IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES TAYLOR; NEVADA GAMING CONTROL BOARD; AND AMERICAN GAMING ASSOCIATION, Appellants/Cross-Respondents, vs. DR. NICHOLAS G. COLON, Respondent/Cross-Appellant.	**Supreme Court No. 78517** District Court Case No. A-18-767[illegible]

Cross-Appellant's Response to this Court's Order to Show Cause

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I. FACTS

Attached as exhibit 1 is the Plaintiff's Opposition to Defendants' Special Motion to Dismiss. Attached as exhibit 2 is the Plaintiff's supplemental authorities to the preceding document. Within the Motion, ex. 1, pp. 14-20, Plaintiff expressly argues, with authority, that he should not be subjected to the process or even a decision under Nevada's anti-slapp legislation under the title, "Nevada's Anti-Slapp Statute is Unconstitutional as it Violates Plaintiff's Right to Trial by Jury. Id at 14. Exhibit 2 sets forth additional authority from two sister states, Minnesota and Washington, finding analogous anti-slapp statutes unconstitutional for reasons similar to those argued by the Plaintiff.

The order on appeal, the Decision and Order of the District Court, ex. 3, determines, "Nevada's Anti-Slapp Statute Does Not Violate the Right to a Trial by

Jury." Ex. 3, pp. 4-5. Plaintiff appealed this order. Notice of Cross-Appeal, ex. 4. Thus, the Decision and Order before this Court denies Plaintiff relief expressly requested, to wit: The ability to prosecute his defamation action without being subjected to Nevada's Anti-Slapp statute. Further, the basis for the request, a claimed invalidity due to a prohibition provided in Nev. Const. Art. 1, § 3 ("The right of trial by Jury shall be secured to all and remain inviolate forever . . .") has never been addressed in this Court.

II. ANALYSIS

There were two issues presented in the District Court, to wit: 1) Can a Plaintiff be subjected to a Defendant's motion requesting relief under the anti-slapp statutes (i.e., is NRS 41.635 *et seq.* valid law?); and 2) Did the Defendants show a right to relief under the application of these same statutes? Plaintiff clearly argued that he could not be subjected to the Defendant's motion, raising the unconstitutionality of NRS 41.635 *et seq.* Ex. 1, pp. 14-20. The relief requested (the invalidity of NRS 41.635) was expressly denied. Ex. 3, pp. 4-5.

A. PLAINTIFF IS AN AGGRIEVED PARTY UNDER THE DISTRICT COURT'S ORDER

The question posed in the Order to Show Cause is: 'Was the Plaintiff an aggrieved party under the order on appeal?' This Court apparently questions that status on the premise that plaintiff's action was not dismissed, and therefore, he is a prevailing party and not an aggrieved party.

Obviously, the two issues before the district court are entirely disparate, and must stand on their independent merits. Having prevailed in showing that Defendants failed to meet their burden, and having failed to extricate itself from the anti-slapp proceeding due to a lack of legal effect to the anti-slapp statutes, Plaintiff is both a prevailing party and an aggrieved party under the Decision and Order. Indeed, there is no meaningful distinction between Plaintiff and Defendants here, as the Defendants prevailed on the issue of the constitutionality of the anti-slapp statutes.

This matter finds itself before this Court under NRS 41.670, providing in relevant part: "4. If the court denies the special motion to dismiss filed pursuant to NRS 41.660, an interlocutory appeal lies to the Supreme Court." If an appeal lies, then the person against whom the appeal is brought has the ability to bring a cross-appeal. NRAP 4(a)(2). Plaintiff continues to suffer under the strictures of NRS 41.635 *et seq.*, even in addressing this appeal. The Decision and Order says the Plaintiff loses on a central independent issue that directly affects Plaintiff's rights in this matter in both the district court and this Court. The Decision and Order renders Plaintiff an aggrieved party for purposes of appeal.

Moreover, Plaintiff meets the test of appealability under the very rule from *Ford v. Showboat Operating Co.*, 110 Nev. 752, 877 P.2d 546 (1994). The Court notes that *Ford* provides that "A party who prevails in the district court and who

does not wish to alter any rights of the parties arising from the judgment is not *aggrieved by the judgment*." (Emphasis in Order to Show Cause). But the Plaintiff seeks to alter the rights of the parties arising from the judgment, and meets the test from *Ford.* For example, a right that Defendants can assert arising from the judgment is a right to have Plaintiff's claims dismissed on remand on appeal should they succeed. Contrarywise, a determination in Plaintiff's favor on the constitutional issue entirely destroys the Defendants' right to process, forward, or even maintain rights under NRS 41.635 *et seq.*, in this Court or the court below. Plaintiff absolutely seeks to alter Defendants' rights under the Decision and Order, to the point where the Decision and Order becomes moot for all purposes, inclusive of the right to appeal or future rights under future rulings on the anti-slapp statute by the district court. Plaintiff is an aggrieved party under the Decision and Order, and properly cross-appeals against the Defendants' appeal.

From yet another perspective, assuming Plaintiff is correct and Nevada's anti-slapp statute is unconstitutional, the following provides real aggrievements suffered by Plaintiff caused by the District Court's decision upholding the constitutionality of the statutes. First, Plaintiff is forced to go through the expensive process of presenting to this Court an analysis of the application of a statutory scheme to which, as a matter of law, Plaintiff should not have to undertake. That is, if the anti-slapp statutes are unconstitutional, Plaintiff is being

put to the task of responding to an appeal which, as a matter of law, could not exist. Should Defendants succeed on their appeal and this Court elect to not determine the constitutionality issue,[1] Plaintiff will suffer a dismissal under statutes which are unconstitutional. Clearly, this is prejudicial and reliant upon the Decision and Order of the district court. In finding the anti-slapp statutes constitutional, Plaintiff is aggrieved by the Decision and Order of the District Court, and the cross-appeal is proper.

Secondly, in terms of practical effect, Plaintiff has been aggrieved in the scope of his argument as to the constitutionality of Nevada's anti-slapp statutes should he be limited to only raising it as a counter-argument to Defendants' appeal, and not an appealable determination by the district court. On appeal Plaintiff would be entitled to file an opening brief on the issue and a reply.[2] As constituted should the perspective in the Order to Show Cause prevail, Plaintiff is only entitled to file an opposition raising the issue, and has no response to the Defendants' arguments attempting to support the constitutionality of the statutes. Clearly, the loss of the ability to respond to any arguments regarding the constitutionality of the statutes

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[1] This appears to be a possibility when merely approaching the constitutional issue as an argument rather than a determination of a properly filed appeal.

[2] As an aside, this is an issue of first impression in Nevada where two other State supreme courts have held contrary to the decision of the District Court here. It would seem that the Court should assure full briefing in accord with appeals on this issue, and not limit Plaintiff to truncated briefing under a disputed procedural quirk in how this matter is presented to the Court.

aggrieves the Plaintiff and renders Plaintiff an aggrieved party under the Decision and Order.[3]

Why is this important? The facts in *Ford*, while confusing, appear to allow for an uncovered possibility in this case. Under the case overruled by *Ford*, *Alamo Irrigation Co. v. United States*, 81 Nev. 390, 404 P.2d 5 (1965), if the lower court makes a ruling against a party, that ruling is reviewable only by cross-appeal. Under *Ford*, a party against whom an appeal is brought may raise issues argued below if they are **not an aggrieved party**. Left open is the question of whether an issue can be raised in defense of the appeal if the respondent **is an aggrieved party** in the court below, but does not appeal the order under which he suffered the prejudice.

