

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

INGRID PATIN, AN INDIVIDUAL;  
AND PATIN LAW GROUP, PLLC, A  
PROFESSIONAL LLC,

Appellants,

vs.

TON VINH LEE,

Respondent.

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Case No.: 69928

Appeal from the Eighth Judicial District  
Court, the Honorable Jennifer P.  
Togliatti Presiding

**APPELLANTS' REPLY BRIEF**

**Marquis Aurbach Coffing**

Micah S. Echols, Esq.

Nevada Bar No. 8437

10001 Park Run Drive

Las Vegas, Nevada 89145

Telephone: (702) 382-0711

Facsimile: (702) 382-5816

mechols@maclaw.com

**Nettles Law Firm**

Christian M. Morris, Esq.

Nevada Bar No. 11218

1389 Galleria Drive, Suite 200

Henderson, Nevada 89014

Telephone: (702) 434-8282

Facsimile: (702) 434-1488

christian@nettleslawfirm.com

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

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## **I. INTRODUCTION**

In the opening brief (“AOB”), Appellants, Ingrid Patin and Patin Law Group, LLC (collectively “Patin”), presented several arguments for the reversal of the District Court’s order denying Patin’s special motion to dismiss under NRS 41.660, including: (1) the mootness of Respondent, Ton Vinh Lee’s (“Lee”), entire defamation per se complaint based upon the reinstatement of the jury’s verdict in the underlying litigation case, *Singletary v. Lee*, District Court Case No. A656091; (2) the absolute litigation privilege since Patin’s statement on her website was based on the underlying litigation case, *Singletary v. Lee*; and (3) the District Court’s incorrect interpretation of NRS 41.660, consisting of (a) the District Court’s application of an incorrect version of NRS 41.660, (b) the District Court’s improper analysis of 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,” (c) the District Court’s inability to construe Patin’s statement as defamatory per se, (d) the District Court’s erroneous rejection of Patin’s absolute fair report privilege, (e) the District Court’s improper reliance on the Nevada Rules of Professional Conduct to allow Lee’s sole defamation per se claim to survive, and (f) the District Court’s incorrect conclusion that Patin’s statement amounted to unprotected attorney advertising. Based upon these several errors, Patin asks this



Court to reverse the District Court's order denying her special motion to dismiss under NRS 41.660.

In his answering brief, Lee avoids many of the critical questions presented in this appeal. Instead, he argues in generalities with a skewed analysis in an attempt to carry on his frivolous and nonsensical defamation per se litigation against Patin, a Nevada attorney and her law firm. Without any citation to legal authority, Lee suggests that he is only required to directly respond to the issues that the District Court actually articulated in its written order denying relief to Patin. Respondent's Answering Brief ("RAB") 3. Although Lee concedes that at least some of the issues presented are properly before the Court (under his misguided scope), he offers only a cursory analysis in response to some of Patin's arguments. Indeed, Lee completely ignores several issues in this appeal, which amounts to a confession of error. *See* NRAP 31(d); *Polk v. State*, 233 P.3d 357, 359–360 (Nev. 2010); *Bates v. Chronister*, 100 Nev. 675, 681–682, 691 P.2d 865, 870 (1984). Not surprisingly, Lee relies heavily upon a superseded case for his arguments: *John v. Douglas County School District*, 125 Nev. 746, 219 P.3d 1276 (2009), *superseded by statute as stated in Shapiro v. Welt*, 389 P.3d 262, 266 (Nev. 2017). *See* RAB 7–8. Yet, Lee offers *John* in his answering brief as if it were controlling law in Nevada. *Id.* To further support his erroneous position, Lee simply repeats the incorrect conclusions reached by the District Court, without meaningfully

responding to many of Patin's challenges. Accordingly, the Court should reject Lee's arguments as unfounded.

In summary, this Court should reverse the District Court's order denying Patin's special motion to dismiss under NRS 41.660 (2 Appellants' Appendix ("AA") 403–408) based upon any of the following arguments: (A) Lee offers a series of unsupported factual and legal assertions that this Court should disregard; (B) By failing to address numerous issues raised in Patin's opening brief, Lee tacitly concedes the correctness of these issues; (C) The mootness of Lee's entire defamation per se lawsuit is a threshold issue, and he cannot now distance himself from his own dental practice, Summerlin Smiles; (D) Lee does not meaningfully challenge the substance of Patin's absolute litigation privilege, and the Court should reverse the District Court's order denying Patin's special motion to dismiss under NRS 41.660 on this basis; and (E) Even if the Court reaches the interpretation of NRS 41.660, the Court should, nevertheless, reverse the District Court's order denying Patin's special motion to dismiss under NRS 41.660 for the several reasons presented in this appeal.

