Ct. App. 2002); Liu v. Moore, 69 Cal. App. 4th 745, 755 (Cal. Ct. App. 1999). If the court finds that the moving party would have succeeded on its motion to strike, it shall award the moving party reasonable attorney's fees and costs. This interpretation does not provide a disincentive for responding parties to dismiss baseless lawsuits, because if the responding party timely dismisses, the moving party will likely have incurred less in fees and costs than it would have if the responding party pursued its lawsuit to a ruling on the motion to strike.

One California court has held that where the responding party voluntarily dismisses prior to a ruling on the special motion to strike, the responding party could prove it prevailed by showing "it actually dismissed because it had substantially achieved its goals through a settlement or other means, because the [moving party] was insolvent, or for other reasons unrelated to the probability of success on the merits." Coltrain v. Shewalter, 66 Cal. App. 4th 94, 107 (Cal. Ct. App. 1998). This analysis is flawed because it places impoverished moving parties in the position of having to fight baseless SLAPP suits out of their own pockets because the responding party

can at any time dismiss the SLAPP on the grounds that the moving party is insolvent and thereby avoid paying attorney's fees.

Another question that has arisen in the interpretation of the California statute is how the fee award is to be assessed if the moving party's victory is partial or limited in comparison to the litigation as a whole. In such cases, the prevailing movant is entitled to a fee award reduced by the court to reflect the partial or limited victory. See ComputerXpress, Inc. v. Jackson, 93 Cal. App. 4th 993, 1019 (Cal. Ct. App. 2001). Finally, the government, if it prevails on a special motion to strike, is entitled to recover its fees and costs just as a private party would. See Schroeder v. City Council of City of Irvine, 99 Cal. App. 4th 174, 197 (Cal. Ct. App. 2002).

Subsection (a)(2), which gives the court discretion to apply additional sanctions upon the responding party, is modeled after a provision in Guam's anti-SLAPP statute. Several state statutes (though notably not California's) provide for additional sanctions beyond fees and costs in various circumstances, with most requiring a showing that the responding party brought its lawsuit with the intent to harass. See, e.g., 10 Delaware Code × 8138(a)(2); Minnesota Statutes × 554.04(2)(b). Such intent-based provisions are ineffective because they place a heavy burden of proof on moving parties when, in fact, most SLAPP lawsuits by definition are brought with an intent to harass. The provision in this Act lifts the heavy burden from the moving party but at the same time makes clear that additional relief is not to be applied in every case Ð only when the court finds that an extra penalty would serve the purposes of the Act.

Just as subsection (a) is designed to deter the filing of baseless SLAPPs, subsection (b) is intended to deter parties who find themselves on the receiving end of valid lawsuits from filing special motions to strike that have no chance of success and show some evidence of bad faith on the part of the movant. The court should grant reasonable attorney's fees to the responding party when, for example, the moving party cannot in good faith maintain that the underlying conduct constitutes "action involving public participation and petition." See Moore v. Shaw, 116 Cal. App. 4th 182, 200 (Cal. Ct. App. 2004).

As a final matter, a moving party who prevails on a special motion to strike under this Act will recover attorney's fees and costs related to a successful appeal on the issue. Dove Audio, Inc. v. Rosenfeld, Meyer & Susman, 47 Cal. App. 4th 777, 785 (Cal. Ct. App. 1996); Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 659 (Cal. Ct. App. 1996). In addition, a moving party may recover reasonable fees in connection with an appeal even when the responding party does not pursue the appeal to a final determination. Wilkerson v. Sullivan, 99 Cal. App. 4th 443, 448 (Cal. Ct. App. 2002).

SECTION 7. RELATIONSHIP TO OTHER LAWS

Nothing in this Act shall limit or preclude any rights the moving party may have under any other constitutional, statutory, case or common law, or rule provisions.

SECTION 8. UNIFORMITY OF APPLICATION AND CONSTRUCTION

This Act shall be applied and construed liberally to effectuate its general purpose to make uniform the law with respect to the subject of this Act among States enacting it.

SECTION 9. SEVERABILITY OF PROVISIONS

If any provision of this Act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 10. SHORT TITLE

This Act may be cited as the Uniform Act Limiting Strategic Litigation Against Public Participation.

SECTION 11. EFFECTIVE DATE

This Act takes effect ..... .

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The Anti-SLAPP Statute: A New Defense For Developers?

0 24

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A little noticed Superior Court decision in December may have broad implications for developers of real estate. In dismissing a lawsuit filed by members of the community against a real estate developer in Pierce v. Mulhern, [1] the Superior Court recognized apparently for the first time in Massachusetts that real estate developers are afforded the protections of the Massachusetts anti-SLAPP statute. [2] As the realities of real estate development in the Commonwealth mandate active public engagement by developers, through hearings with governmental agencies or meetings with community groups, the decision in Pierce largely shields such activity from direct legal action.

"SLAPP" is an acronym for "strategic litigation against public participation," and the law is meant to protect those who participate in a public process from retaliatory litigation, typically alleging causes of action such as defamation or tortious interference with contractual relations/prospective business opportunity, that itself may be meritless, but the defense against which may be very costly. The anti-SLAPP law has historically been the domain of those petitioning against, not proponents of, development. Indeed, the Supreme Judicial Court, in the leading case interpreting the anti-SLAPP statute, wrote, "The typical mischief that the legislature intended to remedy was lawsuits directed at individual citizens of modest means for speaking publicly against development projects." [3] The Supreme Judicial Court identified a single case as the "impetus" for the introduction of the anti-SLAPP legislation in 1994 in Massachusetts. In that case, a developer sued 15 citizens of Rehoboth who, ostensibly concerned with the protection of wetlands, had signed a petition against a permit for the construction of six single-family residences. The suit was eventually dismissed, but not before the 15 citizens had incurred thousands of dollars in legal fees defending against the action.

The anti-SLAPP law works this way: The target of a SLAPP suit files a "special motion to dismiss." The movant must show that the claims in the suit are solely "based on" the exercise of the "right of petition under the constitution of the United States or of the commonwealth." [4] The statute defines "petitioning activity" broadly to include just about any public statement concerning an issue pending before a governmental body. If the initial showing is made, then the burden shifts to the party who brought the suit to establish (1) that the petitioning activity "was devoid of any reasonable factual support or any arguable basis in law"; and (2) that the petitioning activity caused actual injury to the party who brought the lawsuit. [5] This burden shifting imposes a high hurdle: to prove, without the benefit of discovery, the total lack of merit of the petitioning activity. Failure to meet this burden subjects the party who brought the lawsuit to paying the target's legal fees and costs. [6]

In the recent Superior Court case, Pierce, members of the community appealed a special permit issued by the Winchester Zoning Board of Appeals to the developer of a proposed assisted living facility. The Superior Court vacated the special permit on procedural grounds and remanded the matter back to the Zoning Board of Appeals. The developer, however, rather than returning to the ZBA to try to secure another special permit that the members of the community likely would just appeal again, asked the ZBA to sponsor Warrant Articles for Town Meeting to amend the Town's by-laws in such a way that a special permit would not be necessary to proceed with the proposed facility. The members of community filed a contempt complaint against the developer, its principals and attorney, the ZBA and the Town, alleging that the failure to return to the ZBA for a new special permit violated the remand order.

