Case No. 78517

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES TAYLOR; NEVADA GAMING CONTROL BOARD; AND AMERICAN GAMING ASSOCIATION,

Appellants,

v.

DR. NICHOLAS G. COLON,

Respondent.

DISTRICT COURT CASE NO. A-18-782057-C

APPELLANTS' APPENDIX

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CERTIFICATE OF SERVICE

Pursuant to NEV. R. APP. P. 25(5)(c), I hereby certify that I caused to be e-filed and e-served to all parties listed on the Court's Master Service List the foregoing document via the Clerk of the Court by using the electronic filing system on the 4th day of November, 2019.

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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.) Dept. No.	A-18-782057-C Department 31

COMPLAINT FOR DEFAMATION AND JURY DEMAND

JURISDICTIONAL AND COMMON ALLEGATIONS

1. Plaintiff, Dr. Nicholas Colon is a gaming author, consultant, and executive addressing and operating in the gaming industry.

2. On Monday, October 2, 2017, a presentation was made by James Taylor ("Taylor") at the Sands Expo as part of the Global Gaming Expo ("Expo") held at the Sands Convention Center in Las Vegas.

3. The title of the presentation by Taylor was *Scams, Cheats and Black Lists: Current Fraud and Casino Crimes*, and it was convened at 10:00 a.m.

4. Taylor was employed by the Nevada Gaming Control Board ("Board") at the time of the presentation, and was acting within the aegis and scope of his employment at the time of the presentation.

5. The event was hosted and put on by the American Gaming Association, which association played a material part in seeking speakers, choosing subjects, and otherwise acting as a publisher of the information conveyed at the Expo.

6. During the presentation a Power Point with embedded video was shown presenting an alleged exemplar of casino fraud and crime.

7. Plaintiff was a subject of that Power Point video, and the point of the Power Point video was to demonstrate cheating and criminal activities caught on video by, or otherwise occurring at, casinos.

8. Taylor identified Plaintiff as a cheater and a criminal during the presentation.

9. Plaintiff is not a cheater and Plaintiff is not a criminal.

10. Doe defendants are such other persons involved in preparing the presentation of defendant, Taylor, persons having reviewed and approved the presentation of defendant, Taylor, and persons feeding or providing the false information adopted and presented by Defendant, Taylor.

11. The concept of the cheating allegation is that Plaintiff was in possession of an illegal device while being filmed at, which video was provided to the Board and on information and belief, was provided to Taylor by the Board for purposes of the presentation.

12. The alleged device was a crowd counter.

13. Plaintiff's reason for having the crowd counter, as demonstrable from past presentations by Plaintiff in the media, is that Plaintiff publishes counts of people frequenting various casinos as part of data of interest to gamblers and others operating in the industry, and he would use the device to tally customers active at given times at given casinos.

14. Plaintiff was accused of using the crowd counter as a device to enhance his gaming in violation of cheating statutes, in particular NRS 465.075.

15. As was evident from the events and the facts, and necessarily evident to the Board and to Taylor, the alleged use of the crowd counter was not practicable as a device to enhance card counting or otherwise increase odds at blackjack, and was, therefore, not a device in Plaintiff's possession in violation of the law.

16. The publication of the Plaintiff as a criminal and a cheater to persons within the gaming industry, including Plaintiff's clientele, was defamation *per se*.

17. Plaintiff's reputation within the industry is part of his stock in trade, and Taylor and the Board recognized that the publication of Plaintiff as a criminal and a cheater would negatively impact Plaintiff's valued reputation.

18. Plaintiff was included in this video as a defrauder/criminal in Taylor's presentation.

19. Plaintiff is not, and never has been, a cheater, scammer, defrauder, or criminal in the gaming context or any other context.

20. As a result of the foregoing, the defendants are each publishers or vicariously liable for the publication of the false ascription of criminality to Plaintiff by Taylor.

21. The use of video of Dr. Colon with the associated ascription of bad acts constitutes defamation *per se*.

22. Through the aforesaid defamation to persons within the very trade and business of the Plaintiff, the defamation of the Plaintiff was particularly damaging and malicious.

23. The defamation of the Plaintiff was undertaken with fraud, oppression, and malice.

24. Through the express words and power-point used at the Expo, it was communicated to all present that the plaintiff was odious person such that the defendant had committed criminal actions

25. As a result of the defamation the plaintiff have suffered damages as follows:

a. Lost business opportunities;

b. Loss of reputation;

c. Humiliation;

d. Emotional distress;

e. Outrage;

f. Mortification;

g. Ostracism in his profession and business;

h. Punitive damages; and

i. Such other injuries as the jury finds relevant.

all comprising compensable injury to the Plaintiff in an amount in excess of $15,000.00.

AD DAMNUM

WHEREFORE plaintiff requests that this court enter judgment in the amount determined by the trier of fact in actual damages in excess of $15,000.00, award determined punitive damages in an amount in excess of $15,000.00 and together therewith an award of the attorneys fees, costs of suit, interest and such further relief as the court determines

appropriate.

Dated this 2nd day of October, 2018.

Nersesian & Sankiewicz

_____/S/ *Robert A. Nersesian*_____
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Attorneys for plaintiff

JURY DEMAND

Plaintiff herewith demands trial by jury of all issues so triable in the within case.

Dated this 2nd day of October, 2018.

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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,

Defendant(s).

Case No. A-18-782057-C
Dept. No. XXXI

DEFENDANTS' ANTI-SLAPP SPECIAL MOTION TO DISMISS

Defendants, James Taylor and Nevada Gaming Control Board, by and through counsel, Adam Paul Laxalt, Attorney General of the State of Nevada, Theresa M. Haar, Senior Deputy Attorney General and Edward L. Magaw, Deputy Attorney General, submit the following Special Motion to Dismiss pursuant to NRS 41.660 et seq.

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NOTICE OF MOTION

TO: NICHOLAS COLON, Plaintiff;

TO: ROBERT A. NERSESIAN and THEA MARIE SANKIEWICZ, Plaintiff's Attorneys;

YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing **DEFENDANTS' SPECIAL MOTION TO DISMISS** on for hearing before Department XXXI of the Eighth Judicial District Court, Clark County Nevada, Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada 89155, on the 20 day of December, 2018, at the hour of 9:00 A.m., or as soon thereafter as counsel may be heard.

DATED this 6th day of December, 2018.

ADAM PAUL LAXALT
Attorney General

By: /s/ Theresa M. Haar
Theresa M. Haar (Bar No. 12158)
Senior Deputy Attorney General

Attorneys for Defendants Gaming Control Board and James Taylor

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

This Court should dismiss Plaintiff's Complaint pursuant to Nevada's Anti-SLAPP statute. Plaintiff's Complaint alleges a single cause of action of defamation per se, arising out of James Taylor's, Deputy Chief of the Enforcement Division of the Gaming Control Board, presentation during the Global Gaming Expo (G2E) on October 2, 2017 where he played a video of Plaintiff at a blackjack table with a counting device in his hand and identified that counting device as the only counting device recovered by the GCB so far that year.

As demonstrated below, Plaintiff's Complaint must be dismissed pursuant to Nevada's Anti-SLAPP statute, NRS 41.660, et seq. First, the requirements of the Anti-SLAPP statute have been met because this was a statement made on a matter of public concern and Taylor had a good faith basis for making the statement. Second, Taylor's statements were true because the device recovered was the only counting device recovered that year. Third, Plaintiff was arrested for the conduct displayed in the video. And lastly, Taylor and the GCB are immune from liability pursuant to the fair reporting and litigation privilege. Accordingly, dismissal is required.

II. Background

A. Plaintiff's Allegations

Plaintiff is a gambler, and an "author, consultant, and executive addressing and operating in the gaming industry." Complaint at ¶ 1.

Taylor is a Deputy Chief of the Enforcement Division of the GCB. Exhibit A, ¶3.

Plaintiff alleges that he was defamed by being identified as a cheater during Taylor's presentation at G2E 2017. Complaint at ¶ 8.

B. The Statement

Under NRS 41.660(3)(d), the Court should consider written and oral evidence in making its determination under the Anti-SLAPP statute. The below evidence demonstrates that the statement made by Taylor was truthful, made in good faith, and made on a matter

of public concern.

On October 2, 2017, Taylor made a presentation at G2E, the title of which was *Scams, Cheats, and Blacklists*. Exhibit A, ¶5. The purpose of this presentation was to identify the types of scams, cheating, and use of cheating devices that the GCB, as a law enforcement agency, has investigated. Exhibit A, ¶5. All of the information, videos, and photos used in this presentation were acquired through GCB investigations. Exhibit A, ¶5-6. As of 2017, Taylor has presented at G2E on various enforcement related topics at least seven times. Exhibit A, ¶7. At least 300 people attended Taylor's presentation. Exhibit A, ¶8. This presentation featured 121 slides. Exhibit A, ¶5. The three main topics covered were NRS 465.075(1) (Unlawful to possess a device used to obtain an advantage at playing any game in a licensed gaming establishment), NRS 465.070 (Fraud Acts. Place, increase, or decrease a bet or to determine the course of play after acquiring knowledge of the outcome), and NRS 465.083 (Cheating. It is unlawful for any person, whether the person is an owner or employee of or a player in an establishment, to cheat at any gambling game). Exhibit A, ¶5.

Plaintiff's Complaint stems from a 9-second video clip played during the portion of the presentation on NRS 465.075(1), *use of a cheating device*. Exhibit A, ¶9; Exhibit B. This 9-second clip showed an individual sitting at a blackjack table with a hand-held counting device in his hand. Taylor did not identify the individual in the video by name, show his face, display his booking photo following his arrest, or intimate that he had been convicted of any crime. Exhibit A, ¶9-10; Exhibit B. Instead, Taylor simply identified the counting device, and noted that that was the only device that GCB recovered that year. Exhibit A, ¶10; Exhibit B. Plaintiff's Complaint admits that he did possess a device used for counting and he does not challenge that he had previously been removed from properties for card counting. Complaint at ¶13. In fact, Plaintiff acknowledged in a later interview posted on YouTube that he did in fact have the "crowd counter" in his hand which led to his arrest.[1]

[1] "Professional Card Counter ARRESTED, Vindicated & Now Suing! Nicholas Colon #Interview #Blackjack" https://www.youtube.com/watch?v=CtSVkUluwqc

Plaintiff was arrested for Use or Possession of a Cheating Device to Obtain an Advantage at a Gaming Establishment and Cheating at Gaming on May 16, 2017 for the very conduct depicted in the video clip shown during Taylor's G2E presentation. Exhibit A, ¶11.

III. Legal Argument

A. The Anti-SLAPP Standard

"A SLAPP lawsuit is characterized as a meritless suit filed primarily to chill the defendant's exercise of First Amendment rights." *John v. Douglas Cnty. School Dist.*, 125 Nev. 746, 752, 219 P.3d 1276, 1280 (2009). Under Nevada's Anti-SLAPP statute, NRS 41.635 et seq., if a lawsuit is brought against a defendant based upon the exercise of its First Amendment rights, the defendant may file a Special Motion to Dismiss.

Evaluation of the Anti-SLAPP motion is a two-step process. First, the defendant must show, by a preponderance of the evidence, that the plaintiff'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." NRS 41.660(3)(a).

One of the statutory categories of protected speech includes "[c]ommunications 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). "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" includes "written or oral statement made in direct connection with an issue under consideration by a legislative, executive, or judicial body, or any other official proceeding authorized by law." NRS 41.637. This category is construed broadly. *See Mindy's Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 597 (9th Cir. 2010).

Second, once the defendant meets its burden on the first prong, the burden then shifts to the plaintiff, who must make a sufficient evidentiary showing that he has a probability of prevailing on his claim. NRS 41.660(3)(b). Plaintiff will be unable to meet this burden.

The court should treat a Special Motion to Dismiss pursuant to NRS 41.660 as a motion for summary judgment. *See Stubbs v. Strickland*, 297 P.3d 326, 329 (Nev. 2013). If the court grants the Special Motion to Dismiss, the defendant is then entitled to an award of reasonable attorneys' fees and costs, as well as a punitive award of up to $10,000. NRS 41.670(1)(a)-(b).

Under Nevada's Anti-SLAPP statute, the defendant "is immune from any civil action" if the lawsuit is based upon the defendant's "good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." NRS 41.650; 41.660(1). This is not merely an immunity from liability, but is an immunity from suit.

As Nevada's Anti-SLAPP Statute is still relatively new, Nevada looks to California for guidance. *John*, 125 Nev. at 756, 219 P.3d at 1283 ("we consider California case law because California's anti-SLAPP statute is similar in purpose and language to Nevada's anti-SLAPP statute").

1. Defendants' speech was a matter of public concern, made in good faith

Plaintiff's sole claim is based on Taylor's presentation identifying counting devices, cheating, and scams as investigated by the GCB. At G2E, which is a large annual industry expo, cheating and cheating devices, as identified by the government agency that investigates and regulates that conduct, clearly impacts a matter of public concern.

"Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (internal citations omitted). *See Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 650, overruled on another ground by *Equilon Enterprises v. Consumer Cause, Inc.*, supra, 29 Cal.4th at p. 68, fn. 5. ("matters of public interest include legislative and governmental activities").

"In *Nadel v. Regents of University of California*, Division Five of this court held that the *New York Times* standard for proving malice in a defamation action by a public figure or official against a media defendant also applies to defamation actions against government defendants. Particularly pertinent to the issue we address is the *Nadel* court's recognition of the government's legitimate role in the interchange of ideas: '[I]f government has a legitimate role to play in the interchange of ideas—as we conclude it does—then government should have some measure of protection in performing that role, at least as to matters of public interest. Otherwise, if government is compelled to guarantee the truth of its factual assertions on matters of public interest, its speech would be substantially inhibited, and the citizenry would be less informed.'" *Nizam-Aldine v. City of Oakland*, 47 Cal. App. 4th 364, 375, 54 Cal. Rptr. 2d 781, 787–88 (1996) *quoting Nadel v. Regents of University of California*, 28 Cal. App. 4th 1251, 1266-67, 34 Cal. Rptr. 2d 188, 196 (1994).

"[I]n the context of conduct affecting a 'community,' i.e., a limited but definable portion of the public, the constitutionally protected activity must, at a minimum, be connected to a discussion, debate or controversy." *Grenier v. Taylor*, 234 Cal. App. 4th 471, 482, 183 Cal. Rptr. 3d 867, 875 (2015) (finding that the church constituted a community, therefore creating a public interest in the statement made). G2E is a preeminent show for the gaming-entertainment industry, with over 26,000 unique visitors in 2017.[2]

Taylor's presentation focused on cheating and cheating devices, which falls squarely under the purview of Taylor's responsibilities as Deputy Chief of Enforcement with the GCB. The Enforcement Division is the GCB's law enforcement division, with the primary responsibility to conduct criminal and regulatory investigations, gather intelligence on organized crime groups involved in gaming related activities, and make recommendations on candidates for the "List of Excluded Persons." "[S]tatements warning consumers of fraudulent or deceptive business practices constitute a topic of widespread public interest,

[2] https://www.globalgamingexpo.com/RNA/RNA_G2E_v2/2017/_docs/G2E-2017-Exhibitor-Fact-Sheet.pdf?v=636307325920952527

so long as they are provided in the context of information helpful to consumers." *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 262 (9th Cir. 2013).

Here, Taylor was presenting on fraudulent behavior, cheating activities, and cheating devices in the gaming context at a gaming expo. This clearly constitutes a statement made concerning the public interest.

While California's anti-SLAPP law, similar to Nevada's, provides no statutory definition of "an issue of public interest," California courts have established guiding principles 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. *Shapiro v. Welt*, 133 Nev. Adv. Op. 6, 389 P.3d 262, 268 (2017), *citing Piping Rock*.

This was not a small, niche presentation, consisting of nothing more than curiosity of a few onlookers. G2E is a large expo, with over 26,000 people focused on the gaming industry, and Mr. Taylor's presentation was well attended. The focus of the presentation was on cheating, fraud, and devices used in cheating, as investigated by the GCB. The short 9-second video depicting Plaintiff featured him sitting at a blackjack table with a counting device in his hand. Exhibit A, ¶9; Exhibit B. The statement made was simply that the counting device in his hand was the only counting device obtained that year. Exhibit A, ¶10; Exhibit B. This was a statement made to a substantial number of people all working in or interested in the gaming industry, with the entirety of the presentation focusing on GCB's law enforcement responsibilities of identifying and arresting individuals

for cheating, using cheating devices, and engaging in fraud or theft. The entire presentation was made on a matter of public concern. Defendants therefore meet the first prong of the Anti-SLAPP statute.

2. Plaintiff cannot demonstrate probability of prevailing on his defamation claim

With Defendants having satisfied the first prong of the Anti-SLAPP requirements, the burden now shifts to Plaintiff to demonstrate that he has a probability of prevailing on the merits of his claim, by making a showing of prima facie evidence. NRS 41.660(3)(b). Plaintiff cannot satisfy this burden and dismissal is required.

To establish a cause of action for defamation, a plaintiff must demonstrate: (1) a false and defamatory statement by the defendant concerning the plaintiff; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages. *Wynn v. Smith*, 117 Nev. 6, 10 (Nev. 2001). A statement can be defamatory only if it contains a factual assertion that can be proven false. *See Pope v. Motel 6*, 114 P.3d 277, 282 (Nev. 2005). Plaintiff cannot meet this burden, and dismissal is required.

a. Plaintiff cannot demonstrate fault

The degree of fault required by a defendant in a defamation suit depends on both the target and the content of the defendant's speech. In the context of defamation, there are three categories of plaintiffs: the general public figure, the limited purpose public figure, and the private individual. A limited purpose public figure "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Gertz v. Welch*, 418 U.S. 323, 351 (1974). "A limited-purpose public figure is a person who voluntarily injects himself or is thrust into a particular public controversy or public concern, and thereby becomes a public figure for a limited range of issues." *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 720, 57 P.3d 82, 91 (2002). This is a question of law, and the court's determination is based "on whether the person's role in a matter of public concern is voluntary and prominent." *Bongiovi v. Sullivan*, 122 Nev.

556, 572 (2006). Plaintiff here is a limited purpose public figure within the gaming industry.[3]

A public figure cannot recover in a defamation suit unless he can prove by clear and convincing evidence that the defendant published the defamatory statement with actual malice, i.e., with knowledge that it was false or with reckless disregard of whether it was false or not. Mere negligence does not suffice. The plaintiff must affirmatively prove that the author in fact entertained serious doubts as to the truth of his publication or had a "high degree of awareness of their probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). A defamation plaintiff must establish actual malice by clear and convincing evidence. *See Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 511 (1984). This same heightened standard applies to a limited purpose public figure when the statement concerns the public controversy or range of issues for which he is known. *See Makaeff v. Trump Univ., LCC*, 715 F.3d 254 (9th Cir. 2013).

Plaintiff has held himself out as an expert in the gaming industry. *See* Complaint at ¶1. Plaintiff has conducted a number of interviews, and has authored a number of articles, whereby he holds himself out as a gaming expert. *See* footnote 3. Plaintiff is at least a limited purpose public figure within the gaming industry. Accordingly, Plaintiff must demonstrate actual malice, namely that Taylor's statements regarding the recovered counting device possessed by Plaintiff were knowingly false. Plaintiff cannot do so, and dismissal is required.

Even if Plaintiff were merely a private individual, he still cannot meet most basic fault requirement. When a "private figure" brings a defamation claim for statements

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[3] See http://www.aleaconsultinggroup.com/nicholas-g-colon/

https://www.forbes.com/sites/greatspeculations/people/nicholascolon/archive/2017/06/#36cc4d7c6993

https://www.entrepreneur.com/author/nicholas-g-colon

http://www.casinocitytimes.com/home.cfm?id=763

involving a matter of public concern, the First Amendment requires that the plaintiff first prove that the statements were false. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986). The Supreme Court has held that a plaintiff faced with the burden of showing falsity cannot rely merely on a "slight inaccuracy in the details" of the allegedly libelous statement: "Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.' Put another way, the statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'" *Masson v. New Yorker*, 501 U.S. 496, 516 (1991) (citations omitted). While plaintiff bears the burden of proving falsity, defendants can offer the defense of "substantial truth." *Masson*, 501 U.S. at 516 (noting that "[t]he essence of the inquiry [into falsity] remains the same whether the burden rests upon plaintiff or defendant"). As demonstrated below, Taylor's description of the video clip was truthful, and cannot support a claim of defamation. Plaintiff's Complaint must be dismissed.

b. Truth is an absolute defense to defamation

Truth is a defense to the claim of defamation. The doctrine of substantial truth provides that minor inaccuracies do not amount to falsity unless the inaccuracies "would have a different effect on the mind of the reader from that which the pleaded truth would have produced." Specifically, the court must determine whether the gist of the presentation, or the portion of the presentation that carries the "sting" of it, is true. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991); *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 715, 57 P.3d 82, 88 (2002).

Here, Taylor played a 9-second video clip of security footage depicting Plaintiff getting up from an active blackjack table with a counting device in his hand, and identified that as the only counting device that was recovered that year by the GCB. The video itself cannot be defamatory, as the video itself is undisputable. Furthermore, Taylor's description of the recovery of the counting device is based on the accurate contents of the video clip shown, and also cannot support a claim of defamation. "The accuracy and

genuineness of the contents of the video is not in dispute. Thus, the truthful statements relating to the admittedly accurate contents of the video cannot form the basis of Plaintiff's defamation claim." *Kegel v. Brown & Williamson Tobacco Corp.*, No. 306-CV-00093-LRH-VPC, 2009 WL 656372, at *17 (D. Nev. Mar. 10, 2009), on reconsideration in part, No. 3:06-CV-00093LRHVPC, 2009 WL 3125482 (D. Nev. Sept. 24, 2009); *citing Ornatek v. Nevada State Bank*, 93 Nev. 17, 558 P.2d 1145, 1147 (Nev. 1977) (noting that truth is a defense to defamation).

c. "Our only device this year was a counting device"

While Plaintiff is attempting to portray Taylor's statement as accusing Plaintiff of being a cheater, the presentation clearly demonstrates that at no time was Plaintiff identified by name, or identified as a cheater. Instead, the statement was describing the only device that GCB recovered in the year prior to the presentation was the counting device that was clearly depicted in the casino security footage. Exhibit A, ¶9-10; Exhibit B. Plaintiff cannot demonstrate that the statement was published with any doubt as to the truth of the statement, especially as the video footage clearly shows an individual sitting at a blackjack table holding a counting device in his hand.

Plaintiff's own Complaint acknowledges that he was at the blackjack table with a counting device in his hand. Complaint at ¶11-13.

Others reviewed Deputy Chief Taylor's presentation at G2E 2017. No one made any note of the video depicting Plaintiff sitting at a blackjack table with a counting device in his hand.[4]

d. Evaluative opinions based on incontrovertible video footage cannot support a claim for defamation

In *People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 111 Nev. 615, 895 P.2d 1269 (1995), the Nevada Supreme Court identified "evaluative opinions" involving a "value judgment based on true information disclosed to or known by the public.

[4] https://www.cdcgamingreports.com/spotting-scams-stopping-cheats-and-when-to-black-list/

Evaluative opinions convey the publisher's judgment as to the quality of another's behavior and, as such, it is not a statement of fact." 111 Nev. at 624. The Court there determined that such "evaluative opinions" including the opinion that the plaintiff had abused his animals, as shown by a factually accurate videotape, were held nonactionable in defamation. *Id.*; *see also Churchill v. Barach*, 863 F. Supp. 1266, 1273-1274 (D. Nev. 1994) (comments of customer that airline ticket agent was "rigid, uninformed, incompetent and unhelpful at best" were evaluative opinions nonactionable in defamation).

"In the present case, everyone involved has seen the 'movie'; and all the facts upon which opinions were based were 'disclosed' in the videotape itself. Those who were of the opinion that Berosini was being abusive to the animals were making an evaluative judgment based on the facts portrayed in the video. All viewers of that video are free to express their opinion on the question of whether they think Berosini was being cruel to those animals, and no one can be successfully sued for expressing such an evaluative opinion—even if it is 'wrong.' There is no such thing as a false idea or a wrong opinion." *People for Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 111 Nev. 615, 625, 895 P.2d 1269, 1275–76 (1995), holding modified by *City of Las Vegas Downtown Redevelopment Agency v. Hecht*, 113 Nev. 632, 940 P.2d 127 (1997), and holding modified by *City of Las Vegas Downtown Redevelopment Agency v. Hecht*, 113 Nev. 644, 940 P.2d 134 (1997); *citing Nevada Ind. Broadcasting Corp. v. Allen*, 99 Nev. 404, 410, 664 P.2d 337, 341–42 (1983).

Here, Taylor was of the opinion that the video footage demonstrated an individual possessing a counting device. That evaluative opinion is supported by the video clip showing Plaintiff with a counting device in his hand while sitting at a blackjack table. This cannot give rise to a claim of defamation, and therefore Plaintiff's Complaint must be dismissed.

e. Plaintiff was arrested for the acts depicted in the video

Here, Plaintiff was never identified as a cheater in the presentation. His name was never used. His face is not even shown on the security footage. Exhibit B. Yet, Plaintiff still alleges that he was accused of having cheated. Taylor never called Plaintiff a "cheater."

However, Plaintiff was actually arrested for the conduct depicted in the video clip shown. On or about May 16, 2017, Plaintiff was arrested for the crimes of Cheating at Gaming 1st Offense and Use or Possession of a Cheating Device to Obtain an Advantage at a Gaming Establishment at Green Valley Ranch. Exhibit A, ¶11. Plaintiff's criminal records have been sealed, and therefore without a court order unsealing those records, cannot be admitted here. However, at the time that Taylor showed the video depicting Plaintiff's use of a counting device at G2E 2017, Taylor knew that Plaintiff had recently been arrested and was being criminally prosecuted for possessing the counting device that was in his hand in the video. Exhibit A, ¶11. Additionally, Plaintiff, in a recent interview posted on YouTube, acknowledged that he had been arrested for the conduct depicted in the video.[5]

The fact that the criminal records have since been sealed do not overcome the fact that Plaintiff's criminal matter was pending at the time of Taylor's presentation. Truth cannot be extinguished simply because the court records have been expunged. *G.D. v. Kenny*, 205 N.J. 275, 288, 15 A.3d 300, 307 (2011) (*citing Rzeznik v. Chief of Police of Southampton*, 374 Mass. 475, 373 N.E.2d 1128, 1130–31 (1978); *Bahr v. Statesman Journal Co.*, 51 Or. App. 177, 624 P.2d 664, 665–67, review denied, 291 Or. 118, 631 P.2d 341 (1981)).

Even if Taylor referred to Plaintiff as engaging in cheating (which he did not), Taylor was justified in doing so because Plaintiff was arrested on cheating-related charges arising out of his use of that counting device.

B. Defendants are entitled to absolute immunity

1. Defendants are entitled to immunity under the fair reporting and litigation privileges

Defendants GCB and Taylor are entitled to the fair reporting and litigation privileges. Nevada recognizes the fair reporting privilege which is "a special privilege of absolute immunity from defamation" available to those reporting on judicial proceedings. *See Sahara Gaming Corp. v. Culinary Workers Union Local 226*, 115 Nev. 212 (Nev. 1999). This privilege is absolute and "precludes liability even where the defamatory statements

[5] https://www.youtube.com/watch?v=CtSVkUluwqc.

are published with knowledge of their falsity and personal ill will toward the plaintiff." *Circus Circus Hotels, Inc. v. Witherspoon*, 657 P.2d 101, 105 (Nev. 1983). This privilege is recognized "on the theory that members of the public have a manifest interest in observing and being made aware of public proceedings and actions." *Wynn v. Smith*, 117 Nev. At 14.

Accordingly, as Plaintiff's entire Complaint is premised on a presentation by Taylor, a GCB employee, identifying those who had engaged in illicit or illegal activity, supported by actual booking photos and security video footage, GCB and Taylor are entitled to absolute immunity on Plaintiff's sole claim of defamation per se.

