

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAYMOND DELUCCHI and
TOMMY HOLLIS,

Appellants

v.

PAT SONGER,

Respondent.

Supreme Court Case No.: 68994

District Court Case No.: CV 25969

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Nev. R. App. P. 26.1 Disclosure

In accordance with Nevada Rule of Appellate Procedure 26.1, the undersigned counsel of record for Respondent Pat Songer certifies the following persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made so the judges of this Court may evaluate possible disqualification or recusal.

Regarding all parent corporations of Respondent and any public-held company which owns 10% or more of the party's stock, there are no such corporations.

In addition, the following is a list of the names of all law firms whose partners or associates have appeared for the party in the case, including proceedings in district court:

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Jurisdictional Statement

This Court lacks jurisdiction as this appeal is an untimely second appeal from the district court's final judgment entered on December 30, 2014. While Appellants' claim their appeal arises from a superfluous district court order from September 15, 2015, the reality remains their appeal is actually from the district court's final judgment issued on December 30, 2014. The superfluous September 15, 2015, order did nothing to change the outcome or the parties' respective positions in the underlying litigation and, thus, Songer hereby incorporates his briefing on record on this issue herein and states the district court lacked jurisdiction to enter the September 15, 2015, order from which this appeal chronologically arises from.

Statement of the Issues

- 1) Whether the district court abused its discretion in issuing a duplicative and superfluous order when the district court already issued a final judgment in 2014?
- 2) Whether the district court undertook the proper analysis when it applied Nevada's anti-SLAPP statute by first evaluating whether Songer's report was good faith communication in furtherance of the right to petition and right to free speech in direct connection with an issue of public concern?
- 3) Whether a person who provides a good faith communication in furtherance of the right to petition and freedom of speech to the government at its request in connection with a matter of public concern is protected in Nevada's anti-SLAPP statute?

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Statement of the Case

The current appeal arises from the district court's granting of Respondent Songer's motion to dismiss under NRS § 41.660, Nevada's anti-SLAPP statute. See, Appeal No. 66858; JA Vol. VII at 1580. The district court granted Respondent Songer's motion on August 27, 2014; the order was noticed on November 19, 2014. Final judgment for the lower court case was issued on December 30, 2014. *Id.* Appellants filed a premature appeal in Case No. 66858 and failed to perfect it after the district court's final judgment issued.

Based on the success of the anti-SLAPP motion, the district court was required to, and did, award attorney's fees and costs. See, NRS § 41.670 (2013); JA Vol. VII at 1642. This Court determined in Case No. 67414 that the award of attorney's fees was the final judgment upon which an appeal could be taken.

The Court dismissed Appellant's premature appeal in Case No. 66858 for failing to appeal from a final judgment. After the dismissal, Appellant sought a "new" order from the district court. JA Vol. VII at 1593. Songer argued to the district court that it lacked jurisdiction to issue a new order, yet the district court did so and the new order is the basis for this appeal. JA Vol. VII at 1619, 1646.

Statement of the Facts

This case arises from an investigation surrounding the events on the evening of May 25, 2012, on Highway 160 in Pahrump. JA Vol. I at 21. Raymond Delucchi

and Tommy Hollis (“Appellants”) were firefighter paramedics returning to their fire station in Pahrump. On that evening they had an interaction with a patient which eventually led to an investigation conducted under the direction of Erickson, Thorpe & Swainston, Ltd., and with Pat Songer hired to conduct an investigation. Songer’s report is the basis of the legal dispute.

A. Facts regarding Highway 160 incident

On or about May 25, 2012, Brittanie Choyce and her husband James Choyce flagged down Appellants, who were driving towards Pahrump in their ambulance. JA Vol. I at 21. What happened at the scene has been highly contested; however, Appellants admitted that the Choyces captured their attention and they decided to pull over. Opening Brief, 3:10. It is undisputed that Brittanie was experiencing a miscarriage of her 17 ½ week-old, stillborn child. JA Vol I at 21, JA Vol. II 260. It is also undisputed that James was driving her to Las Vegas because she had been directed to go to Las Vegas to seek further treatment regarding her pregnancy. JA Vol. II at 256. Brittanie was scheduled to undergo an evacuation on May 26, 2012, however, her body started delivering the stillborn child the night before the appointment. *Id.*

Appellants and the Choyces’ disagree as to their interaction with one another that evening. Appellants claim they were concerned for their safety and offered to take Brittanie to the nearby Pahrump hospital. Opening Brief, 4:11-14. The

