**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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| INGRID PATIN, AN INDIVIDUAL; AND PATIN LAW GROUP, PLLC, A PROFESSIONAL LLC,<br><br>Appellants,<br><br>vs.<br><br>TON VINH LEE,<br><br>Respondent. | Case No.: 69928<br><br>Appeal from the Eighth Judicial District Court, the Honorable Jennifer P. Togliatti Presiding |



# APPELLANTS' OPENING BRIEF

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## 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.

1. Appellant Ingrid Patin is an individual and a Nevada attorney.

2. Appellant Patin Law Group, PLLC is not a publicly traded entity, nor is it owned by a publicly traded entity.

3. Appellants were represented in the District Court by Nettles Law Firm and are represented in this Court by Nettles Law Firm and Marquis Aurbach Coffing.

Dated this 28th day of September, 2017.

MARQUIS AURBACH COFFING

By /s/ Micah S. Echols
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## I. JURISDICTIONAL STATEMENT

Appellants, Ingrid Patin and Patin Law Group, PLLC (collectively "Patin"), timely appealed from the District Court's February 4, 2016 order denying Defendants' special motion to dismiss pursuant to NRS 41.635 et seq., or in the alternative, motion to dismiss pursuant to NRCP 12(b)(5). 2 Appellants' Appendix ("AA") 403–408, 409–411. Patin's appeal is specifically authorized by NRS 41.670(4): "If the court denies the special motion to dismiss filed pursuant to NRS 41.660, an interlocutory appeal lies to the Supreme Court." This Court previously confirmed its appellate jurisdiction over the District Court's February 4, 2016 order denying Patin's special motion to dismiss: "[W]e conclude that the appeal in Docket No. 69928 is limited to the issues related to the February 4, 2016, order denying the original special motion to dismiss." *See* Order Regarding Jurisdiction in Docket No. 69928 and Dismissing Appeal in Docket No. 72144, at *3 (Apr. 27, 2017). Therefore, this Court has appellate jurisdiction over the issues presented in this appeal.

## II. ROUTING STATEMENT

The Supreme Court should retain this appeal. Subsections (a) and (b) of NRAP 17 do not specifically address how NRS 41.670(4) appeals should be assigned. However, this appeal falls into the exceptions outlined in NRAP 17(a)(13) and (14): "Matters raising as a principal issue a question of first impression involving the United States or Nevada Constitutions or common law; and…Matters raising as a principal issue a question of statewide public importance, or an issue upon which there is an inconsistency in the published decisions of the Court of Appeals or of the Supreme Court or a conflict between published decisions of the two courts."[1]

Specifically, this anti-SLAPP[2] appeal first asks the Court to summarily reverse the District Court's order denying Patin's special motion to dismiss based upon issues of mootness. *See NCAA v. Univ. of Nev.*, 97 Nev. 56, 58, 624 P.2d 10, 11 (1981) ("Cases presenting real controversies at the time of their institution may become moot by the happening of subsequent events.") (citations omitted). Respondent, Ton Vinh Lee ("Lee"), filed a defamation per se lawsuit against Patin

[1] Patin refers to the numbering of NRAP 17(a) prior to the Order Amending Nevada Rules of Appellate Procedure 17 and 21, ADKT 501 (Oct. 12, 2016) since this appeal was docketed before January 1, 2017.

[2] "SLAPP" is an acronym for Strategic Lawsuits Against Public Participation.

based upon a statement posted on Patin's website summarizing a jury's verdict in a wrongful death case, *Singletary v. Lee*, District Court Case No. A656091, in which Patin was the lead counsel for the plaintiffs. 1 AA 1–4. However, Lee did not file his lawsuit after the jury's verdict in January 2014 (1 AA 19–24) or the judgment on the jury's verdict in April 2014. 1 AA 30–33. Instead, Lee waited until August 2015 after the District Court erroneously vacated the jury's verdict during post-trial proceedings in July 2014. 1 AA 60–72. Singletary successfully appealed, and this Court reinstated the jury's verdict in Case No. 66278. 2 AA 417–425. Because Patin's statement was true when first made and is true today, one issue in this appeal is whether the reinstatement of the jury's verdict relates back to Patin's original statement, such that it was always true. *Cf. MDC Rests., LLC v. Dist. Ct.*, 383 P.3d 262, 267–268 (Nev. 2016) ("Here, our decision interpreting a constitutional provision…is necessarily retroactive to the extent that it is applicable from the date of…inception, rather than from the date of this decision."). Therefore, Patin contends that Lee's entire defamation per se lawsuit against her is moot because it cannot rest upon a reversed District Court order that no longer has any effect.

Second, this case asks the Court to apply the protections of the absolute litigation privilege to Patin's general summary of the jury verdict in *Singletary v. Lee* posted on her own law firm's website, as Patin was an attorney involved in the

underlying litigation case. *See Fink v. Oshins*, 118 Nev. 428, 433, 49 P.3d 640, 643–644 (2002) ("This privilege, as its name indicates, is absolute: it precludes liability even where the defamatory statements are published with knowledge of their falsity and personal ill will toward the plaintiff.") (citations and internal quotation marks omitted).

Third, Patin has presented several issues of error correction involving the interpretation and application of the anti-SLAPP statutes (NRS 41.635–NRS 41.670). However, she has also presented at least two issues of first impression: (1) whether the filing of a lawsuit qualifies as 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" for purposes of the anti-SLAPP statutes. *See JSJ Ltd. P'ship v. Mehrban*, 205 Cal.App.4th 1512, 1521–1522 (2012) ("Filing a lawsuit is an act in furtherance of the constitutional right of petition, regardless of whether it has merit."); and (2) whether the District Court's characterization of Patin's statement as attorney advertising qualifies as protected commercial speech. *See Taheri Law Group v. Evans*, 160 Cal.App.4th 482, 491 (2008) ("[T]he legislative history of the commercial speech exemption to the anti-SLAPP statute confirms the Legislature's intent to except from anti-SLAPP coverage disputes that are purely commercial.") (citations omitted). For these

several reasons, Patin asks the Supreme Court to retain this appeal based upon NRAP 17(a)(13) and (14).