The *Ford* ruling states, "a litigant who is **not an aggrieved party** by a judgment need not appeal from the judgment in order to raise argument in support of the judgment not necessarily accepted by the district court." (Emphasis added). In contradistinction, what is the rule regarding cross-appealing by a party who **is an aggrieved party** under a judgment. This question is not answered by either *Ford*, while *Alamo* seems to hold that an appeal must be taken. As a question not answered by *Ford*, presumably *Alamo* would continue to apply, and the only way

[3] While this burden is not of extreme moment, it is of some moment, and the rules merely require that the cross-appellant show that it is aggrieved by the lower court order, and the level of the materiality of the burden shown does not enter into the calculation.

Plaintiff can assure that his argument as to the unconstitutionality of the anti-slapp statutes can be preserved is to file a cross-appeal. Plaintiff has shown how he has been aggrieved by the Decision and Order on the issue of the constitutionality of NRS 41.635 *et seq.* Absent filing the cross-appeal, Plaintiff remained at risk of losing his right to argue the issue in this matter (which, itself, would render Plaintiff an aggrieved party).

B. A RULE STATED FROM *FORD* IN THE ORDER TO SHOW CAUSE DOES NOT APPLY TO THIS CASE

The Order to Show Cause states that "no appeal may be taken from the district court's conclusions of law." Order to Show Cause, p. 1, ¶ 2. As authority for this proposition, the Order to Show Cause cites to *Ford v. Showboat Operating Co.*, 110 Nev. 752, 877 P.2d 546 (1994). *Id.* With all due respect to the Court, this statement, in context, is contrary to the concept of an appeal and is not supported by the citation to *Ford.*

Presumably the Court was relying upon language explained footnote 2 in *Ford*, and the footnote actually holds a decision premised upon an error of law is appealable. The distinction appears to be that the Court recognized that a decision or order must be appealed, and neither a "finding of fact" **or** a "conclusion of law" is appealable. The issue appears to arise because, as the Court noted, an appeal, "must be from a statutorily designated order or judgment," and the party in *Ford* actually appealed from a "conclusion of law" and not an order or judgment.

Contrarywise, here the Plaintiff expressly appealed from the "Order." Ex. 4. This portion of the Order to Show Cause has no application to the current issues.

As to being contrary to the concept of an appeal, erroneous conclusions of law have always supported an appeal from a decision or order argued to be in error on an appeal. Indeed, when, on appeal, when it is shown that the lower court relied upon an erroneous conclusion of law, this Court does not hesitate to take up the appeal and reverse the lower court. *See Rand Props., LLC v. Filippini*, No. 66933, 2016 Nev. Unpub. LEXIS 255, at *4 (Apr. 21, 2016)("We conclude that the district court erred by relying on an erroneous conclusion of law to establish Rand's priority date."); *Geissel v. Galbraith*, 105 Nev. 101, 104, 769 P.2d 1294, 1296 (1989); *Chi. Title Agency v. Schwartz*, 109 Nev. 415, 416, 851 P.2d 419, 420 (1993)("[T]he district court erred as a matter of law . . .."). In the context of appealable issues, conclusions of law are fully justiciable in the Supreme Court so long as the appeal is from an appealable order or judgment and the error is the challenged part of the order or judgment.

Or, bringing this home, if the District Court had made a 'conclusion of law' that knowledge that the statement is false is irrelevant to the application of the anti-slapp bar to a plaintiff's ability to pursue a defamation case,' could it be concluded that this conclusion is unappealable as the Court appears to state? Obviously, this would be a conclusion of law at variance with NRS 41.637 and would be an

erroneous conclusion of law on its face. Certainly, orders and decisions may be appealed on the basis that the lower court committed error in its determination of the law.

III. CONCLUSION

For the reasons set forth above, Plaintiff requests that this Court determine that Plaintiff has adequately responded to the Court's Order to Show Cause, and allow the Plaintiff's Cross-Appeal to stand and be determined in accord with the rules for cross-appeals.

Dated this 26th day of July, 2019.

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CERTIFICATE OF SERVICE

I certify that on the 26th day of July, 2019, I served a copy of this Cross-Appellant's Response to this Court's Order to Show Cause upon all counsel of record:

☐ By personally serving it upon him/her; or

☒ By electronic service in accordance with the Court's Master Service List as follows:

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EXHIBIT 1

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DISTRICT COURT

CLARK COUNTY, NEVADA

DR. NICHOLAS G. COLON, PLAINTIFF, vs. JAMES TAYLOR, NEVADA GAMING CONTROL BOARD, AMERICAN GAMING ASSOCIATION, AND DOES I-XX, DEFENDANTS.	Case No. A-18-782057-C Dept. No. 29 Date of Hearing: 12/20/18 Time of Hearing: 9:00 a.m.

PLAINTIFF'S OPPOSITION TO DEFENDANTS' SPECIAL MOTION TO DISMISS

NOW COMES Plaintiff and herewith opposes the Special Motion to Dismiss brought by James Taylor and the Nevada Gaming Control Board, together with the joinder of the American Gaming Association. This Opposition is based on the pleadings and papers on file to date, the attachments hereto, the separately filed Declaration of Nicholas Colon, the following Memorandum of Points and Authorities, and any oral argument the Court deems pertinent.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants likely revel in the existence of the anti-slapp legislation under which they bring the current motion. From their perspective it immunizes their public communications in

functionally all aspects due to their "public" nature by definition. The mantra of immunity is so ingrained that they continue to spout hyperbole and irrelevancies concerning its application, and come before the Court assuming that they cannot be stripped of its protections. For example, here they state, as they have likely done every time one of their ilk has defamed a citizen, that as Nevada's anti-slapp statute is "relatively new," Nevada courts are to look to the much more ancient practice from California in applying anti-slapp strictures. Defendant's Brief, p. 6: 11-14. In truth, there are over twenty published appellate decisions (Lexis) construing Nevada's anti-slapp statutes, and the statutes themselves are now a quarter-century old. More to the point, California's anti-slapp statute predates Nevada's by a single year, and obviously, this similarity in duration does not give California's anti-slapp decisions any special provenance. Nonetheless, in championing the anti-slapp legislation, Defendants are willing to engage in hyperbole and outright unwarranted exaggeration as to its efficacy and application.

With the confidence engendered by its historic use against victims of slander, the Defendants seem to have overlooked certain aspects of the current litigation. Pointedly, the evidence accompanying this response will show that James Taylor, the deputy chief of the Enforcement Division of the Nevada Gaming Control Board ("Board"), told an audience of three-hundred people (Defendants' Brief, p. 4: 8) that the Plaintiff was a cheater and a criminal, and most importantly, when he did this, he knew that the Plaintiff was neither a cheater nor a criminal. Despite Defendant's lengthy brief, and the following in depth points and authorities, the bottom line under the anti-slapp legislation is that it does not apply when the Defendant knowingly makes false statements concerning the Plaintiff, and that is what James Taylor, in the employ of the Board and forwarding its interests, did in this case. There is no immunity.

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II. FACTS

A. DEFENDANT, JAMES TAYLOR'S PRESENTATION

Defendant, James Taylor ("Taylor"), holds himself out as an expert on casino cheating, and provided a presentation at the 2017 G2E on the subject. Defendants' Motion, Exhibit A, ¶ 5.[1] He is an employee of the Nevada Gaming Control Board Enforcement Division ("Board"), holding the position of Deputy Chief of Enforcement. Id at exhibit A, ¶1. He has worked for the Board for twenty-three years. Id. His mission in this position is to "conduct criminal . . . investigations . . . in gaming related activities." Id at ¶ 3.

Taylor was a presenter at the 2017 G2E. G2E holds itself out as the "world's premier international gaming trade show and education" forum. <http://www.globalgamingexpo.com/Press/Show-Press-Releases/Business-Numbers-Boom-at-Global-Gaming-Expo-2018/> viewed 12/15/18. His presentation was entitled "Scams, Cheats and Blacklists." He obviously spoke as an expert on the subject. Id, and see Plaintiff's declaration ("Pl. Dec.") filed herewith, ¶ 51, and Defendant's Brief, ex. A, ¶ 7 (Defendant, Taylor's seventh presentation at G2E).

