IN THE SUPREME COURT OF THE STATE OF NEVADA

INGRID PATIN, AN INDIVIDUAL; AND PATIN LAW GROUP, PLLC, A PROFESSIONAL LLC, Appellants, v. TON VINH LEE, Respondent.	**Supreme Court Case No.: 69928** District Court Case No.: A-16-723134-C

RESPONDENT'S ANSWERING 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 disqualifications or recusal.

1. Respondent Ton Vinh Lee is an individual.

2. Respondent is was represented in the district court first by Bremer Whyte Brown & O'Meara, and now by Resnick & Louis, and is represented in this Court first by Bremer Whyte Brown & O'Meara, and now by Resnick & Louis.

Dated this 16th day of November, 2017.

RESNICK & LOUIS, P.C.

/s/ Prescott T. Jones

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I. RESPONSE TO APPELLANTS' JURISDICTIONAL STATEMENT

In their Jurisdictional Statement, Appellants properly assert that a right to appeal a special motion to dismiss brought under NRS 41.660 is specifically authorized by NRS 41.670(4). However, Appellants include numerous arguments not part of their special motion to dismiss brought under NRS 41.660 that should have been brought as part of a petition for a writ of mandamus (or other writ). As such, this Court does not have jurisdiction to consider the appeal as a whole.

II. ROUTING STATEMENT

Respondent replies to Petitioners' Routing Statement only to address their assertions that the absolute litigation privilege and the alleged commercial speech exemption to the anti-SLAPP statute are at issue in this appeal. As discussed *infra*, these issues were never raised during the underlying litigation, and as such, cannot be raised for the first time on appeal.

III. ISSUE ON APPEAL

1. DID THE DISTRICT COURT ABUSE ITS DISCRETION IN DENYING THE SPECIAL MOTION TO DISMISS?

IV. STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

This interlocutory appeal of a denied special motion to dismiss is taken by Appellants pursuant to NRS 41.670(4). The scope of such an appeal is to allow this Court to determine if the district court abused its discretion in denying the

special motion to dismiss brought by Appellants under NRS 41.660. *Shapiro v. Welt*, 133 Nev. Adv. Op. 6, 389 P.3d 262, 266 (2017). Here, the district court denied the special motion to dismiss, ruling that (1) 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, and (2) the court couldn't find that the Respondent hadn't put forth prima facie evidence demonstrating a probability of prevailing on the claim, especially because the truth or falsity of an allegedly defamatory statement is an issue for the jury to determine. 2 Appellants' Appendix ("AA") 403-408. In order to succeed in its appeal, Appellants would have to demonstrate that the district court abused its discretion on both points (1) and (2). Because the record demonstrates that the district court performed an exhaustive evaluation of approximately 220 pages of briefing related to the special motion to dismiss, Appellants cannot demonstrate an abuse of discretion and must reject the instant appeal.

Instead of demonstrating how the district court abused its discretion, Appellants attempt to focus this Court's attention on a host of issues that are either unrelated to the denial of the special motion to dismiss or not even raised at the district court level. First, Appellants assert that (1) the absolute litigation privilege applies and (2) the statement constitutes so-called protected commercial speech.

Opening Brief, Issues on Appeal B and C6. Neither of these issues were raised at the district court level and, therefore, cannot be raised for the first time on appeal.

Appellants also assert that this Court's reinstatement of the jury's verdict in the *Singletary* litigation somehow necessitates reversal of the appealed order. However, the reinstated verdict was only for persons not a party to this matter. The verdict in favor of Respondent remains intact. Second, the reinstatement of the verdict occurred on November 29, 2016, long after the district court denied the special motion to dismiss on February 4, 2016. This Court has already ruled this appeal is limited to the issues related to the original special motion to dismissed that was denied on February 4, 2016. *See* April 27, 2017 Order Regarding Jurisdiction in Docket No. 69928 and Dismissing Appeal in Docket No. 72144. By including information that was the subject of subsequent dispositive motions, Appellants are improperly attempting to circumvent this Court's clear directive.

Appellants also raise issues relating to the fair report privilege and Nevada Rules of Professional Conduct. Neither was contained in the February 4, 2016 challenged order, and are nonetheless irrelevant to the instant narrow appeal.

Because Appellants cannot demonstrate that the district court abused its discretion in determining that (1) the subject 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, and (2) the Respondent put forth

prima facie evidence demonstrating a probability of prevailing on the claim, the appeal must be rejected and the underlying district court order upheld.