2. Plaintiff has failed to invoke waiver of State sovereign immunity

NRS 41.031(2) requires "[i]n any action against the State of Nevada, the action must be brought in the name of the State of Nevada on relation of the particular department, commission, board or other agency of the State whose actions are the basis for the suit." Additionally, service of the summons and complaint must be made on the Attorney General and the administrative head of the named agency. NRS 41.031(2)(a)-(b). Plaintiff has failed to meet those requirements, which also warrants dismissal.

III. Conclusion

Based on the foregoing, Plaintiff's Complaint must be dismissed pursuant to the Anti-SLAPP statute. Taylor, an employee of GCB, made a presentation outlining and identifying the types of cheating and cheating devices that GCB has identified. The statements he made regarding Plaintiff, while never actually identifying Plaintiff, were all substantially true, and as truth is an absolute defense to a claim of defamation, Plaintiff

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cannot prevail on his claim. Defendants are also entitled to absolute immunity under the litigation privilege. Lastly, Defendants are entitled to fees and costs for defending this action. NRS 41.670.

DATED this 6th day of December 2018.

ADAM PAUL LAXALT
Attorney General

By: /s/ THERESA M. HAAR
Theresa M. Haar (Bar No. 12158)
Senior Deputy Attorney General
Edward L. Magaw (Bar No. 9111)
Deputy Attorney General
Attorneys for Defendants
James Taylor and Nevada
Gaming Control Board

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court by using the electronic filing system on the 6th day of December 2018.

I certify that the following participants in this case are registered electronic filing systems users and will be served electronically:

Robert A. Nersesian
Thea Marie Sankiewicz
Nersesian & Sankiewicz
528 S. Eighth St.
Las Vegas, NV 89101
Attorneys for Plaintiff

/s/ Anela Kaheaku
Anela Kaheaku, an employee of the
Office of the Attorney General

EXHIBIT A

EXHIBIT A

DISTRICT COURT

CLARK COUNTY, NEVADA

DR. NICHOLAS G. COLON Plaintiff, vs. JAMES TAYLOR, NEVADA GAMING CONTROL BOARD, AMERICAN GAMING ASSOCIATION, AND DOES I-XX, Defendant(s).	Case No. A-18-782057-C Dept. No. XXXI

DECLARATION OF JAMES TAYLOR

I, James Taylor, state under penalty of perjury that the following is true and correct to the best of my knowledge:

1. I am currently employed by the Nevada Gaming Control Board as Deputy Chief of the Enforcement Division. I have been employed by the Nevada Gaming Control Board since 1995.

2. I have been a sworn peace officer since 1995.

3. The Enforcement Division is the Nevada Gaming Control Board's law enforcement division, with the primary responsibility to conduct criminal and regulatory investigations, gather intelligence on organized crime groups involved in gaming-related activities, and make recommendations on candidates for the "List of Excluded Persons."

4. I was a presenter at the Global Gaming Expo (G2E) in 2017.

5. The presentation I made was entitled *Scams, Cheats, and Blacklists.* This presentation was focused on fraud, cheating, and the use of cheating devices as defined under NRS 465.075(1), 465.070, and 465.083. The presentation consisted of 121 slides on a PowerPoint presentation. All of the information I obtained for this presentation, including descriptions, photos, and videos, has been in the possession of the Nevada Gaming Control Board, based on official investigations by the Board.

6. The information contained in my presentation was true and accurate to the best of my knowledge based on the information maintained by the Nevada Gaming Control Board.

7. My presentation at G2E 2017 was approximately the 7th presentation I have made at that expo.

8. There were approximately 300 people in attendance at my presentation that year.

9. During my presentation, under the topic of *use of a cheating device* under NRS 465.075(1), I played a 9 second clip featuring an individual sitting at a blackjack table with a counting device in his hand, without showing his face or otherwise identifying him. The next slide showed the stock image of the counting device. The individual in the clip, who I since have identified as Nicholas Colon, was not identified by name during my presentation.

10. Also during this presentation, I did not call the individual in the video clip "a cheater." Instead, the focus of this portion of the presentation was to identify the only counting device recovered by the Nevada Gaming Control Board so far that year.

11. In using the video clip depicting Mr. Colon, I did have knowledge that on or about May 16, 2017 at Green Valley Ranch, Mr. Colon was arrested for the crimes of Use or Possession of a Cheating Device to Obtain an Advantage at a Gaming Establishment; and Cheating at Gaming. I also have knowledge that Mr. Colon had plead to a lesser crime in exchange for the dismissal of those charges.

12. I am aware that sometime after my presentation, Mr. Colon's criminal records involving that incident have been sealed, and therefore I am unable to review or provide those records here.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: 12/5/18

By: Joanne Cafe

EXHIBIT B

Global Gaming Expo

James Taylor
Deputy Chief
Enforcement Division
Nevada Gaming Control Board

global G2E gaming expo

PRESENTED BY AMERICAN GAMING ASSOCIATION

Enforcement Division

- Regulatory Function
- Arbitrate Disputes (574 cases disputing $51 million)
- Background Investigations on gaming employees. 94,000 registered
  - Nightclub employees now included
- Law Enforcement Function

The video in the next page was provided on DVD

global G2E gaming expo

PRESENTED BY

AMERICAN GAMING ASSOCIATION

global gaming expo G2E

PRESENTED BY

AMERICAN GAMING ASSOCIATION

NRS 465.075 (1)

- It is unlawful to use or possess any computerized, electronic or mechanical device… to obtain an advantage at playing any game in a licensed gaming establishment.

JMOT

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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. 31

AMERICAN GAMING ASSOCIATION'S JOINDER TO DEFENDANTS' ANTI-SLAPP SPECIAL MOTION TO DISMISS

Hearing Date: December 20, 2018
Hearing Time: 9:00 a.m.

Defendant American Gaming Association ("AGA") hereby files this joinder to Defendants' Anti-Slapp Special Motion to Dismiss (the "Motion to Dismiss") filed by defendants James Taylor ("Mr. Taylor") and Nevada Gaming Control Board. Plaintiff Dr. Nicholas Colon ("Dr. Colon") has claimed the AGA is liable for defamation because it organized an event in which Mr. Taylor allegedly defamed Dr. Colon. Accordingly, the AGA's liability is necessarily

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dependent on Mr. Taylor's liability. The AGA therefore joins the Motion to Dismiss and requests that, if this Court dismisses Mr. Taylor, it dismiss the AGA as well.

DATED this 14th day of December, 2018.

McDONALD CARANO LLP

By: /s/ *Jason Sifers*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on or about the 14th day of December, 2018, a true and correct copy of the foregoing **AMERICAN GAMING ASSOCIATION'S JOINDER TO DEFENDANTS' ANTI-SLAPP SPECIAL MOTION TO DISMISS** was electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification on the following:

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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

/S/ Robert A. Nersesian
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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 1

EXHIBIT 1

DECLARATION OF RICHARD JACOBS

1. I make this declaration of my own personal knowledge.

2. If called upon to testify as to the facts herein stated, I am competent to do so.

3. I know Nicholas Colon, and have known him for a period of years.

4. I attended the presentation by James Taylor at the 2017 G2E on Scams, Cheats, and Blacklists on October 2, 2017.

5. My attendance was under the media as a writer/reporter on behalf of CDC Gaming Reports, a web service and publication widely circulated within the gaming industry. I also co-produce and co-host a regular pod-cast series entitled Gambling With and Edge under the name Richard Munchkin.

6. During his presentation Mr. Taylor showed a person I recognized, and now know to have been, Nicholas Colon in connection with a discussion of a tally counter which he labeled a cheating device and asserted was being illegally used by Mr. Colon on a blackjack game. He also showed a photo of Mr. Colon at the game where the cheating allegedly occurred.

7. Although the presentation was over a year ago at this time and I cannot recall the specific words used by Mr. Taylor, it was clear and indisputable that he was conveying that the person depicted, Mr. Colon, was confronted while cheating and using an illegal device in a casino, and that his agency had made an arrest of the individual on that basis.

8. He also conveyed, at that time, the fact that the person was in fact cheating and using an illegal device and the actions were justified due to the guilt of Mr. Colon.

9. At no time did Mr. Taylor tell the audience that the criminal charges against Mr. Colon

had been dismissed.

I make the foregoing declaration under penalty of perjury under the laws of the State of Nevada.

Richard Jacobs

EXHIBIT 2

EXHIBIT 2

DECLARATION OF ELIOT JACOBSON

1. I make the declaration of my own personal knowledge.

2. If called upon to testify to the facts herein stated, I am competent to do so.

3. I have been contacted by Nersesian & Sankiewicz to give my opinion regarding certain concepts as an expert witness through this declaration.

4. I have a Ph.D. in mathematics, University of Arizona (1983), and worked as a Professor of Mathematics at Ohio University for 15 years.

5. I have consulted extensively in the area of risk analysis and game protection within the casino industry.

6. I was qualified as an expert witness, and participated in, the case of Ivey v Genting Casinos (UK) Ltd. t/a Crockfords [2017] UKSC 67, which involved alleged cheating and mathematics.

7. I was also the retained expert by the State of Florida in litigation involving Indian gaming within the state.

8. I am the author of "Advanced Advantage Play," a treatise with statistical and mathematical analysis addressing casino advantage play and beating and protecting nearly all of the table games and side bets that are currently available on casino floors internationally, including blackjack, baccarat and pai gow poker.

9. I am familiar with the device in the photo attached, and own and have used one for counting crowds and attendance..

10. This device, alone, cannot be used to gain an advantage at the game of 21 by card counting. Specifically, successful card counting requires running counts of additions and subtractions involving quick calculations on a running basis, and a device like the one in the photo only calculates addition on a running basis. This provides no advantage to someone attempting to gain an advantage at 21 through card counting, and the number on the dial for whatever is being counted would be meaningless concerning the expected value or probabilities on subsequent hands wagered upon in the game of 21.

11. The opinions stated herein are to a reasonable degree of mathematical and gaming certainty.

I make the foregoing statements under penalty of perjury under the laws of the State of Nevada this 13th day of December, 2018.

Eliot Jacobson, Ph.D

EXHIBIT 3

EXHIBIT 3

Declaration of Michael Aponte

1. I make this declaration of my own personal knowledge.

2. If called upon to testify to the facts herein stated, I am competent to do so.

3. I have been contacted by Nersesian & Sankiewicz to give my opinion regarding certain concepts as an expert witness through this declaration.

4. I have an extensive background in the concept of tracking cards and card counting concerning the game of twenty-one as played in Las Vegas. In fact, I was both a player and one of the managers of the renowned professional card counting team known as the MIT Blackjack Team.

5. In this position with the team, all aspects of card counting were evaluated and vetted by me.

6. At the time I was at the Massachusetts Institute of Technology studying economics.

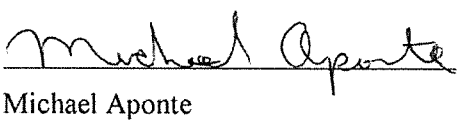
7. Since then, I have worked as a consultant for multiple casinos, advising them as to the distinctions between cheating and legal forms of advantage play such as card counting.

8. I have also worked as a consultant hired by the South Dakota Commission on Gaming to provide guidance on how to amend their gaming laws and regulations to take into account the distinctions between cheating versus legal advantage play at casino games, inclusive of 21.

9. I have been a repeat speaker at the World Game Protection Conference, an annual Las Vegas event connecting casino surveillance, asset protection professionals and gaming regulators from around the world. The conference examines current and emerging threats to casino entertainment complexes and explores opportunities and practices to combat those threats.

10. I have been presented with a photograph of the crowd counter as attached. This simple device cannot be used to gain an advantage at the game of blackjack. Professional card counting requires both the addition of low cards as well as the subtraction of high cards on a running basis. A crowd counter device is limited in that it could only serve to keep track of the low cards. Without knowledge of the negative count of the high cards, and a subsequent conversion of the net running count, it is not possible to gain an advantage at 21 based on the very limited information that a crowd counter could potentially provide.

I make the foregoing statement under penalty of perjury under the laws of the State of Nevada this 12th day of December, 2018.



Michael Aponte

EXHIBIT 4

EXHIBIT 4

Bullet Ace.

Burn card A card discarded before play begins after a shuffle.

Bust To obtain a hard total greater than 21.

Bust out To cheat gamblers.

Cage The cashier's booth.

Candy store A casino where it is easy to win.

Capping bets 1. Illegally adding money to a previously placed bet, typically after seeing one's hand in blackjack. 2. Limiting the amount of money that may be wagered. In poker, the bet is usually capped after a given number of raises if more than two players remain in the pot.

Card counting A (legal) blackjack technique of adjusting bet size and playing strategy according to the composition of the remaining pack. There are many different systems, but all are based on the fundamental principle that big cards (Tens and Aces) are good for the player.

Well-Known Card Counting Systems

	Efficiency		Card Tags									
System	Playing	Betting	2	3	4	5	6	7	8	9	T	A
Ace-Five (Uston)	0.05	0.54	0	0	0	1	0	0	0	0	0	-1
HiLo	0.51	0.97	1	1	1	1	1	0	0	0	-1	-1
HiOpt I	0.61	0.88/0.95	0	1	1	1	1	0	0	0	-1	0
HiOpt II	0.67	0.91/0.98	1	1	2	2	1	1	0	0	-2	0
Knock Out (KO)	0.54	0.98	1	1	1	1	1	1	0	0	-1	-1
Omega II	0.67	0.92/0.99	1	1	2	2	2	1	0	-1	-2	0
Red 7	0.54	0.98	1	1	1	1	1	%	0	0	-1	-1
Revere APM	0.59	0.89	1	1	1	1	1	0	0	-1	-1	0
Revere APC 1971	0.53	1.00	2	3	3	4	3	2	0	-1	-3	-4
Revere APC 1973*	0.66	0.92	2	2	3	4	2	1	0	-2	-3	0
Revere Point Count	0.56	0.98	1	2	2	2	2	1	0	0	-2	-2
Silver Fox	0.54	0.96	1	1	1	1	1	1	0	-1	-1	-1
Thorp Ultimate	0.53	1.00	5	6	8	11	6	4	0	-3	-7	-9
Uston APM	0.55	0.95	0	1	1	1	1	1	0	0	-1	-1
Uston APC	0.69	0.90/0.98	1	2	2	3	2	2	1	-1	-3	0
Uston SS	0.56	0.99	2	2	2	3	2	1	0	-1	-2	-2
Wong Halves	0.57	0.99	$\frac{1}{2}$	1	1	$1\frac{1}{2}$	1	$\frac{1}{2}$	0	$-\frac{1}{2}$	-1	-1
Zen	0.63	0.96	1	1	2	2	2	1	0	0	-2	-1

APM = Advanced Plus-Minus, APC = Advanced Point Count
% = For the Red 7 system, red Sevens are counted as 1, black Sevens as 0.
* = Also called the Revere 14 system because the sum of the positive tags is 14.
Higher betting efficiencies for HiOpt I, HiOpt II, Omega II, and Uston APC are with Ace side count.

Card weight Same as *Tag*.

Carpet joint An upscale casino.

Case Last, as in, "I doubled 55 against the dealer's 16. I hooked a 5, and the dealer pulled the case 5 for 21 [1-deck game]." Or, "I was down to my case bet before I caught a hot shoe and recovered."

EXHIBIT 5

EXHIBIT 5

17CRH000680-0000

Case Type	CRIMINAL COMPLAINT HND
Case Status:	CLOSED
File Date:	05/18/2017
DCM Track:	
Action:	BURGLARY, 1ST
Status Date:	05/18/2017
Case Judge:	GEORGE, STEPHEN L
Next Event:	

All Information | Party | Charge | Ticket/Citation # | Event | Docket | Linked Case | Disposition

Party Information

COLON, NICHOLAS GREGORY - DEFENDANT CR/TR

Disposition
Disp Date

Alias

Party Attorney
Attorney PAWLOWSKI, MATTHEW P
Bar Code 9889
Address **Phone**

More Party Information

Pending Cases

Party Charge Information

COLON, NICHOLAS GREGORY - DEFENDANT CR/TR

Charge # 1 :
57913 - FELONY UNLAWFUL USE OF COIN IN A GAMING MACHINE

Original Charge 57913 UNLAWFUL USE OF COIN IN A GAMING MACHINE (FELONY)
Indicted Charge
Amended Charge
DV Related?
Modifiers
Stage Date

Ticket #
ATN #
Tracking #
Place of Offense HENDERSON TOWNSHIP
Offense Location
Date of Offense 05/16/2017
Complainant

Party Charge Disposition
Disposition Date
Disposition
09/12/2017
DISMISSED BEFORE PRELIM

Sentencing Information

COLON, NICHOLAS GREGORY - DEFENDANT CR/TR

Charge # 2 :
55987 - MISDEMEANOR THEFT, < $650

Original Charge 50424 BURGLARY, 1ST (FELONY)
Indicted Charge
Amended Charge 55987 THEFT, < $650 (MISDEMEANOR)
DV Related?
Modifiers
Stage Date

Ticket #
ATN #
Tracking #
Place of Offense HENDERSON TOWNSHIP
Offense Location
Date of Offense 05/16/2017
Complainant

Party Charge Disposition
Disposition Date
Disposition
09/12/2017
DISMISSED BEFORE PRELIM

Sentencing Information

Ticket/Citation

Citation # : - HENDERSON TOWNSHIP **Offense Date 05/16/2017**

Agency	NV GAMING CONTROL BOARD
Officer	
Second Officer	
Complainant	

Speed Cited	
Speed Limit	
Location	
Insured/Proof	
Accident	N
Work Zone	
Haz Mat	
Points	
Priors	
License Taken	N
BAC	

Plate	
State	
Year	
Type	
Style	
Color	

Events

Date/Time	Location	Type	Result	Event Judge
05/18/2017 08:30 AM	DEPARTMENT 2	FELONY ARRAIGNMENT HND	ARRAIGNMENT HEARING HELD	GEORGE, STEPHEN L
06/21/2017 09:30 AM	DEPARTMENT 2	PRELIMINARY HEARING HND	CRIMINAL HEARING HELD	STOBERSKI, HOLLY
08/03/2017 09:00 AM	DEPARTMENT 2	COURT APPEARANCE HND	CRIMINAL HEARING HELD	STOBERSKI, HOLLY
09/12/2017 09:30 AM	DEPARTMENT 2	PRELIMINARY HEARING HND	CRIMINAL HEARING HELD	GEORGE, STEPHEN L

Docket Information

Date	Docket Text	Amount Owed
05/16/2017	SET FOR FIRST APPEARANCE Event: 72 HOUR HEARING (VIDEO) HND Date: 05/18/2017 Time: 8:30 am Judge: GEORGE, STEPHEN L Location: DEPARTMENT 2	
05/18/2017	PROBABLE CAUSE DETERMINATION	
05/18/2017	FIRST APPEARANCE HELD MOTION BY M. PAWLOWSKI, ESQ FOR BAIL REDUCTION. MOTION GRANTED. BAIL RESET: $5000 TOTAL CASH OR SURETY BOND The following event: 72 HOUR HEARING (VIDEO) HND scheduled for 05/18/2017 at 8:30 am has been resulted as follows: Result: FIRST APPEARANCE HELD Judge: GEORGE, STEPHEN L Location: DEPARTMENT 2	
05/18/2017	CRIMINAL COMPLAINT FILED	
05/18/2017	FURTHER PROCEEDINGS NOT CALENDARED: INITIAL ARRAIGNMENT: DEFENDANT PRESENT IN CUSTODY - VIDEO DEFENSE COUNSEL ACKNOWLEDGES, WAIVED READING OF THE COMPLAINT BY AND THROUGH HIS ATTORNEY, DEFENDANT ASKED FOR DATE CERTAIN FOR HEARING WAIVED 15 DAY RULE PRELIMINARY HEARING DATE SET BAIL SET: $5000 TOTAL CASH OR SURETY BOND REMAND TO METRO	
05/18/2017	SET FOR COURT APPEARANCE Event: PRELIMINARY HEARING HND Date: 06/21/2017 Time: 9:30 am Judge: GEORGE, STEPHEN L Location: DEPARTMENT 2 Result: CRIMINAL HEARING HELD	

Date	Docket Text	Amount Owed
05/18/2017	S.L. GEORGE, JP S. WATERS, DDA M. PAWLOWSKI, ESQ G. ENRIQUEZ, CLK L. BRENSKE, CR	
05/24/2017	$5,000 TOTAL SURETY BOND POSTED Charge #1: UNLAWFUL USE OF COIN IN A GAMING MACHINE	
06/21/2017	H. STOBERSKI, PROTEM FOR S.L. GEORGE, JP S. WATERS, DDA M. PAWLOWSKI, ESQ D. LOPEZ, CLK D. TAVAGLIONE, CR	
06/21/2017	PRELIMINARY HEARING: DEFENDANT NOT PRESENT CONTINUED FOR POSSIBLE NEGOTIATIONS SURETY BOND CONTINUES	
06/21/2017	HEARING HELD The following event: PRELIMINARY HEARING HND scheduled for 06/21/2017 at 9:30 am has been resulted as follows: Result: CRIMINAL HEARING HELD Judge: STOBERSKI, HOLLY Location: DEPARTMENT 2	
06/21/2017	SET FOR COURT APPEARANCE Event: COURT APPEARANCE HND Date: 08/03/2017 Time: 9:00 am Judge: GEORGE, STEPHEN L Location: DEPARTMENT 2	
08/03/2017	H. STOBERSKI, PROTEM FOR S.L. GEORGE, JP T. MOREO, DDA K. FRIEDMAN, ESQ FOR M. PAWLOWSKI, ESQ G. ENRIQUEZ, CLK L. BRENSKE, CR	
08/03/2017	STATUS CHECK: DEFENDANT PRESENT PRELIMINARY HEARING DATE SET SURETY BOND CONTINUES	
08/03/2017	HEARING HELD The following event: COURT APPEARANCE HND scheduled for 08/03/2017 at 9:00 am has been resulted as follows: Result: CRIMINAL HEARING HELD Judge: STOBERSKI, HOLLY Location: DEPARTMENT 2	
08/03/2017	SET FOR COURT APPEARANCE Event: PRELIMINARY HEARING HND Date: 09/12/2017 Time: 9:30 am Judge: GEORGE, STEPHEN L Location: DEPARTMENT 2	
09/12/2017	$1000.00 FINE Charge #1: UNLAWFUL USE OF COIN IN A GAMING MACHINE Receipt: 6268384 Date: 09/12/2017	$1,000.00
09/12/2017	S.L. GEORGE, JP C. PANDELIS, DDA M. PAWLOWSKI, ESQ G. ENRIQUEZ, CLK L. BRENSKE, CR	
09/12/2017	PRELIMINARY HEARING: DEFENDANT PRESENT PER NEGOTIATIONS: COUNT 1 AMENDED TO MISDEMEANOR "THEFT" NOLO CONTENDERE ENTERED AND ACCEPTED - ADJUDICATION WITHHELD $1,000 FINE - PAID IN FULL IN OPEN COURT PETIT LARCENY SCHOOL - DONE STAY OUT OF TROUBLE FOR PENDENCY OF CASE 6 MONTHS CLARK COUNTY JAIL - SUSPENDED COUNT 2 - DISMISSED SURETY BOND EXONERATED CASE DISMISSED CASE CLOSED	

Date	Docket Text	Amount Owed
09/12/2017	HEARING HELD The following event: PRELIMINARY HEARING HND scheduled for 09/12/2017 at 9:30 am has been resulted as follows: Result: CRIMINAL HEARING HELD Judge: GEORGE, STEPHEN L Location: DEPARTMENT 2	
09/12/2017	CASE CLOSED	
09/20/2017	CASE FILE HAS BEEN ELECTRONICALLY SCANNED	

Linked Cases

Link Group	Case #	File Date
17CRH000680-0000	17PCH000749-0000	05/18/2017

Case Disposition

Disposition	Date	Case Judge
CLOSED	09/12/2017	GEORGE, STEPHEN L

APP070

DECL
Robert A. Nersesian
Nevada Bar No. 2762
NERSESIAN & SANKIEWICZ
528 South Eighth Street
Las Vegas, Nevada 89101
Telephone: 702-385-5454
Facsimile: 702-385-7667
Attorneys for Plaintiff

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.

DECLARATION OF DR. NICHOLAS G. COLON

A. BACKGROUND AND EXPERT QUALIFICATION

1. I make this declaration of my own personal knowledge.
2. If called upon to the facts herein stated, I am competent to do so.
3. I am the Plaintiff in the case of Colon v. Taylor, case no.
4. I hold a Bachelor of Science in Mathematics and Physics, Elmhurst College (2002); Masters in Business Administration, University of Phoenix (2010); M.D., American University of Antigua (2008); and have completed substantial graduate coursework towards a Ph.D in applied physics from the University of Illinois.
5. I have applied my physics, business, and mathematics background to an area which I would call gaming mathematics which is a combination of probability and statistics, econometrics, and gaming theory.

6. My vocations and avocations include being:

   a. A mathematician;

   b. An author;

   c. A Publisher;

   d. An investor and independent contractor in gaming;

   e. An indirect owner of Alea Consulting Group, through a company for which I am the sole owner, to wit: Carnivore Investment Strategies, LLC, a Delaware Limited Liability Company; and

   f. Gambling with an advantage (i.e., practicing advantage gambling which is not cheating).[1]

   g. Regularly appears on gaming podcasts for Las Vegas Advisor.com; casinomeister.com, thepog.com, as an expert on gaming issues.

7. In connection with my advantage gambling, I am fully proficient in "card counting" at the game of blackjack, understanding in both the operational aspects as well as the mathematics behind the game.

8. As a gaming mathematician, I have done the math behind many casino games for casino game developers, especially towards the requisite par sheets for approval,[2] including the math determining the expected values and other values behind the programs running two different games which have actually been approved by gaming commissions, sold and put in operation by casinos.

9. As a gaming author,

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[1] This footnote is an editorial addition by Plaintiff's attorney. Advantage gamblers are persons "who 'use[] **legal techniques** . . . to win at casino . . . games.'" Pistor v. Garcia, 791 F.3d 1104, 1108 (9th Cir. 2015)(ellipses and deletions in original, emphasis added).

a. I publish a semi-regular blog available on LasVegasAdvisor.com under my byline;

b. Regular articles in Gambling Insider, an industry print publication;

c. I have published articles on Forbes.com investment blog; Entrepreneur.com, 888casino.com, thepogg.com, casinomeister.com, wizardofvegas.com, casinocitytimes.com, americancasinoguide.com, and many more.

10. As a publisher, I currently publish Women's Poker World, a leading women's poker magazine found at womenspokerworld.com.

11. My consulting work has involved the mathematics for gaming copyright holders and game developers.

12. I have also worked as an assistant tournament director for Casino de Noumea, in New Calidonia, a territory of France in the Melanesian islands.

B. MY ARREST AND MY ACTIVITIES

13. In May, 2017, I was present at Green Valley Ranch casino playing blackjack.

14. I played for about an hour doing nothing more than applying card counting using the Uston APC count, which I do entirely in my head. To the best of my recollection, and noticed that which is commonly referred to as "heat" in advantage gambling. That simply means that I noticed that pit personnel were paying attention to me.

15. Amongst advantage gamblers it is well know that casinos persecute advantage gamblers, and to my knowledge, and necessarily the knowledge of The Nevada Gaming Control Board and its personnel, measures will be taken against such persons by casinos. To my

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[2] A par sheet holds all the critical values of a game such as hold percentages, expected values, variance, etc., for the submitted game. It involves probability and statistics at the highest levels.

personal knowledge gained in my investigative journalism, the following measures have been taken against advantage gamblers by casinos:

a. Fabrication of crime;

b. Arrest;

c. The seizure and beating of an advantage gambler at dinner;

d. 86ing the gambler;

e. Restricting the gambler's play; and

f. Doxing of the gambler to other casinos.

16. Due to the foregoing, it is well known amongst advantage gamblers that when 'heat' is present, the best course is to leave as unceremoniously and as quickly as possible.

17. Thus, when I noted heat, I got up and began to leave.

18. As I was leaving I was surrounded by numerous Green Valley Ranch security personnel.

19. I was asked to show what was in my hand, and I showed my car keys, which included the crowd counter affixed to my key chain.