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The developer filed a special motion to dismiss under the anti-SLAPP statute arguing that the contempt complaint was based solely on the petitioning activity to the Town Meeting. The members of the community filed an opposition brief arguing that the developer was trying to turn the anti-SLAPP statute on its head, that the "intention" of the statute was to "protect the rights of individual members of the public," not big developers.

The Superior Court disagreed with this concern, finding nothing in the statute to limit its protections only to private citizens. [7] The court found that the developer had made its initial showing that the contempt complaint was based solely on the petitioning activity. With the burden then shifted to the members of the community, the court found that they had not established the lack of a factual or legal basis for the petitioning activity. The court observed that "As a result of what [the developer] perceived as ambiguities in the Town's zoning bylaws, the [developer] sought to clarify or change those bylaws through proposed Warrant Articles that would accommodate the Project." [8] The Superior Court dismissed the lawsuit.

To get projects built in the Commonwealth, developers are compelled to participate in a variety of public forums. The Superior Court's decision in Pierce protects developers from direct attacks against that public participation.

Footnotes

1. Civil Action No. 2001-2825-C.
2. M.G.L. c. 231, § 59H.
3. Duracraft Corp. v. Holmes Products Corp., 427 Mass. 156, 161 (1998).
4. M.G.L. c. 231, § 59H; Duracraft, 427 Mass. at 165.
5. M.G.L. c. 231, § 59H.
6. Id.
7. Memorandum and Order at 5.
8. Id. at 7.

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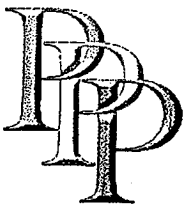

Public Participation Project
Fighting for Free Speech
www.anti-slapp.org

Why Anti-SLAPP Laws are Valuable to the Business Community

"Every dollar spent defending against a groundless lawsuit is a dollar that won't be spent on research and development, capital investment, worker training or job creation."
-Sherman "Tiger" Joyce, President – American Tort Reform Association

Strategic Lawsuits Against Public Participation (SLAPPs) are meritless lawsuits brought not to vindicate legal rights, but to harass, intimidate and silence those who engage in public participation. Such lawsuits use the justice system as a weapon, and waste time and resources on frivolous, meritless claims.

SLAPPs are most commonly brought as malicious prosecution, defamation, and interference with business claims, but businesses also face SLAPPs in the guise of trademark and copyright infringement, anti-trust violations and allegations of conspiracy.

Federal anti-SLAPP legislation would be valuable to the business community because it:

-Provides a procedure for expedited dismissal of SLAPPS to quickly rid the courts of meritless lawsuits;
-Prohibits or limits discovery in a SLAPP, thus reducing litigation costs;
-Provides for attorney's fees and costs for a defendant who successfully has the case dismissed, which deters the bringing of SLAPPs;
-Eliminates the current incentive to forum shop for a jurisdiction with no anti-SLAPP law by providing a uniform level of protection across jurisdictions, while leaving intact state protections.

Examples of SLAPPs targeting the business community:

-In its termination form after firing an employee in 2002, Wells Fargo noted that it was firing the employee for "violation of company policies by misrepresenting information in the sale of annuities, not being properly registered and firm procedures regarding annuity applications." The employee sued Wells Fargo for, among other things, defamation and intentional interference with prospective business relations based on the comments in the termination form. Wells Fargo brought an anti-SLAPP motion and was ultimately successful in the Court of Appeals, allowing them to recover attorneys' fees incurred in defending against the claim. *Fontani v. Wells Fargo Investments, LLC*, 129 Cal. App. 4th 719 (2005).

-Recent anti-SLAPP decisions in California serve to protect businesses against liability arising from certain hiring and firing actions. Business' ability to obtain accurate employment- screening information was strengthened in *Mendoza v. ADP Screening and Selection Services, Inc.* (2010) 182 Cal. App. 4th 1644, which held that background reports on potential employees are constitutionally protected activity within the meaning of the anti-SLAPP law. Similarly, in a 2009 wrongful termination suit that also included claims of defamation, an employer's statements to a regulatory agency regarding the reason for an employee's termination were properly subject to an anti-SLAPP motion. *Dible v. Haight Ashbury Free Clinics, Inc.*, 170 Cal. App. 4th 843.

-Calibra Pictures, the production company behind the movie *Iron Cross*, sued Variety magazine over a negative review of the movie. Because Variety had previously enticed Calibra to spend substantial amounts of money to advertise the movie with it, Calibra sued Variety for, among other claims, breach of contract and fraud. Variety filed an anti-SLAPP motion and it was granted, allowing Variety to recover its attorneys' fees. The CA Court of Appeal held that the lawsuit arose from an exercise of free speech and that there was no evidence that Variety waived its rights to publish the review.

THE WALL STREET JOURNAL.
WSJ.com

JUNE 1, 2010, 9:48 AM ET

Online Venters Rejoice: Federal Anti-SLAPP Law Taking Shape

That airline lose your luggage (again)? A rental-truck outfit overcharge you unjustifiably? That bedbug exterminator spray everywhere except where the bedbugs roam?

In a fit of pique, you might be inclined to take your complaints online, to create an "Acme BugsAway Stinks!" group on Facebook or maybe even film your own Howard Beale-like tirade and put it up on YouTube.

If you do, know that a complaint from the object of your ire might soon be on its way. And maybe a lawsuit.

The NYT on Tuesday has a story on the trend of companies fighting back against consumers who vent online, mostly in the form of defamation suits.

According to the story, those who vent online may often be protected by the First Amendment. But the Constitution doesn't always carry the day — the threat of a suit is often enough to get angry consumers to pull down their remarks.

Many states have what are called anti-SLAPP laws — laws that ban these types of suits. (SLAPP stands for "Strategic Lawsuit Against Public Participation.) Congress is thinking about passing its own.

The bill, in the House Subcommittee on Courts and Competition Policy, would, according to the NYT, enable a defendant who believes he is being sued for speaking out or petitioning on a public matter to seek to have the suit dismissed.

Under the proposed law, if a case is dismissed for being a SLAPP suit, the plaintiff would have to pay the other side's legal fees.

"Just as petition and free speech rights are so important that they require specific constitutional protections, they are also important enough to justify uniform national protections against Slapps," said Mark Goldowitz, director of the California Anti-Slapp Project, which helped draft the bill.

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SENATE AGENDA

for the

COMMITTEE ON JUDICIARY

Day Friday Date April 5, 2013 Start Time 8:00 a.m.* Room 2149

Room 2149 of the Legislative Building, 401 S. Carson St., Carson City, NV.
Videoconferenced to Room 4412 of the Grant Sawyer State Office Building, 555 E. Washington Ave., Las Vegas, NV.

All Senate meetings are available live over the Internet at http://www.leg.state.nv.us. Click on the link "Calendar of Meetings/View."

We are pleased to make reasonable accommodations for members of the public who are disabled and wish to attend the meeting. If special arrangements for the meeting are necessary, please notify the Senate Committee Manager at (775) 684-1438.

All documents, handouts and exhibits in support of your testimony must be submitted electronically in PDF format no later than 5 p.m. the day before the meeting to the Committee on Judiciary Committee Manager at SenJUD@sen.state.nv.us. In addition, please bring 25 copies of your documents, handouts, and exhibits to the meeting for distribution to the public. If you are planning to provide a PowerPoint or other electronic presentation, you are responsible for notifying the Committee Manager prior to the meeting and bringing your own electronic copy for presentation.

