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

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| VETERANS IN POLITICS INTERNATIONAL, INC. AND STEVE W. SANSON,<br><br>Appellants,<br>vs.<br><br>MARSHAL S. WILLICK AND WILLICK LAW GROUP,<br><br>Respondents, | **SUPREME COURT NO.: 72778**<br><br>**DIST. CT. CASE NO.: A-17-750171-C (Dept. 18)** |

# BRIEF OF *AMICUS CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

**(In Support of Neither Party)**

## 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 judges of this Court may evaluate possible disqualification or recusal.

1. The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association of reporters and editors with no parent corporation and no stock.

2. No law firm or lawyer has appeared for the *amicus* below; the only law firm and lawyer appearing for *amicus* in this case is:

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Dated: October 10, 2018

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## INTEREST OF *AMICUS CURIAE*

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970, when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today it provides *pro bono* legal representation, *amicus curiae* support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

Members of the news media rely on the robust protections afforded by the First Amendment to the United States Constitution to function. Nevada's Anti-SLAPP statute, NRS 41.635 *et seq*., is a powerful examples of this State's firm commitment to freedom of speech. It protects journalists and news organizations from frivolous lawsuits aimed at chilling quality newsgathering and reporting.

As an organization that advocates on behalf of journalists and news organizations, *amicus* is particularly interested in ensuring that Nevada's Anti-SLAPP statute is interpreted correctly and provides the greatest degree of protection to members of the news media. Respondents' responding brief argues for application of an incorrect standard for reviewing the denial of a special motion to dismiss under the Anti-SLAPP statute which, if adopted by the Court, would neuter its ability to safeguard against meritless suits designed to silence protected speech.

On September 10, 2018, the Court invited *amicus* to file an *amicus curiae* brief in this case, giving it permission to file this brief under NRAP 29(a).

## SUMMARY OF THE ARGUMENT

*Amicus* takes no position on the merits of the parties' claims or whether the district court erred in denying Appellants' Anti-SLAPP motion. Rather, this brief is filed solely to address Respondents' erroneous argument that the correct standard of review applicable to the denial of an Anti-SLAPP motion is abuse of discretion.

Respondents' argument is based primarily on this Court's decision in *Shapiro v. Welt*, 389 P.3d 262 (Nev. 2017). Yet, this Court applied an abuse of discretion standard in that case because it arose under a prior version of the Anti-SLAPP statute that required plaintiffs to provide "clear and convincing evidence" of a probability of prevailing on their claims in order to survive an Anti-SLAPP motion.

This prior standard differed from the summary judgment-like evidentiary standard that existed prior to the 2013 amendment to the statute and the current version of the statute, which also contains a summary judgment-like "prima face evidence" standard. Thus, as more recent decisions from this Court have recognized, under the current version of the Anti-SLAPP statute this Court should review the district court's denial of Appellants' Anti-SLAPP motion *de novo*.

## ARGUMENT

### 1.0 THE CASES RESPONDENTS CITE FOR AN ABUSE OF DISCRETION STANDARD RELY ON A PRIOR VERSION OF THE ANTI-SLAPP STATUTE AND ARE INAPPOSITE

Respondents' argument that denial of an Anti-SLAPP motion is reviewed for abuse of discretion is based on two decisions from this Court: *Shapiro v. Welt*, 389 P.3d 262 (Nev. 2017) and *SPG Artist Media, LLC v. Primesites, Inc.*, 2017 Nev. Unpub. LEXIS 152 (Nev. Feb. 28, 2017). These cases do not support Respondents' argument, however, as *Shapiro* dealt with a prior—and materially different—version of the statute, and *Primesites* followed this holding with no further analysis.

Nevada's Anti-SLAPP statute underwent significant revisions in 2013 and 2015. Prior to 2013, the Anti-SLAPP statute specified that a court was to "[t]reat [a special motion to dismiss] as a motion for summary judgment." NRS 41.660(3)(a) (1997). This was the basis for this Court's application of a *de novo* standard of review to the denial of an Anti-SLAPP motion prior to 2013. *See John v. Douglas County Sch. Dist.*, 125 Nev. 746, 753 (2009).

In 2013, the Nevada legislature amended NRS 41.660, deleting this summary judgment language and instead providing that if the moving party meets its initial burden under the first prong of the statute, the nonmoving party must "establish[] by clear and convincing evidence a probability of prevailing on the claim." NRS 41.660(3)(b) (2013). This change from a summary judgment standard to a "clear

and convincing evidence" standard is the reason why this Court in *Shapiro* changed the standard of review applicable to denials of Anti-SLAPP motions to abuse of discretion. Specifically, this Court found that "[a]fter 2013," with the plaintiff's "burden increased to clear and convincing evidence, this [C]ourt will provide greater deference to the lower court's findings of fact and therefore will review for an abuse of discretion."[1] *Shapiro*, 389 P.3d at 266.[2] The Court's subsequent unpublished decision in *Primesites* simply looked to *Shapiro* for the applicable standard of review, without discussion or analysis. *See Primesites*, 2017 Nev. Unpub. LEXIS 152 at *1.[3] Like *Shapiro*, the *Primesites* case was initiated in the district court in October 2014, before the 2015 amendments to the Anti-SLAPP statute took effect, and thus the district court applied the 2013 version of the statute with its heavier evidentiary burden.