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(1).

## **II. LEGAL ARGUMENT**

### **A. LEE OFFERS A SERIES OF UNSUPPORTED FACTUAL AND LEGAL ASSERTIONS THAT THIS COURT SHOULD DISREGARD.**

Lee offers a series of unsupported factual and legal assertions that this Court should disregard. In his answering brief, Lee relies largely upon the bare argument of counsel, which carries no weight. *See Jain v. McFarland*, 109 Nev. 465, 475–476, 851 P.2d 450, 457 (1993) (“Arguments of counsel are not evidence and do not establish the facts of the case.”). In doing so, Lee offers unsupported factual and legal assertions that likewise carry no weight. *See* NRAP 28(a)(10)(A); NRAP 28(b) (collectively providing that both parties must supply “citations to the authorities and parts of the record on which the[y]...rel[y]”); *see also Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 997, 860 P.2d 720, 725 (1993) (stating that this Court does not consider factual assertions not supported by citations to the record); *see also Edwards v. Emperor’s Garden Rest.*, 122 Nev. 317, 330, 130 P.3d 1280, 1288 (2006) (concluding that this Court does not consider arguments that are not cogently made).

For example, Lee claims, without any citation to the record, that he unsuccessfully requested that Patin remove the allegedly defamatory statement from her website. RAB 5. But, Lee never made any such request. Instead, Lee filed this lawsuit as retaliation against Patin for her key role as lead counsel in

obtaining a verdict against Lee’s dental practice, Summerlin Smiles. 1 AA 30–33. Notably, Lee has chosen to sue as retaliation based on Patin’s short description of the *Singletary v. Lee* litigation on her website. 1 AA 77. But, Lee did not sue either *The Trial Reporter* or *The Nevada Legal Update*, which contained similar phrases of which Lee complains. 1 AA 34–41.

Lee also suggests that the issues in this appeal are limited to only those issues positively identified in the District Court’s order denying Patin’s special motion to dismiss under NRS 41.660. RAB 3; 2 AA 403–408. For this argument, Lee claims that this Court’s April 27, 2017 “Order Regarding Jurisdiction in Docket No. 69928 and Dismissing Appeal in Docket No. 72144” reaches this conclusion. RAB 3. However, this Court’s order actually determines appellate jurisdiction but does not identify which specific issues are relevant to the appealed February 4, 2016 order. Instead, the Court’s order states that any issues related to the appealed order are properly before this Court. Order 3. As a matter of law, arguments that Patin presented to the District Court that did not prevail are properly before this Court. *See Bd. of Gallery of History, Inc. v. Datecs Corp.*, 116 Nev. 286, 289, 994 P.2d 1149, 1150 (2000) (stating that when a district court does not rule on an asserted claim, the absence of a ruling constitutes a denial of the claim). As such, Lee’s suggestion that he does not need to address all of the issues presented in this appeal is incorrect.

While some of the other unsupported legal and factual assertions in Lee's answering brief will be discussed within the respective legal argument sections, there is one argument worth mentioning here because it is perhaps the strongest reason for reversing the District Court's order denying Patin's special motion to dismiss under NRS 41.660. Lee claims that Patin's description of the *Singletary v. Lee* litigation on her website does not constitute a "report" for purposes of Patin's absolute fair report privilege. RAB 23. But, Lee does not offer any supporting legal authority for his bare statement. Lee's position is especially surprising since *Adelson v. Harris*, 133 Nev. Adv. Op. No. 67, at \*6–7 (Sep. 27, 2017) clarifies that even reports made outside judicial proceedings are protected under this privilege. Tellingly, however, Lee does not even respond to *Adelson*. Therefore, the Court should disregard Lee's numerous factual assertions and bare legal arguments made throughout his answering brief that not supported.

**B. BY FAILING TO ADDRESS NUMEROUS ISSUES RAISED IN PATIN'S OPENING BRIEF, LEE TACITLY CONCEDES THE CORRECTNESS OF THESE ISSUES.**

By failing to address numerous issues raised in Patin's opening brief, Lee tacitly concedes the correctness of these issues. Aside from his skewed position on the scope of this appeal, Lee completely ignores several issues raised in this appeal. For example, Lee claims that the statement on Patin's website regarding *Singletary v. Lee*, prior to the appeal in that case, is "indisputably false." RAB 14.