In his presentation, Taylor showed a photo and a video of the Plaintiff which he alleges did not show the Plaintiff's face, but did show his play at the table. Plaintiff was recognizable from this presentation. See Exhibit 1, and Affidavit of Richard Jacobs, exhibit 2. Plaintiff was also well-known to a large swath of the audience, and enough of Plaintiff was shown that he was identifiable. See Pl. Dec. ¶ 54, and exhibit 1. This presentation labeled the person in the photo, Plaintiff, as a cheater and as someone criminally using a device in violation of NRS 465.075. Defendants' Brief, passim, Affidavit of Richard Jacobs, and Pl. Dec. ¶¶ 55-58.

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[1] All references to Defendants' Motion provide admissible evidence as non-hearsay party admissions. See NRS 51.035(3)(a); United States v. Ganadonegro, 854 F. Supp. 2d 1088, 1119 (D.N.M. 2012).

With these facts, there is also a glaring omission in the facts presented by the Defendants concerning the knowledge and beliefs of James Taylor concerning the tally counter pictured in Defendants' exhibit B. Throughout their brief the Defendants continuously refer to this tally counter as a device which is violative of NRS 465.075. First, to run afoul of the statute and be criminal, the perpetrator must "use, possess with the intent to use or assist another person in using or possessing with the intent to use any . . . mechanical device . . . which is designed, constructed, altered or programmed to obtain an advantage at playing." Id. That is, simply, the device must have been used or intended to be used, for the proscribed purposes prior to running afoul of the statute. As noted in the attachments, the device at issue: 1) Could not be used to an advantage at blackjack, 2) was not used by Plaintiff to an advantage at blackjack, and 3) had Defendants presented the entire video in their possession, considering the foregoing and Plaintiff's current knowledge, it should be obvious that there was no basis upon which to accuse Plaintiff of using the device[2] as stated by Defendant, Taylor. Affidavit of Eliot Jacobson, ex. 2, Affidavit of Michael Aponte, ex. 3, Pl. Dec. ¶¶ 29-31.

Also, while the Defendants claim they can skirt the defamation through equivocation as to their statements, one need only look to the Defendants' brief to see defamation per se provided the Plaintiff was not using a prohibited device at blackjack and was not cheating. At Defendants' Brief, p. 4: 17, Defendants acknowledge that while Plaintiff was being discussed, his picture shown, his arrest described, and a video of him played, Defendant, Taylor, presented

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[2] It is obvious that Defendant, Taylor, critically reviewed the entirety of the footage. For the purposes of his presentation, it could also be assumed that he chose the single most damaging screen shot and short video clip on an hour long video, and per Defendants' Exhibit B, p. 4, Plaintiff is using nothing. The only video was provided is of Plaintiff leaving, and the hour of play which would show that Plaintiff never used anything other than his mind is missing here, at the G2E presentation, and from the discovery provided in the criminal matter (from which even this nine second video was withheld). These exist and exist in Defendants' files. Accord NGCBR Surveillance Standards 2, 3, and 12.

the section of his presentation entitled: "Use of a cheating device," and also listed an express criminal statute. Per Plaintiff's declaration that he was not cheating and the other evidence that he could not be cheating, this presents a publication sufficient to per se defame the Plaintiff.

While Defendant, Taylor, bandies about the conclusory statements in his brief and at the G2E presentation that the tally counter violates NRS 465.075, he does not, and never has, particularized or explained how the device was so used or intended to be so used, and more importantly here, never explained to the G2E audience and never explains to this Court how the device could be used "to obtain an advantage at playing." The absence of this fact is so glaring and critical to the analysis that its absence presents strong, if not determinative, evidence that James Taylor has known that the device could not be so used, and in representing that it was an offending device, he has knowingly falsely published Plaintiff as a cheat and a criminal.

B. CARD COUNTING

The statements in the Defendants' Brief and Defendant, Taylor's, statements at G2E claim that Plaintiff was using the tally counter at a blackjack game at Green Valley Ranch in order to gain an advantage at the game by keeping track of cards (i.e., card counting). Card counting is a process whereby a player constructs his wagering strategy applying the variables offered by the progress of a game of blackjack through the available cards to be dealt. *See* "Professional Blackjack," Stanford Wong (Pi Yee Press 1975, rev. 1994). A deck heavy in aces and tens provides a savvy player an advantage in both an increased propensity for the dealer's hand to be disqualified from consideration (through a 'bust'), and an increased payoff to the player vis a vis the patron through the higher likelihood of a 'blackjack,' which only pays the casino 1 to 1, but pays the player 3 to 2. Id. "Blackjack and the Law," Rose & Loeb (RGE Press, 1998), "Beyond Counting," James Grosjean (RGE Press 2000), "The Blackjack Zone," Elliot Jacobson (Blue Point Books 2005), and "The Law for Gamblers" Robert A. Nersesian

(Huntington Press, 2016), accord Ziglin v. Players MH, L.P., 36 S.W.3d 786, 788 (Mo. Ct. App. 2001). In short, it is smart or skilled play at a game of mixed chance and skill, and it would be logically inconsistent to criminalize an activity which rewards the diligent and punishes the dilatory. See discussion below.

Card counting is indisputably an entirely legal activity. Lyons v. State, 775 P.2d 219, 221 (Nev. 1989); Tsao v. Desert Palace, Inc., 698 F.3d 1128, 1131 (9th Cir. 2012); Carey v. Nev. Gaming Control Bd., 279 F.3d 873, 876 (9th Cir. 2002) ("legal strategy"); Grosch v. Tunica County, 2009 U.S. Dist. LEXIS 4966, *2 (N.D. Miss. 2009); Donovan v. Grand Victoria Casino & Resort, L.P., 934 N.E.2d 1111, 1119 (Ind. 2010);; Uston v. Resorts International Hotel, Inc., 445 A.2d 370 (N.J. 1982); Hoagburg v. Harrah's Marina Hotel Casino, 585 F. Supp. 1167, 1170 (D.N.J. 1984)("Card counting is not a crime."); Bartolo v. Boardwalk Regency Hotel Casino, 449 A.2d 1339 (N.J. Supr. 1982); Blackjack and the Law, I. Nelson Rose. & Robert A. Loeb (RGE Press 1998); Gambling and the Law, I. Nelson Rose, Chap. 15 (Gambling Times, Inc. 1986)(Assumed in the analysis); Advantage Play and Commercial Casinos, Anthony Cabot and Robert Hannum, (Miss. Law. Journal, vol. 74, p. 376 (2005); accord Ziglin v. Players MH, L.P., 36 S.W.3d 786, 788, n.1 (Mo. Ct. App. 2001). The complaint of casinos against the practice can be summed up as hatred for the practice because the purveyors of the system are, simply, better at the game than the casinos.

In order to undertake successful card counting, all systems apply a +/- strategy assigning values to all cards as they are dealt, and requires a running count of this summation at any given point in time to determine if the remaining cards provide a favorable condition for the player to wager, and at that point, the player increases his wagers substantially. That is, when the running count is not in favor of the player, the player plays small money, but if the cards remaining in the deck or shoe turn in the player's favor, the player can capitalize on this and increase his

wagers to a point where the overall game becomes favorable to the player. An example showing the values from the book "Beyond Counting"[3] is attached as exhibit 4, and shows the values to be ascribed to the cards as dealt by the top eighteen card counting systems in use. The one immutable characteristic of card counting is that it requires constant, fast, and running addition **and subtraction** throughout its implementation. Discussion and citatins, supra, and id.