FIRST REVISED AGENDA

*Please note start time.

S.B. 161 Revises various provisions relating to constructional defects. (BDR 3-480) Senator Roberson

S.B. 231 Revises provisions relating to lawsuits involving real property. (BDR 10-1004) Senator Roberson

S.B. 368 Revises provisions concerning constructional defects. (BDR 3-425) Senator Gustavson

S.B. 383 Revises provisions governing time shares. (BDR 10-916) Senator Parks

S.B. 417 Revises provisions relating to civil actions. (BDR 2-1105) Judiciary

WORK SESSION

S.B. 31 Provides for the sharing of information regarding certain children among child welfare agencies, schools, courts, probation departments and treatment providers. (BDR 5-385) Judiciary

S.B. 111 Requires production of certain evidence under certain circumstances. (BDR 3-771) Senator Jones

S.B. 131 Establishes provisions governing the disposition of a decedent's accounts on electronic mail, social networking, messaging and other web-based services. (BDR 12-563) Senator Cegavske

S.B. 226 Makes various changes concerning firearms. (BDR 15-38) Senator Settelmeyer

S.B. 286 Provides immunity from civil action under certain circumstances. (BDR 3-675) Senator Jones

S.B. 356 Revises provisions relating to real property. (BDR 9-824) Senator Roberson

S.B. 373 Makes various changes relating to judgments. (BDR 2-932) Senator Segerblom

Public Comment.

At the Chair's discretion, items on this agenda may be taken in a different order than listed; two or more agenda items may be combined for consideration; an item may be removed from this agenda; or discussion of an item on this agenda may be delayed at any time. The Committee may vote to introduce Bills and Resolutions not on this agenda. Possible discussion, action or Work Session may occur on matters previously considered.

Interested parties may observe the meeting and/or provide testimony through simultaneous videoconference when available.

Public comment will be taken at appropriate times during the meeting. Because of time considerations, the period for public comment by each speaker may be limited, and speakers are urged to avoid repetition of comments made by previous speakers. No public comment or testimony will be taken on Bills/Resolutions being discussed during Work Sessions.

Proposed amendments must be submitted electronically in PDF format to the Committee at SenJUD@sen.state.nv.us no later than 5 p.m. the day before the meeting. The proposed amendment must include the Bill and/or Resolution number, a statement of intent, and the name and contact information of the amendment sponsor. Please bring 25 copies of the proposed amendment to the Committee meeting.

Electronic devices (e.g., cellular telephones, pagers, tablets and laptop computers) must be in silent mode or turned off while in the Committee room.

MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-Seventh Session
April 5, 2013

The Senate Committee on Judiciary was called to order by Chair Tick Segerblom at 8:03 a.m. on Friday, April 5, 2013, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Tick Segerblom, Chair
Senator Ruben J. Kihuen, Vice Chair
Senator Aaron D. Ford
Senator Justin C. Jones
Senator Greg Brower
Senator Scott Hammond
Senator Mark Hutchison

GUEST LEGISLATORS PRESENT:

Senator Donald G. Gustavson, Senatorial District No. 14
Senator David R. Parks, Senatorial District No. 7
Senator Michael Roberson, Senatorial District No. 20
Assemblyman John Ellison, Assembly District No. 33

STAFF MEMBERS PRESENT:

Mindy Martini, Policy Analyst
Nick Anthony, Counsel
Caitlin Brady, Committee Secretary

OTHERS PRESENT:

Rocky Cochran, Cochair, Coalition for Fairness in Construction; President, Southern Nevada Home Builders Association

Senator Hutchison:
It would be status quo. Correct?

Chair Segerblom:
Correct. I will close the work session on S.B. 226.

SENATOR JONES MOVED TO AMEND AND DO PASS AS AMENDED S.B. 226.

SENATOR FORD SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

*****

Chair Segerblom:
I am opening the work session on S.B. 286.

SENATE BILL 286: Provides immunity from civil action under certain circumstances. (BDR 3-675)

Ms. Martini:
Senate Bill 286 defines the right to free speech in direct connection with an issue of public concern to be in a place open to the public or in a public forum. A person who engages in such communication is immune from any civil action for claims based upon that communication. Senator Jones submitted a proposed amendment provided in the work session document (Exhibit R). The proposed amendment provides revisions and indicates the reason for each.

Senator Jones:
A few issues raised by District Judge Elizabeth Gonzalez of the Eighth Judicial District regard section 3, subsection 3, paragraph (f). The proposed amendment changes it from "7 days after the motion is filed" to "7 judicial days after the motion is served upon the plaintiff or plaintiffs." This will ensure sufficient time for notice to the opposing party. The other changes affect section 4, subsection 1, paragraph (b), and section 4, subsection 2, paragraph (b), concerning the $10,000 penalty awarded in addition to attorney's fees. The amended language makes the award discretionary and in an amount "up to $10,000."

Senator Hutchison:
Was it a mandatory fee and now it is discretionary up to $10,000?

Senator Jones:
The attorney's fees are separate. The $10,000 is on top of attorney's fees.

Chair Segerblom:
I view it as being similar to NRCP 11.

Senator Hutchison:
Is there anything mandatory now?

Senator Jones:
No, it is all discretionary.

Senator Hutchison:
I was concerned with the mandates. I am comfortable giving the courts discretion.

Chair Segerblom:
I will close the work session on S.B. 286.

SENATOR FORD MOVED TO AMEND AND DO PASS AS AMENDED S.B. 286.

SENATOR KIHUEN SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

*****

EXHIBITS				
Bill	**Exhibit**		**Witness / Agency**	**Description**
	A	2		Agenda
	B	32		Attendance Roster
S.B. 161	C	1	Senator Michael Roberson	Written Testimony
S.B. 161	D	27	Senator Michael Roberson	Housing Market Study
S.B. 161	E	6	Josh Hicks	Presentation
S.B. 161	F	19	Josh Hicks	Solicitation Letters
S.B. 161	G	18	Josh Hicks	Chapter 40 Notices
S.B. 161	H	6	Josh Hicks	Frequently Asked Questions
S.B. 161	I	52	Josh Hicks	Case Studies
S.B. 368	J	3	Senator Donald G. Gustavson	Written Testimony
S.B. 368	K	2	Assemblyman John Ellison	Written Testimony
S.B. 383	L	2	Senator David R. Parks	Written Testimony
S.B. 383	M	13	Gail J. Anderson	Proposed Amendment
S.B. 31	N	15	Mindy Martini	Work Session Document
S.B. 111	O	5	Mindy Martini	Work Session Document
S.B. 131	P	3	Mindy Martini	Work Session Document
S.B. 226	Q	1	Mindy Martini	Work Session Document
S.B. 286	R	2	Mindy Martini	Work Session Document
S.B. 356	S	1	Mindy Martini	Work Session Document
S.B. 373	T	25	Mindy Martini	Work Session Document

Committee Action:
Do Pass _____
Amend & Do Pass _____
Other _____

Senate Committee on Judiciary
This measure may be considered for action during today's work session.
April 5, 2013

SENATE BILL 286
Provides immunity from civil action under certain circumstances. (BDR 3-675)
Sponsored by: Senators Jones, Segerblom, and Kihuen, et al.
Date Heard: March 28, 2013
Fiscal Impact: Effect on Local Government: No.
Effect on the State: No.