## III. ISSUES ON APPEAL

**A. WHETHER THIS COURT SHOULD SUMMARILY REVERSE THE DISTRICT COURT'S ORDER DENYING PATIN'S SPECIAL MOTION TO DISMISS UNDER NRS 41.660 DUE TO MOOTNESS SINCE SUPREME COURT CASE NO. 66278 REINSTATED THE JURY'S VERDICT IN THE UNDERLYING LITIGATION CASE, *SINGLETARY v. LEE.***

**B. WHETHER THIS COURT SHOULD, ALTERNATIVELY, SUMMARILY REVERSE THE DISTRICT COURT'S ORDER DENYING PATIN'S SPECIAL MOTION TO DISMISS UNDER NRS 41.660 BASED UPON THE ABSOLUTE LITIGATION PRIVILEGE SINCE LEE'S SOLE DEFAMATION PER SE CLAIM AGAINST PATIN WAS BASED UPON A STATEMENT MADE ABOUT THE UNDERLYING LITIGATION CASE, *SINGLETARY v. LEE.***

**C. WHETHER THIS COURT SHOULD REVERSE THE DISTRICT COURT'S ORDER DENYING PATIN'S SPECIAL MOTION TO DISMISS UNDER NRS 41.660 SINCE:**

**1. The District Court applied the wrong version of NRS 41.660, requiring Lee to present only prima facie evidence of prevailing;**

**2. Patin's statement referenced the underlying litigation case, *Singletary v. Lee*, which is protected and unequivocally qualifies as 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";**

**3. Patin's statement referencing the underlying litigation case, *Singletary v. Lee*, is true and not capable of a defamatory per se construction;**

4. **Patin's statement referencing the underlying litigation case, *Singletary v. Lee*, is also protected by the absolute fair report privilege;**

5. **Lee's sole claim for defamation per se against Patin improperly relies upon the Nevada Rules of Professional Conduct and is not actionable; and**

6. **Patin's statement referencing the underlying litigation case, *Singletary v. Lee*, was characterized by the District Court as attorney advertising, such that the statement qualifies as protected commercial speech.**

## IV. STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

At its core, Lee's defamation per se complaint against Patin is a retaliation suit for the wrongful death jury verdict Patin obtained for her clients against Lee's dental practice, Summerlin Smiles, and one of his dentists. 1 AA 1–4, 30–33. This appeal asks the Court to enforce the anti-SLAPP statutes to swiftly halt Lee's frivolous litigation against Patin. The District Court's order denying Patin's special motion to dismiss contains several layers of reversible error, and this Court should reverse. 2 AA 403–408. Following the jury's verdict in *Singletary v. Lee*, Patin posted the following statement on her law firm's website:

> 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.

1 AA 76–80. After the District Court erroneously vacated the jury verdict in *Singletary v. Lee*, Patin updated the description of the case on her website:

> 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. The matter is currently on appeal.

1 AA 98–99. However, in Supreme Case No. 66278, *Singletary v. Lee*, this Court reinstated the jury's verdict: "We therefore reverse the district court's judgment as a matter of law and direct the district court to reinstate the jury's verdict." 2 AA 417–425. Therefore, based upon this Court's order reinstating the jury's verdict, Lee's entire defamation per se lawsuit against Patin is moot, and this Court should summarily reverse the District Court's order denying Patin's special motion to dismiss under NRS 41.660. *See NCAA v. Univ. of Nev.*, 97 Nev. 56, 58, 624 P.2d 10, 11 (1981) ("Cases presenting real controversies at the time of their institution may become moot by the happening of subsequent events.") (citations omitted).

Alternatively, this Court should summarily reverse the District Court's order denying Patin's special motion to dismiss under NRS 41.660 based upon the

absolute litigation privilege. This Court has consistently held that both litigants and attorneys are immune from liability for statements made in connection with litigation. *See Fink v. Oshins*, 118 Nev. 428, 433, 49 P.3d 640, 643–644 (2002) ("This privilege, as its name indicates, is absolute: it precludes liability even where the defamatory statements are published with knowledge of their falsity and personal ill will toward the plaintiff.") (citations and internal quotation marks omitted); *Circus Circus Hotels v. Witherspoon*, 99 Nev. 56, 60, 657 P.2d 101, 104 (1983) (concluding that Nevada follows the long-standing common law rule that communications made in the course of judicial proceedings even if known to be false are absolutely privileged) (citations omitted). Therefore, based upon the absolute litigation privilege, this Court should summarily reverse the District Court's order denying Patin's special motion to dismiss under NRS 41.660.

Even if the Court reaches the statutory analysis of the anti-SLAPP statutes, the Court should still reverse the District Court's order denying Patin's special motion to dismiss under NRS 41.660 for any one of several reasons. First, the District Court erroneously applied NRS 41.660(3)(b) retroactively to benefit Lee with the lower standard "whether the plaintiff has demonstrated with prima facie evidence a probability of prevailing on the claim" in the current 2015 version of this statute. In reality, Lee had to meet the more stringent standard "whether the plaintiff has established by clear and convincing evidence a probability of

prevailing on the claim" in the prior 2013 version of this statute. *See Delucchi v. Songer*, 396 P.3d 826, 830–831 (Nev. 2017). The proper remedy for the District Court's use of an improper legal standard to analyze an issue is for this Court to reverse and remand. *Id.*; *Potter v. Potter*, 121 Nev. 613, 618–619, 119 P.3d 1246, 1250 (2005) (reversing and remanding a district court order where an improper legal standard was applied to a custody issue).

Second, Patin's statement about *Singletary v. Lee* placed on her law firm's website is protected and unequivocally qualifies as 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." NRS 41.637(3) includes within this good faith communication 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." The case law construing anti-SLAPP statutes uniformly includes the filing of a lawsuit, such as *Singletary v. Lee*, as an act in furtherance of the right to petition. *See JSJ Ltd. P'ship v. Mehrban*, 205 Cal.App.4th 1512, 1521–1522 (2012) ("Filing a lawsuit is an act in furtherance of the constitutional right of petition, regardless of whether it has merit."). Therefore, the District Court once again erred in construing NRS 41.637, and this Court should reverse.

Third, Patin's statement referencing the underlying litigation case, *Singletary v. Lee*, is true and not capable of a defamatory per se construction. Lee only takes issue with Patin's first statement placed on her law firm's website. 1 AA 1–4. However, nothing within Patin's statement constitutes defamation. *See, e.g., Chowdry v. NLVH, Inc.*, 109 Nev. 478, 483, 851 P.2d 459, 462 (1993). Since each of the sentences in Patin's statement is true, her statement cannot be categorized as defamation per se. *See Nevada Ind. Broadcasting, Inc.*, 99 Nev. 404, 409, 664 P.2d 337, 341 (1983).

Fourth, Patin's statement referencing the underlying litigation case, *Singletary v. Lee*, is also protected by the absolute fair report privilege. Patin's statement describing *Singletary v. Lee* was only one of several publications summarizing the judicial proceedings and the jury's verdict. 1 AA 34–37, 38–41. Lee, nevertheless, chose to sue only Patin, demonstrating the retaliatory nature of his complaint for defamation per se. Yet, Nevada law protects Patin's republication of the *Singletary v. Lee* judicial proceedings according to the absolute fair report privilege. *See Sahara Gaming Corp. v. Culinary Workers Union Local 226*, 115 Nev. 212, 215, 984 P.2d 164, 166 (1999) ("The law has long recognized a special privilege of absolute immunity from defamation given to the news media and the general public to report newsworthy events in judicial proceedings."). This Court has recently reaffirmed the wisdom of the absolute fair

report privilege. *Adelson v. Harris*, 133 Nev. Adv. Op. No. 67, at *5–6 (Sep. 27, 2017).