However, Lee does not respond to Patin's detailed discussion of each sentence of her statement on the website. Appellants' Opening Brief ("AOB") 33–34. Instead, Lee suggests that the entire statement is defamatory. RAB 16–17. But, Lee does not articulate exactly how Patin's statement is defamatory. As such, Lee tacitly concedes that Patin's statement on her website cannot be construed as defamatory.

Even though Lee based his sole claim against Patin for defamation per se on the Nevada Rules of Professional Conduct (1 AA 2–3), he now claims that Patin's argument challenging such a reliance on the RPCs is "entirely irrelevant." RAB 24–25. But, Lee conveniently ignores the controlling law that prohibits using the RPCs as the basis for liability. Lee's failure to address any of Patin's arguments regarding the RPCs in her opening brief (AOB 38) constitutes a confession of error. Very simply, Lee's defamation per se claim cannot survive without relying upon the RPCs, and this argument provides yet another reason for this Court to grant Patin's requested relief of reversal.

In her opening brief, Patin outlined the background facts and procedural history of this appeal. AOB 14–23. Lee's answering brief does not attempt to recite his own complete version of the facts and procedure. RAB 4–5. Instead, Lee claims that this appeal is narrowed to only a statutory inquiry, despite the various other issues raised in both the District Court and in this Court. By failing to present his own counterstatement of facts in the answering brief, Lee tacitly

agrees that he is not “dissatisfied” with Patin’s recitation of the background facts and procedure. NRAP 28(b). Lee’s bare statement that he disagrees with Patin’s recitation of the factual and procedural background (RAB 5) is insufficient to actually controvert Patin’s recitation under NRAP 28(b). As such, Lee is bound by Patin’s recitation of the factual and procedural background of this case outlined in her opening brief. AOB 14–23.

Additionally, Lee does not respond to Patin’s request under NRS 41.670(1)<sup>1</sup> that if this Court reverses, it should also direct the District Court on remand to award Patin damages, attorney fees, and costs. AOB 12. So, if the Court reverses the District Court’s order denying Patin’s special motion to dismiss under NRS 41.660, the Court should also direct the District Court on remand to consider awarding Patin damages, attorney fees, and costs.

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<sup>1</sup> **NRS 41.670 Award of reasonable costs, attorney’s fees and monetary relief under certain circumstances; separate action for damages; sanctions for frivolous or vexatious special motion to dismiss; interlocutory appeal.**

1. If the court grants a special motion to dismiss filed pursuant to [NRS 41.660](#):

(a) The court shall award reasonable costs and attorney’s fees to the person against whom the action was brought, except that the court shall award reasonable costs and attorney’s fees to this State or to the appropriate political subdivision of this State if the Attorney General, the chief legal officer or attorney of the political subdivision or special counsel provided the defense for the person pursuant to [NRS 41.660](#).

(b) The court may award, in addition to reasonable costs and attorney’s fees awarded pursuant to paragraph (a), an amount of up to \$10,000 to the person against whom the action was brought.

(c) The person against whom the action is brought may bring a separate action to recover:

- (1) Compensatory damages;
- (2) Punitive damages; and
- (3) Attorney’s fees and costs of bringing the separate action....

In summary, Lee's failure to respond to several issues raised in Patin's opening brief constitutes a confession of error. *See* NRAP 31(d); *Polk*, 233 P.3d at 359–360; *Bates*, 100 Nev. at 681–682, 691 P.2d at 870.

**C. THE MOOTNESS OF LEE'S ENTIRE DEFAMATION PER SE LAWSUIT IS A THRESHOLD ISSUE, AND HE CANNOT NOW DISTANCE HIMSELF FROM HIS OWN DENTAL PRACTICE, SUMMERLIN SMILES.**

The mootness of Lee's entire defamation per se lawsuit is a threshold issue, and he cannot now distance himself from his own dental practice, Summerlin Smiles. In the District Court, Lee 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 verdict in *Singletary v. Lee* (2 AA 417–425), Lee cannot change his position and hide from the previous appeal. RAB 22–23. As a matter of judicial estoppel, Lee is bound by his arguments in the District Court, even though he now avoids them. *See Marcuse v. Del Webb Communities*, 123 Nev. 278, 287, 163 P.3d 462, 468–469 (2007).