20. Green Valley security then handcuffed me and stated I was under arrest.

21. An agent with the Nevada Gaming Control Board arrived and I told him that casino security stated I was under arrest.

22. He stated that security made a mistake, and it was he who was arresting me, and now I was under arrest.

23. I was then arrested by the enforcement agent of the Nevada Gaming Control Board.

24. I was booked on violation of NRS 465.075 (use of a device in gaming); NRS 465.083 (cheating); and NRS 205.060 (burglary).

C. THE DEVICE AT ISSUE

25. I was often in possession of a crowd counting tool which was analogous (if not identical) to the tool in the photo attached to the Defendants' Brief, exhibit 4.

26. It was a fixture on my keychain, and I used it for exactly the purpose for which it was designed and intended. That is, I used it to count people.

27. This device only counts upwards in single increments when 'clicked,' and the sum total of the clicks are visible on the readout on its face.

28. The function of the wheel on the side of the tool is to zero-out the total accumulated.

29. I have never used this tool for cheating, tracking cards, or as a gambling device of any kind.

30. I am unfamiliar with any strategy or use of this tool which would provide an advantage at gambling in a casino.

31. The tool definitely cannot be used to gain an advantage or assist in the practice of counting cards at blackjack. Indeed, the use of an even a more sophisticated device which allowed for addition and subtraction (which this device does not) and which could theoretically provide information for card counting would remain contraindicated because it complicates and adds steps to reach conclusions which are much more simply accomplished through mental practices, or for those less adept at keeping track, indexing to one's fingers. Still, in order for the device described to even calculate an advantage in theory would require two of these tools held simultaneously, and this would still require application of mathematics in numbers larger and more complicated than the running counts that card counting requires.

32. The tool was used by me for reasons unrelated to the play of gambling commonly referred to as card-counting. See Defendant's exhibit B for a representative of the device.

33. This tool was used by me to register patrons on the floor of a casino playing casino games, and was not used for any gaming purpose. Specifically, my publications and my research have involved the number of slot machines occupied versus the number of vacant slot machines on a casino floor to arrive at a percentage of available slot-machine gambling in use at given times.

34. Indeed, I have evaluated such percentages in the matter of Barona Hotel & Casino as opposed to other casinos in noting that Barona's slot use as a percentage commonly exceeds that of other casinos by a factor exceeding two (Barona's patron participation is able to commonly crest 50% slot use as determined by me in using the device). This information is valuable to the industry in making marketing, placement, and mission decisions in the operation of casinos, and that was the focus of interest in the particular article discussed which was published in Gaming Insider magazine.

35. Although I am skilled in card counting I: 1) have no idea as to how one would or could use a crowd counter to gain an advantage at blackjack, 2) am confident that a crowd counter of the type indicated cannot be so used; and 3) did not use the crowd counter in my possession for any such purpose at any time.

D. DISPOSITION AND PROSECUTION OF THE CRIMINAL MATTER

36. I was given an appearance date following my arrest.

37. I hired an attorney to represent me (Walsh & Friedman).

38. Walsh & Friedman, as I understand the process, requested discovery from the District Attorney.

39. In response to the discovery request a package of discovery attached as exhibit 1 was provided to Walsh & Friedman, who provided a full copy of the same to me.

40. I was particularly interested in receiving video evidence concerning my play as I was confident that it would show that I was not referencing the crowd counter in my possession in any way, and therefore, not using it to gain any advantage.

41. As is evident, no video was provided with the discovery from the District Attorney.

42. Per my concerns, an express request for any video was made to the District Attorney, to which the reply was that there was no such video evidence.

43. As I was not using the crowd counter in my play of blackjack at Green Valley Ranch, the video evidence would have been important exculpatory evidence concerning the charges against me and it would show I was not using the device to practice card counting or to gain an advantage at the game.

44. On or about September 12, 2017, I appeared in court on the charges against me arising out of the Green Valley Ranch arrest.

45. All of the charges stemmed from my possession and alleged use of the crowd counter.

46. At the hearing all criminal matters and charges against me were dismissed.

E. THE G2E EVENT

47. G2E is the largest gaming conference in the world, and I was a regular attendee, and have been to seven or eight such conferences.

48. The last four conferences I attended were in relation to my blogging and authorship, and I attended under press credentials.

49. My earlier visits were for my company, Carnivore Investment Strategies and for a game upon which I had undertaken the background mathematics, each as an exhibitor.

50. At the G2E for 2017, I attended a session in which Defendant, James Taylor, was giving a presentation on casino cheating.

51. It was my understanding from the literature for the event and the context of the event that James Taylor was speaking as an expert on the subjects and was an expert on the subjects.

52. I was surprised, flabbergasted, and horrified to see myself up on the screen as a cheater and a criminal illegally using a device during Taylor's power-point.

53. Taylor expressly referred to the crowd counter as an illegal card counting device, and indicated that it was in my possession, that I had been arrested due to the possession, and to my recollection, my arrest included a claim of cheating at gambling.

54. I was recognizable from the presentation made by Taylor as the person referred to, and I was also recognized at the event while Taylor was speaking as the person in Taylor's publication at the event. Further, I am well known personally within the casino industry as a commentator, a gambler, and a game developer, and I probably personally knew over fifty people at Taylor's presentation by name and appearance. From the images shown of me by photo and video, some of these persons would have recognized me from the photo and video.

55. While Taylor and the Board repeatedly state that they never called me a cheater, even if this were true, the fact that they found me in possession and use of a "card-counting device" is calling me a criminal and a cheater. My recollection is that Taylor expressly referred to me as a cheater, but considering the level of my emotional state at the time I was put up on the screen, I cannot swear to this with absolute certainty.

56. Taylor also referenced that the crowd counter was seized, and such seizure also indicates to all present that I was a cheater.

57. The presentation by Mr. Taylor was entitled "Scams, Cheats and Black Lists: Current Fraud and Casino Crimes."

58. As card counting is fully legal and common, and fully played within the rules of the game, it is not a scam, and therefore, my inclusion in James Taylor's presentation was as a "Cheat," and it was understood by all present as well that he was calling the person on the screen a cheater and a criminal, and that person was me.

59. All criminal charges against me were dismissed on September 12, 2017, over three weeks prior to Taylor's statements and presentation.

60. While at the conference, Taylor also showed a portion of a video recording of me that was obviously made at Green Valley Ranch immediately prior to my arrest.

61. It is, therefore, obvious that a video existed in the context of a portion of it having been actually shown at the presentation wherein I was defamed, was in the possession of Defendants, and was withheld from me in discovery on my criminal case.

F. DISCREPENCIES IN DEFENDANTS' PAPERS AND LIKLIHOOD OF SPECIAL DAMAGES

62. Until the date in question, I had never been given a trespass warning ("86d") at Green Valley Ranch, and the statement by Taylor that I had been previously trespassed ten times from Green Valley Ranch is a patently false and constructed statement. Further, to my knowledge of advantage gambling, if you are an advantage gambler and return to a gaming property after having been trespassed, the result is ordinarily an arrest, not another trespass, and invariably, with ten alleged prior trespass warnings, if it existed, I would have been arrested for trespassing, but there were no trespassing charges leveled against me upon my arrest.

63. I have never been arrested for trespassing at Green Valley Ranch.

64. Despite the statement by the Defendants in their brief at p. 8: 3 that he was presenting fraudulent activity, there was no fraud, cheating, or cheating device. Nonetheless, as stated by the Defendants in their brief, they admit that this is what was being presented

concerning me together with a picture of me and a video of me presented at the 2017 G2E by James Taylor.

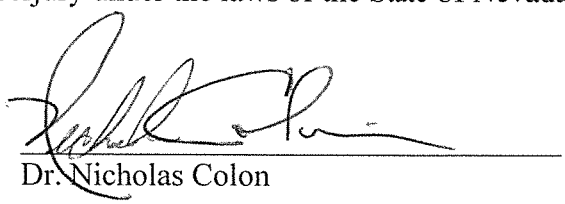
65. Following the assertions by Taylor at G2E and my apparent recognition as the person labeled by Mr. Taylor as a cheat and a criminal, my press credentials were denied for the succeeding G2E despite four years of prior approval and my voluminous reporting within the industry as referenced above. This is also the sole event involving an otherwise unmarred public reputation, and since this, the World Series of Poker have now denied me credentials.

66. Also following the assertions by Tayler at G2E, apparently upon discovering the assertions, my affiliation and regular reporting and writing for Gaming Insider Magazine was terminated by the magazine.

67. Simply, someone being labeled by the Nevada Gaming Control Board as a cheat or a criminal is persona non grata in the gaming industry, is likely restrained from being licensed under the Nevada gaming licensure statutes, and by this label suffers in his employability, reputation, publishability, and legal endeavors in the gaming industry.

I make the foregoing declaration under penalty of perjury under the laws of the State of Nevada.

Dated this 16th day of December, 2018.



Dr. Nicholas Colon

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 **DECLARATION OF DR. NICHOLAS G. COLON** 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 1

EXHIBIT 1

JUSTICE COURT, HENDERSON TOWNSHIP
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

NICHOLAS GREGORY COLON
#7042230,

Defendant.

CASE NO: 17FH0873X

DEPT NO:

CRIMINAL COMPLAINT

The Defendant above named having committed the crimes of BURGLARY (Category B Felony - NRS 205.060 - NOC 50424) and USE OF A DEVICE TO ANALYZE GAMING STRATEGY (Category B Felony - NRS 465.075, 465.088 - NOC 57913), in the manner following, to-wit: That the said Defendant, on or about the 16th day of May, 2017, at and within the County of Clark, State of Nevada,

COUNT 1 - BURGLARY

did willfully, unlawfully, and feloniously enter, with intent to commit larceny, that certain building occupied by GREEN VALLEY RANCH RESORT & CASINO, located at 2300 Paseo Verde Parkway, Henderson, Clark County, Nevada.

COUNT 2 - USE OF A DEVICE TO ANALYZE GAMING STRATEGY

did then and there willfully, unlawfully, and feloniously, while on the premises of 2300 Paseo Verde Parkway, Henderson, Clark County, Nevada, use or possess with intent to use, any computerized, electronic, or mechanical device, or any software or hardware, or any combination thereof, which is designed, constructed, altered, or programmed to obtain an advantage at playing any game in a licensed gaming establishment or any game that is offered by a licensee or affiliate, to wit; a silver card counting device, that projected the outcome of the game, kept track of the cards played or prepared for play, analyzed the probability of the occurrence of an event relating to the game, or analyzed the strategy for playing or betting to be used in the game.

///

All of which is contrary to the form, force and effect of Statutes in such cases made and provided and against the peace and dignity of the State of Nevada. Said Complainant makes this declaration subject to the penalty of perjury.

05/17/17

17FH0873X/mah
NVGCB EV# 20177653LV
(TK)

WITNESS LIST

AGENCY CASE NO. 2017-7653 LV

CODES	ID/P# / ADDRESS					PHONE #
Wit Codes: O	Name	L. HAYNIE		ID/P No	2153	
	SSN			DOB		RESIDENCE
	Res	Street #	City	State	Zip	EMPLOYMENT 486-2020
	Empl	555 E. WASHINGTON AVENUE	LAS VEGAS	NV	89101	FAX 486-2230
Wit Codes: VR	NAME	Otto, Mark		ID/P No		(702) 408-2452 RESIDENCE
	SSN	558-63-6589		DOB	8/10/1969	
1	RES	8901 EMBASSY CT. APT 101	LAS VEGAS	NV	89117	(702) 617-6900 EMPLOYMENT
	Empl	2300 PASEO VERDE PKWY	HENDERSON	NV	89052	FAX
Wit Codes: VR	Name	RODRIGUEZ, LUIS ROGER		ID/P No		702 994-9138 RESIDENCE
	SSN	530-48-9331		DOB	1/9/82	
2	Res	928 LONGSHANKS WAY	HENDERSON	NV	89015	(702) 617-6900 EMPLOYMENT
	Empl	2300 PASEO VERDE PKWY	HENDERSON	NV	89052	FAX
Wit Codes: VR	Name	ANDAYA, ISAI FRANCISCO		ID/P No		(702) 248-8067 RESIDENCE
	SSN	470-94-5133		DOB	12/03/93	
3	Res	7547 GRIST MILL CT. LV		NV	89113	(702) 617-6900 EMPLOYMENT
	Empl	2300 PASEO VERDE PKWY	HENDERSON	NV	89052	FAX
Wit Codes:	Name			ID/P No		RESIDENCE
	SSN			DOB		
	Res	Street #	City	State	Zip	EMPLOYMENT
	Empl	Street #	City	State	Zip	FAX
Wit Codes:	Name			ID/P No		RESIDENCE
	SSN			DOB		
	Res	Street #	City	State	Zip	EMPLOYMENT
	Empl	Street #	City	State	Zip	FAX

Witness Codes: V: Victim VR: Victim Related O: Officer
OOS: Out-Of-State H: Hostile DR: Defendant Related Mi: Minor

Clark County District Attorney
Submission Form No. 2/1995

NEW

Page 1 of 1

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
TEMPORARY CUSTODY RECORD

I.D. #: 1042230 Event #: 2017-7053CLV

DATE OF ARREST: 5/16/2017 TIME OF ARREST: 2315

I.D. ESTAB. BY: SCOPE

INTAKE NAME (AKA, ALIAS, ETC.) Last	First	Middle	TRUE NAME Last	First	Middle
COLON	NICHOLAS	GREGORY			

ADDRESS NUMBER & STREET	BLDG./APT. #	CITY	STATE	ZIP
1467 EVENING STAR AVE		HENDERSON	NV	89012

DATE OF BIRTH	RACE	SEX	HEIGHT	WEIGHT	HAIR	EYES	SOCIAL SECURITY #	Speak English?	PLACE OF BIRTH
5/11/1979	W	M	510	185	BRO	BRO	375 05 6826	☒ Yes ☐ No	LANSING, MI

LOCATION OF CRIME (# - Street - City - State - Zip)	Citizen Arrest	LOCATION OF ARREST	PCN #
2300 PASEO VERDE PKWY, HENDERSON NV 89052 ☐ LV	Y ☒	GREEN VALLEY RANCH RESORT	

BKG. CODE	CHARGE ORD / NRS #	M	GM	F	ARR TYPE*	EVENT NUMBER	WARR / NCIC NUMBER	COURT LV	COURT JC	COURT DC	COURT OTHER
5213	NRS 465.075/ USE/POSS OF DEVICE TO OBTAIN ADVANTAGE AT GAME $5000	☐	☐	☒	P/C	2017-7053CLV		☐	☐	☐	☒
5213	205.060/ BURGLARY $10,000	☐	☐	☒	P/C	2017-7053CLV		☐	☐	☐	☒
5213	465.083/ CHEATING AT GAMBLING $5000	☐	☐	☒	P/C	2017-7053CLV		☐	☐	☐	☒
		☐	☐	☐				☐	☐	☐	☐
		☐	☐	☐				☐	☐	☐	☐
		☐	☐	☐				☐	☐	☐	☐

*ARREST TYPE: PC – PROBABLE CAUSE BS – BONDSMAN SURRENDER BW – BENCH WARRANT WA – WARRANT RM – REMAND GJI – GRAND JURY IND.

OTHER COURT: HENDERSON JL

APPROVAL CONTROL # FOR ADDITIONAL CHARGES:

Arresting Officer's Signature — L HAYNIE / 2153 / NCLB (Print Name / P # / Agency)

Transporting Officer's Signature — M SCHAUF / 2238 / NCLB (Print Name / P # / Agency)

OFFICER MUST SIGN SECOND PAGE WITH ORIGINAL SIGNATURE.

Time Stamp at BOOKING

5-17-17 1:15 BSD RECORDS

P #:

☒ FOR PROBABLE CAUSE/NCIC HIT ARREST SEE PAGE TWO FOR DETAILS.

☐ BENCH WARRANT SERVED ON _____

☐ WARRANT SERVED ON _____

☐ GRAND JURY INDICTMENT SERVED ON _____

TYPE OF I.D. FOR VERIFICATION _____

DNA REQ

PHOTO

UNLAWFUL DISSEMINATION OF THIS RESTRICTED INFORMATION IS PROHIBITED. VIOLATION WILL SUBJECT THE OFFENDER TO CRIMINAL AND CIVIL LIABILITY.

MAY 17 2017

RELEASE TO: DA'S OFFICE

DATE: _____

LAS VEGAS METROPOLITAN POLICE DEPARTMENT

BY: _____ N13052G

LVMPD 22 (REV. 7-08) (1) CENTRAL RECORDS - ORIGINAL

7EH0873X - COLON, NICHOLAS - Page 13 of 8

APP086

LAS VEGAS METROPOLITAN POLICE DEPARTMENT

Page 1 of 1

DECLARATION OF ARREST

I.D. #: _____

True Name: Colon, Nicholas Gregory Date of Arrest: 5/16/2017 Time of Arrest: 2315hrs

OTHER CHARGES RECOMMENDED FOR CONSIDERATION:

Cheating at Gambling and Burglary

THE UNDERSIGNED MAKES THE FOLLOWING DECLARATIONS SUBJECT TO THE PENALTY FOR PERJURY AND SAYS: That I am a peace officer with NGCB (Department), Clark County, Nevada, being so employed for a period of 7+ years (months). That I learned the following facts and circumstances which lead me to believe that the above named subject committed (or was committing) the offense of Use & Possession of cheating device at the location of 2300 Paseo Verde Pkwy Henderson, 89052 and that the offense occurred at approximately 2120 hours on the 16th day of May, of 2017.

DETAILS FOR PROBABLE CAUSE:

On May 16, 2017, at approximately 2141 hours, I responded to Green Valley Ranch Resort in regard to Player Nicholas Colon, being detained for violation of NRS 465.075, Use and Possession of device to obtain advantage at playing games prohibited. An unidentified casino patron approached the table games supervisor and told him that the man on Blackjack Table #4 Double Black Jack #4. The table was using a counting device games supervisor observed the man later identified as Colon, holding his playing cards in one hand while his other hand was under the table. A phone call to surveillance confirmed Colon had something in his hand under table, and would periodically look down in his lap. Surveillance watched live, as Colon stood up from the table (after seeing the table games manager look in his direction), Colon was observed and recorded holding a small silver counting device. A surveillance operator did an internet check for "card counting device", and the third image in the search results was a picture of the device found in Colon's possession. The device in question can be used to determine the odds of higher value cards (or hands) being dealt. According to the unidentified witness, Colon could be heard clicking the counting device as cards were dealt on the table. Post Miranda, Colon stated he did not wish to answer any questions. All questioning related to the crime stopped. Typically, card counting works by assigning a value to each card and then adding or subtracting starting from zero. By keeping a running count, the player can determine when the odds of certain cards being dealt are higher or lower. Counting cards in your head is not illegal, however once a device is used, it is a felony in the state of Nevada. The above actions occurred on May 16, 2017, in Clark County Nevada, City of Henderson, at Green Valley Ranch Resort on Double Blackjack Table #4.

Wherefore, Declarant prays that a finding be made by a magistrate that probable cause exists to hold said person for preliminary hearing (if charges are a felony or gross misdemeanor) or for trial (if charges are a misdemeanor).

Declarant must sign second page with original signature

Declarant's Signature

Louis Haynie 2153

Print Declarant's Name P#

DECLARATION FOR COLON, NICHOLAS

LVMPD 22 – A (REV. 3-01) (1) ORIGINAL – COURT

APP087

STATE GAMING CONTROL BOARD
ENFORCEMENT DIVISION

PROPERTY IMPOUND REPORT

PAGE 1 OF 1

✓ EVIDENCE
____ SAFEKEEPING [Days to be held {30/60/90/120}]
____ OTHER

Date Impounded: 5/16/2017 Time Impounded: 2315 HRS Case No: 2017-76538

Suspect/RP: COLON, NICHOLAS GREGORY

Charge/Incident: Use/Poss Counting Device

Location of Occurrence: Green Valley Ranch Hotel/Casino

PKG NO.	ITEM NO.	DESCRIPTION-Including Serial No., Value If Known and Where Seized
1		Silver Counting Device (Round)

Was identifiable property checked through: ☐ NCIC ☐ SCOPE (Crime Victim)

Property Physically Impounded by: L. Haynie	P No: 2153	Date:
Witnessed by (When Appropriate):	P No:	Date:
Connecting Reports-Type and Case No:		
Supervisor Approving:	P No:	Date:

STATE GAMING CONTROL BOARD

MIRANDA WARNING AND WAIVER

1. You have the right to remain silent.
2. Anything you say can and will be used against you in a court of law.
3. You have the right to talk to a lawyer, and to have him/her present with you while you are being questioned.
4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish.
5. You can decide at any time to exercise these rights and not answer any questions or make any statements.

WAIVER

1. Do you understand your rights as I have explained them to you?

   ☒ Yes ☐ No

2. Having these rights in mind, do you wish to talk to me now?

   ☐ Yes ☒ No

DATE: 5/16/2017

TIME: 2313

Print Name: COLON, NICHOLAS

Signature: IN HANDCUFFS

Agent's Signature

2017-7653CV
GCB Case Number

STATE OF NEVADA
GAMING CONTROL BOARD

VOLUNTARY STATEMENT

OFFICIAL USE ONLY	
CASE #	
CASE TYPE	
DATE OCCURRED	TIME OCCURRED
ID #	

NAME (LAST / FIRST / MIDDLE)						DATE OF BIRTH	SOCIAL SECURITY #
Rodriguez Luis Robert						1-9-1982	530489331
RACE	SEX	HEIGHT	WEIGHT	HAIR	EYES	HOME #	
	M	5'7"	180	Brown	Brown	(702) 994 9138	

RESIDENCE ADDRESS (NUMBER & STREET)	CITY	STATE	ZIP CODE
928 Longshanks Way	Henderson	NV	89015
EMPLOYER ADDRESS	**CITY**	**STATE**	**ZIP CODE**
2300 Paseo Verde PKwy	Henderson	NV	89052

EMPLOYER	OCCUPATION	WORK #	WORK SCHED	DAYS OFF
Green Valley Resort Casino	Table games Supervisor	702 617 7777	7-3	Sun-Mon.

I DO HEREBY MAKE THE FOLLOWING VOLUNTARY STATEMENT ON 5 (MONTH) 16 (DAY) 2017 (YEAR) AT 1005 AM/PM

At approximately 9:20pm I was approached by a guest unknown to me. The man was 6'3" tall white male, he related to me that he was playing Blackjack on table DB-4 and he observed another guest at the table using some type of handheld device to track the deck. He said he surmised this as the guest would click the device in his hand as the cards were being dealt and as players were taking hit cards. He said he left the table to come and tell me and because he didn't want to get involved if there was to be an incident at the table. Upon receiving this information I walked over to table DB-4 and observed the guest in question at the table holding his cards in his left hand but the other right hand was not visible to me as he was holding it under the table. I went to the phone and called surveillance to see if they could observe what might be happening at the table the agent told me he could see the guest but also he could not see the guests hand as it was under the table. I was observing the guest while taking

I HAVE REVIEWED THIS STATEMENT OF ____ PAGE(S) AND BELIEVE IT TO BE TRUE AND ACCURATE TO THE BEST OF MY RECOLLECTION.

Luis Rodriguez 9222
SIGNATURE

WITNESS

5-16-17
DATE

1 OF 2 PAGES

ENF-12 (Rev. 01-07)

STATE OF NEVADA
GAMING CONTROL BOARD

VOLUNTARY STATEMENT CONTINUATION

OFFICIAL USE ONLY	
CASE #	
CASE TYPE	
DATE OCCURRED	TIME OCCURRED
ID #	

to the surveillance agent. The guest appeared to realize I was observing him and as I hung up the phone, and called my shift manager to make a report, the guest got up to color up his chips. As he arose from the game I observed some type of silver colored device in his hand but could not make out the nature of the device. The guest colored up his chips $200 and walked over to MB-1 stood there momentarily and then proceeded to walk away and into the slots in a northerly direction. I noticed the guest was also aware that I was observing him as he would occasionally glance in my direction. While I was making these observations I was relaying all I was witnessing to Wendy my shift ~~Manager~~ Manager. Wendy came to where I was standing and I pointed the guest out to her. The guest was using a rewards card issued to Jack Record #3443124 From what I could discern from the Bravo system he had been playing at DB-4 since 8:09pm

I HAVE REVIEWED THIS STATEMENT OF 2 PAGE(S) AND BELIEVE IT TO BE TRUE AND ACCURATE TO THE BEST OF MY RECOLLECTION.

WITNESS

SIGNATURE

2 PAGE OF 2 PAGES

5-16-17 DATE

ENF-12A (REV. 01-07)

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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, Defendant(s).	Case No. A-18-782057-C Dept. No. XXIX Date of Hearing: December 20, 2018 Time of Hearing: 9:00 a.m.

DEFENDANTS' REPLY IN SUPPORT OF THEIR ANTI-SLAPP SPECIAL MOTION TO DISMISS

Defendants, James Taylor and Nevada Gaming Control Board, by and through counsel, Adam Paul Laxalt, Attorney General of the State of Nevada, Theresa M. Haar, Senior Deputy Attorney General and Edward L. Magaw, Deputy Attorney General, submit their Reply in Support of Their Special Motion to Dismiss pursuant to NRS 41.660 et seq.

I. Introduction

Plaintiff's Complaint alleged a single claim of defamation arising out of Taylor's presentation during G2E in 2017. Defendants Taylor and GCB have demonstrated that Taylor's presentation was a good faith statement on a matter of public concern, and therefore the Anti-SLAPP statute applies. Furthermore, Defendants have demonstrated

that the statement regarding Plaintiff was a substantially true statement, and truth is an absolute defense to defamation. Additionally, Defendants have demonstrated that commentary on a video constitutes evaluative opinion and opinions cannot form the basis of a defamation claim. Lastly, Defendants are entitled to immunity under the fair reporting privilege.

Plaintiff's Opposition did not oppose many of the arguments in Defendants' Special Motion to Dismiss, thereby conceding those arguments, and instead focused on two counter-arguments. First, regarding the usefulness of a crowd counter in counting cards at blackjack. Second, challenging the constitutionality of the Anti-SLAPP Statute. Both arguments fail and Plaintiff's Complaint must be dismissed pursuant to NRS 41.660.

II. Legal Argument

A. Dismissal is required under NRS 41.660 et seq.

Evaluation of the Anti-SLAPP motion is a two-step process. First, the defendant must show that the plaintiff'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." NRS 41.660(3)(a).

Defendants demonstrated that Taylor's presentation was a statement made on a matter of public concern. Motion at 6-8. Plaintiff's only opposition to this was regarding the truthfulness of Taylor's statement, and otherwise conceded that the statement was a matter of public concern. Opp. at 10-11. However, Taylor's statement was truthful, and therefore dismissal is required.

Second, once the defendant meets its burden on the first prong, the burden then shifts to the plaintiff, who must make a sufficient evidentiary showing that he has a probability of prevailing on his claim. NRS 41.660(3)(b). Plaintiff has not met this burden and dismissal is required.

. . .

. . .

. . .

1. Plaintiff has not demonstrated a probability of prevailing on his defamation claim

To establish a cause of action for defamation, a plaintiff must demonstrate: (1) a false and defamatory statement by the defendant concerning the plaintiff; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages. *Wynn v. Smith*, 117 Nev. 6, 10 (2001). A statement can be defamatory only if it contains a factual assertion that can be proven false. *See Pope v. Motel 6*, 121 Nev. 307, 314, 114 P.3d 277, 282 (2005). Plaintiff has not met this burden, and dismissal is required.

a. Plaintiff is a public figure

Defendants demonstrated that Plaintiff is a public figure, or at least a limited purpose public figure. Motion at 9-11. Plaintiff does not dispute this, and instead acknowledges that he is so well-known, that even though his name was not used during Taylor's presentation, nor was his face shown, that he was readily recognized by a number of individuals present for Taylor's presentation. Opp. at 3. As a public figure, Plaintiff has a heightened standard in demonstrating defamation, and must prove actual malice, i.e., with knowledge that it was false or with reckless disregard of whether it was false or not. Mere negligence does not suffice. The plaintiff must affirmatively prove that the author in fact entertained serious doubts as to the truth of his publication or had a "high degree of awareness of their probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). A defamation plaintiff must establish actual malice by clear and convincing evidence. *See Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 511 (1984). This same heightened standard applies to a limited purpose public figure when the statement concerns the public controversy or range of issues for which he is known. *See Makaeff v. Trump Univ., LCC*, 715 F.3d 254 (9th Cir. 2013).