Fifth, Lee's sole claim for defamation per se against Patin improperly relies upon the Nevada Rules of Professional Conduct and is not actionable. 1 AA 1–4. Lee's complaint references RPC 7.2 (Advertising) and requests relief based upon his interpretation of this rule. 1 AA 3, ¶ 19. But, RPC 1.0A confirms, "Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached…. [The Rules] are not designed to be a basis for civil liability." Notably, Lee has already unsuccessfully pursued a Nevada State Bar complaint against Patin based upon his same argument raised in this litigation. 1 AA 100–101.

Finally, Patin's statement referencing the underlying litigation case, *Singletary v. Lee*, was characterized by the District Court as attorney advertising, such that the statement qualifies as protected commercial speech. 2 AA 406. If this Court agrees that Patin's statement on her law firm's website was only attorney advertising, the statement would still be protected under the anti-SLAPP laws as protected commercial speech. *See Taheri Law Group v. Evans*, 160 Cal.App.4th 482, 491 (2008) ("[T]he legislative history of the commercial speech exemption to the anti-SLAPP statute confirms the Legislature's intent to except from anti-SLAPP coverage disputes that are purely commercial.").

In summary, Patin asks this Court to summarily reverse the District Court's order denying her special motion to dismiss under NRS 41.660 based upon the mootness of Lee's entire defamation per se lawsuit and the absolute litigation privilege. If the Court reaches the actual interpretation and application of the anti-SLAPP statutes, the Court should likewise reverse based upon (1) the District Court's improper application of the 2015 version of NRS 41.660(3)(b); (2) Patin's "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"; (3) the truth of Patin's statement posted on her law firm's website; (4) the protection of the absolute fair report privilege; (5) the lack of merit in Lee's reliance on the Nevada Rule of Professional Conduct for his defamation per se claim; and (6) Patin's statement as protected commercial speech under anti-SLAPP laws.

If the Court reverses the District Court's order denying Patin's special motion to dismiss under NRS 41.660 for any one of these reasons, the Court should also direct the District Court on remand to award her damages, attorney fees, and costs according to NRS 41.670.

## V. STANDARDS OF REVIEW

This Court's review of an order denying a request for dispositive relief, such as a dismissal order or a summary judgment order, is reviewed de novo. *See Johnson v. Wells Fargo Bank Nat'l Ass'n*, 382 P.3d 914, 916 (Nev. 2016); *Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010).

This Court reviews questions of law de novo. *See Birth Mother v. Adoptive Parents*, 118 Nev. 972, 974, 59 P.3d 1233, 1235 (2002). Statutory interpretation is a question of law that this Court reviews de novo. *Id.* A district court's application of an improper legal rule also carries a de novo review. *Staccato v. Valley Hosp.*, 123 Nev. 526, 530, 170 P.3d 503, 505–506 (2007).

The applicability of the absolute litigation privilege is a matter of law for the court to decide, which this Court will review de novo. *Fink v. Oshins*, 118 Nev. 428, 432, 49 P.3d 640, 643 (2002). Whether a statement is defamatory is generally a question of law; however, where a statement is susceptible of different constructions, one of which is defamatory, resolution of the ambiguity is a question of fact for the jury. *Posadas v. City of Reno*, 109 Nev. 448, 453, 851 P.2d 438, 442 (1993) (citation and internal quotation marks omitted).

## VI. FACTUAL AND PROCEDURAL BACKGROUND

### A. THE UNDERLYING *SINGLETARY v. LEE* LITIGATION.

In February 2012, Plaintiff Svetlana Singletary, individually and as the representative of the Estate of Reginald Singletary, and her minor son Gabriel L. Singletary filed a wrongful death complaint against Ton Vinh Lee, DDS, individually; Florida Traivai, DMD, individually; Jai Park, DDS, individually; and Ton V. Lee, DDS, Prof. Corp. d/b/a Summerlin Smiles. 1 AA 18. As published in *The Trial Reporter* at the conclusion of the jury trial:

> 1/22/14 - Judge JERRY A. WIESE - CV A656091 - SINGLETARY (Lloyd W. Baker, Ingrid M. Patin, and Jessica M. Goodey of Baker Law Offices) v LEE, D.D.S., dba SUMMERLIN SMILES (Jason B. Friedman of Stark, Friedman & Chapman, L.L.P., of Long Beach, California); PARK, D.D.S. (Edward J. Lemons of Lemons, Grundy & Eisenberg, P.C.); and TRAIVAI, D.M.D. (S. Brent Vogel of Lewis, Brisbois, Bisgaard & Smith, L.L.P.) - WRONGFUL DEATH - MEDICAL MALPRACTICE - DENTAL - FAILURE TO DIAGNOSE/TREAT - INFECTION - LACK OF INFORMED CONSENT. *Prologue: Decedent presented to Dfnt Summerlin Smiles, on March 24, 2011, for routine dental work. New patient examination was done. Dfnts dentists Traivai and Park were independent contractors of Dfnt Summerlin Smiles. On April 16th, Decedent returned to Dfnt Summerlin Smiles for an extraction of the number 32 wisdom tooth, performed by Dfnt Traivai. Following the extraction, Decedent experienced ongoing severe pain in the extraction area on the right side of his face; swelling of the face, jaw, and neck; plus difficulty swallowing. Dfnt Summerlin Smiles was allegedly contacted via telephone on April 18th, and Decedent was advised to call again if his symptoms did not subside within four to five days. Decedent continued to experience his prior symptoms, and had difficulty swallowing, as well as difficulty speaking and eating, on April 19th and April 20th. Decedent was vomiting, began having difficulty*