Senate Bill 286 defines the right to free speech in direct connection with an issue of public concern to be in a place open to the public or in a public forum. A person who engages in such communication is immune from any civil action for claims based upon that communication. If a civil action is sought and the person who engaged in the communication files a special motion to dismiss, the measure adds a process for the court to follow and provides that a court ruling on the motion must be made within 7 days after the motion is filed.

If a court grants a special motion to dismiss, the measure provides that in addition to reasonable costs and attorney's fees, the person against whom the action was brought shall receive $10,000. If, on the other hand, the court denies a special motion to dismiss and finds that the motion was frivolous or vexatious, the measure provides that the prevailing party shall receive: (1) reasonable costs and attorney's fees; (2) $10,000; and (3) any such additional relief as the court deems proper to punish and deter the filing of frivolous or vexatious motions. Finally, the measure provides that if the court denies a special motion to dismiss, an interlocutory appeal lies to the Supreme Court.

Amendments: Senator Jones (see attached).

SB 286 PROPOSED CONCEPTUAL AMENDMENT

By SENATOR JUSTIN JONES

Section 3, subsection 3(f) – make the following change: "Rule on the motion within [30] *7 judicial* days after the motion is ~~[filed]~~ *served upon the plaintiff or plaintiffs.*"

Reason: to address concern raised with sponsor by Eighth Judicial District Court.

Section 4, subsection 1(b) – make the following change: *"The court ~~[shall]~~ may award, in addition to reasonable costs and attorney's fees awarded pursuant to paragraph (a), ~~[the]~~ an additional amount ~~[of]~~ up to $10,000 to the person against whom the action was brought."*

Reason: to address concerns regarding the additional mandatory penalty to be awarded to a prevailing party. The amended language makes the award discretionary and in an amount "up to" $10,000.

Section 4, subsection 2(b) – make the following change:

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~~[: (a) R]~~ its 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:
~~[(b) The]~~ An additional amount ~~[of]~~ up to $10,000~~[, not including reasonable costs and attorney's fees awarded pursuant to paragraph (a)]~~; and
(c) Any such additional relief as the court deems proper to punish and deter the filing of frivolous or vexatious motions.

Reason: to address concerns regarding the additional mandatory penalty to be awarded to a prevailing party. The amended language makes the award discretionary and in an amount "up to" $10,000.

ASSEMBLY AGENDA

COMMITTEE ON JUDICIARY

Day Monday Date May 6, 2013 Time 8 a.m.* Room 3138

Room 3138 of the Legislative Building, 401 S. Carson St., Carson City, NV.
Videoconferenced to Room 4401 of the Grant Sawyer State Office Building, 555 E. Washington Ave., Las Vegas, NV.

*Please note the time change

REVISED

Opening Remarks

S.B. 60 (R1)	Revises various provisions relating to businesses. (BDR 7-380)
S.B. 286 (R1)	Provides immunity from civil action under certain circumstances. (BDR 3-675)
S.B. 421 (R1)	Requires a court to excuse a juror for cause under certain circumstances. (BDR 2-1109)
S.B. 441 (R1)	Makes various changes to provisions governing business entities. (BDR 7-166)

Public comment.

Matters continued from a previous meeting.

Unless waived by the Chairman, proposed amendments, written testimony, and other documents for the record must be submitted electronically in PDF format to the Committee Manager at AsmJud@asm.state.nv.us no later than 5:00 p.m. the business day before the meeting. Proposed amendments must include the Bill and/or Resolution number, a statement of intent, and the name and contact information of the amendment sponsor. Please bring 20 copies of your prepared statements, proposed amendments, and handouts to the Committee meeting.

Letters of support or opposition for particular measures should be directed to the individual members of the Committee and are only entered into the record upon the request of the Chairman, or if the letter is read verbatim as testimony during Committee meetings.

A list of Committee members and their email addresses can be found on the following web page: http://www.leg.state.nv.us/Session/77th2013/Committees/A_Committees/JUD.cfm.

If you cannot attend the meeting, you can listen to it live over the Internet. The address for the legislative website is http://www.leg.state.nv.us. For audio broadcasts, click on the link "Calendar of Meetings/View."

Note: We are pleased to make reasonable accommodations for members of the public who are disabled and wish to attend the meeting. If special arrangements for the meeting are necessary, please notify the Assembly Committee on Judiciary at (775) 684-8566.

(R#) Indicates the reprint number of the bill/resolution being considered.

PLEASE PROVIDE 20 COPIES OF YOUR DOCUMENTS.

Meeting ID: 1059

LH - 0238

MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Seventh Session
May 6, 2013

The Committee on Judiciary was called to order by Chairman Jason Frierson at 8:19 a.m. on Monday, May 6, 2013, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at nelis.leg.state.nv.us/77th2013. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman Jason Frierson, Chairman
Assemblyman James Ohrenschall, Vice Chairman
Assemblyman Richard Carrillo
Assemblywoman Lesley E. Cohen
Assemblywoman Olivia Diaz
Assemblywoman Marilyn Dondero Loop
Assemblywoman Michele Fiore
Assemblyman Ira Hansen
Assemblyman Andrew Martin
Assemblywoman Ellen B. Spiegel
Assemblyman Tyrone Thompson
Assemblyman Jim Wheeler

COMMITTEE MEMBERS ABSENT:

Assemblyman Wesley Duncan (excused)

GUEST LEGISLATORS PRESENT:

Senator Justin C. Jones, Clark County Senatorial District No. 9
Senator Tick Segerblom, Clark County Senatorial District No. 3

STAFF MEMBERS PRESENT:

Dave Ziegler, Committee Policy Analyst
Brad Wilkinson, Committee Counsel
Linda Whimple, Committee Secretary
Colter Thomas, Committee Assistant

OTHERS PRESENT:

Marc J. Randazza, Attorney, Randazza Legal Group
James McGibney, CEO, ViaView, Inc.
Wayne Carlson, Executive Director, Public Agency Risk Management Services, Inc.
Scott W. Anderson, Deputy for Commercial Recordings, Office of the Secretary of State
Scott Scherer, representing the Nevada Registered Agent Association
Robert C. Kim, representing the State Bar of Nevada
Peter C. Neumann, Private Citizen, Reno, Nevada
Robert T. Eglet, Private Citizen, Las Vegas, Nevada
Stephanie H. Allen, representing the Nevada District Judges Association
Chris Frey, Deputy Public Defender, Washoe County Public Defender's Office
Patterson Cashill, representing the Nevada Justice Association

Chairman Frierson:
[Roll was called. Protocol was explained.] Good morning, everyone. Welcome back to the Assembly Committee on Judiciary. We have four bills on the agenda for today, and I see Senator Jones here. I will open the hearing on Senate Bill 286 (1st Reprint) and accommodate you, and then we will get back on track.

Senate Bill 286 (1st Reprint): Provides immunity from civil action under certain circumstances. (BDR 3-675)

Senator Justin C. Jones, Clark County Senatorial District No. 9:
As guaranteed by the First Amendment, the right to petition our government for redress is one of the most important rights we have. Nevada recognizes this right and protects people who exercise their First Amendment right to petition. Specifically, Chapter 41 of the *Nevada Revised Statutes* (NRS) protects people from civil liability for claims based on protected communication. Generally speaking, protected communications must be made in good faith and be truthful, or at least made without knowing it is false. The provisions of NRS Chapter 41 are meant to deter frivolous lawsuits, commonly known as

strategic lawsuits against public participation (SLAPP). A SLAPP is a meritless lawsuit that a plaintiff initiates primarily to stop someone from exercising his First Amendment rights. When a plaintiff files a SLAPP, NRS Chapter 41 allows the defendant to file a special motion to dismiss the lawsuit. If the court grants the special motion, it must also award attorney's fees to the defendant. The defendant may also file a new lawsuit for compensatory damages, punitive damages, and attorney's fees and costs for bringing the new lawsuit.

