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IN THE SUPREME COURT OF THE STATE OF NEVADA

DARRELL T. COKER; Appellant, vs. MARCO SASSONE; Respondent.	**SUPREME COURT NO.: 73863** **APPEAL FROM THE DISTRICT COURT FOR CLARK COUNTY, NEVADA, CASE NO.: A-16-724853-C**

APPELLANT DARRELL T. COKER'S REPLY BRIEF

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. Appellant Darrell T. Coker is an individual, and thus there is no parent corporation or publicly held company that owns 10% or more of his stock.

2. The following law firm represented Appellant in the district court proceedings leading to this appeal and represents Appellant in this appeal:

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No other law firm is expected to appear on Appellant's behalf in this appeal.

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1.0 The Court Should Review the District Court's Decision *De Novo*

For reasons not adopted or even contemplated by any Nevada court, Appellee argues that the Court should not review denial of an Anti-SLAPP motion *de novo*, but instead should create a new hybrid standard of review that is inconsistent with the plain language of the statute.

In 2013, the Nevada legislature amended the Anti-SLAPP statute to, inter alia, require a plaintiff opposing a special motion to dismiss to demonstrate a probability of prevailing on his claims by "clear and convincing evidence." This Court in *Shapiro v. Welt*, 389 P.3d 262 (Nev. 2017) , dealing with an Anti-SLAPP motion filed under that version of the statute, determined that an abuse of discretion standard was appropriate given this change in language. The Court did so solely and explicitly because the Anti-SLAPP statute **at the time** required a party opposing an Anti-SLAPP motion to provide *clear and convincing* evidence supporting its claims. *See id*. at 266. Specifically, it found that "[a]fter 2013, however, with the plaintiffs [sic] burden increased to clear and convincing evidence, this court 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.

[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.

In 2015 the Nevada legislature again amended the Anti-SLAPP statute. This time it removed the "clear and convincing evidence" language and replaced it with a requirement that a nonmoving party "demonstrate[] with prima facie evidence a probability of prevailing on the claim." NRS 41.660(3)(b). This essentially returned the standard to the pre-2013 standard, and the standard of review along with it.

This Court in *Shapiro* used an abuse of discretion standard of review solely in response to the 2013 version of the statute imposing a "clear and convincing evidence" requirement for parties opposing an Anti-SLAPP motion.[2] That evidentiary burden no longer exists in the current version of the statute. For these reasons, this Court's holding in *Shapiro* is inapposite and should be disregarded. The Court should look to its earlier precedents, as well as the plethora of 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 reviewed *de novo*.

Due to a relative dearth of case law applying Nevada's Anti-SLAPP statute, Nevada courts look to case law applying California's Anti-SLAPP statute, Cal. Code Civ. Proc. § 425.16, which shares many similarities with Nevada's law. *See John v. Douglas County Sch. Dist.*, 125 Nev. 746, 756 (2009) (stating that "we consider

[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."

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 in California, it makes sense for this Court to apply the same standard of review as a California appellate court. It is well-established that, under California law, 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).

The reason that the Court in *Shapiro* changed the standard of review from *de novo* to abuse of discretion was the statute's move from a summary judgment-like evidentiary burden to a heightened burden. But the current version of the statute has gone back to the summary judgment-like standard. In fact, the evidentiary burden under California law in opposing an Anti-SLAPP motion has regularly been described as akin to a summary judgment motion. *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).

Lastly, applying a *de novo* standard of review would also be consistent with the principle that appellate courts typically review the interpretation and application of constitutional principles on a *de novo* basis. *Baba v. Board of Supervisors of City & County of San Francisco*, 142 Cal. App. 4th 504, 512 (2004). As explained in

In re George T., 33 Cal. 4th 620, 93 P.3d 1007, 16 Cal.Rptr.3d 61, 69 (Cal. 2004), reviewing courts have a "constitutional responsibility that cannot be delegated to the trial of fact" and they must "make an independent constitutional judgment on the facts of the case." *See also*, *McCoy v. Hearst Corp*. 42 Cal.3d 835, 844 (1986). Nevada's Anti-SLAPP statute provides a substantive immunity to suit against claims that implicate a defendant's First Amendment rights, and so the Court should use a *de novo* standard of review.