V. STANDARD OF REVIEW

This immediate, pre-judgment appeal is authorized under NRS 41.670(4), and only allows for the appeal of a denial of a special motion to dismiss brought under NRS 41.660. This court reviews a district court's order denying a special motion to dismiss for an abuse of discretion. *Shapiro v. Welt*, 133 Nev. Adv. Op. 6, 389 P.3d 262, 266 (2017). Any other issues allegedly being appealed are not allowed in this appeal under NRS 41.670(4), and as such, are irrelevant to this analysis.

VI. FACTUAL AND PROCEDURAL BACKGROUND

The underlying district court litigation arises from a defamatory statement posted on Petitioners' web site wherein they identify Respondent by name, and incorrectly assert that their clients obtained a $3.4 million jury verdict against Respondent in the separate litigation *Singletary v. Lee*, Eighth Judicial District Court case no. A656091 ("*Singletary* Litigation"). The statement appeared 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, 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.

2 A.A. 296-600. The *Singletary* plaintiffs did not in fact obtain a verdict against Respondent, and wrongfully included his name in its statement discussing a dental malpractice/wrongful death "Plaintiff's Verdict." After unsuccessfully requesting that Appellants remove the defamatory statement, Respondent brought the underlying district court litigation.

For the purposes of this appeal, this Court's inquiry is to determine whether or not the district court abused its discretion in denying the special motion to dismiss filed on October 16, 2015. Respondent generally agrees with the dates included in Appellants' Factual and Procedural Background related to the special motion to dismiss only and, pursuant to NRAP 28(b), incorporates same by reference. However, all other portions of Appellants' Factual and Procedural Background are irrelevant to the narrow interlocutory appeal allowed by NRS 41.670(4) and should be disregarded by this Court.

VII. LEGAL ARGUMENT

A. THIS COURT MUST REJECT APPELLANTS' APPEAL AS THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE SPECIAL MOTION TO DISMISS.

1. Standard of Review

"This court reviews a district court's order denying a special motion to dismiss for an abuse of discretion." *SPG Artist Media, LLC v. Primesites, Inc.*, 390 P.3d 657 (Nev. 2017) (*citing Shapiro v. Welt*, 133 Nev., Adv. Op. 6, 389 P.3d 262, 266 (2017)). Appellants incorrectly assert that this matter should be reviewed de novo, based upon matters that are outside of the scope of the instant appeal. This immediate, pre-judgment appeal is authorized under NRS 41.670(4), and only allows for the appeal of a denial of a special motion to dismiss brought under NRS 41.660. Any other issues allegedly being appealed are not allowed in this appeal under NRS 41.670(4), and as such, are irrelevant to this analysis.

Nevada's Anti-SLAPP law is codified in NRS 41.635, *et seq*. The law has been amended twice in recent years, in 2013 and 2015. The 2013 amendments were made as part of SB 286, which was enacted on May 27, 2013. The 2015 amendments were made as part of SB 444, which was enacted and effective on June 8, 2015. Appellant incorrectly asserts, without citation, that the effective date of the 2015 amendments was October 1, 2015. However, as show in Appellants'

own appendix, SB 444 was "effective upon passage and approval," which was June 8, 2015. 2 A.A. 295; *see also* 1 Respondent's Appendix 1, demonstrating that passage and approval was June 8, 2015. The instant litigation was commenced by the filing of a Complaint on August 17, 2015, thereby making the current version of Nevada's Anti-SLAPP law applicable to this matter. The district court did not err in applying the 2015 version of the law.

When presented with a special motion to dismiss, the district 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 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). "[T]he 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.

2. The District Court Did Not Abuse Its Discretion in Ruling that the Statement was 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

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." SB 444, Sec. 12.5 (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." *John,* 125 Nev. at

752, *citing U.S. Ex Rel. Newsham v. Lockheed Missiles*, 190 F.3d 963, 970 (9th Cir. 1999).

The district court ruled, in its February 4, 2016 Order, that the subject communication:

> [u]nder 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 an 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.

2 A.A. 405-406. This alone is sufficient to deny the special motion to dismiss.

Appellants claim an almost unlimited immunity to defamation laws, simply because the defamatory statement references a trial that took place. They rely on NRS 41.637 to claim that the statement is 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 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.