In a recent decision, the Ninth Circuit Court of Appeals held that Nevada's anti-SLAPP provisions under NRS Chapter 41 only protect communications made directly to a governmental agency. The Court also held that Nevada provisions only protect defendants from liability, not from trial. Finally, the Ninth Circuit Court of Appeals concluded that in Nevada there is no right to immediate appeal, an order denying a special motion to dismiss a SLAPP.

I am introducing Senate Bill 286 (1st Reprint) to resolve these limitations. Beginning with section 1, the bill expands the type of protected communication to include the right to free speech if it is about an issue of public concern. Section 1 also protects communications about an issue of public interest made in public places. Section 2 expands the anti-SLAPP provisions to cover any civil action, not just liability. Section 3 specifies standards of proof for motions to dismiss a SLAPP and requires the court to rule on those motions within a specified period of time.

If a court grants a motion to dismiss a SLAPP, section 4 requires the court to grant the defendant, in addition to attorney's fees and costs, an additional amount of $10,000. If a court denies a motion to dismiss and finds it was frivolous, the bill requires the court to grant the plaintiff reasonable costs and attorney's fees for responding to the motion.

That is my presentation. I also have Marc Randazza in Las Vegas, who is one of the preeminent experts on this issue, if the Committee has any questions for me or Mr. Randazza.

Chairman Frierson:
Senator, do you want any comments from Las Vegas to be part of your introduction, or is that just someone available to answer questions?

Senator Jones:
I think he has a presentation. It is up to you, Mr. Chairman, whether you want to hear from him first or ask questions.

Chairman Frierson:
I would like to hear from him.

Marc J. Randazza, Attorney, Randazza Legal Group:
I am a First Amendment attorney. I am based in Nevada, but I practice nationwide. When you look at this bill, it is a pretty rare species of bill. This is probably the first bill you are going to see where you are passing something that is both proconsumer and probusiness simultaneously. This is not only going to protect consumers who want to exercise their right to free speech on government issues, commercial issues, and social issues, but it will also create an environment that will attract more tech jobs to this state. I represent a number of companies that engage in social media, social networking, online media, and traditional media. When I speak to them about where to generate bigger operations, where they should move, where they should be, the top of the list is always Washington, California, Oregon, and Texas, because these are states that have anti-SLAPP laws. I will tell you why that is important.

As I mentioned, I defend First Amendment cases nationwide. The right to free expression is severely hampered in states that do not have anti-SLAPP laws. Let me give you a comparison between two of the states where I do most of my work outside of Nevada, which would be Florida and California. A very long time ago, I had my very first SLAPP in Florida. A gentleman came into my office who had had a dispute with a contractor, and the contractor said, "What are you going to do about it? Go ahead and sue me. I have more money than you." He looked at his situation and said, "Yes, you are right. There is not much I can do about that. But I can warn other people not to do business with you," and he wrote a very truthful account of his experience, backed it up with documents, backed it up with evidence, and backed it up with letters from other people. He was completely within his rights. The contractor sued him for defamation and he came into my office and I said, "Yes, you can beat this," and we fought it, and we beat it. At the end of it, I handed him his win and he looked at me. It was a very formative day in my legal career. He looked at me and said, "Well, if I won, how come I am the one with my retirement fund completely empty? How come I am the one who is broke?" I said, "I am really sorry." In my inexperience as an attorney at the time, I really believed that if we were right, we would win. We did; he has a case named after him, which he said is about as good as having a disease named after him.

Now I have run into the opposite experience in California. I often get calls from people who say they are being sued in a similar case. There is competition from other lawyers to get that case, even when the person cannot afford to pay, because when you see that it is a valid use of a citizen's First Amendment rights they are being sued for, they have the security of knowing that an

anti-SLAPP law is standing behind them. If that case has been brought because of that citizen's exercise of their right to free expression, and it is a case that has no chance of winning, that case is going to be dispensed with early, with the cost of that case falling on the plaintiff. We need this in Nevada. We do not just need this because it is the right thing to do constitutionally. Your constitutional rights do not mean a whole lot if you cannot afford to exercise them.

One of my clients actually came here today. He will be speaking as well, if you would like to hear from him, but he runs a relatively mid-sized media company. He has 26-odd employees, a third of them in Washington, a third in California, and a third here. As they expand, they consider where they should move their operations. They have to consolidate somewhere. When they have those discussions and they ask me, I say, "You get frivolous lawsuit threats on a weekly basis." So far—knock on wood—they have not been sued. But when that happens, and it is inevitable that it is going to happen, if it happens here in Nevada, that can cripple a fledgling tech company like this. So when these tech companies are looking at where they want to be, where they want to create jobs, where is the environment friendly for them, they look at Washington, California, Texas, and they look at Nevada. Despite all of the great things that Nevada has to offer them, they know that they can be smothered in their cradle because of a lack of an anti-SLAPP law.

I think S.B. 286 (R1) is an example of some brilliant legislation. It is going to put us at the forefront, it is going to make us a leader in this area, and I cannot see any reservation that anyone could have to this bill, unless you are the kind of person who wants to run around suing people in frivolous defamation suits.

Assemblywoman Spiegel:
On page 4 of the bill, in section 4, subsection 1, paragraph (b), it talks about how the court may award, in addition to reasonable costs and attorney's fees, an amount of up to $10,000 to the person against whom the action was brought. I am wondering if they use that $10,000 in other states, or if it should be higher, or if it is higher in other places, to really be a detriment?

Marc Randazza:
As a First Amendment advocate, I certainly would not say it would be a bad thing to make that higher, but there is only one state that has statutory damages for violating the anti-SLAPP law, and that is Washington, and this is identical to Washington's bill. So I believe the $10,000 is imported directly from the Washington statute.

Senator Jones:
That is correct. The Washington statute made the $10,000 mandatory. There were some concerns raised on the Senate side about that, so we made it discretionary in the court, so it could be up to $10,000.

Assemblywoman Spiegel:
Would you entertain a discussion of making it higher?

Senator Jones:
I certainly would.

Assemblywoman Spiegel:
Thank you.

Chairman Frierson:
Are there any questions from the Committee? [There were none.] On page 4, line 1, reducing it from 30 days to 7 days, has there been any conversation with the courts about the practical ability for the courts to comply?

Senator Jones:
Yes. I had a discussion with Judge Elizabeth Gonzalez about that issue, and her concern had been that it needed to be after service. Originally, as drafted, the bill said seven days after the motion is filed. Her concern was making sure that the motion is actually served on the plaintiff before the seven days goes into effect. She did not have an issue with the seven days, as long as the plaintiff had been served with the motion. I have not talked with all the judges, but since I practiced before Judge Gonzalez a lot, and many of these go into business court, I figured that was a pretty good measure.

Chairman Frierson:
Thank you, Senator. I know there is a good deal of flexibility with the business courts. Are there any other questions from the Committee? [There were none.]

