MS. MORRIS: Okay.

THE COURT: Okay? So, I -- for efficiency sake and my sanity, I'm continuing this to one day for everybody to make all the record that they want to make. And, then, I'll make the cuff call. So, I understand you want to have it heard today. I do. And I don't think you're incorrect, I could.

MS. MORRIS: Okay.

THE COURT: And I don't think there's anything inappropriate about asking me to do it, but I'm going to decline to do it because I don't -- I think there's a lot of inter -- there's going -- it is going to be a lot of duplication. And rather than having a lot of duplication, I would rather just be efficient, hear everything once, make a decision.

MS. MORRIS: Okay.

THE COURT: Okay. So, understanding that your Supplemental Sur-Reply would only relate to their Opposition and nothing new -- because, then, we're right back where we started from.

MR. JONES: The Reply. Correct, Your Honor?

THE COURT: Right. Your -- I'm meaning you're doing a Supplemental Sur-Reply to their Reply --

MR. JONES: Correct.

THE COURT: -- would only address their Reply and

nothing new. You're telling me you could have that done when?

MR. JONES: One week, Your Honor.

THE COURT: So, the day before Thanksgiving you'll have it done?

MR. JONES: Correct.

THE COURT: Okay.

[Colloquy between the Clerk and the Court]

THE COURT: I'm sorry. Just give me one second to look at --

[Pause in proceedings]

THE COURT: Okay. So, can you return on December 2nd, which is a week after the week that the Supplemental would be filed?

MR. JONES: That works for us, Your Honor.

MS. MORRIS: Yes.

THE COURT: Okay. So, this matter is continued two weeks from today with the understanding that your deadline for your Supplemental Sur-Reply is next Wednesday at 4 o'clock.

MR. JONES: All right. Thank you, Your Honor.

THE COURT: Okay. And, then, I will see you and we will argue everything.

MS. MORRIS: All right.

THE COURT: Thank you very much.

MS. MORRIS: Thank you.

MR. JONES: Thank you.

THE COURT: Do you want this back because I'll just print out my own?

MR. JONES: Yeah. Great. Thank you.

THE COURT: So, the record should reflect Defendants' Motion to Strike is denied but the Alternative Motion to Continue hearing is granted. Two weeks, with leave to file a Sur-Reply.

PROCEEDING CONCLUDED AT 9:19 A.M.

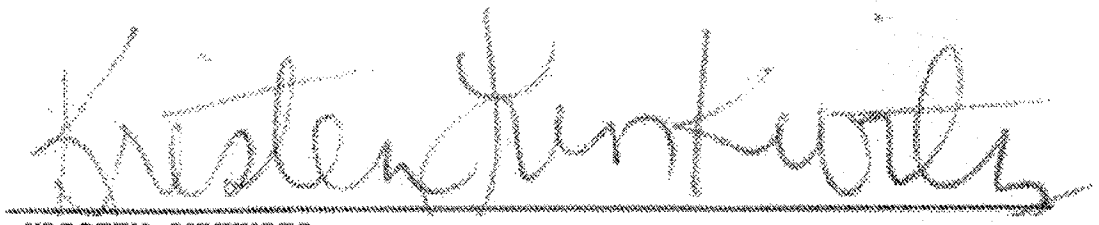
* * * * *

CERTIFICATION

I certify that the foregoing is a correct transcript from the audio-visual recording of the proceedings in the above-entitled matter.

AFFIRMATION

I affirm that this transcript does not contain the social security or tax identification number of any person or entity.



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SUPP
PRESCOTT T. JONES, ESQ.
Nevada State Bar No. 11617
AUGUST B. HOTCHKIN, ESQ.
Nevada State Bar No. 12780
BREMER WHYTE BROWN & O'MEARA LLP
1160 N. TOWN CENTER DRIVE
SUITE 250
LAS VEGAS, NV 89144
TELEPHONE: (702) 258-6665
FACSIMILE: (702) 258-6662
pjones@bremerwhyte.com
ahotchkin@bremerwhyte.com

Attorneys for Plaintiff
TON VINH LEE

DISTRICT COURT

CLARK COUNTY; NEVADA

TON VINH LEE, an individual Plaintiff, vs. INGRID PATIN, an individual, and PATIN LAW GROUP, PLLC, a Nevada Professional LLC, Defendants.	Case No.: A723134 Dept. No.: IX **SUPPLEMENT TO PLAINTIFF'S SUR-REPLY IN OPPOSITION TO DEFENDANTS' SPECIAL MOTION TO DISMISS** Date of Hearing: November 18, 2015 Time of Hearing: 9:00 A.M.

COMES NOW Plaintiff TON VINH LEE, by and through his attorneys of records, Prescott T. Jones, Esq. and August B. Hotchkin, Esq. of the law firm BREMER WHYTE BROWN & O'MEARA LLP, and hereby submits this Supplement to Plaintiff's Sur-Reply In Opposition to Defendants' Special Motion to Dismiss Pursuant on file herein pursuant to this Court's Order on November 18, 2015.

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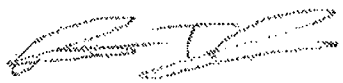
BREMER WHYTE BROWN & O'MEARA LLP
1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144
(702) 258-6665

///

This Supplement to Plaintiff's Sur-Reply is made and based upon the papers and pleadings on file herein, the attached Memorandum of Points and Authorities, and any oral argument that may be entertained at a hearing on this matter.

Dated: November 25, 2015

BREMER WHYTE BROWN & O'MEARA LLP



By: _____
Prescott T. Jones, Esq., Bar No. 11617
August B. Hotchkin, Esq., Bar No. 12780
Attorneys for Plaintiff
TON VINH LEE

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION AND STATEMENT OF RELEVANT FACTS

This matter involves allegations concerning the defamatory statement published on Defendants' website wherein Defendants identify Plaintiff, Ton Vinh Lee (hereinafter 'Dr. Lee") as both an individual and as an owner of the Summerlin Smiles dentistry establishment in Las Vegas, Nevada in connection with an attorney advertisement, representing a plaintiff's verdict against Dr. Lee. Despite the fact no verdict was ever obtained against Dr. Lee individually, and the verdict against his practice and other parties was vacated by the trial court, Defendants continue to assert the statement on the website is true and not defamatory, entitling them to dismissal of Plaintiff's Complaint.

Due to the untimeliness of the Reply and its additional points and authorities which went beyond the scope of the aforementioned Motion and Opposition, Plaintiff was compelled to file a Motion to Strike, or in the alternative, Motion to Continue Hearing and Sur-Reply dated November 16, 2015 and November 17, 2015 respectively. The Motion and related briefs were presented with oral argument by the parties on November 18, 2015 wherein the Court denied Plaintiff's Motion to

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Suite 250
Las Vegas, NV 89144
(702) 258-6665

Strike Defendants' untimely Reply, but granted Plaintiff's Motion to Continue Hearing, allowing Plaintiff's Sur-Reply to be supplemented and filed.

Pursuant to the above, Plaintiff now brings this Supplement to his Sur-Reply filed on November 17, 2015 as expressly authorized by this Court. This Supplement is brought in congruence with the points and authorities set forth in Plaintiff's original Sur-Reply and incorporates those arguments along with additional points and authorities set forth below in the body of this document.

II.

LEGAL DISCUSSION AND ARGUMENT

A. Separate Statement of Facts

Defendants, for the first time in their Reply, set forth a list of undisputed facts. See Defendants' Reply, p. 4, line 10 – p. 5 line 20. However, as addressed in Plaintiff's Sur-Reply, Defendants set forth facts without providing crucial details regarding Plaintiff's verdict. The following is Plaintiff's separate statement of facts:

1. Defendant Ingrid Patin, Esq., served as **lead and trial counsel** in the underlying matter, Singletary et al. v. Ton Vinh Lee, DDS, et al.

2. At the conclusion of the trial of the underlying matter, the jury rendered a verdict in favor of Plaintiffs in the amount of Three Million Four Hundred Seventy Thousand Dollars and Zero Cents ($3,470,000.00) against Florida Traivai, DMD and Ton V. Lee, DDS, Prof. Corp. d/b/a Summerlin Smiles, which was later **vacated** as a result of the Court granting Motions for Judgment as a Matter of Law Pursuant to NRCP 50(b) via its July 16, 2014 order.

3. There has never been a jury verdict against Plaintiff Ton Vinh Lee, DDS as a result of the Singletary litigation.

4. There has not been a jury verdict against non-parties Ton Vinh Lee, DDS PC d/b/a Summerlin Smiles or Florida Traivai DMD since the verdict was vacated on **July 16, 2014.**

5. Defendants Ingrid Patin and Patin Law Group made a statement via their website at

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1160 N. Town Center Drive
Suite 250
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(702) 258-6665

http://patinlaw.com/settlement-verdict/ beginning at some point in 2014 through approximately **August 2015** as follows:

> DENTAL MALPRACTICE/WRONGFUL DEATH – PLAINTIFF'S VERDICT $3.4M, 2014
> Description: Singletary v. Ton Vinh Lee, DDS, et al.
>
> A dental malpractice-based wrongful death action that arose out of the death of Decedent Reginald Singletary following the extraction of the No. 32 wisdom tooth by Defendants on or about April 16, 2011. Plaintiff sued the dental office, Summerlin Smiles, the owner, Ton Vinh Lee, DDS, and the treating dentists, Florida Traivai, DMD and Jai Park, DDS, on behalf of the Estate, herself and minor son.

See Exhibit "E" to Opposition to Special Motion to Dismiss, showing a true and correct copy of Defendants' website as of July 9, 2015.

6. During or around August 2015, Defendants amended their website such that the statement at issue then read:

> DENTAL MALPRACTICE/WRONGFUL DEATH – PLAINTIFF'S VERDICT, 2014
> Description: Singletary v. Ton Vinh Lee, DDS, et al.
>
> A dental malpractice-based wrongful death action that arose out of the death of Decedent Reginald Singletary following the extraction of the No. 32 wisdom tooth by Defendants on or about April 16, 2011. Plaintiff sued the dental office, Summerlin Smiles, the owner, Ton Vinh Lee, DDS, and the treating dentists, Florida Traivai, DMD and Jai Park, DDS, on behalf of the Estate, herself and minor son.
>
> This matter is on appeal.

Notably, the language "$3.4M" was removed, and the language "This matter is on appeal" was added.

7. During November 2015, Defendants removed the statement at issue from their web site completely.

8. The Singletary plaintiffs filed an appeal against Ton Vinh Lee, DDS, Ton Vinh Lee, DDS, Prof. Corp. d/b/a Summerlin Smiles and Florida Traivai, DMD following the trial court's ruling in favor of Ton Vinh Lee DDS' Motion for Judgment as a Matter of Law pursuant to NRCP 50(b).

9. Pursuant to NRS 89.040, Ton Vinh Lee was required to name his Professional

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1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144
(702) 258-6665

Corporation Ton Vihn Lee, DDS PC.

10. The appeal remains pending before the Supreme Court of Nevada, Case No.: 66278, and Appellants' Opening Brief was field on March 24, 2015.

B. Statement of Disputed Facts

As addressed in Plaintiff's initial Sur-Reply to some extent, Defendants' statement of undisputed facts fails to address several facts of consequence. As such, Plaintiff provides the following statement of facts which it disputes against Defendants, and as such, mandates a dismissal of Defendants' Special Motion To Dismiss and incorporated motion for summary judgment:

1. Plaintiff Ton Vinh Lee obtained a judgment on the verdict in the Singletary matter, thus making Defendants' statement on the website false on its face. The trial court granted the aforementioned Motions and entered a **Judgment on Verdict in favor of Ton Vinh Lee, DDS** and awarded him costs in the amount of Six Thousand Thirty Two Dollars and Eighty Three Cents ($6,032.83) as the **prevailing party** under NRS 18.020. The Judgment was **prepared** by Lloyd W. Baker, Esq. and Ingrid Patin, Esq., counsel for the Singletary plaintiffs and filed on September 11, 2014. (Emphasis Added).

2. Almost eleven months after the Judgment on Verdict in favor of Ton Vinh Lee, DDS, Defendants maintained a published statement on their website which identified Ton Vinh Lee, DDS as an individual and stated:

> DENTAL MALPRACTICE/WRONGFUL DEATH – ***PLAINTIFF'S*** **VERDICT $3.4M**, 2014
> Description: Singletary v. **Ton Vinh Lee, DDS**, et al.
>
> A dental malpractice-based wrongful death action that arose out of the death of Decedent Reginald Singletary following the extraction of the No. 32 wisdom tooth by Defendants on or about April 16, 2011. Plaintiff sued the dental office, Summerlin Smiles, the owner, **Ton Vinh Lee, DDS**, and the treating dentists, Florida Traivai, DMD and Jai Park, DDS, on behalf of the Estate, herself and minor son.

(Emphasis Added). Therefore, such statement was false prior to and after Plaintiff filed his Complaint against Defendants.

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3. There was no jury verdict against Plaintiff Ton Vinh Lee, Ton Vinh Lee DDS, d/b/a Summerlin Smiles, or any other defendant in the underlying litigation at the time Defendants' statement was made on their website, or the time the Complaint was filed in the instant action.

The above, contrary to Defendants' assertions otherwise, establish the subject statement posted on Defendants' website is a false and defamatory statement published by Defendants concerning Plaintiff. Chowdry v. NLVH, Inc., 109 Nev. 478, 483, 851 P.2d 459 (1993). In their Reply, Defendants either attempt to undermine the significance of the fact that a judgment was entered in favor of Plaintiff and the circumstances of the appeal, or completely fail to grasp its importance. As set forth above, the appeal is pending before the Supreme Court of Nevada because a judgment was rendered in favor of Plaintiff. Despite the fact Defendants failed to obtain a judgment against Plaintiff in the Singletary action, and the fact Defendants, as lead counsel who are participating directly in the appeal, knew the original jury verdict was vacated as to Plaintiff, and continue to maintain the website which identifies Plaintiff directly in connection with the phrase "PLAINTIFF'S VERDICT," is a true statement. As discussed in Plaintiff's Sur-Reply, the subject statement is susceptible to mean Defendants obtained a verdict against all the named Defendants in the Singletary action, including Plaintiff, both as an individual, and as owner of Summerlin Smiles. Read this way, the statement is clearly susceptible to a defamatory meaning, as a verdict and judgment was entered in favor of Plaintiff Ton Vinh Lee, and not the Singletary plaintiffs. Posadas v. City of Reno, 109 Nev. 448, 453, 851 P.2d 438, 442 (1993); see also Fink v. Oshins, 118 Nev. 428, 437, 49 P.3d 640, 646 (2002).

Therefore, Defendants' motion for summary judgment, incorporated into its Special Motion to Dismiss pursuant to NRS 41.660 fails as a matter of law and must be denied.

C. Defendants' Reliance on Rivero Is Misplaced And Their Attempts To Categorize A Dental Malpractice Suit As A Matter Of Public Concern Under NRS 41.660 Is Too Broad.

Defendants argue despite its acknowledged error in citing the previous version of NRS 41.660 which has been revised substantially, Plaintiff is unable to establish a prima facie case of

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Suite 250
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(702) 258-6665

defamation. See Defendants' Reply, p. 6, lines 7-28.[1] However, Defendants continue to misconstrue the law, and reliance on Nevada's anti-SLAPP statute is misplaced.

First, the burden of proof for a plaintiff to prevail on a defamation claim that is brought within the parameters of Nevada's anti-SLAPP statute was lessened from "clear and convincing evidence" to a "demonstrat[tion] with **prima facie evidence a probability** of prevailing on the [defamation] claim . ." NRS 41.660(3)(b). (Emphasis Added). Second, before there can be a determination whether or not the non-moving party has demonstrated with prima facie evidence a probability of prevailing on the defamation claim, the moving party must first show that the underlying 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 importance. NRS 41.660(3). A good faith communication is one that is "truthful or made without [the] knowledge of falsehood." John v. Douglas County Sch. Dist., 125 Nev. 746, 761 (2009).

Defendants argue the subject website is a matter of public concern and within the scope of NRS 41.637(4) because 1) "[t][he statement specifically pertains to a dental malpractice, wrongful death matter that arose out of the improper care and treatment of a patient of Summerlin Smiles, which is an issue of public health and safety"; and 2) was made "in a place open to the public". Defendants' Reply, p. 10, lines 2 – 16. In support of their contention, Defendants rely on Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO, 105 Cal. App. 4th 913, 924, 130 Cal. Rptr. 2d 81 (2003). Specifically, Defendants focus on the following three (3) scenarios in which a statement or statements may fall within the scope of an anti-SLAPP statute:

1. the subject of the statement or activity precipitating the claim was a person or entity in the public eye;

2. the statement or activity precipitating the claim involved conduct that could affect

---

[1] Interestingly, despite Defendants' recognition of their error, they again improperly cite to the previous version of NRS 41.660(3)(b), asserting that Plaintiff must prove by "clear and convincing" evidence of a probability on the claim. Defendants' Reply, p. 6, lines 9-13.

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large numbers of people beyond the direct participants; or

3. the statement or activity precipitating the claim involved a topic of widespread public interest.

Id. at 918.

In Rivero, the plaintiff was a public university supervisor who was accused by his employees of theft, extortion, and favoritism and became the subject of complaints within the union. Id. at 915. These complaints led to the supervisor's suspension and eventual termination wherein he subsequently brought suit against numerous individuals and entities he claimed were involved or responsible, including his union, for among other things, defamation. Id. at 915-16. The Union filed a special motion to strike under California's anti-SLAPP statute which was denied by the trial court and later affirmed by the California Court of Appeals. Id. As with Nevada, California's anti-SLAPP statute recognizes that there is a "two-step process for determining whether an action is a SLAPP, first requiring the defendant or movant to make a showing that the challenged cause of action is one that arises from a protected activity (e.g., matter of public concern). Id. Once this initial requirement is met by the movant, then "the burden shifts to plaintiff to demonstrate a probability that he or she will prevail on the claim". Id.

The defendants in Rivero offer several theories to support their contentions that the statements made were protected, or free speech involving a matter of public concern. "For one, the Union argues that the [subject of supervisory abuse] is an issue of particular public interest because it impacts a community of public employees numbering in 17,000". Id. at 919. In addition, the Union contended that unlawful workplace activity is a matter of public interest especially where it occurs at a public institution. Id. In its analysis, the California Court of Appeals first addressed the issue of the number of people in connection with the subject activity or conduct, pointing out that the "statements concerned supervision of a staff of eight custodians by Rivero, an individual who had previously received no public attention or media coverage . . . [and] the only individuals directly involved in and affected by the situation were Rivero and the eight custodians . . . [a matter that] is hardly a [one] of public interest." Id. at 924. "The Union disagree[d], arguing that any time a person critics an unlawful workplace activity the statements concern a public issue because public

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policy favors such criticism." Id. The Court however, remained unconvinced, stating that "if the Union were correct, discussion of nearly every workplace dispute would qualify it as a matter of public interest." The Court held that there must be a "threshold level of significance" which must be met to qualify as a matter of public interest, even if it implicates public policy. Id. Moreover, even though the workplace activity in Rivero took place at a publicly financed institution, the Union was too broad, and the mere location does not in of itself qualify under SLAPP. Id. at 925 (reasoning that "the theft of a single pencil or the improvident purchase of a single piece of inexpensive computer hardware cannot amount to a public issue").

Similar to Rivero, here, Defendants "sweep too broadly," arguing because the statement pertains to a lawsuit, specifically in connection with dental malpractice which resulted in a death due to the improper care and treatment of a patient, it is a matter of public concern since it goes to an issue of public health and safety. Id.; Defendants' Reply, p. 10, lines 14-16. As in Rivero, such a conclusion is too broad as it would mean that any medical malpractice action automatically become an issue of public concern, a position unsupported by any law. Moreover, Defendants similarly attempt to place the significance of location to qualify the "issue of public concern" arguing that since it took place at a dental office, it could affect a large number of people, (e.g., patients). Defendants' Reply, p. 10, lines 20 – 24. However, it is dubious at best that Summerlin Smiles is not one of a multitude of dental offices in Las Vegas. Summerlin Smiles is not a hospital, or a large public clinic. It is a private dental practice, owned and operated by a handful of professionals which service a relatively limited clientele. If Summerlin Smiles were categorized as a place that could affect a large number of people within the scope an anti-SLAPP statute, then there is little doubt that a vast majority of any medical practices within Las Vegas would automatically qualify as well.

Ultimately, the Court in Rivero was unable to articulately set forth guidelines as to what issues truly possess public significance and thus qualify as a matter of public concern under anti-SLAPP. Rivero, at 929. However, the Court's overarching theme in its analysis in Rivero was to not allow broad labels or the appearance of "public concerns" serve as a test to qualify a particular activity or conduct within the parameters of an anti-SLAPP statute. See id. This theme continues to

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Suite 250
Las Vegas, NV 89144
(702) 258-6665

remain prevalent as it was again addressed recently by the California Court of Appeals in Griener v. Taylor, 234 Cal. App. 4th 471, 481-82, 183 Cal. Rprtr. 3d 867, 874-75 (2015).

D. Broad Public Interest Topic Does Not Qualify An Issue To Be One As A Matter Of Public Concern Under Anti-SLAPP Which Ultimately Requires More Than Just Information, But Also Public Participation.

Both Nevada and California's respective anti-SLAPP statutes do not define what constitutes an issue public interest or matter of public concern. See Albanese v. Menounos, 218 Cal. App. 4th 923, 929, 160 Cal. Rprtr. 3d 546, 550 (2013), citing Rivero, 105 Cal. App. 4th 913, 920. While the scope or boundaries of an issue of public concern has not been defined, Griener v. Taylor is instructive[2] as the California Court of Appeals has provided some additional guidance which was not provided in Rivero. The Court in Griener dealt with the same issue of analyzing what circumstances qualify as a matter of public concern in order to determine if a movant has sufficiently met its burden under anti-SLAPP. In Griener, the Court continued to recognize that "public interest" within the scope of "anti-SLAPP is not limited to governmental matters and may include private conduct that impacts a broad segment of society and/or affects a community in a manner similar to that of a governmental entity." Griener v. Taylor, 234 Cal. App. 4th 471, 474 183 Cal. Rptr. 3d 867, 874-75 (2015). "However, in the context of conduct affecting a community, i.e., a limited but definable portion of the public, the constitutionally protected activity must, at minimum, be connected to a discussion, debate, or controversy. Merely information statements are not protected." Id. The statements must "**further** the statute's purpose of **encouraging participation** in matters of public significance." Id. (Emphasis Added).

The facts in Grenier involved a pastor of the nondenominational church of approximately 35 years, which as of 2006, included approximately 800 adults and 200 children. Id. at 476. However, by January, 2013 the membership dropped to approximately 400 adults and 150 children. Id. The pastor was involved in a various pastor-related endeavors, which included his writing and publishing a book, his management of his own website to help teach the Bible, and his host of a

[2] SB 444, sec. 12.5(2) allows use of California law in interpreting Nevada's anti-SLAPP statute.

radio show which was broadcasted on stations in California, Texas, Missouri, Virginia, Tennessee and Hawaii. Id. The pastor's sermons were even posted on other social media including YouTube, iTunes, and Twitter. Id. In 2004 and 2005, one of the pastor's stepsons accused the pastor of emotional and physical abuse and demanded an apology. However, the pastor refused to admit he committed such abuse and as part of a previously established discussion thread on the pastor's website, the stepson added his own comments and further discussed his alleged mistreatment on the stepson's own website. As a result, the pastor filed a defamation suit against the stepson and another who had participated in the discussions. Id. Among the alleged defamatory comments cited to in the pastor's complaint, included assertions that included details in connection to the pastor's aforementioned endeavors. Id. at 476-79. The stepson filed a motion to strike under California's anti-SLAPP statute which was summarily denied by the trial court and he appealed. Id. at 479.

The California Court of Appeals found that the majority of the pastor's allegations arose from the stepson's internet postings and held that statements made on a website are made in a public forum. Id. at 481. "However, not every Web site post involves an issue of public interest . . . [and] . . . [m]ere publication on a Web site does not turn otherwise private information into a matter of public interest. Id. As previously addressed in Plaintiff's Sur-Reply, the Court expressly reasoned that:

> "[P]ublic interest" is not mere curiosity. Further, the matter should be something of concern to a **substantial number of people. Accordingly, a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest.** Additionally, there should be a degree of closeness between the challenged statements and the asserted public interest. The assertion of a **broad** and amorphous public interest that can be **connected to the specific dispute is not sufficient.** (citations omitted). One cannot focus on society's general interest in the subject matter of the dispute instead of the specific speech or conduct upon which the complaint is based. In evaluating the first step of the anti-SLAPP statute, the focus must be on the **specific nature of the speech** rather than the generalities that might be abstracted from it.
>
> . . . .
>
> . . . in the context of conduct affecting a "community", i.e,. a limited but definable portion of the public, the constitutionally protected activity must, at

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> minimum, be connected to a discussion, debate or controversy. **Mere informational statements are not protected.** To grant such protection to such statements would in no way further "the statute's purpose of encouraging **participation** in matters of public significance." (citations omitted).

Id. at 482 (Emphasis Added). In applying the above rationale to the facts in Grenier, the Court found the issues raised by the stepson's allegedly defamatory statements were of interest to the particular church's community. Id. at 483. The Court held that the membership of approximately 1,000 to 550 was large enough to qualify as a "community" for the purposes of anti-SLAPP. Id. In addition, because some of the statements included alleged misuse of church funds, there was a direct connection with the church community's interest since the members of the community donated money to the church. Id. Furthermore, the pastor was the community's "spiritual and moral leader" and "[a]s such, allegations regarding [the pastor's] character and fitness to serve as a pastor are of interest to the [community]". Id. The Court reasoned that the situation was analogous to consumer protection information, and the stepson was attempting to warn people away from attending the church with the pastor. Id. "In the context of information ostensibly provided to aid consumers choosing among churches, the statements were connected to an issue of public concern." Id.

Unlike the situation in Grenier, the number of people which would arguably be affected by and have interest in a medical malpractice suit involving Plaintiff (e.g., patients) is undetermined and Defendants have provided no evidence to support that it is "substantial number of people." Moreover, assuming arguendo that the numbers are considered to be substantial for purposes of anti-SLAPP, patients of a dental office are not a tight-knit community like a church. It can hardly be said that patients of a particular dentist meet together every week, engage in community activities, or otherwise participate in each other's lives which is common for a church, especially one as relatively small as the church membership in Grenier.

In addition, the statements were made on a website of the singular leader of the church which served as an express warning to any and all church members or future church members regarding the pastor's alleged misconduct. Id. However, unlike Grenier, the statement here was made on an attorney's website that had no connection with any of Plaintiff's patients as a

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Suite 250
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(702) 258-6665

community, and which clearly had the purpose of advertisement, and bolstering Defendants' reputation as effective trial counsel, rather than warning patients of the alleged dental malpractice. As such, the "degree of closeness between the challenged statements and the asserted public interests" is utterly lacking here. Id. at 482. Defendants' statement is nothing more than a marketing tool to generate business.

Finally, whereas allegations of financial misappropriation or misuse "could lead to discussion within the [church] membership and the implementation of new financial standards," sparking and encouraging the community's participation, a statement that merely states "PLAINTIFF'S VERDICT" in connection with dental malpractice involving a wrongful death which identifies Plaintiff among others, does nothing more than to provide an unsubstantiated informational statement about a lawsuit which is definitively unprotected under anti-SLAPP. Id. Therefore, the subject statement posted on Defendants' website is not a matter of public concern pursuant to NRS 41.660(3), and Defendants' have failed to meet their burden to warrant a dismissal of Plaintiff's claims.

III

CONCLUSION

Based upon the foregoing, in addition to the points, authorities, and other legal argument set forth in Plaintiff's Opposition and Sur-Reply, Defendants' Special Motion to Dismiss Plaintiff's Complaint pursuant to Nevada's anti-SLAPP statute must be denied.

Furthermore, Plaintiff is entitled to and requests attorneys' fees and costs, and any other relief this Court deems as just, as previously set forth in Plaintiff's Opposition and Sur-Reply.

Dated: November 24, 2015

BREMER WHYTE BROWN & O'MEARA LLP

By: _____
Prescott T. Jones, Esq.
Nevada State Bar No. 11617
August B. Hotchkin, Esq.
Nevada State Bar No. 12780
Attorney for Plaintiff,
TON VINH LEE

BREMER WHYTE BROWN & O'MEARA LLP
1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144
(702) 258-6665

CERTIFICATE OF SERVICE

I hereby certify that on 25th of November, 2015, the following document was electronically served to all registered parties for case number A723134 as follows:

Name	Email	Select
Christian M. Morris, Esq.	christianmorris@nettleslawfirm.com	☑
Kim Alverson	kim@nettleslawfirm.com	☑

Patin Law Group, PLLC

Name	Email	Select
Ingrid Patin, Esq.	Ingrid@patinlaw.com	☑

BREMER WHYTE BROWN & O'MEARA LLP
1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144
(702) 258-6665

A-15-723134-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Tort **COURT MINUTES** **December 02, 2015**

A-15-723134-C Ton Lee, Plaintiff(s)
vs.
Ingrid Patin, Defendant(s)

December 02, 2015 **9:00 AM** **Motion to Dismiss**

HEARD BY: Togliatti, Jennifer **COURTROOM:** RJC Courtroom 10C

COURT CLERK: Athena Trujillo

RECORDER: Yvette G. Sison

REPORTER:

PARTIES PRESENT:

Hotchkin, August B., ESQ	Attorney
Jones, Prescott T.	Attorney
Morris, Christian	Attorney
Patin, Ingrid	Defendant

JOURNAL ENTRIES

- Also present: Edward Wynder, Esq. on behalf of Defendant.

Ms. Morris argued in support of the motion, noting that the statement is accurate. Further, Ms. Morris argued that it is free speech and an issue for public concern. Ms. Morris advised the Plaintiff must prove a false and defamatory statement and they cannot prove damages. With respect to the Motion to Dismiss, Ms. Morris argued that Ton V. Lee DDS is the owner of Summerlin Smiles and the statement in the advertisement is factually correct. Mr. Jones argued there is no verdict for the Plaintiff. Upon Court's inquiry, Mr. Jones advised the Plaintiff filed a counter appeal for fees and costs only, not for any verdict unless the Nevada Supreme Court reverses the Judge's ruling. Mr. Jones further argued against the motion noting the statement is defamatory and that the verdict as vacated. Further argument by counsel. COURT ORDERED, matter UNDER ADVISEMENT and matter SET for status check, noting a minute order will issue.

12/09/15 (CHAMBERS) STATUS CHECK: DECISION

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

TON VINH LEE, Plaintiff, vs. INGRID PATIN, PATIN LAW GROUP, PLLC, Defendants.	CASE NO. A-15-723134 DEPT. NO. IX **Transcript of Proceedings**

BEFORE THE HONORABLE JENNIFER TOGLIATTI, DISTRICT COURT JUDGE

DEFENDANTS' RENEWED SPECIAL MOTION TO DISMISS PURSUANT TO NEVADA REVISED STATUTES 41.635-70 OR, IN THE ALTERNATIVE, MOTION TO DISMISS PURSUANT TO NRS 12(b)(5)

WEDNESDAY, DECEMBER 2, 2015

APPEARANCES:

For the Plaintiff: PRESCOTT T. JONES, ESQ.
AUGUST B. HOTCHKIN, ESQ.

For the Defendants: CHRISTIAN MORRIS, ESQ.
EDWARD WYNDER, ESQ.

RECORDED BY: YVETTE SISON, DISTRICT COURT
TRANSCRIBED BY: KRISTEN LUNKWITZ

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

WEDNESDAY, DECEMBER 2, 2015 AT 9:11 A.M.

THE COURT: *Ton Lee versus Ingrid Patin Individually and Patin Law Group*, A723134. Counsel, can you state your appearances?

MR. JONES: Good morning, Your Honor. Prescott Jones and August Hotchkin for the plaintiff.

MS. MORRIS: Good morning, Your Honor. Christian Morris for the defendant. I also have Ed Wynder here with me and Ms. Patin, as well.

THE COURT: Okay. This matter was continued for the Court to hear the Special Motion, and the Motion, and consider all pleadings filed.

MS. MORRIS: I'd like to start with the Special Motion to Dismiss if that pleases the Court?

THE COURT: Sure.

MS. MORRIS: All right. The Special Motion to Dismiss was brought under NRS 41.637, which says:

> A statement which is a good faith communication in furtherance of the right to free speech in direct connection with the issue of public concern is immune from a civil action based on those communications.

In this case, we have free speech because it's an advertisement. Additionally, it's an issue of public concern. What -- and while there aren't any Nevada cases

specifically on the issue of public concern, and there certainly are a litany of California cases on the issue, there is the *Sahara Gaming* case. And, in *Sahara Gaming*, it allowed an absolute privilege for the communication of what happens in a court of justice when it's communicated to the public. So, in this case, we have a communication on what happened in a court of justice and it was dated -- thank you -- and it was simply a recitation of what had occurred. And it was a good faith communication of what had occurred.

If you look at the statement that was posted, it says that there was a verdict. And, in fact, there was a verdict. When we were here previously, we were looking very carefully at the language of the actual statement. And if you'll see that, it states that the verdict was brought -- or there was a verdict and, in fact, there was. And, then, it was against Summerlin Smiles which is, in fact, just a fictitious name for Ton V. Lee, DDS, PC. And he is the owner, Ton V. Lee, in -- DDS, is, in fact, the owner of the PC and the treating physicians who are the ones listed there.

So, it was, in fact, a complete, full, accurate statement of a judicial proceeding which under *Sahara* has an absolute privilege. But it is issue of public concern because it's one that deals with, you know, issues that other dental health, public health professionals would want

to know, persons harmed by other dental malpractice would want to know, people in the public would want to know, and it was something that is of public record. I mean, it was certainly published by other -- the *Trial Reporter*. It was also published, I think, in -- the other publication was, let's see. The *Nevada Legal Update* and the *Trial Reporter* both published it, as well. And in the *Trial Reporter*, again, there's no mention that it was on appeal.

So, under the Special Motion to Dismiss, what we simply have to prove by a preponderance of the evidence is that more likely than not that this was an accurate reporting of free speech, which it was an advertisement, and it was an issue of public concern. So, in *Sahara*, it clearly says that if something's going on in a court of law, it's an issue of public concern so much to the point they give it an absolute privilege.

So, once we established by preponderance of the evidence and it's an issue of public concern, then it shifts over to the defendants to show a burden that they can prove the prima facie case. And, in proving the prima facie case, they have to show that it was a both false and defamatory statement. And, in this case, we know that it was -- every single statement in that statement was, in fact, true. And, for it to be defamatory, it would have to show that he had actually proved damages. Since the -- now

the burden has shifted over to him.

In *Pegasus*, which is another Nevada case we have, it says that:

> The statement is not defamatory if it is substantially true.

It does not have to be absolutely true. And, in *Pegasus*, in that case, that was where a restaurant was considered to be a limited public purpose figure because they had injected themselves into the community and there was a defamatory statement made about whether there was cans of beans there. And, in fact, it was -- the statement was not precisely true because they didn't, in fact, seen the beans but it was substantially true.

So, in addition to the fact that they can't prove that it was either false or defamatory, then they would have to, in fact, prove damages which they haven't done so and won't be able to. And, in fact, if you look at the Complaint on its face, the only allegation that they make in it is that it -- the defamatory statement imputes that Ton V. Lee lacks fitness as a dentist. And the statement which was on Ms. Patin's website clearly says that he is the owner of Summerlin Smiles and delineates that there are two treating physicians.

So, on its face, the Complaint states it's a lack of fitness as a dentist. And all it would -- if you were

to read it, even construing it, it's maybe his lack of fitness as a owner of a business. And it certainly is very clear that she was not listing him as a treating physician in that. So, therefore, I think the Special Motion to Dismiss should be granted.

THE COURT: Do you want to argue related to your 12(b)(5)?

MS. MORRIS: Would you like me to continue with the --

THE COURT: Yes.

MS. MORRIS: Okay.

So, moving back to the Motion to Dismiss, which we were previously before the Court on this matter, and if the Court recalls, the issue was whether or not PC was listed in the statement on Ms. Patin's website. And I think that -- even though I previously addressed it, it's very clear that Ton V. Lee, DDS, is the owner of Summerlin Smiles. And the reason why he is the owner of Summerlin Smiles is because Summerlin Smiles is simply a fictitious name, which is Exhibit L to the Motion, for Ton V. Lee, DDS, PC. And, so, the statement in the advertisement is factually accurate. It could have said Ton V. Lee, DDS, PC and its owner, Ton V. Lee, DDS and it would have had meant the exact same that it says right now because Summerlin Smiles is simply a fictitious name for Ton V. Lee, DDS, PC.

Oh, and -- that's right. In addition, we also attached his trial testimony in open court where he testified under oath that himself, Ton V. Lee, DDS, is president and owner of Summerlin Smiles. And did not correct the Court in any way to say: No, no, no. It's only PC. Which, in fact, he was correct when he made that testimony in open court because Ton V. Lee, DDS, is the owner of Ton V. Lee, DDS, PC, which is the fictitious name for Summerlin Smiles.

Did you want me to readdress the issues that we had in the -- when we were here before?

THE COURT: No.

MS. MORRIS: Okay.

MR. JONES: Good morning, Your Honor. Prescott Jones, again, for the plaintiff.

I'm going to start with the statement, just generally the statement made on the website and the statement that's at issue in this litigation, and I think it goes to really what is the pivotal issue in this case and in this Motion is the truth or falsity of the statement. Two of the -- almost the very first words in that statement are: Plaintiff's verdict. And I think that's very important. We don't have a plaintiff's verdict and we never had a plaintiff's verdict against the plaintiff in this case, Ton Vinh Lee, PC. And I think it's

undisputed that he received a jury verdict and judgment entered in his favor. He was also awarded an award of fees and costs, as well. There is also not a plaintiff's verdict against any of the other defendants in the other underlying litigation.

As we know, the judge in the underlying litigation vacated the jury verdict against the remaining defendants because the plaintiff's only testifying expert in that case provided testimony to the jury that was not based on any reasonable degree of medical certainty. With that in mind, it's hard to justify why you can make the argument that there was a plaintiff's verdict when the jury was -- the judge essentially ruled that the jury was tainted by the testimony that was given to them and, as a result, ruled in their favor.

But, nonetheless, there's not been a jury verdict against any defendant in the underlying litigation since July 2014. That's why the plaintiff in the underlying litigation took an appeal to the Nevada Supreme Court. They're not appealing our client, Mr. Lee -- Dr. Lee is not appealing any verdict that's against him to a Nevada Supreme Court. In fact, it's the plaintiff in the underlying litigation who is appealing everything.

So, there's not a jury verdict -- there's not a plaintiff verdict in the underlying litigation. I think

it's important to point out that it's hard to make the argument that that statement is true when, in fact, you could say the converse of that statement that there's no plaintiff's verdict is, in fact, true at this point, Your Honor.

THE COURT: Why do they say that your client -- that Mr. Lee filed a counter appeal?