Plaintiff has been unable to meet this heightened standard, and therefore Plaintiff's Complaint must be dismissed.

. . .

b. Truth is an absolute defense to defamation

Taylor's presentation played a 9-second clip and identified the device in Plaintiff's hand as the only counting device recovered by GCB that year. This is directly supported by the notes of the presentation Taylor used in the Power Point. Plaintiff has not, and cannot, demonstrated that that is a knowingly false statement.

Taylor did not identify Plaintiff as a cheater in this presentation. However, Plaintiff was arrested for cheating activities based on the conduct in the video. Regardless of whether Plaintiff plead nolo to a lesser crime, and regardless of whether the case was eventually dismissed, it is a true statement that Plaintiff was in fact arrested for cheating-related conduct based on the contents of the video. *See State v. Gomes*, 112 Nev. 1473, 1479, 930 P.2d 701, 705 (1996) ("A plea of nolo contendere does not expressly admit guilt but nevertheless authorizes a court to treat the defendant as if he or she were guilty" *citing North Carolina v. Alford*, 400 U.S. 25, 35 (1970)).

Other courts have considered the issue of making a misstatement of a technical level when addressing someone's criminal history, and have determined that so long as the 'gist' of the statement was correct, the statement was not defamatory. *Hayward v. Watsonville Register-Pajaronian & Sun*, 265 Cal. App. 2d 255, 262, 71 Cal. Rptr. 295, 300 (Ct. App. 1968) ("It is well settled that a defendant is not required in an action of libel to justify every word of the alleged defamatory matter; it is sufficient if the substance, the gist, the sting of the libelous charge be justified and if the gist of the charge be established by the evidence, the defendant has made his case").

In *Jennings v. Telegram-Tribune Co.*, the court there determined that misstating that someone had been convicted of felony tax fraud when they had pled to misdemeanor failing to file a tax return was not defamatory, as it is "substantially true." *Jennings v. Telegram-Tribune Co.*, 164 Cal. App. 3d 119, 127, 210 Cal. Rptr. 485, 489 (Ct. App. 1985).

In *Kilgore v. Younger*, the court determined that the California Attorney General's Office releasing the plaintiff's name on a list of individuals involved in organized crime was not defamatory, despite the fact that he was merely a bookkeeper when others on the list

were involved in significantly more nefarious activity. *Kilgore v. Younger*, 30 Cal. 3d 770, 777, 640 P.2d 793, 797 (1982) (holding that "the average reader of either paper would reasonably interpret the articles to imply only that Kilgore was connected in some fashion with organized crime. As we see it, this is exactly the import of Attorney General Younger's release").

In *Colt v. Freedom Commc'ns, Inc.*, the court there determined that the report, while containing errors and deviating from the SEC Complaint, did not give rise to a finding of defamation, as the effect on the readers of the articles was substantially the same as the effect on the readers of the Complaint. *Colt v. Freedom Commc'ns, Inc.*, 109 Cal. App. 4th 1551, 1560, 1 Cal. Rptr. 3d 245, 252 (2003) (finding that "[t]he articles fairly describe the gist of plaintiffs' misconduct").

In *Tiwari v. NBC Universal, Inc.*, a Plaintiff alleged defamation when it was reported during an episode of *To Catch a Predator* that he was convicted of a felony count of lewd and lascivious acts with a child, when he pled to the misdemeanor of attempting to communicate with a girl under the age of 14. "However, the fact that he was convicted of only a misdemeanor – which was not by its terms a sexual offense and which was then reduced to an infraction as part of a plea deal – would not have affected a viewer." *Tiwari v. NBC Universal, Inc.*, No. C-08-3988 EMC, 2011 WL 5079505, at *15 (N.D. Cal. Oct. 25, 2011), order clarified, No. C-08-3988 EMC, 2011 WL 5903859 (N.D. Cal. Nov. 23, 2011).

Therefore, whether Plaintiff pled nolo or guilty to a lesser crime, after being arrested for cheating-related crimes, Taylor's statement regarding recovery of the counting device was substantially true and does not support a claim of defamation.

c. Opinions cannot support a claim for defamation

Defendants demonstrated that Taylor's commentary based on factually accurate video constitute evaluative opinions, and cannot support a claim of defamation. Motion at 12-13. *See People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 111 Nev. 615, 895 P.2d 1269 (1995). Plaintiff did not dispute whether Taylor's commentary was an . . .

evaluative opinion, and therefore conceded that Taylor's commentary on the conduct in the video was opinion, which cannot support a claim of defamation. Dismissal is required.

2. Defendants are entitled to absolute immunity

Nevada recognizes the fair reporting privilege which is "a special privilege of absolute immunity from defamation" available to those reporting on judicial proceedings. *See Sahara Gaming Corp. v. Culinary Workers Union Local 226*, 115 Nev. 212, 984 P.2d 164 (1999). Defendants GCB and Taylor demonstrated that they are entitled to the fair reporting privilege. Motion at 14-15.

Plaintiff did not challenge Defendants' assertion of immunity, and therefore conceded that Defendants are entitled to immunity under the fair reporting privilege. Dismissal is required.

B. Nevada's Anti-SLAPP Statute is constitutional

The crux of Plaintiff's Opposition is to challenge the constitutionality of Nevada's Anti-SLAPP statute. Opp. at 14-20. As a preliminary matter, "[s]tatutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional. In order to meet that burden, the challenger must make a clear showing of invalidity." *Silvar v. Eighth Jud. Dist. Ct.*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006) (internal citation omitted). Plaintiff has failed to do so. The argument is without merit.

Plaintiff is correct that technically, Nevada has had some form of an Anti-SLAPP statute on the books since the 1990s. Opp. at 2. However, the version passed by the Legislature in 2013 was markedly different from the version in years past and was a strong pronouncement of the importance of the necessity of freedom of speech in this state. "A SLAPP lawsuit is characterized as a meritless suit filed primarily to discourage the named defendant's exercise of First Amendment rights." S.B. 286, 2013 Leg. Sess., 77th Sess. (Nev. 2013). The Nevada legislature acted to protect these rights by creating tort reform mechanism that requires cases attacking these rights to be more than a mere recitation of allegations. The pre-2013 version of the statute only covered petitioning activity, which . . .

made its protections much narrower (at the time) than the Anti-SLAPP statutes of Nevada's neighboring states, such as California and Oregon.

That is why the 2013 amendment added, *inter alia*, NRS 41.637(4), which protects a defendant's exercise of his First Amendment rights in connection with an issue of public interest. This expansion was based on the California Anti-SLAPP statute, Cal. Code Civ. Proc. §425.16(b), which protects "any act… in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue..." The Legislature also took this opportunity to clarify that the Anti-SLAPP statute creates a substantive immunity from suit, not just immunity from liability, drawing inspiration from *Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795, 797 (June 18, 2012) (finding that California's Anti-SLAPP statute provides immunity from suit, rather than immunity from liability). *See* Senate Committee on Judiciary hearing on Nev. SB 286, at 3 (Mar. 28, 2013); *see also* Journal of the Senate, 77th Leg. Sess., Day 78 at 600 (Apr. 22, 2013).

The Nevada Legislature and Judiciary have historically looked to California for guidance on crafting and applying its Anti-SLAPP statute. The Nevada Supreme Court explicitly stated in *John v. Douglas Cty. Sch. Dist.*, 125 Nev. 746, 756 (2009) that "we consider California case law because California's anti-SLAPP statute is similar in purpose and language to Nevada's anti-SLAPP statute."

Furthermore, the Legislature explicitly incorporated California case law in amending the statute in 2015 when it defined a plaintiff's evidentiary burden on the second prong of analysis for a special motion to dismiss. The plaintiff's burden is that of "*prima facie*" evidence, which is defined as "the same burden of proof that a plaintiff has been required to meet pursuant to California's anti-Strategic Lawsuit Against Public Participation law as of the effective date of this act." *See* S.B. 444, 2015 Leg. Sess., 78th Sess. (Nev. 2015) at §12.5(2). This is in contrast to the prior version of the statute which required a heightened evidentiary standard.

. . .

One of the earliest Anti-SLAPP challenges occurred in California in Br*iggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106 (1999). The plaintiff there argued that the state's Anti-SLAPP statute deprived a plaintiff of his right to a jury trial by forcing him to prove his case at the early stages of litigation. The court dismissed this argument, finding that the statute only required a showing of minimal merit as to a plaintiff's claims, not to definitely prove them. *See id*. at 1122-23. The *Briggs* court also cited with approval the public policy underlying a broad application of the statute. *See id*. at 1121-22.

Dealing with a similar issue regarding the Texas Anti-SLAPP statute, Tex. Civ. Prac. & Rem. Code §27.003 et seq., the court in *Deaver v. Desai*, 2015 Tex. App. LEXIS 12259, *14 (Tex. App. Houston 14th Dist. Dec. 3, 2015) found that the evidentiary requirements of that state's statutes did not create any constitutional problems. The Texas statute requires a plaintiff to "establish[] by clear and specific evidence a prima facie case for each essential element of the claim in question." Tex. Civ. Prac. & Rem. Code §27.005. While daunting at first blush, Texas courts have interpreted this language to mean that a plaintiff must merely provide evidence that is "unambiguous, sure, or free from doubt" and that is "explicit or relating to a particular named thing." *Desai*, 2015 Tex. App. LEXIS 12259 at *14. The court there stated that "[t]hese terms do not impose an elevated evidentiary standard, nor do they categorically reject the consideration of circumstantial evidence." *Id*. While this case did not explicitly deal with a constitutional challenge, the standards recited by the court establish that it would withstand constitutional scrutiny.

Oregon addressed the constitutionality of its Anti-SLAPP statute in *Handy v. Lane Cty*., 274 Ore. App. 644, 652 (2015). The Oregon statute, ORS 31.150, requires a plaintiff to "establish that there is a probability that the plaintiff will prevail on the claim by presenting substantial evidence to support a prima facie case." *Id*. at 31.150(3). The court in *Lane* explained that a plaintiff may meet his burden under the statute "by producing direct evidence, reasonable inferences that may be drawn from that evidence, and 'affidavits setting forth such facts as would be admissible in evidence.'" *Lane*, 274 Ore. App. at 652 (*quoting OEA v. Parks*, 253 Ore. App. 558, 567 (2012)). It specified that, for

the statute to remain constitutional, "'the trial court may not weigh the plaintiff's evidence against the defendant's' and 'may consider defendant's evidence only insofar as necessary to determine whether it defeats plaintiff's claim as a matter of law.'" *Lane*, 274 Ore. App. At 652 (*quoting Young v. Davis*, 259 Ore. App. 497, 501 (2013)).

In 2017, the Nevada Supreme Court exercised its discretion in the *Shapiro v. Welt* case to review de novo the Anti-SLAPP statute's constitutionality for the first time on appeal. *Shapiro v. Welt*, 133 Nev.____, 389 P.3d 262, 268 (Adv. Op. 6, Feb. 2, 2017). The Nevada Supreme Court reviewed the same 2015 version of the statute as is at issue here. The Nevada Supreme Court found the Anti-SLAPP statute to be constitutional. This Court should do the same.

III. Conclusion

Based on the foregoing, Plaintiff's Complaint must be dismissed pursuant to the Anti-SLAPP statute. Plaintiff conceded that Taylor's presentation was made on a matter of public concern. Plaintiff also conceded that he is a public figure, which would then require him to affirmatively demonstrate actual malice in order to withstand dismissal. Plaintiff has been unable to do so because the contents of Taylor's statement were substantially true. Additionally, Plaintiff has effectively conceded that Defendants are entitled to immunity under the fair reporting privilege.

Lastly, Nevada's Anti-SLAPP statute is constitutional, and other states with analogous statutes have repeatedly withstood similar constitutional challenges. The

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Nevada Supreme Court has also recently reviewed Nevada's Anti-SLAPP statute and found it to be constitutional. Dismissal pursuant to NRS 41.660 et seq. is required.

DATED this 19th day of December 2018.

ADAM PAUL LAXALT
Attorney General

By: */s/ THERESA M. HAAR*
Theresa M. Haar (Bar No. 12158)
Senior Deputy Attorney General
Edward L. Magaw (Bar No. 9111)
Deputy Attorney General
Attorneys for Defendants
James Taylor and Nevada
Gaming Control Board

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court by using the electronic filing system on the 19th day of December, 2018.

I certify that the following participants in this case are registered electronic filing systems users and will be served electronically:

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SPA
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Attorneys for Plaintiff

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.

Nersesian & Sankiewicz

/S/ Robert A. Nersesian
Robert A. Nersesian
Nev. Bar No. 2762
Thea M. Sankiewicz
Nev. Bar No. 2788
528 S. 8th St.
Las Vegas, NV 89101
Attorneys for Plaintiff

[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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Leiendecker v. Asian Women United of Minn.

Supreme Court of Minnesota

May 24, 2017, Filed

A16-0360

Reporter
895 N.W.2d 623 *; 2017 Minn. LEXIS 292 **; 2017 WL 2267289

Lawrence Leiendecker, et al., Respondents, vs. Asian Women United of Minnesota, et al., Appellants, Greenstein, Mabley & Wall, LLC, et al., Appellants.

Prior History: [**1] Court of Appeals.

Leiendecker v. Asian Women United, 2016 Minn. LEXIS 332 (Minn., May 31, 2016)

Disposition: Affirmed.

Core Terms

district court, anti-SLAPP, immunity, parties, responding party, lawsuit, clear and convincing evidence, court of appeals, jury-trial, statutes, probable cause, constitutional challenge, jury trial, instructions, malicious prosecution, requires, issues, waived, burden of persuasion, petition for review, moving party, ripe, malicious prosecution claim, indemnification, accelerated, allegations, subdivision, provisions, equitable, Clauses

Case Summary

Overview
HOLDINGS: [1]-Respondents had not waived their claim that the anti-SLAPP law, Minn. Stat. § 554.02, was unconstitutional, as the claim did not become viable until the present court reversed the court of appeals, it would have been inappropriate to raise it in a petition for rehearing, and the argument was not ripe when respondents petitioned for review following remand; [2]-Section 554.02, subd. 2, cls. 2 and 3 violated the responding party's right to a jury trial under Minn. Const. art. I, § 4 as applied to actions at law alleging torts because they transferred the jury's fact-finding role to the trial court and because they required the responding party to meet a higher burden of proof before trial (clear and convincing evidence) than it would have to meet at trial (preponderance of the evidence); [3]-The unconstitutional provisions were not severable from the rest of § 554.02.

Outcome
Decision affirmed.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN1[] **Freedom of Speech, Strategic Lawsuits Against Public Participation**

A party moving to dismiss a claim based on the anti-SLAPP law must make a threshold showing that the underlying claim materially relates to an act of the moving party that involves public participation. Minn. Stat. § 554.02, subd. 1). After the moving party makes this threshold showing, the burden shifts to the responding party.

Civil Procedure > Appeals > Standards of

Review > De Novo Review

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN2[] **Standards of Review, De Novo Review**

The legal effect of a party's failure to raise an issue on appeal presents a question of law requiring de novo review. Waiver is the intentional relinquishment of a known right; it is the expression of an intention not to insist upon what the law affords. If a party petitions for review, the party must bring all claims then ripe in that petition for review or waive further review of such claims in the appellate court.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN3[] **Reviewability of Lower Court Decisions, Preservation for Review**

In contrast to waiver, forfeiture refers to the failure to timely assert a right.

Civil Procedure > Preliminary Considerations > Justiciability > Ripeness

HN4[] **Justiciability, Ripeness**

A claim becomes ripe when there is an intervening change in the law between a party's initial decision not to raise the claim because it would have been futile under then-existing law, and a later decision to raise that claim for the first time. An intervening change in the law is a new rule that overrules existing precedent.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN5[] **Reviewability of Lower Court Decisions, Preservation for Review**

Waiver must be based on a full knowledge of the facts.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN6[] **Reviewability of Lower Court Decisions, Preservation for Review**

In general, the appellate court does not consider issues not raised to the courts below.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN7[] **Reviewability of Lower Court Decisions, Preservation for Review**

Waiver is an administrative rule dictating that appellate courts will not decide issues that were not raised in the trial court.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Appeals > Remands

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

HN8[] **Standards of Review, Abuse of Discretion**

Appellate courts review a district court's compliance with remand instructions under the deferential abuse of discretion standard. Though trial courts generally have broad discretion to determine how to proceed on remand, they cannot act in a way that is inconsistent with the remand

instructions provided. A trial court exceeds its broad discretion on remand when it makes findings on a subject not included in the appellate court's remand instructions.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

Constitutional Law > State Constitutional Operation

***HN9*[] Standards of Review, De Novo Review**

An appellate court reviews de novo both the constitutionality of statutes and the interpretation and application of the Minnesota Constitution.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > Inferences & Presumptions

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

***HN10*[] Constitutionality of Legislation, Inferences & Presumptions**

A court presumes that statutes are constitutional. Minn. Stat. § 645.17(3) (2016). The power to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary. But the court exhibits a watchful jealousy of any impairment of the right of a free and inviolate jury trial. A law is unconstitutional if it renders the jury-trial right so burdened with conditions that it is not a jury trial, such as the Constitution guarantees.

Civil Procedure > Appeals > Standards of Review > Reversible Errors

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

***HN11*[] Standards of Review, Reversible Errors**

Minn. Const. art. I, § 4 establishes that the right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy. The language of Article I, Section 4 is categorical, permitting no exceptions. Denial of the jury-trial right is reversible error.

Civil Procedure > Preliminary Considerations > Equity

Torts > Procedural Matters

***HN12*[] Preliminary Considerations, Equity**

The jury-trial right exists for any "type of action" for which a jury trial was provided when the Minnesota Constitution was adopted in 1857. The nature and character of the controversy, as determined from all the pleadings and by the relief sought, determines whether the cause of action is one at law today, and thus carries an attendant constitutional right to jury trial. The jury-trial right does not extend to equitable claims. A tort action seeking money damages, however, is an action at law.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Torts > Intentional Torts > Malicious Prosecution > Elements

***HN13*[] Jury Trials, Province of Court & Jury**

Malicious prosecution is an action for a tort with a right to damages. The tort of malicious prosecution has three elements: (1) the action must be brought

without probable cause or reasonable belief that the plaintiff would ultimately prevail on the merits; (2) the action must be instituted and prosecuted with malicious intent; and (3) the action must terminate in favor of the defendant. Both the probable cause and malice elements of a malicious prosecution claim are factual questions for the jury.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

***HN14*[] Entitlement as Matter of Law, Appropriateness**

Summary judgment is appropriate only if there is no genuine issue as to any material fact. Minn. R. Civ. P. 56.03. All factual inferences must be drawn against the movant for summary judgment.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

***HN15*[] Jury Trials, Province of Court & Jury**

Minn. Stat. § 554.02, subd. 2 unconstitutionally instructs district courts to usurp the role of the jury by making pretrial factual findings that can, depending on the findings, result in the complete dismissal of the underlying action. The role of resolving disputed facts belongs to the jury, not the court.

Evidence > Burdens of Proof > Burdens of Production

Evidence > Burdens of Proof

***HN16*[] Burdens of Proof, Burdens of Production**

The burden of production is the obligation of a party to come forward with sufficient evidence to support its claim or the relief requested. The burden of persuasion is the obligation to persuade the trier of fact of the truth of a proposition. Since the middle of the twentieth century, the term "burden of proof" has been used synonymously with the term "burden of persuasion."

Evidence > Burdens of Proof > Clear & Convincing Proof

Evidence > Burdens of Proof > Preponderance of Evidence

Evidence > Burdens of Proof > Proof Beyond Reasonable Doubt

***HN17*[] Burdens of Proof, Clear & Convincing Proof**

"Clear and convincing evidence" refers to a burden of persuasion. The burden of persuasion is usually expressed in terms of the degree to which a fact-finder must be convinced of the existence of a particular fact—by a preponderance of the evidence, clear and convincing evidence, or proof beyond a reasonable doubt.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Torts > Remedies

HN18[] **Freedom of Speech, Strategic Lawsuits Against Public Participation**

Minn. Stat. § 554.02, subd. 2, cls. 2 and 3 violate the responding party's right to a jury trial in two ways as applied to actions at law alleging torts. First, they transfer the jury's fact-finding role to the district court. Second, they require the responding party to meet a higher burden of proof before trial (clear and convincing evidence) than it would have to meet at trial (preponderance of the evidence).

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

HN19[] **Fundamental Rights, Trial by Jury in Civil Actions**

A party has no right to a jury trial of a fact issue previously decided and binding on him by principles of res judicata and privity.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Torts > Remedies

HN20[] **Freedom of Speech, Strategic Lawsuits Against Public Participation**

Minn. Stat. § 554.02 is unconstitutional as applied to claims at law alleging torts.

Civil Procedure > Preliminary Considerations > Equity

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

HN21[] **Preliminary Considerations, Equity**

Factual findings that are common to both claims at law and claims for equitable relief are binding upon the district court. But by extending equitable jurisdiction to new subjects, the legislature cannot impair the right to trial by jury.

Governments > Legislation > Severability

HN22[] **Legislation, Severability**

Provisions of a law are severable unless they are so essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume the legislature would have enacted the remaining valid provisions without the void one or the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent. Minn. Stat. § 645.20 (2016). If a statute has unconstitutional applications, they are severable from the constitutional applications.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Torts > Remedies

HN23[] **Freedom of Speech, Strategic Lawsuits Against Public Participation**

The two unconstitutional clauses of Minn. Stat. § 554.02, Minn. Stat. § 554.02, subd. 2, cls. 2 and 3, are inseparable from the remainder of the section. Without the unconstitutional provisions, § 554.02 provides no procedure for courts to determine whether a lawsuit violates the substantive prohibition of Minn. Stat. § 554.03. Therefore, § 554.02 is unconstitutional when it requires a district court to make a pretrial finding that speech or conduct is not tortious under Minn. Stat. § 554.03.

Constitutional Law > ... > Fundamental

Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Torts > Remedies

***HN24*[] Freedom of Speech, Strategic Lawsuits Against Public Participation**

Minn. Stat. § 554.02 is unconstitutional when it requires a district court to make a pretrial finding that speech or conduct is not tortious under Minn. Stat. § 554.03.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Torts > Remedies

***HN25*[] Freedom of Speech, Strategic Lawsuits Against Public Participation**

Minn. Stat. § 554.02 is unconstitutional as applied to claims at law alleging torts.

Syllabus

1. The respondents did not waive their argument that Minn. Stat. § 554.02 (2016) violates Article I, Section 4 of the Minnesota Constitution.

2. Minnesota Statutes § 554.02, as applied to claims at law alleging torts, violates the respondents' jury-trial right under Article I, Section 4 of the Minnesota Constitution.

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Thomas P. Kane, Armeen F. Mistry, Cozen O'Connor, Minneapolis, Minnesota, for appellants Greenstein, Mabley & Wall, LLC, et al.

Judges: McKeig, J. Dissenting, Gildea, C.J.

Opinion by: MCKEIG

Opinion

[*628] MCKEIG, Justice.

Sinuon and Lawrence Leiendecker sued the nonprofit organization Asian Women United of Minnesota (AWUM), alleging that two of AWUM's previous lawsuits against them constituted malicious prosecution. AWUM sought immunity under Minnesota's anti-SLAPP (Strategic Lawsuit Against Public Participation) law, which permits parties to move for dismissal of a lawsuit on the ground that a claim against them **[**2]** relates to an act involving public participation. Minn. Stat. §§ 554.01-.06 (2016). After we clarified the law's procedure, the district court ruled that the section of the law that governs motions "to dispose of a judicial claim," Minn. Stat. § 554.02, subdivision 1, violated the Leiendeckers' right to a jury trial by requiring the trial judge to find facts. *Id.*, subd. 2(3) (requiring "the court" to make findings). AWUM appealed to the court of appeals, then petitioned this court for accelerated review, which we granted. For the reasons that follow, we affirm.

Our previous case involving these parties chronicled the history of this litigation.

> The parties in this case have a long-running feud that has resulted in multiple lawsuits. AWUM is a nonprofit organization that operates a shelter for battered women and provides other services for women and children. Sinuon Leiendecker was AWUM's executive director from 1999 to 2004. Lawrence Leiendecker is an attorney who

provided pro bono legal services to AWUM.

The relationship between AWUM and the Leiendeckers began to deteriorate in 2003. In late 2003, the Leiendeckers attempted to oust AWUM's board of directors by forming a new board, terminating the old board, and filing a declaratory-judgment action **[**3]** to have the new board declared legitimate. In response, AWUM's old board alleged that it had previously fired Sinuon from her position as AWUM's executive director and that she had received wages and benefits to which she was not entitled.

[*629] In that lawsuit—the first between the parties—the district court rejected the Leiendeckers' efforts to install the new board of directors. The district court also rejected the old board's allegation that it had fired Sinuon, but permitted the old board to proceed on its claims that Sinuon had received wages and benefits to which she was not entitled. The old board then fired Sinuon and sought, unsuccessfully, to add a legal-malpractice claim against Lawrence to the action. After AWUM declined to tender advance indemnification to Sinuon, the district court dismissed the case and awarded approximately $25,000 to Sinuon as reimbursement of her costs and attorney fees.

In the parties' second lawsuit, Sinuon sued AWUM in August 2005 for, among other things, wrongful termination. The district court dismissed the action, but the court of appeals reversed. *Leiendecker v. Asian Women United of Minn.*, 731 N.W.2d 836, 838 (Minn. App. 2007). The parties settled the second lawsuit in 2008.

In the parties' third lawsuit, AWUM sued Lawrence in **[**4]** February 2007 for legal malpractice and related claims. Lawrence counterclaimed for indemnification. The district court eventually dismissed AWUM's complaint at AWUM's request, granted summary judgment to Lawrence on his counterclaim for indemnification, and entered judgment for over $41,000 in favor of Lawrence.

In the parties' fourth lawsuit, AWUM sued Sinuon in February 2008 for conversion and related claims, alleging that Sinuon had received wages and other payments to which she was not entitled while she was AWUM's executive director. Sinuon again moved for advance indemnification. The district court initially denied Sinuon's motion, but the court of appeals reversed and remanded. *Asian Women United of Minn. v. Leiendecker*, 789 N.W.2d 688, 689 (Minn. App. 2010). On remand, the district court concluded that Sinuon was entitled to indemnification, and then dismissed the lawsuit when AWUM declined to tender advance indemnification to Sinuon. The district court also entered judgment in favor of Sinuon to reimburse her for the costs and attorney fees that she had incurred prior to the dismissal.

In this lawsuit, now the fifth between the parties, the Leiendeckers seek to recover under a host of legal theories for the injuries allegedly inflicted by AWUM and the other **[**5]** defendants through the four previous lawsuits. Their complaint spans 116 pages, includes a total of 11 separately numbered claims, and names 18 defendants (plus some John Does and John Doe entities), including: AWUM; a current and a former executive director of AWUM; certain current and former AWUM board members; and individuals and companies that have provided professional services or expert testimony for AWUM. . . .

In the district court, AWUM moved for dismissal on a number of grounds, but the only ground relevant to this appeal arises out of Minnesota's anti-SLAPP statutes, Minn. Stat. §§ 554.01-.05 (2012). The anti-SLAPP statutes are directed at "SLAPP suits"—"Strategic Lawsuits Against Public Participation"—which

> are lawsuits that target the exercise of "[l]awful conduct or speech that is genuinely aimed in whole or in part at procuring favorable government action." Minn. Stat. § 554.03; *see also Middle-Snake-Tamarac Rivers Watershed Dist. v. Stengrim*, 784 N.W.2d 834, 839 (Minn. 2010). . . .
>
> The district court dismissed most of the Leiendeckers' claims, but denied **[*630]** AWUM's anti-SLAPP motion with respect to one: a claim for malicious prosecution.