James McGibney, CEO, ViaView, Inc.:
We are a social media company. We are also involved in reality TV. We have a massive online media presence. This is very important to us because we get threatened with lawsuits on a daily basis. As you can imagine, companies like Facebook and Twitter, anyone who has a social online presence, is constantly hit with lawsuits. For example, Facebook is already protected by anti-SLAPP, and we would like to have the same thing in Nevada. Even if we go through a trial and it is determined that we are not held liable for something that was posted on our site, we are still going to spend on average $100,000 in attorney's fees. Being a company that makes a few million dollars a year, if we

get hit with three or four of these per year, we could pretty much be out of business. We have a presence in Washington, California, and Nevada, and we are actually thinking about going back to California because of the protections that are afforded there, but we do love Nevada. We are very hopeful that this gets passed.

Chairman Frierson:
Are there any questions from the Committee? [There were none.] Is there anyone else wishing to offer testimony in support? [There was no one.] Is there anyone wishing to offer testimony in opposition, either in Carson City or Las Vegas?

Wayne Carlson, Executive Director, Public Agency Risk Management Services, Inc.:
I had attorneys testify on the Senate side but, unfortunately, they are all out of town today, so I get the opportunity to try to clarify some of the things that we had concerns with in the bill. We supported the expansion under section 1 to private as well as public. We have had success with some of these cases where we have defended government entities against vexatious litigants, so it is an important bill from that standpoint to protect the private sector as well.

We have concerns under section 3, line 22, where they delete the existing process of motion for summary judgment, which we have used successfully and it has worked well. Our testimony was that we did not think it was necessary to substitute it. Part of the reason is because we have had successful awards from the Nevada Supreme Court fairly recently and they were supportive in analyzing the anti-SLAPP provisions. Because the courts have clarity, we thought this might introduce an element of uncertainty in terms of the success of those kinds of defense motions for summary judgment. We would suggest that the new language is not necessary because the existing process is successful.

The next area of concern is a practical matter. We have never been able to recover attorney's fees and costs under existing law because the vexatious litigants did not have any funds or they filed bankruptcy in order to avoid it. It is meaningless to have a fine in there that you cannot collect, and that is the practical reality of it. It was helpful to get that amended, but on the other hand, in section 2, it reverses that possibility. That reversal of the possibility of the defendant having to pay a fine in addition to attorney's fees causes us to pause because it is very subjective as to whether or not the motion is frivolous or vexatious, and we would then be in a position to have to very carefully consider

whether to even go forward with defending the case with a motion, whether it is a summary judgment or the proposed procedure. That is a concern that we have.

Adding the appeal under subsection 4 of section 3, that is probably useful. We support that. We are kind of mixed on the various elements of the bill, but we do not want to create a situation where it deters defendants from defending themselves because they could be subject to fines and penalties for trying to defend themselves from what are most of the time—the ones we have seen where we have used this defense—fairly frivolous and repetitive situations where the person just kept amending the suit every time they lost a motion. It creates a lot of litigation costs. We are realistic that we will likely not recover costs from most of these individuals, but it does cost us money, and we do not want to be in a situation where we are now abandoning that strategy to defend these cases because of a provision in the bill. I do not know how you fix it, but that is a concern that we have expressed.

Chairman Frierson:
It seems to me that you have two concerns that seem to counter each other. On the one hand, you were saying that you preferred it to be more like a motion for summary judgment, but on the other hand, you expressed concern about the defendant being exposed to attorney's fees. It also seems to me that by not necessarily making it a motion for summary judgment, you create a process by which a defendant could defend being hit with attorney's fees. It appears there is a balance attempted to be stricken here. There are two points. Number one is getting rid of the motion for summary judgment but creating this process. The court can still rule on it in a similar fashion with these things being considered and could dismiss the action in subsection 4 of section 3, so we do not seem to lose a great deal of that. By creating a process, if the defendant is exposed to attorney fees, then this at least creates a process where they could defend it.

Wayne Carlson:
I am not an attorney, so I cannot respond to all the details like that, but our attorney did address it in his memorandum, which is on the Nevada Electronic Legislative Information System (NELIS). On number four he says, "When a party moves for a special motion to dismiss under NRS 41.660(1), the party must first make a threshold showing that the lawsuit is based on good faith communications made in furtherance of the right to petition the government. A good faith communication is one which is truthful or made without knowledge of its falsehood."

In number five, he says, "The purpose of the anti-SLAPP legislation in Nevada is to allow a defendant to extricate himself from the litigation early on without being put to great expense, harassment, or interruption of his productive activities." If these other procedures are going to increase the cost to pursue an anti-SLAPP strategy, then it is defeating some of the effort to try to make it easier and cheaper for businesses or governments that are subjected to SLAPP to get out of those suits. So early and quick is the better way. That is why we thought this other process seemed to add cost.

Chairman Frierson:
Who is this letter from? I am not seeing it.

Wayne Carlson:
It is a memo. It says, "From SCB to file." That was Steve Balkinbush's testimony. I believe it is on NELIS.

Chairman Frierson:
If you are talking about NELIS over in the Senate, then we would not have it.

Wayne Carlson:
Yes. I am sorry.

Chairman Frierson:
If he would like that to be circulated to the Committee, he would have to make sure to send it over. At least now we have what you are referring to on record, so the Committee can certainly look at the exhibits over on the Senate side.

Are there any questions from the Committee? [There were none.] Is there anyone wishing to offer testimony in a neutral position either in Carson City or Las Vegas? [There was no one.] Mr. Jones, would you come back up for closing remarks?

Senator Jones:
Mr. Balkinbush was there for the original committee. I think the general sentiment was, "We are okay with how it is," and the Ninth Circuit Court has said that it does not protect people in the way that it should, and that is what this bill is trying to address.

With regard to the concerns that a public agency could be subject to additional cost as a result of this legislation, I would respectfully disagree, and also direct the Committee's attention to section 4, subsection 2, where it speaks of someone who files these special motions to dismiss. The additional fees and $10,000 penalty only apply if the court were to find that the motion was filed in

a frivolous or vexatious manner. Mr. Chairman, as you are aware, it is pretty hard to show that someone's filing of a motion was frivolous or vexatious. I think that those protections are in the bill for public agencies that might be filing these suits and will not deter them in that effect.

Chairman Frierson:
Thank you, Senator. I will direct the Committee that if they want to go back and look at the Senate side, they are more than welcome to do so for any of the exhibits.

[Also submitted but not discussed were (Exhibit C) and (Exhibit D).]

With that said, I will close the hearing on S.B. 286 (R1) and open the hearing on Senate Bill 60 (1st Reprint).

Senate Bill 60 (1st Reprint): Revises various provisions relating to businesses. (BDR 7-380)

Scott W. Anderson, Deputy for Commercial Recordings, Office of the Secretary of State:
Senate Bill 60 (1st Reprint) proposes several changes to Title 7 and Chapter 225 of the *Nevada Revised Statutes* (NRS) that will further standardize and refine the filing processes of the Secretary of State's Commercial Recordings Division. The bill also strengthens provisions relating to registered agent practices in the state. We have met with representatives of the Registered Agent Association and the State Bar of Nevada Business Law Section in coming up with a bill acceptable to all parties. I will touch on the major provisions of the bill and will be happy to answer any questions you may have as we go. As you can see, the bill is quite large due to the fact that the same provisions are repeated in the individual entity chapters within Title 7. Therefore, I will not cite each section specifically, but I will touch on the substance of the provisions contained in the multiple sections.