Choyces' claimed Appellants refused them service. JA Vol. II at 256. Regardless of which version is the truth, what is clear is that Plaintiffs did not transport Brittnie and that she required five blood transfusions and had five blood clots after the miscarriage. *Id.*

Brittnie's mother contacted the Pahrump Valley Fire-Rescue Services on or about May 30, 2012, to complain about Appellants' failure to render medical aid. *Id.* Brittnie was then interviewed by phone, and later in person, by Lieutenant Steve Moody and Fire Chief Scott Lewis. *Id.*

B. Highway 160 Investigation and conflict

Based on the Choyce family complaint, Lt. Moody and Fire Chief Lewis began an internal investigation against Appellants. JA Vol. II at 257. At the time, Delucchi was President of the Fire Fighter's Union and claimed that Fire Chief Lewis was retaliating against him with the investigation. JA Vol. II at 301-302. Delucchi filed an internal complaint against Lewis, which created a conflict of interest and eventually led to the retention of Erickson, Thorpe & Swainston to conduct a third-party investigation. JA Vol. II at 340-342.

C. Songer was retained by Pahrump's counsel to conduct an investigation

As part of the third-party investigation, ETS counsel Becky Bruch, Esq., retained Pat Songer, the Director of Emergency Services at Humboldt General Hospital in Winnemucca, Nevada, to conduct an investigation. JA Vol. I at 32.

Songer has over 22 years of experience in emergency services. JA Vol. I at 70-71.

On or about June 27, 2012, attorney Rebecca Bruch contacted Songer to investigate the Highway 160 incident. JA Vol. I at 32-35. Thus, Pahrump, through its agent Ms. Bruch, requested a written communication from Songer regarding the incident on Highway 160.

Songer conducted his investigation and collected all relevant information that was reasonably available to him. *Id.* This included relying on his investigation, the reports of the incident prepared by Lewis and Moody after their interview with the Choyce family, and his own interviews with Delucchi and Hollis. *Id.* After collecting all available information, Songer prepared a written report containing the facts he had gathered during his investigation and prepared his report. *Id.* At all times, Songer acted in good faith and did not disseminate any information that he knew to be false. *Id.* Ultimately, Delucchi and Hollis were terminated, in part, based on the findings in the report and Pahrump's investigation. JA Vol. II at 254.

D. Collective bargaining mandated arbitration on labor dispute

Appellants invoked their rights under their collective bargaining agreement with Pahrump and took the employment matter to arbitration. JA Vol. II at 251. The arbitration confirmed the tensions between Chief Lewis and Delucci and focused on Appellants' discharge and the allegations of retaliation. JA Vol. II at 254. Ultimately, the arbitrator decided there was not enough evidence to support

Appellants discharge and re-instated Appellants. JA Vol. II at 287. Part of the arbitrator's reasoning for reinstating them is that she found Songer's report lacked objectivity as he had not personally interviewed Ms. Choyce, and instead had relied on notes from Chief Lewis. JA Vol. II at 282. Appellants then filed suit against ETS and Songer. JA Vol. I at 1-7. ETS reached a settlement with Appellants post settlement conference in the initial appeal.

Standard of Review

This Court reviews the district court's order granting the anti-SLAPP motion de novo. *John v. Douglas Cty. Sch. Dist.*, 125 Nev. 746, 753, 219 P.3d 1276, 1281 (2009) citing *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

Summary of Argument

The district court properly followed the 2013 statute, the anti-SLAPP analysis, and should be affirmed. First, procedurally this appeal is improper as it did not arise from a final judgment, but a superfluous second order on the same issue.

Second, and more important, the district court followed Nevada law in conducting its anti-SLAPP analysis with guidance from California authority. Under the first step, the district court concluded the protected conduct, Songer's report, was indeed a good faith communication in furtherance of the right to petition and right to free speech in direct connection with an issue of public

concern. The district court reached this conclusion, as this Court should, through anti-SLAPP analysis, statutory interpretation, legislative history review, and evaluating persuasive authority from California. The district court focused on the conduct, not the actor or the quality of the speech, which is the appropriate procedure and determined the report was protected conduct. As a result, the burden shifted to Appellants to prove by clear and convincing evidence they would prevail on their defamation and intentional infliction of emotional distress claims, which they failed to do. Even under a summary judgment or prima facie standard, Appellants would not prevail on their claims and this Court should affirm the ruling below.