C. THE ACTUAL TOOL

The tally counter at issue does one thing, and one thing only. It keeps track in single units (ones) of an ascending series of numbers. Its use is for counting people, and indeed, that is what the Plaintiff used it for in his work and why it was on his key chain. Pl. Dec. ¶¶ 32-34. Every time the button at the top is pushed, the display goes up by one. It is only useful in crowd counting or anything else if the number is actually looked at and registered with the user. The wheel on the side sweeps off the display number and zeros out the machine.

Considering the various types of card-counting, one thing is certain. The tally counter at issue cannot be used to gain an advantage at blackjack. Simply, it's missing a critical parameter prerequisite to it providing a benefit to the card-counter. That is, **it cannot subtract**.[4] This explains why Defendant, Taylor, did not, does not, and cannot explain to this court, to the District Attorney, or to his audience at G2E how the tally counter could be used by Plaintiff as a prohibited device or a cheating device. Indeed, attached hereto as exhibits 2 and 3 are the affidavits of Michael Aponte and Eliot Jacobson, two qualified gaming experts.[5] They each

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[3] *James Grosjean*, (RGE Press, 2000)

[4] Note that even after the running total of plusses and minuses is applied, the card-counter must still undertake additional mathematical calculations based on the number of decks being dealt, commonly and the number of aces which have been dealt (each of which would be untracked on the tally counter).

[5] For qualifications beyond those set forth in their declarations, an internet search of either Mr. Aponte or Mr. Jacobson will disclose a wealth for further qualifications. By their affidavits,

provide the opinion of a qualified gaming expert with analysis as to why the crowd-counter at issue could not hold the character that Defendant, Taylor, ascribes to it. And note, neither Taylor nor the Board, ever provides this court with an expert opinion as to how the tally counter could be so used. Simply, Defendant, Taylor, provided his audience at G2E, and provides this Court, with a song-and-dance of no import to support his public statements indicting the Plaintiff for being a cheater and a device using criminal. And as the State's premier expert on cheating on gaming, he must know the falseness of his presentations.

C. THE PLAINTIFF AND HIS ACTIVITIES

Plaintiff was playing blackjack at Green Valley Ranch. He had a tally counter on his keychain as otherwise explained herein. He was card counting. Pl. Dec. ¶ 14. He was not using the tool. Pl. Dec. ¶¶ 30-34.

D. THE ANAMOLOUS AND ILLEGAL PROSECUTION OF THE PLAINTIFF

The Defendants admit that they were in possession of video of the Plaintiff's activities at Green Valley Ranch at all relevant times. Plaintiff maintains that this video would show that he never used or intended to use the tally counter in the game of blackjack. Pl. Dec. ¶ 43. To date, no one has seen this video save for the Defendants, and the Defendants conspicuously do not attach it as an exhibit or lodge it with the Court in demonstration of Plaintiff's alleged illegal activities. Yet, they definitely have it. Defendants' Brief, p. 4. In accord with the Plaintiff's recollection, and considering these facts, it is strongly indicated that the video of events concerning Plaintiff at Green Valley Ranch are determinatively exculpatory.

More critically, nonetheless, Plaintiff requested, and was allegedly provided, discovery in the criminal processing of the felony charges against him. The discovery provided is attached

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each have also worked for state agencies at the level of the Board as gaming experts. They are each eminently qualified to provide the opinions stated.

to Plaintiff's declaration. Glaringly absent from this discovery, despite an express request therefor, is the very video which Defendants withhold from this Court and which Defendants were legally obligated to provide to the Plaintiff under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Pl. Dec. ¶¶ 39-43. "Evidence of secreting evidence is evidence of consciousness of guilt." Davis v. Stephens, No. H-12-2919, 2013 U.S. Dist. LEXIS 175086, at *38 (S.D. Tex. Dec. 11, 2013)(Adopting trial court ruling.). In this sense, the failure to provide the videos in the criminal discovery and withholding them from this motion are direct evidence of Defendant, Taylor's knowledge that the Plaintiff did not use the tally counter as proscribed and did not cheat.

Moreover, one of the facts offered by the Defendants must be stricken, and its use is of such a level as to call into question the entire motion. In his affidavit at ¶ 11, Taylor avers, "I also have knowledge that Mr. Colon had pled to a lesser crime in exchange for dismissal of those charges." Defendant's Brief, ex. A, ¶ 11. The plea was expressly a nolo contendere plea in exchange for a dismissal, not a guilty verdict, and all claims against Dr. Colon were dismissed. "Evidence of a plea of nolo contendere or of an offer to plead nolo contendere to . . . any . . . crime is not admissible in a civil . . . proceeding involving the person who made the plea or offer." NRS 48.125.

For explanation on this point only, and not as evidence upon which the determination of Defendant's motion turns, the plea and criminal disposition of the charges is attached hereto as exhibit 5. As noted, all charges were "dismissed" concerning Dr. Colon. Further, this record was pulled from the Henderson Justice Court's web site last week, and obviously, Taylor's protestation in his affidavit at ¶ 12 is false, with the affidavit thereby adding false statements to the prohibited statements Taylor presents with his motion. There are few tactics of an attorney more tied to the denial of justice than offering up inadmissible evidence to taint a trier of fact's

determination, and here that is what the Defendants did, apparently in the hope of illegitimately ringing a bell which cannot be un-rung. Nonetheless, while the disposition of the charges might be admissible (e.g., guilty, not guilty, or dismissed), offering the plea is absolutely prohibited. The only cognizable evidence from the charges against Plaintiff, therefore, are that they were dismissed, and this is further evidence of the falseness of Defendants' statements. Moreover, as this disposition was available and pre-dated Defendants' statements by weeks, clearly there is added weight to the claim that Defendants knew the statements that Plaintiff was a criminal and that Plaintiff was cheating were false when made, and thusly foreclose an anti-slapp defense in this proceeding.

III. ANALYSIS

A. UNDER THE EVIDENCE, DISMISSAL PER THE ANIT-SLAPP STATUTE IS FORECLOSED

Nevada applies the common law as the rule of decision in all its courts. NRS 1.030. Nevada's anti-slapp statutes, NRS 41.635 et seq, are clearly enacted at variance with the common law, and restrain access to courts historically available to those injured by defamatory statements of others. "[A] statute at variance with the common law must be strictly construed." Grimmett v. State, 476 S.W.2d 217, 221 (Ark. 1972); Bodle v. Chenango Cty. Mut. Ins. Co., 2 N.Y. 53, 56 (1848); Monitronics Int'l, Inc. v. Veasley, 323 Ga. App. 126, 137, 746 S.E.2d 793, 803 (2013).

Parsing out the anti-slapp statute, the clear import provides a number of hurdles to the granting of such a motion. The primary and absolute prerequisite to granting relief under the statute is that the communication must be a "good faith communication." See NRS 41.637. If it is not a "good faith communication," all other inquiries end, and there is no relief for the person raising the anti-slapp defense. That is, the anti-slapp immunity solely extends to good faith communications. See NRS 41.650. Under this statute only a communication which is "truthful

or is made without knowledge of its falsehood" can qualify as a good faith communication, and correlatively, gain immunity from the Plaintiff's prosecution. NRS 41.650. Thus, once the Plaintiff shows that the Defendants do not prove by a preponderance of the evidence that the Defendant did not know of the falseness of the representations, or the Plaintiff proves by a preponderance of the evidence submitted on the motion, that the defendant did know of the falsity of the communication, any argument for application of the anti-slapp statute is gone. See NRS 41.660(3)(a).

Here the evidence shows overwhelmingly that Taylor and the Board each knew of the falsity of the following communications:

1) Plaintiff was caught cheating;

2) Plaintiff possessed and used a device which was criminally proscribed under NRS NRS 41.637

The Board's Enforcement Divisions mission statement is spelled out on the Board's website, and it provides in total:

> The Enforcement Division is the law enforcement arm of the Gaming Control Board. It maintains five offices statewide and operates 24 hours a day, 7 days a week. **Primary responsibilities are to conduct criminal** and regulatory investigations, arbitrate disputes between patrons and licensees, gather intelligence on organized criminal groups involved in gaming related activities, make recommendations on potential candidates for the "List of Excluded Persons", conduct background investigations on work card applicants, and inspect and approve new games, surveillance systems, chips and tokens, charitable lotteries and bingo.