Section 2 of the bill adds a penalty to provisions previously added to the individual entity statutes for purporting to do business without proper registration. It adds to those that are only required to have a state business license—sole proprietors, general partnerships, and those required to have a business license but not required to file formation documents with the Secretary of State. This section mirrors those already in statute relating to business entities doing business in Nevada without proper registration and is necessary to ensure that the same penalties for noncompliance with the filing requirements apply to sole proprietors and general partnerships as they do for corporations, limited liability companies, and other Title 7 entities doing business in Nevada.

EXHIBITS

Committee Name: Committee on Judiciary

Date: May 6, 2013 **Time of Meeting:** 8:19 a.m.

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
S.B. 286 (R1)	C	Marc Randazza	Testimony
S.B. 286 (R1)	D	James A. McGibney	Testimony
S.B. 421 (R1)	E	Stephanie Allen	Letter from Judge James T. Russell
S.B. 421 (R1)	F	Stephanie Allen	Proposed Amendment
S.B. 441 (R1)	G	Robert Kim	Memorandum

VIAVIEW

Dear Members of the Assembly Judiciary Committee:

I am the president and founder of ViaView Incorporated, an Internet social media company based in Las Vegas, Nevada. ViaView and its subsidiaries operate popular websites including BullyVille, an online resource dedicated to overcoming bullying; SlingerVille, an online community for tattoo and body art fans; and CheaterVille, an Internet community dedicated to addressing the problems of infidelity. I have been heartened by the state's efforts to recruit an increasing number of technical and Internet-based jobs, as I would like to expand my business. However, the lack of a meaningful anti-SLAPP statute within Nevada poses a material threat to ViaView's growth and continued success in the state, and I have been considering a move to a state with a more favorable set of legal protections. Moreover, it has deprived Nevada businesses of additional business that ViaView could provide it, and cost the state additional tax revenue.

Every week, ViaView receives numerous legal threats arising from the material that third parties post on its numerous websites. Often, these people threaten to sue ViaView for defamation, based entirely on what third parties – whose identities are unknown even to my company – have written. While ViaView's online services are in the fortunate enough to be protected from liability for the actions of third persons by federal law – 47 U.S.C. § 230 – the company is still besieged by legal threats. Even despite the protections of § 230, I personally know of one other social media website owner who was sued over statements made by third parties, and has suffered severe financial consequences. Currently, raising a free speech defense for ViaView's activities within Nevada is costly, and plaintiffs are incentivized to sue companies like ViaView for nuisance settlements because the costs of defense are so high. As a result, ViaView has a constant need for counsel to respond to these legal demands, consuming resources that would otherwise go to hiring new employees or developing ViaView's line of products and services.

Additionally, many companies that create their own content are not fortunate enough to receive the protections of § 230. These small businesses and individuals – bloggers, Internet journalists, and content-producing start-ups – are in a far more vulnerable position than ViaView. For people and entities in this position, defending their free speech rights and Constitutionally protected activity could lead to complete financial ruin.

The proposed amendments to Nevada's current anti-SLAPP laws found in SB 286 provide a powerful method for ViaView (and other companies) to grow without fearing the costs of a frivolous lawsuit. The proposed changes to Nevada's anti-SLAPP statute broaden the range of protected conduct to include ViaView's social media services. As a result, when faced with frivolous litigation for its First Amendment-protected activity, ViaView could quickly dispose of the case. What's more, it would be able to recover its

ViaView, Inc 10620 Southern Highlands Parkway, Las V

Assembly Committee: Judiciary
Exhibit: D Page 1 of 3 Date: 05/06/13
Submitted by: James McGibney

costs and attorneys' fees from the person who brought the action, so that the funds spend defending the company can be recaptured and re-invested in the business. The additional $10,000 mandatory payment included in SB 286 should serve to deter these lawsuits altogether. To the extent it does not, though, this money will help ViaView even more quickly recover the costs of a lawsuit brought against its Constitutionally protected activity.

The passage of SB 286 would ensure more funds are kept within Nevada. Currently, ViaView hosts all of its websites in California in order to avail itself of that state's anti-SLAPP statute. As a small business owner in Southern Nevada, I have seen how local businesses feed one another, and how a nascent home-grown tech sector has tried to establish itself within Las Vegas. I would much prefer to send my hosting fees to a company down the street, rather than one in another state. Doing so would help a local hosting company grow and create jobs (and generate taxation revenue for the state). As it stands, though, California's anti-SLAPP law is so far superior to Nevada's that ViaView cannot bear the legal risk of having all of its digital content – which anyone on the Internet can access – physically based in Nevada. If SB 286 passes, that will change – and likely not just for ViaView, but other companies as well.

As the president of an Internet company, I constantly keep apprised of legal developments that could affect my business. Strong anti-SLAPP statutes like those in California and Washington have helped protect the technology and Internet companies in those states from all kinds of frivolous, wasteful lawsuits that attempt only to target those companies' lawful and First Amendment-protected activities. (I have no problem with – and encourage – meritorious litigation, which SB 286 will not affect.)

Both Southern and Northern Nevada have seen the beginning of direct investment from technology and Internet companies, with Amazon and Zappos increasing their presence in Southern Nevada and Apple making a significant commitment to the Northern portion of the State. In a vacuum, SB 286 alone will not stimulate a technology boom. However, SB 286 is an essential of the ecosystem needed to grow small technology and Internet businesses (which expand into big businesses) that will employ Nevadans in high-technology, desirable jobs, just as they have in California and Washington.

If SB 286 becomes law, ViaView and other businesses like it will finally be able to exhale a sigh of relief and expand within Nevada. By removing the specter of financial ruin in the form of a lawsuit brought to punish Fist Amendment-protected activity, more employees can be hired, and more business can be repatriated to the state. I strongly urge this Committee to give SB 286 its utmost consideration and pass this bill. Thank you for your time and consideration.

James A. McGibney

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Reply to Las Vegas Office
via Email or Fax

May 3, 2013

Nevada State Assembly
Assembly Chamber
Nevada State Legislative Building
401 S. Carson Street
Carson City, Nevada 89701

Re: Report to Assembly on Proposed Changes to Nevada's Anti-SLAPP Laws

Dear Esteemed Assemblymen and women:

Nevada stands among the states with largely ineffective Anti-SLAPP laws. NRS 41.635-670 (the "Anti-SLAPP Laws"). It stands in the shadows of California, Oregon, Washington, and Texas, which have passed far more effective legislation that acts not only to protect freedom of expression in those states, but which also act as an attraction to the establishment of business in those states.

Nevada's Anti-SLAPP Laws protects **only** "good faith communication in furtherance of the right to petition." NRS 41.650. This **limits** its scope to speech made to a government agency, or directly in connection with a matter under consideration by one of the government's arms. NRS 41.637. This is not enough.

With the dawn of the Internet's user-generated content era, individuals have found themselves in the crosshairs of SLAPPs brought over Constitutionally protected speech. Reviews on sites like Yelp! and Avvo beget crushingly expensive litigation by subjects of factual but unflattering reviews. These lawsuits primarily serve to harass and intimidate small defendants and the websites themselves while pummeling them with significant legal fees. Caught in the crossfire are Nevada's already backlogged and overburdened Courts, which must referee these one-sided fights.