In light of a decision from the Supreme Court of Washington that struck down the Washington Anti-SLAPP statute due its imposition of a "clear and

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[1] Though the Court decided *Shapiro* after the 2015 revisions to the Anti-SLAPP statute, the Anti-SLAPP motion at issue in that case was brought under the 2013 version of the statute and was thus analyzed under the earlier version.

[2] Additionally, in *Delucchi v. Songer*, 396 P.3d 826, 831 (Nev. 2017), this Court explained that "[t]he 2013 amendment completely changed the standard of review for a special motion to dismiss by placing a significantly different burden of proof on the parties."

[3] Even if *Primesites* had provided a discussion of why an abuse of discretion standard was appropriate, it is an unpublished opinion that this Court is free to disregard. *See* NRAP 36(c)(3).

convincing evidence" standard, in 2015 the Nevada legislature again amended its Anti-SLAPP statute. This time it replaced the "clear and convincing evidence" language with the requirement that the nonmoving party "demonstrate[] with *prima facie evidence* a probability of prevailing on the claim." NRS 41.660(3)(b) (emphasis added). This returned the standard for denial of an Anti-SLAPP motion to the pre-2013 standard, and the standard of review for such denials along with it.

This Court in *Shapiro* applied an abuse of discretion standard of review solely in response to the 2013 version of the statute's imposition of a "clear and convincing evidence" requirement for parties opposing an Anti-SLAPP motion. That evidentiary burden no longer exists in the current version of the statute, and no party has argued that the 2013 version of the Anti-SLAPP statute applies here. In fact, in what appears to be the only decision from this Court regarding the applicable standard of review as to the *current* version of the Anti-SLAPP statute, the Court in *Goldentree Master Fund, Ltd. v. EB Holdings II, Inc.*, 2018 Nev. Unpub. LEXIS 270, *1 fn. 3 (Nev. 2018) reviewed the denial of an Anti-SLAPP motion *de novo*.

For these reasons, this Court's decisions in *Shapiro* and *Primesites* as to the applicable standard of review are inapposite and should be disregarded. The Court should look to its earlier precedents, as well as persuasive California case law on this subject, and determine that the denial (or grant) of an Anti-SLAPP motion under the current version of the statute is subject to *de novo* review.

## 2.0 UNDER THE CURRENT STATUTE'S EVIDENTIARY BURDEN, THIS COURT SHOULD REVIEW A DISTRICT COURT'S DENIAL OF AN ANTI-SLAPP MOTION *DE NOVO*

Due to a relative dearth of case law applying Nevada's Anti-SLAPP statute, Nevada courts frequently look to case law applying California's Anti-SLAPP statute, Cal. Code Civ. Proc. § 425.16, which shares many of the features of Nevada's law. *See John*, 125 Nev. at 756 (stating that "we consider California case law because California's anti-SLAPP statute is similar in purpose and language to Nevada's anti-SLAPP statute"); *see also Shapiro*, 389 P.3d at 268 (same). In fact, the current version of the statute explicitly provides that a nonmoving party's burden in opposing an Anti-SLAPP motion is identical to the burden under California law:

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

NRS 41.665(2).

Since a non-movant's burden in opposing an Anti-SLAPP motion is exactly the same in Nevada as it is in California, it makes sense for this Court to apply the same standard of review as a California appellate court. It is well-established under California law that the grant or denial of an Anti-SLAPP motion is reviewed *de*

*novo*. *See Chodos v. Cole*, 210 Cal. App. 4th 692, 698 (2012) (stating that "[w]e review de novo the trial court's order granting an anti-SLAPP motion"); *see also Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.*, 122 Cal. App. 4th 1049, 1056 (2004) (stating an appellate court "will independently determine whether a cause of action is based upon activity protected under the [Anti-SLAPP] statute, and if so, whether the plaintiff has established a reasonable probability of prevailing"); *and see Governor Gray Davis Com. v. American Taxpayers Alliance*, 102 Cal. App. 4th 449, 456 (2002) (same).