Lee's argument that this Court is powerless to consider the mootness issue is similarly without merit because mootness can be raised at anytime based upon "the happening of subsequent events." *See NCAA v. Univ. of Nev.*, 97 Nev. 56, 58, 624 P.2d 10, 11 (1981). Indeed, Lee cannot avoid this mootness issue since it calls into question the entire basis of his lawsuit. In his answering brief, Lee claims, without citing to any legal authority, that this Court's decision on mootness is confined to the record. RAB 3. While this Court generally confines its review of issues appearing as part of the record, this rule is not absolute. *See Carson Ready Mix, Inc. v. First Nat'l Bank of Nevada*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981). In fact, this Court distinguished *Carson Ready Mix* by allowing a review of documents outside the record to determine issues of waiver. *See Nevada Gold & Casinos, Inc. v. American Heritage, Inc.*, 121 Nev. 84, 89, 110 P.3d 481, 484 (2005) ("While *Carson Ready Mix* recites the general rule, it is not without exception. In particular, we may consider relevant facts outside the record in determining whether appellants have waived their appeal.") (citations omitted). Since Patin's mootness issues raised in her opening brief would have the effect of ending this entire litigation, the mootness issues are properly included in this appeal, and this Court can look beyond the record in determining whether Lee's entire defamation per se lawsuit is now moot.

In his answering brief, Lee suggests that he was completely vindicated in the *Singletary v. Lee* litigation. RAB 22–23. However, by his own admission, Lee was an aggrieved party in subsequent proceedings on remand in *Singletary v. Lee*. On remand in *Singletary v. Lee*, the District Court calculated the damages owed to Singletary, including calculations for costs and interest. 1 Appellants’ Reply Appendix (“ARA”) 1–9. In this District Court order, Singletary did not owe Lee anything for costs since these amounts were shifted to Lee’s own dental practice, Summerlin Smiles, and Florida Traivai. 1 ARA 9. Thus, Singletary was the prevailing party. Dissatisfied with this result, both Lee and Summerlin Smiles appealed the District Court order to this Court, which was docketed as Case No. 72707. 1 ARA 10–12. But, Lee and Summerlin Smiles promptly withdrew their appeal, and the District Court order favoring Singletary now stands. 1 ARA 13–15. Accordingly, Singletary was not required to pay Lee anything in the *Singletary v. Lee* litigation.

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), without distinguishing Lee from his dental practice, Summerlin Smiles. 1 AA 36–37 (emphasis added). Yet, Lee has no response to this statement making him one

and the same with Summerlin Smiles. Since Lee directly tied himself to the vacated jury verdict in *Singletary v. Lee* to prevail in the District Court, he cannot now change his position as a matter of judicial estoppel. *Marcuse*, 123 Nev. at 287, 163 P.3d at 468–469. Therefore, Lee’s entire defamation per se litigation against Patin is moot, and this Court should reverse the District Court’s order denying Patin’s special motion to dismiss under NRS 41.660.

**D. LEE DOES NOT MEANINGFULLY CHALLENGE THE SUBSTANCE OF PATIN’S ABSOLUTE LITIGATION PRIVILEGE, AND THE COURT SHOULD REVERSE THE DISTRICT COURT’S ORDER DENYING PATIN’S SPECIAL MOTION TO DISMISS UNDER NRS 41.660 ON THIS BASIS.**

Lee does not meaningfully challenge the substance of Patin’s absolute litigation privilege, and the Court should reverse the District Court’s order denying Patin’s special motion to dismiss under NRS 41.660 on this basis. In his answering brief, Lee offers only a cursory response to the substance of Patin’s absolute litigation privilege. RAB 20–21. Lee’s main argument is that Patin’s absolute litigation privilege was not raised in the District Court. RAB 19. However, the absolute litigation privilege is sufficiently related to the absolute fair report privilege, which was discussed at length in the District Court. 2 AA 378–400. Thus, the District Court’s order denying Patin’s special motion to dismiss (2 AA 403–408) “innately” involved the absolute litigation privilege. *See FDIC v. Rhodes*, 336 P.3d 961, 965 (Nev. 2014). Further, the absolute litigation privilege is

a form of immunity, which is not waivable. *See Fink v. Oshins*, 118 Nev. 428, 433 n.7, 49 P.3d 640, 643 n.7 (2002) (“[T]he absolute privilege provides unconditional **immunity**, even for statements made with personal ill will.”) (emphasis added; citations and internal quotation marks omitted). *Cf. Clark County School Dist. v. Richardson Constr., Inc.*, 123 Nev. 382, 389–390, 168 P.3d 87, 92 (2007) (explaining that a limited sovereign immunity defense is not waivable).