*breathing, and was transported by ambulance to non-party hospital, where he was admitted to the Intensive Care Unit, on April 21st. Antibiotics were administered and drainage of Decedent's neck was performed. Decedent died on April 25th.* Case being tried on comparative fault. Decedent, male, age 42, was survived by his spouse and minor son, who brought suit for his wrongful death, Plntfs, both Nevada residents, alleged Dfnts fell below the standard of care by giving Decedent incorrect advice when he called Dfnt Summerlin Smiles, and followed their advice even though he became progressively sicker. Plntfs also alleged Dfnts failed to obtain Decedent's informed consent regarding use of antibiotics to prevent infection. (Court ruled issue was moot.) Plntfs called Joseph B. Marzouk, M.D., an infectious diseases specialist, of Oakland, California. Plntfs also called Andrew Pallos, D.D.S. of Laguna Niguel, California, who was of the opinion that Dfnts fell below the standard of care. Dfnts Lee and Park denied liability, advancing the defense that they did not provide any treatment to Decedent. Dfnt Traivai, female, a Nevada resident, denied falling below the standard of care. Dfnt Traivai argued that there were no complications during the procedure, and Decedent was given both verbal and written postoperative instructions, which instructed Decedent to contact the office or go to the emergency department if he experienced any severe or unexpected complications. Dfnt Traivai also argued that, in the days following the extraction procedure, she was not contacted and was not aware of Decedent's condition and/or any potential complications. Additionally, Dfnt Traivai argued she did not instruct an employee of Dfnt Summerlin Smiles to give any medical advice and/or instructions to Decedent. Dfnt Traivai called Christian E. Sandrock, M.D., an infectious diseases specialist, of Sacramento, California; and William C. Ardary, D.D.S., M.D., an oral and maxillofacial surgeon, of Arcadia, California. Plntfs alleged that, as a result of Dfnts' negligence, Decedent developed necrotizing mediastinitis and septic shock, then Ludwig's angina from the dental abscess, which resulted in his death. Prayer: In excess of $10,000 compensatory damages; plus $600,000 loss of support (D Vogel). (Carrier: Hartford Insurance.) Seven day trial. Jury out two-plus hours. FOUND FOR DFNTS LEE AND PARK; AWARDED PLNTF SPOUSE $985,000 COMPENSATORY DAMAGES (REPRESENTING $125,000 FOR PAST PAIN AND SUFFERING,

> $500,000 FOR FUTURE PAIN AND SUFFERING, $60,000 PAST LOSS OF SUPPORT, AND $300,000 FUTURE LOSS OF SUPPORT). AWARDED PLNTF SON $2,485,000 COMPENSATORY DAMAGES (REPRESENTING $125,000 FOR PAST PAIN AND SUFFERING, $2 MILLION FOR FUTURE PAIN AND SUFFERING, $60,000 PAST LOSS OF SUPPORT, AND $300,000 FUTURE LOSS OF SUPPORT). (Found Decedent to be twenty-five percent at fault, found Dfnt Traivai to be fifty percent at fault, and found Dfnt Summerlin Smiles to be twenty-five percent at fault; therefore, Plntf spouse to recover $492,500 from Dfnt Traivai and $246,250 from Dfnt Summerlin Smiles; and Plntf son to recover $1,242,500 from Dfnt Traivai and $621,250 from Dfnt Summerlin Smiles).

1 AA 36–37. Notably, *The Trial Reporter* listed the running title of the case as "SINGLETARY (Lloyd W. Baker, Ingrid M. Patin, and Jessica M. Goodey of Baker Law Offices) v **LEE, D.D.S., dba SUMMERLIN SMILES** (Jason B. Friedman of Stark, Friedman & Chapman, L.L.P., of Long Beach, California). *Id.* (emphasis added). *The Nevada Legal Update* also published a similar summary of the case after the jury's verdict using the running title of the case as "***Singletary v. Lee, D.D.S.***" 1 AA 41 (italics in original; emphasis added).

In post-trial proceedings, Summerlin Smiles and Traivai moved the District Court under NRCP 50(b) to vacate the jury's verdict based upon an alleged lack of expert testimony on standard of care and causation stated to reasonable degree of medical probability. 1 AA 60–72. In an order issued in July 2014, the District Court agreed with the defense and struck Dr. Pallos' trial testimony regarding standard of care and causation due to the absence of the qualifying statement

"reasonable degree of medical probability." 1 AA 70. In its order granting the NRCP 50(b) motions, the District Court stated that it was "reluctant to do so.…" 1 AA 72. Singletary appealed this ruling, which was docketed as Supreme Court Case No. 66278. 1 AA 105–119.

### B. LEE'S DEFAMATION PER SE LAWSUIT AGAINST PATIN.

During the pendency of Singletary's Nevada Supreme Court appeal, Lee filed a complaint against Patin in August 2015, alleging a sole claim for defamation per se. 1 AA 1–4. Specifically, Lee complained of the following statement:

> 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.

1 AA 76–80. Lee's main contention was that his name was in the running title of the case description on Patin's law firm's website "Singletary v. Ton Vinh Lee, DDS, et al.," even though the jury did not find him personally liable. 1 AA 2, ¶ 10; 1 AA 76–80. Yet, it is undisputed that Lee's name was in the caption of the District Court case (1 AA 17–18) and the prior Supreme Court case. 2 AA 417–

425. Additionally, Lee never sought to remove his name from the official court caption in either court. Lee generally claimed that Patin's statement was defamatory based upon the requirements of RPC 7.2(i): "If the past successes or results obtained include a monetary sum, the amount involved must have been actually received by the client…." 1 AA 3, ¶ 19. Lee also suggested that because Patin's statement mentioned that Lee was personally sued in the *Singletary v. Lee* lawsuit, the statement somehow imputed his "lack of fitness as a dentist…." 1 AA 3, ¶ 20. Lee conceded that a "simple internet search reveals the claimed verdict for wrongful death." 1 AA 3, ¶ 21. Lee also filed a Nevada State Bar complaint against Patin, but the State Bar did not take any action. 1 AA 98–99.

After the District Court erroneously vacated the jury's verdict in *Singletary v. Lee,* Patin updated the description on her website:

> 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. The matter is currently on appeal.

1 AA 98–99.

### C. PATIN'S INITIAL MOTION TO DISMISS.

Prior to being served with process, Patin filed a motion to dismiss. 1 AA 5–44. Patin argued the insufficiency of service of process and the failure to state a claim for defamation per se based on the truth of her statement. *Id.* Lee argued that he had recently served process and that there was a factual issue regarding defamation that needed to be determined by a jury. 1 AA 45–86. Lee also argued that Patin's statements were in violation of RPC 7.2(i). 1 AA 54–56. The District Court minutes reflect, "Mr. Jones [counsel for Lee] argued that there is no verdict against his client as it was vacated by the Judge, although it is on appeal." 1 AA 102. Ultimately, the District Court treated Patin's motion to dismiss as a motion for summary judgment and denied the motion without prejudice based on NRCP 56(f).[3] 1 AA 200–202.

### D. PATIN'S SPECIAL MOTION TO DISMISS UNDER NRS 41.660.

In October 2015, Patin filed a special motion to dismiss under NRS 41.660. 1 AA 120–199. She once again argued that the statement placed on her law firm's website was true and, therefore, not actionable. *Id.* Patin also reviewed the framework for the District Court's analysis of an anti-SLAPP motion and argued

[3] Notably, the District Court granted NRCP 56(f) relief to Lee without the required affidavit giving reasons why he could not present facts essential to support his opposition. *See Choy v. Ameristar Casinos, Inc.*, 127 Nev. 870, 872, 265 P.3d 698, 700 (2011).

the various points. *Id.* In his opposition, Lee argued that the vacated jury verdict made Patin's statement false, that he should be able to take advantage of the 2015 legislative changes to NRS 41.660, that the anti-SLAPP laws should not even apply to this lawsuit, and that he otherwise satisfies the requirements of the anti-SLAPP laws to avoid dismissal of his complaint. 2 AA 203–309.