MR. JONES: He was appealing an award of fees and costs, I believe, Your Honor. It has nothing to do with any verdict that was against him. And, in fact, I think that counter appeal has been dismissed at that point, anyway. I think the only issue that's pending before the Nevada Supreme Court is the plaintiff in the underlying litigation's appeal of the verdict against them, not in favor of them.

So, at this point, Your Honor, what we really have is the opposite is true. There is no plaintiff's verdict in this case. There hasn't been in over a year and a half, at this point in time. And, unless the Nevada Supreme Court reverses the judge's ruling, there's not going to be a plaintiff's verdict in this case.

And, I think, it's also important to take a look at the fact that they're making the argument that it's just simply -- they're saying plaintiff's verdict and that's a recitation of the facts of the case, but it's important to

take a look at who that statement is directed to. It's directed to potential clients of the defendant. The potential clients of the defendant are going to read that statement and see that there's a plaintiff verdict and without any statement to the contrary, they're going to believe that the parties that are named, including my client, Ton Vinh Lee, DDS, who is the first defendant named in that case, had a plaintiff verdict against him for dental malpractice and wrongful death.

And, because of the fact that the defendant published this on her website, potential clients of my client, Dr. Lee, are also going to read that statement and also come to the same conclusion that Dr. Lee has a -- has been found liable for dental malpractice and wrongful death.

And, in fact, you know, if we get to discovery, Dr. Lee is going to testify that he has been approached by some of his clients and, essentially: I Googled your name. This is one of the first things that came up. You know, what's this all about? Wrongful death and, you know, that's just the clients that have told him that. You have to imagine that there's a number of them who have decided not to use him and he's certainly been damaged by the statement that's been made. But that's for another day.

So, turning now to the requirements for anti-

SLAPP. As my opposing counsel said, it's a two-part requirement. You have to first show a good faith communication and furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern. The first part of that statement, I think, is the most important: A good faith communication.

As we set forth in the brief, NRS 41.647 requires that a good faith communication has to be either truthful or made without knowledge of its falsehood. As I just set forth before and as we set forth extensively in the pleadings, there is no plaintiff's verdict in this case. It can't possibly be said that there is a plaintiff's verdict at this point in time or during the time that the statement was on the defendant's website. Defendants are the handling attorneys, of course, for the underlying litigation. It can't possibly be said that it wasn't made without knowledge of its falsehood.

Second part of that requirement, assuming that if Your Honor is inclined to find that it was, indeed, a good faith communication, second part of that requirement -- again, it's also on the defendant's burden to show that it was made in furtherance of the right to petition or the right of free speech in direct connection with an issue of public concern. And this is where the problems with the statement that the defendants' put into their pleadings --

it sort of comes into play here. They seem to rely on a lot on the portion of the statement that said this matter is on appeal to make the argument that it's some sort of commentary or reporting on an issue that's in front of the Nevada Supreme Court. And, of course, the statement didn't even come into play, it wasn't even on the website until around the time that the Complaint was filed. I think, with that in mind, it's sort of hard to make the argument that it's some sort of commentary on a pending judicial action.

And I think opposing counsel said it well. One of the first things she said to Your Honor is that this in an advertisement and that's exactly our point. It can't possibly be protected free speech that's a commentary on a judicial proceeding that brings it under Nevada's anti-SLAPP law when what we're really talking about here is advertisements, something that the defendants' trying to use for her financial gain.

And if you take a look at the statement, as well, if it is some sort of commentary on a pending judicial proceeding, not a single fact at issue in front of the Nevada Supreme Court is discussed in the defamatory statement. It simply lists the parties at issue in the case. There's no discussion of why this matter was appealed, which was the judge's granting of the judgment as

a matter of law in favor of my clients. There's no discussion of the fact that the plaintiff's only testifying expert was found to have made testimony that is not based on any reasonable degree of medical certainty. There's no discussion of that at all, Your Honor. It's clearly something that's meant for her financial gain. It doesn't bring that in Nevada's anti-SLAPP statute.

If this Court's inclined to find that this does fall under Nevada's anti-SLAPP statute, I can go and discuss the second part of that requirement which is that the burden, then, shifts to my side to show that we've shown a prima facie case for defamation. I think this has been hashed out quite a bit in the pleadings and I don't want to necessarily just recite everything that's in the pleadings, but I do want to cover a couple of topics. And, in fact, we have to show not through clear and convincing evidence, as we've set forth. We have to show in our new law -- under the new law, which is simply a probability of prevailing on the claim. And I think we easily show that, Your Honor.

What we have to first show is, of course, a false and defamatory statement by the defendant concerning the plaintiff was made. And, in fact, out of all the prongs of a defamation claim, this is the only one that's contested by the defendant in their pleadings, so I'm going to focus

mostly on this. And the first part of that statement is that is has to be a false statement. And, I think, you know, we've discussed that at length. I don't think there's really any need to delve into that any further unless Your Honor has any questions.

But I do want to talk about, just a little bit, about the claim that defendants make that even if this statement is not found to be true, that it's somehow substantially true and, therefore, the Court has to find in their favor. And, I think, if this -- if Your Honor is inclined to find that it is substantially true but not completely true, I think that shows that it's absolutely an issue for the jury and should not be granted at this stage of the litigation.

You'll remember, Your Honor, that the statute provides that a Motion to Dismiss, even though it's called a Motion to Dismiss under Nevada's Anti-SLAPP Laws, it's actually governed under Nevada's summary judgment standard, Rule 56. So, what we're looking for is, of course, a dispute of material fact.

And, then, the second part of the first prong of the defamatory -- of the element of a defamatory action is that the statement, of course, must be defamatory. Pursuant to the *Las Vegas Sun* case that was cited in our brief:

A statement is defamatory if it tends to lower the subject in the estimation of the community and excites derogatory opinions against him.

And, Your Honor, I head opposing counsel say that it can't possibly be the case that it's defamatory because he was sued in his capacity as owner of Ton Vinh Lee, DDS, PC, DVA, Summerlin Smiles, therefore, it doesn't impute a lack of fitness to him, personally, just his practice. And, Your Honor, I think, quite frankly, that's ridiculous. He is named -- the first -- in fact, in the caption of the statement, it says:

Description: Ton Vinh Lee, DDS, et al.

Take a look at the people that the statement is directed to, it's essentially laypeople. It's not directed towards attorneys. I think any person -- any potential jury member who would view this statement would think that, of course, with Ton Vinh Lee, DDS, being the first person who is named there, that he was, in fact, the one who received a plaintiff's verdict for dental malpractice and wrongful death.

It's important to point out, as well, that the defendant does nothing -- makes no attempt in that statement to differentiate between Ton Vinh Lee, DDS, personally, Ton Vinh Lee in his professional capacity, or Ton Vinh Lee in his capacity as owner of Summerlin Smiles.

And, nonetheless, will remember that Ton Vinh Lee, in his capacity as owner of the PC, was -- received a jury verdict in his favor and that's not being appealed, I don't believe, Your Honor.

And, again, the defendants don't argue the second prong that there's an unprivileged privilecation [sic] to a third party -- publication. Sorry. To a third party. They don't argue the third prong, that there's an existence of fault. They don't argue the last prong, that the defamation tends to injure the plaintiff in his or her business or profession, although it's kind of wrapped up a little bit in the argument of the first prong, as well. So, I think we've addressed that.

So, with that in mind, Your Honor, just briefly on the 12(b) -- the Renewed 12(b)(5) Motion, I'm a bit confused and my colleague who is with me here today and I had talked extensively about the issue as to the fact that Ton Vinh Lee, DDS, as sole owner of Ton Vinh Lee, PC, which does business as Summerlin Smiles, why the fact that he owns the company means that this case is subject to dismissal. At the end of the day, he was sued in his capacity as owner of Ton Vinh Lee, PC. That's undisputed. It's also undisputed that he received a jury verdict in his favor. There was never a jury verdict. There's nothing that was vacated, nothing that was overturned.

So, I think, with that in mind, I can't see how that simple fact alone -- and keep in mind, that's all that's being argued as it relates to the 12(b)(5) Motion in this brief, that that fact alone necessitates dismissal and I can't quite comprehend why but, with that in mind, he's never received a jury verdict against him. The remaining defendants, including his PC, did receive a jury verdict against him but that verdict was vacated. And we go into quite a bit of discussion in the brief as to the legal effect of a vacating of a jury verdict. It's, essentially, to make it as if it never existed at all. There is no jury verdict. There was no jury verdict. Unless the Nevada Supreme Court overturns Judge Wiese's ruling, there is never going to be a jury verdict against any of the defendants in the underlying litigation, whether it's Dr. Lee, personally, or Dr. Lee's company, or Dr. Lee's treating dentist.

So, with that in mind, Your Honor, I just want to end by discussing the fact that this is, again, governed under Nevada's summary judgment standard. It possibly -- this Motion could not possibly be granted as it was written by the defendants. The wrong law, as we discussed at length during the last hearing, the wrong law was cited and relied on. And, even again, even in the Reply brief in which -- after which the correct law was set forth, there

was still a couple references to clear and convincing evidence. The wrong law was cited. The wrong facts that relate to the statement at issue were repeatedly relied on. Almost every single argument in their initial Motion is premised on the wrong law and the wrong facts. Statement is true -- sorry, Your Honor. The statement is not true because there was never a plaintiff's verdict against the plaintiff in this case. There is not a plaintiff's verdict against any other defendant in the underlying litigation. And I want to end with just a brief quote from the *John versus Douglas County School District* case that says:

> Theh 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.

And, Your Honor, that's not present in this case. Both plaintiff and defendant are professionals that own their own professional practice. They're in similar financial positions. And, in fact, it can hardly be said that my client is trying to rack up litigation costs as against defendant to put them in a weaker position. In fact, I'd say the opposite is true. We have been subjected to motion after motion and we had to file a sur-reply. We had to file a Motion to Strike, a Motion to Continue. Simply put, this is not a SLAPP lawsuit. Even if it is a

SLAPP lawsuit, it's simply -- it cannot be dismissed because the statement is false.

And, if you have any questions, Your Honor, I'll be happy to answer them. Otherwise, we'll submit.

THE COURT: I don't have any questions.

MR. JONES: Thank you, Your Honor.

THE COURT: Thank you.

MS. MORRIS: In reply, the purpose of an anti-SLAPP lawsuit or case is to protect free speech. And, in this case, whether the statement that was placed on the website is true or false is a decision that is a matter of law to be decided. And, in this case, the issue is whether it was a good faith communication. The statement which was made does not say that a verdict was taken against Ton Vinh Lee, DDS, as an individual. It simply states that he was sued as the owner, which is completely accurate. It does not say that there was a judgment. It says that there was a verdict, which is completely accurate. It was posted after the verdict came in. And, at the time it was posted, it was completely accurate.

And I think that counsel made an excellent point. If it goes up to the Supreme Court and the judgment gets reinstated, then it is, again, an accurate statement. At the moment, it's an issue that's on appeal. And the cross-appeal, which was made by Ton V. Lee, is still pending

before the Supreme Court. Only a portion of it was dismissed regarding Dr. Traivai. And, so, it is an issue that is being decided by a judicial body.

What has been reported on that website was something that happened in a court of law. And, under the *Sahara* case, there is an absolute privilege if you simply recite something that has occurred in a court of law. It isn't that Ton V. Lee, DDS, is named first. That's the title of the case. And, in fact, a verdict was brought in that amount and the individuals who are sued are accurately listed on that statement.

So, I think he said that it's, you know, it doesn't matter that it's -- we didn't argue that it's a privileged communication to a third party. That is, in fact, exactly what we're arguing, that this is a privileged communication to a third party. And -- sorry?

[Colloquy between counsel]

MS. MORRIS: Yeah. The fair report [indiscernible].

But the other issue that has been addressed is whether, you know, that he doesn't think that this is an issue of public concern. I mean, this was a dental malpractice death case and it was reported. It's a matter of public record. The -- Ton V. Lee took the stand and said yes, he is the owner. And, now, he comes to Court to

say that it's defamatory that it's been published out there that he is the owner when he has, in fact, admitted he is. If this statement that was posted said anything different than what it does, then it could have a defamatory construction. But, the fact is that every single statement within her post was true. There was a verdict that it was a based on the death, it was the date it was, and plaintiffs sued the dental office, Summerlin Smiles, accurate; the owner, Ton V Lee, DDS, accurate; and the treating dentists, accurate.

So, nothing in that statement is inaccurate. It is a truthful statement. And it is one of public concern that took place in a court of law. And, under the *Sahara* case, simply reciting what happens in a Court of law -- and in the *Sahara* case, they took a Mississippi Complaint, and stole some language from it, and put it in a letter, and the Court said: There's an absolute privilege to that, that the public has a right to know what goes on. And not everyone can be there. And, so, reporting what occurs in a court of law is absolutely privileged.

So, he said that we only argued a portion of it when we renewed our Motion to Dismiss under 12(b)(5). We renewed the Motion, meaning all points of law were in addition. We only focused on -- or renewed. The only reason we focused on who was the owner of Summerlin Smiles

is because that was what was addressed in the hearing previously.

So, we have an anti-SLAPP, which we can prove that this was a good faith communication and it was -- it's protected because it's an issue of public concern. Then, the burden shifts over to them and they are not able to prove that this is a false and defamatory statement. They are not able to show any type of damages. It was made -- at the time it was made, it was absolutely true. And, in fact, it might be true later when the Supreme Court reverses it. So, even if you choose not to grant the Special Motion to Dismiss with the anti-SLAPP, I think that the 12(b)(5) is clearly a Motion that needs to be granted due to the fact that there is an absolute privilege for the statements that were made. And, as a matter of law, they're true.

Thank you.

THE COURT: Okay. Well, that matter has been thoroughly briefed and argued, I appreciate your appearance today, and I'll issue a minute order with the Court's ruling. Thank you.

MR. JONES: Thank you, Your Honor.

PROCEEDING CONCLUDED AT 9:38 A.M.

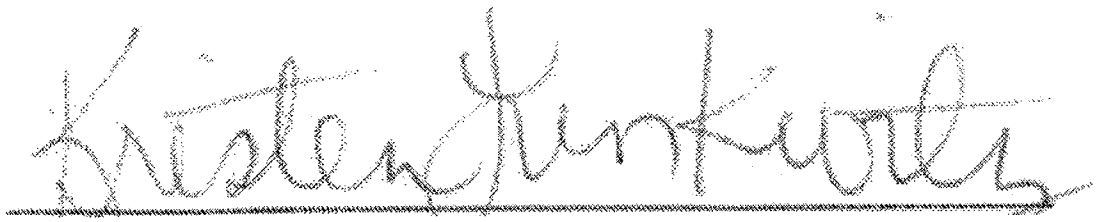
* * * * *

CERTIFICATION

I certify that the foregoing is a correct transcript from the audio-visual recording of the proceedings in the above-entitled matter.

AFFIRMATION

I affirm that this transcript does not contain the social security or tax identification number of any person or ertity.



KRISTEN LUNKWITZ
INDEPENDENT TRANSCRIBER

A-15-723134-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Tort | **COURT MINUTES** | **January 13, 2016**

A-15-723134-C Ton Lee, Plaintiff(s)
vs.
Ingrid Patin, Defendant(s)

January 13, 2016 **3:00 AM** **Status Check**

HEARD BY: Togliatti, Jennifer **COURTROOM:**

COURT CLERK: Phyllis Irby

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

- This Court having considered the Defendants Special Motion to Dismiss Pursuant to NRS 41.635-70, or in the Alternative Motion to Dismiss Pursuant to NRS 12(b)(5), all related pleadings, and oral arguments of counsel, first FINDS Defendants Motion is timely filed pursuant to NRS 41.660. Next, this Court FINDS the communication at issue (as detailed by the Plaintiff in his Opposition to this Motion) under the circumstances of the nature, content, and location of the communication is not 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. Specifically, NRS 41.637(3) doesn t apply because the communication does not reference an appeal, nor does there appear to be any connection to the communication and its timing to any purpose other than attorney advertising. NRS 41.637(4) does not apply because it appears there is no direct connection to a matter of public interest, and instead it appears to be for the purpose of attorney advertising.

However, even if NRS 41. 637(3) or (4) did apply to complained of communication, this Court cannot find at this juncture that the Plaintiff hasn t put forth prima facie evidence demonstrating a probability of prevailing on this claim. This is particularly true because the truth or falsity of an allegedly defamatory statement is an issue for the jury to determine. Posadas v. City of Reno, 109 Nev. 448, 453 (1993). Further, because if found to be defamatory and the statement is such that would

tend to injure the Plaintiff in his business or profession, then it will be deemed defamation per se and damages will be presumed. Nevada Ind. Broadcasting v. Allen, 99 Nev. 404, 409 (1983). Therefore, for the reasons stated herein Court ORDERS Special Motion to Dismiss pursuant to Nevada s anti-SLAPP laws DENIED.

Next, this Court FINDS all of Defendants other arguments are not properly decided in a Motion to Dismiss and/or are without merit and ORDERS Defendants Alternative 12(b)(5) Motion to Dismiss DENIED. Further, this Court DENIES Plaintiff s Countermotion for attorney s fees and costs as this Court does not find the special motion to be frivolous or vexatious. Further, the misstatement of the evidentiary burden cannot be considered more than a harmless error on the part of counsel considering the facts here.

Finally, this Court notes that the parties have not in any Motion to Dismiss thus far distinguished between allegations of conduct of the individual Defendant versus the corporate Defendant, and therefore, this Court notes that any rulings herein and regarding the previous Motion to Dismiss do not address that issue. Counsel for the Plaintiff is to prepare the proposed order tracking the language of this minute order and allow for Defendants counsel s signature as to form and content.

CLERK'S NOTE: A copy of this Minute Order shall be placed in the Attorney folders for the following:
Prescott T. Jones, Esq., August B. Hotchkin, Esq., and Bremer Whyte Brown & O'Meara LLP./pi

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CLERK OF THE COURT

PRESCOTT T. JONES, ESQ.
Nevada State Bar No. 11617
AUGUST B. HOTCHKIN, ESQ.
Nevada State Bar No. 12780
BREMER WHYTE BROWN & O'MEARA LLP
1160 N. TOWN CENTER DRIVE
SUITE 250
LAS VEGAS, NV 89144
TELEPHONE: (702) 258-6665
FACSIMILE: (702) 258-6662
pjones@bremerwhyte.com
ahotchkin@bremerwhyte.com

Attorneys for Plaintiff,
TON VINH LEE

DISTRICT COURT

CLARK COUNTY; NEVADA

TON VINH LEE, an individual, Plaintiff, vs. INGRID PATIN, an individual; and PATIN LAW GROUP, PLLC, a Nevada Professional LLC, Defendants.	Case No. A-15-723134 Dept. No.: IX **NOTICE OF ENTRY OF ORDER DENYING DEFENDANTS' SPECIAL MOTION TO DISMISS PURSUANT TO NRS 41.635-70, OR IN THE ALTERNATIVE, MOTION TO DISMISS PURSUANT TO NRCP 12(B)(5)**

PLEASE TAKE NOTICE that an **ORDER DENYING DEFENDANTS' SPECIAL MOTION TO DISMISS PURSUANT TO NRS 41.635-70, OR IN THE ALTERNATIVE, MOTION TO DISMISS PURSUANT TO NRCP 12(B)(5)** was entered on February 3, 2016. A copy of said ORDER is attached hereto.

Dated: February 4, 2016

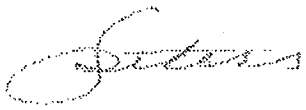
BREMER WHYTE BROWN & O'MEARA LLP

By: _____
Prescott T. Jones, Esq., Bar No. 11617
August B. Hotchkin, Esq., Bar No. 12780
Attorneys for Plaintiff
TON VINH LEE

CERTIFICATE OF SERVICE

I hereby certify that on 4th day of February, 2016, a true and correct copy of the foregoing document was electronically served on Wiznet upon all parties on the master e-file and serve list.

Name	Email	Service
Christian M. Morris, Esq.	christianmorris@nettleslawfirm.com	☑
Kim Alverson	kim@nettleslawfirm.com	☑
Patin Law Group, PLLC		
Name	**Email**	**Service**
Ingrid Patin, Esq.	ingrid@patinlaw.com	☑



Jo Peters, an employee of Bremer Whyte Brown & O'Meara

BREMER WHYTE BROWN & O'MEARA LLP
1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144
(702) 258-6665

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CLERK OF THE COURT

ORDR
PRESCOTT T. JONES, ESQ.
Nevada State Bar No. 11617
AUGUST B. HOTCHKIN, ESQ.
Nevada State Bar No. 12780
BREMER WHYTE BROWN & O'MEARA LLP
1160 N. TOWN CENTER DRIVE
SUITE 250
LAS VEGAS, NV 89144
TELEPHONE: (702) 258-6665
FACSIMILE: (702) 258-6662
pjones@bremerwhyte.com
ahotchkin@bremerwhyte.com

Attorneys for Plaintiff,
TON VINH LEE

DISTRICT COURT

CLARK COUNTY, NEVADA

TON VINH LEE, an individual, Plaintiff, vs. INGRID PATIN, an individual; and PATIN LAW GROUP, PLLC, a Nevada Professional LLC, Defendants.	Case No. A-15-723134 Dept. No.: IX **ORDER DENYING DEFENDANTS' SPECIAL MOTION TO DISMISS PURSUANT TO NRS 41.635-70, OR IN THE ALTERNATIVE, MOTION TO DISMISS PURSUANT TO NRCP 12(B)(5)**

Defendants INGRID PATIN and PATIN LAW GROUP, PLLC's (collectively "Defendants") Special Motion to Dismiss Pursuant to NRS 41.635-70, or in the Alternative, Motion to Dismiss Pursuant to NRCP 12(b)(5) came on for hearing before this Court on December 2, 2015. The Court, having read all of the pleadings and papers on file herein, and good cause appearing, therefore, it is hereby:

ORDERED, ADJUDGED AND DECREED that Defendants' Motion is timely filed pursuant to NRS 41.660.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the communication at issue (as detailed by the Plaintiff Ton Vinh Lee in his Opposition to this Motion) under the circumstances of the nature, content, and location of the communication is not 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. Specifically, NRS 41.637(3) does not apply because the communication does not reference an appeal, nor does there appear to be any connection to the communication and its timing to any purpose other than attorney advertising. NRS 41.637(4) does not apply because it appears there is no direct connection to a matter of public interest, and instead it appears to be for the purpose of attorney advertising. However, even if NRS 41.637(3) or (4) did apply to complained-of communication, this Court cannot find at this juncture that the Plaintiff hasn't put forth prima facie evidence demonstrating a probability of prevailing on this claim. This is particularly true because the truth or falsity of an allegedly defamatory statement is an issue for the jury to determine. Posadas v. City of Reno, 109 Nev. 448, 453 (1993). Further, because if found to be defamatory and the statement is such that would tend to injure the Plaintiff in his business or profession, then it will be deemed defamation per se and damages will be presumed. Nevada Ind. Broadcasting v. Allen, 99 Nev. 404, 409 (1983).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as set forth herein, the Special Motion to Dismiss pursuant to Nevada's Anti-SLAPP law is DENIED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all of Defendants' other arguments are not properly decided in a Motion to Dismiss and/or are without merit. Defendants' Alternative 12(b)(5) Motion to Dismiss is DENIED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff's Countermotion for attorney's fees and costs is DENIED as this Court does not find the Special Motion to be frivolous or vexatious.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the misstatement of the evidentiary burden cannot be considered more than a harmless error on the part of counsel considering the facts here.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parties have not in any Motion to Dismiss thus far distinguished between allegations of conduct of the individual Defendant versus the corporate Defendant, and therefore, any rulings herein and regarding the previous Motion to Dismiss do not address this issue.

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 N. Town Center Drive
Suite 600
Las Vegas, NV 89144
(702) 382-0211

IT IS SO ORDERED.

DATED this 3rd day of January, 2016. February 8.

A723134
Order Denying Defendants' Special Motion to Dismiss Pursuant to NRS 41.660 or, in the Alternative, Motion to Dismiss Pursuant to NRCP 12(b)(5)

Jennifer P. Togliatti
DISTRICT COURT JUDGE

Respectfully submitted,

BREMER WHYTE BROWN & O'MEARA LLP

By: _____ #12780
Prescott T. Jones, Esq.
Nevada State Bar No. 11617
August B. Hotchkin, Esq.
Nevada State Bar No. 12780

Approved as to form and content,

NETTLES LAW GROUP

By: _____
Christian M. Morris, Esq.
Nevada State Bar No. 11218

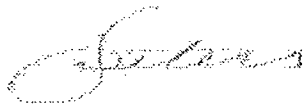
CERTIFICATE OF SERVICE

I hereby certify that on 4th day of February, 2016, the following document was electronically served to all registered parties for case number A723134 as follows:

Name	Email		Select
Christian M. Morris, Esq.	[redacted]	☒	☑
Kim Alverson	[redacted]	☒	☑

Patin Law Group, PLLC

Name	Email		Select
Ingrid Patin, Esq.	[redacted]	☒	☑



Jo Peters, an employee of Bremer Whyte Brown & O'Meara

BREMER WHYTE BROWN & O'MEARA LLP
1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144
(702) 258-6665

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03/04/2016 01:07:34 PM

CLERK OF THE COURT

NOAS
CHRISTIAN M. MORRIS, ESQ.
Nevada Bar No. 11218
NETTLES LAW FIRM
1389 Galleria Drive, Suite 200
Henderson, Nevada 89014
Telephone: (702) 434-8282
Facsimile: (702) 434-1488
christian@nettleslawfirm.com
Attorney for Defendants, Ingrid Patin and Patin Law Group, PLLC

DISTRICT COURT

CLARK COUNTY, NEVADA

TON VINH LEE, an individual, Plaintiff, v. INGRID PATIN, an individual, and PATIN LAW GROUP, PLLC, a Nevada Professional LLC, Defendants.	CASE NO.: A-15-723134-C DEPT NO.: IX **NOTICE OF APPEAL**

NETTLES LAW FIRM
1389 Galleria Drive, Suite 200
Henderson, NV 89014
702 434 8282 / 702 434 1488 (fax)

Defendants, Ingrid Patin, an individual, and Patin Law Group, PLLC, a Nevada Professional LLC, by and through their counsel of record, Christian M. Morris, Esq. of the Nettles Law Firm, hereby appeal to the Supreme Court of Nevada from the Order [Denying Defendants' Special Motion to Dismiss Pursuant to NRS 41.635-70], filed on February 4, 2016, and attached hereto as **Exhibit A**.

Dated this 4th day of March, 2016.

NETTLES LAW FIRM

Christian M. Morris, Esq.
Nevada Bar No. 011218
1389 Galleria Drive, Suite 200
Henderson, NV 89014
Attorneys for Defendants, Ingrid Patin and Patin Law Group, PLLC

NETTLES LAW FIRM
1389 Galleria Drive, Suite 200
Henderson, NV 89014

NETTLES LAW FIRM
1389 Galleria Drive, Suite 200
Henderson, NV 89014

CERTIFICATE OF SERVICE

Pursuant to NEFCR 9, NRCP (b) and EDCR 7.26, I certify that on this 4 day of March, 2016, I served the foregoing **NOTICE OF APPEAL** on the following parties by electronic transmission through the Wiznet system on.

Bremer Whyte Brown & O'Meara	
Contact	**Email**
Ashley Boyd	aboyd@bremerwhyte.com
Courtney Droessler	cdroessler@bremerwhyte.com
Jennifer Vela	jvela@bremerwhyte.com
Jo Peters	jpeters@bremerwhyte.com

Bremer, Whyte, Brown & O'Meara	
Contact	**Email**
Prescott Jones, Esq.	pjones@bremerwhyte.com

Bremer, Whyte, Brown & O'Meara, LLP	
Contact	**Email**
August B. Hotchkin	ahotchkin@bremerwhyte.com

Patin Law Group, PLLC	
Contact	
Ingrid Patin, Esq.	ingrid@patinlaw.com

An Employee of Nettles Law Firm

ASTA
CHRISTIAN M. MORRIS, ESQ.
Nevada Bar No. 11218
NETTLES LAW FIRM
1389 Galleria Drive, Suite 200
Henderson, Nevada 89014
Telephone: (702) 434-8282
Facsimile: (702) 434-1488
christian@nettleslawfirm.com
Attorney for Defendants, Ingrid Patin and Patin Law Group, PLLC

DISTRICT COURT

CLARK COUNTY, NEVADA

TON VINH LEE, an individual, Plaintiff, v. INGRID PATIN, an individual, and PATIN LAW GROUP, PLLC, a Nevada Professional LLC, Defendants.	CASE NO.: A-15-723134-C DEPT NO.: IX **CASE APPEAL STATEMENT**

CASE APPEAL STATEMENT

Defendants, Ingrid Patin, an individual, and Patin Law Group, PLLC, a Nevada Professional LLC, by and through their counsel of record, Christian M. Morris, Esq. of the Nettles Law Firm, hereby file this Case Appeal Statement.

1. Name of appellant filing this Case Appeal Statement: Defendants, Ingrid Patin, an individual, and Patin Law Group, PLLC, a Nevada Professional LLC

2. Identify the Judge issuing the decision, judgment, or order appealed from: Honorable Jennifer Togliatti

3. Identify each appellant and the name and address of counsel for each appellant:

Appellants: Ingrid Patin, an individual

Patin Law Group, PLLC, a Nevada Professional LLC

Attorneys: Christian M. Morris, Esq.
Nettles Law Firm
1389 Galleria Drive, Suite 200
Henderson, NV 89014

4. Identify each respondent and the name and address of appellate counsel, if known, for each respondent (if the name of a respondent's appellate counsel is unknown, indicated as much and provide the name and address of that respondent's trial counsel):

Respondents: Ton Vinh Lee

Attorneys: Prescott T. Jones, Esq.
BREMER WHYTE BROWN & O'MEARA LLP
1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144

5. Indicate whether any attorney identified above in response to question 3 or 4 is not licensed to practice law in Nevada and, if so, whether the district court granted that attorney permission to appear under SCR 42 (attach a copy of any district court order granting such permission): N/A.

6. Indicated whether appellant was represented by appointed or retained counsel in the district court: Retained.

7. Indicate whether appellant is represented by appointed or retained counsel on appeal: Retained.

8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave: N/A.

9. Indicate the date the proceedings commenced in the district court (e.g., date complaint indictment, information, or petition was filed): The complaint was filed on August 17, 2015.

NETTLES LAW FIRM
1389 Galleria Drive, Suite 200
Henderson, NV 89014

NETTLES LAW FIRM
1389 Galleria Drive, Suite 200
Henderson, NV 89014

10. Provide a brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief granted by the district court:

This appeal is taken from a defamation per se action brought against Defendants by Plaintiff. Plaintiff alleges that Defendant posted a false and defamatory statement on their business website. The alleged false and defamatory statement relates to a jury verdict rendered in favor of Plaintiffs against Defendants Ton V. Lee, DDS, Prof. Corp. d/b/a Summerlin Smiles and Florida Traivai, DMD in the amount of $3,470,000 in Case No. A-12-656091-C. The Judgment on Jury Verdict awarded the total of $3,470,000, plus interest, and costs in the amount of $38,042.64 to Plaintiffs. The alleged false and defamatory statement lists the case name, *Singletary v. Ton Vinh Lee, DDS, et al.*, as well as a detailed description of the case: "A dental malpractice-based wrongful death action that arose out of the death of Decedent Reginald Singletary following the extraction of the No. 32 wisdom tooth by Defendants on or about April 16, 2011. Plaintiff sued the dental office, Summerlin Smiles, the owner, Ton Vinh Lee, DDS, and the treating dentists, Florida Traivai, DMD and Jai Park, DDS, on behalf of the Estate, herself and minor son."

Defendants appeal from the Order [Denying Defendants' Special Motion to Dismiss Pursuant to NRS 41.635-70], filed on February 4, 2016.

11. Indicate whether the case has previously been the subject of an appeal to or original writ proceeding in the Supreme Court and, if so, the caption and Supreme Court docket number of the prior proceeding: N/A

12. Indicate whether this appeal involves child custody or visitation: N/A.

13. If this is a civil case, indicate whether this appeal involves the possibility of settlement: This case does involve the possibility of a settlement.

Dated this 4th day of March, 2016.

NETTLES LAW FIRM

Christian M. Morris, Esq.
Nevada Bar No. 011218
1389 Galleria Drive, Suite 200
Henderson, NV 89014
Attorneys for Defendants, Ingrid Patin and Patin Law Group, PLLC

NETTLES LAW FIRM
1389 Galleria Drive, Suite 200
Henderson, NV 89014

NETTLES LAW FIRM
1389 Galleria Drive, Suite 200
Henderson, NV 89014

CERTIFICATE OF SERVICE

Pursuant to NEFCR 9, NRCP (b) and EDCR 7.26, I certify that on this 4 day of March, 2016, I served the foregoing **CASE APPEAL STATEMENT** on the following parties by electronic transmission through the Wiznet system.

Bremer Whyte Brown & O'Meara	
Contact	**Email**
Ashley Boyd	aboyd@bremerwhyte.com
Courtney Droessler	cdroessler@bremerwhyte.com
Jennifer Vela	jvela@bremerwhyte.com
Jo Peters	jpeters@bremerwhyte.com

Bremer, Whyte, Brown & O'Meara	
Contact	**Email**
Prescott Jones, Esq.	pjones@bremerwhyte.com

Bremer, Whyte, Brown & O'Meara, LLP	
Contact	**Email**
August B. Hotchkin	ahotchkin@bremerwhyte.com

Patin Law Group, PLLC	
Contact	
Ingrid Patin, Esq.	ingrid@patinlaw.com

An Employee of Nettles Law Firm

IN THE SUPREME COURT OF THE STATE OF NEVADA

SVETLANA SINGLETARY, INDIVIDUALLY, AND AS THE REPRESENTATIVE OF THE ESTATE OF REGINALD SINGLETARY, AND AS PARENT AND LEGAL GUARDIAN OF GABRIEL L. SINGLETARY, A MINOR,
Appellant,
vs.
TON VINH LEE, DDS, INDIVIDUALLY; FLORIDA TRAIVAI, DMD, INDIVIDUALLY; AND TON V. LEE, DDS, PROF. CORP., A NEVADA PROFESSIONAL CORPORATION, D/B/A SUMMERLIN SMILES,
Respondents.

Supreme Court No. 66278
District Court Case No. A656091

FILED
NOV 29 2016
CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Elizabeth A. Brown, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the..."

Judgment, as quoted above, entered this 17th day of October, 2016.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this November 16, 2016.

Elizabeth A. Brown, Supreme Court Clerk

By: Dana Richards
Deputy Clerk

A-12-656091-C
CCJAR
NV Supreme Court Clerks Certificate/Judgm
4601907

9

IN THE SUPREME COURT OF THE STATE OF NEVADA

SVETLANA SINGLETARY, INDIVIDUALLY, AND AS THE REPRESENTATIVE OF THE ESTATE OF REGINALD SINGLETARY, AND AS PARENT AND LEGAL GUARDIAN OF GABRIEL L. SINGLETARY, A MINOR,
Appellant,
vs.
TON VINH LEE, DDS, INDIVIDUALLY; FLORIDA TRAIVAI, DMD, INDIVIDUALLY; AND TON V. LEE, DDS, PROF. CORP., A NEVADA PROFESSIONAL CORPORATION, D/B/A SUMMERLIN SMILES,
Respondents.

No. 66278

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a district court judgment as a matter of law in a dental malpractice action. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

Appellant brought dental malpractice claims against respondents, alleging that Ronald Singletary died as a result of respondents' negligence following a tooth extraction. At the close of appellant's case, respondents orally moved for dismissal under NRCP 41(b), arguing that appellant's dental expert failed to testify regarding standard of care to a reasonable degree of medical probability. The district court denied those motions. Subsequently, a jury found that both Summerlin Smiles and Dr. Florida Traivai were contributorily negligent, and awarded damages to appellant. Summerlin Smiles and Dr. Traivai filed motions for judgment as a matter of law on the same ground raised in their NRCP 41(b) motions. The district court granted the motions, finding that appellant's expert failed to provide standard of care and causation

16-32399

testimony to the required degree of certainty, and it entered judgment as a matter of law in favor of Summerlin Smiles and Dr. Traivai.

In deciding whether to grant an NRCP 50(b) motion, the district court "must view the evidence and all inferences in favor of the nonmoving party." *Nelson v. Heer*, 123 Nev. 217, 222, 163 P.3d 420, 424 (2007). "To defeat the motion, the nonmoving party must have presented sufficient evidence such that the jury could grant relief to that party." *Id.* at 222-23, 163 P.3d at 424. This court reviews a district court order granting a NRCP 50(b) motion de novo. *Id.* at 223, 163 P.3d at 425.

Having reviewed the parties' briefs and appendices, we conclude that the district court erred in granting judgment as a matter of law and finding that appellant's general dentistry expert failed to state his standard of care opinions to the required reasonable degree of medical probability. The district court determined that the dental expert's testimony should have been stricken as inadmissible because the expert did not use the phrase "to a reasonable degree of medical probability" in rendering his opinion on the standard of care following a tooth extraction. We conclude that this finding was in error. While medical expert testimony regarding standard of care must be made to a reasonable degree of medical probability, there is no requirement that the specific phrase "reasonable degree of medical probability" must be used by the expert in their testimony. *Morsicato v. Sav-On Drug Stores, Inc.*, 121 Nev. 153, 157-58, 111 P.3d 1112, 1115-16 (2005). Thus, the district court should have considered the nature, purpose, and certainty of the dental expert's testimony rather than whether he uttered a specific phrase. *Id.*; *see FCH1, LLC. v. Rodriguez*, 130 Nev., Adv. Op. 46, 335 P.3d 183, 188 (2014) (recognizing that "the refrain is functional, not talismatic," and in evaluating such testimony, the district court should "consider[ ] the

purpose of the expert testimony and its certainty in light of its context" rather than listen for specific words (citing *Williams v. Eighth Judicial Dist. Court*, 127 Nev. 518, 530, 262 P.3d 360, 368 (2011))).

In this case, the expert's opinions were based on his extensive experience as a practicing dentist, including his experience performing tooth extractions, and his review of the documents and records in this case. In testifying that the standard of care requires antibiotic treatment and/or follow-up care to determine whether the patient is experiencing symptoms of infection and that Summerlin Smiles and Dr. Traivai breached that standard, appellant's expert did not use speculative, hypothetical, or equivocal language. Appellant's expert provided a definitive opinion as to the standard of care and its breach in this case, stating that Singletary's infection could have been controlled with antibiotics, that the use of antibiotics is common practice, and that it was a violation of the standard of care not to follow up with Singletary. Although the district court also found that appellant's expert failed to provide causation testimony with the required degree of certainty, appellant's infectious disease expert testified that Singletary died from an infection and swelling that spread from the site of his removed tooth into his neck and the area around the lung space, but that if Singletary had been given antibiotics in the days following the tooth extraction he would not have died, and the infectious disease expert specifically stated that his opinion was made "to a reasonable degree of medical probability." We therefore reverse the district court's judgment as a matter of law and direct the district court to reinstate the jury's verdict.