Even if this Court determines that the absolute litigation privilege was not sufficiently raised in the District Court, several exceptions apply to this case for this Court to consider Patin’s absolute litigation privilege on its merits. *See Livingston v. Washoe County*, 112 Nev. 479, 482, 916 P.2d 163, 166 (1996) (constitutional issues addressed for the first time on appeal); *Shapiro v. Welt*, 389 P.3d 262, 266–267 (2017) (addressing constitutionality of NRS 41.637 for the first time on appeal); *Lee v. Ball*, 121 Nev. 391, 395 n.11, 116 P.3d 64, 67 n.11 (2005) (issues considered for the first time on appeal that constitute plain error). So, even if the Court determines that Patin’s absolute litigation privilege was not sufficiently raised in the District Court, the Court should, nevertheless, consider the merits of her privilege now.

On the merits of Patin’s absolute litigation privilege, there is no doubt that Lee’s entire litigation should immediately halt on this basis. Lee argues that Patin’s statement made on her website falls outside the scope of the absolute

litigation privilege. RAB 20–21. According to Lee, the absolute litigation privilege only applies when (1) the privileged statement is actually filed in the litigation; (2) the privileged statement is actually filed either before or during the litigation; and (3) the privileged statement must be made to someone who is significantly interested in the litigation. *Id.* On all three accounts, Lee is incorrect, and this Court should enforce the absolute litigation privilege in Patin’s favor.

Contrary to Lee’s argument, none of the case law he cited requires a privileged statement to actually be filed within the litigation. Lee suggests that “in the course of judicial proceedings” means that privileged statements can only be made in court filings. RAB 20. However, Nevada case law does not require such a strict interpretation. If Lee’s argument were true, then a privileged statement could not be made in anticipation of litigation because it is not actually filed with the court. However, the law protects such statements made outside of actual court filings. *See Fink v. Oshins*, 118 Nev. 428, 433, 49 P.3d 640, 644 (2002) (“When the defamatory communication is made before a judicial proceeding is initiated, it will be cloaked with immunity only if the communication is made in contemplation of initiation of the proceeding.”) (citations and internal quotation marks omitted). Additionally, this Court has extended the absolute litigation privilege to letters of counsel that are not filed with the court. *See Jacobs v. Adelson*, 325 P.3d 1282, 1287 (2014) (citing *Theiss v. Scherer*, 396 F.2d 646, 648

(6th Cir. 1968) (noting that a letter written by an attorney was absolutely privileged because it was addressed to another attorney who represented a party with a financial interest in the proceeding, and copies were sent to individuals with direct financial interests in proceeding)). So, Lee's suggestion that Patin's statement on her website falls outside the scope of the absolute litigation privilege because it was not filed with the court is without merit.

Lee next argues that a statement loses its protection under the absolute litigation privilege if it is made after the conclusion of litigation. Lee creates this argument from the same "in the course of judicial proceedings" language. RAB 20. However, Lee does not identify any legal authority that separates district court litigation from Supreme Court litigation. But, just the opposite is true. An appeal is a continuation of district court litigation. *See, e.g., Ingersoll-Rand Fin. Corp. v. Miller Min. Co.*, 817 F.2d 1424, 1426 (9th Cir. 1987) ("[T]he instant appeal is clearly a continuation of a judicial proceeding..."). Thus, Lee's attempt to divide the District Court litigation in *Singletary v. Lee* and the related appeal into separate proceedings is ineffectual for overcoming Patin's absolute litigation privilege. Lee argues in several places in his answering brief that the District Court litigation in *Singletary v. Lee* ended while the related appeal was still pending. The District Court order also believed this misplaced argument. 1 AA 406. *Ingersoll-Rand* completely undermines Lee's argument on this point.

Finally, Lee argues that the absolute litigation privilege only applies when the protected statement is made to someone who is significantly interested in the litigation. But, Lee himself is the recipient of the allegedly defamatory statement and was a named party in the *Singletary v. Lee* litigation. 1 AA 17–18. No other recipient can be identified because after the District Court erroneously vacated the jury verdict in *Singletary v. Lee*, Patin updated her website description. 1 AA 98–99. The instant case is unlike *Jacobs* where a statement was thrust into the media. *Id.* at 1286–1287 (“[W]e adopt the majority view that statements made to the media are not subject to absolute privilege.”). Overall, the Court should extend the absolute litigation privilege to Patin because “[a]n absolute privilege is an immunity, which protects against even the threat that a court or jury will inquire into a communication.” *Hampe v. Foote*, 118 Nev. 405, 409, 47 P.3d 438, 440 (2002) (citation omitted), *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).