In a brief hearing in November 2015, the District Court allowed supplemental briefing before deciding Patin's special motion to dismiss under NRS 41.660. 2 AA 351–361. In December 2015, the District Court heard argument on Patin's special motion to dismiss under NRS 41.660. 2 AA 376–400. Once again, Lee argued that Patin's statement is defamatory because the verdict had been vacated. 2 AA 376. The District Court did not make a decision at the hearing but took the matter under advisement. *Id.*

By January 2016, the District Court issued a minute order and a subsequent written order in February 2016 denying Patin's special motion to dismiss under NRS 41.660. 2 AA 401–408. The District Court's denial order made the following conclusions:

- Patin's special motion to dismiss under NRS 41.660 was timely filed. 2 AA 405.
- Patin's statement 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. 2 AA 405–406. The District Court reasoned that NRS 41.637(3)[4] did 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." 2 AA 406. The District Court reached the same conclusion with respect to NRS 41.637(4).[5] 2 AA 406.

- The District Court also offered an alternative analysis applying the anti-SLAPP laws to the instant case. The District Court reasoned that Lee had offered at least "prima facie evidence demonstrating a probability of prevailing on this claim." 2 AA 406. The District Court cited *Posadas v. City of Reno*, 109 Nev. 448, 453 (1993) for the notion that "the truth or falsity of an allegedly defamatory statement is an issue for the jury to determine." 2 AA 406. The District Court made the additional conclusion that if Patin's statement is found to be defamatory,

[4] NRS 41.637(3): "'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:….Written or oral statement made in direct connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law[,]….which is truthful or is made without knowledge of its falsehood."

[5] NRS 41.637(4): "'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:…. 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."

it would tend to injure Lee in his business or profession, such that it could be deemed defamation per se with presumed damages. 2 AA 406.

- The District Court characterized Patin's argument to apply the applicable clear and convincing standard from the 2013 version of NRS 41.660(3)(b) as a "misstatement of the evidentiary burden" but was nothing more than "harmless error on the part of counsel…." 2 AA 406.

In March 2016, Patin timely appealed from the District Court's order denying her special motion to dismiss under NRS 41.660. 2 AA 409–416.

### E. THIS COURT REINSTATES THE *SINGLETARY v. LEE* JURY VERDICT IN SUPREME COURT CASE NO. 66278.

After Patin had appealed the District Court's order denying her special motion to dismiss under NRS 41.660 in the instant case, this Court reinstated the jury verdict in the separate *Singletary v. Lee* Supreme Court Case No. 66278. 2 AA 417–425. In the *Singletary v. Lee* appeal, this Court ruled 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." 2 AA 416. The Court reasoned that "[w]hile 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." 2 AA 419 (citation omitted). Summarizing the trial testimony, this Court elaborated on its ruling, "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." 2 AA 420. Ultimately, this Court "reverse[d] the district court's judgment as a matter of law and direct[ed] the district court to reinstate the jury's verdict." *Id.* No petition for rehearing was filed in the *Singletary v. Lee* appeal, and the remittitur issued in November 2016. 2 AA 424–425. Lee has, nevertheless, chosen to maintain his lawsuit against Patin.

## VII. LEGAL ARGUMENT

### A. THIS COURT SHOULD SUMMARILY REVERSE THE DISTRICT COURT'S ORDER DENYING PATIN'S SPECIAL MOTION TO DISMISS UNDER NRS 41.660 DUE TO MOOTNESS SINCE SUPREME COURT CASE NO. 66278 REINSTATED THE JURY'S VERDICT IN THE UNDERLYING LITIGATION CASE, *SINGLETARY v. LEE.*

This Court should summarily reverse the District Court's order denying Patin's special motion to dismiss under NRS 41.660 due to mootness since Supreme Court Case No. 66278 reinstated the jury's verdict in the underlying litigation case, *Singletary v. Lee*. When the case law and the facts of a case are so clear as to require reversal, this Court can entertain summary proceedings.

*Cf. United States v. Dura-Lux Int'l Corp.*, 529 F.2d 659, 660–662 (8th Cir. 1976) (the court sua sponte concluded that a summary disposition was appropriate because the questions presented did not require further argument); *Leigh v. Gaffney*, 432 F.2d 923 (10th Cir. 1970) (the court entertained summary proceedings because the question presented did not warrant further argument); *Goldstein v. Riggs Nat'l Bank*, 459 F.2d 1161, 1163 n.2 (D.C. Cir. 1972) (the court dispensed with additional briefing and argument because the "the merits of the claim are so clear as to warrant expeditious action"). Similar to these holdings, NRAP 2 permits this Court to "expedite its decision or for other good cause—suspend any provision of these Rules in a particular case and order proceedings as the court directs…."

In the *Singletary v. Lee* appeal, this Court reinstated the jury's verdict: "We therefore reverse the district court's judgment as a matter of law and direct the district court to reinstate the jury's verdict." 2 AA 417–425. Lee had directly relied upon the District Court's erroneous order vacating the jury's verdict in *Singletary v. Lee* to argue that Patin's statement was allegedly false: "Mr. Jones [counsel for Lee] argued that there is no verdict against his client as it was vacated by the Judge, although it is on appeal." 1 AA 102. The District Court also denied relief to Patin since her statement did not "reference an appeal…." 2 AA 406. Now that this Court has reinstated the jury's verdict in *Singletary v. Lee*, Lee has

no colorable claim that Patin's statement can possibly be construed as defamatory, and his entire lawsuit is moot. *See NCAA v. Univ. of Nev.*, 97 Nev. 56, 58, 624 P.2d 10, 11 (1981) ("Cases presenting real controversies at the time of their institution may become moot by the happening of subsequent events.") (citations omitted). In fact, the issue of mootness can be considered at any stage of the proceedings since it goes to the controversy's justiciability. *See Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 264, 71 P.3d 1258, 1260 n.3 (2003) (citations omitted). Since there is no longer any real controversy in this case, the Court should summarily reverse the District Court's order denying Patin's special motion to dismiss under NRS 41.660.