Appellant also challenges the district court's award of costs to respondent Ton Vinh Lee, D.D.S. Appellant, however, expressly asked the district court to award Dr. Lee half of the costs requested in his motion.

Appellant therefore lacks standing to appeal the costs award because she is not aggrieved by that order. NRAP 3A(a); *Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 874 P.2d 729 (1994); *Farnham v. Farnham*, 80 Nev. 180, 391 P.2d 26 (1964) (holding that party who prevails in the district court is not "aggrieved"). Regardless, appellant did not argue that Dr. Lee failed to file a memorandum of costs in the district court, *see Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (holding that a point not raised in the district court is deemed to have been waived and will not be considered on appeal), and the argument otherwise lacks merit because Dr. Lee did provide a memorandum of costs. We therefore affirm the award of costs to Dr. Lee. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.[1]

Cherry, J.
Cherry

Douglas, J.
Douglas

Gibbons, J.
Gibbons

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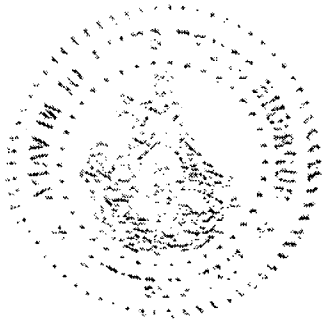
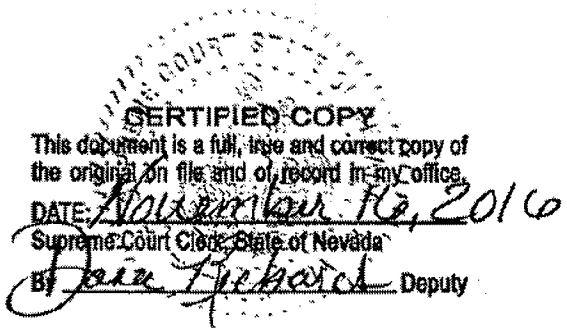
[1]In light of this order, we need not address appellant's other assignments of error.

Respondents' request that we instruct the district court to address certain issues regarding statutory caps and remittitur is denied as the district court entered judgment as a matter of law without considering those issues and those issues should be addressed in the district court in the first instance.

cc: Hon. Jerry A. Wiese, District Judge
James J. Jimmerson, Settlement Judge
Patin Law Group, PLLC
Baker Law Offices
Marquis Aurbach Coffing
Maupin Naylor Braster
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
David N. Frederick
Horvitz & Levy, LLP
Stark Friedman & Chapman
Eighth District Court Clerk




CERTIFIED COPY
This document is a full, true and correct copy of
the original on file and of record in my office.
DATE: November 16, 2016
Supreme Court Clerk, State of Nevada
By: Deputy

IN THE SUPREME COURT OF THE STATE OF NEVADA

SVETLANA SINGLETARY, INDIVIDUALLY, AND AS THE REPRESENTATIVE OF THE ESTATE OF REGINALD SINGLETARY, AND AS PARENT AND LEGAL GUARDIAN OF GABRIEL L. SINGLETARY, A MINOR,
Appellant,
vs.
TON VINH LEE, DDS, INDIVIDUALLY; FLORIDA TRAIVAI, DMD, INDIVIDUALLY; AND TON V. LEE, DDS, PROF. CORP., A NEVADA PROFESSIONAL CORPORATION, D/B/A SUMMERLIN SMILES,
Respondents.

Supreme Court No. 66278
District Court Case No. A656091

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: November 16, 2016

Elizabeth A. Brown, Clerk of Court

By: Dana Richards
Deputy Clerk

cc (without enclosures):
Hon. Jerry A. Wiese, District Judge
Marquis Aurbach Coffing
Baker Law Offices
Patin Law Group, PLLC
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Stark Friedman & Chapman
David N. Frederick
Maupin Naylor Braster
Horvitz & Levy, LLP

RECEIPT FOR REMITTITUR

Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on NOV 29 2016.

HEATHER UNGERMANN

Deputy District Court Clerk

RECEIVED

NOV 28 2016

CLERK OF THE COURT

in favor of Plaintiffs and against Summerlin Smiles based upon a proper standard, which would result in an award of $867,500. In the related issues of remittitur and additur, the affected party is given a mandatory option of a new trial in lieu of accepting the new award.[182] Therefore, since Plaintiffs have already prevailed against Summerlin Smiles at trial under the heightened standard, the Court should either reinstate the jury's verdict against Summerlin Smiles ($867,500), or alternatively, at Plaintiffs' option, order a new trial as to Summerlin Smiles based upon the lower standard for ordinary negligence.

E. THE AWARD OF COSTS TO LEE SHOULD BE VACATED FOR HIS FAILURE TO PROPERLY ITEMIZE THE REQUESTED COSTS AND HIS FAILURE TO FILE A MEMORANDUM OF COSTS.

The $6,032.83 award of costs to Lee should be vacated for his failure to properly itemize the requested costs and his failure to file a memorandum of costs. Lee failed to itemize his requested costs, as required by Nevada law, and he also failed to separately file a memorandum of costs, as required by NRS 18.110(1).[183]

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

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[182] See Lee v. Ball, 121 Nev. 391, 394–395, 116 P.3d 64, 66–67 (2005) ("[T]he district court abused its discretion in failing to offer Lee the option of a new trial or acceptance of the additur."); see also Harris v. Zee, 87 Nev. 309, 311, 486 P.2d 490, 491 (1971) (both the district court and the Supreme Court possess power to enter an order granting a new trial unless the plaintiff accepts a remittitur).

[183] See Gibellini v. Klindt, 110 Nev. 1201, 1206, 885 P.2d 540, 543 (1994) (prohibiting a reasonable estimate of costs, for administrative convenience, as the basis to recover costs).

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10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

1. Nevada Law Does Not Permit Arbitrary Estimates of Requested Costs.

In the hearing on Lee's motion for costs, the District Court stated that it was unable to award the full $12,065.67 in requested costs because Lee and Summerlin Smiles were represented by the same counsel, and Lee prevailed while Summerlin Smiles did not.[184] The District Court acknowledged that it was not certain what to do, so it just awarded half the requested amount ($6,032.83), without any specific allocation to Lee and Summerlin Smiles.[185] Yet, Nevada law does not permit arbitrary estimates of costs to be awarded. In Gibellini v. Klindt, this Court prohibited the practice of awarding costs based upon a reasonable estimate of costs, as opposed to actual costs, for administrative convenience.[186] Since Lee was unable to itemize any of his costs, the entire award of costs should be vacated.

2. Lee's Failure to File a Memorandum of Costs to Support His Award of Costs Is Fatal to the Entire Award.

According to NRS 18.110(1), a verified memorandum of costs must be filed with the clerk within five days after the entry of judgment. Lee never separately filed a memorandum of costs.[187] Instead, he only filed a motion for

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[184] AA 11:2247–2253.

[185] Id.

[186] 110 Nev. at 1206, 885 P.2d at 543.

[187] AA 13:2786–2795.

costs.[188] In recent Nevada precedent, this Court has specifically upheld the denial of costs for failure to comply with NRS 18.110(1) by actually filing a memorandum of costs: "Even if the homeowners were not precluded from recovering costs by NRS 17.115 and NRCP 68, they would be for their failure to file a memorandum of costs pursuant to NRS 18.110(1)."[189] Therefore, regardless of the Court's decision on the other issues presented in this appeal, the award of costs to Lee should be vacated.

VII. CONCLUSION

In summary, the Court should reinstate the jury's $3,470,000 verdict in favor of Plaintiffs based upon the District Court's unnecessary requirement for specific talismanic language to be uttered by Plaintiffs' experts at trial to establish the standard of care to a reasonable degree of medical probability. Similarly, this Court's review of all the evidence in the record supports the establishment of the standard of care to a reasonable degree of medical probability. If the Court reinstates the jury's verdict, the Court should also reinstate Plaintiffs' $38,042.64 award of costs against Traivai and Summerlin Smiles.

Alternatively, the Court should order a new trial based upon the prejudice to Plaintiffs for prevailing on Defendants' oral NRCP 41(b) motions at the close of Plaintiffs' case, only to have the District Court reconsider similar motions post-trial after the jury had already been released. At that point, it was

[188] AA 11:2180–2185.

[189] Gunderson v. D.R. Horton, Inc., 319 P.3d 606, 616, n. 6 (Nev. 2014).

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

impossible for Plaintiffs to rehabilitate their witnesses, and this Court should, alternatively, grant a new trial on this basis.

With respect to Summerlin Smiles, the Court should either reinstate the jury's $867,500 verdict or, at Plaintiffs' option, order a new trial as to Plaintiffs' ordinary negligence claims against Summerlin Smiles because none of the claims were subject to the more stringent standards for dental malpractice.

Finally, the Court should vacate the award of costs to Lee because he failed to itemize the requested costs or separately file a memorandum of costs.

Dated this 23rd day of March, 2015.

MARQUIS AURBACH COFFING

By /s/ Micah S. Echols
Micah S. Echols, Esq.
Nevada Bar No. 8437
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Appellants/Cross-Respondents

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

CERTIFICATE OF COMPLIANCE

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 Microsoft Word 2007 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 28.2(e)(2) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 9,299 words; or

☐ does not exceed _____ pages.

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

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

Dated this 23rd day of March, 2015.

MARQUIS AURBACH COFFING

By /s/ Micah S. Echols
Micah S. Echols, Esq.
Nevada Bar No. 8437
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Appellants/Cross-Respondents

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANTS/CROSS-RESPONDENTS' OPENING BRIEF** and **APPELLANTS/CROSS-RESPONDENTS' APPENDIX, VOLUMES 1–13** were filed electronically with the Nevada Supreme Court on the 23rd day of March, 2015. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

David Frederick, Esq.
Amanda Brookhyser, Esq
S. Brent Vogel, Esq.
A. William Maupin, Esq.
Jason Friedman, Esq

/s/ Leah Dell
Leah Dell, an employee of
Marquis Aurbach Coffing

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

MAC:13785-001 2437437_1

EXHIBIT "C"

EXHIBIT "C"

Lloyd W. Baker, Esq.
Nevada Bar No. 6893
Ingrid Patin, Esq.
Nevada Bar No. 011239
BAKER LAW OFFICES
500 S. Eighth Street
Las Vegas, NV 89101
Telephone : (702) 360-4949
Facsimile : (702) 360-3234

Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

SVETLANA SINGLETARY, individually, as the Representative of the Estate of REGINALD SINGLETARY, and as parent and legal guardian of GABRIEL L. SINGLETARY, a Minor,

Plaintiff,

v.

TON VINH LEE, DDS, individually, FLORIDA TRAIVAI, DMD, individually, JAI PARK, DDS, individually; TON V. LEE, DDS, PROF. CORP., a Nevada Professional Corporation d/b/a SUMMERLIN SMILES, DOE SUMMERLIN SMILES EMPLOYEE, and DOES I through X and ROE CORPORATIONS I through X, inclusive,

Defendants.

Case No.: A-12-656091-C
Dept. No.: 30

JUDGMENT ON JURY VERDICT FOR DEFENDANT TON VINH LEE, DDS

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JUDGMENT ON JURY VERDICT FOR DEFENDANT TON VINH LEE, DDS

This action came on for trial before the Eighth Judicial District Court and a jury on January 13, 2014, before Honorable Jerry A. Wiese, II, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED, that judgment be entered in favor of Defendant Ton Vinh Lee, DDS.

IT IS FURTHER ORDERED AND ADJUDGED, that Defendant Ton Vinh Lee, DDS is entitled to his costs in the amount of Six Thousand Thirty Two Dollars and Eighty Three Cents ($6,032.83), as the prevailing party under Nevada Revised Statute 18.020.

DATED this 10 day of September, 2014.

DISTRICT COURT JUDGE

Prepared by:

BAKER LAW OFFICES

By: _____

LLOYD W. BAKER, ESQ.
Nevada Bar No. 6893
INGRID PATIN, ESQ.
Nevada Bar No.: 011239
500 South Eighth St.
Las Vegas, NV 89101
(702) 360-4949
Attorneys for Plaintiff

EXHIBIT "D"

EXHIBIT "D"

Senate Bill No. 444–Committee on Judiciary

CHAPTER.....

AN ACT relating to civil actions; revising provisions relating to special motions to dismiss certain claims based upon the right to petition and the right to free speech under certain circumstances; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law establishes certain provisions to deter frivolous or vexatious lawsuits (Strategic Lawsuits Against Public Participation, commonly known as "SLAPP lawsuits"). (Chapter 387, Statutes of Nevada 1997, p. 1363; NRS 41.635-41.670) A SLAPP lawsuit is characterized as a meritless suit filed primarily to discourage the named defendant's exercise of First Amendment rights. "The hallmark of a SLAPP lawsuit is that it is filed to obtain a financial advantage over one's adversary by increasing litigation costs until the adversary's case is weakened or abandoned." (*Metabolic Research, Inc. v. Ferrel*, 693 F.3d 795, 796 n.1 (9th Cir. 2012))

Existing law 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 liability for claims based upon that communication. (NRS 41.650) Existing law also provides that if an action is brought against a person based upon such good faith communication, the person may file a special motion to dismiss the claim. If a special motion to dismiss is filed, the court must first 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. If the court determines that the moving party has met this burden, the court must then determine whether the person who brought the claim has established by clear and convincing evidence a probability of prevailing on the claim. While the court's ruling on the special motion to dismiss is pending and while the disposition of any appeal from that ruling is pending, the court must stay discovery. (NRS 41.660)

Section 13 of this bill revises provisions governing a special motion to dismiss a claim that 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. **Section 13** increases from 7 days to 20 judicial days the time within which a court must rule on a special motion to dismiss. **Section 13** replaces the determination of whether a person who brought the claim has established by clear and convincing evidence a probability of prevailing on the claim and instead requires a court to determine whether the person has demonstrated with prima facie evidence a probability of prevailing on the claim. **Section 13** also authorizes limited discovery for the purposes of allowing a party to obtain certain information necessary to meet or oppose the burden of the party who brought the claim to demonstrate with prima facie evidence a probability of prevailing on the claim. Finally, **section 13** requires the court to modify certain deadlines upon a finding that such a modification would serve the interests of justice.

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:

Sections 1-3, 3.5, 4, 4.5, 5-9, 9.5 and 10-12. (Deleted by amendment.)

Sec. 12.5. Chapter 41 of NRS is hereby amended by adding thereto a new section to read as follows:

The Legislature finds and declares that:

1. NRS 41.660 provides certain protections to a person against whom an action is brought, if the action 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.

2. When a plaintiff must demonstrate a probability of success of prevailing on a claim pursuant to NRS 41.660, the Legislature intends that in determining whether the plaintiff "has demonstrated with prima facie evidence a probability of prevailing on the claim" the plaintiff must meet the same burden of proof that a plaintiff has been required to meet pursuant to California's anti-Strategic Lawsuits Against Public Participation law as of the effective date of this act.

Sec. 13. 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) 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]~~ ***demonstrated with prima facie*** 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]~~ ***Except as otherwise provided in subsection 4, 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

(f) Rule on the motion within ~~[7]~~ ***20*** judicial days after the motion is served upon the plaintiff.

4. ***Upon a showing by a party that information necessary to meet or oppose the burden pursuant to paragraph (b) of subsection 3 is in the possession of another party or a third party and is not reasonably available without discovery, the court shall allow limited discovery for the purpose of ascertaining such information.***

5. 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.

6. The court shall modify any deadlines pursuant to this section or any other deadlines relating to a complaint filed pursuant to this section if such modification would serve the interests of justice.

7. As used in this section:

(a) "Complaint" means any action 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, including, without limitation, a counterclaim or cross-claim.

(b) "Plaintiff" means any person asserting a claim, including, without limitation, a counterclaim or cross-claim.

Sec. 14. The amendatory provisions of this act apply to an action commenced on or after the effective date of this act.

Sec. 15. (Deleted by amendment.)

Sec. 16. This act becomes effective upon passage and approval.

EXHIBIT "E"

EXHIBIT "E"

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Settlement – Verdict

Settlement/Verdict

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Recent Settlements and Verdicts

DENTAL MALPRACTICE/WRONGFUL DEATH – PLAINTIFF'S VERDICT $3.4M, 2014
Description: Singletary v. Ton Vinh Lee, DDS, et al.

A dental malpractice-based wrongful death action that arose out of the death of Decedent Reginald Singletary following the extraction of the No. 32 wisdom tooth by Defendants on or about April 16, 2011. Plaintiff sued the dental office, Summerlin Smiles, the owner, Ton Vinh Lee, DDS, and the treating dentists, Florida Traivai, DMD and Jai Park, DDS, on behalf of the Estate, herself and minor son.

NEGLIGENCE/WRONGFUL DEATH – SETTLEMENT, 2014
Description: Lavoll v. Jack in the Box, Inc.

A negligence-based wrongful death action that arose out of the shooting of Decedent Brittney Lavoll by Third-Party Defendant, Kevin Gipson, on March 25, 2010 in or near the parking lot of Jack in the Box, located at 7510 West Lake Mead Boulevard, Las Vegas, Nevada 89128.

MOTOR VEHICLE ACCIDENT – SETTLEMENT, 2014
Description: Benefraim v. Colorado Casualty Insurance Company

A negligence-based bad faith action that arose out of a motor vehicle accident that occurred on February 18, 2011. Plaintiff was a 70 year old restrained passenger in the vehicle. There was moderate damage to both vehicles as a result of the subject motor vehicle accident.

SLIP AND FALL – SETTLEMENT, 2014
Description: Shanko v. Sunrise Mountain View Hospital d/b/a Mountain View Hospital

A negligence-based action that arose out of a slip and fall incident that occurred on July 7, 2011 in the cafeteria of Mountain View Hospital. Plaintiff slipped and fell due to liquid on the floor.

MINOR MOTOR VEHICLE ACCIDENT – PLAINTIFF'S VERDICT $12,597, 2013
Description: Gomez v. Caldejon, et al.

A negligence-based action that arose out of a motor vehicle accident that occurred in a parking lot on September 30, 2010. There was approximately $54.00 in property damage and $4,857.00 in medial specials.

MINOR MOTOR VEHICLE ACCIDENT – SETTLEMENT, 2011
Description: Corbett v. Nestor Jonathan Mendez, et al.

A negligence-based action that arose out of a motor vehicle accident. There was minor property damage.

MODERATE MOTOR VEHICLE ACCIDENT – PLAINTIFF'S VERDICT $57K, 2011
Description: Mesgun v. James Jordan, et al.

A negligence-based action that arose out of a motor vehicle accident that occurred on July 16, 2008. Following the trial of this matter, Defendants' appealed. A settlement was reached during the Supreme Court Settlement Conference.

Patin Law Group, PLLC

6671 S. Las Vegas Boulevard, Suite 210
Las Vegas, NV 89119
Ph: 702.461.5241
Fx: 702.728.2782
Email:info@patinlaw.com
Se habla espanol

Ingrid Patin

Map

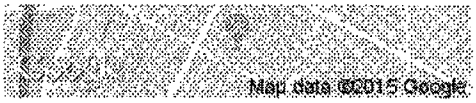

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Exhibit "F"

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Nevada State Bar No. 11617
AUGUST B. HOTCHKIN, ESQ.
Nevada State Bar No. 12780
BREMER WHYTE BROWN & O'MEARA LLP
1160 N. TOWN CENTER DRIVE
SUITE 250
LAS VEGAS, NV 89144
TELEPHONE: (702) 258-6665
FACSIMILE: (702) 258-6662
pjones@bremerwhyte.com
ahotchkin@bremerwhyte.com
Attorneys for Plaintiff,
TON VINH LEE

DISTRICT COURT

CLARK COUNTY, NEVADA

TON VINH LEE, an individual Plaintiff, vs. INGRID PATIN, an individual, and PATIN LAW GROUP, PLLC, a Nevada Professional L.L.C, Defendants.	Case No.: A723134 Dept. No.: IX **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** Date of Hearing: October 14, 2015 Time of Hearing: 9:00 A.M.

COMES NOW Plaintiff TON VINH LEE, by and through his attorneys of records, Prescott T. Jones, Esq. and August B. Hotchkin, Esq. of the law firm BREMER WHYTE BROWN & O'MEARA LLP, and hereby submits this Opposition to Defendants' Motion to Dismiss on file herein.

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consequently, the Court struck the claim; Id. p. 6, lines 5-8.

2. During trial, the Court was not able to determine whether Dr. Pallos' opinion to a reasonable degree of medical probability was related solely to the "informed consent" issue or if it was related to three other general opinions; Id. p. 9, lines 1-4.

3. That it was evident that the Court must agree with Plaintiff and Ms. Traival that Dr. Pallos' opinion which he offered to a reasonable degree of medical probability was only related to the "informed consent" issue which was stricken for a lack of foundation; Id. at lines 5-15.

4. That the Court must conclude that Dr. Pallos' testimony regarding the standard of care and causation, which formed the basis for the jury's verdict in favor of Singletary should have been stricken since it was not stated to a reasonable degree of medical probability. Id., p. 10, lines 19-22.

Based on the foregoing, the district court granted Plaintiff and Ms. Traival's motions for judgment as a matter of law and a Judgment On Jury Verdict For Defendant Ton Vinh Lee, DDS, was filed on September 11, 2014 wherein a judgment was entered in favor of Plaintiff Ton Vinh Lee and awarded him costs in the amount of $6,032.83 as a prevailing party under NRS 18.020. **Ex. "B"**.

Despite the fact that the Court granted Plaintiff's Motion for Judgment as a Matter of Law and entered a Judgment on Verdict in favor of Plaintiff in the medical malpractice and wrongful death suit over a year ago, Defendants have failed to or otherwise refused to delete the incorrect, misleading, and defamatory statement on the Patin Law Group website. **Ex. "C"**.

Based on the foregoing, Plaintiff filed his Complaint on August 17, 2015 against Defendants. Thereafter, Plaintiff properly served Defendant Patin Law Group, PLLC on August 19, 2015. **Ex. "D"**. Plaintiff also properly served Defendant Ingrid Patin as an individual and the registered agent of Patin Law Group, PLLC on September 16, 2015. **Ex. "E" and "F"**.

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Rule 12(b)(5), "shall be made before pleading if a further pleading is permitted." It is well-established in Nevada law that "[i]f 'matters outside the pleading are presented to and not excluded by the court,' a motion to dismiss for failure to state a claim upon which relief can be granted 'shall be treated as one for summary judgment and disposed of as provided in Rule 56.'" Schneider v. *Cont'l Assur. Co.*, 110 Nev. 1270, 1271, 885 P.2d 572, 573 (1994) quoting NRCP 12(b). "A district court must treat a motion to dismiss as one for summary judgment under NRCP 56 'where materials outside of the pleadings are presented to and considered by the district court.'" Id. quoting Thompson v. City of North Las Vegas, 108 Nev. 435, 438, 833 P.2d 1132, 1134 (1992). (emphasis added).

3. Motion For Summary Judgment

Summary judgment is only appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no issue as to any material fact that the moving party is entitled to judgment as a matter of law." NRCP 56(c). Summary judgment is appropriate when trial would serve no useful purpose. Short v. Hotel Riviera, Inc., 79 Nev. 94, 96 (1963). As the Supreme Court of Nevada noted, summary judgment is an "integral part" of civil practice and is "designed to secure the just, speedy, and inexpensive determination of every action." Wood v. Safeway, Inc., 121 P.3d 1026, 1030 (2005) citing Celotex Corporation v. Catrett, 477 U.S. 317, 327; 106 U.S. 254 (1986).

The Supreme Court of Nevada has held that summary adjudication is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Riley v. OPP IX, LP, 112 Nev. 826, 830 (1996). A genuine issue of material fact is such that a rational trier of fact could return a verdict for the non-moving party. Wood v. Safeway, Inc., 121 P.3d 1026, 1032 (Nev. 2005); Posadas, 109 Nev. at 452.

A party opposing summary judgment must set forth facts demonstrating the existence of a genuine issue for the Court or have summary judgment entered against it. Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110 (1992); Collins v. Union Fed. Savings & Loan, 99 Nev. 284, 294 (1983). In assessing the merits of a summary judgment, the pleadings and proof are to be construed in a light most favorable to the non-moving party. Id. at 302, 662 P.2d at 621.

BREMER WHYTE BROWN & O'MEARA LLP
1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144
(702) 258-6665

is whether the allegations give fair notice of the nature and basis of a legally sufficient claim and the relief requested." Breliant v. Preferred Equities Corp., 109 Nev. 842, 846, 858 P.2d 1258, 1260 (1993).

Here Defendants only basis for its Motion to Dismiss under NRCP 12(b)(5) is the assertion that Defendants' statements are true. *Defendants' Motion*, pp. 7-9. Defendants' Motion to Dismiss fails as a matter of law and must be denied because its sole basis that the statements are true contradicts the primary and most important standard concerning a motion for dismissal which is that the allegations in the Complaint must be accepted as true. Defendants provide no other argument or reasonable basis as to why Defendants' claim as a matter of law, and such an assertion requires this court to make a factual determination which it cannot due pursuant to NRCP 12(b)(5). Lubin, 117 Nev. at 107; see also Vacation Village, 110 Nev. at 484.

D. **Defendants' Motion For Summary Judgment Must Be Denied Because There Exists A Genuine Material Fact In Dispute As To Defendants' Claims That The Defamatory Statements Are "True" Are In Fact False, And The Issue Of Truth Or Falsity Is An Issue Properly Left To The Jury**

As correctly stated in Defendants' Motion, in order to establish a prima facie case of defamation, Plaintiffs must prove that (1) a false and defamatory statement by defendant concerning the plaintiff was made; (2) by an unprivileged publication to a third person; (3) the existence fault, amounting to at least negligence; and (4) actual or presumed damages. Chowdhry v. NLVH, Inc., 109 Nev. 478, 483, 851 P.2d 459 (1993). "If the defamation tends to injure the plaintiff or his or her business or profession, it is deemed defamation per se, and damages will be presumed." Id. citing Nevada Ind. Broadcasting v. Allen, 99 Nev. 404, 409, 664 P.2d 337, 341 (1983). "Whether a statement is capable of a defamatory construction is a question of law" and "[a] jury question arises when the statement is susceptible of different meanings, one of which is defamatory." Id. at 484 citing Brend v. Sanford, 97 Nev. 643, 646-47, 637 P.2d 1223, 1225-1226 (1981). Statements or "words must be reviewed in their entirety and in context in order to determine whether they are susceptible of defamatory meaning." Id. Furthermore, "the truth or falsity of an allegedly defamatory statement is an issue of fact properly left to the jury for resolution." Posadas v. City of Reno, 109 Nev. 448, 453, 851 P.2d 438, 442 (1993); see also Fink v.

of Defendant Ton Vinh Lee, DDS.

IT IS FURTHER ORDERED AND ADJUDGED, that Defendant Ton Vinh Lee, DDS is entitled to his costs in the amount of Six Thousand Thirty Two Dollars and Eighty Three Cents ($6,032.83), **as the prevailing party** under Nevada Revised Statute 18.020.

Ex. "B" (Emphasis Added). Not only was a judgment entered in favor of Ton Vinh Lee, Plaintiff in the instant action, and one of the defendants in the medical malpractice and wrongful death suit, but even more striking is the fact that the Judgment was prepared and submitted by Defendants themselves. **Ex. "B"**. Indeed, it was not Defendants' clients that were the prevailing party with the favorable verdict as to Plaintiff Ton Vinh Lee, but instead, only against the other defendants. See *Defendants' Mot.'s Exhibit "C"* and Plaintiff's **Ex. "B"**. The reason that the "matter is on appeal" is because Defendants are attempting to reverse the district court's ruling wherein it granted Plaintiff Ton Vinh Lee's Motion for Judgment as a Matter of Law vacating the Jury's Verdict "based upon the fact that the Plaintiffs failed to establish the standard of care, a breach of the standard of care, or causation, to a reasonable degree of medical probability, . . ." **Ex. "A"**, p. 12, lines 13-19. As such, Defendants' assertions that the subject defamatory statement is true are not only patently false, but an attempt to mislead this Court by omitting a key detail that puts the statement and its defamatory nature into context. See, Chowdhry at 483 and Brend, at 646-47.

Even more egregious is the fact that Defendants, who were the trial attorneys of the case and completely aware and cognizant regarding the developments concerning the ultimate "verdict," not only continued to keep a known false and misleading statement on Defendants website, but even now, are attempting to mislead this Court by continuing to represent this falsehood to seek dismissal of Plaintiffs' Complaint. This alone is more than a sufficient basis to deny the instant motion as a genuine issue of material fact exists concerning the subject defamatory statement made by Defendants.

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court. A verdict from a jury serves only to assist in rendering that final judgment. Here, Defendants attach a Special Verdict Form, however, the original verdict in favor of Singletary was vacated by the district court and a final Judgement in favor of Plaintiff Ton Vinh Lee was entered. **Ex. "A" and "B".**

2. Defendants' Publication Of The Defamatory Statement On Their Website Was In Violation of The Nevada Rules of Professional Conduct Rule 7.2(f).

Nev. Rules of Prof'l Conduct 7.2 governs attorney advertising and provides in relevant part:

> **Rule 7.2. Advertising.**
>
> (a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through the public media, such as a telephone directory, legal directory, newspaper or other periodical, billboards and other signs, radio, television and recorded messages the public may access by dialing a telephone number, or through written or electronic communication not involving solicitation as prohibited by Rule 7.3.
>
> These Rules shall not apply to any advertisement broadcast or disseminated in another jurisdiction in which the advertising lawyer is admitted if such advertisement complies with the rules governing lawyer advertising in that jurisdiction and the advertisement is not intended primarily for broadcast or dissemination within the State of Nevada.
>
> (b) If the advertisement uses any actors to portray a lawyer, members of the law firm, clients, or utilizes depictions of fictionalized events or scenes, the same must be disclosed. In the event actors are used, the disclosure must be sufficiently specific to identify which persons in the advertisement are actors, and the disclosure must appear for the duration in which the actor(s) appear in the advertisement.
>
> (c) All advertisements and written communications disseminated pursuant to these Rules shall identify the name of at least one lawyer responsible for their content.
>
> (d) Every advertisement and written communication that indicates one or more areas of law in which the lawyer or law firm practices shall conform to the requirements of Rule 7.4.
>
> (e) Every advertisement and written communication indicating that the charging of a fee is contingent on outcome or that the fee will be a percentage of the recovery shall contain the following disclaimer if the client may be liable for the opposing parties' fees and costs: "You may have to pay the opposing parties' attorney fees and costs in the event of a loss."
>
> (f) A lawyer who advertises a specific fee or range of fees shall include the duration said fees are in effect and any other limiting conditions to the availability of the fees. For advertisements in the yellow pages of telephone directories or other media not published more frequently than annually, the advertised fee or range of fees shall be honored for no less than one year following publication.
>
> (g) A lawyer may make statements describing or characterizing the quality of the lawyer's services in advertisements and written communications. However, such statements are subject to proof of verification, to be provided at the request of the state bar or a client or prospective client.

SHERMAN & HOWARD L.L.C.
3960 HOWARD HUGHES PKWY
SUITE 650
LAS VEGAS, NV 89169
(702) 784-5200

81 of NRS, limited-liability company, limited partnership, limited-liability limited partnership, business trust and municipal corporation created and existing under the laws of this State, any other state, territory or foreign government, or the Government of the United States, doing business in this State shall appoint and keep in this State a registered agent who resides or is located in this State, upon whom all legal process and any demand or notice authorized by law to be served upon it may be served in the manner provided in subsection 2. A statement of change of registered agent must be filed in the manner provided in NRS 77.340 if the corporation, miscellaneous organization, limited-liability company, limited-liability partnership, limited partnership, limited-liability limited partnership, business trust or municipal corporation desires to change its registered agent. A registered agent must file a statement of change in the manner provided in NRS 77.350 or 77.360 if the registered agent changes its name or address.

2. All legal process and any demand or notice authorized by law to be served upon the corporation, miscellaneous organization, limited-liability company, limited-liability partnership, limited partnership, limited-liability partnership, business trust or municipal corporation may be served upon the registered agent personally or by leaving a true copy thereof with a person of suitable age and discretion at the most recent street address of the registered agent shown on the information filed with the Secretary of State pursuant to chapter 77 of NRS.

3. Unless the street address of the registered agent is the home residence of the registered agent, **the street address of the registered agent** of a corporation, miscellaneous organization, limited-liability company, limited-liability partnership, limited partnership, limited-liability limited partnership, business trust or municipal corporation **must be staffed during normal business hours by:**

(a) The registered agent; or

(b) One or more natural persons who are:

(1) Of suitable age and discretion to receive service of legal process and any demand or notice authorized by law to be served upon the corporation, miscellaneous organization, limited-liability company, limited-liability partnership, limited partnership, limited-liability limited partnership, business trust or municipal corporation; and

(2) Authorized by the registered agent to receive service of legal process and any demand or notice authorized by law to be served upon the corporation, miscellaneous organization, limited-liability company, limited-liability partnership, limited partnership, limited-liability limited partnership, business trust or municipal corporation.

4. A corporation, miscellaneous organization, limited-liability company, limited-liability partnership, limited partnership, limited-liability limited partnership, business trust or municipal corporation that fails or refuses to comply with the requirements of subsection 3 is subject to a fine of not less than $100 nor more than $500 for each day of such failure or refusal to comply with the requirements of subsection 3, to be recovered with costs by the State, before any court of competent jurisdiction, by action at law prosecuted by the Attorney General or by the district attorney of the county in which the action or proceeding to recover the fine is prosecuted.

Defendants cite to Foster v. Lewis, 78 Nev. 330, 372 P.2d 679 (1962) as grounds that the

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North Stephanie Street, Suite 200
Las Vegas, NV 89074
(702) 382-2101

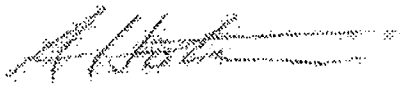
III.

CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that the Court deny Defendants' Motion in its entirety.

Dated: September 25, 2015

BREMER WHYTE BROWN & O'MEARA LLP



By: _____
Prescott T. Jones, Esq., Bar No. 11617
August B. Hotchkin, Esq., Bar No. 12780
Attorneys for Plaintiff TON VINH LEE

LIST OF EXHIBITS

Exhibit A.....Order Granting Motion for Summary Judgment

Exhibit B.....Judgment on Verdict

Exhibit C.....Patin Law Website Page time stamped 7/9/15

Exhibit D.....Affidavit of Service (Patin Group)

Exhibit E.....Affidavit of Service (Patin Individual)

Exhibit F.....Nevada Secretary of State Business Entity Information Concerning Patin Law Group, PLLC

BREMER WHYTE BROWN & O'MEARA LLP
6101 S. Town Center Drive
Suite 250
Las Vegas, NV 89135
(702) 258-6665

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CLERK OF THE COURT

CHRISTIAN M. MORRIS, ESQ.
Nevada Bar No. 11218
NETTLES LAW FIRM
1389 Galleria Drive, Suite 200
Henderson, Nevada 89014
Telephone: (702) 434-8282
Facsimile: (702) 434-1488
briannettles@nettleslawfirm.com
christianmorris@nettleslawfirm.com
Attorneys for Defendants

DISTRICT COURT

CLARK COUNTY, NEVADA

TON VINH LEE, an individual, Plaintiff, v. INGRID PATIN, an individual, and PATIN LAW GROUP, PLLC, a Nevada Professional LLC, Defendants.	CASE NO. A-15-723134 DEPARTMENT NO. IX **REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' SPECIAL MOTION TO DISMISS PURSUANT TO NEVADA REVISED STATUTE 41.635-70, OR IN THE ALTERNATIVE MOTION TO DISMISS PURSUANT TO NRS 12(b)(5)**

Defendants Ingrid Patin, an individual, and Patin Law Group, PLLC (hereinafter, "Defendants"), by and through their counsel of record, Christian M. Morris, Esq. of Nettles Law Firm, hereby submits this Reply to Plaintiff's Opposition to Defendants' Special Motion to Dismiss pursuant to NRS 41.635-70 (Nevada Anti-SLAPP statute), or in the alternative a Motion to Dismiss Pursuant to NRS 12(b)(5), and hereby move for dismissal of Plaintiff's Complaint and for an award of costs and attorney fees and damages.

This Reply is made and based upon the papers and pleadings on file with the Court, the papers attached to this Motion, the following Memorandum of Points and Authorities, and any

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NETTLES LAW FIRM
1389 Galleria Drive, Suite 200
Henderson, NV 89014
702.434.8282 / 702.434.1488 (fax)

oral argument the Court may entertain at the hearing on the Motion.

Dated this 12th day of November, 2015.

NETTLES LAW FIRM

/s/ Christian Morris
Christian M. Morris, Esq.
Nevada Bar No. 011218
1389 Galleria Drive, Suite 200
Henderson, NV 89014
Attorneys for Defendants

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Following the filing of Defendants' Special Motion to Dismiss pursuant to NRS 41.635-70, or in the Alternative Motion to Dismiss pursuant to NRS 12(B)(5), it was brought to Defendants' attention that changes were made to the currently published Nevada Revised Statutes 41.660 by Senate Bill No. 444. Specifically, NRS 41.660 was amended as follows:

> (b) If the court determines that the moving party has met the burden pursuant to paragraph (a), determine whether the plaintiff has demonstrated with prima facie evidence a probability of prevailing on the claim;
> . . . .
> (e) Except as otherwise provided in subsection 4, stay discovery pending:
> . . . .
> (f) Rule on the motion within 20 judicial days after the motion is served upon the plaintiff.
> 4. Upon a showing by a party that information necessary to meet or oppose the burden pursuant to paragraph (b) of subsection 3 is in the possession of another party or a third party and is not reasonably available without discovery, the court shall allow limited discovery for the purpose of ascertaining such information.
> . . . .
> 6. The court shall modify any deadlines pursuant to this section or any other deadlines relating to a complaint filed pursuant to this section if such modification would serve the interests of justice.

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> 7. As used in this section:
>
> (a) "Complaint:" means any action 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, including, without limitation, a counterclaim or cross-claim.
> (b) "Plaintiff" means any person asserting a claim, including, without limitation, a counterclaim or cross-claim.
> . . . .

It should be noted that the above amendments to NRS 41.660 and have not yet been published.

With regard to the instant Motion, the only amendment to NRS 41.660 that has any relevance is Section (3)(b), which alters the standard of clear and convincing evidence to "demonstrated with prima facie evidence," the same burden of proof as required by California's anti-Strategic Lawsuits Against Public Participation (Anti-SLAPP) law. Despite the change in the standard from clear and convincing evidence to demonstrated with prima facie evidence, Defendants are still entitled to dismissal of Plaintiff's Complaint and an award of attorney's fees and costs as provided by Nevada's anti-Strategic Lawsuit Against Public Participation (anti-SLAPP) statute, NRS 41.635, et. seq.