Appellants claim that the defamatory statement at issue falls under subsections (3) and, to a lesser extent, (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, Appellants cannot claim that they were unaware that Dr. Lee received a judgment in his favor on a jury verdict. Indisputably, the District Court did not abuse its discretion in ruling that 41.637(3) and (4) are inapplicable.

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 "[t]his 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." Appellants could 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 Appellants claimed that their clients received. It in no way referenced, implied, or discussed the pending appeal (until it was revised after Respondent filed suit in the underlying district court litigation). Instead, it was made **after the conclusion** of the district court litigation in an attempt to advertise to potential new clients. Therefore, no direct connection can be shown.

Appellants' reliance on a non-binding California Court of Appeals case, *Healy v. Tuscany Hills Landscape & Recreation Corp.*, 137 Cal. App. 4th 1 (2006), represents Appellants' last gasp in its attempt to persuade this Court to ignore clear Nevada statutes to the contrary of their position. Courts interpreting the *Healy* case have noted the "strong" connection between the communication and the related litigation, which is a situation that is simply not present in the instant matter. For example, in *Hanover Ins. Co v. Fremont Bank*, the United States District Court for the Northern District of California noted that the *Healy* case

featured a communication that was actually received by "witnesses and [persons] otherwise involved in the litigation." 68 F. Supp. 3d 1085, 1105 (2014). The Court distinguished the *Healy* facts with the facts of their case, noting that "here the [recipient of the communication] has little interest in the state court litigation. . . . the communication must be directed to persons having 'some interest in the litigation.'" *Id.* at 1105-06, *quoting Neville v. Chudacoff*, 160 Cal. App. 4th 1255, 1266 (2008). The Court then rejected the Appellant's attempt to apply the *Healy* holding to such facts, and found that the communications were not made in connection with a litigation, and therefore were not a protected activity within the meaning of the anti-SLAPP statutes. *Id.* at 1106. Similarly, here, Appellants cannot even identify any person whatsoever that received the communication that had some interest in the litigation. Indeed, because the intended audience of the communications (potential new clients) does not have any connection to or interest in the litigation, Appellants' reliance on *Healy* is misplaced.

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, Appellants are claiming that they received a huge recovery on behalf of their client in order to generate additional business.

Based on the foregoing, the district court did not abuse its discretion in ruling that 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. Based on this alone, the appeal must be denied and the district court's ruling upheld.

3. The District Court Did Not Commit an Abuse of Discretion in Ruling that Respondent has Demonstrated a Prime Facie Case

As set forth above, the appeal must fail for the simple reason that the district court did not abuse its discretion in ruling that 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. However, the appeal must also fail because the district court did not commit an abuse of discretion in finding that the Respondent put forth prima facie evidence demonstrating a probability of prevailing on the claim. The district court ruled:

> However, even if NRS 41.637(3) or (4) did apply to the 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).

2 A.A. 406 (emphasis added). Based upon the evidence presented to the district court, there can be no question that the court did not abuse its discretion in denying the special motion to dismiss.

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). Respondent alleges a claim for defamation per se in the underlying district court litigation. 1 A.A. 1-4.

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.

1 A.A. 77. The statement is indisputably false as against Respondent because no verdict against Respondent was obtained at all. Instead, Respondent received a judgment on jury verdict in his favor. 1 A.A. 73-75. This judgment was not impacted in any way as a result of subsequent appeals.

Nonetheless, "words must be reviewed in their entirety and in context in order to determine whether they are susceptible of defamatory meaning." *Chowdhry*, 109 Nev. at 483. 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; *see also Fink v. Oshins*, 118 Nev. 428, 437, 49 P.3d 640, 646 (2002). While Appellants rely on a number of sources that published the "verdict" in the underlying medical malpractice and wrongful death suit, Appellants, in an obvious attempt to mislead this Court, completely and utterly fail to mention that the true outcome of the case as to Respondent which resulted in a Judgment on Jury Verdict For Defendant Ton Vinh Lee, DDS filed on September 11, 2014 which states in relevant part:

> 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 SO 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.

2 A.A. 288-90. Not only was a judgment entered in favor of Respondent, but even more striking is the fact that the Judgment was prepared and submitted by

Appellants themselves. 2 A.A. 288-290. As such, Appellants' assertion that the subject defamatory statement is true is not only patently false, but constitutes 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.