Because this Court "reversed" the District Court's order vacating the jury's verdict in *Singletary v. Lee*, there can be no argument that the District Court's reversed order has any effect. 2 AA 417–425. "Reversal" means "[a]n annulling or setting aside…." BLACK'S LAW DICTIONARY, 1513 (10th ed. 2014). In turn, "annulment" is defined as "[t]he act of nullifying or making void…." *Id.* at 110. In contrast, "reinstate" means "[t]o place again in a former state or position; to restore <the judge reinstated the judgment that had been vacated>." *Id.* at 1477. When Patin made her statement, it was true. The statement is also true today based upon this Court's reinstatement of the jury's verdict in *Singletary v. Lee*. Certainly, Lee cannot have a cause of action for defamation per se based upon a

void order since this Court's reinstatement relates back to the jury's verdict, as a matter of law. *Cf. MDC Rests., LLC v. Dist. Ct.*, 383 P.3d 262, 267–268 (Nev. 2016) ("Here, our decision interpreting a constitutional provision…is necessarily retroactive to the extent that it is applicable from the date of…inception, rather than from the date of this decision."); *see also* NRS 86.276(5) ("[A] reinstatement pursuant to this section relates back to the date on which the company forfeited its right to transact business under the provisions of this chapter and reinstates the company's right to transact business as if such right had at all times remained in full force and effect.").

Therefore, based upon this Court's order reinstating the jury's verdict in *Singletary v. Lee*, Lee's entire defamation per se lawsuit against Patin is moot, and this Court should summarily reverse the District Court's order denying Patin's special motion to dismiss under NRS 41.660.

### B. THIS COURT SHOULD, ALTERNATIVELY, SUMMARILY REVERSE THE DISTRICT COURT'S ORDER DENYING PATIN'S SPECIAL MOTION TO DISMISS UNDER NRS 41.660 BASED UPON THE ABSOLUTE LITIGATION PRIVILEGE SINCE LEE'S SOLE DEFAMATION PER SE CLAIM AGAINST PATIN WAS BASED UPON A STATEMENT MADE ABOUT THE UNDERLYING LITIGATION CASE, *SINGLETARY v. LEE.*

This court should, alternatively, summarily reverse the District Court's order denying Patin's special motion to dismiss under NRS 41.660 based upon the

absolute litigation privilege since Lee's sole defamation per se claim against Patin was based upon a statement made about the underlying litigation case, *Singletary v. Lee*. This Court has consistently held that both litigants and attorneys are immune from liability for statements made in connection with litigation. *See Fink v. Oshins*, 118 Nev. 428, 433, 49 P.3d 640, 643–644 (2002) ("This privilege, as its name indicates, is absolute: it precludes liability even where the defamatory statements are published with knowledge of their falsity and personal ill will toward the plaintiff.") (citations and internal quotation marks omitted); *Circus Circus Hotels v. Witherspoon*, 99 Nev. 56, 60, 657 P.2d 101, 104 (1983) (concluding that Nevada follows the long-standing common law rule that communications made in the course of judicial proceedings even if known to be false are absolutely privileged) (citations omitted).

The District Court improperly disregarded the absolute litigation privilege to allow Lee's litigation to continue unnecessarily. The District Court erroneously analyzed Lee's defamation per se claim, as if it arose outside the context of a judicial proceeding. 2 AA 403–408. But, a proper analysis and application of the absolute litigation privilege categorically requires that Patin enjoy immunity under this privilege. "The policy behind the absolute privilege, as it applies to attorneys participating in judicial proceedings, is to grant them as officers of the court the utmost freedom in their efforts to obtain justice for their clients." *Fink v. Oshins*,

118 Nev. 428, 433, 49 P.3d 640, 643 (2002) (citation and internal quotation marks omitted). The scope of the absolute privilege is quite broad. The defamatory communication need not be strictly relevant to any issue involved in the proposed or pending litigation, it only need be in some way pertinent to the subject of controversy. *See Witherspoon*, 99 Nev. at 60, 657 P.2d at 104. Whenever there is a doubt whether the absolute litigation privilege applies, this Court favors applying the privilege liberally. *See Fink*, 118 Nev. at 433–434, 49 P.3d at 644 (citation omitted).

Since *Witherspoon* and *Fink*, courts have uniformly upheld the absolute litigation privilege. For example, *Clark County School Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 383, 213 P.3d 496, 502 (2009) extended the absolute litigation privilege to parties in litigation in addition to their attorneys: "[T]he absolute privilege affords parties the same protection from liability as those protections afforded to an attorney for defamatory statements made during, or in anticipation of, judicial proceedings." (citing RESTATEMENT (SECOND) OF TORTS, § 587, cmt. d (1977)). Courts have also refused to make a distinction between "communications" made during the litigation process and "conduct" occurring during litigation. The absolute litigation privilege applies to both. *See Clark v. Druckman*, 624 S.E.2d 864, 870 (W.Va. 2005); *see also Maness v. Star-Kist Foods, Inc.*, 7 F.3d 704, 709 (8th Cir. 1993) (applying Minnesota law and

explaining that the privilege can extend to an attorney's "actions arising out of his professional relationship"). When applicable, "[a]n absolute privilege bars any civil litigation based on the underlying communication." *Hampe v. Foote*, 118 Nev. 405, 409, 47 P.3d 438, 440 (2002), *overruled in part on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228 n.6, 181 P.3d 670, 672 n.6 (2008). Therefore, based upon the absolute litigation privilege, this Court should summarily reverse the District Court's order denying Patin's special motion to dismiss under NRS 41.660.

### C. THIS COURT SHOULD REVERSE THE DISTRICT COURT'S ORDER DENYING PATIN'S SPECIAL MOTION TO DISMISS UNDER NRS 41.660 BASED UPON AN INTERPRETATION AND APPLICATION OF THE ANTI-SLAPP LAWS.

Even if the Court reaches the statutory analysis of the anti-SLAPP statutes, the Court should still reverse the District Court's order denying Patin's special motion to dismiss under NRS 41.660 for any one of several reasons.

#### 1. The District Court applied the wrong version of NRS 41.660, requiring Lee to present only prima facie evidence of prevailing.

The District Court erroneously applied NRS 41.660(3)(b) retroactively to benefit Lee with the lower standard "whether the plaintiff has demonstrated with prima facie evidence a probability of prevailing on the claim" in the current 2015 version of this statute. In reality, Lee had to meet the more stringent standard

"whether the plaintiff has established by clear and convincing evidence a probability of prevailing on the claim" in the 2013 version of this statute. *See Delucchi v. Songer*, 396 P.3d 826, 830–831 (Nev. 2017).