Accordingly, Defendants move this court to GRANT this Special Motion to Dismiss and award statutory costs and attorney fees pursuant to NRS 41.635-70. In the alternative, Defendants move for this court to dismiss this case matter pursuant to 12(b)(5) and award fees and costs incurred by Defendants for having to bring this motion; based on the fact the statement on Defendants' website is true and Plaintiff Ton Vinh Lee has testified under oath that he is the owner of Summerlin Smiles.

II.

LEGAL ARGUMENT

A. NRS 41.660 "Special" Motion to Dismiss

Under Nevada's anti-SLAPP statute, the person against whom the SLAPP action is brought may file a special motion to dismiss. NRS 41.635-70. The District Court must treat a special motion to dismiss as a motion for summary judgment, and if granted, as an adjudication on the merits. NRS 41.660(3)-(4); John v. Douglas County Sch. Dist., 125 Nev. 746, 753, 219

NETTLES LAW FIRM
1389 Galleria Drive, Suite 200
Henderson, NV 89014
702.434.8282 / 702.434.1488 (fax)

NETTLES LAW FIRM
1389 Galleria Drive, Suite 200
Henderson, NV 89014
702.434.8282 / 702.434.1488 (fax)

P.3d 1276, 1281 (2009). The appropriate standard of review for a denial of a special motion to dismiss is the same as for a grant of summary judgment: de novo. See Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and the moving part is entitled to judgment as a matter of law. Id. When decided a summary judgment motion, all evidence and any reasonable inferences derived therefrom "must be viewed in the light most favorable to the moving party." Id. General allegations and conclusory statements do not create genuine issues of fact. Id. at 731, 121 P.3d at 1030-31.

Here, this matter is sufficiently ripe for adjudication as a matter of law. The undisputed facts material to the Defendants' request for summary judgment are as follows:

1. Defendant Ingrid Patin, Esq. served as lead counsel in the underlying matter, Singletary, et al. v. Ton Vinh Lee, DDS, et al.
2. That the appropriately abbreviated caption for the underlying matter is Singletary, et al. v. Ton Vinh Lee, DDS, et al.
3. That Svetlana Singletary, individually, and as the Representative of the Estate of Reginald Singletary, and as parent and legal guardian of Gabriel L. Singletary, a minor, was the Plaintiff in the underlying matter represented by Ingrid Patin, Esq.
4. That Ton Vinh Lee, DDS, Florida Traivai, DMD, Jai Park, DDS and Ton V. Lee, DDS, PC d/b/a Summerlin Smiles were named as Defendants in the underlying matter.
5. That the underlying matter came on for trial before the Eighth Judicial District Court and a jury on January 13, 2014.
6. That at the conclusion of the trial of the matter, the jury rendered a verdict in favor of Plaintiffs in the amount of Three Million Four Hundred Seventy Thousand Dollars and Zero Cents ($3,470,000.00) against Florida Traivai, DMD and Ton V. Lee, DDS, Prof. Corp. d/b/a Summerlin Smiles.

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7. A Special Verdict Form that was filed in open court on January 22, 2014.
8. A Judgement on Jury Verdict was filed on behalf of Plaintiffs in the underlying matter on April 29, 2014.
9. Plaintiff Ton Vinh Lee is the owner of Ton V. Lee, DDS, PC d/b/a Summerlin Smiles.
10. Plaintiffs in the underlying matter filed an appeal against Ton Vinh Lee, DDS, Ton V. Lee, DDS, Prof. Corp. d/b/a Summerlin Smiles and Florida Traivai, DMD following the Court's ruling on a Motion for Judgment as a Matter of Law pursuant to NRCP 50(b).
11. Directly addressed in the Amended Case Appeal Statement filed on behalf of Plaintiffs in the underlying matter, Plaintiffs appealed from several Orders entered by the Trial Court, including, but not limited to, " (3) the Order on Defendant Traivai's and Lee's Motions for Judgment as a Matter of Law Pursuant to NRCP 50(b) and Motion for Remittitur, filed on July 16, 2014; and (4) the Judgment on Jury Verdict for Defendant Ton Vinh Lee, DDS [Granting Costs to Defendant and Dismissing Plaintiffs' Claims], filed on September 11, 2014."
12. Plaintiff Ton Vinh Lee is actively participating in the appeal of the underlying matter as an individual and the owner of Summerlin Smiles.
13. The underlying matter, District Court Case No. A-12-656091-C is currently pending before the Nevada Supreme Court.

These facts are undisputed and prove that Plaintiff cannot establish that the single statement posted on Defendants' website at issue is: "(1) a **false** and defamatory statement by defendant concerning the plaintiff. . . ." Chowdhry v. NLVH, Inc., 109 Nev. 478, 483, 851 P.2d 459 (1993) (citing Restatement Second of Torts, § 558 (1977)) (emphasis added). Despite the fact that the underlying matter is currently on appeal, this does not change the fact that the statement posted on Defendants' website was completely **true** and not defamatory in nature. The subject statement is also a written made in direct connection with an issue under consideration by a

judicial body and in direct connection with an issue of public concern made in a public forum. NRS 41.637(3); NRS 41.637(4). Additionally, the verdict in the underlying matter was awarded against Ton V. Lee, DDS, PC d/b/a Summerlin Smiles. As the owner of Summerlin Smiles, Plaintiff Ton Vinh Lee actively participated in the trial of the underlying matter and is currently participating in the appeal of the underlying matter.

B. The Minor Deficiency In Defendants' Special Motion Does Not Warrant A Denial, As Plaintiff Is Unable To Prevail On His Claim For Defamation Under The Burden Of Prima Facie Evidence

As explained in Defendants' Special Motion, the statement is protected under Nevada's anti-SLAPP statute. Therefore, the burden shifts to Plaintiff to prove "by clear and convincing evidence a probability of prevailing on the claim." NRS 41.660(3)(b). At this phase, Plaintiff must prove that his claim for defamation is legally sufficient and must present sufficient evidence to show that he can obtain a favorable judgment. Vogel v. Felice, 26 Cal. Rptr. 3d 350, 358 (Cal. Ct. App. 2002). In other words, Plaintiff "must provide the court with sufficient evidence to permit the court to determine whether 'there is a probability that the plaintiff will prevail on the claim.'" DuPont Merck Pharmaceutical Co. v. Superior Court, 78 Cal. App. 4th 562, 568, 92 Cal. Rptr. 2d 755 (2000) (emphasis added).

In order to establish a prima facie case of defamation, a plaintiff must prove: (1) a **false** and defamatory statement by defendant concerning the plaintiff; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages. Chowdhry v. NLVH, Inc., 109 Nev. 478, 483, 851 P.2d 459 (1993) (citing Restatement Second of Torts, § 558 (1977)) (emphasis added). A claim of defamation is not present if a statement is true or substantially true. Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 715, 57 P.3d 82, 88 (2002). If the defamation tends to injure the plaintiff in his or her business or profession, it is deemed defamation per se, and damages will be presumed. Id. at 483-84. Whether a statement could be construed as defamatory is a question of law. Branda v.

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Sanford, 97 Nev. 643, 646, 637 P.2d 1223, 1225 (1981). A jury questions arises only when the statement is susceptible to different meanings, one of which is defamatory. Id.; Chowdhry v. NLVH, Inc., 109 Nev. 478, 483-84, 851 P.2d 459 (1993).

The subject statement on Defendants' website once read:

> DENTAL MALPRACTICE/WRONGFUL DEATH $3.4M – PLAINTIFF'S VERDICT, 2014
> DESCRIPTION: SINGLETARY V. TON VINH LEE, DDS, ET AL.
> A dental malpractice-based wrongful death action that arose out of the death of Decedent Reginald Singletary following the extraction of the No. 32 wisdom tooth by Defendants on or about April 16, 2011. Plaintiff sued the dental office, Summerlin Smiles, the owner, Ton Vinh Lee, DDS, and the treating dentists, Florida Traivai, DDS and Jai Park, DDS, on behalf of the Estate, herself and minor son.

This statement does not contain a defamatory factual assertion, as every fact contained in the statement is **true**, and accurately depicts a judicial proceeding. Specifically, the underlying matter involved a dental malpractice-based wrongful death action. Plaintiffs in the underlying matter were collectively awarded Three Million Four Hundred Seventy Thousand Dollars and Zero Cents ($3,470,000.00) by a jury. The Special Verdict Form memorializing the jury award was filed in open court, and both the Special Verdict Form and Judgment on Jury Verdict clearly state that the award to Plaintiffs was against Florida Traivai, DMD and Ton V. Lee, DDS, a Prof. Corp. d/b/a Summerlin Smiles. Second, the description appropriately identified the Plaintiffs and Defendants in the underlying case as stated in the case caption. Third, an appropriate description of the matter and the individuals or entities sued is true because the underlying matter was a wrongful death case following the improper care and treatment of a patient of Summerlin Smiles and Plaintiffs in the underlying matter did sue the parties named. Moreover, Defendants specifically delineated the roles of each party sued. Defendants specifically stated that Ton V. Lee, DDS was sued as the owner of Summerlin Smiles, and not as a treating dentist. The statement clearly indicates that Plaintiff sued Summerlin Smiles, the

NETTLES LAW FIRM
1389 Galleria Drive, Suite 200
Henderson, NV 89014
702.434.8282 / 702.434.1488 (fax)

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1389 Galleria Drive, Suite 200
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702.434.8282 / 702.434.1488 (fax)

owner (Ton V. Lee, DDS, PC), Ton Vinh Lee, DDS, Florida Traivai and Jai Park, DDS. This is an important distinction because it removes any possibility that this statement could be misconstrued that Ton V. Lee was the treating dentist who caused the death. Lastly, Ton V. Lee formed a professional corporation; Ton V. Lee, DDS, PC; listing himself as a the President, Director and Secretary. It is undisputed that Ton V. Lee, DDS, was the sole owner of Summerlin Smiles.

Furthermore, truth is an absolute defense to a defamation action. Pegasus 118 Nev. 706, 715. As fully addressed in Defendants' Special Motion, every portion of Defendant's statement is an accurate factual description of the underlying matter and trial outcome. Defendants Ton V. Lee, DDS, PC d/b/a Summerlin Smiles and Florida Traivai, DMD had a jury verdict rendered against them, and the statement does nothing more than describe this trial outcome and provide a fair, accurate and impartial reporting. As previously stated, the statement is a fair recitation of the outcome of the underlying judicial proceeding, the context of which is actually less than other multiple independent sources that also publicized the outcome. Thus, Plaintiff's Complaint should be dismissed with prejudice, as Plaintiff can prove no set of facts that would entitle him to relief.

C. There Is A Direct Connection Between The Statement And The Requirements Of Subsections (3) and (4) Of NRS 41.637

A "[g]ood 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 "written or oral statement made in direct connection with an issue under consideration by a. . .judicial body. . . ." NRS 41.637(3). Here, Defendants statement is clearly made in direct connection with an issue under consideration by a judicial body. The statement specifically pertains to the plaintiff's verdict that was rendered in the matter of Singletary, et al. v. Ton V. Lee, DDS, et. al. (Case No. A-12-656091-C), which is currently under consideration by the Supreme Court of

NETTLES LAW FIRM
1389 Galleria Drive, Suite 200
Henderson, NV 89014
702.434.8282 / 702.434.1488 (fax)

Nevada.

On February 7, 2012, Plaintiff Svetlana Singletary, individually, and as the Representative of the Estate of Reginald Singletary, and as parent and legal guardian of Gabriel L. Singletary, a minor, commenced the underlying matter through the filing of a Complaint in the Eighth Judicial District Court. The Complaint named Ton Vinh Lee, DDS, Florida Traivai, DMD, Jai Park, DDS and Ton V. Lee, DDS, Prof. Corp. d/b/a Summerlin Smiles as Defendants. The action came on for trial before the Eighth Judicial District Court and a jury on January 13, 2014. On January 25, 2014, a jury rendered a verdict in the underlying matter in Plaintiff's favor in the amount of Three Million Four Hundred Seventy Thousand Dollars and Zero Cents ($3,470,000.00).

Several months after trial, Defendants Ton V. Lee, DDS, Prof. Corp. d/b/a Summerlin Smiles and Florida Traivai, DMD in the underlying matter filed a Motion for Judgment as a Matter of Law. Following the Court's ruling on a Motion for Judgment as a Matter of Law pursuant to NRCP 50(b) in the underlying matter, counsel for Plaintiff in the underlying matter filed an Appeal against Ton V. Lee, DDS, Prof. Corp. d/b/a Summerlin Smiles and Florida Traivai, DMD. As directly addressed in the Amended Case Appeal Statement filed on behalf of Plaintiffs in the underlying matter, Plaintiffs appealed from several Orders entered by the Trial Court, including, but not limited to, " (3) the Order on Defendant Traivai's and Lee's Motions for Judgment as a Matter of Law Pursuant to NRCP 50(b) and Motion for Remittitur, filed on July 16, 2014; and (4) the Judgment on Jury Verdict for Defendant Ton Vinh Lee, DDS [Granting Costs to Defendant and Dismissing Plaintiffs' Claims], filed on September 11, 2014."

The appeal of the underlying matter is currently pending before the Supreme Court of Nevada, which is the highest judicial body in this State. The basis of the appeal is the District Court's action to vacate the award by the jury in the underlying matter. In the appeal, Plaintiff Singletary, in the underlying matter, is specifically requesting reinstatement of the jury award, among other requests for relief. Thus, the statement has a direct connection to the appeal

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1389 Galleria Drive, Suite 200
Henderson, NV 89014
702.434.8282 / 702.434.1488 (fax)

currently being considered by a judicial body, the Supreme Court of Nevada.

Moreover, A "[g]ood 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 "any communication made in direct connection with an issue of public interest in a place open to the public or in a public forum." NRS 41.637(4). The court in Rivero described three (3) situations in which statements may concern a public issue or a matter of public interest: (1) the subject of the statement or activity precipitating the claim was a person or entity in the public eye; (2) the statement or activity precipitating the claim involved conduct that could affect large numbers of people beyond the direct participants; or (3) the statement or activity precipitating the claim involved a topic of widespread public interest. Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO, 105 Cal. App. 4th 913, 924, 130 Cal. Rptr. 2d 81 (2003). Here, Defendants statement is clearly made in direct connection with an issue of public interest in a place open to the public. The statement specifically pertains to a dental malpractice, wrongful death matter that arose out of the improper care and treatment of a patient of Summerlin Smiles, which is an issue of public health and safety. The fact that the clinic, Ton V. Lee, DDS, Prof. Corp. d/b/a Summerlin Smiles, and one of its treating physicians, Florida Traivai, DMD, were found liable for the death of patient make this matter one of public interest or concern. The dental malpractice performed by the clinic, Ton V. Lee, DDS, Prof. Corp. d/b/a Summerlin Smiles, and one of its treating physicians, Florida Traivai, DMD, affected one patient (Reginald Singletary in the underlying matter) and could affect large numbers of patients that undergo dental procedures with Ton V. Lee, DDS, Prof. Corp. d/b/a Summerlin Smiles or Florida Traivai, DMD. Additionally, the statement was posted on Defendants' website, which is open and accessible by the public.

Based upon the foregoing, it is clear that the written statement of Defendants was made in direct connection with litigation of the underlying matter, Singletary, et al. v. Ton V. Lee,

DDS, et. al. (District Court Case No. A-12-656091-C), an issue under consideration per NRS 41.637(3) and the statement was made in direct connection with an issue of public interest in a place open to the public. The statement is therefore protected by Nevada's anti-SLAPP statute.

D. Plaintiff Is Not Entitled To An Award of Attorney's Fees And Costs Or A Separate Award Of Damages

Pursuant to NRS 41.670, Plaintiff is only entitled to an award of attorney's fees and costs and a separate award of damages "if the court denies [the] special motion to dismiss filed pursuant to NRS 41.660 and finds that the motion was frivolous or vexatious. . . ." Not only has Plaintiff failed to set forth any legitimate reason as to why Defendants' Special Motion was frivolous or vexatious, but Plaintiff is unable to prevail on his claim under the burden of prima facie evidence warranting a denial of Defendants' Special Motion.

First, Counsel for Plaintiff has continually misrepresented to this Court what was stated on Defendants' website. Defendants, in their statement, did not specifically identify any particular defendant upon whom the verdict was rendered as alleged by Plaintiff Ton Vinh Lee, nor did Defendants single out Plaintiff Ton Vinh Lee in the statement. Defendants accurately identified the case name, correctly stated the jury verdict award and appropriately provided a description of the case and Defendants sued.

In each pleading on file with the Court in this matter, Defendants have cited to the current version of the statement on Defendants' website. The original statement that was posted prior to the filing of the Complaint in this matter stated as follows:

> DENTAL MALPRACTICE/WRONGFUL DEATH $3.4M – PLAINTIFF'S VERDICT, 2014
> DESCRIPTION: SINGLETARY V. TON VINH LEE, DDS, ET AL.
> A dental malpractice-based wrongful death action that arose out of the death of Decedent Reginald Singletary following the extraction of the No. 32 wisdom tooth by Defendants on or about April 16, 2011. Plaintiff sued the dental office, Summerlin Smiles, the owner, Ton Vinh Lee, DDS, and the treating dentists, Florida Traivai, DDS and Jai Park, DDS, on behalf of the Estate, herself and minor son.

NETTLES LAW FIRM
1389 Galleria Drive, Suite 200
Henderson, NV 89014
702.434.8282 / 702.434.1488 (fax)

NETTLES LAW FIRM
1389 Galleria Drive, Suite 200
Henderson, NV 89014
702.434.8282 / 702.434.1488 (fax)

Prior to the filing of the Complaint in this matter, Defendants amended the statement as follows:

> DENTAL MALPRACTICE/WRONGFUL DEATH – PLAINTIFF'S VERDICT, 2014
> DESCRIPTION: SINGLETARY V. TON VINH LEE, DDS, ET AL.
> A dental malpractice-based wrongful death action that arose out of the death of Decedent Reginald Singletary following the extraction of the No. 32 wisdom tooth by Defendants on or about April 16, 2011. Plaintiff sued the dental office, Summerlin Smiles, the owner, Ton Vinh Lee, DDS, and the treating dentists, Florida Traivai, DDS and Jai Park, DDS, on behalf of the Estate, herself and minor son.
> This matter is on appeal.

This amendment was made in light of the grievance submitted to the State Bar of Nevada by Plaintiff Ton Vinh Lee. At the recommendation of this Court, the statement has since been removed from Defendants' website. Defendants have not made any misrepresentations to this Court or representations that lack candor, but have instead provided all pertinent information to this Court.

Second, Defendants acknowledge that they were unaware of Senate Bill No. 444 at the time of the filing of the Special Motion. As stated above, the currently published Nevada Revised Statutes do not contain the amendments from the 2015 Legislative Session. Without publication of the amendments to the Nevada Anti-SLAPP statute through Senate Bill No. 444, counsel for Defendants erroneously relied upon outdated information. Defendants innocently relied upon the currently published Nevada Revised Statutes when filing the Special Motion, and in no way acted in a vexatious nature. Notwithstanding the mistake, Defendants have set forth arguments above which show that Plaintiff is unable to prevail under the lesser burden of prima facie evidence.

Lastly, failure to withdraw the Special Motion does not meet the threshold of frivolous or vexatious. Defendants' Special Motion was brought with sufficient grounds to prevail, and not just to cause annoyance or frustration to Plaintiff. In fact, Defendants are well aware of the fact that Plaintiff could be awarded damages up to $10,000 in addition to attorney's fees and costs if the Special Motion were denied. As such, Defendants did not file the instant motion lightly, and have set forth numerous arguments as to why a Special Motion is appropriate under

the circumstances.

III.

CONCLUSION

Defendants respectfully request this Honorable Court to issue an Order dismissing, with prejudice, Plaintiff's Complaint pursuant to NRS 41.635-70 (Nevada Anti-SLAPP statute), as the statement was made in direct connection with a judicial proceeding and is an issue of public concern. Plaintiff is unable to present prima facie evidence of a probability of success on his claims because the statement is true, is not defamatory in nature, is privileged, and because Plaintiff cannot establish causation to the exclusion of other publications or actual malice. For these reasons, the Special Motion to Dismiss is appropriate and Defendants are entitled to an award of attorney's fees and costs and statutory damages of $10,000.

In the alternative Defendants respectfully request this matter be dismissed with prejudice pursuant to NRS 12(b)(5) and attorney's fees and costs be granted to Defendants.

DATED this 12th day of November, 2015.

NETTLES LAW FIRM

/s/ Christian Morris
Christian M. Morris, Esq.
Nevada Bar No. 011218
1389 Galleria Drive, Suite 200
Henderson, NV 89014
Attorneys for Defendants

NETTLES LAW FIRM
1389 Galleria Drive, Suite 200
Henderson, NV 89014
702.434.8282 / 702.434.1488 (fax)

NETTLES LAW FIRM
1389 Galleria Drive, Suite 200
Henderson, NV 89014
702.434.8282 / 702.434.1488 (fax)

CERTIFICATE OF SERVICE

Pursuant to NEFCR 9, NRCP (b) and EDCR 7.26, I certify that on this date, I served the foregoing **REPLY TO PLAINTIFF'S OPPOSITION DEFENDANTS' TO SPECIAL MOTION TO DISMISS PURSUANT TO NEVADA REVISED STATUTE 41.635-70 OR IN THE ALTERNATIVE MOTION TO DISMISS PURSUANT TO NRS 12(b)(5)** on the following parties by electronic transmission through the Wiznet system on this 12th day of November, 2015.

Prescott T. Jones, Esq.
Jessica Friedman, Esq.
BREMER WHYTE BROWN & O'MEARA LLP
1160 N. Town Center DriveSuite 250
Las Vegas, NV 89144
Attorneys for Plaintiff
TON VINH LEE

/s/ Kim L. Alverson
An Employee of Nettles Law Firm

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CLERK OF THE COURT

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PRESCOTT T. JONES, ESQ.
Nevada State Bar No. 11617
AUGUST B. HOTCHKIN, ESQ.
Nevada State Bar No. 12780
BREMER WHYTE BROWN & O'MEARA LLP
1160 N. TOWN CENTER DRIVE
SUITE 250
LAS VEGAS, NV 89144
TELEPHONE: (702) 258-6665
FACSIMILE: (702) 258-6662
pjones@bremerwhyte.com
ahotchkin@bremerwhyte.com
Attorneys for Plaintiff,
TON VINH LEE

DISTRICT COURT

CLARK COUNTY, NEVADA

TON VINH LEE, an individual Plaintiff, vs. INGRID PATIN, an individual, and PATIN LAW GROUP, PLLC, a Nevada Professional LLC, Defendants.	Case No.: A723134 Dept. No.: IX **PLAINTIFF'S SUR-REPLY IN OPPOSITION TO DEFENDANTS' SPECIAL MOTION TO DISMISS** Date of Hearing: November 18, 2015 Time of Hearing: 9:00 A.M.

COMES NOW Plaintiff TON VINH LEE, by and through his attorneys of records, Prescott T. Jones, Esq. and August B. Hotchkin, Esq. of the law firm BREMER WHYTE BROWN & O'MEARA LLP, and hereby submits this Sur-Reply In Opposition to Defendants' Special Motion to Dismiss Pursuant on file herein.

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This Sur-Reply is made and based upon the papers and pleadings on file herein, the attached Memorandum of Points and Authorities, and any oral argument that may be entertained at a hearing on this matter.

Dated: November 17, 2015

BREMER WHYTE BROWN & O'MEARA LLP

By: _____
Prescott T. Jones, Esq., Bar No. 11617
August B. Hotchkin, Esq., Bar No. 12780
Attorneys for Plaintiff
TON VINH LEE

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION AND SUMMARY OF RELEVANT FACTS

This matter involves allegations concerning the defamatory statement published on Defendants' website wherein Defendants identify Plaintiff, Ton Vinh Lee (hereinafter "Dr. Lee") as both an individual and as an owner of the Summerlin Smiles dentistry establishment in Las Vegas, Nevada in connection with an attorney advertisement, representing a plaintiff's verdict against Dr. Lee. Despite the fact that no verdict was ever obtained against Dr. Lee individually, and the verdict against his practice and other parties was vacated by the trial court, Defendants continue to assert that the statement on the website is true and not defamatory, entitling them to dismissal of Plaintiff's Complaint. To this end, Defendants filed a Motion to Dismiss or in the alternative, Motion for Summary Judgment on September 8, 2015. After Plaintiff and Defendants filed an Opposition and Reply respectively, the Motion was heard by this Court on October 14, 2015 wherein, after oral argument from both parties, the Court denied Defendants' Motion in its entirety albeit without prejudice pursuant to NRCP 56(f). *See* **Exhibit "A"** to Opposition.

Only *two days* after this Court denied Defendants' original Motion for dismissal of Plaintiff's Complaint, Defendants filed their Special Motion to Dismiss Plaintiffs' Complaint pursuant to NRS 41.635-70 or in the alternative Motion to Dismiss pursuant to NRCP 12(b)(5) (*erroneously* titled NRS 12(b)(5)) (hereinafter "Special Motion To Dismiss"), which is set for

BREMER WHYTE BROWN & O'MEARA LLP
1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144
(702) 258-6665

hearing before this Honorable Court on November 18, 2015 at 9:00 a.m. Plaintiff subsequently filed his timely Opposition to said Motion on November 2, 2015 which pointed out, among other things, that Defendants relied upon a previous version of Nevada's Anit-SLAPP statute, specifically the language contained in NRS 41.660 *et. seq,.* which was recently amended and *substantially* revised Nevada's approach to defamation suits, both in law and public policy. Most importantly, the burden of proof for a plaintiff was lessened from "clear and convincing evidence" to a "demonstrat[tion] with ***prima facie evidence a probability*** of prevailing on the [defamation] claim . ." NRS 41.660(3)(b). (Emphasis Added). Upon the realization of this egregious error, Defendants filed their untimely Reply on November 12, 2015 without first seeking leave from this Court, in violation of EDCR 2.20(h). In said Reply, Defendants attempt to sweep their error under the rug, stating that their reliance on the previous version of NRS 41.660 was innocently made, providing a feeble excuse that the amended version had not yet been published. However, discussed in more detail in Plaintiff's Motion to Strike filed on November 15, 2015, Defendants are represented by a 12-year established law firm which most likely had access or should have access to advanced legal research tools which would have immediately alerted them of the statute's amendment.

Despite the fact that Plaintiff already met its burden of demonstrating with prima facie evidence a probability of prevailing in his claim, Defendants continue to argue that the subject statement is true and not defamatory in nature, and for the first time in their Reply Brief, assert a list of "undisputed facts" which should have been set forth in the Motion, not the untimely Reply. *See* Defendants' Reply, p. 4, line 10 – p. 5, line 24. Defendants' conduct and actions are not only further evidence that Defendants' tactics are nothing more than harassing and vexatious, but also deprive Plaintiff of the opportunity to address Defendants' additional assertions, which is unfairly prejudicial. Defendants' continual barrage of briefs calling for dismissal have forced Plaintiff to incur significant additional attorneys' fees and costs, by filing a Motion to Strike and this Sur-

PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101
(702) 214-2100

Reply.[1]

Accordingly, Plaintiff moves this Court to not only deny Defendants' Special Motion to Dismiss in its entirety, but to award statutory costs and attorneys' fees pursuant to NRS 41.635-70. Plaintiff also moves for this Court to award attorneys' fees and costs for having to file this Sur-Reply as well as any fees and costs it may deem appropriate pursuant to NRS 18.010.

II.

LEGAL DISCUSSION

A. Defendants Fail to Provide A Complete Statement Of Undisputed Facts Which Includes The Context Of Why A Verdict Was Entered In Favor Of Plaintiff Which Reveals That The Subject Statement On Defendants' Website Is False And Defamatory.

Defendants' Reply includes, for the first time, a list of "undisputed facts material to the Defendants' request for summary judgment" which is procedurally improper and continues to take into account the *importance* of the fact that a verdict was entered in favor of Plaintiff. *See* Defendants' Reply, p. 4, line 10 – p. 5 line 20. Defendants set forth facts without providing crucial details regarding Plaintiff's verdict. In order to provide a clear and complete picture, Plaintiff incorporates the following additional relevant facts for this Court:

1. A Judgment on Jury Verdict was entered in favor of Ton Vinh Lee, DDS.

2. A Judgment on Jury Verdict was filed in favor of the plaintiffs as to Ton Vinh Lee, P.C. and on of the treating dentists in the underlying matter on April 29, 2014. (previously provided in Defendants' Reply).

3. However, Ton Vinh Lee, P.C. and Florida Traivai, DMD each filed Motions for Judgment as a Matter of Law Pursuant to NRCP 50(b), which were granted by the District Court, agreeing that the plaintiffs in Singletary action failed to provide expert opinions concerning the standard of care and causation to a reasonable degree of medical probability. *See* Order Granting Motion for Judgment as a Matter of Law, p. 12, lines 15-16, attached hereto as **Exhibit "A"**.

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[1] It should be noted that because Defendants filed an untimely Reply without first obtaining leave from this Court, a violation of EDCR 2.20(h), raising additional arguments and setting forth, for the first time, a list of "undisputed facts", Plaintiff has not had adequate time to address all the points and authorities set forth in Defendants' Reply. As such, Plaintiff objects to all arguments in Defendants' Reply in their entirety, and in no way admits or concedes to any statements or assertions made in said Reply, even though they may not be fully addressed in this Sur-Reply.

4. Upon granting Plaintiff Ton Vinh Lee's NRCP 50(b) Motion, the jury verdict against Ton Vinh Lee, P.C. and one of the treating dentists was vacated.

5. There was no jury verdict against Plaintiff Ton Vinh Lee, Ton Vinh Lee DDS, d/b/a Summerlin Smiles, or any other defendant in the underlying litigation at the time Defendants' statement was made on their website, or the time that the Complaint was filed in the instant action.

Based on the foregoing, Defendants' statement is susceptible to mean that Defendants' obtained a verdict against all the named defendants in the Singletary action, *including* Plaintiff, both as an individual, and as owner of Summerlin Smiles. As such, the subject statement is not only false, but susceptible to a defamatory meaning. *Posadas v. City of Reno*, 109 Nev. 448, 453, 851 P.2d 438, 442 (1993); *see also Pink v. Oshins*, 118 Nev. 428, 437, 49 P.3d 640, 646 (2002).

B. Defendants Improperly Set Forth In Their Untimely Reply, For The First Time, A List Of Undisputed Facts In An Attempt To Rectify The Numerous Deficiencies In Their Special Motion To Dismiss As Well As Arguments Under The Correct Prima Facie Case Standard Pursuant To NRS 41.660.

"[T]he special ***motion*** to dismiss is procedurally treated as a summary judgment . . . The district court can only grant the special ***motion*** to dismiss if there is no genuine issue of material fact and 'the moving party is entitled to a judgment as a matter of law.'" *John v. Douglas County Sch. Dist.*, 125 Nev. 746, 753-54 (2009). (Emphasis Added).

Defendants assert *for the first time* in their untimely Reply a list of "undisputed facts", in support of its Special Motion to Dismiss which should have been set forth in the Motion. *See* Defendants' Reply, p. 4, line 10 – p. 5, line 24; EDCR 2.20(h).[2] Not only is the Reply improperly filed in violation of EDCR 2.20(h), it is clearly an underhanded attempt for Defendants to take a second bite at the apple in *attempting to perfect* their "motion for summary judgment", taking advantage of Plaintiff pointing out the severe discrepancies in Defendants' Special Motion to Dismiss (e.g., citing and relying on the wrong version of NRS 41.660). Defendants' tactics are in

[2] Plaintiff sets forth points and authorities in more detail in his Motion to Strike Or In The Alternative, Motion for Continuance on an Order Shortening Time filed on November 16, 2015, arguing that Defendants' Reply is untimely and filed in violation of EDCR 2.20(h).

BREMER WHYTE BROWN & O'MEARA LLP
1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144
(702) 258-6665

direct contradiction with Nevada law and public policy. Plaintiff did not open the door for Defendants to perfect and address the inadequacies of their Special Motion to Dismiss by diligently pointing them out in his Opposition. Allowing Defendants' Reply to *retroactively* fix the inadequacies of their Special Motion to Dismiss deprives Plaintiff of equal opportunity to adequately address and defend against the assertions that should have been set forth in said Motion.

C. **Defendants Fail To Show That the Subject Defamatory Statement Was Made In Furtherance Of the Right To Free Speech In Direct Connection With A Matter of Public Concern Because The Statement Is An Advertisement In Nature For The Purpose Of Marketing.**

NRS 41.660(3) provides in relevant part:

> If a special motion to dismiss is filed pursuant to subsection 2, the court shall:
> (a) 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 connect 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 demonstrated with prima facie evidence a probability of prevailing on the claim;
> . . .

NRS 41.637 defines what constitutes as "good faith communication in furtherance of the right to petition or the right to free speech in direct connect with an issue of public concern", which 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;
> 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 made without knowledge of its falsehood.

Before there can be a determination whether or not the non-moving party has demonstrated with prima facie evidence a probability of prevailing on the defamation claim, the moving party must show that the underlying action is "brought against a person based upon a good faith

BREMER WHYTE BROWN & O'MEARA LLP
1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144
(702) 258-6665

communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public importance. *Id.* The moving party must make this showing based upon a preponderance of the evidence. NRS 41.660(3)(a). A good faith communication is one that is "truthful or made without [the] knowledge of falsehood." *John*, 125 Nev. at 761.

Defendants' claim that Plaintiff cannot establish that the statement posted on Defendants' website is false and defamatory and that the subject statement was made in direct connection with issue concerning a judicial body, constituting as a matter of public concern, focusing on NRS 41.637(4) for statutory support. *See* Defendants' Reply, p. 5, line 21 – p. 6, line 5. Prior to the commencement of this action, Defendants' statement posted on their website read:

> DENTAL MALPRACTICE/WRONGFUL DEATH – PLAINTIFF'S VERDICT $3.4M, 2014
> Description: Singletary v. Ton Vinh Lee, DDS, et al.
>
> A dental malpractice-based wrongful death action that arose out of the death of Decedent Reginald Singletary following the extraction of the No. 32 wisdom tooth by Defendants on or about April 16, 2011. Plaintiff sued the dental office, Summerlin Smiles, the owner, Ton Vinh Lee, DDS, and the treating dentists, Florida Traivai, DMD and Jai Park, DDS, on behalf of the Estate, herself and minor son.

See "Settlement-Verdict, Patinlaw.com/settlement-verdict/, July 9, 2015 version, attached hereto as **Exhibit "B"** To Opposition. According to Defendants, the above statement was made in direct connection with an issue under consideration by a judicial body, concerning the issue of dental malpractice "which is an issue of public health and safety" which was posted on a website that "is open and accessible by the public." *See* Defendants' Reply, p. 10, lines 14-26.

First, the above statement was not made in good faith as it is not truthful and Defendants, as the lead trial counsel who were well aware of the verdict in favor of Plaintiff, knew or should have known that posting a $3.4 million dollar verdict without actually receiving the judgment monies and forwarding them to their clients (Nev. Rules of Prof'l Conduct 7.2(i)) was perpetuating a falsehood. Defendants, as licensed practicing attorneys, also knew or should have known, that without providing *context* to the above statement that it was or would be susceptible to interpretation by anyone accessing this information that all of the named defendants listed in the statement, including Plaintiff Ton Vinh Lee, was found liable and committed malpractice causing

BROOKS WHITE BROWN & O'HARA LLP
1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144
(702) 258-8080

the wrongful death of a person.

Second, while a website is arguably a public forum, this does not mean that any statement made on a website is a matter of public concern or interest. *See Grienier v. Taylor*, 234 Cal. App. 4th 471, 481-82, 183 Cal. Rptr. 3d 867, 874-75 (2015). While the scope or boundaries of an issue of public concern has not been defined, *Griener v. Taylor* is instructive[3] as the California Court of Appeals has provided some guidance and persuasive reasoning to this issue as it relates to an anti-SLAPP statute, holding that:

> "[P]ublic interest" is not mere curiosity. Further, the matter should be something of concern to a ***substantial number of people***. ***Accordingly, a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest.*** The assertion of a ***broad*** and amorphous public interest that can be ***connected to the specific dispute is not sufficient.*** (citations omitted). Once cannot focus on society's general interest in the subject matter of the dispute instead of the specific speech or conduct upon which the complaint is based.
>
> . . . .
>
> . . . in the context of conduct affecting a "community", i.e., a limited but definable portion of the public, the constitutionally protected activity must, at minimum, be connected to a discussion, debate or controversy. ***Mere informational statements are not protected.*** To grant such protection to such statements would in no way further "the statute's purpose of encouraging ***participation*** in matters of public significance." (citations omitted).

Id. (Emphasis Added).

Here, the subject statement was not made in connection with a matter of public concern or interest as it is undisputed that the statement was made on a law firm website which is aimed at a specific and relatively small audience: potential clients for the purpose of advertising legal services. Moreover, Defendants use a very broad subject "medical malpractice" in connection with a very specific dental practice and singular alleged wrongful death event to suggest that it is an interest of public concern which is not sufficient or what was contemplated for anti-SLAPP statutes. *Id.* Furthermore, while the subject statement may be connected to a controversy (e.g., a lawsuit), it

[3] SB 444, sec. 12.5(2) allows use of California law in interpreting Nevada's anti-SLAPP statute.

serves as nothing more than for the purposes of advertisement, and to further the marketing and soliciting agenda of a law firm, rather than encouraging participation in matters of public significance. *Id.* Indeed, to suggest that the statement was made in direct connection with an issue of public concern is a thinly veiled cover that lacks any substance as its true singular purpose is to bolster Defendants' reputation and implied ability to be successful in the pursuit of a law suits again medical professionals like Plaintiff and obtain sizeable verdicts in favor of their clients. If a statement like the one published on Defendants' website constituted as a matter of public concern, then any and all statements made by attorneys would always be protected by anti-SLAPP law suits, as matters of public concern.

D. Plaintiff Has Demonstrated Prima Facie Evidence That His Claims Against Defendant For Defamation Have A Probability Of Prevailing.

Once and only if the moving party meets this burden, then it must "determine whether the plaintiff has ***demonstrated with prima facie evidence*** a probability of prevailing on the claim." NRS 41.660(3)(b) (Emphasis Added). "A prima facie case is defined as sufficiency of evidence in order to send the question to the jury. The question of sufficiency of the evidence does not turn on whether the trier of fact will make the desired finding. Therefore, . . . the weight of the evidence [is] not of consequence in the presentation of a prima facie case." *Vancheri v. GNLV Corp.*, 105 Nev. 417, 420, 777 P.2d 366, 368 (1989). A prima facie case is supported by sufficient evidence when enough evidence is produced ***to permit a trier of fact to infer the fact at issue and rule in the party's favor.*** *Foster v. Dingwall*, 227 P3.d 1042, 1050 (Nev. 2010). (Emphasis Added).