Argument

I. This is an untimely second appeal on issues the district court ruled on in 2014

Songer hereby incorporates his arguments in his motion to dismiss untimely appeal and rehearing of the same. Appellants opening brief shows that this appeal is an appeal from the district court's ruling on Songer's motion to dismiss ruled on in 2014 and for which the final judgment was entered in December 2014. The district court did not have jurisdiction to enter the order on September 15, 2015, due to the pending appeal in Case No. 67414. Even if it had jurisdiction, the order fails to change the position of the parties and is a repetitive, duplicative order which created procedural issues and delayed the proceedings. This Court should

take the opportunity to remind district court's that superfluous orders will not be tolerated and dismiss the appeal based on a lack of jurisdiction and as an untimely second appeal.

II. This Court should affirm the district court because it properly analyzed and applied NRS § 41.660 in determining Songer's report constituted a good faith communication in furtherance of the right to petition and right to free speech

This appeal revolves around the 2013 anti-strategic lawsuit against public participation ("SLAPP") statute immunity and its application to Songer's report. Anti-SLAPP immunity applies when there is 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." NRS § 41.637(2013). The statute defines a good faith communication 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)(emphasis added).

The district court concluded Songer's report fell into both subsection 2 and 3

of the statute's definitions and that the report was drafted in good faith. JA Vol. VII at 1583. As a result of applying the plain meaning of the statute and following the anti-SLAPP analysis, the district court dismissed Appellants' complaint. JA Vol. VII at 1582-1585. This Court should follow the same analysis and affirm the district court's ruling.

A. The district court properly applied the purposefully broad 2013 statute

In determining which statute applied, the restrictive 1997 version or the purposefully broad 2013 version, the district court had ample information and arrived at the conclusion to apply the 2013 statute. JA Vol. III at 1510:5-6.

First, there was the plain meaning of the statute to consider. "It is well settled in Nevada that words in a statute should be given their plain meaning unless this violates the spirit of the act." *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986). Second, a clarifying amendment, such as the 2013 amendment, "is persuasive evidence of what the Legislature intended by the first statute" which was to provide broad protection. *See In re Estate of Thomas*, 116 Nev. 492, 495 (2000)(citing *Sheriff v. Smith*, 91 Nev. 729, 734, (1975); *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 district court applied the amended 2013 statute, which clarified the former statute in order to give meaning to the legislative intent of broad protection to all Nevadans engaged in protected conduct. See, e.g. *State v. First Judicial Dist. Court in & for Storey Cmty.*, 53 Nev. 386, 2 P.2d 129 (1931).

1. Nevada purposefully amended the statute to provide broad protection to Nevadans

The Legislature's 2013 amendment was in direct response to the Ninth Circuit's interpretation that Nevada's anti-SLAPP laws provided limited protection to the public and a very narrow scope. *Metabolic Research, Inc. v. Ferrell* 693 F.3d 795, 799 (9th Cir. 2012); See Hearing on S.B. 286 Before the Senate Committee on Judiciary, 77th Leg. (Nev., March 28, 2013), JA Vol VI at 1315. In *Metabolic Research* the Ninth Circuit held that Nevada's anti-SLAPP statutes were more in line with Oregon's narrow statutes, than with those of California, despite Nevada's SLAPP statutes being very similar to California's statutes and ultimately denied protection for free speech communication. 693 F.3d 795, 799 (9th Cir. 2012). Given the limited application that the Ninth Circuit read into Nevada's anti-SLAPP statutes the year before, the Legislature purposefully undertook the 2013 amendments to clarify the statute to be in line with the original intent of offering broad protection for protected speech directly connected to matters of public concern. See Hearing on S.B. 286 Before the Senate Committee on Judiciary, 77th Leg. (Nev., March 28, 2013), JA Vol. VI at 1315. The

legislative history shows the 2013 Amendments passed unanimously, and because the prior statute was interpreted as too narrowly and was antiquated, which was not in line with the legislative intent in offering broad anti-SLAPP protection to the public for their exercising their First Amendment rights. *Id.*

Given the legislative history and the 2013 amendments' clarifying nature, the district court properly applied the 2013 statute and Appellants needed to show by clear and convincing evidence a probability of prevailing on the claim, which they failed to do. NRS § 41.660(3)(b)(2013); JA Vol. VII at 1510:5-6, JA Vol. VII at 1583. As a result, this Court should affirm the lower court.

B. The district court followed the anti-SLAPP analysis outlined in NRS § 41.660 and determined Songer's report was a good faith communication in furtherance of the right to petition and right to free speech in direct connection with a matter of public concern

Once the district court determined the 2013 version of the statute applied, it analyzed Songer's report in accordance with Nevada law and anti-SLAPP analysis and concluded Songer was entitled to anti-SLAPP protection and dismissed the lawsuit. This Court should affirm the district court.