As explained above, this Court in *Shapiro* changed the standard of review from *de novo* to abuse of discretion in response to the Nevada statute's move from a summary judgment-like evidentiary burden to a heightened burden for plaintiffs. But the current version of the statute returns to a summary judgment-like standard. The evidentiary burden imposed under California law on Plaintiffs opposing an Anti-SLAPP motion has, likewise, routinely been described as akin to a summary judgment-like burden. *See Hall v. Time Warner, Inc.*, 153 Cal. App. 4th 1337, 1346 (2007) (stating that, in deciding Anti-SLAPP motion, "[t]he court cannot weigh the evidence, but must determine whether the evidence is sufficient to support a judgment in the plaintiff's favor as a matter of law, **as on a motion for summary judgment**") (emphasis added); *see also Kyle v. Carmon*, 71 Cal. App. 4th 901, 907 (1999) (stating that "[t]he burden on the plaintiff is similar to the standard used in

determining motions for nonsuit, directed verdict, or **summary judgment**") (emphasis added); *and see Seelig v. Infinity Broadcasting Corp.*, 97 Cal. App. 4th 798, 809 (2002) (same).

Most importantly, a *de novo* standard of review is necessary if the Anti-SLAPP statute is to effectively fulfill its legislative purpose to provide defendants with a substantive immunity from SLAPP suits. NRS 41.650 provides that "[a] person who engages in a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern is **immune from any civil action** for claims based upon the communication" (emphasis added). This creates not merely immunity from liability or damages, but a substantive immunity **from the suit itself**. This demonstrates a recognition on the part of the Legislature that SLAPP suits frequently have the goal of inflicting as much pain as possible on a defendant for exercising their First Amendment rights; the purpose of such a suit is not to win, but either to extract a settlement in the face of prohibitive legal expenses, or to intimidate other would-be critics into silence. This is why the entitlement to attorneys' fees, costs, and potential damages in NRS 41.670 is so important. Without that provision a SLAPP plaintiff could achieve their goals of censorious litigation even if they eventually lose, because the defendant would be out-of-pocket all their attorneys' fees and costs. This is also why an interlocutory appeal

is necessary; a defendant's substantive immunity from suit could effectively be lost without the ability to immediately seek appellate review of an order denying an Anti-SLAPP motion.

For these same reasons, applying a *de novo* standard of review to orders denying Anti-SLAPP motions is necessary to ensure that the substantive immunity created by the Anti-SLAPP statute is properly and consistently available to defendants faced with SLAPP suits. The more deferential abuse of discretion standard should be used for fact-intensive inquiries such as discretionary fee awards, not to determine whether a defendant has a substantive right, created by statute, meant to vindicate and protect the exercise of their First Amendment rights. *See Baba v. Board of Supervisors of City & County of San Francisco*, 142 Cal. App. 4th 504, 512 (2004) (appellate courts should typically review interpretation and application of constitutional principles *de novo*).

Nevada courts use the same standards as California's in deciding whether a plaintiff has satisfied its burden in opposing an Anti-SLAPP motion. This is by design; clearly the Nevada Legislature intended for the laws to be harmonized. *See* NRS 41.665(2). California courts have repeatedly referred to this standard as akin to a summary judgment motion. And California appellate courts have routinely reviewed orders denying anti-SLAPP motions *de novo*. There is no reason for the Court to apply a different standard of appellate review that would be inconsistent

not only with California's law, but with *all other state's* Anti-SLAPP law. *See*, e.g., *Cole*, 210 Cal. App. 4th at 698; *Jardin v. Marklund*, 431 S.W.3d 765 (Tex. App. 2014) (reviewing Anti-SLAPP decision *de novo*); *Plotkin v. State Accident Ins. Fund*, 280 Ore. App. 812, 815-16 (2016) (reviewing Anti-SLAPP decision for "legal error," equivalent to *de novo* review); *Krimbill v. Talarico*, 417 P.3d 1240, 1244 (OK Ct. App. 2017); *and see Competitive Enter. Inst. V. Mann*, 150 A.3d 1213, 1240 (D.C. 2016) (applying *de novo* standard of review). This Court should remain consistent with its own decisions under the pre-2013 version of the Anti-SLAPP statute, consistent with its recent 2018 decision under the current version of the statute, and consistent with the legislative intent.

## CONCLUSION

For the foregoing reasons, the Court should explicitly define the proper standard of review in reviewing the grant or denial of a special motion to dismiss under NRS 41.660 as *de novo*.

Dated October 10, 2018.

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## CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Amicus 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 Amicus Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 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 further certify that this Amicus Brief complies with formatting requirements of NRAP 32(a)(4) and with the type-face requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this Amicus Brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman. Finally, pursuant to the Court's September 10, 2018 Order, this brief is no longer than 10 pages.

Dated: October 10, 2018

/s/Marc J. Randazza
Marc J. Randazza

## CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. Proc. 25(b) and NEFR 9(f), I hereby certify that on this date I electronically filed the foregoing document with the Clerk of the Nevada Supreme Court by using the NEVADA ELECTRONIC FILING RULES ("Eflex"). Participants in this case who are registered with Eflex as users will be served by the Eflex system as follows:

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