Nevada courts use the same standards as California's in deciding whether a plaintiff has satisfied its burden in opposing an Anti-SLAPP motion, and California courts have repeatedly referred to this standard as equivalent to a summary judgment motion. There is thus no reason for the Court to use anything other than a *de novo* standard, and there is certainly no reason for the Court to treat anything as a mixed question of law and fact or use the "substantial evidence" standard, as urged by Appellee.

2.0 Appellee is Mistaken About the Record, and the Court Should Take this Opportunity to Rule on Appellant's Evidentiary Objections

Appellee argues that, because Mr. Coker did not object to evidence Appellee provided in opposing the Anti-SLAPP Motion at the district court, he cannot raise such objections on appeal. This assertion is baffling and unsupported by the clear record. Mr. Coker's reply in support of the Anti-SLAPP Motion clearly has a section devoted to why Mr. Coker's evidence is either irrelevant or inadmissible

(Appellant's Appendix 221–224). When Appellee improperly attempted to add evidence to the record in opposing Mr. Coker's Notice of Supplemental Authority, Mr. Coker explained how such evidence was inadmissible in his reply in support of that notice. (Appellant's Supplemental Appendix at 3–4.) Appellee never responded to any of these objections, and the arguments regarding admissibility of evidence in the Opening Brief are essentially identical to briefing on these issues before the district court.[3] Nor did Appellee make any objection at the district court to the admissibility or relevance of Mr. Coker's declaration. Thus, to the extent any evidentiary objections are waived under *Guy v. State*, 108 Nev. 770, 780 (1992), it is Appellee's objections that are waived.

3.0 Mr. Coker Provided Sufficient Evidence to Meet His Burden Under Prong One, and Appellee Provided No Countervailing Evidence

An Anti-SLAPP Motion is evaluated in a two-prong process. Under the first prong, it is the moving party's burden to show, by a preponderance of evidence, that the plaintiff's claims are based upon the moving party's good-faith exercise of speech in direct connection with an issue of public concern. For purposes of this appeal, such communications include communications made in direct connection with an issue of public interest, made in a public forum, and that are either true or made without knowledge of falsity. Once this burden is met, the burden shifts to the

[3] Bizarrely, despite having now seen Mr. Coker's evidentiary objections *twice*, Appellee makes no effort to explain how any of his evidence is admissible.

non-moving party to show by *prima facie* evidence a probability of prevailing on his claims.

It is vitally important for the Court to keep in mind that the legality of a defendant's alleged conduct is not the focus of the prong one inquiry; such questions are better left for the prong two analysis. *See Coretronic Corp. v. Cozen O'Connor*, 192 Cal. App. 4th 1381, 1388 (2d Dist. 2011); *see also Taus v. Loftus*, 40 Cal. 4th 683, 706-07, 713, 727-29 (2007). Otherwise, a plaintiff could defeat an Anti-SLAPP motion with trivial ease by simply asserting that the defendant's speech was in some way unlawful. Just as a defendant does not lose his protections under the First Amendment due to an allegation that his speech is defamatory, he does not lose the protections of the Anti-SLAPP statute simply because the plaintiff claims he spoke with knowing falsity.

As explained above, an Anti-SLAPP motion is treated as a motion for summary judgment. This means that, while the parties must present competent, admissible evidence to meet their burdens under the statute, the Court cannot make credibility determinations or make a comparative weighting of the parties' evidence. As explained in *Vancheri v. GNLV Corp.*, 105 Nev. 417, 777 P.2d 366, 368 (Nev. 1989), "[a] prima facie case is defined as sufficiency of evidence in order to send the question to the jury … The question of sufficiency of the evidence does not turn on whether the trier of fact will make the desired finding. Therefore, **a witness's**

credibility and the weight of the evidence are not of consequence in the presentation of a prima facie case." *Id*. (emphasis added).

As explained in the Opening Brief, Appellee's claims are based upon Mr. Coker's distribution of artistic works, which may well be in the public domain, to the public. This is plainly conduct protected by the Anti-SLAPP statute. *See, e.g.*, *Maloney v. T3Media, Inc.*, 94 F. Supp. 3d 1128, 1134 (C.D. Cal. 2015) (aff'd 853 F.3d 1004 (9th Cir. 2017)) (finding that first prong of Anti-SLAPP analysis was satisfied because the plaintiff's claims stemmed from publication and distribution of expressive photographs).