In *Delucchi*, this Court explained that substantive changes to the anti-SLAPP statutes, specifically NRS 41.660(3)(b), could not be applied retroactively because there was a substantive change in how courts consider motions to dismiss. *Id.* at 831. As a matter of law, Lee was required to satisfy the more stringent clear and convincing standard taken from the 2013 version of NRS 41.660(3)(b) since he filed his lawsuit before the October 1, 2015 effective date of the 2015 amended version of NRS 41.660(3)(b). *See Shapiro v. Welt*, 389 P.3d 262, 267 n.2 (Nev. 2017) ("We note that a previous version of the statute was in effect at the time of these proceedings. *See* 2013 Nev. Stat., ch. 176, § 3(3)(b), at 623–624. NRS 41.660(3)(b) was amended by the 2015 Legislature, and the 'established by clear and convincing evidence' standard has changed to 'demonstrated with prima facie evidence.' Here, because these proceedings began prior to the 2015 legislative change, the 'clear and convincing evidence' standard is proper."); *see also LVMPD v. Blackjack Bonding*, 343 P.3d 608, 611 n.1 (Nev. 2015) ("We apply the version of the NPRA that was in effect in 2012 when Blackjack made its public records request. Thus, we do not address the subsequent amendments to the NPRA."). The District Court committed reversible error by both applying the

improper prima facie standard and erroneously characterizing Patin's correct statement of the law as a "misstatement of the evidentiary burden." 2 AA 406.

The proper remedy for the District Court's use of an improper legal standard to analyze an issue is for this Court to reverse and remand. *Delucchi*, 396 P.3d at 830–831; *Potter v. Potter*, 121 Nev. 613, 618–619, 119 P.3d 1246, 1250 (2005) (reversing and remanding a district court order where an improper legal standard was applied to a custody issue). Therefore, the Court should reverse the District Court's order denying Patin's special motion to dismiss under NRS 41.660.

**2. Patin's statement referenced the underlying litigation case, *Singletary v. Lee*, which is protected and unequivocally qualifies as 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."**

Patin's statement about *Singletary v. Lee* placed on her law firm's website is protected and unequivocally qualifies as 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." NRS 41.637(3) includes within this good faith communication 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." The case law construing anti-SLAPP statutes uniformly includes the filing of a lawsuit, such as *Singletary v. Lee*, as an

act in furtherance of the right to petition. *See JSJ Ltd. P'ship v. Mehrban*, 205 Cal.App.4th 1512, 1521–1522 (2012) ("Filing a lawsuit is an act in furtherance of the constitutional right of petition, regardless of whether it has merit."); *Sure-Tan, Inc. v. Nat'l Labor Relations Bd.*, 467 U.S. 883, 896–897 (1984) ("[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government."); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) ("Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right to petition."). The District Court's conclusion that Patin had to reference the subsequent appeal is not supported by any law and is nonsensical. 2 AA 406. How would Patin know to reference an appeal prior the District Court's erroneous order vacating the jury verdict or before the appeal was taken?

Certainly, Patin's "written statement" made during the *Singletary v. Lee* litigation qualifies as being "made in direct connection with an issue under consideration by a legislative, executive or judicial body…." NRS 41.637(3). California courts construing their own similar anti-SLAPP statute (Cal. Code of Civ. Pro. § 425.16) have reached the same result that Patin advocates. For example, *Healy v. Tuscany Hills Landscape & Recreation Corp.*, 137 Cal.App.4th 1, 5 (2006) explained that "[t]he statute defines acts in furtherance of the constitutional right to petition to include any written or oral statement or writing

made in connection with an issue under consideration or review by a…judicial body…." (citing § 425.16(e)(2) and internal quotation marks omitted). *Healy* further clarified that "[t]his includes statements or writings made in connection with litigation in the civil courts." *Id.* (citation omitted). So, the simple test that allows Patin to invoke the protections of the anti-SLAPP laws only requires that "an action for defamation fall[] within the anti-SLAPP statute if the allegedly defamatory statement was made in connection with litigation." *Id.* (citation omitted). Therefore, the District Court once again erred in construing NRS 41.637, and this Court should reverse.

### 3. Patin's statement referencing the underlying litigation case, ***Singletary v. Lee,*** is true and not capable of a defamatory per se construction.

Patin's statement referencing the underlying litigation case, *Singletary v. Lee*, is true and not capable of a defamatory per se construction. "Defamation per se" is defined as "[a] statement that is defamatory in and of itself and is not capable of an innocent meaning." BLACK'S LAW DICTIONARY, 506 (10th ed. 2014). Lee only takes issue with Patin's first statement placed on her law firm's website. 1 AA 1–4.

> 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.

1 AA 77. Even though Patin referenced the running title "Singletary v. Ton Vinh Lee, DDS, **et al.**" (1 AA 76–80; emphasis added), Lee omits the "et al." in his complaint. 1 AA 2, ¶ 10. BLACK'S LAW DICTIONARY defines "et al." as "[a]nd other persons…." *Id.* at 669. So, Lee's argument that Patin's entire description is only about him is legally inaccurate. The only other statement in this description involving Lee personally states that "Plaintiff sued…Ton Vinh Lee, DDS…." 1 AA 77. But, it is true that Singletary, as plaintiff, sued Lee. 1 AA 17–18. The fact that Lee does not like the lawsuit as a whole or does not like the fact that the jury verdict and judgment can be located online is inconsequential. In fact, Lee cannot demonstrate that Patin's statement has affected him in the least bit because the *Singletary v. Lee* proceedings, as a whole, are his real complaint. Regardless, suing a plaintiff's attorney cannot erase the jury's verdict that was reinstated by this Court. In that sense, Lee's entire lawsuit is nothing more than retaliatory.

Nothing within Patin's statement constitutes defamation. A claim for defamation requires (1) a false and defamatory statement by the defendant concerning the plaintiff; (2) an unprivileged publication to a third person; (3) fault;

and (4) actual or presumed damages. *See Chowdry v. NLVH, Inc.*, 109 Nev. 478, 483, 851 P.2d 459, 462 (1993). Nevada law only requires any allegedly defamatory statements to be substantially true to defeat a defamation claim. *See Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 715, 57 P.3d 82, 88 (2002). Since each of the descriptions in Patin's statement is true or substantially true, none of the sentences can be categorized as defamation per se. *See Nevada Ind. Broadcasting, Inc.*, 99 Nev. 404, 409, 664 P.2d 337, 341 (1983). Moreover, there is no factual issue with regard to Patin's statement as it relates to Lee's business or profession because each sentence in the statement is true. Instead of assuming that a factual issue exists, as the District Court (2 AA 406), this Court should first review whether Patin's statement is defamatory, which is a question of law. *See Posadas v. City of Reno*, 109 Nev. 448, 453, 851 P.2d 438, 442 (1993) (citation and internal quotation marks omitted).

As discussed above, Patin's statement was protected by the absolute litigation privilege. *See Circus Circus Hotels v. Witherspoon*, 99 Nev. 56, 60, 657 P.2d 101, 104 (1983) (concluding that Nevada follows the long-standing common law rule that communications made in the course of judicial proceedings even if known to be false are absolutely privileged) (citations omitted). As discussed below, Patin's statement was also protected by the absolute fair report privilege. *See Sahara Gaming Corp. v. Culinary Workers Union Local 226*, 115 Nev. 212,

215, 984 P.2d 164, 166 (1999) ("The law has long recognized a special privilege of absolute immunity from defamation given to the news media and the general public to report newsworthy events in judicial proceedings."). As such, Lee cannot point to an unprivileged publication to a third person or demonstrate fault, and this Court should reverse the District Court's order denying Patin's special motion to dismiss.