**E. EVEN IF THE COURT REACHES THE INTERPRETATION OF NRS 41.660, THE COURT SHOULD, NEVERTHELESS, REVERSE THE DISTRICT COURT’S ORDER DENYING PATIN’S SPECIAL MOTION TO DISMISS UNDER NRS 41.660 FOR THE SEVERAL REASONS PRESENTED IN THIS APPEAL.**

Even if the Court reaches the interpretation of NRS 41.660, the Court should, nevertheless, reverse the District Court’s order denying Patin’s special

motion to dismiss under NRS 41.660 for the several reasons presented in this appeal, including (1) the lack of prima facie or clear and convincing evidence to support Lee's claim for defamation per se against Patin; (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) Patin's statement on her website is true and not capable of a defamatory construction; (4) Patin's statement is protected by the absolute fair report privilege; (5) Lee has no actionable claim against Patin based upon the Nevada Rules of Professional Conduct; and (6) attorney advertising amounts to protected commercial speech.

**1. Lee cannot demonstrate prima facie or clear and convincing evidence to support his claim for defamation per se regardless of which version of NRS 41.660 is applied.**

Lee cannot demonstrate prima facie or clear and convincing evidence to support his claim for defamation per se regardless of which version of NRS 41.660 is applied. In his answering brief, Lee argues that the current 2015 version of NRS 41.660(3)(b) applies to this case, instead of the earlier 2013 version. RAB 6. To support his argument that the new 2015 version of the statute became effective on June 8, 2015, Lee includes an undated version of a draft Senate Bill 444 (2015). 1 Respondent's Appendix ("RA") 1. The key distinction between the two versions of this statute is whether Lee has to demonstrate 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 compared to “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). Regardless of which standard is applied, Lee cannot demonstrate under either the lower (prima facie) or higher (clear and convincing) standard. If the Court determines that the District Court applied the wrong standard, the proper remedy 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). If the District Court applied the correct standard, this Court’s analysis continues.

2. **Lee does not meaningfully challenge that Patin’s statement referencing the underlying litigation case, *Singletary v. Lee*, 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.”**

Lee does not meaningfully challenge that Patin’s statement referencing the underlying litigation case, *Singletary v. Lee*, 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.” In her opening brief, Patin cited a variety of cases to satisfy this test. AOB 31–33;

*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.”); *Healy v. Tuscan Hills Landscape & Recreation Corp.*, 137 Cal.App.4th 1, 5 (2006) (“The 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....”). Of these four authorities, Lee only attempts to distinguish *Healy*. RAB 11–12. Lee makes no attempt to address the other three cases, which stand uncontested.

Lee first claims that *Healy* is non-binding and can be ignored. However, 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. Lee next claims that *Healy* is inapplicable because Patin’s statement on her website must be sufficiently related to some pending litigation. However, Lee’s argument completely ignores that Patin’s

website referenced the running title of the District Court litigation case: “Singletary v. Ton Vinh Lee, DDS, et al.” 1 AA 76–80. Lee then argues that the plain language of NRS 41.637(3) and (4) should include an additional provision to limit good faith communications to only persons who have a substantial interest in the outcome of the litigation. RAB 11–12. But, this Court does not speculate as to what the Legislature could have or should have done when interpreting the plain language of statutes. *See S. Nev. Homebuilders Ass’n v. Clark Cnty.*, 121 Nev. 446, 451, 117 P.3d 171, 174 (2005) (“[I]t is not the business of this court to fill in alleged legislative omissions based on conjecture as to what the legislature would or should have done.”) (citations omitted). As such, Lee’s suggestion to add new language to the statute to save his lawsuit is unavailing, and this Court should reverse the District Court’s order denying Patin’s special motion to dismiss under NRS 41.660.

3. **By failing to articulate an opposing interpretation, Lee agrees that Patin’s statement referencing the underlying litigation case, *Singletary v. Lee*, is true and not capable of a defamatory per se construction.**