While Appellee provides a great deal of table-pounding about how this suit is *really* based on fraudulent conduct, courts look at the conduct on which a complaint premises liability, not what the cause of action is called or how the plaintiff tries to characterize it. *See, e.g., In Re Episcopal Church Cases*., 45 Cal. 4th 467, 477 (2009) (finding that first prong inquiry turns on the "gravamen or principal thrust" of the plaintiff's claims, not what the cause of action is called). The complaint premises liability on the distribution of artistic works, and distribution of artistic works is protected under the Anti-SLAPP statute. The analysis is that simple, and the first requirement of the prong one showing is satisfied.

Appellee does not contest that Mr. Coker's conduct took place on a public forum, and thus the second requirement of the prong one showing is also met.

To satisfy his burden under the first prong, Mr. Coker provided a declaration showing that he distributed allegedly fraudulent pieces of artwork believing they were lawful and believing he had the right to distribute such works. Neither the district court nor Appellee at any point explained how this declaration was inadequate to make his showing that his communications were made in good faith. Appellee at no point objected to Mr. Coker's declaration, and Appellee provided no admissible controverting evidence. The evidentiary record regarding Mr. Coker's good faith is thus as follows:

- Mr. Coker: A sworn declaration stating his conduct was in good faith.
- Appellee: Nothing.

Mr. Coker made a sufficient evidentiary showing that his statements were either truthful or made in good faith. He thus satisfied his burden under the Anti-SLAPP statute, and the district court should have then evaluated whether Appellee made a sufficient evidentiary showing on the merits of his claims.

Appellee attempts to argue that applying Nevada's Anti-SLAPP statute to the distribution of expressive artwork is somehow contrary to the purpose of the statute, turning to its legislative history since its plain language fails Appellee. But this argument makes no sense. Of course the legislature would speak of 1997 version of the statute in terms of participation in government and the right to petition; *the 1997 version only applied to petitioning activity*. It is misleading to claim this record has

any bearing on the issue before the Court, since the 2013 version of the statute drastically broadened its scope to include statements on matters of public interest, and that broadened scope remained intact in the 2015 revision. Furthermore, while Appellee implies at a few points that there are limitations on First Amendment protections afforded to commercial speech, he provides no argument as to how Mr. Coker's speech is commercial, rather than purely expressive. Even if Mr. Coker's speech were commercial, there is no explanation of how it would be outside the very broad category of expression that prong one of the Anti-SLAPP statute encompasses, particularly since Nevada's Anti-SLAPP statute does not have an exception for commercial speech.

CONCLUSION

Appellee's claims are based on the distribution of artistic, expressive works. This is protected conduct under the Anti-SLAPP statute. Mr. Coker engaged in this conduct in good faith, reasonably believing he had the right to distribute the works of art in question. Appellee provided nothing to controvert Mr. Coker's showing, and so the Court must decide, *de novo*, that Mr. Coker satisfied his burden under the first prong of the Anti-SLAPP statute's analysis. The case should then be either remanded with the first prong satisfied, and the trial court should then evaluate the second prong, or the Court should review the existing record and make the second

prong determination as it did in *Panicaro v. Crowley*, 2017 Nev. App. Unpub. LEXIS 4, *4-5 (Jan. 5, 2017).

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RULE 28.2 CERTIFICATION

1. The undersigned has read the following reply brief of Defendant/ Appellant Darrell T. Coker;

2. To the best of the undersigned's knowledge, information and belief, the brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

3. The following brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e) that every assertion in the brief regarding matters in the record be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found; and,

4. The brief complies with the formatting requirements of Rule 32(a)(4)-(6) and the type-volume limitations stated in Rule 32(a)(7). Specifically, the brief was written in 14-Point Times New Roman font, and the brief is 2,504 words as counted by Microsoft Word.

Dated: July 5, 2018.

/s/ Marc J. Randazza
Marc J. Randazza

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this foregoing document was electronically filed on this 5th day of July 2018, and served via the Supreme Court of Nevada's eFlex electronic filing system to:

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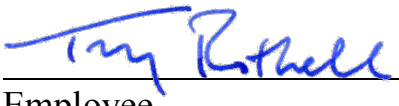

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