1. Nevada established a burden-shifting test on anti-SLAPP claims

The Legislature set up a burden-shifting test when a party claims the immunities of NRS § 41.650(2013). First, the Court must determine whether the conduct was based upon 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

as defined by Nevada law. NRS § 41.660(3)(a); NRS § 41.637(2013). Once the Court determines a good faith communication exists as defined in NRS § 41.637, then the burden shifts to plaintiff to prove by clear and convincing evidence a likelihood of prevailing on its claims. NRS § 41.660(3)(b)(2013).

By following Nevada law and deferring to California anti-SLAPP law, the district court recognized its obligation to first look at the protected conduct, the report, to determine if it was a good faith communication pursuant to the statute; not to determine the quality of the speech or the actor as Appellants argue. JA Vol. VII at 1514-1518. In doing so, the district court determined Songer acted in good faith and his communication to Pahrump was also in good faith. JA Vol. VII at 1518:10-16.

Thus, this Court should apply the same analysis and conclude Songer's report is a good faith communication in furtherance of the right to petition and right to free speech as defined in NRS § 41.637(2) and (3) in direct connection with a matter of public concern and affirm the district court's ruling.

2. Nevada follows California's anti-SLAPP burden-shifting analysis requiring the court to first analyze the conduct to determine if the conduct is a good faith communication in furtherance of the right to petition and right to free speech

Nevada's burden-shifting analysis is consistent with California's anti-SLAPP statute, which the Nevada Legislature made abundantly clear is what Nevada follows. *See*, NRS § 41.665(2015). Thus, it is no surprise that Nevada's

anti-SLAPP laws mirror the California laws. NRS § 41.635 *et seq.* 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 as Nevada courts. Cal. Civ. Proc. Code § 425.16(b); NRS § 41.660(3). Just like Nevada, the California Courts first determine whether the defendant made a threshold showing the challenged cause of action arises out of acts done in furtherance of the defendant's exercise of a right to petition or right to free speech as defined in the statute. *Id.* The second step is determining whether the plaintiff has demonstrated a probability of prevailing on the claim; Nevada's 2013 statute applied the higher standard of clear and convincing evidence. *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 a protected activity, 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 Dist. 2003) (Court stated that to demonstrate a probability of success, the plaintiff must adduce competent admissible evidence).

a) Anti-SLAPP analysis focuses on the protected conduct, not the merits of the speech

California courts recognize that the first step is to determine if the conduct is protected, not the merits of the speech. “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 a person 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); *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 conduct falls into the statute's definition of a good faith communication, then the defendant meets his burden and the burden shifts to the plaintiff. California courts do not make judgments on the merits of the speech itself.

b) Anti-SLAPP analysis focuses on the conduct, not the actor

If the Court were to look past the protected conduct itself, the report, and to Songer's status as Appellants' suggest, then it would see that anti-SLAPP provisions do apply to contractors or private employees such as Songer. This is consistent with the first step of the analysis and focusing on the conduct, rather than on the actor.

In *Vargas v. City of Salinas*, the California Supreme Court reaffirmed that anti-SLAPP protections extend to government entities and public employees when citizens challenged the city's use its newsletter to inform citizens of potential program cuts should a controversial local measure be adopted. *Vargas v. City of Salinas*, 46 Cal. 4th 1, 16, 205 P.3d 207, 215 (2009), *citing cases*. The City of Salinas put information about a public hearing on the measure in its newsletter and citizens in favor of the measure sued the government accusing it of unlawful

campaigning by using the newsletter. *Id.* at 213. The government moved for anti-SLAPP protection and the citizens argued anti-SLAPP did not apply to the government. However, the California Supreme Court re-iterated its long stance that government agencies and employees are entitled to anti-SLAPP protection. *Id.* at 215.

Likewise, “government agencies and their representatives have First Amendment rights, and are “persons” entitled to protection under section 425.16, subdivision (b).” *Santa Barbara Cty. Coal. Against Auto. Subsidies v. Santa Barbara Cty. Ass’n of Governments*, 167 Cal. App. 4th 1229, 1237, 84 Cal. Rptr. 3d 714, 721 (2008), as modified on denial of reh’g (Nov. 5, 2008); see also *Vergos v. McNeal*, 146 Cal. App. 4th 1387, 1405, 53 Cal. Rptr. 3d 647, 661 (2007)(reversing denial of anti-SLAPP motion because anti-SLAPP did apply to government employee). In these matters, the California courts first looked to the protected conduct, not who was conducting the activity.