(Emphasis added). That is, the first and foremost responsibility noted by the Enforcement Division is to conduct criminal investigations. Further, in undertaking these responsibilities, the Nevada legislature has designated the agents of the Enforcement Division the status of peace officers charged with enforcing NRS Chapter 465 regarding cheating and use of devices. NRS 289.360

Taylor is a chief within this organization. He is of such a stature as to be the person designated to present the Board's perspectives at G2E for 2017 on the issues of cheating at gambling. He is, in short, the preeminent gaming body in the country's (the Board's) expert on cheating. It is thusly axiomatic that he holds a position as one of the persons most knowledgeable, if not the person most knowledgeable, in the entire State regarding the parameters of cheating and use of devices. Minimally, he would be familiar with the same conclusions (that the tally counter at issue could not provide an advantage in card counting) proffered by two other state consultants on gaming, to wit: Jacobson and Aponte.

Conspicuously absent in his papers filed on this motion is any cogent description of how the device from which he claimed Plaintiff was legitimately arrested at G2E could be used in violation of the device statute, NRS 465.075, in the play of blackjack. Plaintiff, however, provides three experts (himself, Aponte, and Jacobson) who all aver that the device at issue could not be used for such a proscribed purpose. See Plaintiff's Declaration, ¶¶ 30-32, Jacobson Declaration, ex. 2, and Aponte Declaration, ex. 3. It strains credulity to conclude that the very person charged with investigating and enforcing device crimes would not know the limits and parameters of that which could be used as a device in violation of NRS 465.075. His mere status shows that he would and did, and his repeat presentations as an expert at G2E on cheating also confirm that Defendant, Taylor, knew at the time he first reviewed the evidence, knew during the prosecution of the Plaintiff, knew during his presentation at G2E, and knows today that the Plaintiff was neither a cheater nor a criminal. Yet, Plaintiff's guilt was part of his message giving rise to this litigation. The evidence shows, well beyond a preponderance, that the Defendants knew that the statements concerning Plaintiff were false when made.

But that is not all. As referenced above, Defendants secreted exculpatory evidence from the criminal proceedings against Plaintiff in violation of Plaintiff's constitutional protections.

Defendants continue to secret this exculpatory evidence even today, seeking to have these proceedings ended without ever producing the evidence. As noted, this is evidence of the Defendants' innocence, and the Defendants knew and know that the Plaintiff was not a cheater nor a criminal. That is the only explanation as to why the video was not produced in the criminal discovery and not produced with this motion.

Additional evidence that Taylor and the Board know of Plaintiff's innocence is found by a search of "card counting device" within Google Images at <https://www.google.com/search?rlz=1C1AVFC_enUS756US756&biw=1920&bih=969&tbm=isch&sa=1&ei=yQkXXKOBC9PF0PEP5LSNuAI&q=%22card+counting+device%22&oq=%22card+counting+device%22&gs_l=img.3..0i30j0i24.99638.101475..102396...0.0..0.88.173.2.....1....1..gws-wiz-img.....0.44e58c2t_vU> (viewed 12/16/18). There, in images totaling over 650, with many clearly showing cheating devices and devices which could be used to count cards, there is not a single image of a tally counter. Simply, this device cannot be used as the Defendants pretend to this Court.

For this Court to conclude that the Defendants did not know that the Plaintiff was not cheating and not illegally using a device, it is necessary to believe that this chief in the enforcement division did not understand the rudiments of card counting. That is not possible. For this Court to conclude that Defendants did not know that the Plaintiff was not cheating and not illegally using a device, some alternative rationale for withholding the exculpatory video from the criminal discovery must be shown, and the Defendants do not show it. Plaintiff's affidavit shows he was not cheating and not a criminal, and so labeling the Plaintiff fulfills the requirements of defamation per se. The affidavits of Plaintiff, Aponte, and Jacobson demonstrate that the communications by the Defendants were false. All the elements of Plaintiff's defamation claim are shown, and with the evidence here presented that Defendants

knew, and must have known, that they were false at the time made, the current motion is without basis and should be denied.

B. NEVADA'S ANTI-SLAPP STATUTE IS UNCONSTITUTIONAL AS IT VIOLATES PLAINTIFF'S RIGHT TO TRIAL BY JURY

Plaintiff posits that Nevada's anti-slapp legislation is unconstitutional in this case as an infringement on Plaintiff's right to trial by jury under Nev. Const. Art. 1, § 3. There do not appear to be any published cases addressing the constitutionality of the individual or collective constitutionality of these anti-slapp statutes, NRS41.635 et seq. An unpublished decision does find the statutes constitutional on challenges to their constitutionality under Nev. Const. Art. 3 § 1 (separation of powers), and USCS Const. Art. VI, Cl 2, but the issue of the guarantee of trial by jury was not at issue or discussed. Davis v. Parks, No. 61150, 2014 Nev. Unpub. LEXIS 651, at *3-6 (Apr. 23, 2014). Thus, this appears to be an issue of first impression.

1. THE NATURE OF PLAINTIFF'S CLAIM

Plaintiff brings a classic defamation claim stemming from an alleged defamation per se. The state has always recognized such claims under the common law as adopted and mandated by its constitution and NRS 1.030. See e.g. Thus, Plaintiff is before this court with a common-law civil claim (a tort today, and a trespass under nineteenth century nomenclature) which predates the anti-slapp statute by over a century.

2. THE LEGISLATION AT ISSUE

Plaintiff's action in the context of Defendants' motion raises the question of the constitutionality of NRS 41.660(3)(a), which provides that the Court is to "[d]etermine 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." (Emphasis added). In the context of determining whether a "good faith communication" is at issue, the Court is to determine,

among other things, whether the Defendant knew its communication was false. NRS 41.637, last sentence. Under NRS 41.660(3)(a), the Court is to make a factual determination on the evidence available as to whether or not a "good faith communication" was made, and a determinative factor absolutely foreclosing such a conclusion is whether or not, by a "preponderance of the evidence" the publisher of the communication knew, or did not know, of the falsity of the communication. Thus, under the statutes and especially in this case, the Court is charged with determining an integral part of the factual backdrop to the efficacy of the claim for defamation.

3. THE CONSTITUTIONAL RIGHT TO A TRIAL BY JURY IN NEVADA

On the adoption of the Nevada Constitution the State's founders provided the strongest possible language with respect to protecting the right to a trial by jury. They wrote, and the citizens adopted, language stating that the right to a trial by jury shall be "secured to all" and "inviolate forever." Nev. Const. Art. 1, § 3.

Early in its history this Court defined this right as encompassing the right as it existed at common law. State v. Mclear, 11 Nev. 39, 44 (1876), Hudson v. Las Vegas, 81 Nev. 677, 680 409 P.2d 245, 246-47 (1965). This rule continues in full force today.

The Nevada Supreme Court and other courts, including the United States Supreme Court, have delineated the secure area where a right to jury trial exists and is inviolate over the enactments of a legislature, and, as shown below, this case falls squarely within the ambit of cases where the right to a jury trial is inviolate. The rule in Nevada can be stated as follows: If at common law the action at issue was at law and triable to a jury, and corollary tribunals without juries did not exist for adjudicating the action without a jury, then the right to try the action to a jury in Nevada exists and is inviolate. State v. McLear, 11 Nev. 39, 44 (1876), Cheung v. Eighth Judicial District Court, 121 Nev. 867 (2005).