"Whether a statement is capable of a defamatory construction is a question of law" and "[a] jury question arises when the statement is susceptible of different meanings, one of which is defamatory." *Id.* at 484 *citing Brandon v. Sanford*, 97 Nev. 643, 646-47, 637 P.2d 1223, 1225-1226 (1981). Statements or "words must be reviewed in their entirety and in ***context*** in order to determine whether they are susceptible of defamatory meaning." *Id.* Furthermore, "the truth or falsity of an allegedly defamatory statement is an ***issue of fact properly left to the jury*** for resolution." *Posadas*, 109 Nev. at 453, 851 P.2d at 442; *see also Fink*, 118 Nev. at 437, 49 P.3d at 646 (2002). (Emphasis Added).

BREMER WHYTE BROWN & O'MEARA LLP
1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144
(702) 258-6665

Defendants set forth in their untimely Reply, a list of "undisputed" material facts which they argue entitle them summary judgment as a matter of law. *See* Defendants' Reply, p. 4, line 10 – p. 5, line 24. Defendants' list however, fails to provide additional material facts that brings the subject defamatory statement into context which, as a matter of law, must be taken into account in order to determine whether the words in the statement are susceptible of defamatory meaning. *See Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 483, 851 P.2d 459 (1993).

Defendants' assertions that the subject statement is true are surface-based only, claiming it correctly "identifies" the parties involved in the malpractice suit. Defendants also attempt to narrow this Court's view by stating that they "specifically delineated the roles of each party sued . . . specifically stat[ing] that Ton V. Lee, DDS was sued as the owner of Summerlin Smiles, and not as a treating dentist."

However, contrary to Defendants' belief, due to the simplistic description in the statement which "identifies" all parties involved, in conjunction with the preliminary language: "DENTAL MALPRACTICE/WRONGFUL DEATH - PLAINTIFF'S VERDICT", the statements' omission of key details, referenced above, in addition to the statement's advertisement-nature leads any prospective client or other reader to believe that a verdict was obtained by all the people identified, including Ton Vinh Lee, both as an individual and an owner of Summerlin Smiles. When read in the context that Defendants identify Dr. Lee by name, and his practice, and incorrectly assert that their clients obtained a $3.4 million jury verdict against Dr. Lee and his practice, despite the fact that *no verdict was ever obtained against Dr. Lee individually, and the verdict against his practice and other parties was vacated,* the above statement is **susceptible** to mean that the plaintiff in Singletary v. Ton Vinh Lee, DDS, et al., obtained a verdict and monetary award against all the named defendants in the lawsuit, giving the implication that Dr. Lee was found to have committed dental malpractice, resulting in the death of a patient.

Therefore, the statement can easily be inferred by a jury to hold a false and defamatory meaning and Plaintiff has established a prima facie case here.

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BREMER WHYTE BROWN & O'MEARA LLP
1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144
(702) 258-6665

E. **Plaintiff Is Entitled To An Award Of Attorneys' Fees And Costs Because He Has Been Forced To Incur Unnecessary Additional Fees And Costs Defending Against A Second Motion To Dismiss Which Is Vexatious, Harassing, And Without Merit.**

Defendants continually attempt to dismiss this action with meritless arguments that were already considered and denied by this Court. *See* **Exhibit "A"** To Opposition. Immediately upon the denial of the original motion, Defendants filed the underlying Special Motion to Dismiss under an outdated version of Nevada's anti-SLAPP statute which was substantially amended and revised. *See* NRS 41.660(3). Defendants' feebly excuse this egregious inaccuracy and misrepresentation to this Court as an innocent mistake, stating that Defendants' reliance on the outdated version of the statute was justified because it was not yet published. However, as set forth above, it is difficult and surprising to imagine that Defendants' counsel of record, an established law firm of over twelve years, does not have access to advanced legal research tools, which would have undoubtedly alerted them to the significant change in the law. It is clear that Defendants are employing relentless-assault-and-bombardment tactics by continually filing motions for dismissal with this Court to wear Plaintiff down.

Moreover, Defendants attempt to bully Plaintiff and demand significant attorneys' fees and costs for daring to bring a Complaint against them. If Defendants are so brash in demanding such fees and costs for having to defend this suit bases on outdated law, then fairness demands that they are willing to accept the consequences of their actions and the risks they took in filing a Special Motion to Dismiss. As Defendants even admitted in their own untimely Reply, they "are well aware of the fact that Plaintiff could be awarded damages up to $10,000 in addition to attorney's fees and costs if the Special Motion were denied." Defendants should be held accountable for their actions, and filing an untimely Reply without leave of this Court in violation of EDCR 2.20(h), which deprives Plaintiff of an opportunity to adequately respond to the improper addition of a list of "undisputed facts," as Defendants are attempting a second bite of the apple which should not be allowed by this Court.

Based on the above, Plaintiff should be awarded attorneys' fees and costs incurred pursuant to NRS 41.670(2), as well as a separate award of damages up to $10,000, plus additional relief as

BREMER WHYTE BROWN & O'MEARA LLP
1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144
(702) 258-6665

this Court deems proper pursuant to NRS 41.670(3) and/or NRS 18.010.

F. Plaintiff Requests Leave To File A Sur-Reply Which Adequately Addresses All Points And Authorities Asserted By Defendants In Their Improperly And Untimely Filed Reply.

As stated throughout this Sur-reply, and discussed in Plaintiff's Motion to Strike on file herein, Defendants filed an untimely Reply without first obtaining leave from this Court, in violation of EDCR 2.20(h). Defendants' Reply sets forth, for the first time, a list of "undisputed facts" and argument under the proper standard of the controlling statute, NRS 41.660. The effect of the Reply, if this Court allows it to be considered in rendering its decision on the underlying Special Motion to Dismiss, will be unduly and unfairly prejudicial to Plaintiff since Defendants will be afforded a second-bite-of-the-apple, without providing Plaintiff adequate time to fully address and respond to the entirety of the Reply.

Therefore, based on the above, as well as those arguments set forth in Plaintiff's Motion to Strike filed on November 16, 2015, should this Court deny Plaintiff's Motion to Strike Defendants' Reply and allow it to be part of the record and consider it in its ruling on the underlying Special Motion to Dismiss, Plaintiff requests this Court provide leave to allow Plaintiff adequate time to file a more comprehensive Sur-Reply in order to adequately address the entirety of Defendants' Reply.

III.

CONCLUSION

Based on the foregoing, Plaintiff continues to respectfully request that the Court deny Defendants' Special Motion to Dismiss in its entirety as Defendants cite the wrong version of Nevada's Anti-SLAPP law, cite the wrong allegedly defamatory statement, the claims made in Plaintiff's complaint do not constitute a SLAPP lawsuit as required for Nevada's Anti-SLAPP law to apply, and find that Plaintiff demonstrates a prima facie case. Furthermore, Defendants' separate Motion to Dismiss under Rule 12(b)(5) must be denied as no basis is shown as to why Plaintiff's claims must fail due to the fact that Plaintiff is the owner of Ton Vinh Lee DDS PC d/b/a Summerlin Smiles.

BREMER WHYTE BROWN & O'MEARA LLP
1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144
(702) 258-6665

Plaintiff further requests an award of attorney's fees and costs incurred pursuant to NRS 41.670(2), and a separate award of damages up to $10,000, plus additional relief as this Court deems proper pursuant to NRS 41.670(3) and/or NRS 18.010.

Finally, if this Court is so inclined to allow the admission of Defendants' Reply for consideration of Defendants' Special Motion to Dismiss, Plaintiff requests leave from this Court to allow sufficient and adequate time to file a comprehensive Sur-Reply in response to Defendants' Reply.

Dated: November 17, 2015

BREMER WHYTE BROWN & O'MEARA LLP

By: _____

Prescott T. Jones, Esq.
Nevada State Bar No. 11617
August B. Hotchkin, Esq.
Nevada State Bar No. 12780
Attorney for Plaintiff,
TON VINH LEE

BREMER WHYTE BROWN & O'MEARA LLP
1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144
(702) 258-6665

EXHIBIT "A"

EXHIBIT "A"

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ORDR

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

***

SVETLANA SINGLETARY, et al

Plaintiffs

v.

TON LEE, DDS., et al,

Defendants

CASE NO. A656091
DEPT. XXX

ORDER ON DEFENDANT TRAIVAI'S AND LEE'S MOTIONS FOR JUDGMENT AS A MATTER OF LAW PURSUANT TO NRCP 50(B), AND MOTION FOR REMITTITUR

INTRODUCTION

Defendants, Florida Traivai, DMD and Ton V. Lee, DDS d/b/a Summerlin Smiles, each filed a Motion for Judgment as a Matter of Law Pursuant to NRCP 50(b). Such Motions came on for hearing on June 26, 2014. Having reviewed the pleadings and papers on file, having heard oral argument by the parties, and good cause appearing, the Court now issues its Order.

This is a case in which plaintiffs – the wife, child, and estate – sued for dental malpractice/wrongful death. Decedent Reginald Singletary went to Dr. Park at Summerlin Smiles for a wisdom tooth extraction on April 16, 2011. Following the tooth extraction, Reginald did not do well. His condition deteriorated from April 21, 2011, to April 24, 2011, and he passed away on April 25, 2011, due to necrotizing mediastinitis and septic shock due to Ludwig's Angina from dental abscess.

The case was tried by a Jury from January 13, 2014, through January 22, 2014, and resulted in a verdict in favor of the Plaintiffs.

ARGUMENT

Defendants both now argue, pursuant to NRCP 50(b), that a Judgment as a Matter of Law should be granted in favor of the Defendants, and against the Plaintiffs, due to the fact that Plaintiff failed to offer his opinions regarding standard of care and causation to a reasonable degree of medical probability. Defendants further argue that if the Court is now willing to grant Judgment as a Matter of Law in favor of the Defendants, the Court should reduce the Plaintiffs' noneconomic damages by Remittitur to $350,000, pursuant to NRS 41A.035

Plaintiffs argue initially that the Defendants are precluded from bringing an NRCP 50(b) Motion for Judgment as a Matter of Law now, because the Defendants brought an NRCP 41(b) Motion to Dismiss during trial, and not an NRCP 50(b) Motion, and consequently, the Defendants are now precluded from "renewing" an NRCP 50(b) motion. Additionally, Plaintiffs argue that Dr. Pallos did offer his opinions, to a "reasonable degree of medical probability," and that when he stated those words on pg. 67 of the transcript, he was referring to his three main opinions regarding standard of care, and not the requirements of informed consent.

LEGAL ANALYSIS, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

Both Defendants have brought a Motion for Judgment as a Matter of Law pursuant to NRCP 50(b). NRCP 50(b) reads as follows:

> (b) Renewing motion for judgment after trial; alternative motion for new trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after service of written notice of entry of judgment and may alternatively request a new trial or join a motion for new trial under Rule 59. In ruling on a renewed motion the court may:
>
> (1) If a verdict was returned;
>
> (A) Allow the judgment to stand,
>
> (B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

. . . .

(NRCP 50[b]).

The Editor's Note with regard to rule 50(b) reads in part as follows:

> Subdivision (b) is amended to conform to the 1991 amendment to the federal rule. The Nevada rule was amended in 1971 to delete the requirement under the then-existing federal rule that a motion for judgment notwithstanding the verdict did not lie unless it was preceded by a motion for a directed verdict. The revised rule takes the same approach as the federal rule, as amended in 1963 and 1991, that a post-verdict motion for judgment as a matter of law is a renewal of an earlier motion made before or at the close of evidence. Thus, a "renewed" motion filed under subdivision (b) must have been preceded by a motion filed at the time permitted by subdivision (a)(2). . . .

(NRCP50 [Editor's Note]).

Plaintiff argues that Defendants' Motion for Judgment as a Matter of Law is inappropriate, as Defendants never made a Rule 50(b) Motion for Judgment as a Matter of Law during Trial, but instead brought a Rule 41(b) Motion to Dismiss.

NRCP 41(b) reads as follows:

> (b) Involuntary dismissal: Effect thereof. For failure of the plaintiff to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(NRCP 41[b]).

The Editor's Note to NRCP 41 states in pertinent part as follows:

> Subdivision (b) is amended to conform to the 1963 and 1991 amendments to the federal rule by removing the second sentence, which authorized the defendant to file a motion for involuntary dismissal at the close of the plaintiff's evidence in jury and nonjury cases when the plaintiff had "failed to prove a sufficient case for the court or jury." For a nonjury case, the device is replaced by the new provisions of Rule 52(c), which authorize the court to enter judgment on partial findings against the plaintiff as well as the defendant. For a jury case, the correct motion is the motion for judgment as a matter of law under amended Rule 50.

(NRCP 41, Editor's Note).

In the case of *Lehtola v. Brown Nevada Corporation*, 82 Nev. 132, 412 P.2d 972 (1966), the Nevada Supreme Court addressed facts similar to the facts in the present case. In that case the Plaintiffs received jury verdicts in their favor, which were set aside by the trial court and a judgment notwithstanding the verdicts (JNOV's) were entered for the Defendant. In reviewing the case on appeal, the Nevada Supreme Court noted that at the close of the plaintiffs' case in chief, the defendant moved for involuntary dismissal pursuant to NRCP 41(b). The judge reserved ruling and the defendant presented his case. Thereafter, the Court did not rule on the 41(b) motion and the Defendant did not make a motion for directed verdict at the close of the case. The Defendant proceeded to argue that the lower court could treat the mid-trial motion as a motion for a directed verdict at the close of the case, thereby providing the necessary foundation for the later motion for JNOV. The Nevada Supreme Court did not agree. The Court acknowledged that a 41(b) motion for involuntary dismissal made at the close of Plaintiff's case in chief and a 50(a) motion for a directed verdict made at the close of Plaintiff's case in chief were functionally indistinguishable. The Court stated, "However, it does not follow that a 41(b) motion at the close of the plaintiffs' case may serve as a motion for a directed verdict as contemplated by Rule 50 to establish a basis for a subsequent motion for a judgment n.o.v. A 50(a) motion must be made at the close of all the evidence if the movant wishes later to make a postverdict motion under that rule." (*Id.*, at 136). The Court further stated that "A 41(b) mid-trial motion necessarily tests the evidence as it then exists. Here the court reserved ruling on that motion. Thereafter, the complexion of the case changed as the defendant offered evidence. The record does not show that at the close of the case the defendant requested a ruling on the mid-trial motion, and no motion was made for a directed verdict. Nothing occurred. The lower

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. . . .

. . . .

court therefore, was not authorized to entertain a postverdict motion under 50(b)." (Id., at 136).[1]

The Court must address what motions were made by the Defense at the close of Plaintiff's case, and what motions were made at the close of the evidence, to determine if the Defendants preserved their right to bring a post-trial Rule 50 motion.

On January 16, 2014, at the close of the Plaintiffs' case in chief, the Defendants each made a NRCP "Rule 41(b) motion." Mr. Vogel stated, "On behalf of Dr. Traivai, I would like to make a Rule 41(b) motion. Based on the testimony of plaintiffs' expert, they have not established that there was a deviation of the standard of care, an admissible -- admissible testimony of a deviation of the standard of care on behalf of Dr. Traivai. . ." (See Trial Transcript 1/16/14, at pg. 160). Mr. Friedman similarly stated, "And, Your Honor, I made the -- a motion also on 41(b) relative to Dr. Lee as well as Summerlin Smiles. There's been no testimony whatsoever that the person who answered the phone, if anybody answered the phone, was an employee of Summerlin Smiles or Dr. Lee. . . ." (See Trial Transcript 1/16/14, at pg. 161). Mr. Lemons did not refer to Rule 41(b) or to Rule 50, but stated the following: "And I'm going to make a similar motion on behalf of Dr. Park, Your Honor, but for a little different grounds. Dr. Pallos testified that Dr. Park's involvement in the extraction process accorded with the standard of care, and he didn't specify any deviation from the standard of care to a reasonable degree of medical probability as to Dr. Park in his testimony. . . ." (See Trial Transcript 1/16/14, at pg. 161).

. . . .

[1] It should be noted that in 1966, NRCP 41(b) allowed a Defendant to make a motion, at the close of Plaintiff's evidence, for dismissal on the ground that the Plaintiff had failed to prove a sufficient case for the court or jury. Rule 50(a) allowed for a motion for a directed verdict to be made at the close of the evidence offered by an opponent or at the close of the case. Rule 50(b) provided that if a motion for directed verdict made at the close of all the evidence was denied or not granted, the court was deemed to have submitted the action to the jury subject to a later determination of the legal question raised by motion. Not later than 10 days after service of the written notice of entry of judgment, the party who moved for a directed verdict could move again to have the verdict and any judgment entered thereon set aside and to have a judgment entered in accordance with the motion for directed verdict. (*Lehtola v. Brown*, at FN 1).

In response to the Defendants' Motions, the Court and the attorneys participated in an exchange regarding whether, and to what extent, Dr. Pallos had offered any opinions to a "reasonable degree of medical probability." There was also a discussion regarding whether any case law required "standard of care" opinions to be stated to a "reasonable degree of medical probability." The Court noted that Dr. Pallos admitted with regard to the "informed consent issue," that his opinion was based on speculation, and that he had no foundation for it, and consequently, the Court struck that claim. (See Trial Transcript 1/16/14, at pg. 173).

Counsel for Dr. Lee and Summerlin Smiles argued that the Plaintiff could not establish who, if anyone, answered the phone, and consequently, the Plaintiff's claims against Dr. Lee and Summerlin Smiles failed. The Court concluded that based upon Ms. Singletary's testimony that a call was made, and that she spoke with somebody, there was at least "circumstantial evidence" that the Jury could rely on in that regard.

After reviewing the case of *Morsicato v. Sav-On Drug Stores*, 121 Nev. 153, 111 P.3d 1112 (2005), the Court concluded that expert testimony regarding both "standard of care" and "causation," needed to be stated to a "reasonable degree of medical probability." The *Morsicato* case specifically says that "medical expert testimony, regarding the standard of care and causation in a medical malpractice case, must be based on testimony made to a reasonable degree of medical probability." (*Id.*, at pg. 158). During the hearing on the Defendants' Motions for Judgment as a Matter of Law, it was argued that there was a difference between requiring an opinion to be "based on" a reasonable degree of medical probability, and requiring the witness to "state" that the opinion is "to a reasonable degree of medical probability." The Supreme Court in *Morsicato*, however, indicated that "medical expert testimony regarding standard of care and causation must be ***stated*** to a reasonable degree of medical probability." (Id., at pg. 158, emphasis added).

In the case at issue, Dr. Pallos only used the words, "to a reasonable degree of medical certainty, or probability," one time. (See Trial Transcript 1/16/14, at pg. 67).

The Defendants argue that Dr. Pallos' only opinion stated to a reasonable degree of medical probability related to "informed consent," an opinion the court later struck as having no foundation. The Plaintiffs, on the other hand, argue that Dr. Pallos' opinion given on 1/16/14, related not to the "informed consent" issue, but to the three general opinions that Dr. Pallos offered. After being qualified as an expert, the relevant questions and answers went substantially as follows:

> Q. . . . did you formulate any opinions with regard to the standard of care?
> A. Yes, I have.
> Q. Okay. What are those opinions (See Transcript 1/16/14, at pg. 51)
> . . . .
> A. One of the things required by the standard of care is that we obtain what's called
> an informed consent. Very important. That means I – before I cut you, before I do surgery, before I have permission to do those procedures that could harm you, I have to inform you of what I'm going to do. What else could be done instead of what I am proposing to do that I consider to be in your best interest? What other methods are there? And what risks are associated with what I'm going to do? . . .
>
> I believe in this case that was not followed, and there was a failure in following the standard of care relative to this item called the informed consent. . . . (See Transcript 1/16/14, at pg. 52)
>
> Number 2, antibiotics . . . We have to either give that antibiotic, make that antibiotic accessible to that patient, or follow that patient like a dog on bone to make sure that person does not need the antibiotic, if we choose not to prescribe that antibiotic. . . .
>
> Number 3, the follow up is required, whether I choose to call the patient or I hire an employee who calls the patient on my behalf. Very important not to abandon, neglect, leave that patient . . . .
>
> So that is my opinion in a nutshell regarding those three categories. (See Transcript, 1/16/14, at pg. 53).
> Q. . . . . Let's start with No. 1 and get specific with regard to how the dentist in this case acted below the standard of care with regard to informed consent.
> A. . . . . The first thing required is that I tell you what the procedure is that I'm about
> to do or want to do. . . . (See Transcript, 1/16/14, at pg. 54).
> . . . .
> A. So this patient had a chronic infection in the opinion of the doctor who treated or
> at least got the consent. Okay? So she had to tell him this. You know, your tooth is dead. Your pulp is necrotic. You have a periodontal infection. You have a chronic infection. There exists that infection. Okay. So that's No. 1 she had to tell him this.

Number 2, are there alternatives to taking out the tooth -- (See Transcript, 1/16/14, at pg. 61).

Q. Dr. Pallos, now that you've kind of explained to us with regard to this tooth, which is Tooth No. 32, and the condition of that tooth, can you continue explaining to us how the dentist in this case acted below the standard of care with regard to informed consent.

A. . . . . So the first thing regarding the requirement for an adequate minimum informed consent is that we tell the patient what we want to do . . . .

. . . .

Now, the second component that's required is that we talk about an alternative method.

. . . .

Requirement No. 3 is I have to communicate with you what may happen if I do this so that we can get through it together and you'll end up better than you are now. Okay? And what's required there is that I tell about the risks if I do this surgery. . . .

. . .

So we have these three requirements.

After that, the fourth requirement is all these things have to be written down, and you get to sign that you still want to do this. . . . (See Transcript, 1/16/14, at pgs. 62-64).

. . . .

Q. So let's start with the fourth part of this. . . . do you have any opinion with regard to whether or not that informed consent form was not proper in any way?

A. Okay. There's a form that we all get some kind of version of that form. It's supposed to contain at least these three ingredients: What I want to do, what's the procedure that I want to do, what are the alternatives to that procedure, and what are the risks if I do this. . . . And yes, it meets the standard in that sense. And so I don't have any objection about the form.

. . . .

Q. Now, with regard to the other three parts of the informed consent discussion, in what way did Dr. Traivai's informed consent discussion not meet the standard of care? You've explained to us what's required. How did it not meet the standard of care?

A. Okay. By what happened in this case, by the behavior of this person, he was not prepared to know whether his infection was getting worse to the point where he needed urgent attention and life-saving antibiotics. In my opinion, they fell short of meeting the goal of explaining, listen, it's an infection . . . .

So in my opinion, to a reasonable degree of medical certainty, or probability is the way it's -- we have to phrase it, ***they fell below the standard of care in meeting this requirement of giving an effective informed consent. In all three of those points.***

. . . .

Q. Dr. Pallos, we were talking about the first opinion that you have with regard to informed consent and how the dentist violated the standard of care with regard to the informed consent discussion. . . . . (See Transcript, 1/16/14, at pgs. 65-68, emphasis added).

In reviewing the transcript during Trial, the Court could not determine whether Dr. Pallos' opinion to a reasonable degree of medical probability was related solely to the "informed consent" opinion or if it related to the three general opinions, which Dr. Pallos set forth in pgs. 52 and 53 of the Transcript. However, in meticulously reviewing the transcript in its entirety, it is evident that the Court must agree with Defendants; Dr. Pallos' opinion, which he offered to a "reasonable degree of medical probability," only related to the 3 points that he referenced dealing with the "informed consent" opinion. He was not critical of the "form" used, which he referenced as the "fourth requirement," but he was critical of the other three (3) elements which he discussed relating to informed consent. ([1] What the procedure is/ What the problem is; [2] What are the alternatives; and [3] What are the risks.) Plaintiff's counsel's follow-up questioning makes it even more clear that the opinions Dr. Pallos was offering were limited to the "informed consent" issue.

The only opinion that Dr. Pallos stated to a "reasonable degree of medical probability" was stricken for lack of foundation. The question then becomes whether or not the other opinions that Dr. Pallos offered should have also been stricken, due to the fact that they were not offered to a reasonable degree of medical probability. The language referenced above, from the *Morsicato* case, indicates very clearly that "medical expert testimony regarding standard of care and causation must be stated to a reasonable degree of medical probability. . ." (*Morsicato*, at pg. 158). The Nevada Supreme Court recently issued a decision, however, that may be interpreted as relaxing that standard. In the case of *FCH1, LLC v. Rodriguez*, 130 Nev. Adv. Op. 46 (Nev. 2014), the District Court struck the testimony of the Palms' experts on security and crowd control, and economics because they failed to offer their opinions "to a reasonable degree of professional probability." (*FCH1*, at pg. 5) The District Court relied on *Hallmark* in making its decision. The Nevada Supreme Court indicated that "*Hallmark*'s refrain is functional, not talismanic, because the 'standard for admissibility varies depending upon the expert opinion's nature and purpose.'"

(*FCH1*, at pg. 5, citing to *Morsicato* at pg. 157.) The Court stated, "Thus, rather than listening for specific words the district court should have considered the purpose of the expert testimony and its certainty in light of its context." (*FCH1*, at pg. 5, citing to *Williams v. Eighth Judicial Dist. Court*, 262 P.3d 360, 368 [2011]).

It has been argued recently that the FCH1 case intended to relax the standard to which expert testimony should be held. The Court's language indicating that the "standard for admissibility varies depending upon the expert opinion's nature and purpose," is still quite ambiguous and we have no guidance as to what the court was referring to. The nature and purpose of Dr. Pallos, the Plaintiff's expert, was to provide expert opinion testimony regarding "standard of care" and "causation" in this claim for alleged medical malpractice. The Nevada Supreme Court has clearly held in the past that "medical expert testimony regarding standard of care and causation must be stated to a reasonable degree of medical probability." (*Morsicato* at pg. 158). Since the Supreme Court cited to *Morsicato* in its FCH1 case, but did not specifically overrule *Morsicato*, this Court must conclude that it was not the intention of the Nevada Supreme Court to change the standard which is required of a medical expert when testifying as to standard of care and causation, and that such testimony must still be offered "to a reasonable degree of medical probability."

Based upon the foregoing, this Court must conclude that Dr. Pallos' testimony regarding standard of care and causation, which formed the basis for the Jury's verdict in favor of the Plaintiff, should have been stricken because it was not stated to a "reasonable degree of medical probability."

With regard to the issue of whether the Defendant's Rule 41(b) Motions at the close of Plaintiffs' case, and at the close of the evidence, was sufficient to preserve the issue for a post-trial motion, this Court believes, similarly to the Court in *Lehtola*, that an NRCP 41(b) Motion and an NRCP 50(a) Motion are "functionally indistinguishable." The better and clearer practice would be to call it an NRCP 50(a) Motion, when moving for Judgment as a Matter of Law, but whether it was called a

41(b) Motion or a rule 50 Motion, the Defendants effectively sought judgment as a matter of law. Such Motion was based on the contention that the Plaintiffs had failed to make a prima facie case, due to the lack of standard of care and causation testimony, to a reasonable degree of medical probability.

The Defendants did not make a motion at the close of the evidence, for judgment as a matter of law. There was some discussion with Mr. Lemons, who represented Dr. Park, on January 21, 2014, with regard to the standard to which an economic expert must testify. The Court allowed the economic expert's testimony, even though it was not offered to a reasonable degree of medical probability, because the Court found such testimony to be based upon the expert's expertise, and to satisfy the *Hallmark* requirements. (See *FCH1, LLC* at pg. 5). There was no additional request from any attorney or party for judgment as a matter of law, with regard to the argument that Dr. Pallos' testimony was not stated to the necessary standard. The *Lehtola* case seems to indicate that a motion must be made at the close of the evidence but this Court does not find that the state of the evidence, with regard to that issue, was any different at the close of the evidence than it was at the close of the Plaintiff's case in chief. Additionally, Rule 50 indicates that a motion for judgment as a matter of law "may be made at the close of the evidence offered by the nonmoving party **or** at the close of the case." (NRCP 50[A][2], emphasis added). An additional distinction between the present case and the *Lehtola* case, is that the Judge in that case reserved ruling on the motion for judgment as a matter of law, which was made at the close of Plaintiff's case, and then did not rule on it at the end of the Trial either. Consequently, it could not provide the pre-requisite for renewal of a motion for judgment as a matter of law. In the present case, the Court denied the Defendant's motion for judgment as a matter of law made at the close of the Plaintiffs' case.

CONCLUSION.

Based upon the foregoing, and good cause appearing, this Court concludes that although Defendants called their motions "41(b)" motions, instead of "50(a)" motions,

the Defendants' Motions to Dismiss, stated pursuant to NRCP 41(b), were effectively motions for judgment as a matter of law. Consequently, they were sufficient to form the basis for an NRCP 50(b) "renewal" of a Motion for Judgment as a Matter of Law.

After considering the relevant trial transcripts, the Court concludes that Dr. Pallos, who was the Plaintiffs' only standard of care and causation expert, failed to state his opinions to a reasonable degree of medical probability. (With the exception of his opinion relating to informed consent, which the Court struck at the time of Trial as having no foundation). The Court further concludes that a medical expert's testimony "regarding standard of care and causation must be stated to a reasonable degree of medical probability," (*Morsicato*, at pg. 158), and that the case of *FCH1, LLC v. Rodriguez*, 130 Nev. Adv. Op. 46 (Nev. 2014), did not overrule the specific holding of *Morsicato*.

Although the Court is reluctant to do so, based upon the fact that the Plaintiffs failed to establish the standard of care, a breach of the standard of care, or causation, to a reasonable degree of medical probability, the Court has no choice but to grant the Defendant's Motion for Judgment as a Matter of Law, vacate the Jury's Verdict, and enter Judgment as a Matter of Law in favor of the Defendants. The Defendants' alternative Motion for Remittitur is rendered Moot. Consequently, and good cause appearing therefor,

Defendant Lee d/b/a Summerlin Smiles' Motion for Judgment as a Matter of Law is hereby **GRANTED**;

Defendant Florida Traiva's Motion for Judgment as a Matter of Law is hereby **GRANTED.**

DATED this 16 day of July, 2014.

JERRY A. WIESE II
DISTRICT COURT JUDGE
DEPARTMENT XXX
Case A656091

CERTIFICATE OF SERVICE

I hereby certify that on 17th of November, 2015, the following document was electronically served to all registered parties for case number A723134 as follows:

Name	Email	Select
Christian M. Morris, Esq.	[redacted]	✓
Kim Alverson	[redacted]	✓

Patin Law Group, PLLC

Name	Email	Select
Ingrid Patin, Esq.	[redacted]	✓

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP
1330 N. Town Center Drive
Suite 265
Las Vegas, NV 89144
(702) 727-1400

A-15-723134-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Tort	COURT MINUTES	November 18, 2015

A-15-723134-C Ton Lee, Plaintiff(s)
vs.
Ingrid Patin, Defendant(s)

November 18, 2015 **9:00 AM** **All Pending Motions**

HEARD BY: Togliatti, Jennifer **COURTROOM:** RJC Courtroom 10C

COURT CLERK: Athena Trujillo

RECORDER: Yvette G. Sison

REPORTER:

PARTIES PRESENT:

Jones, Prescott T.	Attorney
Morris, Christian	Attorney
Patin, Ingrid	Defendant

JOURNAL ENTRIES

- DEFENDANTS' SPECIAL MOTION TO DISMISS PURSUANT TO NEVADA REVISED STATUTE 41.635-70 OR IN THE ALTERNATIVE MOTION TO DISMISS PURSUANT TO NRS 12(B)(5) ... PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' REPLY IN SUPPORT OF SPECIAL MOTION TO DISMISS; OR IN THE ALTERNATIVE PLAINTIFF'S MOTION TO CONTINUE HEARING ON ORDER SHORTENING TIME

Mr. Jones argued the Plaintiff's Motion is untimely and argued for the reply to be stricken, noting there are arguments made for the first time in the brief. Ms. Morris argued there are no new facts in the brief. COURT ORDERED, Plaintiff Motion to Strike Defendant's Reply in Support of Special Motion to Dismiss DENIED; Motion to Continued GRANTED to allow a sur-reply to be filed.

12/02/15 9:00 AM DEFENDANTS' SPECIAL MOTION TO DISMISS PURSUANT TO NEVADA REVISED STATUTE 41.635-70 OR IN THE ALTERNATIVE MOTION TO DISMISS PURSUANT TO NRS 12(B)(5)

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

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TON VINH LEE, Plaintiff, vs. INGRID PATIN, PATIN LAW GROUP, PLLC, Defendants.	CASE NO. A-15-723134 DEPT. NO. IX **Transcript of Proceedings**

BEFORE THE HONORABLE JENNIFER TOGLIATTI, DISTRICT COURT JUDGE

DEFENDANTS' SPECIAL MOTION TO DISMISS PURSUANT TO NEVADA REVISED STATUTE 41.635-70 OR, IN THE ALTERNATIVE, MOTION TO DISMISS PURSUANT TO NRS 12(b)(5); PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' REPLY IN SUPPORT OF SPECIAL MOTION TO DISMISS OR, IN THE ALTERNATIVE, PLAINTIFF'S MOTION TO CONTINUE HEARING ON ORDER SHORTENING TIME

WEDNESDAY, NOVEMBER 18, 2015

APPEARANCES:

For the Plaintiff: PRESCOTT T. JONES, ESQ.

For the Defendants: CHRISTIAN MORRIS, ESQ.

RECORDED BY: YVETTE SISON, DISTRICT COURT
TRANSCRIBED BY: KRISTEN LUNKWITZ

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

WEDNESDAY, NOVEMBER 18, 2015 AT 9:11 A.M.

MR. JONES: Good morning, Your Honor. Prescott Jones for the plaintiff.

MS. MORRIS: Good morning, Your Honor. Christian Morris for the defendant, Ingrid Patin, and Ingrid is here, as well.

THE COURT: Okay. This was originally on calendar for Defendants' Special Motion to Dismiss Pursuant to Nevada Revised Statute 41.635-70 or, in the Alternative, Motion to Dismiss Pursuant to NRS 12(b)(5). Plaintiff filed a Motion to Strike Defendants' Reply in Support of Special Motion to Dismiss or, in the Alternative, to Continue the Hearing on an Order Shortening Time. So, I think we should address that first.

MR. JONES: Agreed, Your Honor. Again, Prescott Jones for the plaintiff.

It's a pretty simple argument. The Reply brief was untimely. It was filed on Thursday just before midnight. By our calculations, a Reply brief was due on Tuesday. Given the fact that the grounds for the Special Motion to Dismiss do include an automatic right to appeal, which was pointed out by the defendant in their moving papers, we think this case is especially important to have a proper record in case it does go up to the Court of

Appeals or the Supreme Court.

So, with that in mind, we believe that the Reply brief should be stricken. There are several arguments, as well, that were raised for the first time in that brief. For the first time, we saw a statement of undisputed facts which, of course, is required because a Special Motion to Dismiss is governed by the Rule 56 summary judgment standard. We did, you could say, scramble to get a Sur-Reply brief on file yesterday but we were, of course, prejudiced by only having three judicial days to get that Sur-Reply brief done to address the rather incomplete nature of the statement of undisputed facts that involve some of the arguments that were raised for the first time in that brief.

THE COURT: Why don't you list out the arguments that were made for the first time in the brief?

MR. JONES: Well, for the first time, Your Honor, we saw the proper standard for the Special Motion to Dismiss, the prima facie evidence standard throughout the Special Motion to Dismiss that was filed. Originally, we saw the clear and convincing evidence standard, that's number one. Number two, we saw, for the first time, the proper statement be utilized and analyzed by the defendants. We never saw those arguments before. They relied heavily in their Special Motion to Dismiss on the

statement: This matter is on appeal. That statement was, of course, not included in the original statement that's subject of this action. Those are the two big ones, Your Honor.

THE COURT: Do you have the document you filed three days ago -- that you filed in three days' time?

MR. JONES: I do, Your Honor.

THE COURT: Because I don't have it.

MR. JONES: I apologize, Your Honor. We instructed a runner to deliver it to the chambers.

THE COURT: It could be -- I don't know when it came. It could be in the process to making its way to me. I'm not sure.

MR. JONES: Understood. And I apologize, Your Honor.

THE COURT: Okay. So, you want to respond to the Motion to Strike first?

MS. MORRIS: I do. First of all, there was absolutely no new information included in the Reply. Simply because it was titled, Undisputed Set of Facts, there were no new facts alleged in any way. And, for them to claim that that's the first time that they've seen the proper standard, that are the ones who stated it in their Opposition multiple times. Therefore, there is no surprise. There's no new evidence that's presented.

THE COURT: How are they supposed to respond to undisputed facts and say they're disputed if they're, for the first time, in a Reply?

MS. MORRIS: These are the same facts that have been stated multiple times in multiple motions on this case. There's absolutely no new fact that was stated in it.

THE COURT: But my question to you was -- I appreciate that they are not new. The question is: Where are the -- where is their ability to dispute that they're disputed? That's what I'm saying. I'm not saying they are new facts. I'm saying they're the same old regurgitated facts that you've been fighting about and are disputed. That's what I'm concerned about.

MS. MORRIS: Okay. So, in this case, we have two Motions in front of you. One is a Special Motion or, in the Alternative, a Motion to Dismiss. So, when we're talking about whether to move this out further, it is only if we are here to discuss the Special Motion to Dismiss. And if they say they need more time to respond to the Special Motion to Dismiss Reply, fine. But the undisputed facts that were stated in there, that standard for a Motion for Summary Judgment doesn't apply to the or, in the Alternative, Motion to Dismiss that we can certainly address here today.

So, in the event they want to have more time to specifically respond to the Special Motion to Dismiss due to the fact it's titled, Undisputed Facts, that's fine, but I don't believe that prevents us from discussing the or, in the Alternative, Motion to Dismiss that was filed along with it.

THE COURT: So, my first question is, if -- I mean, you've since filed this. Obviously, you're entitled to have me read it before we have argument. And I'm not going to do it right now this second. So, I'm not going to hear the Special Motion to Dismiss until it's continued and I get the opportunity to review what you've done and they get the -- I don't know. Maybe you got it and read it but I didn't.

So, would you file a supplement to this if you had more time or would you just want me -- is this it and you want me to read it and, then, hear the Special Motion to Dismiss?

MR. JONES: I would request leave to file a supplement. We could do it within, say, five judicial days.

THE COURT: As much as I would love to see all of you multiple times, I'd love to hear you argue for an hour today, and an hour in two weeks, and an hour in two weeks after that. No.