Because focusing on the conduct and not the actor is the key to the first step of the anti-SLAPP analysis, Appellants reliance on *Korbin v. Gastfriend* is misplaced. 443 Mass. 327, 330, 821 N.E.2d 60, 63 (2005). First, the Massachusetts’ anti-SLAPP statute is narrow and focuses solely on the right to petition. M.G.L.A. 231 § 59H. The Nevada Legislature expressly rejected the narrow interpretation of Nevada’s statute by the Ninth Circuit and explicitly shows

deference to California's statute and law related thereof. Second, the Massachusetts Court did not follow the same two-step process as required in Nevada. Rather, it skipped to who engaged in the activity instead of focusing on the conduct, which is contrary to both Nevada and California law. Not surprisingly, no court outside of Massachusetts has adopted the opinion. Courts within its own boundaries recognize "the anti-SLAPP statute is restricted by its language." *Plante v. Wylie*, 63 Mass. App. Ct. 151, 156, 824 N.E.2d 461, 465 (2005). Thus, the district court properly rejected following this opinion with a restrictive statute and where it fails to follow the analysis required under Nevada law.

Here, the district court analyzed the conduct—Songer's report—and determined the report fell into two separate definition of a good faith communication as defined in NRS § 41.637. JA Vol. VII at 1582-1585. This determination is consistent with Nevada and California law on first evaluating whether the conduct itself is indeed a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with a matter of public concern and not focusing on the merits or the actor engaged in the conduct.

c) The plain language of NRS § 41.650 is not limited to citizens

Appellants argue Songer's report falls outside the scope of NRS § 41.650 because he was hired by the Town of Pahrump. However, NRS § 41.637 applies to a "person," not a citizen and does not exclude someone merely because they were

hired by the government. In fact, even the government and government employees are entitled to the protections of anti-SLAPP legislation as indicated in California law above.

The plain language of NRS § 41.650 makes no distinction between whether Songer was a citizen exercising his free speech or hired to conduct an investigation which results in a written report. Appellants argue NRS § 41.650 only applies to private citizens, yet the anti-SLAPP statutes specifically applies to a “person.” Specifically, NRS § 41.650 states, “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 action for claims based upon the communication.” NRS § 41.650(2013). Had the legislature intended for the immunity to apply only to “citizens,” then the Legislature would have used that specific language. For example, Chapter 41 is replete with definitions relating to the status of a person such as: “employee,” “local judicial officer,” “volunteer,” and “recipient,” yet there is no definition for “person.” *See* NRS § 41.0307; NRS § 41.0377; NRS § 41.500; and NRS § 41.725. The lack of limiting language that the statute only applies to a “citizen” is consistent with the legislative intent of broad protection for person making good faith communications on matters of public concern as defined by statute. The California Court of Appeals interpreted California’s anti-SLAPP statutes use of the word “person” in Section

California Civil Procedure § 425.16 in *Bradbury v. Superior Court*, 49 Cal. App. 4th 1108, 1114, 57 Cal. Rptr. 2d 207, 211 (1996), *as modified on denial of reh'g* (Oct. 31, 1996). The Court determined “person” was a broad term, which extended to the government and its employees. *Id.* Again, this is consistent with the purposefully broad application Nevada enacted in anti-SLAPP protection.

The district court was required to, and did, give the word “person” its plain meaning within the statute and not to add a limitation that immunity only applies “citizens” as Appellants argue. *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986). Such a limitation in NRS § 41.650 is inconsistent with the purpose of the statute in providing broad protection and with the legislature’s amendments demonstrating Nevada’s broad anti-SLAPP protection. As a result, this Court should uphold the district court’s ruling that Songer was entitled to the protections of NRS § 41.650.

3. Songer’s report falls squarely within the protection of NRS § 41.637 as a good faith communication in furtherance of the right to petition and right to free speech

Nevada expressly prohibits meritless lawsuits that seek civil liability against a person for their involvement in public affairs. Nevada’s Anti-SLAPP laws are purposefully designed to protect the public from frivolous lawsuits that are used to “censor, chill, intimidate or punish persons for involving themselves in public affairs.” *See* 1997 Nev. Stat., ch. 387, preamble, at 1367.

Here, Songer’s report regarding Appellants’ conduct on Highway 160, falls squarely within the purview of NRS § 41.637. The written report is a good faith communication because it (1) communicated information regarding a matter of reasonable concern to Pahrump; and (2) was made in direct connection with Pahrump’s investigation regarding Appellants’ potential misconduct and public safety concerns.

a. The district court correctly concluded Songer’s report falls under the protection of NRS § 41.637(2)

NRS § 41.637 specifically defines a good faith communication in furtherance of the right to free speech in direct connection with an issue of public concern as a “communication of information ... to a Legislator, officer or employee of ... this state or a political subdivision of this state, regarding a matter reasonably of concern to the respective governmental entity.” *See*, NRS § 41.637(2).