Leiendecker v. Asian Women United of Minn., 848 N.W.2d 224, 226-28 (Minn. 2014) (footnotes omitted).

HN1[↑] A party moving to dismiss a claim based on the anti-SLAPP law must "make a threshold showing that the underlying 'claim materially relates to an act of the **[**6]** moving party that involves public participation.'" *Stengrim*, 784 N.W.2d at 841 (quoting Minn. Stat. § 554.02, subd. 1). After the moving party makes this threshold showing, the burden shifts to the responding party. Clauses 2 and 3 of Minnesota Statutes § 554.02, subdivision 2, explain the responding party's burden:

> (2) the responding party has the burden of proof, of going forward with the evidence, and of persuasion on the motion;
>
> (3) the court shall grant the motion and dismiss the judicial claim unless the court finds that the responding party has produced clear and convincing evidence that the acts of the moving party are not immunized from liability under section 554.03 . . . .

In the previous case involving these parties, we announced that the plain language of clause 3 requires the responding party to provide evidence—not mere allegations—to show by clear and convincing evidence that the moving party's acts are not immune. *Leiendecker*, 848 N.W.2d at 232-33. As we said then, under subdivision 2, "the responding party bears the burden to persuade the trier of fact—here, the district court—of the truth of a proposition." 848 N.W.2d at 231.

On remand, the court of appeals determined that AWUM had made a threshold showing that the lawsuit filed by the Leiendeckers materially related to an act by AWUM involving public participation. **[**7]** *Leiendecker v. Asian Women United of Minn.*, Nos. A12-1978, A12-2015, 2014 Minn. App. Unpub. LEXIS 1262, 2014 WL 7011061, at *3-4 (Minn. App. Dec. 15, 2014), *rev. denied* (Minn. Feb. 25, 2015). The court of appeals then remanded the case to the district court with instructions to apply the standard we articulated in *Leiendecker* to the Leiendeckers' response. 2014 Minn. App. Unpub. LEXIS 1262, 2014 WL 7011061, at *4.

At the district court, AWUM renewed its motion to dismiss under the anti-SLAPP law. In response, the Leiendeckers moved for an order declaring the anti-SLAPP law unconstitutional.[1] The district court found that the Leiendeckers fell short of proving by clear and convincing evidence that AWUM's acts were not immunized from liability. But the court concluded that Minn. Stat. § 554.02 violated the Leiendeckers' constitutional right to a jury trial. Minn. Const. art. I, § 4. As a result, the district court denied AWUM's motion to dismiss.

AWUM appealed and sought accelerated review. We granted AWUM's petition for accelerated review.[2] AWUM argues that **[*631]** (1) the

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[1] As the district court explained, although the Leiendeckers "broadly challenged the constitutionality" of the anti-SLAPP law, once the constitutional jury-trial challenge to Minn. Stat. § 554.02 was resolved, there was no need to address the Leiendeckers' other constitutional claims.

[2] Although we refer only to AWUM in this opinion, we note that we also granted the petition for accelerated review filed by appellants Greenstein, Mabley & Wall, LLC, et al., which also challenged the district court's ruling on the constitutionality of section 554.02. The Leiendeckers also petitioned for accelerated review on their claims that the anti-SLAPP law is facially unconstitutional. We denied that petition. The Leiendeckers nonetheless presented in their brief for this appeal the additional constitutional challenges they raised before the district court, which that court did not address. Because we denied the Leiendeckers' petition for accelerated review on these issues, we grant AWUM's motion to strike pages 37-48 of the

Leiendeckers waived their claim that the anti-SLAPP law is unconstitutional and (2) the law is constitutional in any event. Because we conclude that the Leiendeckers did not waive their constitutional claim and Minn. Stat. § 554.02 is unconstitutional as applied to the Leiendeckers' claim at law alleging a tort, we affirm.

I.

Before proceeding **[**8]** to the merits of the constitutional argument, we must resolve two preliminary issues: whether the Leiendeckers waived their argument that the law is unconstitutional and whether the district court violated the court of appeals' remand instructions.

A.

AWUM contends that the Leiendeckers waived their right to assert that the anti-SLAPP law is unconstitutional by failing to make that argument at any of three junctures: (1) in their petition for review of the court of appeals' 2013 decision, (2) in their petition for rehearing following our 2014 decision, and (3) in their second petition for review following the court of appeals' 2014 decision on remand. We conclude that the Leiendeckers' constitutional challenge was not ripe until the case was remanded to the district court and, therefore, could not have been waived at an earlier point in time.

HN2[↑] The legal effect of a party's failure to raise an issue on appeal presents a question of law requiring de novo review. *See State v. Dahlin*, 753 N.W.2d 300, 304 (Minn. 2008) (reviewing de novo whether a party's decision not to petition for review on the legal issue addressed in an earlier writ proceeding waived appellate review of that issue in a subsequent appeal). "Waiver is the intentional relinquishment **[**9]** of a known right; it is the expression of an intention not to insist upon what the law affords . . . ." *Carlson v. Doran*, 252 Minn. 449, 456, 90 N.W.2d 323, 328 (1958).[3] The focus here is on what the Leiendeckers asserted, or more correctly did not assert, in previous proceedings in this court. "[I]f a party petitions for review, the party must bring all claims then ripe in that petition for review or waive further review of such claims in our court." *Dahlin*, 753 N.W.2d at 304; *see also Peterson v. BASF Corp.*, 675 N.W.2d 57, 66 (Minn. 2004) (explaining that "to facilitate fair and efficient judicial proceedings, matters that are ripe for review should be brought to the court's attention when submitting a petition for review"), *vacated on other grounds*, 544 U.S. 1012, 125 S. Ct. 1968, 161 L. Ed. 2d 845 (2005).

This issue also arises in the context of successive appeals. *HN4*[↑] A claim becomes ripe when there is an intervening change in the law between a party's initial decision not to raise the claim because it would have been futile under then-existing law, and a later decision to raise that claim for the first time. *See State v. Lindquist*, 869 N.W.2d 863, 867-68 (Minn. 2015) (holding that a claim was not forfeited when "an intervening change in the law . . . excused" the "failure to bring what would have otherwise been a futile argument"); *Peterson*, 675 N.W.2d at 68 (noting that there had **[*632]** been no "significant changes in the law or in the facts of the case that **[**10]** would make review" of the issue previously not raised "any different now than it would have been" in the first proceeding). An intervening change in the law is a new rule that overrules existing precedent. *Lindquist*, 869 N.W.2d at 867; *see also State v. Her*, 781 N.W.2d 869, 874-75 (Minn. 2010) (explaining the "different type of intent" required by an intervening decision and concluding "[t]his is a change in the law from" the court's precedent).

The Leiendeckers' constitutional challenge to the

Leiendeckers' brief filed on July 25, 2016.

[3] *HN3*[↑] In contrast to waiver, forfeiture refers to the failure to timely assert a right. *State v. Beaulieu*, 859 N.W.2d 275, 278 n.3 (Minn. 2015). Waiver is the proper doctrine to apply here because AWUM asserts that the Leiendeckers intentionally refrained from asserting a known constitutional challenge to the anti-SLAPP statutes. *See id.* (explaining the distinction between the two doctrines).

anti-SLAPP law was not ripe when we granted review of the court of appeals' 2013 decision. In that decision, the court of appeals determined that mere allegations in a complaint could satisfy the anti-SLAPP law's requirement that the responding party show by clear and convincing evidence that the moving party's acts are not immune, and that the anti-SLAPP law did not require the district court to weigh the evidence presented by the parties. *Leiendecker v. Asian Women United of Minn.*, 834 N.W.2d 741, 751 (Minn. App. 2013), *rev'd*, 848 N.W.2d 224 (Minn. 2014). Thus, the court of appeals *accepted* the Leiendeckers' argument that mere allegations in a complaint were sufficient to satisfy the respondent's burden in response to a motion to dismiss under Minn. Stat. § 554.02. 834 N.W.2d at 749. In reversing both components of the court of appeals' decision, we stated: "Before addressing the Leiendeckers' [statutory interpretation] **[**11]** argument, however, it is important to first note what the Leiendeckers do not argue. The Leiendeckers disclaim any argument that the anti-SLAPP statutes *actually* violate their jury-trial right." *Leiendecker*, 848 N.W.2d at 232. AWUM argues that in this comment, we foreclosed future constitutional challenges to the anti-SLAPP law. AWUM is mistaken.

HN5[↑] Waiver "must be based on a full knowledge of the facts." *Cohler v. Smith*, 280 Minn. 181, 189, 158 N.W.2d 574, 579 (1968). In its petition for review of the court of appeals' 2013 decision, AWUM asked us to interpret the anti-SLAPP law differently than the court of appeals. The Leiendeckers prevailed at the court of appeals, and that court's interpretation of section 554.02 did not present a jury-trial problem, so the Leiendeckers had no reason to assert a constitutional challenge to the statute. Instead, they argued that we must affirm the court of appeals based in part on a constitutional-avoidance argument. *See Leiendecker*, 848 N.W.2d at 232 (noting the "narrower" constitutional avoidance argument presented, under which we were asked to interpret the anti-SLAPP law in a manner that would uphold its constitutionality). Thus, only after we reversed the court of appeals did the Leiendeckers' claim under Article I, Section 4 of the Minnesota Constitution become viable.

Nor were the Leiendeckers obliged to assert a constitutional **[**12]** challenge when they petitioned for rehearing following our 2014 decision. At that point, we had already addressed the Leiendeckers' constitutional-avoidance argument. Thus, we remanded the case to the court of appeals to address whether AWUM had made its threshold showing under section 554.02. *Leiendecker*, 848 N.W.2d at 233. Raising new arguments that had not been presented in defending the court of appeals' decision or that were not yet ripe at the time of our initial review is not an appropriate use of a petition for rehearing. *See In re Estate of Carey*, 194 Minn. 127, 146, 260 N.W. 320, 328-29 (1935). Indeed, the Leiendeckers' current challenge is entirely based on our new interpretation of the law, which did not exist when we first reviewed this appeal, so they did not waive their **[*633]** constitutional argument when they failed to raise it in a petition for rehearing.

Lastly, the Leiendeckers' constitutional argument was not ripe when they petitioned for review following the court of appeals' decision on remand, for two reasons: the claim was not addressed by the court of appeals on remand and the issue had not yet been raised before the district court. *See Woodhall v. State*, 738 N.W.2d 357, 363 n.6 (Minn. 2007) (noting that the parties had not raised a constitutional claim before the district court or the court of appeals, and ***HN6***[↑] in general, this court **[**13]** does "not consider issues not raised to the courts below"); *State v. Grunig*, 660 N.W.2d 134, 136 (Minn. 2003) (***HN7***[↑] "[W]aiver . . . is an administrative rule dictating that appellate courts will not decide issues that were not raised in the [district] court."). One reason for the waiver doctrine is to ensure the factual development of claims at the district court. *Johnson v. State*, 673 N.W.2d 144, 147 (Minn. 2004). The Leiendeckers had no prior opportunity to make their

constitutional challenge at the district court, given that it did not become viable until after we reversed the court of appeals' decision based on our interpretation of section 554.02. Thus, they did not waive their constitutional challenge by failing to include it in their second petition for review to this court. *See Her*, 781 N.W.2d at 875 (explaining that the State had not "had the opportunity to develop a factual record regarding . . . intent" based on the law reflected in intervening decisions).

B.

We must also determine whether the district court overstepped the bounds of the court of appeals' remand instructions. ***HN8***[↑] "Appellate courts review a district court's compliance with remand instructions under the deferential abuse of discretion standard." *Janssen v. Best & Flanagan, LLP*, 704 N.W.2d 759, 763 (Minn. 2005). "Though trial courts generally have broad discretion to determine how to proceed on remand, they cannot act in **[**14]** a way that is inconsistent with the remand instructions provided." *Dobbins v. State*, 845 N.W.2d 148, 156 (Minn. 2013) (citation omitted) (internal quotation marks omitted). A district court exceeds its broad discretion on remand when it makes findings on a subject not included in the appellate court's remand instructions. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 213 (Minn. 1988).

The district court properly ruled on the constitutionality of the anti-SLAPP law. On remand, the district court received instructions to "apply the standard articulated by the supreme court to determine whether the Leiendeckers have met their burden" under the anti-SLAPP law. *Leiendecker*, 2014 Minn. App. Unpub. LEXIS 1262, 2014 WL 7011061, at *1. The court of appeals did not instruct the district court, either explicitly or implicitly, that it could not also address the constitutionality of the statute that the court of appeals asked it to apply. In fact, it would make little sense to prohibit the district court from considering the constitutionality of a statute, once raised by the parties, after applying the proper legal standard in light of the available record. In the absence of some specific statement by the court of appeals that the district court was not permitted to analyze the constitutionality of the statute on remand, we hold that the district court did not exceed its **[**15]** instructions on remand.

II.

We now address the merits of AWUM's appeal: the constitutionality of Minn. Stat. § 554.02 as applied to the Leiendeckers' malicious prosecution claim. ***HN9***[↑] We review de novo both the constitutionality of statutes and the interpretation and **[*634]** application of the Minnesota Constitution. *United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equip., LLC*, 813 N.W.2d 49, 53 (Minn. 2012); *Deegan v. State*, 711 N.W.2d 89, 92 (Minn. 2006). ***HN10***[↑] We presume that statutes are constitutional. Minn. Stat. § 645.17(3) (2016); *In re Welfare of B.A.H.*, 845 N.W.2d 158, 162 (Minn. 2014). The "power to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary." *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989). But we exhibit a "watchful jealousy" of any "impairment of the right of a free and inviolate jury trial." *Flour City Fuel & Transfer Co. v. Young*, 150 Minn. 452, 458, 185 N.W. 934, 937 (1921). A law is unconstitutional if it renders the jury-trial right "so burdened with conditions that it is not a jury trial, such as the Constitution guarantees." *Id.* at 454, 185 N.W. at 935.

HN11[↑] Article I, Section 4 of the Minnesota Constitution establishes that the "right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy." The language of Article I, Section 4 is "categorical," permitting no exceptions. *United Prairie Bank*, 813 N.W.2d at 62. Denial of the jury-trial right is reversible error. *Landgraf v. Ellsworth*, 267 Minn. 323, 326, 126 N.W.2d 766, 768 (1964).

HN12[↑] The jury-trial right exists for any "type of action" for which a jury trial was provided when the Minnesota Constitution was adopted in 1857.

Olson v. Synergistic Techs. Bus. Sys., Inc., 628 N.W.2d 142, 149 (Minn. 2001). "The nature and character of the controversy, **[**16]** as determined from all the pleadings and by the relief sought, determines whether the cause of action is one at law *today*, and thus carries an attendant constitutional right to jury trial." *Abraham v. Cty. of Hennepin*, 639 N.W.2d 342, 349 (Minn. 2002). The jury-trial right does not extend to equitable claims. *Bond v. Welcome*, 61 Minn. 43, 44, 63 N.W. 3, 4 (1895). A tort action seeking money damages, however, is an action at law. *Abraham*, 639 N.W.2d at 353.

A.

Malicious prosecution is a claim at law, so the Leiendeckers are entitled to a jury trial. Specifically, ***HN13***[↑] malicious prosecution "is an action for a tort" with a right to damages. *Schmidt v. Beckenbah*, 29 Minn. 122, 123, 12 N.W. 349, 349-50 (1882). The tort of malicious prosecution has three elements: "(1) the action [must be] brought without probable cause or reasonable belief that the plaintiff would ultimately prevail on the merits; (2) the action must be instituted and prosecuted with malicious intent; and (3) the action must terminate in favor of the defendant." *Kellar v. VonHoltum*, 568 N.W.2d 186, 192 (Minn. App. 1997), *rev. denied* (Minn. Oct. 31, 1997). Both the probable cause and malice elements of a malicious prosecution claim are factual questions for the jury. *Smith v. Maben*, 42 Minn. 516, 518, 44 N.W. 792, 793 (1890) ("Malice . . . is a distinct issue to be found, as a question of fact, by the jury."); *Burton v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 33 Minn. 189, 192, 22 N.W. 300, 301 (1885) ("When the facts are in controversy, the subject of probable cause should be submitted to the jury . . . .").[4]

[*635] ***HN15***[↑] Subdivision 2 of Minnesota Statutes § 554.02 unconstitutionally **[**17]** instructs district courts to usurp the role of the jury by making pretrial factual findings that can, depending on the findings, result in the complete dismissal of the underlying action. Our 2014 decision stated that "the responding party bears the burden to persuade the *trier of fact—here, the district court*" by a showing of clear and convincing evidence that the acts of the moving party are not immune. *Leiendecker*, 848 N.W.2d at 231 (emphasis added). But the role of resolving disputed facts belongs to the jury, not the court. *Gabrielson v. Warnemunde*, 443 N.W.2d 540, 543 n.1 (Minn. 1989).

Specifically, clauses 2 and 3 of Minnesota Statutes § 554.02, subdivision 2, combine to abrogate the Leiendeckers' jury-trial right. Clauses 2 and 3 provide:

> (2) the responding party has the burden of proof, of going forward with the evidence, and of persuasion on the motion;
>
> (3) the court shall grant the motion and dismiss the judicial claim unless the court finds that the responding party has produced clear and convincing evidence that the acts of the moving party are not immunized from liability under section 554.03 . . . .

Clause 2 imposes on the responding party the burdens of proof, production, and persuasion. ***HN16***[↑] The burden of production is "the obligation of a party to come forward with sufficient evidence to support its claim or the relief **[**18]** requested." *Braylock v. Jesson*, 819 N.W.2d 585, 590 (Minn. 2012); *see also Burden of Production, Black's Law Dictionary* (10th ed. 2014). The burden of persuasion is "the obligation to persuade the trier of fact of the truth of a

[4] Contrary to the dissent's position, the district court resolved at least one factual dispute when analyzing the element of probable cause. The district court determined that "[a]bsent Lawrence's advice to Sinuon, it is unlikely AWUM would have formed a new board at that time." ***HN14***[↑] Summary judgment is appropriate only if "there is no genuine issue as to any material fact." Minn. R. Civ. P. 56.03. "[A]ll factual inferences must be drawn against the movant for summary judgment." *Sauter v. Sauter*, 244 Minn. 482, 485, 70 N.W.2d 351, 353 (1955). Here, the district court made factual inferences on the probable cause element, while recognizing that "by making these findings, [the district court] has taken away part of the jury's role: to determine the factual validity of Plaintiffs' claim."

proposition." *Braylock*, 819 N.W.2d at 590; *see also Burden of Persuasion, Black's Law Dictionary, supra.* Since the middle of the twentieth century, the term "burden of proof" has been used synonymously with the term "burden of persuasion." *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 276, 114 S. Ct. 2251, 129 L. Ed. 2d 221 (1994).

Clause 3 animates the burdens allocated by clause 2. Clause 3 requires the responding party to "produce[] . . . evidence" (the burden of production) that persuades the district court by a "clear and convincing" standard (the burden of persuasion) that the moving party's acts are not immune under the anti-SLAPP law. ***HN17***[↑] Clear and convincing evidence refers to a burden of persuasion. *Braylock*, 819 N.W.2d at 591 ("[T]he burden of persuasion . . . is usually expressed in terms of the degree to which a fact-finder must be convinced of the existence of a particular fact—by a preponderance of the evidence, clear and convincing evidence, or proof beyond a reasonable doubt."). We have used clause 3's phrase, "produced clear and convincing evidence," to describe what a party must do to satisfy a burden of *persuasion*, not a burden of production. *Jacobson v. $55,900 in U.S. Currency*, 728 N.W.2d 510, 522 (Minn. 2007) ("[T]he prosecuting agency, in order to prevail, must **[**19]** meet its burden of persuasion by producing clear and convincing evidence that the defendant property is connected to drug trafficking."). This settled usage confirms that section 554.02 requires the responding **[*636]** party to persuade the district court in its role as a trier of fact.

HN18[↑] Clauses 2 and 3 violate the responding party's right to a jury trial in two ways as applied to actions at law alleging torts.[5] First, they transfer the jury's fact-finding role to the district court. Second, they require the responding party to meet a higher burden of proof before trial (clear and convincing evidence) than it would have to meet at trial (preponderance of the evidence). *See Nelson v. International Harvester Co.*, 117 Minn. 298, 301, 135 N.W. 808, 810 (1912) (applying a preponderance-of-the-evidence standard to a malicious prosecution claim).

The law provides the district court with two options to resolve a motion to dismiss. The district court could decide that the responding party failed to show by clear and convincing evidence that the moving party engaged in tortious conduct. This determination would require dismissal of the suit under the anti-SLAPP law, thus precluding a jury trial. Alternatively, the district court could decide that the responding party *did* show by clear and convincing **[**20]** evidence that the moving party engaged in tortious conduct. This conclusion would also arguably preclude a jury trial. *See Leader v. Joyce*, 271 Minn. 9, 13, 135 N.W.2d 34, 37 (1965) (***HN19***[↑] "A party has no right to a jury trial of a fact issue previously decided and binding on him by principles of res judicata and privity."). Thus, a district court's ruling on anti-SLAPP immunity necessarily decides the merits of the tort action itself. This result unconstitutionally abridges Article I, Section 4.

In a similar case, the Washington Supreme Court agreed. That court determined that Washington's anti-SLAPP law—which it described as "close to" Minnesota's—violated Washington's constitutional jury-trial guarantee. *Davis v. Cox*, 183 Wn.2d 269, 351 P.3d 862, 871, 874 (Wash. 2015). Like Minnesota's anti-SLAPP law, the Washington law's requirement that the responding party "establish by clear and convincing evidence a probability of prevailing on the claim," Wash. Rev. Code § 4.24.525 (2014), "invades the jury's essential role of deciding debatable questions of fact," *Davis*, 351 P.3d at 874.

We also note that, procedurally, Minn. Stat. §

[5] The anti-SLAPP law requires the responding party to prove that the moving party's acts "constitute[] a tort or a violation of a person's constitutional rights." Minn. Stat. § 554.03. As only one claim remains in this action, a tort claim for malicious prosecution, we do not need to decide whether the anti-SLAPP law is unconstitutional as applied to alleged violations of a person's constitutional rights.

554.02 is unlike other judicial gatekeeping laws. For example, the heightened pleading standard in the Private Securities Litigation and Reform Act, 15 U.S.C. § 78u-5(c) (2012), does not resemble the anti-SLAPP statute. When assessing a claim under that standard, a court must "constantly **[**21]** assum[e] the plaintiff's allegations [are] true," and "a plaintiff is not forced to plead more than she would be required to prove at trial." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 326-28, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007). By comparison, a court assessing a claim under Minn. Stat. § 554.02 must "make a finding" based on evidence, rather than assuming that the allegations are true. And the party responding to an anti-SLAPP motion must meet a clear-and-convincing-evidence standard, rather than the preponderance-of-the-evidence standard that would apply at trial.

AWUM's analogy between the anti-SLAPP law and Minnesota's punitive damages statute fails for the same reason. Minnesota Statutes § 549.191 (2016) precludes plaintiffs from seeking punitive **[*637]** damages without first filing "one or more affidavits showing the factual basis for the claim." The district court "may not allow an amendment where the motion and supporting affidavits do not reasonably allow a conclusion that clear and convincing evidence will establish the defendant acted with willful indifference." *Gamma-10 Plastics, Inc. v. Am. President Lines, Ltd.*, 32 F.3d 1244, 1255 (8th Cir. 1994) (quoting *Swanlund v. Shimano Indus. Corp.*, 459 N.W.2d 151, 154 (Minn. App. 1990)) (internal quotation marks omitted). Under the punitive damages statute, the moving party must establish a prima facie case by clear and convincing evidence, which consists only of producing evidence that will "reasonably allow" a conclusion of willful **[**22]** indifference, much like a summary-judgment standard. *Id.* (quoting *Swanlund*, 459 N.W.2d at 154) (internal quotation marks omitted). Unlike the anti-SLAPP law, the punitive damages statute does not require a party to *actually* prove its claim by clear and convincing evidence to the district court.

Nor are Minnesota's substantive immunities affected by our holding that ***HN20***[↑] Minn. Stat. § 554.02 is unconstitutional as applied to claims at law alleging torts. AWUM argues that the anti-SLAPP law resembles other immunities enacted by the Minnesota Legislature. *See, e.g.*, Minn. Stat. § 214.34 (2016) (immunizing parties submitting health reports from civil liability); Minn. Stat. § 604A.12, subd. 2 (2016) (immunizing parties donating livestock services from civil liability). These are substantive immunities; they immunize participants in certain categories of activity. Like the above statutes, the anti-SLAPP law creates a substantive immunity: non-tortious conduct or speech aimed at procuring favorable government action. What differentiates section 554.02 is its procedural requirement that the responding party prove by clear and convincing evidence that its claim falls outside the law's substantive immunity. The Legislature can immunize a category of people from lawsuits, but it cannot interpose the district **[**23]** court as the fact-finder in actions at law.

AWUM contends that because the anti-SLAPP law does not specify a right to a jury trial on the issue of anti-SLAPP immunity, the responding party is entitled to a jury trial only after immunity is denied. We do not decide whether anti-SLAPP immunity is a form of equitable relief wholly apart from the actual merits of a tort claim, because even if it is, the law still abridges the Leiendeckers' jury-trial right. Allowing equitable immunities that are identical to a plaintiff's cause of action would permit the Legislature to erode the jury-trial right by sleight of hand. ***HN21***[↑] "[F]actual findings that are common to both claims at law and claims for equitable relief are binding upon the district court." *Onvoy, Inc. v. ALLETE, Inc.*, 736 N.W.2d 611, 617 (Minn. 2007). But "[b]y extending equitable jurisdiction to new subjects, the Legislature cannot impair the right to trial by jury." *Westerlund v. Peterson*, 157 Minn. 379, 385, 197 N.W. 110, 112 (1923). The anti-SLAPP law requires the district court to determine whether defendants are "immunized from liability." Minn.

Stat. § 554.02. This purportedly equitable finding on immunity is actually a factual finding regarding the defendants' tort liability. Because this finding is precisely what the responding party would have to prove to a jury, the district court's **[**24]** immunity ruling would cut the jury out of the case—or at the least, render it superfluous.

B.

Having decided that clauses 2 and 3 of section 554.02, subdivision 2, are unconstitutional as applied to claims at law **[*638]** alleging torts, we must now determine whether these provisions are severable from the remainder of section 554.02. *HN22*[↑] Provisions of a law are severable unless they are "so essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume the legislature would have enacted the remaining valid provisions without the void one" or "the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent." Minn. Stat. § 645.20 (2016). If a statute has unconstitutional applications, they are severable from the constitutional applications. *See Hoene v. Jamieson*, 289 Minn. 1, 7, 182 N.W.2d 834, 838 (1970) (severing an unconstitutional application from the law's constitutional applications).

HN23[↑] The two unconstitutional clauses of Minn. Stat. § 554.02 are inseparable from the remainder of the section. Without the unconstitutional provisions, section 554.02 provides no procedure for courts to determine whether a lawsuit violates the substantive prohibition of Minn. Stat. § 554.03. We therefore conclude that *HN24*[↑] Minn. Stat. § 554.02 is unconstitutional when it requires a district **[**25]** court to make a pretrial finding that speech or conduct is not tortious under Minn. Stat. § 554.03, as was the case here. For the foregoing reasons, *HN25*[↑] Minn. Stat. § 554.02 is unconstitutional as applied to claims at law alleging torts.

Affirmed.

Dissent by: GILDEA

Dissent

GILDEA, Chief Justice (dissenting).