IN THE SUPREME COURT OF THE STATE OF NEVADA

INGRID PATIN, AN INDIVIDUAL; AND PATIN LAW GROUP, PLLC, A PROFESSIONAL LLC, Appellants, vs. TON VINH LEE, Respondent.	Electronically Filed Sep 21 2017 01:13 p.m. Elizabeth A. Brown Clerk of Supreme Court Case No.: 69928 Appeal from the Eighth Judicial District Court, the Honorable Jennifer P. Togliatti Presiding

APPELLANTS' APPENDIX
(Volume 2, Bates Nos. 203–425)

Marquis Aurbach Coffing
Micah S. Echols, Esq.
Nevada Bar No. 8437
10001 Park Run Drive
Las Vegas, Nevada 89145
Telephone: (702) 382-0711
Facsimile: (702) 382-5816
mechols@maclaw.com

Nettles Law Firm
Christian M. Morris, Esq.
Nevada Bar No. 11218
1389 Galleria Drive, Suite 200
Henderson, Nevada 89014
Telephone: (702) 434-8282
Facsimile: (702) 434-1488
christian@nettleslawfirm.com

Attorneys for Appellants, Ingrid Patin and Patin Law Group, PLLC

INDEX TO APPELLANTS' APPENDIX

Document Description		Location
Exhibits to Plaintiff's Opposition to Defendants' Motion to Dismiss		
Exhibit	**Document Description**	
A	Order on Defendant Traivai's and Lee's Motions for Judgment as a Matter of Law Pursuant to NRCP 50(b), and Motion for Remittitur (filed 07/16/14)	Volume 1, Bates Nos. 60–72
B	Judgment on Jury Verdict for Defendant Ton Vinh Lee, DDS in *Singletary v. Lee*, Eighth Judicial Case No. A656091 (filed 09/11/14)	Volume 1, Bates Nos. 73–75
C	Patin Law Group Website Page (printed 07/09/15)	Volume 1, Bates Nos. 76–80
D	Affidavit of Service to Patin Law Group, PLLC (dated 08/28/15)	Volume 1, Bates Nos. 81–82
E	Affidavit of Service to Ingrid Patin, Esq., individually (dated 09/18/15)	Volume 1, Bates Nos. 83–84
F	Duplicate of Affidavit of Service to Ingrid Patin, Esq., individually (dated 09/18/15) *Cited in brief as SOS Entity Info*	Volume 1, Bates Nos. 85–86
Defendants' Reply to Plaintiff's Opposition to Motion to Dismiss (filed 10/06/15)		Volume 1, Bates Nos. 87–97
Exhibits to Defendants' Reply to Plaintiff's Opposition to Motion to Dismiss		
Exhibit	**Document Description**	
A	Patin Law Group Website Page (printed 10/01/15)	Volume 1, Bates Nos. 98–99
B	August 7, 2015 Letter from State Bar of Nevada	Volume 1, Bates Nos. 100–101
Minutes of October 14, 2015 Hearing on Defendants' Motion to Dismiss		Volume 1, Bates No. 102
Plaintiff's Supplement to Opposition to Defendants' Motion to Dismiss (filed 10/14/15)		Volume 1, Bates Nos. 103–104

Document Description		Location
Exhibit to Plaintiff's Supplement to Opposition to Defendants' Motion to Dismiss		
Exhibit	**Document Description**	
A	Docketing Statement in *Singletary v. Lee*, Supreme Court Case No. 66278 without Exhibits (filed 09/19/14)	Volume 1, Bates Nos. 105–119
Special Motion to Dismiss Pursuant to NRS 41.635–70 or, in the Alternative, Motion to Dismiss Pursuant to [NRCP] 12(b)(5) (filed 10/16/15)		Volume 1, Bates Nos. 120–136
Exhibits to Special Motion to Dismiss Pursuant to NRS 41.635–70 or, in the Alternative, Motion to Dismiss Pursuant to [NRCP] 12(b)(5)		
Exhibit	**Document Description**	
A	Caption Page of Complaint in *Singletary v. Lee*, Eighth Judicial Case No. A656091 (filed 02/07/12)	Volume 1, Bates Nos. 137–138
B	Special Verdict Form in *Singletary v. Lee*, Eighth Judicial Case No. A656091 (filed 01/22/14)	Volume 1, Bates Nos. 139–144
C	Order [Awarding $38,042.64 in Costs] in *Singletary v. Lee*, Eighth Judicial Case No. A656091 (filed 04/11/14)	Volume 1, Bates Nos. 145–149
D	Judgment on Jury Verdict in *Singletary v. Lee*, Eighth Judicial Case No. A656091 (filed 04/29/14)	Volume 1, Bates Nos. 150–153
E	Published Jury Verdict in *The Trial Reporter* of Nevada (published February 2014)	Volume 1, Bates Nos. 154–157
F	Patin Law Group Website Page (printed 07/09/15)	Volume 1, Bates Nos. 158–159
G	Published Jury Verdict in *The Nevada Legal Update* (published Fall 2014)	Volume 1, Bates Nos. 160–163
H	Google Search Results	Volume 1, Bates Nos. 164–166

Document Description		Location
Exhibits to Special Motion to Dismiss Pursuant to NRS 41.635–70 or, in the Alternative, Motion to Dismiss Pursuant to [NRCP] 12(b)(5) (cont.)		
Exhibit	**Document Description**	
I	Case Appeal Statement in *Singletary v. Lee*, Eighth Judicial Case No. A656091 (filed 08/08/14)	Volume 1, Bates Nos. 167–173
J	Case Appeal Statement for Cross-Appeal in *Singletary v. Lee*, Eighth Judicial Case No. A656091 (filed 11/07/14); and Case Appeal Statement for Cross-Appeal in *Singletary v. Lee*, Eighth Judicial Case No. A656091 (filed 09/11/14)	Volume 1, Bates Nos. 174–186
K	Excerpted Minutes of Nevada Senate Judiciary Committee (dated March 28, 2013)	Volume 1, Bates Nos. 187–189
L	Fictitious Firm Application and Secretary of State Listing for Ton V. Lee, DDS, PC	Volume 1, Bates Nos. 190–194
M	Excerpted Transcript of Trial Testimony of Ton Vinh Lee, DDS in *Singletary v. Lee*, Eighth Judicial Case No. A656091 (dated 01/17/14)	Volume 1, Bates Nos. 195–199
Notice of Entry of Order Denying Defendants' Motion to Dismiss with Order (filed 10/23/15)		Volume 1, Bates Nos. 200–202
Plaintiff's Opposition to Defendants' Special Motion to Dismiss Pursuant to NRS 41.635–70 or, in the Alternative, Motion to Dismiss Pursuant to [NRCP] 12(b)(5) (filed 11/02/15)		Volume 2, Bates Nos. 203–218

Document Description		Location
Exhibits to Plaintiff's Opposition to Defendants' Special Motion to Dismiss Pursuant to NRS 41.635–70 or, in the Alternative, Motion to Dismiss Pursuant to [NRCP] 12(b)(5)		
Exhibit	**Document Description**	
A	Order on Defendant Traivai's and Lee's Motions for Judgment as a Matter of Law Pursuant to NRCP 50(b), and Motion for Remittitur (filed 07/16/14)	Volume 2, Bates Nos. 219–231
B	Appellants/Cross-Respondents' Opening Brief in *Singletary v. Lee*, Supreme Court Case No. 66278 (filed 03/24/15)	Volume 2, Bates Nos. 232–287
C	Judgment on Jury Verdict for Defendant Ton Vinh Lee, DDS in *Singletary v. Lee*, Eighth Judicial Case No. A656091 (filed 09/11/14)	Volume 2, Bates Nos. 288–290
D	Senate Bill No. 444 (Anti-SLAPP)	Volume 2, Bates Nos. 291–295
E	Patin Law Group Website Page (printed 07/09/15)	Volume 2, Bates Nos. 296–300
F	Plaintiff's Opposition to Defendants' Motion to Dismiss without Exhibits (filed 09/25/15)	Volume 2, Bates Nos. 301–309
Reply to Plaintiff's Opposition to Defendants' Special Motion to Dismiss Pursuant to NRS 41.635–70 or, in the Alternative, Motion to Dismiss Pursuant to [NRCP] 12(b)(5) (filed 11/12/15)		Volume 2, Bates Nos. 310–323
Plaintiff's Sur-Reply in Opposition to Defendant's Special Motion to Dismiss (filed 11/17/15)		Volume 2, Bates Nos. 324–336

Document Description		Location
Exhibits to Plaintiff's Sur-Reply in Opposition to Defendant's Special Motion to Dismiss		
Exhibit	**Document Description**	
A	Order on Defendant Traivai's and Lee's Motions for Judgment as a Matter of Law Pursuant to NRCP 50(b), and Motion for Remittitur (filed 07/16/14)	Volume 2, Bates Nos. 337–349
	Certificate of Service	Volume 2, Bates No. 350
Minutes of November 18, 2015 Hearing on All Pending Motions		Volume 2, Bates No. 351
Transcript of November 18, 2015 Hearing on All Pending Motions (filed 02/13/17)		Volume 2, Bates Nos. 352–361
Supplement to Plaintiff's Sur-Reply in Opposition to Defendants' Special Motion to Dismiss (filed 11/25/15)		Volume 2, Bates Nos. 362–375
Minutes of December 2, 2015 Hearing on Defendants' Special Motion to Dismiss Pursuant to NRS 41.635–70 or, in the Alternative, Motion to Dismiss Pursuant to NRCP 12(b)(5)		Volume 2, Bates Nos. 376–377
Transcript of December 2, 2015 Hearing on Defendants' Special Motion to Dismiss Pursuant to NRS 41.635–70 or, in the Alternative, Motion to Dismiss Pursuant to [NRCP] 12(b)(5) (filed 02/13/17)		Volume 2, Bates Nos. 378–400
January 13, 2016 Minute Order Denying Defendants' Special Motion to Dismiss Pursuant to NRS 41.635–70 or, in the Alternative, Motion to Dismiss Pursuant to [NRCP] 12(b)(5)		Volume 2, Bates Nos. 401–402
Notice of Entry of Order Denying Defendants' Special Motion to Dismiss Pursuant to NRS 41.635–70 or, in the Alternative, Motion to Dismiss Pursuant to NRCP 12(b)(5) with Order (filed 02/04/16)		Volume 2, Bates Nos. 403–408
Notice of Appeal (filed 03/04/16)		Volume 2, Bates Nos. 409–411

Document Description	Location
Case Appeal Statement (filed 03/04/16)	Volume 2, Bates Nos. 412–416
Supreme Court Clerk's Certificate, Judgment, and Order Affirming in Part, Reversing in Part and Remanding from Case No. 66278 and Filed in District Court Case No. A656091 (*Singletary v. Lee*) (filed 11/29/16)	Volume 2, Bates Nos. 417–425

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OPP
PRESCOTT T. JONES, ESQ.
Nevada State Bar No. 11617
AUGUST B. HOTCHKIN, ESQ.
Nevada State Bar No. 12780
BREMER WHYTE BROWN & O'MEARA LLP
1160 N. TOWN CENTER DRIVE
SUITE 250
LAS VEGAS, NV 89144
TELEPHONE: (702) 258-6665
FACSIMILE: (702) 258-6662
pjones@bremerwhyte.com
ahotchkin@bremerwhyte.com
Attorneys for Plaintiff,
TON VINH LEE

DISTRICT COURT

CLARK COUNTY; NEVADA

TON VINH LEE, an individual Plaintiff, vs. INGRID PATIN, an individual, and PATIN LAW GROUP, PLLC, a Nevada Professional LLC, Defendants.	Case No.: A723134 Dept. No.: IX **PLAINTIFF'S OPPOSITION TO DEFENDANTS' SPECIAL MOTION TO DISMISS PURSUANT TO NRS 41.635-70, OR IN THE ALTERNATIVE MOTION TO DISMISS PURSUANT TO NRS 12(B)(5)** Date of Hearing: November 18, 2015 Time of Hearing: 9:00 A.M.

COMES NOW Plaintiff TON VINH LEE, by and through his attorneys of records, Prescott T. Jones, Esq. and August B. Hotchkin, Esq. of the law firm BREMER WHYTE BROWN & O'MEARA LLP, and hereby submits this Opposition to Defendants' Special Motion to Dismiss on file herein.

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This Opposition is made and based upon the papers and pleadings on file herein, the attached Memorandum of Points and Authorities, and any oral argument that may be entertained at a hearing on this matter.

Dated: November 2, 2015

BREMER WHYTE BROWN & O'MEARA LLP

By: _____
Prescott T. Jones, Esq., Bar No. 11617
August B. Hotchkin, Esq., Bar No. 12780
Attorneys for Plaintiff
TON VINH LEE

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

This lawsuit represent the Plaintiff, Ton Vinh Lee's final effort to have Defendants remove a statement[1] from their web site in which Defendants identify Dr. Lee by name, and his practice, and incorrectly assert that their clients obtained a $3.4 million jury verdict against Dr. Lee and his practice. In fact, no verdict was ever obtained against Dr. Lee individually, and the verdict against his practice and other parties was vacated as a result of Defendants' clients' expert opinions not being stated to a reasonable degree of medical probability. See Order Granting Motion for Judgment as a Matter of Law, p. 12, lines 15-16, attached hereto as **Exhibit "A"** ("the Court has no choice but to grant the Defendant's Motion for Judgment as a Matter of Law, vacate the Jury's Verdict, and enter Judgment as a Matter of Law in favor of the Defendants [Ton V. Lee, DDS PC d/b/a Summerlin Smiles]"); see also "Opening Brief" filed by Singletary plaintiffs[2] in the appeal of the underlying litigation, p. 20, lines 11-12, attached hereto as **Exhibit "B"** ("[s]ince Lee prevailed

[1] Notably, the statement as presented in Defendants' Special Motion is not the statement at issue, since Defendants have modified the statement on their website since being served with the Complaint in this action. See discussion infra, at argument section 1B.

[2] Ms. Patin is noted as one of Plaintiffs'/Appellants' counsel of record in the Supreme Court appeal. See Exhibit "B", p. 1 (cover sheet).

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1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144
(702) 258-6665

at trial, he moved the District Court for an award of costs"), p. 23, lines 4-7 ("the District Court, nevertheless, construed the holdings in favor of Defendants [Traivai and Summerlin Smiles]. Plaintiffs now appeal to this Court, seeking reinstatement of the jury's verdict and their award of costs, or alternatively, a new trial"); see also Judgment on Jury Verdict for Defendant Ton Vinh Lee, DDS, attached hereto as **Exhibit "C"** ("It is Ordered and Adjudged, that judgment be entered in favor of Defendant Ton Vinh Lee, DDS.").

Accordingly, when Defendants' statement was made on its website, at the time of the filing of the Complaint in the instant action, and at the present time, there is no jury verdict against either Plaintiff Ton Vinh Lee or non-party Ton Vinh Lee DDS, d/b/a Summerlin Smiles. Despite that fact, Defendants continue to maintain that they have obtained a Plaintiff's verdict in a dental practice/wrongful death action, and continue to name Summerlin Smiles, Plaintiff Ton Vinh Lee, and other dentists in the practice as parties that verdict was received against.

Nonetheless, Defendants come before this Court for a second time seeking dismissal of the Plaintiff's Complaint; this time seeking dismissal under an outdated version of Nevada's Anti-SLAPP statute, or in the alternative, under NRCP 12(b)(5) because Dr. Lee is an owner of Ton Vinh Lee DDS, PC. Additionally, Defendants seek their fees and costs incurred for bringing the Motion under NRS 41.670(1) for the Anti-SLAPP portion of the Motion, and under an unspecified basis for the portion of the Motion brought under NRCP 12(b)(5).

As initially set forth in Plaintiff's Objection to Request to Set Expedited Hearing, Defendants fail to set forth or utilize the current version of Nevada's Anti-SLAPP law. On June 8, 2015, the Governor signed into law SB444, a copy of which is attached hereto as **Exhibit "D"**, which amended Nevada's Anti-SLAPP by (1) increasing the time from 7 days to 20 judicial days the time within which a court must rule on a special motion to dismiss, (2) changing the standard by whilch a Plaintiff must prove a probability of prevailing on a claim, from "clear and convincing evidence" to demonstrating with prima facie evidence a probability of prevailing on the claim, (3) authorizing limited discovery for the purposes of allowing a party to obtain certain information necessary to meet or oppose such a motion, and (4) narrowing the law's applicability to claims based upon a good faith communication in furtherance of the right to petition or the right to free

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1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144
(702) 258-6665

speech in direct connection with an issue of public concern.

As set forth below, this claim is not the type of claim covered by Nevada's Anti-SLAPP law. Furthermore, even if it is covered by Nevada's Anti-SLAPP law, Plaintiff easily demonstrates a prima facie claim for defamation.

II.

LEGAL DISCUSSION AND ARGUMENT

A. Defendants Cite an Outdated Version of Nevada's Anti-SLAPP Law

1. Defendants Ignore SB 444, Passed During the 2015 Legislative Session.

As set forth above and in Plaintiff's Objection to Request to Set Expedited Hearing, Defendants fail to set forth or utilize the current version of Nevada's Anti-SLAPP law. On June 8, 2015, the Governor signed into law SB444, a copy of which is attached hereto as **Exhibit "D"**, which substantially amended Nevada's Anti-SLAPP law.

Shockingly, in a case addressing Defendants' ignorance of the Court Order overturning a jury verdict, they ignore a critical revision to the law that forms their basis for dismissal. In fact, numerous arguments contained in Defendants' Motion are negated as a result of the revisions to the Anti-SLAPP law. By way of example, Defendants' entire argument section A(b) entitled "Clear and Convincing Evidence" is completely irrelevant as a result of the revisions to NRS 41.660(3)(b), which deleted the language "established by clear and convincing," and replaced with "demonstrated with prima facie" to describe the type of evidence required by a party opposing an Anti-SLAPP Motion.

2. Legal Standard for Special Motion Brought Under NRS 41.660, as Amended.

The new version of Nevada's Anti-SLAPP law governs special motions to dismiss brought under NRS 41.660(1)(a). When presented with such a Motion, the Court must first determine if the suit falls under the purview of the statute. NRS 41.660(1); NRS 41.660(3)(a) ("[i]f a special motion to dismiss is filed pursuant to subsection 2, the court shall: (a) 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

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1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144
(702) 258-6665

connection with an issue of public concern"); John v. Douglas County Sch. Dist., 125 Nev. 746, 754 (2009) ("when a party moves for a special motion to dismiss under Nevada's anti-SLAPP statute, it bears the initial burden of production and persuasion. This means the moving 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.") (citations omitted). To do so, the moving party must show that the underlying 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 importance. Id. The moving party must make this showing based upon a preponderance of the evidence. NRS 41.660(3)(a). A good faith communication is one that is "truthful or made without [the] knowledge of falsehood." John, 125 Nev. at 761.

If, and only if, the moving party meets this burden, then it must "determine whether the plaintiff has **demonstrated with prima facie evidence** a probability of prevailing on the claim." NRS 41.660(3)(b) (emphasis added). Defendants incorrectly cite to an old version of the statute that had a higher burden of proof on the plaintiff, requiring the plaintiff to "establish[] by clear and convincing evidence the probability of prevailing on the claim." See, e.g., Defendants' Special Motion to Dismiss, passim.

"Since the special motion to dismiss is procedurally treated as a summary judgment, the following standards apply. First, the district court can only grant the special motion to dismiss if there is no genuine issue of material fact and 'the moving party is entitled to a judgment as a matter of law.'" John, 125 Nev. at 753-54.

B. <u>Defendants Repeatedly Cite and Refer to a Version of the Defamatory Statement that was Amended After Plaintiff Filed Suit.</u>

As set forth in prior briefs, on July 9, 2015, the following statement appears on Defendants' web site under the heading "Recent Settlements and Verdicts:"

> DENTAL MALPRACTICE/WRONGFUL DEATH – PLAINTIFF'S VERDICT $3.4M, 2014
> Description: Singletary v. Ton Vinh Lee, DDS, et al.
>
> A dental malpractice-based wrongful death action that arose out of the death of Decedent Reginald Singletary following the extraction of the No. 32 wisdom tooth by Defendants on or about April 16, 2011. Plaintiff sued the dental office,

BREMER WHYTE BROWN & O'MEARA LLP
1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144
(702) 258-8665

> Summerlin Smiles, the owner, Ton Vinh Lee, DDS, and the treating dentists, Florida Traivai, DMD and Jai Park, DDS, on behalf of the Estate, herself and minor son.

See "Settlement-Verdict, Patinlaw.com/settlement-verdict/, July 9, 2015 version, attached hereto as **Exhibit "E"**.

Plaintiff filed his Complaint on August 17, 2015. On or about August 19, 2015, Patin Law Group, PLLC was served. On September 8, 2015, Defendants filed their Motion to Dismiss, and set forth a new, amended version of the statement on the website, which reads:

> DENTAL MALPRACTICE/WRONGFUL DEATH – PLAINTIFF'S VERDICT, 2014
> DESCRIPTION: SINGLETARY V. TON VINH LEE, DDS, ET AL.
> A dental malpractice-based wrongful death action that arose out of the death of Decedent Reginald Singletary following the extraction of the No. 32 wisdom tooth by Defendants on or about April 16, 2011. Plaintiff sued the dental office, Summerlin Smiles, the owner, Ton Vinh Lee, DDS, and the treating dentists, Florida Traivai, DMD and Jai Park, DDS, on behalf of the Estate, herself and minor son.
> This matter is on appeal.

Notably, Defendants removed the referenced to $3.4M, and added a statement at the end that reads "This matter is on appeal."

Throughout the course of the litigation, Defendants have misrepresented to Plaintiff and this Court that the amended statement represents the statement at issue. See, e.g., Special Motion to Dismiss, p. 3, lines 18-19 ("[t]he issue here is whether the statement made about this jury verdict is false and defamatory. Below is the statement: [the amended statement is then quoted]"), p. 6, lines 16-17 ("[s]pecifically, the statement at issue reads as follows: [the amended statement is then quoted]"). Defendants cannot, of course, amend a defamatory statement after suit is filed, and then claim to this Court that this statement is the one at issue in this litigation. Such representations lack candor with this Court and must not be tolerated.

C. <u>The Host of Deficiencies in Defendants' Special Motion Necessitates Denial of the Motion.</u>

In their Special Motion to Dismiss, Defendants (1) failed to cite the current version of Nevada's Anti-SLAPP law that forms the basis of their Motion, and (2) failed to represented to this Court and to Plaintiff that the version of the defamatory statement cited in their brief was in fact a

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1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144
(702) 258-6665

revised version of the statement that was amended after suit was filed. As discussed above, a Special Motion to Dismiss is procedurally treated as a motion for summary judgment. Accordingly, this Court can only grant the special motion to dismiss if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." John, 125 Nev. at 753-54. Furthermore, "when a party moves for a special motion to dismiss under Nevada's anti-SLAPP statute, it bears the initial burden of production and persuasion." Id. at 754.

Here, Defendants cannot possibly show that there is no genuine issue of material fact when it misrepresents the facts at issue in the case. Secondly, they cannot possibly show they are entitled to a judgment as a matter of law when they cite the wrong law. Because Defendants, as the moving party, bear the initial burden of production and persuasion, the Special Motion to Dismiss must be denied.

D. Plaintiff's Claims do not Constitute a SLAPP Suit to Which Nevada's Anti-SLAPP Laws Apply.

Even if this Court is willing to look past the multiple deficiencies in Defendants' Special Motion to Dismiss and consider the Motion on its merits, the Motion must fail because the claims made by Plaintiff do not constitute a SLAPP suit to which Nevada's Anti-SLAPP laws apply. As a threshold issue, "[t]he Legislature finds and declares that: 1. NRS 41.660 provides certain protections to a person against whom an action is brought, if the action 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." SB444, Sec. 12.5[3] (emphasis added); see also NRS 41.660(1) (substantially similar language). "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."[4] John v. Douglas County Sch. Dist., 125 Nev. 746, 752 (2009), citing U.S. Ex Rel. Newsham v. Lockheed Missiles, 190 F.3d 963, 970 (9th Cir. 1999).

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[3] This section constitutes a new section of Chapter 41 of NRS.

[4] Plaintiff notes the relative financial parity between the parties, as both parties are professionals that own their own professional practices.

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Suite 250
Las Vegas, NV 89144
(702) 258-6665

Simply put, this litigation does not involve "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." Defendants claim an almost unlimited immunity to defamation laws, simply because the defamatory statement references a trial that took place. They rely entirely on NRS 41.637, which reads in full:

> **NRS 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" defined.**
>
> "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;
> 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.

Defendants claim that the defamatory statement at issue falls under subsections (3) and (4). However, this assertion ignores the last part of the statute, which requires that the statement, no matter which subsection applies, be "truthful or is made without knowledge of its falsehood." As set forth above, as trial/appellate counsel, Defendants cannot claim that they were unaware that Dr. Lee received a judgment in his favor on a jury verdict, or that Ton Vinh Lee DDS, PC d/b/a Summerlin Smiles won on its Judgment as a Matter of Law and had the jury verdict against it vacated[5].

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[5] The fact that the verdict against Ton Vinh Lee DDS PC d/b/a Summerlin Smiles was "vacated" means that the verdict was annulled, cancelled, rescinded, voided, and has no legal effect. See Black's Law Dictionary, 2d Ed. Definition of Vacate ("[t]o annul; to cancel or rescind ; to render an act void; as, to vacate an entry of record, or a judgment")

Even if this Court is willing to look beyond the fact that the statement was neither truthful nor made without knowledge of its falsehood, subsection (3), which involves a "[w]ritten 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" also does not apply to the statement. First, the statement "This matter is on appeal" was added after suit was brought and cannot be considered when analyzing whether this litigation constitutes a SLAPP suit. Second, the statement was not made in "direct connection with an issue under consideration by a . . . judicial body." Defendants do not demonstrate a "direct connection;" instead, they seem to rely on the fact that because it references a case that was subsequently appealed, subsection (3) applies. Importantly, this statement was made as part of an attorney advertisement that sought to solicit business as a result of a verdict Defendants claimed that their clients received. It in no way referenced, implied, or discussed the pending appeal (until it was revised after Plaintiff filed suit). Therefore, no direct connection can be shown.

Subsection (4) similarly does not apply. The statement was not a "[c]ommunication made in direct connection with an issue of public interest in a place open to the public or in a public forum." Again, the "direct connection" is missing in an instance where, as in the instant matter, Defendants are claiming that they received a huge recovery on behalf of their client in order to generate additional business. An attorney advertisement is in no way an issue a public interest, and Defendants do not even attempt to argue as such. Instead, they grasp at straws by arguing that the practice of dental medicine is an issue of "public health and safety." By this logic, it is difficult to imagine a profession or job that does not in some way impact "public health and safety" and would therefore put that profession, and comments about it, under the purview of this statute. Additionally, nowhere to Defendants attempt to argue how the language "public health and safety," which does not appear in the statute, is synonymous with the NRS 41.637 language "public interest."

Based on the foregoing, the Plaintiff's Complaint does not constitute a SLAPP suit to which a Special Motion to Dismiss applies, and therefore must be denied.

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1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144
(702) 258-6665

E. Even If Nevada's Anti-SLAPP Laws Apply, Plaintiff Easily Demonstrates a Prima Facie Case

This Court must deny Defendant's Special Motion to Dismiss as the Plaintiff's Complaint does not fall within the definition of a SLAPP suit. However, if this Court is somehow inclined to find that the Complaint constitutes a SLAPP suit, the Motion must still fail as Plaintiff easily demonstrates a prima facie case. As set forth above, Defendants set forth the improper standard when the burden shifts to the Plaintiff in a Special Motion to Dismiss, claiming that Plaintiff must show their case by "clear and convincing evidence." That is, of course, no longer the standard in Nevada, as Plaintiff must now only "**demonstrate[] with prima facie evidence** a probability of prevailing on the claim." NRS 41.660(3)(b) (emphasis added).

In Nevada, in order to establish a prima facie case of defamation, a plaintiff must prove that (1) a false and defamatory statement by defendant concerning the plaintiff was made; (2) by an unprivileged publication to a third person; (3) the existence of fault, amounting to at least negligence; and (4) actual or presumed damages. Chowdhry v. NLVH, Inc., 109 Nev. 478, 483 (1993). "If the defamation tends to injure the plaintiff or his or her business or profession, it is deemed defamation per se, and damages will be presumed." Id., citing Nevada Ind. Broadcasting v. Allen, 99 Nev. 404, 409 (1983). Plaintiff alleges a claim for Defamation Per Se in the instant litigation.

The first prong requires the showing of a false and defamatory statement by Defendant concerning the Plaintiff. Again, the statement in question reads:

> DENTAL MALPRACTICE/WRONGFUL DEATH – PLAINTIFF'S VERDICT $3.4M, 2014
> Description: Singletary v. Ton Vinh Lee, DDS, et al.
>
> A dental malpractice-based wrongful death action that arose out of the death of Decedent Reginald Singletary following the extraction of the No. 32 wisdom tooth by Defendants on or about April 16, 2011. Plaintiff sued the dental office, Summerlin Smiles, the owner, Ton Vinh Lee, DDS, and the treating dentists, Florida Traivai, DMD and Jai Park, DDS, on behalf of the Estate, herself and minor son.

Exhibit "E". As also discussed above, the statement is false as against Plaintiff because no Plaintiff's verdict was obtained at all. Instead, Plaintiff Ton Vinh Lee received a judgment on jury

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Suite 250
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(702) 258-6665

verdict in his favor. **Exhibit "C"**. Non-party Ton Vinh Lee DDS, PC[6] d/b/a Summerlin Smiles had the jury verdict vacated on July 16, 2014, pursuant to the court order attached as **Exhibit "A"**, well over one year before Defendants were served with the Complaint in the instant litigation.

A statement is defamatory when "under any reasonable definition[,] such charges would tend to lower the subject in the estimation of the community and to excite derogatory opinions against him and to hold him up to contempt." Las Vegas Sun v. Franklin, 74 Nev. 282, 287 (1958). Here, there is no doubt that naming Plaintiff, and his business, in connection with a wrongful death/dental malpractice case, and claiming a $3.4 million verdict in favor of the Singletary plaintiffs, "tends to lower the subject in the estimation of the community," would "excite derogatory opinions against him," and "hold him up to contempt." Defendants make the absurd claim that "[n]o ordinary person reading the statement in its entirety could reasonably conclude that the post was suggesting Dr. Lee was an unfit dentist or that he had personally committed malpractice." Special Motion to Dismiss, p. 12, lines 7-9. Plaintiff Dr. Lee is named twice in his personal capacity, under the heading "DENTAL MALPRACTICE/WRONGFUL DEATH – PLAINTIFF'S VERDICT $3.4M, 2014."

Defendants make the further absurd claim that "[e]ven if it [the statement] were not entirely true, it would still certainly be substantially true under Pegasus." Special Motion to Dismiss, p. 11, lines 19-20. Pegasus did not involve, in any way, shape, or form, a Special Motion to Dismiss brought under an Anti-SLAPP law. Nonetheless, "the truth or falsity of an allegedly defamatory statement is an **issue of fact properly left to the jury** for resolution." Posadas v. City of Reno, 109 Nev. 448, 453, 851 P.2d 438, 442 (1993); see also Fink v. Oshins, 118 Nev. 428, 437, 49 P.3d 640, 646 (2002) (emphasis added).

Defendants do not address prong (2), that the statement involve "an unprivileged publication to a third person." Because the statement was made in the form of an attorney advertisement from

---

[6] Notably, Defendants try to conflate Dr. Ton Vinh Lee, DDS, the dentist, with his corporate entity Ton Vinh Lee DDS, PC (which conducts business under the d/b/a Summerlin Smiles). See Special Motion to Dismiss, p. 10, lines 20-28, p. 11, lines 1-25, in which Defendants note that they named Ton Vinh Lee DDS (in his personal capacity) in the statement, but later argue that Summerlin Smiles is the same as Ton Vinh Lee DDS PC.

Defendants' web site, that prong is easily fulfilled.

The third prong, that "the existence of fault, amounting to at least negligence" be shown, is also not addressed by Defendants. However, as trial/appellate counsel, Defendants cannot claim that they were unaware that Dr. Lee received a judgment in his favor on a jury verdict, or that Ton Vinh Lee DDS, PC d/b/a Summerlin Smiles won on its Judgment as a Matter of Law and had the jury verdict against it vacated.

The last prong, that the defamation tends to injure the plaintiff or his or her business or profession, is also not addressed. However, as discussed above, the fact that the statement names Plaintiff, and his business, in connection with a wrongful death/dental malpractice case, and claiming a $3.4 million verdict in favor of the Singletary plaintiffs, is prima facie evidence that this prong is satisfied.

In light of the foregoing, Plaintiff easily satisfies NRS 41.660(3)(b)'s standard by demonstrating with prima facie evidence a probability of prevailing on the claim. Accordingly, the Special Motion to Dismiss must be denied in its entirety.

F. Defendant's Additional Arguments Regarding Fair Report Privilege, Multiple Publication, and Limited-Purpose Public Figure are Irrelevant to an Anti-SLAPP Motion, and are Nonsensical in Light of the Facts of This Case.

Defendants raise a host of arguments wholly unrelated to the Anti-SLAPP portions of the Special Motion to Dismiss. As set forth above, the procedure to evaluate an Anti-SLAPP Special Motion to Dismiss under NRCP 41.660 is spelled out by the statute, and the entire analysis is contained above. Nothing related to the fair report privilege, multiple publication, and limited-purpose public figure has any bearing on the Anti-SLAPP Special Motion to Dismiss, and as such, must be disregarded by the Court as Defendants failed to make such arguments in their first Motion to Dismiss under Rule 12(b)(5), and such arguments fail to fall within the scope of the dismissal of the first Motion without prejudice.

Nonetheless, if the Court is willing to entertain such arguments, each argument fails as they are all inapplicable to the facts of this case. Defendants first argue that the subject attorney advertisement is protected by the fair reporting privilege (properly the "fair report privilege").

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"Invocation of the privilege [] requires the district court to determine whether the [party's] statements were fair, accurate, and impartial." Lubin v. Kunin, 117 Nev. 107, 115 (2001); see also Dorsey v. National Enquirer, Inc., 973 F.2d 1431, 1435 (9th Cir. 1992) (cited by the Lubin Court) (citing California law for the proposition that the question of whether a magazine's account is a "fair and true" report is one of law, so long as "there is no dispute as to what occurred in the judicial proceeding reported upon or as to what was contained in the report").

Again, the fair report privilege requires a fair, accurate, and impartial reporting of a case. Here, the statement is per se partial, as the statement is an attorney advertisement and cannot constitute a "report" in any sense of the word. Second, it is neither fair nor impartial as at the time the statement was made, as the jury verdicts cited were in favor of Plaintiff Ton Vinh Lee, DDS, and vacated as against Ton Vinh Lee, DDS PC.

Regarding the claim that "damages cannot be presumed to come from a single publication when allegedly defamatory information is available from multiple independent sources," no law is cited or even attempted to be relied upon. Accordingly, such a statement is in violation of EDCR 2.20, and is impossible to respond to. Nonetheless, the statements noted by Defendants are not at issue in this litigation, and nonetheless predate the vacating of the jury's verdict (unlike the defamatory statement at issue in this litigation).

Lastly, Defendants make an additional absurd claim that Plaintiff Dr. Lee is a "limited purpose public figure" by virtue of "owning a dental office, naming a professional corporation after himself, and advertising himself personally on the dental office website. Such a statement is completely unsupported by Nevada law, a fact even acknowledged by Defendants ("[a]lthough it is not clear how far the Nevada Supreme Court is willing to extend the limited-purpose public figure doctrine").

Conversely, Nevada law does **not** extend the limited purpose public figure doctrine to figures who do not voluntarily and prominently extend themselves in a matter of public concern. "A limited-purpose public figure is a person who voluntarily injects himself or is thrust into a particular public controversy or public concern, and thereby becomes a public figure for a limited range of issues." Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 720 (2002). To determine

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Suite 250
Las Vegas, NV 89144
(702) 258-6665

whether a person becomes a limited-purpose public figure, the Court "examin[es] the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." Bongiovi v. Sullivan, 122 Nev. 556, 572 (2006) (internal quotations and citations omitted). "The test for determining whether someone is a limited public figure includes examining whether a person's role in a matter of public concern is voluntary and prominent." Pegasus, 118 Nev. at 720. Simply put, in no way can Dr. Lee be shown to be a public figure as he was the one sued by the Singletary plaintiffs, as represented by Defendants Ingrid Patin and the Patin Law Group PLLC, which has nothing to do with public interest or public concern. The subject lawsuit merely concerned personal injury claims relating to dental treatment.

G. Plaintiff is Entitled To Attorney's Fees, Costs, and a Statutory Award from Defendant

NRS 41.670(2) provides that "[i]f 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." Further, NRS 41.670(3) reads "[i]n additional 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."

As set forth above, Defendants filed the instant Special Motion to Dismiss despite (1) citing a deceptively-edited version of the defamatory statement, edited after the instant Complaint was filed, while representing to the Court and Plaintiff that it is the statement at issue in the litigation, (2) citing and relying on an outdated version of Nevada's Anti-SLAPP statute, and (3) failing to withdraw the Special Motion to Dismiss when the fact that the wrong law was cited via the filing of Plaintiff's Objection to Defendants' Request for Expedited Hearing on Special Motion to Dismiss on October 20, 2015. It is difficult to imagine a more frivolous or vexatious Motion in light of the above. Accordingly, Plaintiff requests an award of its attorney's fees and costs incurred in responding to the frivolous and vexatious filing, as well as an award of $10,000 plus any additional relief the court deems proper.

II. Defendants' Separate Motion to Dismiss Under Rule 12(b)(5) Must Fail as Defendants' Statements are Defamatory Regardless of Dr. Lee's Ownership of Summerlin Smiles.

In its separate Motion to Dismiss under Rule 12(b)(5),[7] Defendants claim that because Ton Vinh Lee DDS is the owner of Ton Vinh Lee DDS PC, d/b/a Summerlin Smiles, their statement is somehow no longer defamatory. No basis in Nevada law is provided for such an assertion. Simply put, there is no jury verdict whatsoever against Plaintiff Ton Vinh Lee DDS, as that jury verdict was in favor of Dr. Lee; and the jury verdict against non-party Ton Vinh Lee DDS PC d/b/a Summerlin Smiles was vacated almost one year before the July 9, 2015 screenshot of the defamatory statement was taken.

Nonetheless, as matters outside of the pleadings are included in Defendants' separate Motion to Dismiss under Rule 12(b)(5), the Motion is properly one for Summary Judgment under NRCP 56. Summary Judgment is improper in this matter as there are multiple issues of fact as set forth above, including the fact that Defendants do not cite the proper defamatory statement at issue.

Otherwise, Plaintiff incorporates the arguments made above, including the analysis as to why a prima facie case for defamation per se is shown, and also incorporate all arguments made in its Opposition to Motion to Dismiss, attached hereto as **Exhibit "F"**.

III.

CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that the Court deny Defendants' Special Motion to Dismiss in its entirety as Defendants cite the wrong version of Nevada's Anti-SLAPP law, cite the wrong allegedly defamatory statement, the claims made in Plaintiff's complaint do not constitute a SLAPP lawsuit as required for Nevada's Anti-SLAPP law to apply, and Plaintiff demonstrates a prima facie case. Furthermore, Defendants' separate Motion to Dismiss under Rule 12(b)(5) must be denied as no basis is shown as to why Plaintiff's claims must

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[7] Plaintiff notes that this request is separate and apart from Defendant's Special Motion to Dismiss. Should this Court deny dismissal under Nevada's Anti-SLAPP law, but be inclined to grant under Rule 12(b)(5), Plaintiff notes that Defendants would not be entitled to fees, costs, and damages under NRS 41.670, and Plaintiff is still entitled to fees, costs, and damages under the same statute.

fail due to the fact that Plaintiff is the owner of Ton Vinh Lee DDS PC d/b/a Summerlin Smiles.