4. IN A HISTORIC CONTEXT THE INESTIMABLE RIGHT TO A TRIAL BY JURY MUST BE PROTECTED IN A CASE SUCH AS THIS

A glut of legislation, regulation and administrative agencies now relegates the determination of many legal issues and rights to the hands of government employees and judges arguably addressing the government's interests. Nevertheless, we remain a government of limited and delegated powers, and those powers reserved to the people or not delegated to the government remain with the people and outside the scope of government intrusion. *See* U.S. Const. Preamble and Nev. Const. Preamble ("We the People . . . establish . . ."), and U.S. Const. Amd. IX.

A right expressly reserved to the people in both the United States Constitution and in the Nevada Constitution is the right to trial by jury. U.S. Const. Amd. VII, and Nev. Const. Article 1 § 3 ("**Trial by jury: waiver in civil cases.** The right of trial by Jury shall be secured to all and remain inviolate forever . . ."). The Nevada Constitution contemplates and expressly includes civil cases in the constitutional right to a jury trial. See State v. McClear, 11 Nev. 39, 64 (Nev. 1876) ("Another feature of the right of trial by jury as guaranteed by the Constitution is deserving, in this connection, of a brief notice. This provision applies to civil as well as criminal cases.").

From where does this right arise and what is its importance? Evident in aboriginal societies and likely in pre-Western pagan societies as well, as a check against unbridled despotism, community councils comprised of peers determined matters of import with respect to the community. As this natural occurrence developed it found itself written into the laws that have been handed down to the present day. Beginning with the Magna Carta, our law's foundational documents time and again mention and secure the right to trial by jury. See

Magna Carta, §§ 39 and 52. As a check on its power and authority, governments, nonetheless, regularly seek to curtail, skirt, or even abolish the right.[6]

For example, one of the core attributes of the infamous Star Chamber was the lack of a trial by jury, and ancient Great Britain actually increased its original limited jurisdiction to swallow those cases which at the common law and under the Magna Carta provided the protection of the right to a trial by jury. It was against this, in part, that the people rebelled, creating a revolution and the repeal of the Star Chamber in 1641 and contributing to the rise of Cromwell and Parliament over unbridled monarchy. See Cromwell and Communism, Chapter IV, Eduard Bernstein (J.H.W. Dietz, 1895), English Translation, H.J. Stenning (George Allen & Unwin, 1930).

Still, Great Britain under its reconstituted monarchy later continued to attempt to curtail this right causing further revolution and discontent of its people, and in a context especially pertinent to American society, this fact was brought home. In the Declaration of Independence Thomas Jefferson provides a list of the grievances causing the United States to secede and ultimately the American Revolution. Express amongst this list is the following: "For depriving us in many cases, of the benefit of Trial by Jury." In short, our forefathers spilt blood to protect this very right.

The right then became ensconced as a basic civil liberty when it was adopted into the United States Constitution as the Seventh Amendment. As noted in the seminal constitutional commentaries, Justice Story wrote,

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[6] An excellent and thorough discussion on the history of the common law as related to the right to trial by jury appears in State v. Gannon, 52 A. 727, 734-39 (Conn. 1902). Although this discussion is an early review of 'jury nullification' arguments, the common law of England is set forth providing for a right to trial by jury in civil cases where the amount in dispute exceeds forty shillings. That would include this case.

> "[I]t is a most important and valuable amendment; and places upon the high ground of constitutional right the inestimable privilege of a trial by jury in civil cases, a privilege scarcely inferior to that in criminal cases, which is conceded by all to be essential to political and civil liberty."

J. Story, Commentaries on the Constitution of the United States, at p. 1762 (1883).[7] Yet, in 2007 the Nevada legislature passed legislation transferring a large swath of civil actions, including tournaments, to the exclusive jurisdiction of the Nevada Gaming Control Board. In short, the legislature attempted to circumvent this privilege that is "essential to political and civil liberty," and expressly preserved and inviolate under the Nevada constitution.

Admittedly, juries are expensive and trials can be messy and complicated. The results of the citizen's decision can be antithetical to the goals of the government. See Granfinanciera v. Nordberg, 492 U.S. 33, 63, 106 L. Ed. 2d 26, 54 (1989). Nevertheless, these are not concerns for the judicial branch of government in addressing the constitutionality of a matter. See id., and Ins v. Chadha, 462 U.S. 919, 944, (1983) ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary

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[7] See also Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 581, 108 L. Ed. 2d 519 (1990)(Justice Brennan concurring), stating relative to the right to trial by jury:

> What Blackstone described as "the glory of the English law" and "the most transcendent privilege which any subject can enjoy," 3 W. Blackstone, Commentaries, was crucial in the eyes of those who founded this country. The encroachment on civil jury trial by colonial administrators was a "deeply divisive issue in the years just preceding the outbreak of hostilities between the colonies and England," and all 13 States reinstituted the right after hostilities ensued. Wolfram, The Constitutional History of the Seventh Amendment, 57 Minn. L. Rev. 639, 654-655 (1973). "In fact, '[t]he right to trial by jury was probably the only one universally secured by the first American constitutions.'" Id., at 655 (quoting L. Levy, Freedom of Speech and Press in Early American History -- Legacy of Suppression 281 (1963 reprint)). Fear of a Federal Government that had not guaranteed jury trial in civil cases, voiced first at the Philadelphia Convention in 1787 and regularly during the ratification debates, was the concern that precipitated the maelstrom over the need for a bill of rights in the United States Constitution. Wolfram, supra, at 657-660.

objectives -- or the hallmarks -- of democratic government . . .").[8] Certainly, if Minutemen died to protect this right, it should not and cannot be jettisoned for expediency, convenience, or even for competing ideals of justice. In short, if the right to a trial by jury stated in the Nevada Constitution reaches the current matter, regardless of how inefficient that system may be and no matter the goals and the interests of the State, that right exists and must be preserved. To do less is to undermine a hallmark of a democratic government and breach the sacred trust the people put in the government when the right to trial by jury was reserved and preserved.

5. APPLICATION TO THE RIGHT TO TRIAL BY JURY IN THIS CASE

Plaintiff seeks relief on a claim fully cognizable at common law, the claim still exists under current law, and a right to a jury trial under the common law existed in 1864 (1776 for the federal government and some other states), then the plaintiff must be provided with the ability to try that claim before a jury. Defendants, nonetheless, seek to apply a statute which provides a law requiring that the claim be adjudicated summarily, and the burdens and weighing of evidence can be undertaken by the Court rather than a jury. This clearly invades the province of the jury in the historical context of defamation claims dating to the constitutes a sufficient alternative forum where the right to a jury trial does not exist.

Specifically, in this case the court is to make a determination by a preponderance concerning whether or not Plaintiff can prevail on the issue of whether or not Defendant,

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[8] In Chadha the United States Supreme Court addressed the congress' reservation of a future veto to legislation following its implementation. The Supreme Court recognized that there were compelling reasons of convenience and usefulness to such a provision and also noted that it had become ingrained in American law in over 200 acts and four decades. Nevertheless, because the practice violated the separation of powers infringing upon the president's ability to veto a repeal, in one fell swoop the constitution trumped the 200 extant laws and was found unconstitutional. It was apparently unimportant and not worthy of any legal weight that no one had presented or thought of the problem in the preceding half century. The Constitution, after all, is the law.

Taylor, knew that his statements were false. The Court will be required to weigh the affidavits of Aponte and Jacobson, will have to determine the impact of Defendant Taylor and the Board secreting evidence, and, simply, determine a myriad of facts classically left to a jury under Nevada's constitutionally protected system. These are all operations of the trier of fact, which, with the Plaintiff's jury demand in the original complaint, have always been an exclusive function of the jury. Nevada's anti-slapp statutes have transferred these functions to the judicial officer, taken them away from the jury, and in the event this Court were to determine that the within matter be dismissed, entirely obviated Plaintiff's constitutional guarantee under Nev. Const. Art. 1, § 3. As applied in the action at bar, Nevada's anti-slapp statute is unconstitutional.