#### 4. Patin's statement referencing the underlying litigation case, *Singletary v. Lee*, is also protected by the absolute fair report privilege.

Patin's statement referencing the underlying litigation case, *Singletary v. Lee*, is also protected by the absolute fair report privilege. Patin's statement describing *Singletary v. Lee* was only one of several publications summarizing the proceedings and the jury's verdict. 1 AA 34–37, 38–41. Lee, nevertheless, chose to sue only Patin, demonstrating the retaliatory nature of his complaint for defamation per se. Yet, Nevada law protects Patin's republication of the *Singletary v. Lee* judicial proceedings according to the absolute fair report privilege. *See Sahara Gaming Corp. v. Culinary Workers Union Local 226*, 115 Nev. 212, 215, 984 P.2d 164, 166 (1999) ("The law has long recognized a special privilege of absolute immunity from defamation given to the news media and the general public to report newsworthy events in judicial proceedings."). This Court

has recently reaffirmed the wisdom of the absolute fair report privilege. *Adelson v. Harris*, 133 Nev. Adv. Op. No. 67, at *5–6 (Sep. 27, 2017).

In *Adelson*, this Court confirmed that the absolute fair report privilege extends to "any person who makes a republication of a judicial proceeding from material that is available to the general public." *Id.* at *5 (citation omitted). The privilege also precludes liability "even where the defamatory statements are published with knowledge of their falsity and personal ill will toward the plaintiff." *Id.* (citations omitted). So, Lee's general claim that Patin's statement is defamatory will not overcome this absolute fair report privilege or the absolute litigation privilege. *Adelson* also clarified that so long as there is some attribution to the judicial proceeding, as in the instant case, the allegedly defamatory statement will still be immune from liability. *Id.* at *7. Aside from the stated case name "Singletary v. Ton Vinh Lee, DDS, et al." (1 AA 98–99), Lee also conceded that a "simple internet search reveals the claimed verdict for wrongful death." 1 AA 3, ¶ 21. So, by Lee's own admissions and the clarifications by this Court in *Adelson*, the Court should extend the absolute fair report privilege to Patin to swiftly end this litigation.

### 5. Lee's sole claim for defamation per se against Patin improperly relies upon the Nevada Rules of Professional Conduct and is not actionable.

Lee's sole claim for defamation per se against Patin improperly relies upon the Nevada Rules of Professional Conduct and is not actionable. 1 AA 1–4. Lee's complaint references RPC 7.2 (Advertising) and requests relief based upon his interpretation of this rule. 1 AA 3, ¶ 19. But, RPC 1.0A confirms, "Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached…. [The Rules] are not designed to be a basis for civil liability." Nevada case law confirms this point: "The district court appropriately struck the causes of action based on violations of ethical rules because the rules were not meant to create a cause of action for civil damages." *Mainor v. Nault*, 120 Nev. 750, 769, 101 P.3d 308, 321 (2004), *invalidated on other grounds by In re Frei Irrevocable Trust dated October 29, 1996*, 390 P.3d 646, 652 n.8 (Nev. 2017). Notably, Lee already unsuccessfully pursued a Nevada State Bar complaint against Patin based upon his same argument, but the State Bar took no action. 1 AA 100–101. Lee cannot allege his defamation per se claim against Patin without his misplaced reliance on RPC 7.2. Therefore, this independent basis provides yet another reason for this Court to reverse the District Court's order denying Patin's special motion to dismiss under NRS 41.660.

### 6. Patin's statement referencing the underlying litigation case, ***Singletary v. Lee,*** was characterized by the District Court as attorney advertising, such that the statement qualifies as protected commercial speech.

Patin's statement referencing the underlying litigation case, *Singletary v. Lee*, was characterized by the District Court as attorney advertising, such that the statement qualifies as protected commercial speech. 2 AA 406. In order words, if this Court agrees that Patin's statement on her law firm's website was only attorney advertising, the statement would still be protected under the anti-SLAPP laws as protected commercial speech. *See Taheri Law Group v. Evans*, 160 Cal.App.4th 482, 491 (2008) ("[T]he legislative history of the commercial speech exemption to the anti-SLAPP statute confirms the Legislature's intent to except from anti-SLAPP coverage disputes that are purely commercial.") (citations omitted).

This Court has previously recognized that California's anti-SLAPP statute (Cal. Code of Civ. Pro. § 425.16) is "similar in purpose and language" to Nevada's anti-SLAPP statutes. *Shapiro*, 389 P.3d at 268. As such, California law construing its own anti-SLAPP statute is persuasive authority when this Court construes Nevada's anti-SLAPP statutes (NRS 41.635–NRS 41.670). Since the District Court concluded that Patin's statement placed on her law firm's website was only for attorney advertising (2 AA 406), the commercial speech protection

outlined in California law is applicable here. *Evans* explained, "Like proprietors of other commercial enterprises, the lawyer sells his services to prospective buyer[s] or customer[s]. It is also clear that lawyers engage in commercial speech when they advertise their services." 160 Cal.App.4th at 491–492 (internal quotation marks and citations omitted). Therefore, if this Court agrees with the District Court's conclusion that Patin's statement only amounted to attorney advertising, the Court should adopt the commercial speech exemption within Nevada's anti-SLAPP laws.

## VIII. CONCLUSION

In summary, Patin asks this Court to summarily reverse the District Court's order denying her special motion to dismiss under NRS 41.660 based upon the mootness of Lee's entire defamation per se lawsuit and the absolute litigation privilege. If the Court reaches the actual interpretation and application of the anti-SLAPP statutes, the Court should likewise reverse based upon (1) the District Court's improper application of the 2015 version of NRS 41.660(3)(b); (2) Patin's "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"; (3) the truth of Patin's statement posted on her law firm's website; (4) the protection of the absolute fair report privilege; (5) the lack of merit in Lee's reliance on the Nevada

Rule of Professional Conduct for his defamation per se claim; and (6) Patin's statement as protected commercial speech under anti-SLAPP laws.

If the Court reverses the District Court's order denying Patin's special motion to dismiss under NRS 41.660 for any one of these reasons, the Court should also direct the District Court on remand to award her damages, attorney fees, and costs according to NRS 41.670.

Dated this 28th day of September, 2017.

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## 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 32(a)(7) 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 10,244 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 28th day of September, 2017.

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## CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANTS' OPENING BRIEF** was filed electronically with the Nevada Supreme Court on the 28th day of September, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Prescott Jones, Esq.
Brian Nettles, Esq.
Christian Morris, Esq.

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