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 Respondent 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." Appellants made the absurd claim to the district court 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." 1 A.A. 131. Respondent is named twice in his personal capacity, under the heading "DENTAL MALPRACTICE/WRONGFUL DEATH – PLAINTIFF'S VERDICT $3.4M, 2014."

Appellants made the further absurd claim that "[e]ven if it [the statement] were not entirely true, it would still certainly be substantially true under *Pegasus*."

1 A.A. 130. *Pegasus* did not involve, in any way, shape, or form, a Special Motion to Dismiss brought under an Anti-SLAPP law. Nonetheless, as noted by the district court in its order on the special motion to dismiss (2 A.A. 406), "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; *see also Fink*, 118 Nev. at 437.

Appellants did not address prong (2) in their special motion to dismiss, that the statement involve "an unprivileged publication to a third person." Because the statement was made in the form of an attorney advertisement from Appellants' web site, that prong is easily fulfilled.

The third prong, that "the existence of fault, amounting to at least negligence" be shown, was also not addressed by Appellants in their special motion to dismiss. However, as trial/appellate counsel, Respondents cannot claim that they were unaware that Appellant received a judgment in his favor on a jury verdict.

The last prong, that the defamation tends to injure a plaintiff or his or her business or profession, was also not addressed in the special motion to dismiss. However, as discussed above, the fact that the statement names Respondent personally 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.

Lastly, Appellants set forth the improper standard when the burden shifts to a plaintiff in a special motion to dismiss, claiming that Respondent must show their case by "clear and convincing evidence." That is, of course, no longer the standard in Nevada, as Respondent must now only "demonstrate[] with prima facie evidence a probability of prevailing on the claim." NRS 41.660(3)(b) (emphasis added). As set forth above, the 2015 amendments to Nevada's Anti-SLAPP laws took effect prior to the filing of the underlying district court litigation. Accordingly, the district court did not abuse its discretion in ruling that the Respondent presented prima facie evidence demonstrating a probability of prevailing on his claim.

Based on the foregoing, the appeal can only be successful if the Appellants demonstrate **both** (1) the district court abused its discretion in ruling that 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, **and** (2) the district court abused its discretion in ruling that the Respondent presented prima facie evidence demonstrating a probability of prevailing on his claim. Because the district court clearly did not abuse its discretion in either part of its February 4, 2016 order, the appeal must be denied and the district court ruling upheld.

B. THIS COURT SHOULD REJECT APPELLANT'S ARGUMENT RELATING TO THE ABSOLUTE LITIGATION PRIVILEGE AS IT WAS NOT RAISED IN THE UNDERLYING DISTRICT COURT LITIGIATION AND IS, NONETHELESS, INAPPLICABLE TO THE INSTANT MATTER.

This Court must reject Appellants' assertion of the absolute litigation privilege because (1) the privilege was not previously invoked at the district court level, (2) the absolute litigation privilege is outside of the scope of the appealed motion, and therefore, outside of the permissible scope of this appeal, and (3) is nonetheless inapplicable as the defamatory statement is outside of the scope of the privilege.

In Nevada, a party cannot raise an issue on appeal that it did not first make to the district court in the underlying litigation. *See In re AMERCO Derivative Litigation*, 127 Nev. 196, 217 n.6, 252 P.3d 681, 697 n.6 (2011) ("we decline to address an issue raised for the first time on appeal."). Here, as is shown in examination of the special motion to dismiss under NRS 41.660 (1 A.A. 120-136), the reply brief submitted in support thereof (2 A.A. 310-323), and the transcript of the November 18, 2015 hearing on the special motion to dismiss under NRS 41.660 (2 A.A. 352-361), no mention or discussion of the absolute litigation privilege is made whatsoever. As such, this Court must reject Appellants' arguments relating to the absolute litigation privilege.

Even if this Court is inclined to disregard the Appellants' failure to raise the absolute litigation privilege at the district court level, this Court must also reject the argument because the absolute litigation privilege is inapplicable to the instant matter. Simply put, Appellants exhibit a profound misunderstanding of the absolutely litigation privilege, as the privilege has never been extended to statements made to parties unrelated to the litigation as part of an attorney advertisement. This Court has recognized "the long-standing common law rule that communications uttered or published **in the course of judicial proceedings** are absolutely privileged," rendering those who made the communications immune from civil liability. *Fink*, 118 Nev. at 432-33 (*quoting Circus Circus Hotels v. Witherspoon*, 99 Nev. 56, 60, 657 P.2d 101, 104 (1983)) (emphasis added). "The policy behind the [litigation] 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.'" *Id.* at 433, 49 P.3d at 643 (*quoting Bull v. McCuskey*, 96 Nev. 706, 712, 615 P.2d 957, 961 (1980) *abrogated on other grounds by Ace Truck & Equip. Rentals, Inc. v. Kahn*, 103 Nev. 503, 746 P.2d 132 (1987), *abrogated by Bongiovi v. Sullivan*, 122 Nev. 556, 138 P.3d 433 (2006)).