III. CONCLUSION

For the reasons set forth above, Defendants' anti-slapp motion fails, and should be denied.

Dated this 17th day of December, 2018.

Nersesian & Sankiewicz

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of December, 2018, pursuant to NRCP 5(b) and EDCR 8.05(f), the above referenced **PLAINTIFF'S OPPOSITION TO DEFENDANTS' SPECIAL MOTION TO DISMISS** was served via e-service through the Eighth Judicial District Court e-filing system, and that the date and time of the electronic service is in place of the date and place of deposit in the mail and by depositing the same into the U.S. Mail in Las Vegas, Nevada, postage prepaid, addressed as follows:

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EXHIBIT 2

EXHIBIT 2

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DISTRICT COURT

CLARK COUNTY, NEVADA

DR. NICHOLAS G. COLON, PLAINTIFF, vs. JAMES TAYLOR, NEVADA GAMING CONTROL BOARD, AMERICAN GAMING ASSOCIATION, AND DOES I-XX, DEFENDANTS.	Case No. A-18-782057-C Dept. No. 29 Date of Hearing: 12/20/18 Time of Hearing: 9:00 a.m. (Heard by Hon. Linda Bell, Dept. VII)

PLAINTIFF'S SUPPLEMENTAL AUTHORITIES IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' SPECIAL MOTION TO DISMISS

As is evident in the context of the matter before the Court, Plaintiff was provided with limited time to respond. This supplement is not to produce new arguments, but rather, to supplement the authority in Plaintiff's prior reply with respect to the unconstitutionality of Nevada's anti-slapp legislation in the context of Nevada's constitutional right to trial by jury.

Since time for reflection and further research, two cases are pertinent to the decision before the Court. In Leiendecker v. Asian Women United of Minn., 895 N.W.2d 623, 628

(Minn. 2017) and Davis v. Cox, 183 Wash. 2d 269, 295, 351 P.3d 862, 875 (2015),[1] the respective state Supreme Courts declared similar anti-slapp statutes unconstitutional under state constitutional guarantees on the right to trial by jury. Copies are attached. These cases are supportive of Plaintiff's argument that the anti-slapp statutes are unconstitutional and forward the same reasons argued by Plaintiff.

Dated this 2d day of January, 2019.

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[1] Limited on unrelated grounds in Maytown Sand & Gravel, LLC v. Thurston Cty., 191 Wash. 2d 392, 440 n.15, 423 P.3d 223, 248 (2018).

CERTIFICATE OF SERVICE

I hereby certify that on the 2d day of January, 2019, pursuant to NRCP 5(b) and EDCR 8.05(f), the above referenced **PLAINTIFF'S SUPPLEMENTAL AUTHORITIES TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' SPECIAL MOTION TO DISMISS** was served via e-service through the Eighth Judicial District Court e-filing system, and that the date and time of the electronic service is in place of the date and place of deposit in the mail and by depositing the same into the U.S. Mail in Las Vegas, Nevada, postage prepaid, addressed as follows:

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EXHIBIT 3

EXHIBIT 3

DAO

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

DR. NICHOLAS G. COLON, Colon, *vs.* JAMES TAYLOR, NEVADA GAMING CONTROL BOARD, AMERICAN GAMING ASSOCIATION, AND DOES I-XX, Defendants.	Case No. A-18-782057-C Dept. No. XXIX

DECISION AND ORDER

James Taylor, a Deputy Chief of the Enforcement Division of the Gaming Control Board, gave a presentation on scams, cheating, and fraud in casinos. During this presentation, Mr. Taylor presented a picture of Dr. Nicholas G. Colon under a section entitled "Use of a cheating device". Dr. Colon brought a lawsuit against Mr. Taylor and the Gaming Control Board, alleging that they defamed Dr. Colon by at least implying he was a cheater. Defendants James Taylor and Nevada Gaming Control Board brought an Anti-SLAPP Motion to Dismiss Dr. Colon's Complaint. Plaintiff Dr. Nicholas Colon opposed the Anti-SLAPP Motion to Dismiss. The parties made oral arguments on December 20, 2018. I am denying the Anti-SLAPP Motion to Dismiss.

I. Factual and Procedural Background

On October 2, 2018, the Sands Convention Center held the Global Gaming Expo. At this Expo, James Taylor, a Deputy Chief of the Enforcement Division of the Gaming Control Board, gave a presentation on scams, cheating, and fraud in casinos. Mr. Taylor gave this presentation to about 300 people. As part of that presentation, Mr. Taylor showed a short video that depicted a man sitting at a blackjack table holding some sort of device in his hand. The video clip did not show the face of the man, but focused on what the man was holding under the table. Though there is a dispute as to what exactly Mr. Taylor said during the display of the video clip, it is undisputed that Mr. Taylor stated that a cheating device was used in violation of the law. Dr. Colon, who is an author, consultant, and executive addressing and operating in the gaming industry, claims that he was the

man in the video. This claim is not disputed. Dr. Colon further contends that the device in his hand was not a cheating device, but was instead a crowd counter. Dr. Colon alleges that many in attendance at Mr. Taylor's presentation recognized him as the man in the video. On the same day, Dr. Colon filed a complaint claiming one count of defamation per se based on Mr. Taylor's depiction of him as a cheater during the presentation.

On December 6, 2018, Mr. Taylor and the Gaming Control Board filed an Anti-SLAPP Motion to Dismiss. Dr. Colon filed an Opposition to on December 17, 2018. Defendants filed a Reply on December 19, 2018. Oral arguments on the motion were heard on December 20, 2018.

II. Discussion

An Anti-SLAPP Motion to Dismiss is governed by NRS 41.660, et seq. First, I must "[d]etermine 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." NRS 41.660(3)(a). Such communications include "written or oral statements made in direct connection with an issue under consideration by a legislative, executive, or judicial body, or any other official proceeding authorized by law." NRS 41.637. Good faith communication is any "communication made in direct connection with an issue of public interest in a place open to the public or in a public forum, which is truthful or is made without knowledge of its falsehood." NRS 41.637(4).

Nevada adopted the California standard for what distinguishes a public interest from a private one:

> (1) "public interest" does not equate with mere curiosity;
> (2) a matter of public interest should be something of concern to a substantial number of people; a matter of concern to a speaker and a relatively small specific audience is not a matter of public interest;
> (3) there should be some degree of closeness between the challenged statements and the asserted public interest—the assertion of a broad and amorphous public interest is not sufficient;
> (4) the focus of the speaker's conduct should be the public interest rather than a mere effort to gather ammunition for another round of private controversy; and
> (5) a person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people.

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

Shapiro v. Welt 389 P.3d 262 268, 133 Nev. Adv. Op. 6 (2017) citing Piping Rock Partners, Inc. v. David Lerner Assocs., Inc., 946 F. Supp.2d 957, 968 (N.D. Cal. 2013) aff'd 609 Fed.Appx. 497 (9th Cir. 2015) citing Weinberg v. Feisel, 110 Cal.App.4th 1122, 2 Cal.Rptr.3d 385, 392-93 (2003).

The only alleged defamation in Dr. Colon's complaint was when Mr. Taylor, during his presentation on cheating at the G2E expo, showed a video clip of Dr. Colon sitting at a blackjack table holding some sort of device in his hand. Mr. Taylor then identified the device as the only counting device that was recovered by the GCB so far that year.