The majority strikes down Minn. Stat. § 554.02 (2016) of the anti-SLAPP statutes as unconstitutional as applied to claims at law alleging torts. Specifically, the majority holds that the statute violates the right to jury trial because the statute requires that the district court judge resolve fact issues. It is not necessary, in my view, to reach the broad issue the majority decides. We presume that statutes are constitutional. *Midland Glass Co. v. City of Shakopee*, 303 Minn. 134, 138, 226 N.W.2d 324, 326 (1975). And our precedent recognizes that we resolve cases without reaching constitutional issues whenever possible. *See Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 732 n.7 (Minn. 2003) ("Our general practice is to avoid a constitutional ruling if there is another basis on which a case can be decided."); *In re Senty-Haugen*, 583 N.W.2d 266, 269 n.3 (Minn. 1998) ("It is well-settled law that courts should not reach constitutional issues if matters can be resolved otherwise."). In this case, it is not necessary to decide whether section 554.02 of the anti-SLAPP statutes violates the jury-trial right because the dispositive question that the district court decided was one of law. **[**26]** A judge's resolution of questions of law does not violate the jury-trial right.[1] *See Smith v. Stewart*, 41 Minn. 7, 8, 42 N.W. 595, 596 (1889) (stating that questions of law are determined by the court and not the jury). I would resolve this case on this more narrow ground and not reach the constitutional question the majority decides. I am concerned that the majority's resolution of this case may undermine the summary judgment remedy. The majority does not contend that rulings made on summary judgment violate the

[1] AWUM argued before the district court that rulings as a matter of law do not violate the jury-trial right and it makes the same argument here.

jury-trial right. But courts are likely to see such arguments in the future based on the rule the majority announces today. For these reasons, I dissent.

The complaint alleges malicious prosecution. The anti-SLAPP statutes provide an **[*639]** immunity to defendants and AWUM invoked that immunity. *See* Minn. Stat. § 554.03 (2016). To overcome the immunity defense, the statute requires that the Leiendeckers show by clear and convincing evidence that AWUM's actions are not immune. *See* Minn. Stat. § 554.02, subd. 2. The parties agree that the Leiendeckers would have met that burden if they proved the elements of their malicious prosecution claim.

The tort of malicious prosecution requires that the Leiendeckers prove that AWUM brought a lawsuit without probable cause and with malice. *See Allen v. Osco Drug, Inc.*, 265 N.W.2d 639, 642, 645 (1978) (discussing **[**27]** malicious prosecution); *Virtue v. Creamery Package Mfg. Co.*, 123 Minn. 17, 32-33, 142 N.W. 930, 936 (1913) (same). In addition, the Leiendeckers must prove that AWUM's lawsuit terminated in favor of the Leiendeckers. *See Virtue*, 123 Minn. at 32-33, 142 N.W. at 936. We have recognized that within the context of malicious prosecution, the first element—probable cause—is a question of law if the facts are undisputed. *Allen*, 265 N.W.2d at 642. In my view, the probable cause element is dispositive of the issues raised in this appeal.

The district court here concluded that AWUM brought the lawsuit underlying the malicious prosecution claim with probable cause. Specifically, on the legal malpractice claim against Lawrence Leiendecker in the underlying action, the court relied on determinations in prior district court proceedings and undisputed testimony from the Leiendeckers' themselves. Similarly, on the conversion claim against Sinuon Leiendecker in the underlying action, the court based its conclusion on uncontroverted facts about Sinuon's salary and an unchallenged incident demonstrating her ability to give herself money with little oversight. The district court here did not find facts and did not need to make any credibility determinations on the probable cause element. Indeed, the parties themselves did not dispute the facts relating **[**28]** to the element of probable cause. In short, the district court's conclusion that the Leiendeckers failed to show a lack of probable cause was a ruling as a matter of law.[2]

On appeal, the Leiendeckers do not contend otherwise and their brief points to no disputes of fact as to the probable cause element. The fact that the district court made findings of fact when analyzing the other elements of the tort is not dispositive here. The Leiendeckers' failure to show a lack of probable cause is dispositive. Because the district court's resolution of the legal question of **[**29]** probable cause did not **[*640]** violate the Leiendeckers' right to a jury trial and the court's resolution of the probable cause element is dispositive of the immunity issue, I would reverse.[3]

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[2] The majority points to only one statement in the district court order to support its conclusion that there were factual disputes on the issue of probable cause on the legal malpractice claim against Lawrence. Notably, the majority does not identify any factual disputes on the issue of probable cause on the conversion claim against Sinuon. As to Lawrence, the majority notes that the district court determined that "[a]bsent Lawrence's advice to Sinuon, it is unlikely AWUM would have formed a new board at that time." The district court, however, did not have to choose between conflicting evidence or resolve conflicting inferences in order to make this conclusion. *See Scheiber v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 61 Minn. 499, 500, 63 N.W. 1034, 1034 (1895) (stating that in the absence of "fair doubt" as to the inferences to be drawn from undisputed facts, "it is . . . the duty of the court to decide the question as one of law"). Indeed, the Leiendeckers did not contest at the district court (or on appeal) the fact that AWUM relied on Lawrence's advice when it decided to form a new board. In contending that AWUM's legal malpractice claim was brought maliciously, the Leiendeckers argued Lawrence's advice was not malpractice. They did not argue that AWUM did not receive advice from Lawrence or rely on the advice he gave. Because there were no factual disputes that required resolution, the district court properly determined probable cause as a matter of law.

[3] The Leiendeckers also raise alternate constitutional challenges to the anti-SLAPP law, but the district court did not rule on these matters and so they are not properly before our court in this appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988).

Davis v. Cox

Supreme Court of Washington

January 20, 2015, Argued; May 28, 2015, Filed

No. 90233-0

Reporter
183 Wn.2d 269 *; 351 P.3d 862 **; 2015 Wash. LEXIS 568 ***; 43 Media L. Rep. 1769

KENT L. DAVIS ET AL., *Petitioners*, v. GRACE COX ET AL., *Respondents*.

Prior History: Davis v. Cox, 180 Wn. App. 514, 325 P.3d 255, 2014 Wash. App. LEXIS 779 (2014)

Core Terms

anti-SLAPP, prevailing, requires, probability, statute's, summary judgment, frivolous, boycott, clear and convincing evidence, trial judge, right to trial, special motion, lawsuits, burden of proof, provisions, material fact, Cooperative, trial court, plaintiffs', courts, public participation, attorney's fees, plain language, moving party, defendants', discovery, disputed, provides, responding party, evidentiary

Case Summary

Overview

HOLDINGS: [1]-The Washington Act Limiting Strategic Lawsuits Against Public Participation, Wash. Rev. Code § 4.24.525, violates the right of trial by jury under Wash. Const. art. I, § 21 and is unconstitutional because § 4.24.525(4)(b) requires a trial judge to adjudicate factual questions in nonfrivolous claims without a trial; further, § 4.24.525(6)(a) doubtlessly falls on the impermissible side that punishes the exercise of the right to petition under the First Amendment.

Outcome

Reversed and remanded.

LexisNexis® Headnotes

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

Evidence > Burdens of Proof > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

HN1[] **Case or Controversy, Constitutionality of Legislation**

The Washington Act Limiting Strategic Lawsuits Against Public Participation's evidentiary burden fails to strike a balance that the Washington Constitution requires. Because Wash. Rev. Code § 4.24.525(4)(b) requires a trial judge to adjudicate factual questions in nonfrivolous claims without a trial, § 4.24.525 violates a right of trial by jury under Wash. Const. art. I, § 21 and is invalid.

Constitutional Law > ... > Case or Controversy > Constitutionality of

Legislation > General Overview

***HN2*[] Case or Controversy, Constitutionality of Legislation**

The doctrine of constitutional avoidance requires a court to choose a constitutional interpretation of a statute over an unconstitutional interpretation when the statute is genuinely susceptible to two constructions.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

***HN3*[] Standards of Review, De Novo Review**

An appellate court reviews de novo questions of statutory interpretation. To discern and implement the legislature's intent, a court begins by looking at a statute's plain language and ordinary meaning. Where the statute's plain language is unambiguous, the court must give effect to that plain meaning as an expression of legislative intent.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

***HN4*[] Summary Judgment, Entitlement as Matter of Law**

Summary judgment is proper only if a moving party shows that there is no genuine issue as to any material fact and that a moving party is entitled to a judgment as a matter of law. Wash. Super. Ct. Civ. R. 56(c). Summary judgment does not concern degrees of likelihood or probability. Summary judgment requires a legal certainty: the material facts must be undisputed, and one side wins as a matter of law.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

Governments > Legislation > Interpretation

***HN5*[] Case or Controversy, Constitutionality of Legislation**

A court cannot add words or clauses to an unambiguous statute when the legislature chooses not to include that language. And when a statute contains no ambiguity, the court cannot use the doctrine of constitutional avoidance to press statutory construction to a point of disingenuous evasion even to avoid a constitutional question.

Governments > Legislation > Interpretation

***HN6*[] Legislation, Interpretation**

A court harmonizes related provisions in a statute whenever possible.

Governments > Legislation > Interpretation

***HN7*[] Legislation, Interpretation**

Where the legislature borrows a statute from another source but makes certain deviations from that source, a court is bound to conclude the legislature's deviation is purposeful and evidences its intent to differ from an original source on a particular issue.

Civil Procedure > Judgments > Summary Judgment > General Overview

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

HN8[] **Judgments, Summary Judgment**

Under the Washington Constitution, a right of trial by jury shall remain inviolate. Wash. Const. art. I, § 21. The term "inviolate" connotes deserving of the highest protection and indicates that the right must remain an essential component of Washington's legal system that it always is. The right must not diminish over time and must be protected from all assaults to its essential guaranties. At its core, the right of trial by jury guarantees litigants the right to have the jury resolve questions of disputed material facts. The right of trial by jury protected by the Seventh Amendment to the United States Constitution does not apply to the states. But the right of trial by jury is not limitless. For example, it is well established that when there is no genuine issue of material fact, summary judgment proceedings under Wash. Super. Ct. Civ. R. 56(c) do not infringe upon a litigant's constitutional right to a jury trial.

Civil Procedure > Judgments > Summary Judgment > General Overview

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

HN9[] **Judgments, Summary Judgment**

The constitutionality of summary judgment procedures under Wash. Super. Ct. Civ. R. 56(c) cannot save the Washington Act Limiting Strategic Lawsuits Against Public Participation, Wash. Rev. Code § 4.24.525, which violates the right to a jury trial under Wash. Const. art. I, § 21.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Evidence > ... > Testimony > Credibility of Witnesses > General Overview

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

Evidence > Inferences & Presumptions > Inferences

HN10[] **Fundamental Freedoms, Freedom to Petition**

A limit on a right of trial by jury under Wash. Const. art. I, § 21 is that it does not encompass frivolous claims that are brought for an improper purpose. The petition clause of the First Amendment to the United States Constitution informs this holding. The United States Supreme Court recognizes that the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances. The right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government. Frivolous suits (i.e., those that lack a "reasonable basis," are "based on insubstantial claims," or are "baseless") are not within the scope of a First Amendment protection but all other suits are constitutionally protected. Thus, when a suit raises a genuine issue of material fact that turns on the credibility of witnesses or on the proper inferences to be drawn from undisputed facts, the First Amendment requires that the suit cannot be enjoined because that will usurp a traditional factfinding function of a jury.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

HN11[] **Fundamental Freedoms, Freedom to Petition**

The United States Supreme Court interprets a petition clause of the First Amendment to expansively protect plaintiffs' constitutional right to file lawsuits seeking redress for grievances. The only instance in which this petitioning activity may be constitutionally punished is when a party pursues frivolous litigation, whether defined as lacking a "reasonable basis," or as sham litigation. That the petition clause requires this limitation makes good sense, considering that a right to sue and defend in the courts is an alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

HN12[] **Costs & Attorney Fees, Attorney Fees & Expenses**

The United States Supreme Court's petition clause jurisprudence does not call into question long-standing fee-shifting provisions that do not turn on a finding of frivolousness. Instead, the Supreme Court finds unconstitutional only serious deprivations or punishments of petitioning activity under the First Amendment. Whatever the precise contours of a line, Wash. Rev. Code § 4.24.525(6)(a) of the Washington Act Limiting Strategic Lawsuits Against Public Participation doubtlessly falls on an impermissible side that punishes the exercise of a right to petition.

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

HN13[] **Fundamental Rights, Trial by Jury in Civil Actions**

Wash. Const. art. I, § 21 does not encompass a right of jury trial on frivolous or sham claims. Exclusion of such claims comports with a long-standing principle that litigants cannot be allowed to abuse the heavy machinery of the judicial process for improper purposes that cause serious harm to innocent victims, such as to harass, cause delay, or chill free expression. Such conduct is, and always will be, sanctionable.

Civil Procedure > Appeals > Frivolous Appeals

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

HN14[] **Appeals, Frivolous Appeals**

For purposes of Wash. Const. art. I, § 21, which does not encompass a right of jury trial on frivolous or sham claims, a frivolous action is one that cannot be supported by any rational argument on the law or facts. An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that

there was no reasonable possibility of reversal. The genuineness of a claim does not turn on whether it succeeds. Wash. Rev. Code § 4.24.525(4)(b)'s standard is a higher threshold than a frivolousness inquiry. Thus, § 4.24.525(4)(b) of the Washington Act Limiting Strategic Lawsuits Against Public Participation creates a truncated adjudication of the merits of a plaintiff's claim, including nonfrivolous factual issues, without a trial. Such a procedure invades a jury's essential role of deciding debatable questions of fact. In this way, § 4.24.525(4)(b) violates the right of trial by jury under Wash. Const. art. I, § 21.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

HN15[] **Case or Controversy, Constitutionality of Legislation**

By its plain terms, the special motion to strike procedure under Wash. Rev. Code § 4.24.525(4)(b) of the Washington Act Limiting Strategic Lawsuits Against Public Participation is incompatible with a right to a jury trial under Wash. Const. art. I, § 21.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

Governments > Legislation > Severability

HN16[] **Case or Controversy, Constitutionality of Legislation**

When an appellate court holds that a statutory provision is unconstitutional, the court must determine whether the provision is severable from the rest of the statute. To determine severability, the appellate court first asks whether the constitutional and unconstitutional provisions are so connected that it cannot be believed that the legislature will pass one without another. The appellate court then considers whether a part eliminated is so intimately connected with the balance of an act as to make it useless to accomplish the purposes of the legislature. As to the first inquiry, the appellate court may look to the presence of a severability clause in the statute for a necessary assurance that the remaining provisions will be enacted without the portions which are contrary to the Washington Constitution.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

Governments > Legislation > Severability

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN17[] **Case or Controversy, Constitutionality of Legislation**

Under the second test of severability, Wash. Rev. Code § 4.24.525(4)(b) of the Washington Act Limiting Strategic Lawsuits Against Public Participation is not severable. This subsection is the law's mainspring because every provision in § 4.24.525 has meaning and effect only in connection with the filing of a special motion to strike under § 4.24.525(4)(b). Without § 4.24.525(4)(b), the rest of § 4.24.525 is useless to accomplish the purposes of the legislature. The Washington Supreme Court therefore invalidates § 4.24.525 as a whole.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to

Petition

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

***HN18*[↓] Fundamental Freedoms, Freedom to Petition**

The legislature may enact anti-Strategic Lawsuits Against Public Participation (anti-SLAPP) laws to prevent vexatious litigants from abusing the judicial process by filing frivolous lawsuits for improper purposes. But a constitutional conundrum that Wash. Rev. Code § 4.24.525 creates is that it seeks to protect one group of citizen's constitutional rights of expression and petition under the First Amendment--by cutting off another group's constitutional rights of petition and jury trial. This the legislature cannot do. Wash. Rev. Code § 4.24.525(4)(b) violates a right of trial by jury under Wash. Const. art. I, § 21 because it requires a trial judge to invade a jury's province of resolving disputed facts and dismiss--and punish--nonfrivolous claims without a trial.

Headnotes/Summary

Summary

WASHINGTON OFFICIAL REPORTS SUMMARY

Nature of Action: In a derivative suit, several members of a nonprofit incorporated grocery cooperative sought to nullify a resolution adopted by the cooperative's board of directors to boycott goods produced by companies based in Israel. The members alleged that the board acted ultra vires and breached its fiduciary duties by adopting the resolution in violation of the cooperative's written "Boycott Policy," under which the cooperative "will honor nationally recognized boycotts" when the staff "decide[s] by consensus" to do so. The members sought (1) a declaration that the boycott resolution was void, (2) permanent injunctive relief preventing enforcement of the resolution, and (3) monetary damages. The directors moved to strike the members' claims as a strategic lawsuit against public participation and petition under RCW 4.24.525(4)(a) (anti-SLAPP statute). The members opposed the motion on statutory and constitutional grounds and requested the trial court to lift the automatic stay of discovery under the anti-SLAPP statute.

Superior Court: After denying the members' motion for discovery, the Superior Court for Thurston County, No. 11-2-01925-7, Wm. Thomas McPhee, J., on July 12, 2012, granted the directors' motion to strike the members' claims and awarded the directors statutory damages, attorney fees, and costs.

Court of Appeals: At 180 Wn. App. 514 (2014), the court *affirmed* the trial court's decisions to strike the members' claims, to award the directors statutory damages of $10,000 each, and to require the members to pay the attorney fees and costs awarded to the directors.

Supreme Court: Holding that a provision of the special motion to strike procedure under the anti-SLAPP statute violated the state constitutional right to a jury trial and that the statute was rendered invalid as a consequence, the court *reverses* the decision of the Court of Appeals and *remands* the case to the trial court for further proceedings.

Headnotes

WASHINGTON OFFICIAL REPORTS HEADNOTES

WA[1][] [1]

Statutes > Validity > Constitutional Construction > Avoidance of Unconstitutional Interpretation > Susceptibility to Two Constructions > Necessity.

The doctrine of constitutional avoidance does not require a court to choose a constitutional interpretation of a statute over an unconstitutional interpretation if the statute is not genuinely susceptible to two constructions.

WA[2][] [2]

Statutes > Construction > Legislative Intent > Statutory Language > Plain Language > Unambiguous Language > Effect.

In discerning and implementing the legislative intent of a statute, a court begins with the statute's plain language and the ordinary meaning of that language. When the plain language of a statute is unambiguous, a court must give effect to the plain meaning of that language as an expression of legislative intent.

WA[3][] [3]

Statutes > Construction > Amendment > Judicial Amendment > Additional Language.

A court cannot add words or clauses to an unambiguous statute that the legislature has chosen not to include.

WA[4][] [4]

Statutes > Validity > Constitutional Construction > Tortured Interpretation.

The Supreme Court will not press the construction of a statute to the point of disingenuous evasion to remedy a constitutional infirmity in the statute.

WA[5][] [5]

Statutes > Construction > Provisions > Same Act.

Courts seek to harmonize related provisions in a statute whenever possible.

WA[6][] [6]

Statutes > Construction > Borrowed Statute > Deviations From Source > Effect.

When the legislature borrows a statute from another source but makes certain deviations from that source, a court is bound to conclude that the deviations were made purposefully and evidence the legislature's intent to differ from the original source on the particular issues.

WA[7][] [7]

Government > Public Participation > Statutory Protection > Special Motion To Strike > Construction of Statute > Persuasive Authority > California Cases.

Court decisions interpreting California's statute prohibiting strategic lawsuits against public participation and petition do not inform a court's interpretation of the special motion to strike procedure under RCW 4.24.525 in relation to provisions of the Washington statute that differ from the provisions of the California statute.

WA[8][] [8]

Government > Public Participation > Statutory Protection > Special Motion To Strike > Construction of Statute > Persuasive Authority > Minnesota Cases.

Minnesota court decisions interpreting Minnesota's statute prohibiting strategic lawsuits against public participation and petition can be persuasive authority for purposes of interpreting the special motion to strike procedure under RCW 4.24.525.

WA[9][] [9]

Government > Public Participation > Statutory Protection > Special Motion To Strike > Adjudication > Factual Adjudication Without Trial.

RCW 4.24.525(4)(b) establishes a preliminary procedure by which a trial court ruling on a special motion to strike a claim as a strategic lawsuit against public participation and petition adjudicates the facts of the claim without a trial. It does not establish a summary judgment standard. The statute requires a trial court to weigh the evidence and to dismiss a claim unless it makes a factual finding that the plaintiff has established by clear and convincing evidence a probability of prevailing at trial. By their terms, the standard under the statute and the standard for summary judgment involve fundamentally different inquiries. (*Johnson v. Ryan*, 186 Wn. App. 562 (2015); *Spratt v. Toft*, 180 Wn. App. 620 (2014); and *Dillon v. Seattle Deposition Reporters, LLC*, 179 Wn. App. 41 (2014), are overruled insofar as they are inconsistent.)

WA[10][] [10]

Jury > Right to Jury > Constitutional Right > State Provision > "Inviolate" Protection > What Constitutes.

For purposes of Const. art. I, § 21, under which "[t]he right of trial by jury shall remain inviolate," "inviolate" connotes deserving of the highest protection and indicates that the right must remain the essential component of Washington's legal system that it always has been. The right must not diminish over time and must be protected from all assaults to its essential guaranties. At its core, the right to trial by a jury guarantees litigants the right to have a jury resolve questions of disputed material facts.

WA[11][] [11]

Jury > Right to Jury > Constitutional Right > Federal Provision > Applicability to States.

The Seventh Amendment right to a jury trial does not apply to the states.

WA[12][] [12]

Courts > Access to Courts > Constitutional Right > First Amendment.

The right of access to the courts for the redress of wrongs is an aspect of the First Amendment right to petition the government. When a suit raises a genuine issue of material fact that turns on the credibility of witnesses or on the proper inferences to be drawn from undisputed facts, the First Amendment requires that the suit cannot be enjoined because that would usurp the traditional fact-finding function of the jury. The only instance in which this petitioning activity may be constitutionally punished is when a party pursues frivolous litigation, whether defined as lacking a reasonable basis or as sham litigation.

WA[13][] [13]

Jury > Right to Jury > Constitutional Right > State Provision > Scope > Limitation > Frivolous or Sham Claims.

Const. art. I, § 21 does not encompass a right of jury trial on frivolous or sham claims. Exclusion of such claims comports with the long-standing principle that litigants cannot be allowed to abuse the heavy machinery of the judicial process for improper purposes that cause serious harm to innocent victims, such as to harass, cause delay, or chill free expression. Such conduct has always been, and always will be, sanctionable.

WA[14][] [14]

Government > Public Participation > Statutory Protection > Special Motion To Strike > Adjudication > By Court > Validity > Right to Jury Trial.

Because RCW 4.24.525(4)(b) requires a trial court, in ruling on a special motion to strike a claim as a strategic lawsuit against public participation and petition (anti-SLAPP motion), to make a factual determination on whether the claimant has established by clear and convincing evidence a probability of prevailing on the claim, the statute violates the Const. art. I, § 21 right of trial by jury. The standard established by RCW 4.24.525(4)(b), which is intended to deter improper anti-SLAPP motions, makes clear that the standard is a higher threshold than a frivolousness inquiry. RCW 4.24.525(4)(b) creates a truncated adjudication of the merits of a plaintiff's claim, including nonfrivolous factual issues, without a trial. Such a procedure invades the jury's essential role of deciding debatable questions of fact.

WA[15][] [15]

Statutes > Validity > Invalidity > Partial Invalidity > Severability > Test.

Whether an invalid portion of a statute may be severed from the remaining, valid portion is determined by (1) whether the respective portions are so connected that it could not be believed that the legislature would have enacted one without the other or (2) whether the invalid portion is so intimately connected with the balance of the statute as to render the statute useless in accomplishing its legislative purpose.

WA[16][] [16]

Government > Public Participation > Statutory Protection > Special Motion To Strike > Adjudication > By Court > Validity > Invalidity > Scope.

Because the adjudication provision of RCW 4.24.525(4)(b) is a mainspring of the total statute governing proceedings on a special motion to strike a claim as a strategic lawsuit against public participation and petition, the invalidity of the provision renders the entire statute invalid.

STEPHENS, J., delivered the opinion for a unanimous court.

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Jeffrey L. Needle, *Jesse A. Wing*, *Joseph R. Shaeffer*, and *Tiffany M. Cartwright* on behalf of Washington Employment Lawyers Association, amicus curiae.

Matthew J. Segal, *Sarah C. Johnson*, *Sarah A. Dunne*, and *Nancy L. Talner* on behalf of American Civil Liberties Union of Washington, amicus curiae.

Jessica L. Goldman and *Bruce D. Brown* on behalf of Reporters Committee for Freedom of the Press; Allied Daily Newspapers of Washington; American Society of News Editors; Association of Alternative Newsmedia; The Association of American Publishers, Inc.; Bloomberg L.P.; California

Newspaper Publishers Association; The E.W. Scripps Company; Forbes Media LLC; Gannett Co., Inc.; Hearst Corporation; Investigative Reporting Workshop at American University; KIRO-TV; The McClatchy Company; MediaNews Group, Inc.; National Press Photographers Association; Newspaper Association of America; North Jersey Media Group Inc.; Online News Association; Public Participation Project; The Seattle Times Company; Sound Publishing, Inc. d/b/a the Daily Herald of Everett; Stephens Media LLC; Time Inc.; Tully Center for Free Speech; Washington Newspaper Publishers Association; and Washington State Association of Broadcasters, amici curiae.

Neil M. Fox on behalf of Jewish Voice for Peace, Palestine Solidarity Legal Support, National Lawyers Guild, American Muslims for Palestine, and International Jewish Anti-Zionist Network, amici curiae.

Judges: [***1] AUTHOR: Justice Debra L. Stephens. WE CONCUR: Chief Justice Barbara A. Madsen, Justice Charles W. Johnson, Justice Susan Owens, Justice Mary E. Fairhurst, Justice Charles K. Wiggins, Justice Steven C. González, Justice Sheryl Gordon McCloud, Justice Mary I. Yu.

Opinion by: Debra L. Stephens

Opinion

EN BANC
[*274] [864]**

¶1 STEPHENS, J. — This case requires us to decide the contitutionality of the Washington Act Limiting Strategic Lawsuits Against Public Participation (anti-SLAPP statute). LAWS OF 2010, ch. 118 (codified at RCW 4.24.525). In the statute's prefatory findings, the legislature explained it was "concerned about lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances," *id.* § 1(1)(a), and so the statute's purpose was to establish "an efficient, uniform, and comprehensive method for speedy adjudication" of such lawsuits, *id.* § 1(2)(b).

¶2 The statute attempts to achieve this goal in three principal ways. It halts discovery in such cases presumptively, RCW 4.24.525(5)(c), creates a "special motion to strike a claim" (anti-SLAPP motion), *id.* at (4)(b), and awards a prevailing party on the motion attorney fees and a $ 10,000 assessment, *id.* at (6)(a). When ruling on an anti-SLAPP **[***2]** motion, the trial court first determines whether the claim at issue is "based on an action involving public participation and petition," a defined term that broadly describes rights of expression and petition. *Id.* at (4)(b). If that is so, the trial court then decides whether the party bringing the claim can prove by "clear and convincing evidence a probability of prevailing on the claim." *Id.* If the party cannot meet that burden, the statute requires the trial court to dismiss the claim and award statutory remedies to the opposing party. *Id.* at (6)(a).

¶3 *HN1*[↑] Though the statute seeks to "[s]trike a balance between the rights of persons to file lawsuits and to trial by jury and the rights of persons to participate in matters of public concern," LAWS OF 2010, ch. 118, § 1(2)(a), we conclude **[*275]** the statute's evidentiary burden fails to strike the balance that the Washington Constitution requires. Because RCW 4.24.525(4)(b) requires the trial judge to adjudicate factual questions in nonfrivolous claims without a trial, we hold RCW 4.24.525 violates the right of trial by jury under article I, section 21 of the Washington Constitution and is invalid. We reverse the Court of Appeals and remand this case to the superior court for further proceedings.

I. BACKGROUND

A. *Overview of Washington's [***3] Anti-SLAPP Laws*

¶4 Anti-SLAPP statutes punish those who file lawsuits—labeled strategic lawsuits against public

participation or SLAPPs—that abuse the judicial process in order to silence an individual's free expression or petitioning activity. Tom Wyrwich, *A Cure for a "Public Concern": Washington's New Anti-SLAPP [**865] Law*, 86 WASH. L. REV. 663, 666-68 (2011). Such litigation is initiated "[w]ith no concern for the inevitable failure of the lawsuit" and instead only forces the defendant into costly litigation that "devastate[s] the defendant financially and chill[s] the defendant's public involvement." *Id.* at 666-67. Though such suits are "typically dismissed as groundless or unconstitutional," the problem is that dismissal comes only after "the defendants are put to great expense, harassment, and interruption of their productive activities." LAWS OF 2010, ch. 118, § 1(1)(b).