The Town of Pahrump through its retained counsel, ETS, sought and requested Songer’s communication, the report, because Pahrump was concerned about Appellants’ actions on Highway 160 and the conflict with the complaint against Chief Lewis. Thus, the report is a communication regarding a matter reasonably of concern to Pahrump. It is reasonable for a town, such as Pahrump, to have a reasonable concern when its emergency response personnel fail to aid a woman undergoing a miscarriage. When the people responsible with aiding others in a medical emergency fail to do just that—aid a woman in a medical emergency—it

raises reasonable concerns for any government agency. The concerns include, but are not limited to, the competence of the emergency personnel, public safety, potential exposure and litigation, and the facts underlying the alleged incident.

Songer reviewed all the documents reasonably available to him and interviewed Delucchi and Hollis. JA Vol. 1 at 32-35. In fact, both Delucchi and Hollis admitted that there was patient contact, but that they felt “the scene wasn’t safe enough” for them to approach Ms. Choyce and that “the driver kept our attention.” JA Vol. I at 39-40. Given the: 1) conflicting stories between the Choyce family and Delucchi and Hollis, and 2) circumstances that reasonably suggest some potential negligence, it was reasonable for Pahrump to undergo an investigation of the incident and to request a report.

If this Court were to entertain Appellants contention that Songer’s report was not a protected communication, it would chill and intimidate future investigators from cooperating with the government on issues of public concern. It would also serve to punish investigators for involving themselves in public affairs and heeding the call of duty when retained by the government. Such results are contrary to the statute and legislative intent of encouraging public participation without fear of retaliatory litigation or a SLAPP.

To overcome Songer’s conduct falling into subsection (2), Appellants points to *Talega Maint. Corp. v. Standard Pac. Corp.*, 225 Cal. App. 4th 722, 170 Cal.

Rptr. 3d 453 (2014) for the proposition that “public interest” should impact a broad section of society and their incident was somehow a private matter. Opening Brief, 20:8-10. *Talega*, however, is distinguishable from the facts at hand. In *Talega* a developer attempted to use California’s anti-SLAPP laws to avoid a fraud claim raised by the homeowner’s association. *Id.* The developer argued that the HOA board meetings constituted a public issue under consideration by a governmental body and thus it was entitled to immunity. *Id.* at 733. In this context, the court rejected the notion that the HOA Board meetings served a governmental function. The Court stated “The definition of ‘public interest’ within the meaning of the anti-SLAPP statute has been broadly construed to include not only governmental matters, but also private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity.” *Id.* at 734. Citing *Damon v. Ocean Hills Journalism Club*, 85 Cal.App.4th at p. 479, 102 Cal.Rptr.2d 205 (2000).

Here, the public safety was of major concern to Pahrump with the actions that occurred on Highway 160. When qualified medical professionals who were supposed to provide medical assistance fail to render aid to a woman having a miscarriage it is a matter of public concern with broad implications on public safety and the employment proceedings against them were a lawful government function. Firefighters are known to take an oath to “serve unselfishly” yet from

Appellants own brief it is evident their concerns were for themselves and not Brittnie Choyce. JA Vol. I at 39-40. Firefighter paramedics failing to provide treatment is a public interest that impacts a broad spectrum of society in a variety of ways, including tax payer money paying for their salaries and competency concerns.

Thus, it is evident Songer's report falls within the purview of NRS § 41.637(2), as the district court correctly concluded. This Court should affirm the lower court and conclude Songer's report falls under the good faith communication in furtherance of the right to free speech in direct connection with a matter of public concern as defined in NRS § 41.637(2).

b) The district court correctly concluded Songer's report falls under the protection of NRS § 41.637(3)

Even if the report did not fall under subsection (2), it also falls under subsection (3) protection. NRS § 41.637(3) specifically defines a good faith communication in furtherance of the right to free speech in direct connection with an issue of public concern as a "written ... statement made in direct connection with an issue under consideration by a[n] executive office or... any other official proceeding authorized by law." NRS § 41.637(3).

It is undisputed that Pahrump retained ETS because Pahrump needed an outside entity to coordinate and oversee the investigation into the Highway 160 incident and the internal cross-complaints filed by Delucchi and Chief Lewis. The

firm, in turn, retained Songer to conduct an investigation on the Highway 160 incident. Thus, Songer's report was *made in direct connection with an issue*, the Highway 160 incident, *under consideration* by Pahrump, regarding *an official proceeding*, Appellants' disciplinary actions. Pahrump and PVFRS used Songer's report in the disciplinary proceedings against Appellants, which was an official proceeding authorized by law. Therefore, the report qualifies as a good faith communication in furtherance of the right to free speech based on it being a written statement made in direct connection with an issue under consideration by Pahrump and used in the disciplinary hearing of Delucchi and Hollis.