Similarly, businesses have been faced with lawsuits over their own First Amendment protected activity, ranging from advertising and marketing practices to the management of their employees. This drives down the profits of these businesses and interferes with their ability to grow and hire new employees. Once again, Nevada's courts suffer the costs of these suits as well.

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Submitted by: Marc Randazza

Broadened Anti-SLAPP Laws serve numerous public services. First, it protects the public – individuals and businesses alike – from going broke fighting meritless claims. Meritorious claims will still proceed; new Anti-SLAPP Laws will not mean the end of defamation law in Nevada. Anti-SLAPP statutes have had no impact upon meritorious defamation cases in California, Oregon, Texas, or Washington. Updating Nevada Anti-SLAPP laws will, however, mean that marginal and frivolous cases are kept out of the courts – and if they are brought, the costs will fall on the plaintiff who filed suit.

Second, the proposed changes to Nevada's Anti-SLAPP Laws create new safeguards to ensure the laws have effect. At any time, a defendant may require a plaintiff to post a bond for the estimated value of his or her attorneys' fees, provided the defendant can show a reasonable possibility of succeeding on an Anti-SLAPP motion. If the plaintiff cannot post a bond, the case is dismissed. This ensures that defendants who win Anti-SLAPP motions do not merely obtain pyrrhic victories.

Expanding the scope of Nevada's Anti-SLAPP Laws to apply to *all* speech about matters of public concern – not merely speech seeking government action – will benefit individuals and Nevada's courts. Abuses of the judicial process will be resolved privately with these motions, rather than requiring the courts to exercise close control over every single case before it. Businesses will be able to truncate or at least significantly limit questionable litigation, making more funds available for expansion and hiring. While there are numerous factors affecting the technology sector's growth over the last 20 years, it is not an accident that social media companies such as Yelp, Avvo, Twitter, Zynga, Facebook, and others are based in California and Washington – states with robust Anti-SLAPP statutes that protect a wide range of speech.

My law firm represents a large number of journalists and Internet technology companies. Despite the fact that we are headquartered in Las Vegas, we reluctantly advise clients to organize or incorporate in California, Oregon, and Washington so that they can benefit from those states' Anti-SLAPP statutes. Most significantly, individuals will be spared from personal bankruptcy and financial destruction arising from all-consuming litigation against a more powerful party.

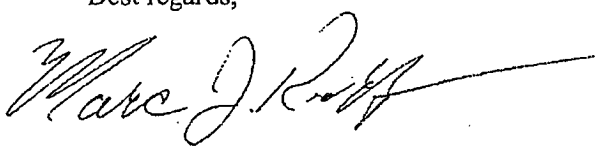
The trend of litigation against Constitutionally protected speech within Nevada cannot be denied. Military veterans have been sued for expressing opposition to a Las Vegas family law attorney's position on the disposition of military benefits upon divorce. Anonymous commenters have been brought into court, and sought to be deprived of their Constitutional right to anonymity, for comments left on *Las Vegas Review-Journal* online articles. Nevada's own Righthaven LLC filed more than 200 lawsuits in Nevada's courts – and whenever attorneys stepped forward to litigate the issue of "Fair Use," or whether the interests of the First Amendment trumped Righthaven's dubious copyright claims, Righthaven lost *every single time*.[1]

Broadening Nevada's Anti-SLAPP Laws serves multiple public interests. While an increasing number of state and federal lawsuits feature litigants who are *pro se*, or not represented by an attorney, new Anti-SLAPP Laws will encourage access to justice. Because of the proposed fee-

[1] Because the proposed amendments to Nevada's Anti-SLAPP Laws are substantive, rather than procedural, they will apply in the United States District Court for the District of Nevada – where Righthaven filed its actions – as well as Nevada's state courts.

shifting and bond provisions, attorneys will compete to take these cases and vindicate their clients' free speech rights, rather than accept it – and quarantine it – in their *pro bono* allotment for the year. Most importantly, though, it will memorialize to Nevadans and the nation this State's commitment to truly open debate, free expression, and the sacrosanct principles enshrined in the First Amendment of the United States Constitution and Article I of the Nevada State Constitution.

Best regards,



Marc J. Randazza

Anti-SLAPP Statutes Are Both Business-Friendly and Pro-Consumer

I. Anti-SLAPP Statutes Kill Frivolous Lawsuits Early.
   a. Not just for defamation – Anti-SLAPP Statutes apply to any baseless state law claim based on free expression, such as tortious interference claims and false advertising actions (but allow meritorious suits to proceed).
   b. Protects Employers from firing employees with cause[1] and engaging in lawful pre-employment screening of employees,[2] but does not prohibit meritorious suits for unlawful conduct. Eliminating frivolous claims ensures meritorious ones receive faster and more thorough treatment.
   c. Makes more money available for growth, research, and development, and requires less money be spent defending lawsuits over Constitutionally protected behavior.

II. Anti-SLAPP Statutes are Journalism and Web-business friendly.
   a. While the tech boom of California had many causes, the benefit of a strong Anti-SLAPP statute has helped social platforms such as Facebook and Twitter prosper.
   b. Online review sites have used Anti-SLAPP statutes to avoid frivolous lawsuits and shift the costs of their defense onto plaintiffs who bring indefensible claims.[3]
   c. Traditional media such as the Las Vegas Review-Journal and Las Vegas Sun benefit from having a strong Anti-SLAPP statute to protect them from plaintiffs with poor cases hoping to strike it rich.[4]

III. SLAPP Suits Can Happen to Anyone.
   a. A Las Vegas attorney sued military veterans, including Nevadans, for defamation based on their disagreement with his position on how military benefits are divided in divorce. Many statements likely were not defamatory. Without a meaningful Anti-SLAPP statute, these veterans were forced to face the crushing costs of extensive litigation until proving their statements were not defamatory.
   b. Righthaven LLC also used copyright infringement claims to file more than 200 lawsuits in Nevada and seek up to $150,000 for incidental infringements; whenever litigated by attorneys, courts found these "infringements" to constitute First Amendment-protected fair use under the Copyright Act.[5]
   c. An Anti-SLAPP statute will not inhibit meritorious claims. However, it will discourage baseless claims, incentivize attorneys to assist the public, and make plaintiffs bring only their strongest claims before an overburdened judiciary.[6]

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[1] *Fontani v. Wells Fargo Investments, LLC*, 129 Cal. App. 4th 719 (2005); see *Dible v. Haight Ashbury Free Clinics, Inc.*, (2009) 170 Cal. App. 4th 843.

[2] *Mendoza v. ADP Screening and Selection Services, Inc.* (2010) 182 Cal. App. 4th 1644.

[3] *Davis v. Avvo, Inc.*, Case No. C11-1571RSM *2012 WL 1067640* at *1 (W.D. Wash. Mar. 28, 2012) (applying Washington's Anti-SLAPP statute to information found on attorney review website, which constituted a matter of public concern.)

[4] http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-fall-2009/anti-slapp-saves-day (discussing traditional print media's use of Anti-SLAPP statutes to repel frivolous defamation suits by public figures, public officers, and the like).

[5] See generally www.righthavenlawsuits.com.

[6] Nevada's Anti-SLAPP statute exists to "filter[] unmeritorious claims in an effort to protect citizens from costly retaliatory lawsuits arising from their right to free speech[.]" *John v. Douglas County Sch. Dist.*, 219 P.3d 1276,1282 (Nev. 2009).