¶5 In 1989, Washington became the first state to enact anti-SLAPP legislation. LAWS OF 1989, ch. 234 (codified as amended at RCW 4.24.500-.520). This initial statute grants speakers immunity from claims based on the speaker's communication to a governmental entity regarding any matter reasonably of concern to the governmental entity. *See* RCW 4.24.510. However, this statute has come to be seen as having a limited effect because **[***4]** it applies only to communications to governmental entities and it creates no method for early dismissal. Wyrwich, *supra*, at 669-70.
[*276]

¶6 In 2010, the legislature enacted the anti-SLAPP statute at issue in this case. LAWS OF 2010, ch. 118 (codified at RCW 4.24.525). This statute is unique from its predecessor in that it creates an entirely new method for adjudicating SLAPPs, separate from the rules of civil procedure. The new statute did not amend or repeal the prior statute and instead codifies its new procedures in one new statutory section. *See* RCW 4.24.525. Subsections (1) and (2) define key terms. Subsection (3) provides that the law does not apply to prosecutors. Subsection (4) is the law's mainspring: it establishes a "special motion to strike a claim" and sets forth the evidentiary standard that trial courts must use to adjudicate the motion. Subsection (5) contains various procedural rules to halt discovery and ensure speedy adjudication of an anti-SLAPP motion. Subsection (6) provides the prevailing party on the motion statutory damages of $ 10,000, attorney fees, costs, and discretionary additional relief. Subsection (7) states the statute does not abridge any other rights the movants possess.

¶7 The law's mainspring, subsection (4), provides that a party may bring a special motion to strike any claim that is based on "an action **[***5]** involving public participation and petition." RCW 4.24.525(4)(a). That phrase—"an action involving public participation and petition"—is a defined term that uses capacious language in five nonexclusive examples. *See id.* at (2)(a)-(e). When a party brings such a motion, the moving party has "the initial burden of showing by a preponderance of the evidence" that the claim is based on an action involving public participation and petition. *Id.* at (4)(b). If the moving party meets this burden, the burden shifts to the responding party "to establish by clear and convincing evidence a probability of prevailing on the claim." *Id.* When a trial judge adjudicates such a motion, "the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based." *Id.* at (4)(c). If the court determines the responding party has met its burden to establish by **[*277]** clear and convincing evidence a probability of prevailing on the claim, "the substance of the determination may not be admitted into evidence at any later stage of the case," *id.* at (4)(d)(i), and the case proceeds toward trial.

¶8 Upon the filing of a special motion to strike, subsection (5) freezes all other aspects of **[***6]** the litigation. Discovery is stayed, as are pending motions and hearings. *Id.* at (5)(c). The discovery stay remains in effect until the court rules on the special motion to strike, though on a party's motion and for good cause shown, the court may order that "specified discovery or other hearings or motions be conducted." *Id.*

¶9 Subsection (5) also ensures the special motion to strike will be resolved quickly. The motion must be filed within 60 days of service of the most recent complaint or at a later time in the court's discretion. *Id.* at (5)(a). The court must hold a hearing on the motion within 30 days, unless "the docket conditions of the court require a later hearing" and, regardless, the court "is directed" to hold the hearing "with all due speed and **[**866]** such hearings should receive priority." *Id.* The court must render its decision "as soon as possible," but no later than seven days after the hearing. *Id.* at (5)(b). Every party has a "right of expedited appeal" from the trial court's order granting the motion, the trial court's order denying the motion, or the trial court's "failure to rule on the motion in a timely fashion." *Id.* at (5)(d).

¶10 When a party prevails on an anti-SLAPP motion, the court **[***7]** not only dismisses the other side's claim, but also must award the moving party costs, attorney fees, and $ 10,000 in statutory damages. *Id.* at (6)(a)(i)-(ii). The court may award "[s]uch additional relief ... as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated." *Id.* at (6)(a)(iii).

B. *Procedural Background*

¶11 The Olympia Food Cooperative is a nonprofit corporation grocery store. It emphasizes an egalitarian philosophy **[*278]** that requires consensus in decision-making and engages in various forms of public policy engagement, such as boycotts of certain goods. At issue in this case, the Cooperative's board of directors adopted a boycott of goods produced by Israel-based companies to protest Israel's perceived human rights violations. The board adopted this boycott without staff consensus on whether it should be adopted.

¶12 Five members of the Cooperative (plaintiffs) brought a derivative action against 16 current or former members of its board (defendants). The complaint alleged the board acted ultra vires and breached its fiduciary duties by violating the Cooperative's written "Boycott Policy." *See* Clerk's Papers (CP) at 106-07. That policy, adopted by the **[***8]** board in 1993, provides that the Cooperative "will honor nationally recognized boycotts" when the staff "decide[s] by consensus" to do so. *Id.* at 106. Because the board adopted the boycott of Israel-based companies without staff consensus, the complaint sought a declaratory judgment that the boycott was void, a permanent injunction of the boycott, and an "award of damages in an amount to be proved at trial." *Id.* at 17. Defendants responded that the board's inherent authority to govern the Cooperative under its bylaws and the Washington Nonprofit Corporation Act, RCW 24.03.095, authorized the adoption of the boycott without staff consensus, notwithstanding the boycott policy.

¶13 Defendants filed a special motion to strike plaintiffs' claims under the anti-SLAPP statute. Plaintiffs opposed the motion on statutory and constitutional grounds and requested that the trial court lift the anti-SLAPP statute's automatic stay of discovery. The superior court denied plaintiffs' discovery request, rejected their constitutional challenges to the statute, and granted defendants' special motion to strike. Pursuant to RCW 4.24.525(6)(a), the superior court ordered plaintiffs to pay $ 221,846.75 to defendants: $ 10,000.00 in statutory damages to each defendant **[***9]** ($ 160,000.00 total), attorney fees ($ 61,668.00), and **[*279]** costs ($ 178.75). [1] Plaintiffs appealed, and the Court of Appeals affirmed on all issues. *Davis v. Cox*, 180 Wn. App. 514, 325 P.3d 255 (2014). We granted plaintiffs' petition for review. *Davis v. Cox*, 182 Wn.2d 1008, 345 P.3d 784 (2014).

II. DISCUSSION

[1] In *Akrie v. Grant*, 180 Wn.2d 1008, 325 P.3d 913 (2014) (review stayed pending this case), the court is asked to determine whether, as a matter of statutory interpretation, RCW 4.24.525(6)(a) requires that $ 10,000 be awarded to each prevailing defendant (here, $ 160,000 total) or instead $ 10,000 to all defendants in total. Because we invalidate RCW 4.24.525 today, we do not reach that question of interpretation.

¶14 Plaintiffs and supporting amici curiae contend the anti-SLAPP statute's burden of proof, stay of discovery, and statutory penalties are unconstitutional on several grounds. They contend some or all of these provisions violate the right of trial by jury under article I, section 21 of the Washington Constitution; the Washington separation of powers doctrine under *Putman v. Wenatchee Valley Medical Center, PS*, 166 Wn.2d 974, 979-85, 216 P.3d 374 (2009); the Washington right of access to courts under *Putman*, 166 **[**867]** Wn.2d at 979; the petition clause of the First Amendment to the United States Constitution; and the vagueness doctrine under the due process clause of the Fourteenth Amendment to the United States Constitution. We hold the anti-SLAPP statute violates the right of trial by jury and do not resolve how these other constitutional limits may apply to the anti-SLAPP statute's provisions.

A. *The Anti-SLAPP Statute Establishes a Preliminary Procedure **[***10]** for Factual Adjudication of Claims without a Trial, Not a Summary Judgment Procedure*

WA[1][↑] [1] ¶15 Before turning to the constitutional arguments against the anti-SLAPP statute, we must resolve a dispute about how the statute operates. Defendants contend RCW 4.24.525(4)(b) requires the trial judge to perform an analysis equivalent to a summary judgment analysis, that is, not **[*280]** find facts and instead grant the motion only if undisputed material facts show the movant is entitled to relief as a matter of law. Plaintiffs counter that the statute requires the trial judge to weigh the evidence and make a factual determination on the probability they will prevail on the merits of their claim. The Court of Appeals below relied on its decision in *Dillon v. Seattle Deposition Reporters, LLC*, 179 Wn. App. 41, 86-90, 316 P.3d 1119 (2014), to construe the statute as a summary judgment analysis in order to save its constitutionality. *Davis*, 180 Wn. App. at 546-47. Though ***HN2***[↑] the doctrine of constitutional avoidance requires us to choose a constitutional interpretation of a statute over an unconstitutional interpretation when the statute is "'genuinely susceptible to two constructions,'" *Gonzales v. Carhart*, 550 U.S. 124, 154, 127 S. Ct. 1610, 167 L. Ed. 2d 480 (2007) (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 238, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998)), that is not the case here. We conclude the plain language of RCW 4.24.525(4)(b) is not genuinely susceptible to being interpreted as a summary judgment procedure.

WA[2][↑] [2] ¶16 ***HN3***[↑] We review **[***11]** de novo questions of statutory interpretation. *Eubanks v. Brown*, 180 Wn.2d 590, 596-97, 327 P.3d 635 (2014). To discern and implement the legislature's intent, "[w]e begin by looking at the 'statute's plain language and ordinary meaning.'" *Id.* at 597 (internal quotation marks omitted) (quoting *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)). Where a statute's plain language is unambiguous, "we 'must give effect to that plain meaning as an expression of legislative intent.'" *Id.* (quoting *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)).

WA[3-9][↑] [3-9] ¶17 The plain language of RCW 4.24.525(4)(b) requires the trial court to weigh the evidence and make a factual determination of plaintiffs' "probability of prevailing on the claim." The moving party bears "the initial *burden* of showing by a *preponderance of the evidence* that [plaintiffs'] claim is based on [defendants'] action involving **[*281]** public participation and petition." RCW 4.24.525(4)(b) (emphasis added). "If the moving party meets this *burden*, the *burden shifts* to the responding party *to establish* by *clear and convincing evidence a probability* of prevailing on the claim." *Id.* (emphasis added). And when the trial judge adjudicates these questions, the statute directs that the trial judge "shall consider pleadings and *supporting and opposing* affidavits stating the facts" relating to the underlying claims and defenses. *Id.* at (4)(c) (emphasis added).

¶18 By **[***12]** contrast, ***HN4***[↑] summary judgment is proper only if the moving party shows

that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). By their terms, the two standards involve fundamentally different inquiries. The anti-SLAPP statute provides a burden of proof concerning whether the evidence crosses a certain threshold of proving a likelihood of prevailing on the claim. *See* 2 MCCORMICK ON EVIDENCE § 336 (Kenneth S. Brown ed., 7th ed. 2013) (comparing burdens of production and burdens of proof). But summary judgment does not concern degrees of likelihood or probability. Summary judgment requires a legal certainty: the material facts must be undisputed, and one side wins as a matter of law. If the legislature intended to adopt a **[**868]** summary judgment standard, it could have used the well-known language of CR 56(c). But it did not do so. It instead chose language describing the evidentiary burden to evaluate the "probability of prevailing on the claim." RCW 4.24.525(4)(b). And it directed the trial judge to evaluate disputed evidence, including "supporting and opposing affidavits." *Id.* at (4)(c). In this case, the trial judge did just that. [2]

Thus, RCW 4.24.525(4)(b)'s plain **[***13]** language **[*282]** requires the trial judge to make factual determinations and adjudicate a SLAPP claim.

¶19 Another way to frame our conclusion is to consider what the defendants ask us to do. They ask us to interpret the words "to establish by clear and convincing evidence a probability of prevailing on the claim" to mean "to establish by clear and convincing evidence a probability of prevailing on the claim, if there is no genuine issue as to any material fact and the moving party is entitled to prevail on the special motion to strike as a matter of law." This goes beyond interpretation and requires us to rewrite the statute; we decline the invitation. *J.P.*, 149 Wn.2d at 450 (***HN5***[↑] "[W]e 'cannot add words or clauses to an unambiguous **[***15]** statute when the legislature has chosen not to include that language.'" (quoting *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003))). And because the statute contains no ambiguity, we cannot use the doctrine of constitutional avoidance to "'press statutory construction to the point of disingenuous evasion even to avoid a constitutional question.'" *State v. Abrams*, 163 Wn.2d 277, 282, 178 P.3d 1021 (2008) (internal quotation marks omitted) (quoting *Miller v. French*, 530 U.S. 327, 341, 120 S. Ct. 2246, 147 L. Ed. 2d 326 (2000)).

¶20 Though RCW 4.24.525(4)(b)'s language itself is plain, we observe that a related provision confirms our **[*283]** reading. If the trial court determines the responding party has met its burden to establish by clear and convincing evidence a probability of prevailing on the claim, "the substance of the determination may not be admitted into evidence at any later stage of the case." RCW 4.24.525(4)(d)(i). Under defendants' theory—wherein all the responding party must do to defeat a special motion to strike is show a disputed material fact—subsection (4)(d)(i) would mean the mere fact that there *is* a triable issue of fact cannot be

[2] One disputed material fact in this case is whether a boycott of Israel-based companies is a "nationally recognized boycott[ ]," as the Cooperative's boycott policy requires for the board to adopt a boycott. CP at 106. The declarations on this fact conflict. *Compare, e.g.*, CP at 348 (Decl. of Jon Haber) ("No matter where they have been pursued, efforts to organize boycotts of and divestment from Israel have failed in the United States. In short, policies boycotting and/or divesting from the State of Israel have never been 'nationally recognized' in this county. Among food cooperatives alone, the record is stark: every food cooperative in the United States where such policies have been proposed has rejected them. [Describes examples]."), *with* CP at 470 (Decl. of Grace Cox) ("[T]he web site of the U.S. Campaign to End the Occupation ... name[s] hundreds of its own U.S. member organizations[ ] as supporters for its campaigns, including boycotts against Motorola, Caterpillar, and other companies in the U.S. and around the world that were profiting from Israel's occupation. The U.S. Campaign now reports about 380 state-level member *[***14] organizations* across the country, including five businesses in Olympia, WA."). On this disputed material fact, when the superior court resolved the anti-SLAPP motion, it weighed the evidence and found the defendants' "evidence clearly shows that the Israel boycott and divestment movement is a national movement." CP at 990. The Court of Appeals below reasoned that this is an immaterial fact, on the theory that the Cooperative's board is not bound by its adopted policies because its inherent authority to manage the affairs of the corporation includes the authority to disregard its adopted policies. *Davis*, 180 Wn. App. at 532-36.

admitted into evidence. That makes little sense. By contrast, under plaintiffs' reading, subsection (4)(d)(i) has meaning. The legislature's apparent concern expressed in subsection (4)(d)(i) is that a jury at trial might give undue weight to a trial judge's factual finding that the plaintiff's claim establishes by clear and **[***16]** convincing evidence a probability of prevailing on the merits. Given that ***HN6***[↑] we harmonize related provisions in a statute whenever possible, *State v. Hirschfelder*, 170 Wn.2d 536, 543, 242 P.3d 876 (2010), subsection (4)(d)(i) confirms our reading that subsection (4)(b) requires the trial judge to make a factual determination on the probability of plaintiffs prevailing on their claims. It is not a mere summary judgment proceeding.
[869]**

¶21 Tellingly, defendants offer no textual analysis of RCW 4.24.525(4)(b)'s burden of proof or any related provisions. Instead, they point to nonbinding authorities supporting their view that the anti-SLAPP statute imposes a summary judgment analysis. In turn, plaintiffs counter with other nonbinding authorities to the contrary. We are cautious in looking beyond our state's statute, however, because among the slight majority of states that have adopted an anti-SLAPP statute, the details of these statutes vary significantly. *See* THOMAS R. BURKE, ANTI-SLAPP LITIGATION ch. 8 (2014) (collecting statutes).

¶22 Defendants primarily rely on California authority. They argue the Washington anti-SLAPP statute "mirrors the California anti-SLAPP act, which was enacted in 1992, **[*284]** was the model for Washington's law, and has consistently been construed to create a summary judgment standard." Resp'ts' **[***17]** Suppl. Br. at 10-11. It is true that some provisions of the Washington anti-SLAPP statute and the California statute resemble or are identical to each other. *Compare* RCW 4.24.525, *with* CAL. CIV. PROC. CODE § 425.16. But it is also true that they deviate. Wyrwich, *supra*, at 671-92 (discussing some of the similarities and differences between the two statutes and concluding that because Washington modeled its statute on California's, Washington courts must give effect to the differences in our anti-SLAPP statute); *see also* CAL. CIV. PROC. CODE § 425.17(a) (amending the California anti-SLAPP statute, CAL. CIV. PROC. CODE § 425.16, to limit its application based on findings by the California legislature that *defendants* have engaged in a "disturbing abuse" of the anti-SLAPP statute contrary to *plaintiffs'* "rights of freedom of speech and petition for the redress of grievances"). And the relevant provisions of the two statutes at issue—their burden of proof standards—are notably different. California's statute provides that a plaintiff defeats a defendant's motion by establishing "*a probability* that the plaintiff will prevail on the claim." CAL. CIV. PROC. CODE § 425.16(b)(1) (emphasis added). By contrast, our statute expressly ratchets up the plaintiff's evidentiary burden, requiring the plaintiff to establish "by *clear and convincing evidence* ***[***18]*** *a probability* of prevailing on the claim." RCW 4.24.525(4)(b) (emphasis added). ***HN7***[↑] Where our legislature borrows a statute from another source but makes certain deviations from that source, "we are bound to conclude" the legislature's deviation "was purposeful and evidenced its intent" to differ from the original source on the particular issue. *State v. Jackson*, 137 Wn.2d 712, 723, 976 P.2d 1229 (1999). Therefore, case law interpreting the California statute's burden of proof does not inform the proper interpretation of our statute's burden of proof. [3]
[*285]

¶23 Defendants also cite two federal opinions that

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[3] Given the difference between our statute and California's, we express no opinion on whether California's case law is a persuasive interpretation of the California statute or whether such a standard would be consistent with our constitution. *But see Opinion of the Justices*, 138 N.H. 445, 641 A.2d 1012, 1013-15 (1994) (holding a proposed anti-SLAPP bill using an "a probability" evidentiary standard "modeled after the California statute" violated the constitutional right of trial by jury). We note only that if our legislature desires to create a summary judgment standard for an anti-SLAPP motion, the relevant language in CR 56(c) describes that standard.

applied RCW 4.24.525(4)(b) to require a summary judgment analysis. *Phoenix Trading, Inc. v. Loops LLC*, 732 F.3d 936, 941-42 (9th Cir. 2013); *AR Pillow, Inc. v. Maxwell Payton, LLC*, **[***19]** No. C11-1962RAJ, 2012 WL 6024765, *2, 2012 U.S. Dist. LEXIS 172015, at *5 (W.D. Wash. Dec. 4, 2012) (court order). But these opinions simply adopted California law without giving effect to our statute's different burden of proof, as we must do. *Jackson*, 137 Wn.2d at 723. By contrast, a federal court that grappled with RCW 4.24.525(4)(b)'s text and its unique burden of proof concluded that it requires a trial court to "dismiss a case without a trial based upon its view of the merits of the case" and that it "runs in direct conflict" with the traditional means of disposing of a claim without a trial under Federal Rules of Civil Procedure 12 and 56. *Intercon Solutions, Inc. v. Basel Action Network*, 969 F. Supp. 2d 1026, 1041-55 (N.D. Ill. 2013). Another federal court that grappled with RCW 4.24.525(4)(b)'s text reasoned that a "crucial distinction[ ]" between Washington's and California's statutes that "cannot be overstated" is that the Washington statute "radically alters a plaintiff's burden of proof." **[**870]** *Jones v. City of Yakima Police Dep't*, No. 12-CV-3005-TOR, 2012 WL 1899228, at *3, 2012 U.S. Dist. LEXIS 72837, at *8-9 (E.D. Wash. May 24, 2012) (court order). Because we must give effect to the textual differences between Washington's and California's anti-SLAPP statutes, the persuasive federal authority applying RCW 4.24.525(4)(b) confirms our plain language reading of RCW 4.24.525(4)(b)'s text.

¶24 Next, defendants cite case law applying three other jurisdictions' anti-SLAPP statutes. *Lamz v. Wells*, 938 So. 2d 792, 796 (La. Ct. App. 2006); *Abbas v. Foreign Policy [*286] Grp., LLC*, 975 F. Supp. 2d 1, 13 (D.D.C. 2013) (applying Washington, DC, law); *Or. Educ. Ass'n v. Parks*, 253 Or. App. 558, 291 P.3d 789, 794 (2012). These authorities are unhelpful for the same reason California's case law is unhelpful: they **[***20]** do not interpret a clear and convincing evidentiary standard. Moreover, these opinions provide no new reasoning. The Louisiana opinion and the authority it cites do not explain why a summary judgment standard is correct even under its own statutes' burdens of proof. *Lamz*, 938 So. 2d at 796. The United States District Court opinion applying Washington, DC, law forsakes textual analysis in favor of simply relying on California law to adopt a summary judgment analysis, *Abbas*, 975 F. Supp. 2d at 13, but the United States Court of Appeals for the District of Columbia has now abrogated this holding, noting that "it requires the Court to re-write the special motion to dismiss provision," *Abbas v. Foreign Policy Grp. LLC*, 783 F.3d 1328, 1334-35 (D.C. Cir. 2015); *see also id.* ("Put simply, the D.C. Anti-SLAPP Act's likelihood of success standard is different from and more difficult for plaintiffs to meet than the standards imposed by Federal Rules 12 and 56."). Last, the Oregon opinion does not appear to hold that Oregon courts use a summary judgment standard in applying that state's anti-SLAPP statute. [4] These authorities thus provide no persuasive support for defendants' position.

¶25 Defendants next highlight that lower Washington courts have held RCW 4.24.525(4)(b) creates a summary judgment analysis. *See Johnson v. Ryan*, 186 Wn. App. 562, 571, 346 P.3d 789 (2015); *Spratt v. Toft*, 180 Wn. App. 620, 636-37, 324 P.3d 707 (2014); *Davis*, 180 Wn. App. at 528, **[*287]** 546-47; *Dillon*, 179 Wn. App. at 86-90. These opinions all followed this position based on the Court of Appeals opinion in *Dillon*. There, the Court of Appeals, in self-identified dicta, opined that RCW 4.24.525(4)(b) establishes a summary

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[4]

> The Oregon Court of Appeals explained that the Oregon anti-SLAPP statute requires a court to evaluate **[***21]** the evidence and draw a conclusion as to whether there is a probability that the plaintiff will prevail. *By contrast*, on summary judgment, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the nonmoving party, and draw a conclusion as to whether there is a triable disputed issue or fact.
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> *Or. Educ. Ass'n*, 291 P.3d at 794 (emphasis added).

judgment standard. *See Dillon*, 179 Wn. App. at 86-90 (noting it was not "strictly necessary" to do so but stating it would "take this opportunity" to engage in a five-page discussion instructing Washington courts that they "should" use a summary judgment analysis). *But see, e.g.*, *Davis*, 180 Wn. App. at 528, 546-47 (quoting *Dillon* as if it announced a holding on this issue).

¶26 In *Dillon*, the court recognized that California law is unpersuasive because the California statute lacks a clear and convincing evidence standard but it found Minnesota law **[***22]** to be persuasive because its anti-SLAPP statute uses such a standard. *Dillon*, 179 Wn. App. at 87-88. The court then adopted a Minnesota Court of Appeals decision that interpreted its statute to require clear and convincing evidence "'in light of the Rule 12 standard for granting judgment on the pleadings' or 'in light of the Rule 56 standard for granting summary judgment.'" *Id.* (emphasis omitted) (quoting *Nexus v. Swift*, 785 N.W.2d 771, 781-82 (Minn. Ct. App. 2010)).

¶27 As it turns out, the Minnesota Supreme Court subsequently abrogated that Minnesota Court of Appeals opinion. *See Leiendecker v. Asian Women United of Minn.*, 848 N.W.2d 224, 231-33 (Minn. 2014). Similar to our statute's evidentiary standard and unlike California's lower "a probability" standard, the Minnesota statute requires the **[**871]** trial court to determine whether "the responding party has produced clear and convincing evidence." *Compare* MINN. STAT. § 554.02, subd. 2(3), *and* RCW 4.24.525(4)(b), *with* CAL. CIV. PROC. CODE § 425.16(b)(1). The Minnesota Supreme Court noted that the "constitutional-avoidance canon provides a 'presumption ... that a statute is constitutional, and we are required to place a construction on the statute that will find it so *if at all possible*.'" *Leiendecker*, 848 N.W.2d at **[*288]** 232 (alteration in original) (quoting *Kline v. Berg Drywall, Inc.*, 685 N.W.2d 12, 23 (Minn. 2004)). But it concluded that under the statute's unambiguous terms, it was "neither reasonable nor 'possible'" to impose a summary judgment analysis onto the statute as a matter of construction **[***23]** because the summary judgment analysis and the anti-SLAPP standard "are incompatible with one another." *Id.* at 231-33. [5] Thus, the court held the statute requires the trial judge to find facts. *Id.*

¶28 We believe the reasoning of the Minnesota Supreme Court, interpreting a statute close to ours, is persuasive. It confirms our plain language analysis of RCW 4.24.525(4)(b)'s text, as described above. In sum, we hold RCW 4.24.525(4)(b) requires the trial judge to weigh the evidence and dismiss a claim unless it makes a factual finding that the plaintiff has established by clear and convincing evidence a probability of prevailing at trial. [6]

B. *RCW 4.24.525(4)(b) Violates the Right of Trial by Jury under Article I, Section 21 of the Washington Constitution*

WA[10,11][↑] [10, 11] ¶29 ***HN8***[↑] Under the Washington Constitution, "[t]he right of trial by jury shall remain inviolate." WASH. CONST. art. I, § 21. [7] "The term 'inviolate' connotes deserving of the highest protection" and "indicates that the right must remain the essential component of our legal **[***24]** system that it has always been." *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, **[*289]** 771 P.2d 711, 780 P.2d 260 (1989). The right "must not diminish over time and must be

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[5] The Minnesota Supreme Court expressly reserved the jury trial constitutional question in that case because no party argued that position. *Leiendecker*, 848 N.W.2d at 232.

[6] For the same reasons, we reject defendants' alternative argument that RCW 4.24.525(4)(b) creates a standard equivalent to that used when a trial judge evaluates whether to grant a motion for a directed verdict.

[7] The right of trial by jury protected by the Seventh Amendment to the United States Constitution does not apply to the states, *see Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217, 36 S. Ct. 595, 60 L. Ed. 961 (1916); *Walker v. Sauvinet*, 92 U.S. (2 Otto) 90, 92-93, 23 L. Ed. 678 (1875), so our opinion rests solely on article I, section 21 of the Washington Constitution, *see Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 644 & n.4, 771 P.2d 711, 780 P.2d 260 (1989).

protected from all assaults to its essential guaranties." *Id.* At its core, the right of trial by jury guarantees litigants the right to have a jury resolve questions of disputed material facts.

¶30 But the right of trial by jury is not limitless. For example, it is well established that "[w]hen there is no genuine issue of material fact, ... summary judgment proceedings do not infringe upon a litigant's constitutional right to a jury trial." *LaMon v. Butler*, 112 Wn.2d 193, 200 n.5, 770 P.2d 1027 (1989) (citing *Nave v. City of Seattle*, 68 Wn.2d 721, 725, 415 P.2d 93 (1966); *Diamond Door Co. v. Lane-Stanton Lumber Co.*, 505 F.2d 1199, 1203 (9th Cir. 1974)). As discussed above, however, the trial judge must resolve disputed material facts under RCW 4.24.525(4)(b)'s plain language, so ***HN9***[↑] the constitutionality of summary judgment procedures cannot save the anti-SLAPP statute.