Appellants argue with no citation that report needed to be to Pahrump in its legislative capacity to be protected under the statute. Opening brief, 20:18-19. There is no such requirement in the statute or in law. The requirement is the issue be under consideration by Pahrump in an official proceeding authorized by law. An investigation into employee misconduct which effects public safety is certainly covered by this broad definition.

California broadly defines "official proceeding authorized by law" and does not limit it to a legislative agenda. The protections of California's anti-SLAPP have been extended to peer reviews in hospitals. "Hospital peer review, in the words of the Legislature, 'is essential to preserving the highest standards of medical practice' throughout California." *Kibler v. N. Inyo Cty. Local Hosp. Dist.*,

39 Cal. 4th 192, 199, 138 P.3d 193, 196 (2006), *as modified* (July 20, 2006); citing *Arnett v. Dal Cielo*, 14 Cal. 4th 4, 923 P.2d 1 (1996). Likewise, the protection was extended to a union's request to use a certain fact-finding procedure to resolve an impasse with the county. *Riverside v. Public Employment Relations Board* 200 Cal.Rptr.3d 573, 246 Cal.App.4th 20 (App. 4 Dist. 2016). The protection even extends to state university employment practices regarding retention, tenure, and promotion as official proceedings authorized by law. *Park v. Board of Trustees of California State University*, 192 Cal.Rptr.3d 78, 239 Cal.App.4th 1258 (App. 2 Dist. 2015). None of these examples are strictly related to a legislative agenda, which is consistent with the broad application of anti-SLAPP laws. There is no reason to believe in law or fact that Nevada legislature would limit the protection to only items being considered for legislation.

Therefore, this Court should affirm the lower court and conclude Songer's report falls under the good faith communication in furtherance of the right to free speech in direct connection with a matter of public concern as defined in NRS § 41.637(3).

C. Appellants failed to meet their burden by clear and convincing evidence of the likelihood of prevailing on the claim of defamation and intentional infliction of emotional distress and are not entitled to the benefits of 2015 amendment

All Appellants presented this Court and the district court was with the inadmissible arbitration opinion and award and transcripts from that hearing. There is

no legal basis which would allow these inadmissible hearsay documents to be admissible at trial and therefore the documents cannot be considered as clear and convincing evidence of being able to prevail on their claim. Appellants sole argument for why they have demonstrated clear and convincing evidence is the private arbitrator made some unfavorable comments during a labor dispute arbitration. The Court should not consider this inadmissible evidence as clear and convincing evidence of Appellants' ability to prevail on their defamation and intentional infliction of emotional distress claims.

1. Arbitration hearing transcripts are not evidence of defamation or intentional infliction of emotional distress

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 direct 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 facts regarding the investigation and her hearsay opinions do not show clear and convincing evidence of being able to prevail on the claims. Likewise, the arbitration testimony is inadmissible and would only be admitted in an attempt to impeach the witness.

In contrast, Songer presented the district court with his motion to dismiss and legal basis for the anti-SLAPP dismissal and a declaration. JA Vol. I at 32-35. Songer stated he believed his report to be accurate when he made it and did so with

the information available to him. *Id.* at 35. Appellants did not present an affidavit or anything else beyond the arbitration hearing to support through clear and convincing evidence their ability to prevail on a defamation and intentional infliction of emotional distress claim against Songer. The lack of evidence is also insufficient for a summary judgment standard which would have required admissible evidence such as an affidavit. Nev. R. Civ. P. 56. In other words, Appellants failed to make a prima facie case of prevailing on their two claims against Songer and the district court properly dismissed their complaint.

2. The arbitration hearing did not have issue preclusion effect because the issues and parties were different, and ultimately the district did not disturb the arbitration ruling

Appellants claim issue preclusion due to the collective bargaining agreement mandated arbitration in an attempt to meet the clear and convincing evidence standard. However, for issue preclusion to apply the following factors must be met: “(1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; ... (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation”; and (4) the issue was actually and necessarily litigated. *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008) *holding modified by Weddell v. Sharp*, 131 Nev. Adv. Op. 28, 350 P.3d 80 (2015). Appellants also argue that district court had no

authority to overrule the Arbitrator's decision. These premises are flawed because there was no issue preclusion and the district court did not disrupt the arbitrator's decision.