A. Mr. Taylor's presentation was a matter of public concern.

Mr. Taylor's speech was a matter of public concern. Security and the laws surrounding gaming are not a mere curiosity. Gaming is a central pillar of the Las Vegas economy. There are a substantial number of people concerned about such matters, which is evident given the large number of people that listened to Mr. Taylor's speech. There is no assertion of a broad and amorphous public interest, as the use of cheating devices correlate exactly with gaming security. There is no evidence that Mr. Taylor's speech was an effort to do anything other than act in the public interest. Thus, Mr. Taylor's speech was a matter of public interest.

B. Mr. Taylor's presentation was not a good faith communication.

Although Mr. Taylor's speech is a matter of public concern, I cannot find that Mr. Taylor made the communication in good faith by a preponderance of the evidence. Dr. Colon contends that the device in his hand was a crowd counter, not a cheating device. This crowd counter cannot be used to cheat at blackjack because it cannot subtract, only add. This contention is supported by the affidavits of two gaming experts, Michael Aponte and Eliot Jacobson, as well as the affidavit of Dr. Colon. Mr. Taylor and the Gaming Control Board do not dispute that the device in his hand was a crowd counter, and could not be used to cheat at blackjack.

Mr. Taylor and the Gaming Control Board argue that Mr. Taylor did not specifically claim that the crowd counter was a cheating device. Instead, Mr. Taylor simply identified the device as a counting device and stated that it was the only counting device obtained that year. In context, this is not a persuasive argument. Mr. Taylor also discussed Dr. Colon's arrest and discussed Dr. Colon under the section entitled "Use of a cheating device." Mr. Taylor also cited NRS 465.075(1), which

makes it "unlawful to use or possess any computerized electronic or mechanical device . . . to obtain an advantage at playing any game in a licensed gaming establishment."

In order to find good faith communication, I have to find that the communication was truthful or was made without knowledge of its falsehood. The communication that the crowd counter was a cheating device was not truthful. There is no evidence that Mr. Taylor was without knowledge of its falsehood, as Mr. Taylor does not make any such claims in his affidavit. Instead, the evidence shows that Mr. Taylor most likely knew that the crowd counter could not be used as a cheating device, as Dr. Colon provided two separate affidavits supporting this contention. Thus, I find by a preponderance of the evidence that Mr. Taylor's statements do not constitute a good faith communication.

C. Nevada's Anti-SLAPP statute does not violate the right to a trial by jury.

Colon also challenges the constitutionality of NRS 41.660, et seq. as it infringes on the right to a trial by jury as stated in article 1, section 3 of the Nevada Constitution. Colon claims that the statutory scheme calls for the Court to invade into the province of the jury by weighing the evidence and adjudicating matters summarily.

Nevada's current Anti-SLAPP statute was created by the legislature in an effort to protect the exercise of another constitutional right: the First Amendment rights to free speech. S.B. 286, 2013 Leg. Sess., 77th Sess. (Nev. 2013). "Statutes are presumed to be valid . . . . [E]very reasonable construction must be resorted to, in order to save a statue from unconstitutionality." Shapiro v. Welt, 133 Nev. Adv. Op. 6, 389 P.3d 262, 267 (2017) (internal quotations omitted). In Shapiro, the Nevada Supreme Court used its discretion to review the constitutionality of Nevada's Anti-SLAPP statute. Though it did not address specifically the right to a trial by jury, the court did find the statute constitutional. While this does not foreclose the discussion at hand, it serves as a proper background to my analysis.

Adjudicating matters summarily is not new to the judiciary in this or any jurisdiction. Virtually every jurisdiction in this country, including the highest court, embraces motions for summary judgment and motions to dismiss in their respective rules of civil procedure. These rules have been held to be constitutional when pitted against the right to a trial by jury. See Fid. & Deposit

Co. of Maryland v. United States, 187 U.S. 315, 318, 23 S. Ct. 120, 120; see also United States v. Carter, No. 3:15CV161, 2015 WL 9593652, at *7 (E.D. Va. Dec. 31, 2015), aff'd, 669 F. App'x 682 (4th Cir. 2016), and aff'd, 669 F. App'x 682 (4th Cir. 2016)(stating that a right to a trial by jury does not exist until a plaintiff shows a genuine issue of material fact).

Nevada looks to California case law when considering its Anti-SLAPP statute. See John v. Douglas Cty. Sch. Dist., 125 Nev. 746, 756 (2009); S.B. 444, 2015 Leg. Sess., 78th Sess. (Nev. 2015) at §12.5(2). California considered the constitutionality of Anti-SLAPP statutes in Briggs. V. Eden Council for Hope & Opportunity. 19 Cal. 4th 1106 (1999). In Briggs, the California court found that, because the statute only required a showing of minimal merit as to plaintiff's claims, the statute did not violate the plaintiff's right to trial. Id.

Here, the Anti-SLAPP statute puts the initial burden on the defendant, not the plaintiff. The defendant must show by a preponderance of the evidence that the claim is based upon good faith communication. NRS 411.660(3)(a). After that, the plaintiff must show a minimal merit of their claim, in this case that they have a probability of prevailing on the claim. NRS 411.660(3)(b). The only time that the court considers the evidence and functions like a jury is the first prong of the Anti-SLAPP statute, when it is considering the defendant's burden of proof. When the plaintiff has the burden of proof, the plaintiff needs only a minimal merit as to their claim. As plaintiff needs only a minimal merit, it functions as a special motion for summary judgment. Thus, plaintiff's right to a trial is not impacted by the Anti-SLAPP statute.

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

III. Conclusion

Defendants have not shown by a preponderance of the evidence that Dr. Colon's 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. Thus, I am denying Defendant's Anti-SLAPP Motion to Dismiss.

DATED this ~~day of January~~ 25 day of Feb, 2019.

LINDA MARIE BELL
DISTRICT COURT JUDGE

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date of filing, a copy of this Order was electronically served through the Eighth Judicial District Court EFP system or, if no e-mail was provided, by facsimile, U.S. Mail and/or placed in the Clerk's Office attorney folder(s) for:

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SYLVIA PERRY
JUDICIAL EXECUTIVE ASSISTANT, DEPARTMENT VII

AFFIRMATION
Pursuant to NRS 239B.030
The undersigned does hereby affirm that the preceding Decision and Order filed in District Court case number A685807 **DOES NOT** contain the social security number of any person.

/s/ Linda Marie Bell Date: 01/ /2019
District Court Judge

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

EXHIBIT 4

EXHIBIT 4

NOAS
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DISTRICT COURT

CLARK COUNTY, NEVADA

DR. NICHOLAS G. COLON, PLAINTIFF, vs. JAMES TAYLOR, NEVADA GAMING CONTROL BOARD, AMERICAN GAMING ASSOCIATION, AND DOES I-XX, DEFENDANTS.	Case No. A-18-782057-C Dept. No. 29

PLAINTIFF'S NOTICE OF APPEAL OF A PORTION OF THE ORDER DENYING THE DEFENDANTS' SPECIAL MOTION TO DISMISS

NOW COMES Plaintiff and herewith appeals against all Defendants that portion of this Court's order filed February 26, 2019 denying the Defendants' Special Motion to Dismiss. The portion of the order appealed from is that portion which determines that the Plaintiff's assertion of the unconstitutionality of NRS 41.635 *et seq.* is unfounded. That is, Plaintiff contends that NRS 41.635 *et seq.* is not violative of this constitutional mandate, and § C at pp. 4-5 of the

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order of February 26, 2019 is in error. This appeal is made to the Nevada Supreme Court.

Dated this 15th day of April, 2019.

Nersesian & Sankiewicz

/S/ Robert A. Nersesian
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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of April, 2019, pursuant to NRCP 5(b), the above referenced PLAINTIFF'S NOTICE OF APPEAL OF A PORTION OF THE ORDER DENYING THE DEFENDANTS' SPECIAL MOTION TO DISMISS was served via e-service through the Eighth Judicial District Court e-filing system, and by depositing the same into the U.S. Mail in Las Vegas, Nevada, postage prepaid, addressed as follows:

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