While the privilege is broad, it applies only to communications made during actual judicial proceedings, and communications preliminary to a proposed judicial

proceeding, if the communication is made in contemplation of initiation of the proceeding. *Fink*, 118 Nev. at 433-34. Here, no statement was made during actual judicial proceedings. Instead, the district court ruled that the statements were made as part of an attorney advertisement. 2 A.A. 406. Furthermore, the statement was made about the district court litigation after the resolution of the matter, and therefore cannot be found to be made during actual judicial proceedings.

A "[party's] statements to someone who is not directly involved with the actual or anticipated judicial proceeding will be covered by the absolute privilege only if the recipient of the communication is significantly interested in the proceeding." *Fink,* 118 Nev. at 428 (internal quotation marks omitted). Here, the statement is undoubtedly not made to anyone "significantly interested in the litigation," but rather to potential clients of the Appellants for the purposes of marketing. Additionally, "[i]n order to determine whether a person who is not directly involved in the judicial proceeding may still be 'significantly interested in the proceeding,' the district court must review 'the recipient's legal relationship to the litigation, not their interest as an observer.'" *Shapiro*, 389 P.3d at 268-69, *quoting Jacobs*, 130 Nev., Adv. Op. 44, 325 P.3d at 1287. Appellants never requested such a review, and furthermore, even if such a review was conducted, potential clients of Appellants undoubtedly have no legal relationship to the *Singletary* litigation.

Accordingly, Appellants' arguments relating to the absolute litigation privilege must be disregarded by this Court.

C. THIS COURT MUST REJECT APPELLANTS' APPEAL BECAUSE REINSTATEMENT OF THE UNDERLYING VERDICT DOES NOT IMPACT THE PARTIES TO THIS LITIGATION.

Appellants grossly misrepresent the ruling of this Court in reinstating a portion of *Singletary* verdict. Truth be told, this Court only reinstated the verdict against non-parties to the instant matter, and the verdict **in favor** of Respondent (the only Plaintiff in the underlying district court litigation) remains intact. 2 A.A. 418-421 (holding that the verdict was reinstated as to Summerlin Smiles and Dr. Traivai **only**, and further upholding the award of costs **in favor** of Respondent).

Incredibly, Appellants assert that "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." Opening Brief, pp. 25-26. This is an outright misrepresentation to this Court. As discussed above, Respondent Dr. Lee received a jury verdict and award of costs in his favor (1 A.A. 73-75), while the later reinstatement of the jury verdict applies only to non-parties to this litigation (2 A.A. 418-421, holding that the verdict was reinstated as to Summerlin Smiles and Dr. Traivai **only**, and further upholding the award of costs **in favor** of Respondent Dr. Lee). Appellants' entire argument relating to the reinstatement of the jury verdict in the *Singletary* matter must be disregarded by this Court due to

its irrelevance as it only related to non-parties to the instant litigation, and due to Appellants' blatant misrepresentation of this Court's ruling.

D. APPELLANTS' RELIANCE ON THE FAIR REPORTING PRIVILEGE IS IMPROPER AND WAS CORRECTLY REJECTED BY THE DISTRICT COURT.

Appellants also assert that the subject attorney advertisement is protected by the fair report privilege. "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); s*ee also Dorsey v. National Enquirer, Inc.*, 973 F.2d 1431, 1435 (9th Cir. 1992) (cited by *Lubin*) (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 the jury verdicts cited were actually in favor of Respondent, and (at the time the statements were made) vacated as against all other defendants to the *Singletary* litigation.

Notwithstanding the above, the procedure to evaluate an Anti-SLAPP special motion to dismiss under NRS 41.660 is spelled out by the statute and

relevant case law, and the entire analysis is contained above. This interlocutory appeal is limited to that analysis, and any other additional arguments, including the invocation of the fair report privilege, are properly raised in a post-judgment appeal or writ petition. Such arguments are not appropriate in the instant appeal, and must be disregarded by this Court. Based on the foregoing, the district court did not abuse its discretion in denying the special motion to dismiss.