Plaintiff further requests an award of attorney's fees and costs incurred pursuant to NRS 41.670(2), and a separate award of damages up to $10,000, plus additional relief as this Court deems proper pursuant to NRS 41.670(3).

Dated: November 2, 2015

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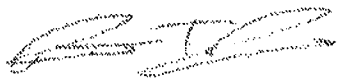

By: _____
Prescott T. Jones, Esq.
Nevada State Bar No. 11617
August B. Hotchkin, Esq.
Nevada State Bar No. 12780
Attorney for Plaintiff,
TON VINH LEE

BREMER WHYTE BROWN & O'MEARA LLP
1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144
(702) 258-8665

EXHIBIT "A"

EXHIBIT "A"

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ORDR

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

***

SVETLANA SINGLETARY, et al

Plaintiffs

v.

TON LEE, DDS., et al,

Defendants

CASE NO. A656091
DEPT. XXX

ORDER ON DEFENDANT TRAIVAI'S AND LEE'S MOTIONS FOR JUDGMENT AS A MATTER OF LAW PURSUANT TO NRCP 50(B), AND MOTION FOR REMITTITUR

INTRODUCTION

Defendants, Florida Traivai, DMD and Ton V. Lee, DDS d/b/a Summerlin Smiles, each filed a Motion for Judgment as a Matter of Law Pursuant to NRCP 50(b). Such Motions came on for hearing on June 26, 2014. Having reviewed the pleadings and papers on file, having heard oral argument by the parties, and good cause appearing, the Court now issues its Order.

This is a case in which plaintiffs – the wife, child, and estate – sued for dental malpractice/wrongful death. Decedent Reginald Singletary went to Dr. Park at Summerlin Smiles for a wisdom tooth extraction on April 16, 2011. Following the tooth extraction, Reginald did not do well. His condition deteriorated from April 21, 2011, to April 24, 2011, and he passed away on April 25, 2011, due to necrotizing mediastinitis and septic shock due to Ludwig's Angina from dental abscess.

The case was tried by a Jury from January 13, 2014, through January 22, 2014, and resulted in a verdict in favor of the Plaintiffs.

ARGUMENT

Defendants both now argue, pursuant to NRCP 50(b), that a Judgment as a Matter of Law should be granted in favor of the Defendants, and against the Plaintiffs, due to the fact that Plaintiff failed to offer his opinions regarding standard of care and causation to a reasonable degree of medical probability. Defendants further argue that if the Court is now willing to grant Judgment as a Matter of Law in favor of the Defendants, the Court should reduce the Plaintiffs' noneconomic damages by Remittitur to $350,000, pursuant to NRS 41A.035

Plaintiffs argue initially that the Defendants are precluded from bringing an NRCP 50(b) Motion for Judgment as a Matter of Law now, because the Defendants brought an NRCP 41(b) Motion to Dismiss during trial, and not an NRCP 50(b) Motion, and consequently, the Defendants are now precluded from "renewing" an NRCP 50(b) motion. Additionally, Plaintiffs argue that Dr. Pallos did offer his opinions, to a "reasonable degree of medical probability," and that when he stated those words on pg. 67 of the transcript, he was referring to his three main opinions regarding standard of care, and not the requirements of informed consent.

LEGAL ANALYSIS, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

Both Defendants have brought a Motion for Judgment as a Matter of Law pursuant to NRCP 50(b). NRCP 50(b) reads as follows:

> (b) Renewing motion for judgment after trial; alternative motion for new trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after service of written notice of entry of judgment and may alternatively request a new trial or join a motion for new trial under Rule 59. In ruling on a renewed motion the court may:
>
> (1) If a verdict was returned;
>
> (A) Allow the judgment to stand,
>
> (B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

. . . .

(NRCP 50[b]).

The Editor's Note with regard to rule 50(b) reads in part as follows:

> Subdivision (b) is amended to conform to the 1991 amendment to the federal rule. The Nevada rule was amended in 1971 to delete the requirement under the then-existing federal rule that a motion for judgment notwithstanding the verdict did not lie unless it was preceded by a motion for a directed verdict. The revised rule takes the same approach as the federal rule, as amended in 1963 and 1991, that a post-verdict motion for judgment as a matter of law is a renewal of an earlier motion made before or at the close of evidence. Thus, a "renewed" motion filed under subdivision (b) must have been preceded by a motion filed at the time permitted by subdivision (a)(2). . . .

(NRCP50 [Editor's Note]).

Plaintiff argues that Defendants' Motion for Judgment as a Matter of Law is inappropriate, as Defendants never made a Rule 50(b) Motion for Judgment as a Matter of Law during Trial, but instead brought a Rule 41(b) Motion to Dismiss.

NRCP 41(b) reads as follows:

> (b) Involuntary dismissal: Effect thereof. For failure of the plaintiff to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(NRCP 41[b]).

The Editor's Note to NRCP 41 states in pertinent part as follows:

> Subdivision (b) is amended to conform to the 1963 and 1991 amendments to the federal rule by removing the second sentence, which authorized the defendant to file a motion for involuntary dismissal at the close of the plaintiff's evidence in jury and nonjury cases when the plaintiff had "failed to prove a sufficient case for the court or jury." For a nonjury case, the device is replaced by the new provisions of Rule 52(c), which authorize the court to enter judgment on partial findings against the plaintiff as well as the defendant. For a jury case, the correct motion is the motion for judgment as a matter of law under amended Rule 50.

(NRCP 41, Editor's Note).

In the case of *Lehtola v. Brown Nevada Corporation*, 82 Nev. 132, 412 P.2d 972 (1966), the Nevada Supreme Court addressed facts similar to the facts in the present case. In that case the Plaintiffs received jury verdicts in their favor, which were set aside by the trial court and a judgment notwithstanding the verdicts (JNOV's) were entered for the Defendant. In reviewing the case on appeal, the Nevada Supreme Court noted that at the close of the plaintiffs' case in chief, the defendant moved for involuntary dismissal pursuant to NRCP 41(b). The judge reserved ruling and the defendant presented his case. Thereafter, the Court did not rule on the 41(b) motion and the Defendant did not make a motion for directed verdict at the close of the case. The Defendant proceeded to argue that the lower court could treat the mid-trial motion as a motion for a directed verdict at the close of the case, thereby providing the necessary foundation for the later motion for JNOV. The Nevada Supreme Court did not agree. The Court acknowledged that a 41(b) motion for involuntary dismissal made at the close of Plaintiff's case in chief and a 50(a) motion for a directed verdict made at the close of Plaintiff's case in chief were functionally indistinguishable. The Court stated, "However, it does not follow that a 41(b) motion at the close of the plaintiffs' case may serve as a motion for a directed verdict as contemplated by Rule 50 to establish a basis for a subsequent motion for a judgment n.o.v. A 50(a) motion must be made at the close of all the evidence if the movant wishes later to make a postverdict motion under that rule." (*Id.*, at 136). The Court further stated that "A 41(b) mid-trial motion necessarily tests the evidence as it then exists. Here the court reserved ruling on that motion. Thereafter, the complexion of the case changed as the defendant offered evidence. The record does not show that at the close of the case the defendant requested a ruling on the mid-trial motion, and no motion was made for a directed verdict. Nothing occurred. The lower

. . . .

. . . .

. . . .

court therefore, was not authorized to entertain a postverdict motion under 50(b)." (Id., at 136).[1]

The Court must address what motions were made by the Defense at the close of Plaintiff's case, and what motions were made at the close of the evidence, to determine if the Defendants preserved their right to bring a post-trial Rule 50 motion.

On January 16, 2014, at the close of the Plaintiffs' case in chief, the Defendants each made a NRCP "Rule 41(b) motion." Mr. Vogel stated, "On behalf of Dr. Traivai, I would like to make a Rule 41(b) motion. Based on the testimony of plaintiffs' expert, they have not established that there was a deviation of the standard of care, an admissible – admissible testimony of a deviation of the standard of care on behalf of Dr. Traivai. . ." (See Trial Transcript 1/16/14, at pg. 160). Mr. Friedman similarly stated, "And, Your Honor, I made the – a motion also on 41(b) relative to Dr. Lee as well as Summerlin Smiles. There's been no testimony whatsoever that the person who answered the phone, if anybody answered the phone, was an employee of Summerlin Smiles or Dr. Lee. . . ." (See Trial Transcript 1/16/14, at pg. 161). Mr. Lemons did not refer to Rule 41(b) or to Rule 50, but stated the following: "And I'm going to make a similar motion on behalf of Dr. Park, Your Honor, but for a little different grounds. Dr. Pallos testified that Dr. Park's involvement in the extraction process accorded with the standard of care, and he didn't specify any deviation from the standard of care to a reasonable degree of medical probability as to Dr. Park in his testimony. . . ." (See Trial Transcript 1/16/14, at pg. 161).

. . . .

[1] It should be noted that in 1966, NRCP 41(b) allowed a Defendant to make a motion, at the close of Plaintiff's evidence, for dismissal on the ground that the Plaintiff had failed to prove a sufficient case for the court or jury. Rule 50(a) allowed for a motion for a directed verdict to be made at the close of the evidence offered by an opponent or at the close of the case. Rule 50(b) provided that if a motion for directed verdict made at the close of all the evidence was denied or not granted, the court was deemed to have submitted the action to the jury subject to a later determination of the legal question raised by motion. Not later than 10 days after service of the written notice of entry of judgment, the party who moved for a directed verdict could move again to have the verdict and any judgment entered thereon set aside and to have a judgment entered in accordance with the motion for directed verdict. (*Lehtola v. Brown*, at FN 1).

In response to the Defendants' Motions, the Court and the attorneys participated in an exchange regarding whether, and to what extent, Dr. Pallos had offered any opinions to a "reasonable degree of medical probability." There was also a discussion regarding whether any case law required "standard of care" opinions to be stated to a "reasonable degree of medical probability." The Court noted that Dr. Pallos admitted with regard to the "informed consent issue," that his opinion was based on speculation, and that he had no foundation for it, and consequently, the Court struck that claim. (See Trial Transcript 1/16/14, at pg. 173).

Counsel for Dr. Lee and Summerlin Smiles argued that the Plaintiff could not establish who, if anyone, answered the phone, and consequently, the Plaintiff's claims against Dr. Lee and Summerlin Smiles failed. The Court concluded that based upon Ms. Singletary's testimony that a call was made, and that she spoke with somebody, there was at least "circumstantial evidence" that the Jury could rely on in that regard.

After reviewing the case of *Morsicato v. Sav-On Drug Stores*, 121 Nev. 153, 111 P.3d 1112 (2005), the Court concluded that expert testimony regarding both "standard of care" and "causation," needed to be stated to a "reasonable degree of medical probability." The *Morsicato* case specifically says that "medical expert testimony, regarding the standard of care and causation in a medical malpractice case, must be based on testimony made to a reasonable degree of medical probability." (*Id.*, at pg. 158). During the hearing on the Defendants' Motions for Judgment as a Matter of Law, it was argued that there was a difference between requiring an opinion to be "based on" a reasonable degree of medical probability, and requiring the witness to "state" that the opinion is "to a reasonable degree of medical probability." The Supreme Court in *Morsicato*, however, indicated that "medical expert testimony regarding standard of care and causation must be ***stated*** to a reasonable degree of medical probability." (Id., at pg. 158, emphasis added).

In the case at issue, Dr. Pallos only used the words, "to a reasonable degree of medical certainty, or probability," one time. (See Trial Transcript 1/16/14, at pg. 67).

The Defendants argue that Dr. Pallos' only opinion stated to a reasonable degree of medical probability related to "informed consent," an opinion the court later struck as having no foundation. The Plaintiffs, on the other hand, argue that Dr. Pallos' opinion given on 1/16/14, related not to the "informed consent" issue, but to the three general opinions that Dr. Pallos offered. After being qualified as an expert, the relevant questions and answers went substantially as follows:

> Q. . . . did you formulate any opinions with regard to the standard of care?
> A. Yes, I have.
> Q. Okay. What are those opinions (See Transcript 1/16/14, at pg. 51)
> . . . .
> A. One of the things required by the standard of care is that we obtain what's called
> an informed consent. Very important. That means I – before I cut you, before I do surgery, before I have permission to do those procedures that could harm you, I have to inform you of what I'm going to do. What else could be done instead of what I am proposing to do that I consider to be in your best interest? What other methods are there? And what risks are associated with what I'm going to do? . . .
>
> I believe in this case that was not followed, and there was a failure in following the standard of care relative to this item called the informed consent. . . . (See Transcript 1/16/14, at pg. 52)
>
> Number 2, antibiotics . . . We have to either give that antibiotic, make that antibiotic accessible to that patient, or follow that patient like a dog on bone to make sure that person does not need the antibiotic, if we choose not to prescribe that antibiotic. . . .
>
> Number 3, the follow up is required, whether I choose to call the patient or I hire an employee who calls the patient on my behalf. Very important not to abandon, neglect, leave that patient . . . .
>
> So that is my opinion in a nutshell regarding those three categories. (See Transcript, 1/16/14, at pg. 53).
> Q. . . . . Let's start with No. 1 and get specific with regard to how the dentist in this case acted below the standard of care with regard to informed consent.
> A. . . . . The first thing required is that I tell you what the procedure is that I'm about
> to do or want to do. . . . (See Transcript, 1/16/14, at pg. 54).
> . . . .
> A. So this patient had a chronic infection in the opinion of the doctor who treated or
> at least got the consent. Okay? So she had to tell him this. You know, your tooth is dead. Your pulp is necrotic. You have a periodontal infection. You have a chronic infection. There exists that infection. Okay. So that's No. 1 she had to tell him this.

Number 2, are there alternatives to taking out the tooth -- (See Transcript, 1/16/14, at pg. 61).

Q. Dr. Pallos, now that you've kind of explained to us with regard to this tooth, which is Tooth No. 32, and the condition of that tooth, can you continue explaining to us how the dentist in this case acted below the standard of care with regard to informed consent.

A. . . . . So the first thing regarding the requirement for an adequate minimum informed consent is that we tell the patient what we want to do . . . .

. . . .

Now, the second component that's required is that we talk about an alternative method.

. . . .

Requirement No. 3 is I have to communicate with you what may happen if I do this so that we can get through it together and you'll end up better than you are now. Okay? And what's required there is that I tell about the risks if I do this surgery. . . .

. . .

So we have these three requirements.

After that, the fourth requirement is all these things have to be written down, and you get to sign that you still want to do this. . . . (See Transcript, 1/16/14, at pgs. 62-64).

. . . .

Q. So let's start with the fourth part of this. . . . do you have any opinion with regard to whether or not that informed consent form was not proper in any way?

A. Okay. There's a form that we all get some kind of version of that form. It's supposed to contain at least these three ingredients: What I want to do, what's the procedure that I want to do, what are the alternatives to that procedure, and what are the risks if I do this. . . . And yes, it meets the standard in that sense. And so I don't have any objection about the form.

. . . .

Q. Now, with regard to the other three parts of the informed consent discussion, in what way did Dr. Traivai's informed consent discussion not meet the standard of care? You've explained to us what's required. How did it not meet the standard of care?

A. Okay. By what happened in this case, by the behavior of this person, he was not prepared to know whether his infection was getting worse to the point where he needed urgent attention and life-saving antibiotics. In my opinion, they fell short of meeting the goal of explaining, listen, it's an infection . . . .

So in my opinion, to a reasonable degree of medical certainty, or probability is the way it's -- we have to phrase it, ***they fell below the standard of care in meeting this requirement of giving an effective informed consent. In all three of those points.***

. . . .

Q. Dr. Pallos, we were talking about the first opinion that you have with regard to informed consent and how the dentist violated the standard of care with regard to the informed consent discussion. . . . . (See Transcript, 1/16/14, at pgs. 65-68, emphasis added).

In reviewing the transcript during Trial, the Court could not determine whether Dr. Pallos' opinion to a reasonable degree of medical probability was related solely to the "informed consent" opinion or if it related to the three general opinions, which Dr. Pallos set forth in pgs. 52 and 53 of the Transcript. However, in meticulously reviewing the transcript in its entirety, it is evident that the Court must agree with Defendants; Dr. Pallos' opinion, which he offered to a "reasonable degree of medical probability," only related to the 3 points that he referenced dealing with the "informed consent" opinion. He was not critical of the "form" used, which he referenced as the "fourth requirement," but he was critical of the other three (3) elements which he discussed relating to informed consent. ([1] What the procedure is/ What the problem is; [2] What are the alternatives; and [3] What are the risks.) Plaintiff's counsel's follow-up questioning makes it even more clear that the opinions Dr. Pallos was offering were limited to the "informed consent" issue.

The only opinion that Dr. Pallos stated to a "reasonable degree of medical probability" was stricken for lack of foundation. The question then becomes whether or not the other opinions that Dr. Pallos offered should have also been stricken, due to the fact that they were not offered to a reasonable degree of medical probability. The language referenced above, from the *Morsicato* case, indicates very clearly that "medical expert testimony regarding standard of care and causation must be stated to a reasonable degree of medical probability. . ." (*Morsicato*, at pg. 158). The Nevada Supreme Court recently issued a decision, however, that may be interpreted as relaxing that standard. In the case of *FCH1, LLC v. Rodriguez*, 130 Nev. Adv. Op. 46 (Nev. 2014), the District Court struck the testimony of the Palms' experts on security and crowd control, and economics because they failed to offer their opinions "to a reasonable degree of professional probability." (*FCH1*, at pg. 5) The District Court relied on *Hallmark* in making its decision. The Nevada Supreme Court indicated that "*Hallmark's* refrain is functional, not talismanic, because the 'standard for admissibility varies depending upon the expert opinion's nature and purpose.'"

(*FCH1*, at pg. 5, citing to *Morsicato* at pg. 157.) The Court stated, "Thus, rather than listening for specific words the district court should have considered the purpose of the expert testimony and its certainty in light of its context." (*FCH1*, at pg. 5, citing to *Williams v. Eighth Judicial Dist. Court*, 262 P.3d 360, 368 [2011]).

It has been argued recently that the FCH1 case intended to relax the standard to which expert testimony should be held. The Court's language indicating that the "standard for admissibility varies depending upon the expert opinion's nature and purpose," is still quite ambiguous and we have no guidance as to what the court was referring to. The nature and purpose of Dr. Pallos, the Plailntiff's expert, was to provide expert opinion testimony regarding "standard of care" and "causation" in this claim for alleged medical malpractice. The Nevada Supreme Court has clearly held in the past that "medical expert testimony regarding standard of care and causation must be stated to a reasonable degree of medical probability." (*Morsicato* at pg. 158). Since the Supreme Court cited to *Morsicato* in its FCH1 case, but did not specifically overrule *Morsicato*, this Court must conclude that it was not the intention of the Nevada Supreme Court to change the standard which is required of a medical expert when testifying as to standard of care and causation, and that such testimony must still be offered "to a reasonable degree of medical probability."

Based upon the foregoing, this Court must conclude that Dr. Pallos' testimony regarding standard of care and causation, which formed the basis for the Jury's verdict in favor of the Plaintiff, should have been stricken because it was not stated to a "reasonable degree of medical probability."

With regard to the issue of whether the Defendant's Rule 41(b) Motions at the close of Plaintiffs' case, and at the close of the evidence, was sufficient to preserve the issue for a post-trial motion, this Court believes, similarly to the Court in *Lehtola*, that an NRCP 41(b) Motion and an NRCP 50(a) Motion are "functionally indistinguishable." The better and clearer practice would be to call it an NRCP 50(a) Motion, when moving for Judgment as a Matter of Law, but whether it was called a

41(b) Motion or a rule 50 Motion, the Defendants effectively sought judgment as a matter of law. Such Motion was based on the contention that the Plaintiffs had failed to make a prima facie case, due to the lack of standard of care and causation testimony, to a reasonable degree of medical probability.

The Defendants did not make a motion at the close of the evidence, for judgment as a matter of law. There was some discussion with Mr. Lemons, who represented Dr. Park, on January 21, 2014, with regard to the standard to which an economic expert must testify. The Court allowed the economic expert's testimony, even though it was not offered to a reasonable degree of medical probability, because the Court found such testimony to be based upon the expert's expertise, and to satisfy the *Hallmark* requirements. (See *FCH1, LLC* at pg. 5). There was no additional request from any attorney or party for judgment as a matter of law, with regard to the argument that Dr. Pallos' testimony was not stated to the necessary standard. The *Lehtola* case seems to indicate that a motion must be made at the close of the evidence but this Court does not find that the state of the evidence, with regard to that issue, was any different at the close of the evidence than it was at the close of the Plaintiff's case in chief. Additionally, Rule 50 indicates that a motion for judgment as a matter of law "may be made at the close of the evidence offered by the nonmoving party **or** at the close of the case." (NRCP 50[A][2], emphasis added). An additional distinction between the present case and the *Lehtola* case, is that the Judge in that case reserved ruling on the motion for judgment as a matter of law, which was made at the close of Plaintiff's case, and then did not rule on it at the end of the Trial either. Consequently, it could not provide the pre-requisite for renewal of a motion for judgment as a matter of law. In the present case, the Court denied the Defendant's motion for judgment as a matter of law made at the close of the Plaintiffs' case.

CONCLUSION.

Based upon the foregoing, and good cause appearing, this Court concludes that although Defendants called their motions"41(b)" motions, instead of "50(a)" motions,

the Defendants' Motions to Dismiss, stated pursuant to NRCP 41(b), were effectively motions for judgment as a matter of law. Consequently, they were sufficient to form the basis for an NRCP 50(b) "renewal" of a Motion for Judgment as a Matter of Law.

After considering the relevant trial transcripts, the Court concludes that Dr. Pallos, who was the Plaintiffs' only standard of care and causation expert, failed to state his opinions to a reasonable degree of medical probability. (With the exception of his opinion relating to informed consent, which the Court struck at the time of Trial as having no foundation). The Court further concludes that a medical expert's testimony "regarding standard of care and causation must be stated to a reasonable degree of medical probability," (*Morsicato*, at pg. 158), and that the case of *FCH1, LLC v. Rodriguez*, 130 Nev. Adv. Op. 46 (Nev. 2014), did not overrule the specific holding of *Morsicato*.

Although the Court is reluctant to do so, based upon the fact that the Plaintiffs failed to establish the standard of care, a breach of the standard of care, or causation, to a reasonable degree of medical probability, the Court has no choice but to grant the Defendant's Motion for Judgment as a Matter of Law, vacate the Jury's Verdict, and enter Judgment as a Matter of Law in favor of the Defendants. The Defendants' alternative Motion for Remittitur is rendered Moot. Consequently, and good cause appearing therefor,

Defendant Lee d/b/a Summerlin Smiles' Motion for Judgment as a Matter of Law is hereby **GRANTED;**

Defendant Florida Traivai's Motion for Judgment as a Matter of Law is hereby **GRANTED.**

DATED this 16 day of July, 2014.

JERRY A. WIESE II
DISTRICT COURT JUDGE
DEPARTMENT XXX
Case A656091

EXHIBIT "B"

EXHIBIT "B"

IN THE SUPREME COURT OF THE STATE OF NEVADA

SVETLANA SINGLETARY, INDIVIDUALLY, AND AS THE REPRESENTATIVE OF THE ESTATE OF REGINALD SINGLETARY, AND AS PARENT AND LEGAL GUARDIAN OF GABRIEL L. SINGLETARY, A MINOR, Appellants/Cross-Respondents, vs. TON VINH LEE, DDS, INDIVIDUALLY; FLORIDA TRAIVAI, DMD, INDIVIDUALLY; AND TON V. LEE, DDS, PROF. CORP., A NEVADA PROFESSIONAL CORPORATION D/B/A SUMMERLIN SMILES, Respondents/Cross-Appellants.	Case No.: 66278 Appeal from The Eighth Judicial District Court, The Honorable Jerry A. Wiese II Presiding

APPELLANTS/CROSS-RESPONDENTS' OPENING BRIEF

MARQUIS AURBACH COFFING
Micah S. Echols, Esq.
Nevada Bar No. 8437
10001 Park Run Drive
Las Vegas, Nevada 89145
Telephone: (702) 382-0711
Facsimile: (702) 382-5816
mechols@maclaw.com

BAKER LAW OFFICES
Lloyd W. Baker, Esq.
Nevada Bar No. 6893
Ingrid Patin, Esq.
Nevada Bar No. 11239
500 S. Eighth Street
Las Vegas, Nevada 89101
Telephone: (702) 360-4949
Facsimile: (702) 360-3234
lloyd@bakerattorneys.net
ingrid@patinlaw.com

Attorneys for Appellants/Cross-Respondents

MAC:13785-001 2437437_1

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

NRAP 26.1 DISCLOSURE

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

Appellants/Cross-Respondents, Svetlana Singletary, individually, and as the representative of the Estate of Reginald Singletary, and as parent and legal guardian of Gabriel L. Singletary, a minor, are individuals (collectively "Plaintiffs").

Plaintiffs are represented in both the District Court and this Court by Micah S. Echols, Esq. of Marquis Aurbach Coffing and Lloyd W. Baker. Esq. and Ingrid Patin, Esq. of Baker Law Offices.

Dated this 23rd day of March, 2015.

MARQUIS AURBACH COFFING

By /s/ Micah S. Echols
Micah S. Echols, Esq.
Nevada Bar No. 8437
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Appellants/Cross-Respondents

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

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MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

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MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

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MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

TREATISES

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

I. JURISDICTIONAL STATEMENT

Appellants/Cross-Respondents, Svetlana Singletary ("Ms. Singletary"), individually, and as the representative of the Estate of Reginald Singletary ("Mr. Singletary"), and as parent and legal guardian of Gabriel L. Singletary ("Gabriel"), a minor (collectively "Plaintiffs"), asserted five negligence-based claims against Ton Vihn Lee, DDS ("Lee"); Florida Traivai, DMD ("Traivai"); Jai Park, DDS ("Park"); and Ton V. Lee, DDS, Prof. Corp. d/b/a Summerlin Smiles ("Summerlin Smiles") (collectively "Defendants").[1] After trial, the jury rendered its verdict against Traivai and Summerlin Smiles, and in favor of Lee and Park.[2] By stipulation and order, Park was later dismissed from this litigation.[3] Judgment upon the jury's verdict was later entered resolving all claims in this litigation.[4]

In post-trial proceedings, the District Court granted judgment as a matter of law to Traivai and Summerlin Smiles and dismissed all of Plaintiffs' claims.[5] Plaintiffs timely appealed from the District Court's post-trial dismissal order, the judgment, and the award of costs to Lee.[6] As such, this Court has jurisdiction according to NRAP 3A(b)(1) and NRAP 3A(b)(8).

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[1] Appellants/Cross-Respondents' Appendix ("AA") 1:1–23.

[2] AA 10:1983–1989.

[3] AA 11:2231–2238.

[4] AA 11:2261–2266; AA 13:2737–2741.

[5] AA 13:2678–2690.

[6] AA 13:2692–2694, 2742–2744.

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

II. ISSUES ON APPEAL

A. **WHETHER THE DISTRICT COURT ERRED BY CONCLUDING IN POST-TRIAL PROCEEDINGS THAT PLAINTIFFS' EXPERTS WERE REQUIRED TO ARTICULATE IN SPECIFIC TALISMANIC LANGUAGE AT TRIAL THE STANDARD OF CARE TO A REASONABLE DEGREE OF MEDICAL PROBABILITY.**

B. **WHETHER THE DISTRICT COURT ERRED BY CONCLUDING THAT THERE WAS NOT SUFFICIENT EVIDENCE AND OTHER INFORMATION IN THE RECORD TO SUPPORT THE ESTABLISHMENT OF THE STANDARD OF CARE TO A REASONABLE DEGREE OF MEDICAL PROBABILITY.**

C. **WHETHER THE DISTRICT COURT'S CONSIDERATION OF DEFENDANTS' ORAL MOTIONS UNDER NRCP 41(b) AT THE CLOSE OF PLAINTIFFS' CASE WAS PREJUDICIAL AND WARRANTS A NEW TRIAL.**

D. **WHETHER THE DISTRICT COURT ERRED BY APPLYING A HEIGHTENED STANDARD TO PLAINTIFFS' CLAIMS AGAINST SUMMERLIN SMILES, EVEN THOUGH SUCH CLAIMS WERE ACTUALLY BASED UPON ORDINARY NEGLIGENCE.**

E. **WHETHER THE AWARD OF COSTS TO LEE SHOULD BE VACATED FOR HIS FAILURE TO PROPERLY ITEMIZE THE REQUESTED COSTS AND HIS FAILURE TO FILE A MEMORANDUM OF COSTS.**

III. STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

This is a wrongful death and dental negligence case in which a jury awarded Ms. Singletary the sum of $985,000 and her minor son, Gabriel, the sum of $2,485,000 (for a total of $3,470,000) for the untimely passing of Mr. Singletary at age 41 based upon negligent dental services related to the extraction of a wisdom tooth.[7] The jury also attributed fault as 50% to Traivai,

[7] AA 11:2261–2266.

25% to Summerlin Smiles, and 25% to Mr. Singletary.[8] Despite the jury's award to Plaintiffs, the District Court granted post-trial motions under NRCP 50(b) filed by Traivai and Summerlin Smiles, based upon the theory that Plaintiffs' experts had not properly articulated at trial the standard of care to a reasonable degree of medical probability.[9] Through this appeal, Plaintiffs seek the remedy of reinstating the jury's verdict and the $38,042.64 award of costs in their favor against Traivai and Summerlin Smiles.[10] Alternatively, Plaintiffs ask this Court to order a new trial involving only Traivai and Summerlin Smiles as Defendants.

The Court should reinstate the jury's verdict, or alternatively, order a new trial based upon the following assignments of error:

First, the District Court erred by concluding that Plaintiffs' experts were required to articulate in specific talismanic language at trial the standard of care to a reasonable degree of medical probability. Although the District Court referenced this Court's recent FCH1, LLC v. Rodriguez[11] case in the post-trial

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[8] Id.

[9] AA 13:2678–2690.

[10] AA 11:2254–2260, 2261–2266. Plaintiffs' argument regarding the reinstatement of its costs upon a reinstatement of the jury verdict is based upon the fact that they will once again become the prevailing parties. Cf. 10 Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE, § 2668 at 213–214 (3d ed.); see also Loomis v. Lange Fin. Corp., 109 Nev. 1121, 1129, 865 P.2d 1161, 1165–1166 (1993).

[11] 335 P.3d 183 (Nev. 2014).

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

dismissal order,[12] the District Court disobeyed the relevant holding that "rather than listening for specific words the district court should have considered the purpose of the expert testimony and its certainty in light of its context."[13] Other courts reviewing similar standard of care and liability issues have upheld liability to the dentist or other medical professional.[14] Therefore, if the Court determines that Plaintiffs sufficiently established the standard of care in the District Court, the Court should reinstate the jury's verdict in their favor.

Second, the District Court erred by concluding that there was not sufficient evidence and other information in the record to support the establishment of the standard of care to a reasonable degree of medical probability. In dismissing Plaintiffs' entire case, the District Court relied heavily upon its interpretation of the law. However, the District Court did not consider the entirety of the evidence presented to the jury. As a matter of law, the District Court was ***not*** permitted to weigh or ignore all the evidence presented to the jury: "In . . . deciding whether to grant a motion for judgment as a matter of law, the district court must view the evidence and all inferences in favor of the nonmoving party."[15] Therefore, after reviewing all the evidence

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[12] AA 13:2678–2690.

[13] Rodriguez, 335 P.3d at 188 (citation omitted).

[14] See, e.g., Looney v. Davis, 721 So.2d 152, 158–159 (Ala. 1998) ("[D]espite the fact that [the plaintiff] returned the following morning complaining of continued bleeding, Dr. Looney still failed to discern her liver disease or that she posed a bleeding risk.").

[15] Nelson v. Heer, 123 Nev. 217, 222, 163 P.3d 420, 424 (2007) (citations omitted).

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

relevant to the standard of care, the Court should reinstate the jury's verdict in Plaintiffs' favor on this related basis.

Third, the District Court's consideration of Defendants' oral motions under NRCP 41(b) at the close of Plaintiffs' case was prejudicial. Although the District Court denied Defendants' oral NRCP 41(b) motions at the close of Plaintiffs' case, the District Court later granted the post-trial NRCP 50(b) motions because of the later availability of transcripts.[16] Of course, since the jury had already been released, Plaintiffs were prejudiced by not being able to present the additional evidence, if necessary, to support the jury's verdict.[17] Therefore, the District Court should have allowed a new trial, and, as an alternative to reinstating the jury's verdict, Plaintiffs ask this Court to order a new trial.[18]

Fourth, the District Court erred by applying a heightened standard to Plaintiffs' claims against Summerlin Smiles, even though such claims were actually based upon ordinary negligence. As a matter of law, none of Plaintiffs' claims against Summerlin Smiles were based upon medical or dental

[16] AA 13:2678–2690.

[17] See Cook v. Sunrise Hosp. and Medical Center, LLC, 124 Nev. 997, 1007, 194 P.3d 1214, 1220 (2008) (stating that prejudicial error is established "when the complaining party demonstrates that the error substantially affected the party's rights") (citations omitted).

[18] Cf. Morsicato v. Sav-On Drug Stores, Inc., 121 Nev. 153, 111 P.3d 1112 (2005) (ordering new trial upon reversal of admissibility of expert testimony); see also Levinson v. Prentice–Hall, Inc., 868 F.2d 558, 562 (3d Cir. 1989) (concluding that the purpose of moving for a directed verdict before judgment notwithstanding the verdict is to afford the opposing party an opportunity to cure defects in its proof prior to submission of the case to the jury).

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

malpractice. Instead, the claims were based upon professional or corporate negligence.[19] As this Court has stated, "[We] clarify that NRS 41A.071 only applies to medical malpractice or dental malpractice actions, not professional negligence actions."[20] Since Plaintiffs' claims against Summerlin Smiles for (1) negligence; (2) corporate negligence; (3) negligent hiring, training, and supervision; (4) vicarious liability; and (5) negligence per se do not fall within the scope of medical malpractice, it was reversible error for the District Court to apply the heightened standard, especially after the jury's verdict.[21] As Plaintiffs have already prevailed against Summerlin Smiles at trial under the heightened standard, the Court should either reinstate the jury's verdict against Summerlin Smiles ($867,500), or alternatively, at Plaintiffs' option order a new trial as to Summerlin Smiles based upon the lower standard for ordinary negligence.[22]

Finally, the $6,032.83 award of costs to Lee should be vacated for his failure to properly itemize the requested costs and his failure to file a memorandum of costs. Lee failed to itemize his requested costs, as required by

[19] AA 1:1–23.

[20] Egan v. Chambers, 299 P.3d 364, 367 (Nev. 2013) (overruling in part Fierle v. Perez, 125 Nev. 728, 219 P.3d 906 (2009)).

[21] Cf. Jeep Corp. v. Murray, 101 Nev. 640, 644–645, 708 P.2d 297, 300 (1985) (applying lower standards of proof for ordinary negligence claim not based upon medical or dental malpractice), *superceded by statute on other grounds as stated in,* Countrywide Home Loans v. Thitchener, 124 Nev. 725, 740–741, 192 P.3d 243, 253–254 (2008).

[22] Cf. Lee v. Ball, 121 Nev. 391, 394–395, 116 P.3d 64, 66–67 (2005) ("[T]he district court abused its discretion in failing to offer Lee the option of a new trial or acceptance of the additur.").

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

Nevada law, and he also failed to separately file a memorandum of costs, as required by NRS 18.110(1).[23] Therefore, regardless of the Court's decision on the other issues presented in this appeal, the award of costs to Lee should be vacated.

In summary, the Court should reinstate the jury's $3,470,000 verdict in favor of Plaintiffs based upon the District Court's unnecessary requirement for specific talismanic language to be uttered by Plaintiffs' experts at trial to establish the standard of care to a reasonable degree of medical probability. Similarly, this Court's review of all the evidence in the record supports the establishment of the standard of care to a reasonable degree of medical probability. If the Court reinstates the jury's verdict, the Court should also reinstate Plaintiffs' $38,042.64 award of costs against Traivai and Summerlin Smiles.

Alternatively, the Court should order a new trial based upon the prejudice to Plaintiffs for prevailing on Defendants' oral NRCP 41(b) motions at the close of Plaintiffs' case, only to have the District Court reconsider similar motions post-trial after the jury had already been released. At that point, it was impossible for Plaintiffs to rehabilitate their witnesses, and this Court should, alternatively, grant a new trial on this basis.

With respect to Summerlin Smiles, the Court should either reinstate the jury's $867,500 verdict or, at Plaintiffs' option, order a new trial as to

[23] See Gibellini v. Klindt, 110 Nev. 1201, 1206, 885 P.2d 540, 543 (1994) (prohibiting a reasonable estimate of costs, for administrative convenience, as the basis to recover costs).

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

Plaintiffs' ordinary negligence claims against Summerlin Smiles because none of the claims were subject to the more stringent standards for dental malpractice.

Finally, the Court should vacate the award of costs to Lee because he failed to itemize the requested costs or separately file a memorandum of costs.

IV. STANDARDS OF REVIEW

A. STANDARDS FOR REVIEWING NRCP 50 MOTIONS.

This Court reviews a district court's order granting a motion for judgment as a matter of law under NRCP 50 de novo.[24] "In . . . deciding whether to grant a motion for judgment as a matter of law, the district court must view the evidence and all inferences in favor of the nonmoving party."[25] To overcome a motion brought pursuant to NRCP 50(a), "the nonmoving party must have presented sufficient evidence such that the jury could grant relief to that party."[26]

B. STANDARDS FOR REVIEWING A JURY'S VERDICT.

The Court will uphold a jury verdict when it is supported by substantial evidence.[27] The Court's duty is not to measure the weight of the evidence, but to determine whether there is adequate substantial evidence to support the jury's

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[24] Nelson v. Heer, 123 Nev. 217, 223, 163 P.3d 420, 425 (2007).

[25] Id.

[26] Id., 123 Nev. at 222–223, 163 P.3d at 424.

[27] In re Peterson, 77 Nev. 87, 93–94, 360 P.2d 259, 262–263 (1961).

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

verdict.[28] Substantial evidence means that a reasonable mind might accept the evidence as adequate to support a conclusion.[29] It is a basic principle of appellate review that when substantial evidence supports a jury's verdict, the Supreme Court will not disturb the result "despite suspicions and doubts based upon conflicting evidence."[30] This Court has repeatedly expressed its reluctance to substitute its judgment for that of the trier of fact on the issue of damages.[31] The role of determining witness credibility belongs to the district court, and this Court will not direct that certain witnesses should or should not be believed.[32]

C. STANDARDS FOR REVIEWING LEGAL QUESTIONS.

This Court reviews questions of law de novo.[33] Statutory interpretation is a question of law which this Court reviews de novo.[34]

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[28] Id.