By failing to articulate an opposing interpretation, Lee agrees that Patin’s statement referencing the underlying litigation case, *Singletary v. Lee*, is true and not capable of a defamatory per se construction. Lee points out in his answering brief that NRS 41.637(4) requires a good faith communication to be “truthful or is

made without knowledge of its falsehood.” RAB 10. However, in analyzing the claimed defamatory statement previously appearing on Patin’s website, Lee wholly ignores Patin’s analysis of why her statement is true and not subject to a defamatory construction. RAB 13–18. Instead, Lee offers a series of legal standards, statements of law, and the District Court’s own erroneous conclusions. *Id.* Lee argues that he was named “personally” in connection with Patin’s statement. RAB 17. But, he ignores that the only time his name comes up in Patin’s statement is with the running title “Singletary v. Ton Vinh Lee, DDS, et al.” (1 AA 76–80; emphasis added). In attempt to escape the running title of the *Singletary v. Lee* litigation, Lee refers to the underlying litigation as the “*Singletary* litigation.” RAB 3. 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. Nevertheless, Lee does not respond to these issues in his answering brief and, thus, concedes the correctness of Patin’s position. *See* NRAP 31(d); *Polk*, 233 P.3d at 359–360; *Bates*, 100 Nev. at 681–682, 691 P.2d at 870.

Lee further argues that Patin’s plain description of the *Singletary v. Lee* litigation hypothetically had a detrimental effect on him. RAB 16. However, Lee simply offers a formulation of legal elements without articulating any harm. *Id.* Lee next suggests that this Court can disavow *Pegasus v. Reno Newspapers, Inc.*,

118 Nev. 706, 715, 57 P.3d 82, 88 (2002) only requiring any allegedly defamatory statements to be substantially true to defeat a defamation claim. In his estimation, the determination of a defamatory statement is always a question for the jury. RAB 17. But, this Court has explained that the application of a privilege is a legal matter for the court to resolve and should be reviewed de novo. *Pegasus*, 118 Nev. at 714, 57 P.3d at 88 (citations omitted). Additionally, Lee cannot claim a factual issue to avoid a summary disposition without actually offering any competing facts. Otherwise, defamation cases would always have to proceed to trial regardless of their frivolous nature, as Lee's case against Patin. Tellingly, the District Court's order states that "this Court cannot find at this juncture that the Plaintiff [Lee] hasn't put forth prima facie evidence demonstrating a probability of prevailing on this claim." 2 AA 406. Nevertheless, the District Court did not actually conclude that Lee **actually presented** any prima facie (or clear and convincing) evidence of prevailing on his claim for defamation per se. When pressed for an explanation of this supposed evidence, Lee's answering brief only discusses general principles without actually articulating any support for his sole claim. Therefore, the Court should determine that Patin's statement on her website is not capable of a defamatory per se construction and reverse the District Court's order denying Patin's special motion to dismiss under NRS 41.660.

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

Lee tacitly concedes that Patin's statement referencing the underlying litigation case, *Singletary v. Lee*, is also protected by the absolute fair report privilege. The absolute fair report privilege provides Patin with an independent basis to reverse the District Court's order denying Patin's special motion to dismiss under NRS 41.660. In response to Patin's argument on this privilege (AOB 36–37), Lee argues that Patin's report was allegedly “partial” and, therefore, cannot constitute a “report.” RAB 23. Lee also offers the bare argument that Patin's statement was false at the time it was made and, therefore, cannot be protected under this privilege. *Id.* Although Patin cited to this Court's recent opinion *Adelson v. Harris*, 133 Nev. Adv. Op. No. 67, at \*5–6 (Sep. 27, 2017) in her opening brief (AOB 36–37), Lee avoids the case altogether. In *Adelson*, the dispute over whether a statement was defamatory focused only on the hyperlink referenced in an article. *Id.* at \*7. The statement itself from the article was clearly covered by the absolute fair report privilege to which all parties conceded. *Id.* Notably, the statement claimed that Adelson “personally approved of prostitution in his Macau casinos.” *Id.* at \*4 (emphasis omitted). Compared to the more egregious statement in *Adelson*, Patin's statement clearly falls within the scope of the absolute fair report privilege. First, Lee's bare claim of a biased report is

unavailing, as the same reports appear in *The Trial Reporter* and *The Nevada Legal Update*. 1 AA 34–41. Since these other publications contain similar descriptions as Patin’s website, they demonstrate that the motivation for Lee’s entire lawsuit against Patin is retaliation. Second, the privilege also precludes liability “even where the defamatory statements are published with knowledge of their falsity and personal ill will toward the plaintiff.” *Adelson* at \*5 (citations omitted). In any event, Lee’s argument that his claim is actionable because Patin’s statement was allegedly false at the time it was made is also unavailing. RAB 23; *see Ingersoll-Rand*, 817 F.2d at 1426. Patin changed her website after the District Court in *Singletary v. Lee* erroneously vacated the jury verdict. 1 AA 99. Regardless, Lee does not challenge that the reinstatement of the jury’s verdict in *Singletary v. Lee* relates back to the time of Patin’s original statement. *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, since the contours of the absolute fair litigation privilege protect Patin’s statement on her website, this Court should reverse the District Court’s order denying Patin’s special motion to dismiss under NRS 41.660.