E. APPELLANTS' ARGUMENTS RELATED TO THE NEVADA RULES OF PROFESSIONAL CONDUCT ARE COMPLETELY IRRELEVANT TO THE INSTANT APPEAL.

Appellants also assert that by including reference to the Nevada Rules of Professional Conduct in Respondent's Complaint, somehow the entire appealed order must be reversed. Again, the procedure to evaluate an Anti-SLAPP special motion to dismiss under NRS 41.660 is spelled out by the statute and relevant case law, and the entire analysis is contained above. This interlocutory appeal is limited to that analysis, and any other additional arguments, including the invocation of the fair report privilege, are properly raised in a post-judgment appeal or writ petition.

This argument is entirely irrelevant to the instant appeal, and Appellants cannot show how inclusion of an allegation in the Complaint demonstrates that the district court abused its discretion in denying the special motion to dismiss. Additionally, this argument is not appropriate in the instant appeal, and must be

disregarded by this Court. Based on the foregoing, the district court did not abuse its discretion in denying the special motion to dismiss.

F. APPELLANTS' ARGUMENTS RELATED TO "PROTECTED COMMERCIAL SPEECH" ARE IMPROPERLY RAISED FOR THE FIRST TIME ON APPEAL AND, NONETHELESS, ARE INAPPLICABLE TO THE FACTS OF THIS MATTER.

This Court must reject Appellants' attempt to characterize the defamatory statement as "protected commercial speech" because (1) the argument was not previously invoked at the district court level, (2) the argument is not relevant to the instant interlocutory appeal, and (3) the argument is nonetheless inapplicable to the facts of this matter.

Again, a party cannot raise an issue on appeal that it did not first make to the district court in the underlying litigation. *See In re AMERCO Derivative Litigation*, 127 Nev. at 217 n.6 ("we decline to address an issue raised for the first time on appeal"). Here, as is shown in examination of the special motion to dismiss under NRS 41.660 (1 A.A. 120-136), the reply brief submitted in support thereof (2 A.A. 310-323), and the transcript of the November 18, 2015 hearing on the special motion to dismiss under NRS 41.660 (2 A.A. 352-361), no mention or discussion of protected commercial speech is made whatsoever. As such, this Court must reject Appellants' arguments.

Even if this Court is inclined to disregard the Appellants' failure to raise the argument at the district court level, the procedure to evaluate an Anti-SLAPP

special motion to dismiss under NRS 41.660 is spelled out by the statute and relevant case law, and the entire analysis is contained above. This interlocutory appeal is limited to that analysis, and any other additional arguments, including the invocation of "protected commercial speech," are properly raised in a post-judgment appeal or writ petition.

Lastly, this Court must also reject the argument because the statement is not protected from defamation claims under the doctrine of "protected commercial speech." First, Nevada does not have a single case that carves out "protected commercial speech" from defamation claims under Anti-SLAPP laws. Instead, Appellants rely on a single non-binding California Court of Appeals case, *Taheri Law Group v. Evans*, 160 Cal. App. 4th 482, 491 (2008), for the proposition that defamation claims cannot be made against commercial speech. Appellants' analysis greatly misconstrues the *Taheri* holding and the underlying California law. Indeed, California's commercial speech exemption actually applies to the Anti-SLAPP laws as a whole, meaning that a special motion to dismiss **cannot** be brought where the alleged defamatory statement is commercial speech. Cal. Code. Civ. Proc. § 425.17(c). This actually supports the denial of Appellants' special motion to dismiss. Additionally, the *Taheri* decision is based on a California statute that has no Nevada analogue. As such, it cannot be demonstrated that the district court abused its discretion in denying the special motion to dismiss.

VIII. CONCLUSION

Based on the foregoing, it cannot be shown that the district court abused its discretion in denying the Appellants' special motion to dismiss. The district court's order must be upheld.

Dated this 16th day of November, 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 2016 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 has a typeface of 14 points or more and contains 6,563 words.

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 16th day of November, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **RESPONDENT'S ANSWERING BRIEF** was filed electronically with the Nevada Supreme Court on the 16th day of November, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Micah Echols, Esq.
Brian Nettles, Esq.
Christian Morris, Esq.

/s/ Lisa Bell
Lisa Bell, an employee of Resnick & Louis