[29] Ringle v. Bruton, 120 Nev. 82, 91, 86 P.3d 1032, 1038 (2004) (citation and internal quotations omitted).

[30] Allen v. Webb, 87 Nev. 261, 266, 485 P.2d 677, 679 (1971).

[31] Automatic Merchandisers, Inc. v. Ward, 98 Nev. 282, 284–285, 646 P.2d 553, 555 (1982).

[32] Douglas Spencer and Assocs. v. Las Vegas Sun, 84 Nev. 279, 282, 439 P.2d 473, 475 (1968).

[33] Birth Mother v. Adoptive Parents, 118 Nev. 972, 974, 59 P.3d 1233, 1235 (2002).

[34] Id.

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

D. STANDARDS FOR REVIEWING AWARDS OF COSTS.

Statutes permitting the recovery of costs are to be strictly construed because they are in derogation of the common law.[35] The determination of reasonable costs must be actual and reasonable, rather than a reasonable estimate or calculation of such costs.[36]

V. FACTUAL AND PROCEDURAL BACKGROUND

A. PLAINTIFFS' COMPLAINT.

1. The Events of March 24, 2011 Leading to Mr. Singletary's Untimely Passing on April 25, 2011.

Plaintiffs filed their complaint on February 7, 2012.[37] The complaint alleged that on March 24, 2011, Mr. Singletary went to Summerlin Smiles as a new patient for routine dental work.[38] During this visit, Mr. Singletary informed Summerlin Smiles of the prior pain in his No. 32 wisdom tooth.[39]

On April 16, 2011, Mr. Singletary underwent extraction of his No. 32 wisdom tooth.[40] This extraction procedure caused Mr. Singletary to experience

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[35] Gibellini v. Klindt, 110 Nev. 1201, 1205, 885 P.2d 540, 543 (1994).

[36] Id., 110 Nev. at 1206, 885 P.2d at 543.

[37] AA 1:1–23.

[38] AA 1:5, ¶ 12.

[39] Id., ¶ 13. The No. 32 wisdom tooth is a third molar, as listed in the following chart: http://www.mouthandteeth.com/anatomy/teeth-names-numbers.htm.

[40] AA 1:5, ¶ 14.

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severe pain in the extraction area and swelling in his face in the following days.[41]

Because of the severe pain Mr. Singletary was experiencing, and his difficulty swallowing, Ms. Singletary called Summerlin Smiles on April 18, 2011 at 10:29 a.m. seeking help.[42] The Summerlin Smiles employee answering the phone stated that the symptoms would eventually subside and informed Ms. Singletary to call back if the pain, swelling, and difficulty swallowing did not subside within four to five days.[43]

In the following days, Mr. Singletary's symptoms did not subside. Instead, they worsened, and he continued to experience pain, swelling in his face, jaw, and neck as well as difficulty swallowing.[44] Additionally, Mr. Singletary began having difficulty speaking and eating.[45]

By April 21, 2011, five days after the extraction procedure, Mr. Singletary's health continued to decline, and he began vomiting and had trouble breathing.[46] On this day, Mr. Singletary was transported by ambulance to St. Rose Dominican Hospital—San Martin in Las Vegas, Nevada.[47] At St. Rose,

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[41] Id., ¶¶ 15–17.

[42] AA 1:6, ¶ 18.

[43] Id.

[44] AA 1:6, ¶ 19.

[45] Id.

[46] Id., ¶ 20.

[47] Id.

Mr. Singletary was transferred to the ICU where he received antibiotics and underwent drainage of the neck.[48] Unfortunately, Mr. Singletary's condition continued to deteriorate, and he passed away on April 25, 2011 due to necrotizing mediastinitis and septic shock due to Ludwig's angina from dental abscess, as indicated on Mr. Singletary's death certificate.[49]

Plaintiffs attached to their complaint the supporting affidavit of Andrew Pallos, D.D.S. ("Dr. Pallos") who opined that Defendants were negligent in (1) failing to engage in a proper informed consent; (2) providing misleading advice and failing to offer Mr. Singletary an appointment for follow-up; (3) failing to treat the infection; and (4) violating NRS 631.3452 based upon (a) failing to diagnose, (b) failing to administer medicine or other remedies, (c) failing to ensure the overall quality of patient care, (d) failing to supervise all dental personnel.[50] Dr. Pallos concluded his opinions were "stated to a reasonable degree of medical probability, that the breach of the standard of care by Defendants proximately and legally caused severe and permanent injury and the ultimate death of Decedent Reginald Singletary."[51]

2. The Claims Alleged in Plaintiffs' Complaint.

Based upon the events leading up to Mr. Singletary's untimely passing, Plaintiffs alleged the following claims: (1) dental malpractice/negligence as to

[48] Id., ¶ 21.

[49] Id., ¶ 22; AA 8:1602.

[50] AA 1:25–28.

[51] AA 1:28 (emphasis omitted).

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all Defendants; (2) corporate negligence as to Summerlin Smiles; (3) negligent hiring, training, and supervision as to Summerlin Smiles; (4) vicarious liability as to Summerlin Smiles; and (5) negligence per se as to Summerlin Smiles.[52]

B. THE EVIDENCE PRESENTED AT TRIAL.

During trial, the jury heard evidence that eventually resulted in the jury's verdict in favor of Plaintiffs and against Traivai and Summerlin Smiles.[53]

1. Testimony of Liubov Kostyukova.

The jury first heard testimony from Liubov Kostyukova ("Kostyukova"), who was living in the same home with the Singletarys at the time of events of this case.[54] Kostyukova testified to the first-hand observation of the symptoms that Mr. Singletary was experiencing in April 2011 after the extraction procedure.[55] Kostyukova was also aware of the phone call that Ms. Singletary made to Summerlin Smiles and Mr. Singletary's eventual transport to St. Rose.[56]

2. Testimony of Ms. Singletary.

Ms. Singletary next testified of the pain that Mr. Singletary was in when she saw him on the evening of the extraction procedure.[57] She also testified of

[52] AA 1:7–21.

[53] AA 10:1983–1987.

[54] AA 3:444.

[55] AA 3:450.

[56] AA 3:452.

[57] AA 3:496.

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the later phone call to Summerlin Smiles, and her inability to get an appointment without first waiting four to five days.[58] Additionally, no one from Summerlin Smiles offered to call back or consult with anyone else in the office.[59]

3. Testimony of Cherisse Lesperance.

The Summerlin Smiles front office manager, Cherisse Lesperance ("Lesperance"), testified at trial that patient complaints made over the phone were given to a doctor or dentist present in the office to speak directly with the patient.[60] On April 18, 2011, Lesperance recalls working at the Summerlin Smiles office, although it was not a normal business day.[61] Lesperance also explained that Traivai did not schedule root canals, molar root canals, or hard extractions because she was not experienced enough to do them and asked another dentist to do the procedure.[62]

4. Testimony of Dr. Joseph Baroukh.

At trial, Dr. Joseph Baroukh ("Dr. Baroukh") was qualified as an infectious disease expert without any objection from Defendants.[63] After explaining to the jury his own expert report summarizing the documents he

[58] AA 3:501.

[59] AA 3:513.

[60] AA 4:628.

[61] AA 4:630.

[62] AA 4:652–653.

[63] AA 4:692.

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reviewed, Dr. Baroukh testified that Mr. Singletary would not have died if had been given antibiotics on April 17, 18, or 19, 2011.[64] Dr. Baroukh commented that the infection was severe and actually got into Mr. Singletary's bloodstream.[65] The antibiotics could have stopped the progression of the infection.[66] Dr. Baroukh also stated his opinion to a reasonable degree of medical probability.[67]

5. Testimony of Dr. John Buehler.

At trial, Dr. John Buehler ("Dr. Buehler") was qualified as an economics expert without objection from Defendants.[68] Dr. Buehler concluded that the loss of earnings because of Mr. Singletary's untimely death was $598,871 at the time of trial.[69]

6. Testimony of Dr. Andrew Pallos.

Dr. Andrew Pallos ("Dr. Pallos") was qualified at trial as an expert in general dentistry, without any objection from Defendants.[70] Dr. Pallos outlined for the jury his credentials and dental practice over the last 30 years, including

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[64] AA 4:695.

[65] AA 4:695–696.

[66] Id.

[67] AA 4:698.

[68] AA 5:858.

[69] AA 5:859.

[70] AA 5:895.

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many hundreds of tooth extractions.[71] In Dr. Pallos' opinion, Mr. Singletary died unnecessarily because the original infection could have been controlled.[72] Dr. Pallos went on to testify that the common practice is to use antibiotics when there is an infection, or to prevent an infection, even when there is minimal risk of infections.[73] In fact, as Dr. Pallos testified, the risk of infection goes up significantly if the dentist refuses to give antibiotics preventatively, at the time of the procedure, by providing a prescription, or by following up.[74]

Dr. Pallos also testified regarding the required follow-up. He specifically opined that it is a violation of the standard of care when a patient calls with an emergency, and the dentist blames the patient for believing that there was an emergency.[75] Dr. Pallos reviewed x-rays and explained to the jury that a tooth can die if it is attacked by bacteria to the point where the bacteria totally destroys the internal nerves and blood vessels.[76] After further explanation, Dr. Pallos explained that his testimony was based upon a reasonable degree of medical probability and that Defendants fell below the standard of care.[77]

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[71] AA 5:895–897.

[72] AA 5:897.

[73] AA 5:900.

[74] AA 5:901.

[75] AA 5:904.

[76] AA 5:911.

[77] AA 5:918.

Dr. Pallos also testified that the dentist who is licensed and treats the patient is responsible for follow-up care to ensure that the patient recovers and does not die.[78] Additionally, it was below the standard of care for Summerlin Smiles to give assurances to Ms. Singletary without really knowing if Mr. Singletary had an emergency.[79] Dr. Pallos did not place any blame on Mr. Singletary because he was given extra strength Vicodin and was not completely aware of his situation.[80]

Outside the presence of the jury, but before cross-examination, Defendants asked the District Court to strike certain portions of Dr. Pallos' testimony. The District Court acknowledged that there was a factual difference between the testimony given at trial and the deposition testimony.[81] The District Court struck Dr. Pallos' testimony on the limited topic of informed consent, but required Defendants to cross-examine Dr. Pallos on their other issues.[82]

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[78] AA 5:927.

[79] AA 5:931.

[80] AA 5:933.

[81] AA 5:952.

[82] AA 5:954.

C. DEFENDANTS' ORAL NRCP 41(b) MOTIONS AT THE CLOSE OF PLAINTIFFS' CASE.

After Dr. Pallos' testimony, Plaintiffs rested, and Defendants made oral NRCP 41(b) motions.[83] Traivai argued that there was no establishment of a deviation of the standard of care as to her.[84] Traivai also argued that she should not be liable as an independent contractor.[85] Summerlin Smiles joined in the motion on the basis that there was allegedly no evidence that the person who answered the phone was an employee of either Summerlin Smiles or Lee.[86] Plaintiffs summarized the testimony offered by Dr. Pallos and orally opposed the oral motions.[87]

After the presentation of the oral motions, the District Court asked the court reporter to perform a word search of Dr. Pallos' testimony.[88] The District Court then quoted back Dr. Pallos' testimony where he stated that his opinion was based upon a reasonable degree of medical probability.[89] The District Court was unable to resolve the issue of the scope of Dr. Pallos' statement that his entire testimony was based upon a reasonable degree of medical probability,

[83] AA 5:1011.

[84] Id.

[85] Id.

[86] AA 5:1012.

[87] AA 5:1013–1015.

[88] AA 5:1017.

[89] AA 5:1019.

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even though Dr. Pallos used that phrase in his testimony.[90] Ultimately, the District Court acknowledged that because of the competing factual information, it was not permitted to grant the oral NRCP 41(b) motions since all reasonable inferences had to be made in favor of Plaintiffs.[91] After further discussion, the District Court once again denied Defendants' oral motions.[92]

D. THE JURY'S VERDICT AND SUBSEQUENT AWARDS OF COSTS IN FAVOR OF PLAINTIFFS AND LEE.

1. The Jury's Verdict in Favor of Plaintiffs.

After the case was submitted, the jury returned a verdict in favor of Plaintiffs as to Traivai and Summerlin Smiles.[93] The jury awarded Ms. Singletary $125,000 for past damages and $500,000 for future damages.[94] And, the jury awarded Gabriel $125,000 for past damages and $2,000,000 for future damages.[95] Additionally, the jury awarded Ms. Singletary $60,000 for past loss of probable support and $300,000 for future loss of probable support.[96] The jury also awarded Gabriel these same amounts for loss of probable support.[97] In

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[90] AA 5:1019–1033.

[91] AA 5:1033–1034.

[92] AA 5:1041.

[93] AA 10:1983–1987.

[94] AA 10:1985.

[95] Id.

[96] AA 10:1986.

[97] Id.

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total, the jury awarded Ms. Singletary the sum of $985,000 and Gabriel the sum of $2,485,000, for a total of $3,470,000. The jury also assigned the comparative negligence as 50% to Traivai, 25% to Summerlin Smiles, and 25% to Mr. Singletary.[98]

2. The Separate Awards of Costs to Plaintiffs and Lee.

In post-trial proceedings, Plaintiffs moved for costs as the prevailing parties against Traivai and Summerlin Smiles.[99] The retaxed amount of costs awarded to Plaintiffs was $38,042.64.[100] With regard to this award of costs that was later vacated,[101] Plaintiffs' argument on appeal based upon a reinstatement of the jury verdict requests that this award of costs also be reinstated.[102]

Since Lee prevailed at trial,[103] he moved the District Court for an award of costs.[104] However, Lee failed to separately file a memorandum of costs.[105] And, Lee was jointly represented by counsel that also represented Summerlin Smiles, which did not prevail. As such, it was impossible for anyone to know

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[98] AA 10:1983–1987.

[99] AA 10:1990–1999, 2139–2158.

[100] AA 11:2254–2260.

[101] AA 13:2678–2690.

[102] Cf. 10 Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE, § 2668 at 213–214 (3d ed.); see also Loomis v. Lange Fin. Corp., 109 Nev. 1121, 1129, 865 P.2d 1161, 1165–1166 (1993).

[103] AA 10:1983–1988.

[104] AA 11:2180–2185.

[105] AA 13:2786–2795.

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how much of the $12,065.67 was allotted to each client.[106] Yet, the District Court simply estimated that half of the costs would be allocated to each client and, therefore, awarded Lee the sum of $6,032.83.[107]

E. DEFENDANTS' POST-TRIAL NRCP 50(b) MOTIONS.

After the judgment upon the jury verdict was entered,[108] Traivai filed an NRCP 50(b) motion for judgment as a matter of law.[109] Traivai argued that Dr. Pallos' testimony that was specifically stated to a reasonable degree of medical probability only extended to his opinion on informed consent—which is precisely the issue the District Court denied because of the competing factual issues at the close of Plaintiffs' case.[110] Summerlin Smiles also moved for judgment as a matter of law based upon NRCP 50(b) for the same reasons as Traivai.[111]

Plaintiffs opposed both motions separately. Plaintiffs reminded the District Court that it still had a duty to construe all the evidence in Plaintiffs' favor if the NRCP 50(b) motion was treated as a continuation of Traivai's prior motion.[112] Plaintiffs pointed out that Dr. Pallos' testimony where the phrase

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[106] AA 11:2180–2224.

[107] AA 11:2246, 2247–2253; AA 13:2737–2741.

[108] AA 11:2261–2266.

[109] AA 11:2267–2446.

[110] Id.

[111] AA 12:2447–1047.

[112] AA 12:2481.

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"reasonable degree of medical probability" is used is in the midst of a discussion of all of the expert opinions offered.[113] Plaintiffs also identified Dr. Pallos' expert affidavit attached to the complaint and his expert report, as providing the requisite level of clarity for establishing the standard of care.[114]

Plaintiffs' opposition to Summerlin Smiles' NRCP 50(b) motion included the same arguments as its opposition to Travai's similar motion, and included additional information demonstrating that Ms. Singletary had, in fact, called Summerlin Smiles on April 18, 2011 to request help for Mr. Singletary.[115] Additionally, Plaintiffs filed a supplement, attaching this Court's recent advance opinion FCH1, LLC v. Rodriguez and arguing for the broad view of the establishment of the standard of care.[116] After oral argument on the NRCP 50(b) motions, the District Court took the matter under advisement to issue a written decision.[117]

In its written order, the District Court granted the NRCP 50(b) motions and dismissed Plaintiffs' case on the perceived difference between the legal standard from this Court of requiring an opinion to be "stated" as opposed to "based upon" a reasonable degree of medical probability.[118] Then, without

[113] AA 12:2490–2491.

[114] AA 1:24–28; AA 12:2514–2519.

[115] AA 12:2528–2526.

[116] AA 11:2577–2601.

[117] AA 13:2650–2677.

[118] AA 13:2678–2690; see especially AA 13:2684–2685.

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taking into account the other information presented at trial, the District Court limited Dr. Pallos' testimony to the interpretation that Defendants had proposed at the close of Plaintiffs' case.[119] Although the District Court acknowledged key holdings from this Court in Rodriguez and other earlier authorities, the District Court, nevertheless, construed the holdings in favor of Defendants.[120] Plaintiffs now appeal to this Court, seeking reinstatement of the jury's verdict and their award of costs, or alternatively, a new trial.

VI. LEGAL ARGUMENT

A. THE DISTRICT COURT ERRED BY CONCLUDING IN POST-TRIAL PROCEEDINGS THAT PLAINTIFFS' EXPERTS WERE REQUIRED TO ARTICULATE IN SPECIFIC TALISMANIC LANGUAGE AT TRIAL THE STANDARD OF CARE TO A REASONABLE DEGREE OF MEDICAL PROBABILITY.

The District Court erred by concluding that Plaintiffs' experts were required to articulate in specific talismanic language at trial the standard of care to a reasonable degree of medical probability. Although the District Court referenced this Court's recent FCH1, LLC v. Rodriguez[121] case in the post-trial dismissal order,[122] the District Court disobeyed the relevant holding that "rather than listening for specific words the district court should have considered the

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[119] AA 13:2685–2687.

[120] AA 13:2687–2688.

[121] 335 P.3d 183 (Nev. 2014).

[122] AA 13:2678–2690.

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purpose of the expert testimony and its certainty in light of its context."[123] Other courts reviewing similar standard of care and liability issues have upheld liability to the dentist or other medical professional.[124]

1. Nevada Law Does Not Demand the "Talismanic" Level of Specificity that the District Court Required to Establish the Standard of Care.

In its post-trial NRCP 50(b) dismissal order, the District Court specifically acknowledged this Court's evaluative standard for allowing expert testimony at trial.[125] Yet, the District Court chose to apply a talismanic standard, looking for specific words, instead of evaluating Dr. Pallos' testimony and the related evidence. The District Court's failure was reversible error.

In Banks v. Sunrise Hospital,[126] this Court explained "that [a] testifying physician must state to a degree of reasonable medical probability that the condition in question was caused by the industrial injury, or sufficient facts must be shown so that the trier of fact can make the reasonable conclusion that the condition was caused by the industrial injury."[127]

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[123] Rodriguez, 335 P.3d at 188 (citation omitted).

[124] See, e.g., Looney v. Davis, 721 So.2d 152, 158–159 (Ala. 1998) ("[D]espite the fact that [the plaintiff] returned the following morning complaining of continued bleeding, Dr. Looney still failed to discern her liver disease or that she posed a bleeding risk.").

[125] AA 13:2687–2689.

[126] 120 Nev. 822, 102 P.3d 52 (2004).

[127] Id., 120 Nev. at 834–835, 102 P.3d at 61 (citations and internal quotation marks omitted).

This Court later clarified the seemingly broad standard in Banks and held in Morsicato v. Sav-On Drug Stores, Inc. that "the holding in Banks was not intended to modify or change in any way the requirement that medical expert testimony, regarding the standard of care and causation in a medical malpractice case, must be ***based on*** testimony made to a reasonable degree of medical probability."[128] Thus, this language from Morsicato already suggests an evaluative approach to expert testimony, as opposed to the more stringent standards adopted by the District Court. But, another line in Morsicato states, "We conclude that medical expert testimony regarding standard of care and causation must be ***stated*** to a reasonable degree of medical probability."[129] Yet, the opinion does not explicitly hold that any "talismanic" language must be stated in order to establish the standard of care—although, the District Court reached this conclusion.[130]

Since Morsicato, this Court has decided several other cases on the issue of establishing the standard of care by expert testimony. Although Hallmark v. Eldridge did not specifically comment upon Morsicato, it discussed the admissibility of expert testimony.[131] In Williams v. District Court, this Court reiterated the Morsicato standard for expert testimony on behalf of plaintiffs, with respect to causation, that such testimony "must be ***made*** to a reasonable

[128] 121 Nev. 153, 158, 111 P.3d 1112, 1115 (2005) (emphasis added).

[129] Id., 121 Nev. at 158, 111 P.3d at 1116.

[130] AA 13:2688.

[131] 124 Nev. 492, 189 P.3d 646 (2008).

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degree of medical probability."[132] Williams does not specifically address the standard relevant to establishing the standard of care. However, Williams did instruct courts to review the competence and quality of the evidence to determine its admissibility.[133]

More recently, in FCH1, LLC v. Rodriguez,[134] this Court clarified some of the language regarding the establishment of the standard of care by expert testimony. In Rodriguez, commenting upon the standards in Hallmark, Morsicato, and Williams, this Court held that "Hallmark's refrain is functional, not talismanic . . . Thus, rather than listening for specific words the district court should have considered the purpose of the expert testimony and its certainty in light of its context."[135] Despite recognizing this specific language, the District Court determined that the phrase from this Court "purpose of the expert testimony and its certainty in light of its context" was ambiguous and somehow favored Defendants' position on the alleged failure to establish the standard of care.[136] Very simply, Rodriguez reiterated the developing evaluative standard for expert testimony to satisfy the reasonable degree of medical probability standards. In direct contradiction to this line of reasoning,

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[132] 262 P.3d 360, 367 (Nev. 2011) (emphasis added; citation and internal quotation marks omitted).

[133] Id. at 368 (citations omitted).

[134] 335 P.3d 183 (Nev. 2014).

[135] Id. at 188 (citations omitted).

[136] AA 13:2688.

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the District Court erroneously required Plaintiffs to establish the standard of care by prohibited "talismanic" language. On this legal issue alone, the Court should reinstate the jury's verdict in favor of Plaintiffs.

2. Other Courts Reviewing Standard of Care and Liability Issues in Similar Cases Have Upheld Liability to the Dentist or Other Medical Professional.

In line with this Court's evaluative standard for establishing the standard of care by expert testimony, other courts have reached similar conclusions. In Looney v. Davis, the Alabama Supreme Court held that "despite the fact that [the plaintiff] returned the following morning complaining of continued bleeding, Dr. Looney still failed to discern her liver disease or that she posed a bleeding risk."[137] Because of this factual scenario related to the dentist's failure to care for a patient following a tooth extraction, the Supreme Court commented that the dentist's position on the alleged lack of duty and causation was "illusory."[138] Moreover, it is a dentist's duty to discover and treat an infection resulting from tooth extractions.[139] Looney also commented that even though the patient was later cared for by attending physicians in a hospital, similar to the instant case, the later care did not create an intervening or superseding cause to the dentist's negligence.[140]

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[137] 721 So.2d 152, 158–159 (Ala. 1998).

[138] Id. at 159.

[139] Darling v. Semler, 27 P.2d 886, 887 (Or. 1933).

[140] Looney, 721 So.2d at 162–163.

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Similarly, in Longman v. Jasiek,[141] the Illinois Appellate Court explained, "Where injury results from the surgeon's refusal to continue treatment through postoperative complications as would another professional exercising ordinary skill and care, a cognizable claim arises."[142] Longman involved postoperative complications from wisdom teeth extractions in which the court concluded that the patient's abscess could have been treated if the dentist had actually seen her.[143] Additionally, the court was critical of the dentist's treating of other patients "on the very days when plaintiff's telephoned pleas were spurned."[144] In a later opinion from the Illinois Appellate Court, the court reiterated that expert testimony is required to establish the standard of care on a more probably than not standard.[145] The court also recognized the standard that "a surgeon is required to continue to care for his patient until the threat of post-operative complications is past."[146]

In summary, if the Court determines that Plaintiffs sufficiently established the standard of care in the District Court, the Court should reinstate the jury's verdict in their favor.

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[141] 414 N.E.2d 520 (Ill. App. 1980).

[142] Id. at 523.

[143] Id. at 523–524.

[144] Id. at 524.

[145] Swaw v. Klompien, 522 N.E.2d 1267, 1273 (Ill. App. 1988) (citation omitted).

[146] Id. at 1272.

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B. THE DISTRICT COURT ERRED BY CONCLUDING THAT THERE WAS NOT SUFFICIENT EVIDENCE AND OTHER INFORMATION IN THE RECORD TO SUPPORT THE ESTABLISHMENT OF THE STANDARD OF CARE TO A REASONABLE DEGREE OF MEDICAL PROBABILITY.

The District Court erred by concluding that there was not sufficient evidence and other information in the record to support the establishment of the standard of care to a reasonable degree of medical probability. In dismissing Plaintiffs' entire case, the District Court relied heavily upon its interpretation of the law. However, the District Court did not consider the entirety of the evidence presented to the jury. As a matter of law, the District Court was ***not*** permitted to weigh or ignore all the evidence presented to the jury: "In . . . deciding whether to grant a motion for judgment as a matter of law, the district court must view the evidence and all inferences in favor of the nonmoving party."[147]

1. The District Court Improperly Limited Its Review in Post-Trial Motions to Only Some of the Evidence and Information Provided.

As a matter of Nevada law, a district court is not permitted to weigh or evaluate evidence or other information when deciding motions under NRCP 50.[148] The District Court explicitly recognized its limitations when ruling on the NRCP 41(b) motions at the close of Plaintiffs' case.[149] And, a motion for

[147] Nelson v. Heer, 123 Nev. 217, 222, 163 P.3d 420, 424 (2007) (citations omitted).

[148] Id.; see also Bliss v. DePrang, 81 Nev. 599, 601–602, 407 P.2d 726, 727 (1965).

[149] AA 5:1033–1034.

judgment as a matter of law made in post-trial proceedings requires the same limited standard to be applied.[150] With respect to conflicting expert testimony, even in the context of the establishment of the standard of care, courts have held that "[w]here the parties offer conflicting medical testimony regarding the applicable standard of care and defendant's breach of that standard, the jury is uniquely qualified to resolve the conflict, and a judgment n.o.v. is not proper."[151] Thus, the District Court correctly denied Defendants' NRCP 41(b) motions at the close of Plaintiffs' case, but improperly weighed and evaluated evidence in post-trial proceedings.[152]

2. When All the Evidence and Information Presented Is Considered, the Standard of Care Was Established to a Reasonable Degree of Medical Probability.

If the District Court had properly deferred to the province of the jury as the fact finder, it would have upheld the jury's verdict based upon substantial evidence, even as to the establishment of the standard of care by requisite expert testimony. Dr. Pallos established the standard of care relevant to this case throughout his entire trial testimony.[153]

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[150] See NRCP 50(b); Dudley v. Prima, 84 Nev. 549, 551, 445 P.2d 31, 32 (1968) ("A motion for a judgment notwithstanding the verdict differs from a motion for a new trial in that ***the court in considering a motion for a judgment notwithstanding the verdict is not free to weigh the evidence.***") (emphasis added and citations omitted).

[151] See, e.g., Swaw, 522 N.E.2d at 1271 (citation omitted).

[152] AA 13:2678–2690.

[153] AA 5:895–947.

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In Dr. Pallos' opinion, Mr. Singletary died unnecessarily because the original infection could have been controlled.[154] Dr. Pallos went on to testify that the common practice is to use antibiotics when there is an infection, or to prevent an infection, even when there is minimal risk of infections.[155] In fact, as Dr. Pallos testified, the risk of infection goes up significantly if the dentist refuses to give antibiotics preventatively, at the time of the procedure, by providing a prescription, or by following up.[156]

Dr. Pallos specifically opined that it is a violation of the standard of care when a patient calls with an emergency, and the dentist blames the patient for believing that there was an emergency.[157] After further explanation, Dr. Pallos explained that his testimony was based upon a reasonable degree of medical probability that Defendants fell below the standard of care.[158]

Dr. Pallos also explained that the dentist who is licensed and treats the patient is responsible for follow-up care to ensure that the patient recovers and does not die.[159] Additionally, it was below the standard of care for Summerlin

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10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

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[154] AA 5:897.

[155] AA 5:900.

[156] AA 5:901.

[157] AA 5:904.

[158] AA 5:918.

[159] AA 5:927.

Smiles to give assurances to Ms. Singletary without really knowing if Mr. Singletary had an emergency.[160]

Aside from his trial testimony, Dr. Pallos also opined in his affidavit supporting Plaintiffs' complaint that Defendants fell below the standard of care, stated to a reasonable degree of medical probability, for (1) failing to engage in a proper informed consent; (2) providing misleading advice and failing to offer Mr. Singletary an appointment for follow-up; (3) failing to treat the infection; and (4) violating NRS 631.3452 based upon (a) failing to diagnose, (b) failing to administer medicine or other remedies, (c) failing to ensure the overall quality of patient care, (d) failing to supervise all dental personnel.[161] Furthermore, Dr. Pallos' expert report stated all his opinions "to a reasonable degree of medical probability."[162]

In essence, Dr. Pallos established the standard of care according to the reasonable degree of medical probability in his trial testimony. Dr. Pallos' expert affidavit attached to the complaint and his expert report both support his trial testimony. Since the NRCP 50(b) motions were to be reviewed under the same standard as the NRCP 41(b) motions, it was completely improper for the District Court to deny the NRCP 41(b) motions for conflicting evidence, only to later weigh and evaluate the evidence to grant the NRCP 50(b) motions.

[160] AA 5:931.

[161] AA 1:25–28.

[162] AA 12:2514–2519.

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Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

Therefore, after reviewing all the evidence relevant to the standard of care, the Court should reinstate the jury's verdict in Plaintiffs' favor on this related basis.

C. THE DISTRICT COURT'S CONSIDERATION OF DEFENDANTS' ORAL MOTIONS UNDER NRCP 41(b) AT THE CLOSE OF PLAINTIFFS' CASE WAS PREJUDICIAL AND WARRANTS A NEW TRIAL.

The District Court's consideration of Defendants' oral motions under NRCP 41(b) at the close of Plaintiffs' case was prejudicial. Although the District Court denied Defendants' oral NRCP 41(b) motions at the close of Plaintiffs' case, the District Court later granted the post-trial NRCP 50(b) motions because of the later availability of transcripts.[163] Of course, since the jury had already been released, Plaintiffs were prejudiced by not being able to present the additional evidence, if necessary, to support the jury's verdict.[164]

1. Plaintiffs Have Satisfied the Test for Demonstrating Prejudice as to the Post-Trial Dismissal Because of the Favorable Jury Verdict.

According to Nevada law, prejudicial error is established "when the complaining party demonstrates that the error substantially affected the party's rights."[165] Stated another way, an error in the admission of evidence is prejudicial if the error "so substantially affected [the complaining party's] rights

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[163] AA 13:2678–2690.

[164] See Cook v. Sunrise Hosp. and Medical Center, LLC, 124 Nev. 997, 1007, 194 P.3d 1214, 1220 (2008) (stating that prejudicial error is established "when the complaining party demonstrates that the error substantially affected the party's rights") (citations omitted).

[165] Id.

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Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

that it could be reasonably assumed that if it were not for the alleged error [ ], a different result might reasonably have been expected."[166] By virtue of the jury's verdict favorable to Plaintiffs, and the District Court's subsequent dismissal, Plaintiffs have demonstrated that they were prejudiced by the late evidentiary ruling after trial. In fact, the District Court acknowledged in its post-trial dismissal order, "Dr. Pallos' testimony regarding standard of care and causation . . . formed the basis for the [j]ury's verdict in favor of the Plaintiff[s] . . ."[167] Therefore, Plaintiffs have demonstrated prejudice for purposes of their alternative requested relief of a new trial.

2. Since the Sufficiency of the Evidence Was Not Determined Until Post-Trial Proceedings, the District Court Should Have Allowed a New Trial.

In the post-trial dismissal order, the District Court confessed that it had reviewed the cases raised orally during the oral NRCP 41(b) motions and the actual trial transcript more completely in granting the NRCP 50(b) motions.[168] Of course, if Defendants had filed written motions at the close of Plaintiffs' case, and provided time for written oppositions from Plaintiffs, the District Court could have made its post-trial ruling at the close of Plaintiffs' case. If the District Court had ordered dismissal, Plaintiffs could have brought back Dr. Pallos for rehabilitation or clarification of the District Court's misconception of the scope of his testimony made upon a reasonable degree of medical

[166] Beattie v. Thomas, 99 Nev. 579, 586, 668 P.2d 268, 273 (1983).

[167] AA 13:2688.

[168] AA 13:2684, 2690.

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10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

probability. In fact, the Third Circuit Court of Appeals has explained that the purpose of moving for a directed verdict before judgment notwithstanding the verdict is to afford the opposing party an opportunity to cure defects in its proof prior to submission of the case to the jury.[169]

Because of the associated prejudice with an oral motion, some courts have required a motion for judgment as a matter of law to be in writing and filed: "In order to preserve a challenge to the sufficiency of the evidence to support the verdict in a civil case, a party must make two motions. First, a party must ***file*** a pre-verdict motion pursuant to Fed.R.Civ.P. 50(a)."[170] Second, "a party must ***file*** a post-verdict motion for judgment as a matter of law or, alternatively, a motion for a new trial, under Rule 50(b)."[171] A written motion in the instant case certainly would have afforded Plaintiffs their procedural due process and allowed the District Court to reflect upon the arguments and the information presented before Plaintiffs suffered a forfeiture of their entire case.[172]

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

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[169] Levinson v. Prentice–Hall, Inc., 868 F.2d 558, 562 (3d Cir. 1989).

[170] Nitco Holding Corp. v. Boujikian, 491 F.3d 1086, 1089 (9th Cir. 2007) (emphasis added and citations omitted).

[171] Id. (emphasis added and citations omitted).

[172] A strict reading of Boujikian would mean that an oral motion under NRCP 41(b) or NRCP 50(a) is not sufficient to preserve error for a subsequent, written NRCP 50(b) motion. Cf. Price v. Sinnott, 85 Nev. 600, 607, 460 P.2d 837, 841 (1969) ("A party may not gamble on the jury's verdict and then later, when displeased with the verdict, challenge the sufficiency of the evidence to support it.").

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Since Plaintiffs prevailed on Defendants' oral NRCP 41(b) motions, but later had all their claims dismissed, the District Court should have allowed a new trial because the evidence was present, but it just had not been articulated exactly the way the District Court wanted. Notably, the evidentiary ruling in Morsicato caused this Court to order a new trial.[173] Similarly, Hallmark ordered a new trial limited to damages based upon erroneous evidentiary rulings.[174] Therefore, the District Court should have allowed a new trial, and, as an alternative to reinstating the jury's verdict, Plaintiffs ask this Court to order a new trial.

D. THE DISTRICT COURT ERRED BY APPLYING A HEIGHTENED STANDARD TO PLAINTIFFS' CLAIMS AGAINST SUMMERLIN SMILES, EVEN THOUGH SUCH CLAIMS ARE ACTUALLY BASED UPON ORDINARY NEGLIGENCE.

The District Court erred by applying a heightened standard to Plaintiffs' claims against Summerlin Smiles, even though such claims were actually based upon ordinary negligence. As a matter of law, none of Plaintiffs' claims against Summerlin Smiles were based upon medical or dental malpractice. Instead, the claims were based upon professional or corporate negligence.[175] As this Court has stated, "[We] clarify that NRS 41A.071 only applies to medical malpractice

[173] Morsicato, 121 Nev. at 159, 111 P.3d at 1116.

[174] Hallmark, 124 Nev. at 506, 189 P.3d at 655.

[175] AA 1:1–23.

or dental malpractice actions, not professional negligence actions."[176] Since Plaintiffs' claims against Summerlin Smiles for (1) negligence; (2) corporate negligence; (3) negligent hiring, training, and supervision; (4) vicarious liability; and (5) negligence per se do not fall within the scope of medical malpractice, it was reversible error for the District Court to apply the heightened standard, especially after the jury's verdict.[177]

1. Plaintiffs' Claims Against Summerlin Smiles Do Not Fall Within the Scope of Dental Malpractice, and the District Court Erred by Applying a Heightened Standard.

As a matter of Nevada law, this Court has held that "medical facilities should be required to conform to normal standards of reasonableness under general principles of tort law when performing nonmedical functions."[178] This Court recently clarified in Egan v. Chambers that professional corporations are not subject to the affidavit requirement of NRS 41A.071 because such corporations do not fit within the statutes that define medical malpractice, including NRS 41A.009.[179] As applied to the instant case, none of Plaintiffs' claims against Summerlin Smiles were considered "dental malpractice" under

[176] Egan v. Chambers, 299 P.3d 364, 367 (Nev. 2013) (overruling in part Fierle v. Perez, 125 Nev. 728, 219 P.3d 906 (2009)).

[177] Cf. Jeep Corp. v. Murray, 101 Nev. 640, 644–645, 708 P.2d 297, 300 (1985) (applying lower standards of proof for ordinary negligence claim not based upon medical or dental malpractice), *superceded by statute on other grounds as stated in*, Countrywide Home Loans v. Thitchener, 124 Nev. 725, 740–741, 192 P.3d 243, 253–254 (2008).

[178] DeBoer v. Sr. Bridges of Sparks Fam. Hosp., 282 P.3d 727, 731 (Nev. 2012).

[179] Egan, 299 P.3d at 367.

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10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

NRS 41A.004 and NRS 631.075, which limits the heightened standards to actual individuals, such as Traivai. Since Plaintiffs' five claims against Summerlin Smiles were largely non-medical in nature, they should have never been subject to the heightened standard of a reasonable degree of medical probability. Yet, this Court has clarified that even claims that are otherwise medical or dental malpractice do not qualify for the heightened protections when based upon professional negligence because professional corporations do not fit within the statutory protections for malpractice. As such, the District Court completely erred by applying the heightened standards of malpractice claims to Plaintiffs' claims against Summerlin Smiles.

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

2. Since Plaintiffs Prevailed Against Summerlin Smiles Under Even the Heightened Standard, the Court Should Reinstate the Jury's Verdict Against Summerlin Smiles, or Alternatively, Order a New Trial.

According to Plaintiffs' arguments presented in this appeal, they have already prevailed against Summerlin Smiles under the heightened standard for establishing a duty of care. Yet, even if the Court does not reinstate the jury's verdict against Traivai or Summerlin Smiles, or grant a new trial based upon the prejudicial effect of the oral NRCP 41(b) motions, the Court should still grant relief to Plaintiffs against Summerlin Smiles. The jury's total verdict was $3,470,000.[180] The jury also attributed 25% of the comparative fault to Summerlin Smiles.[181] Thus, the Court could simply reinstate the jury's verdict

[180] AA 10:1983–1987.

[181] Id.