5. **Lee has no response to the non-actionable nature of his sole claim for defamation per se because it improperly relies upon the Nevada Rules of Professional Conduct.**

Lee has no response to the non-actionable nature of his sole claim for defamation per se because it improperly relies upon the Nevada Rules of Professional Conduct. In her opening brief, Patin cited RPC 1.0A and *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) for the notion that Lee’s defamation per se claim cannot rely upon the RPCs for liability against Patin. AOB 38. Lee ignores the substance of this argument and instead claims that it is inapplicable. RAB 24–25. Yet, Lee’s non-response once again constitutes a confession of error, and this Court should reverse the District Court’s order on this alternative basis. *See* NRAP 31(d); *Polk*, 233 P.3d at 359–360; *Bates*, 100 Nev. at 681–682, 691 P.2d at 870.

6. **If this Court considers Patin’s statement referencing the underlying litigation case, *Singletary v. Lee*, as only attorney advertising, the Court should also consider the protected nature of this statement.**

If this Court considers Patin’s statement referencing the underlying litigation case, *Singletary v. Lee*, as only advertising, the Court should also consider the protected nature of this statement. In his answering brief, Lee claims that he is entitled to characterize Patin’s statement on her website as “attorney advertising,”



but Patin supposedly has no right to challenge this mischaracterization. RAB 25–26. Yet, since Lee has made this mischaracterization, the protections of the anti-SLAPP laws apply. By definition, “advertising” is “[t]he action of drawing the public’s attention to something to promote its sale.” BLACK’S LAW DICTIONARY, 64 (10th ed. 2014). Lee suggests that *Taheri Law Group v. Evans*, 160 Cal.App.4th 482, 491 (2008) is inapplicable to the instant case. However, the holding of *Taheri* confirms that the attorney’s statement were “much more than commercial speech” because they involved communication with a client—exactly what Lee has alleged against Patin in the instant case. 1 AA 1–4. In the end, *Taheri* confirmed that “the activity alleged is the very sort of activity the anti-SLAPP statute is designed to cover.” *Id.* Although Nevada does not have an “analog” statute in NRS Chapter 41, this Court looks to California anti-SLAPP law for guidance. *Shapiro*, 389 P.3d at 268. Therefore, if the Court reaches this final argument, the Court should construe Patin’s “attorney advertising” as protected under the commercial exemption based upon this California law.

### **III. CONCLUSION**

In summary, this Court should reverse the District Court’s order denying Patin’s special motion to dismiss under NRS 41.660 (2 AA 403–408) based upon any of the following arguments: (A) Lee offers a series of unsupported factual and legal assertions that this Court should disregard; (B) By failing to address

numerous issues raised in Patin's opening brief, Lee tacitly concedes the correctness of these issues; (C) The mootness of Lee's entire defamation per se lawsuit is a threshold issue, and he cannot now distance himself from his own dental practice, Summerlin Smiles; (D) Lee does not meaningfully challenge the substance of Patin's absolute litigation privilege, and the Court should reverse the District Court's order denying Patin's special motion to dismiss under NRS 41.660 on this basis; and (E) Even if the Court reaches the interpretation of NRS 41.660, the Court should, nevertheless, reverse the District Court's order denying Patin's special motion to dismiss under NRS 41.660 for the several reasons presented in this appeal.

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(1).

Dated this 5th day of February, 2018.

MARQUIS AURBACH COFFING

By /s/ Micah S. Echols

Micah S. Echols, Esq.

Nevada Bar No. 8437

10001 Park Run Drive

Las Vegas, Nevada 89145

*Attorneys for Appellants, Ingrid Patin*

*and Patin Law Group, PLLC*

## **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 6,605 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 5th day of February, 2018.

MARQUIS AURBACH COFFING

By /s/ Micah S. Echols  
Micah S. Echols, Esq.  
Nevada Bar No. 8437  
10001 Park Run Drive  
Las Vegas, Nevada 89145  
*Attorneys for Appellants, Ingrid Patin  
and Patin Law Group, PLLC*

## **CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **APPELLANTS' REPLY BRIEF** and **APPELLANTS' REPLY APPENDIX** were filed electronically with the Nevada Supreme Court on the 5th day of February, 2018. 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