First, the issues presented before the arbitrator and the district court are fundamentally different. One was an employment dispute over the level of discipline for failing to treat a patient; the other deals with claims for defamation and intentional infliction of emotional distress. Second, the parties are not the same as Songer was not a party to the arbitration, but a witness. Thus, he was not afforded the same rights or protections as that of the Town of Pahrump. Appellants will likely argue that Songer was in privity with the Town, but this is flawed because their interests were not aligned. Songer conducted an investigation into the events on Highway 160; Pahrump was interested in disciplining Appellants for their potential misconduct.

Thirdly, the Arbitrator's decision was to reinstate Appellants, issue back pay, and set aside their license revocation. JA Vol. II at 287. The district court's decision does not impact or overrule the Arbitrator's decision to reinstate Appellants. The two rulings are completely separate and stand apart.

The district court had the obligation to determine if the report was a good faith communication as defined in NRS § 41.637(2)-(3) and did just that. Failed

arguments of issue preclusion did not prevent the district court from applying the proper anti-SLAPP analysis and dismissing Appellants' SLAPP complaint.

3. Appellants are not entitled to the benefits of the 2015 amendment and failed to raise the issue before the lower court

Finally, Appellants argue for benefits of the 2015 amendment for the standard of review. Opening Brief, 21:17-20. This premise presumes (1) the appeal is timely, and (2) the 2015 amendment occurred during the pendency of the appeal; both are wrong. Appeal No. 66858 was dismissed on June 1, 2015, and this is the second bite at the appeal apple. Instead of asking for rehearing on that appeal, Appellants ran to the district court and filed a "Motion for Final Dismissal" on June 15, 2015. Nowhere in this motion did Appellants preserve the issue of the pending legislative action. In fact, the 2015 amendments became effective June 8, 2015, a full week before the Appellants filed for final dismissal order with the district court. See, 78th Legislative Session, S.B. 444 (2015). At that time, they might have been able to raise the new statute, but instead argued for a duplicate order to undertake a new appeal. The statute did not change during the pendency of this appeal, it occurred months before the appeal and Appellants raise the issue for the first time on appeal, despite having the opportunity before the district court.

Appellants are not entitled to the benefits of the 2015 amendment. Even if they were, they failed to provide prima facie evidence for their claims of defamation and intentional infliction of emotional distress.

Conclusion

This Court should affirm the district court's ruling and dismiss Appellants' SLAPP litigation. The anti-SLAPP analysis shows that Songer's report is the focus of the inquiry, not him as the actor or the merits of what was contained in the report. Songer's report was a good faith communication in furtherance of the right to petition and right to free speech in connection with an issue of public concern. The report qualifies under both NRS § 41.637(2) and (3) for anti-SLAPP immunity in NRS § 41.650. The district court followed the appropriate procedure and analysis in making its determination, and Appellants failed to meet their burden by clear and convincing evidence of being able to prevail on a claim for defamation or intentional infliction of emotional distress. Appellants cannot meet their burden even under the lower summary judgment standard or even the prima facie standard because there is no evidence to support their claims against Songer. Songer has no personal vendetta against Appellants. Before ETS asked Songer to investigate the Highway 160 issue, the parties had likely never met as Songer was a stranger to Pahrump having worked in Winnemucca. Songer used his 22 years of experience in emergency services, along with his interview of Appellants, and available information, including reviewing Pahrump's policies and procedures, in drafting his report and concluding Appellants failed to treat a patient who was having a miscarriage. At the end of the day, this appeal is about disgruntled employees

attempting to sue a neutral third-party for his investigation report that the Town of Pahrump solicited through its attorney. Allowing Appellants to prevail on this appeal will chill, intimidate, and punish Songer for his involvement in this public affair, which is what Nevada's anti-SLAPP laws are made to protect against. Nevada purposefully adopted a broad statute to afford every person protection for their good faith communications in furtherance of the right to petition or right to free speech on an issue of public concern and explicitly defers to California's broad statute. Thus, the Court should follow the same analysis as the district court and find Songer's report qualified as a good faith communication as defined in NRS §. 41.637(2) and (3), and is entitled to NRS § 41.650 immunity because Appellants failed to meet their burden of proof.

Dated this 22nd day of September.

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CERTIFICATION PURSUANT TO RULE 28.2

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

2. I further certify that this brief complies with the page limitations of NRAP 32(a)(7) of not exceeding 30 pages, excluding the parts of the brief exempted by NRAP 32(a)(7)(C).

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(3)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relief on is to be found.

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4. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 22nd day of September.

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