WA[12][↑] [12] ¶31 ***HN10***[↑] Another relevant limit on the right of trial by jury is that it does not encompass *frivolous* claims that are brought for an improper purpose. The petition clause of the First Amendment to the United States Constitution informs this holding. The United States Supreme Court "recognize[s] that the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." **[***25]** *Bill Johnson's Rests., Inc. v. Nat'l Labor Relations Bd.*, 461 U.S. 731, 741, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983); *see also Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387, 131 S. Ct. 2488, 180 L. Ed. 2d **[**872]** 408 (2011) ("'[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government.'" (alteration in original) (quoting *Sure-Tan, Inc. v. Nat'l Labor Relations Bd.*, 467 U.S. 883, 896-97, 104 S. Ct. 2803, 81 L. Ed. 2d 732 (1984) and citing *BE&K Constr. Co. v. Nat'l Labor Relations Bd.*, 536 U.S. 516, 525, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002); *Bill Johnson's Rests.*, 461 U.S. at 741; *Ca. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513, 92 S. Ct. 609, 30 L. Ed. 2d **[*290]** 642 (1972)). For example, the question presented in *Bill Johnson's Restaurants* was whether the National Labor Relations Board (NLRB) could enjoin an employer's *non*frivolous pending lawsuit against an employee when the employer was allegedly motivated to file the suit to retaliate against the employee's exercise of rights under the National Labor Relations Act, 29 U.S.C. §§ 151-169. *Bill Johnson's Rests.*, 461 U.S. at 733. Drawing the constitutional line, the court held that frivolous suits (i.e., those that lack a "'reasonable basis,'" are "based on insubstantial claims," or are "baseless") are "not within the scope of the First Amendment protection" but that all other suits are constitutionally protected. *See id.* at 743-44. Thus, when a suit raises "a genuine issue of material fact that turns on the credibility of witnesses or on the proper inferences to be drawn from undisputed facts," the First Amendment requires that the suit cannot be enjoined because that would "usurp the traditional factfinding function of the ... jury." *Id.* at 745.

¶32 The United States Supreme Court has elaborated on the contours of **[***26]** the First Amendment's right to petition in a doctrine that began in antitrust litigation. Under the *Noerr/Pennington* doctrine, [8] when individuals petition any branch of government, including the courts, such petitioning cannot be a basis for antitrust liability, unless the petition was a "'mere sham.'" *BE&K Constr. Co.*, 536 U.S. at 525 (quoting *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)). To constitute unprotected sham litigation, the litigation must meet two criteria. First, it "'must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits,'" and second, the litigant's "subjective motivation" must be to "'interfere **[*291]** *directly* with the business

[8] This doctrine arises from *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965).

relationships of a competitor ... through the use [of] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon.'" *Id.* at 526 (alterations in original) (quoting *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)). In *BE&K Construction Co.*, for example, the court applied this doctrine to hold that the NLRB's imposition of liability on an employer for its filing of a retaliatory lawsuit against unions, after the lawsuit had lost on its merits, still violated the petition clause because the NLRB imposed the liability without proving the employer's suit was objectively baseless, as defined above. *Id.* at 523, 536 **[***27]** .

¶33 In sum, *HN11*[↑] the United States Supreme Court has interpreted the petition clause to expansively protect plaintiffs' constitutional right to file lawsuits seeking redress for grievances. The only instance in which this petitioning activity may be constitutionally punished is when a party pursues frivolous litigation, whether defined as lacking a "'reasonable basis,'" *Bill Johnson's Rests.*, 461 U.S. at 743, or as sham litigation, *BE&K Constr. Co.*, 536 U.S. at 524-26. [9] That the petition clause requires this limitation makes good sense, considering that "[t]he right to sue **[**873]** and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other **[*292]** rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship." *Chambers v. Balt. & Ohio R.R. Co.*, 207 U.S. 142, 148, 28 S. Ct. 34, 52 L. Ed. 143 (1907).

WA[13][↑] [13] ¶34 Interpreting the right of trial by jury in light of the petition clause jurisprudence, we recognize that *HN13*[↑] article I, section 21 of the Washington Constitution does not encompass the right of jury trial on frivolous or sham claims. Exclusion of such claims comports with the long-standing principle that litigants cannot be allowed to abuse the heavy machinery of the judicial process for improper **[***29]** purposes that cause serious harm to innocent victims, such as to harass, cause delay, or chill free expression. Such conduct has always been, and always will be, sanctionable. *See, e.g.*, RCW 4.84.185 (providing a court in any civil action may award reasonable expenses, including attorney fees, incurred in defending against a claim or defense that is "frivolous and advanced without reasonable cause"); CR 11(a) (providing a court in any civil action may award an appropriate sanction, including reasonable expenses incurred and attorney fees, to a party that defends against a claim or defense that a reasonable inquiry would have shown is not "well grounded in fact," not "warranted by existing law or a good faith argument" for change to the law, or is used "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation"); RPC 3.1 (providing a lawyer commits professional misconduct by asserting a "frivolous" claim, defense, or issue); RPC 4.4(a) (providing a lawyer commits professional misconduct by using "means that have no substantial purpose other than to embarrass, delay, or burden a third person"); RESTATEMENT (SECOND) OF TORTS § 674 (AM. LAW INST. 1965) (providing a cause of action for wrongful use of civil **[***30]** proceedings when a claim is brought "without probable cause, and primarily for a

[9] *HN12*[↑] The United States Supreme Court's petition clause jurisprudence does not call into question long-standing fee-shifting provisions that do not turn on a finding of frivolousness. *BE&K Constr. Co.*, 536 U.S. at 537 ("[N]othing in our holding today should be read to question the validity ... of statutory provisions that merely authorize the imposition of attorney's fees on a losing plaintiff."). Instead, the court has found unconstitutional only serious deprivations **[***28]** or punishments of petitioning activity, such as the enjoinment of the suit in *Bill Johnson's Restaurants* or imposition of substantive liability in the *Noerr/Pennington* cases. Whatever the precise contours of the line, RCW 4.24.525(6)(a) doubtlessly falls on the impermissible side that punishes the exercise of the right to petition. In addition to attorney fees and cost shifting, the statute assesses a statutory penalty of $ 10,000 (potentially to each movant, as in this case below, where $ 160,000 was awarded in total to the 16 movants) and "[s]uch additional relief ... as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated." RCW 4.24.525(6)(a)(iii). This is harsh punishment for bringing what may be a nonfrivolous claim, albeit one that cannot show by clear and convincing evidence a probability of succeeding at trial.

purpose other than that of securing the proper adjudication of the claim in which the proceedings are based"); RESTATEMENT § 682 (providing a cause of action **[*293]** for abuse of process against "[o]ne who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed"). All of these remedies are consistent with the right of trial by jury because they are limited to punishing or deterring frivolous or sham litigation.

WA[14][↑] [14] ¶35 But the same cannot be said of the anti-SLAPP statute. It is not so limited. RCW 4.24.525(4)(b) requires the trial judge to make a factual determination of whether the plaintiff has established by clear and convincing evidence a probability of prevailing on the claim. This is no frivolousness standard. *See, e.g., Goldmark v. McKenna*, 172 Wn.2d 568, 582, 259 P.3d 1095 (2011) (*HN14*[↑] "A frivolous action is one that cannot be supported by any rational argument on the law or facts."); *Millers Cas. Ins. Co. of Tex. v. Briggs*, 100 Wn.2d 9, 15, 665 P.2d 887 (1983) ("'[A]n appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.'" (quoting *Streater v. White*, 26 Wn. App. 430, 435, 613 P.2d 187 (1980))). Rather, the statute mandates dismissal of a claim and imposition **[***31]** of sanctions merely because the claim cannot establish by clear and convincing evidence a probability of prevailing at trial. *Cf. BE&K Constr. Co.*, 536 U.S. at 532 ("[T]he genuineness of a [claim] does not turn on whether it succeeds."); *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992) ("The fact that a [claim] does not prevail on its merits is by no means dispositive of the question of CR 11 sanctions."); *Holland v. City of Tacoma*, 90 Wn. App. 533, 546, 954 P.2d 290 (1998) (properly holding judgment may be entered against a plaintiff's claim on **[**874]** summary judgment without the claim being frivolous). Significantly, a separate subsection of the anti-SLAPP statute uses a frivolousness standard, in contrast to the burden of proof under RCW 4.24.525(4)(b). The statute provides that if an *anti-SLAPP motion* is "frivolous or is solely intended to cause unnecessary delay," the **[*294]** responding party is entitled to statutory remedies. RCW 4.24.525(6)(b). This provision's standard, intended to deter improper anti-SLAPP motions, makes clear that RCW 4.24.525(4)(b)'s standard is a higher threshold than a frivolousness inquiry.

¶36 Thus, RCW 4.24.525(4)(b) creates a truncated adjudication of the merits of a plaintiff's claim, including nonfrivolous factual issues, without a trial. Such a procedure invades the jury's essential role of deciding debatable questions of fact. In this way, RCW 4.24.525(4)(b) violates the right of trial by jury under article I, section 21 of the Washington Constitution. [10]

C. *The Constitutionally Invalid Aspects of RCW 4.24.525 Cannot Be Severed from Its Remaining Provisions*

¶37 *HN16*[↑] Because we hold RCW 4.24.525(4)(b) is unconstitutional, we must determine whether the provision is severable from the rest of RCW 4.24.525. We conclude it is not.

WA[15][↑] [15] ¶38 To determine severability, we first ask whether "'the constitutional and unconstitutional provisions are so connected ... that it could not be believed **[***33]** that the legislature

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[10] Defendants **[***32]** recognize that plaintiffs' jury trial argument presents a facial challenge based on article I, section 21 of the Washington Constitution. They point out the claims in this lawsuit include a request for equitable relief that would not be presented to a jury, noting a facial challenge "'must establish that no set of circumstances exists under which the Act would be valid.'" Resp'ts' Suppl. Br. at 10 (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)). *But see United States v. Stevens*, 559 U.S. 460, 472-73, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010) (recognizing that whether subsequent United States Supreme Court case law has repudiated *Salerno* on this point is unresolved). Our decision does not turn on the character of the particular claims here, as there is no question the statute broadly applies to all claims, with the only limitation being that they concern an action involving public participation and petition. RCW 4.24.525(2), (4)(b). *HN15*[↑] By its plain terms, the special motion to strike procedure is incompatible with article I, section 21 of the Washington Constitution.

would have passed one without the other.'" *Abrams*, 163 Wn.2d at 285 (alteration in original) (internal quotation marks omitted) (quoting *Gerberding v. Munro*, 134 Wn.2d 188, 197, 949 P.2d 1366 (1998)). We then consider **[*295]** whether "'the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature.'" *Id.* at 285-86 (internal quotation marks omitted) (quoting *Gerberding*, 134 Wn.2d at 197). As to the first inquiry, we may look to the presence of a severability clause in the statute for "'the necessary assurance that the remaining provisions would have been enacted without the portions which are contrary to the constitution.'" *Id.* at 286 (quoting *State v. Anderson*, 81 Wn.2d 234, 236, 501 P.2d 184 (1972)). Here, the anti-SLAPP statute contains a provision stating, "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." LAWS OF 2010, ch. 118, § 5.

WA[16][↑] [16] ¶39 Nonetheless, *HN17*[↑] under the second test of severability, subsection (4)(b) is not severable. This subsection is the law's mainspring because every provision in RCW 4.24.525 has meaning and effect only in connection with the filing of the special motion to strike under subsection (4)(b). *See Leonard v. City of Spokane*, 127 Wn.2d 194, 202, 897 P.2d 358 (1995) (holding a provision that was "the heart and soul of **[***34]** the Act" is nonseverable). Therefore, this case presents a paradigmatic example of a nonseverable provision. Without subsection (4)(b), the rest of RCW 4.24.525 is "'useless to accomplish the purposes of the legislature.'" *Abrams*, 163 Wn.2d at 286 (internal quotation marks omitted) (quoting *Gerberding*, 134 Wn.2d at 197). We therefore invalidate RCW 4.24.525 as a whole.

III. CONCLUSION

¶40 *HN18*[↑] The legislature may enact anti-SLAPP laws to prevent vexatious litigants **[**875]** from abusing the judicial process by filing frivolous lawsuits for improper purposes. But the constitutional conundrum that RCW 4.24.525 creates is that it seeks to protect one group of citizens' constitutional **[*296]** rights of expression and petition by cutting off another group's constitutional rights of petition and jury trial. This the legislature cannot do. *See Opinion of the Justices*, 138 N.H. 445, 641 A.2d 1012, 1015 (1994) (invalidating an anti-SLAPP bill because the law "cannot strengthen the constitutional rights of one group of citizens by infringing upon the rights of another group"). We hold RCW 4.24.525(4)(b) violates the right of trial by jury under article I, section 21 of the Washington Constitution because it requires a trial judge to invade the jury's province of resolving disputed facts and dismiss—and punish—nonfrivolous claims without a trial. We reverse the Court of Appeals and remand the case to the superior court for further proceedings.

[*35]** MADSEN, C.J., and JOHNSON, OWENS, FAIRHURST, WIGGINS, GONZÁLEZ, GORDON MCCLOUD, and YU, JJ., concur.

References

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Annotated Revised Code of Washington by LexisNexis

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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,

Defendant(s).

Case No. A-18-782057-C
Dept. No. XXIX

DEFENDANTS' RESPONSE TO PLAINTIFF'S SUPPLEMENTAL AUTHORITIES

Defendants, James Taylor and Nevada Gaming Control Board, by and through counsel, Aaron D. Ford, Attorney General of the State of Nevada, Theresa M. Haar, Senior Deputy Attorney General and Edward L. Magaw, Deputy Attorney General, respond to Plaintiff's Supplemental Authorities.

Plaintiff's supplemental authorities change nothing. Unable to overcome Nevada's Anti-SLAPP statute, Plaintiff provides two supplemental authorities, which address Minnesota and Washington's Anti-SLAPP regimes. While Plaintiff argues that Nevada's Anti-SLAPP Statute is the same or similar to the invalidated statutes in those states, that is simply not an accurate reading of Nevada's statute. Pl.'s Supp. at 2.

Defendants addressed this issue directly in their Reply in Support of Special Motion to Dismiss. Reply at 7-9. The 2013 version of Nevada's Anti-SLAPP Statute was based largely on Washington's statute, which included the heightened burden of proof for a plaintiff. In direct response to the Washington Supreme Court's decision in *Davis v. Cox*, invalidating the Washington statute, the Nevada legislature amended its Anti-SLAPP Statute to ensure that its statute would not suffer the same fate.

Specifically, the Legislature explicitly incorporated California case law in amending the statute in 2015 when it defined a plaintiff's evidentiary burden on the second prong of analysis for a special motion to dismiss. The plaintiff's burden is that of "*prima facie*" evidence, which is defined as "the same burden of proof that a plaintiff has been required to meet pursuant to California's anti-Strategic Lawsuit Against Public Participation law as of the effective date of this act." *See* S.B. 444, 2015 Leg., 78th Sess. (Nev. 2015) at §12.5(2). This is in contrast to the prior version of the statute which required a heightened evidentiary standard similar to Washington's.

In reality, to accept Plaintiff's argument, this Court would have to believe that California's Anti-SLAPP statute is unconstitutional too. Barely a week ago, Nevada's Supreme Court confirmed that Nevada's Anti-SLAPP statute is modeled on California's. See *Coker v. Sassone*, 135 Nev. _____ (Adv. Op. 2, Jan. 3, 2019). Ex. A. California's Anti-SLAPP Statute, is constitutional. *See* B*riggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106 (1999).

Coker bears an additional mention because it demonstrates why Plaintiff's defamation claim fails on the merits. In *Coker*, the defendant's Anti-SLAPP Special Motion to Dismiss was denied, and affirmed by the Nevada Supreme Court. However, that case is notably different from the case at hand. There, the Court determined that the statement at issue was not a matter of public concern and therefore the statute does not apply. Second, the defendant did not provide any evidence regarding the truthfulness of his statement. Lastly, the Court determined that the conduct at issue was not on an issue of public interest, and instead was merely a private dispute.

Each of those factors for denying the Special Motion to Dismiss in the *Coker* matter are easily distinguishable from the case at hand. It is clear from Defendants' Motion, and Plaintiff has conceded, that a presentation by a law enforcement officer on gaming related activities to an audience at a large gaming expo is clearly a matter of public concern. Additionally, Plaintiff conceded that he is a public figure, and therefore the heightened fault standard applies, requiring Plaintiff to affirmatively prove that Taylor made his statement with actual malice, which Plaintiff failed to do.

The Court should not be persuaded by Plaintiff's supplemental authorities, ineffectively challenging the constitutionality of Nevada's Anti-SLAPP Statute. Dismissal is appropriate.

DATED this 8th day of January 2019.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court by using the electronic filing system on the 8th day of January 2019.

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EXHIBIT A

EXHIBIT A

135 Nev., Advance Opinion 2

IN THE SUPREME COURT OF THE STATE OF NEVADA

DARRELL T. COKER, AN INDIVIDUAL,
Appellant,
vs.
MARCO SASSONE,
Respondent.

No. 73863

FILED
JAN 03 2019
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

Appeal from a district court order denying a special motion to dismiss. Eighth Judicial District Court, Clark County; Rob Bare, Judge.

Affirmed.

Randazza Legal Group, PLLC, and Marc J. Randazza and Alex J. Shepard, Las Vegas,
for Appellant.

Gentile, Cristalli, Miller, Armeni & Savarese, PLLC, and Dominic P. Gentile, Clyde F. DeWitt, and Lauren E. Paglini, Las Vegas,
for Respondent.

BEFORE CHERRY, PARRAGUIRRE and STIGLICH, JJ.

OPINION

By the Court, PARRAGUIRRE, J.:

In this appeal, we are asked to review a district court order denying appellant's special motion to dismiss. Central to its resolution are Nevada's anti-SLAPP statutes—specifically NRS 41.660, which authorizes a litigant to file a special motion to dismiss when an action filed in court 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." We first clarify that in light of recent legislative changes, the appropriate standard of review for a district court's denial or grant of an anti-SLAPP motion to dismiss is de novo. We next conclude that the district court properly denied appellant's special motion to dismiss for the reasons set forth herein.

FACTUAL AND PROCEDURAL BACKGROUND

Respondent Marco Sassone is an artist and painter who has created numerous works of art using media such as watercolor, oil paint, and serigraph throughout his career. After being informed that copies of his artwork were being advertised on various websites as original, signed lithographs—a medium on which Sassone contends he never produced nor sold his artwork—Sassone investigated the activity. It is Sassone's contention that the copies being sold were counterfeit, his signature was forged, and that this activity was part of an ongoing fraudulent scheme. He traced the sales back to appellant Darrell Coker and sued under Nevada's Deceptive Trade Practice and RICO statutes.

Coker then filed a special motion to dismiss under NRS 41.660, arguing that dissemination of artwork to the public is expressive conduct. It is Coker's contention that as such, his activity is protected by Nevada's anti-SLAPP statute. Additionally, Coker contends that dissemination of artwork is in the public interest, further warranting anti-SLAPP protection. In opposing this motion, Sassone argues that he filed the present action to enjoin Coker from injuring Sassone's reputation and reducing the value of his artwork—*not* to silence his speech.

The district court denied Coker's motion, finding that Coker failed to demonstrate that his conduct was "a good faith communication that

was either truthful or made without knowledge of its falsehood," one of the statutory requirements for anti-SLAPP protection. Coker timely appealed.

DISCUSSION

Standard of review

Nevada's anti-SLAPP statutes aim to protect First Amendment rights by providing defendants with a procedural mechanism to dismiss "meritless lawsuit[s] that a party initiates primarily to chill a defendant's exercise of his or her First Amendment free speech rights" before incurring the costs of litigation. *Stubbs v. Strickland*, 129 Nev. 146, 150, 297 P.3d 326, 329 (2013). Since enactment in 1993, these statutes have undergone a series of legislative changes to ensure full protection and meaningful appellate review.

Relevant here is the evolution of NRS 41.660, which authorizes defendants to file a special motion to dismiss when an action is filed to restrict or inhibit free speech. Before October 1, 2013, NRS 41.660 simply instructed courts to treat the special motion to dismiss as a motion for summary judgment, and thus, this court reviewed such motions de novo. *John v. Douglas Cty. Sch. Dist.*, 125 Nev. 746, 753, 219 P.3d 1276, 1281 (2009), *superseded by statute as stated in Delucchi v. Songer*, 133 Nev. 290, 296, 396 P.3d 826, 831 (2017). In 2013, the Legislature removed the language likening an anti-SLAPP motion to dismiss to a motion for summary judgment and set forth a specific burden-shifting framework.[1]

[1]As amended in 2013, NRS 41.660 required a moving party to establish "by a preponderance of the evidence" that the communication in question fell within the anti-SLAPP statute. 2013 Nev. Stat., ch. 176, § 3, at 623-24. If established, the burden then shifted to the plaintiff to prove by "clear and convincing evidence" the probability of prevailing on the claim. *Id.*

2013 Nev. Stat., ch. 176, § 3, at 623-24. "The 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." *Delucchi v. Songer*, 133 Nev. 290, 296, 396 P.3d 826, 831 (2017). Plaintiffs bore the heightened "clear and convincing evidence" burden of proof, and we accordingly adopted the more deferential abuse of discretion standard of review. *Shapiro v. Welt*, 133 Nev. 35, 37, 389 P.3d 262, 266 (2017).

However, NRS 41.660's burden-shifting framework evolved in 2015 when the Legislature *decreased* the plaintiff's burden of proof from "clear and convincing" to "prima facie" evidence. 2015 Nev. Stat., ch. 428, § 13, at 2455. As amended, the special motion to dismiss again functions like a summary judgment motion procedurally, thus, we conclude de novo review is appropriate.[2]

We find support for this reversion not only in general principles of appellate review, but also in California's anti-SLAPP jurisprudence. This court has repeatedly recognized the similarities between California's and Nevada's anti-SLAPP statutes, routinely looking to California courts for guidance in this area.[3] *See, e.g., Patin v. Lee*, 134 Nev., Adv. Op. 87, 429

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[2]However, we note that the standard of review set forth in *Shapiro v. Welt* applies to actions where the proceedings were initiated before the 2015 legislative change.

[3]California's and Nevada's statutes share a near-identical structure for anti-SLAPP review. Both statutes posit a two-step process for determining how to rule on an anti-SLAPP motion. *Compare* Cal. Civ. Proc. Code §§ 425.16(b)(1), 425.16(e) (West 2016), *with* NRS 41.660(3)(a)-(b). Both statutes allow courts to consult affidavits when making a determination. *Compare* Cal. Civ. Proc. Code § 425.16(b)(2) (West 2016) (which permits courts to "consider the pleadings, and supporting and opposing affidavits"), *with* NRS 41.660(3)(d) (which permits courts to

P.3d 1248, 1250-51 (2018); *Shapiro*, 133 Nev. at 40, 389 P.3d at 268 (adopting California's "guiding principles" to define "an issue of public interest" pursuant to NRS 41.637(4)); *John*, 125 Nev. at 752, 219 P.3d at 1281 (describing both states' anti-SLAPP statutes as "similar in purpose and language"). As such, we turn to *Park v. Board of Trustees of California State University*, wherein the California Supreme Court explained:

> We review de novo the grant or denial of an anti-SLAPP motion. We exercise independent judgment in determining whether, based on our own review of the record, the challenged claims arise from protected activity. In addition to the pleadings, we may consider affidavits concerning the facts upon which liability is based. We do not, however, weigh the evidence, but accept plaintiff's submissions as true and consider only whether any contrary evidence from the defendant establishes its entitlement to prevail as a matter of law.

393 P.3d 905, 911 (Cal. 2017) (citations omitted). In light of the 2015 legislative change to NRS 41.660, we find it appropriate to adopt California's recitation of the standard of review for a district court's denial or grant of an anti-SLAPP motion to dismiss as de novo.

Having clarified the applicable standard of review, we now turn to the merits of Coker's anti-SLAPP motion.

"[c]onsider such evidence, written or oral, by witnesses or affidavits, as may be material in making a determination"). Moreover, in NRS 41.665, the Nevada Legislature specifically stated that the standard for determining whether a plaintiff has satisfied its burden of proof under NRS 41.660 is the same standard required by California's anti-SLAPP statute. Given the similarity in structure, language, and the legislative mandate to adopt California's standard for the requisite burden of proof, reliance on California caselaw is warranted.

Coker's conduct is not protected communication under Nevada's anti-SLAPP statute

Under Nevada's anti-SLAPP statutes, a moving party may file a special motion to dismiss if an action is filed in retaliation to the exercise of free speech. A district court considering a special motion to dismiss must undertake a two-prong analysis. First, it 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 free speech in direct connection with an issue of public concern." NRS 41.660(3)(a). If successful, the district court advances to the second prong, whereby "the burden shifts to the plaintiff to show 'with prima facie evidence a probability of prevailing on the claim.'" *Shapiro*, 133 Nev. at 38, 389 P.3d at 267 (quoting NRS 41.660(3)(b)). Otherwise, the inquiry ends at the first prong, and the case advances to discovery.

We recently affirmed that a moving party seeking protection under NRS 41.660 need only demonstrate that his or her conduct falls within one of four statutorily defined categories of speech, rather than address difficult questions of First Amendment law. *See Delucchi v. Songer*, 133 Nev. 290, 299, 396 P.3d 826, 833 (2017). NRS 41.637(4) defines one such category as: "[c]ommunication 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." Here, the district court dismissed Coker's anti-SLAPP motion without reaching the second prong, finding that Coker failed to demonstrate that his conduct was "truthful or made without knowledge of its falsehood." We agree, and further conclude that Coker failed to sufficiently prove that his

communication was made in direct connection with an issue of public interest.[4]

Coker failed to demonstrate that his conduct was truthful or made without knowledge of its falsehood

We clarified in *Shapiro v. Welt* that "no communication falls within the purview of NRS 41.660 unless it is 'truthful or is made without knowledge of its falsehood.'" 133 Nev. at 40, 389 P.3d at 268 (quoting NRS 41.637). To satisfy this requirement, Coker relied on his declaration, wherein he swears that he bought the lithographs from a bulk art supplier and never personally created any copies of the artwork.[5] The issue here, however, is neither creation nor distribution. Rather, Sassone's complaint is based on Coker's representation of the lithographs as originals. Thus, Coker would need to provide evidence persuading this court that at the time he advertised and sold the lithographs online, he believed that they were originals and, thus, advertised them as such.

Tellingly, Coker has made no such statement. Nor has he provided this court with any evidence suggesting that he believed that the lithographs were, in fact, originals.[6] Absent such evidence, we conclude that

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[4]We find no reason to address the other elements required for activity to fall within NRS 41.660's scope of protection, as Sassone does not dispute that his claim was based upon the challenged activity or that the communication was made in a public forum.

[5]Coker additionally argues that Sassone failed to produce evidence that Coker's conduct was untruthful or dishonest. We reject Coker's attempt to shift the burden, as NRS 41.660 clearly mandates that at this stage of the inquiry, it is Coker's burden—not Sassone's—to prove that his conduct was either truthful or made without knowledge of its falsehood.

[6]We acknowledge that Coker additionally provided photocopies of canceled checks he used to pay the bulk art supplier and a sworn declaration

Coker has failed to demonstrate that his conduct was truthful or made without knowledge of its falsehood.

Coker failed to demonstrate that his conduct was made in direct connection with an issue of public interest

Coker argues that "[t]he public has a right to and significant interest in the widespread access to creative works," thereby making his activity protected under NRS 41.660. Sassone again distinguishes that the challenged activity is not the mere dissemination of his artwork, but Coker's description of the counterfeit works as originals. In this respect, Sassone acknowledges that had Coker copied Sassone's works and sold the copies while disclosing them as such, Sassone would have no basis for his suit. We find this distinction imperative in concluding that Coker's conduct was not made in direct connection with an issue of public interest.

To determine whether an issue is in the public interest, we have adopted California's guiding principles:

> (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

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by Thomas R. Burke, a prominent anti-SLAPP litigator. However, upon review of this evidence, we find neither persuasive.

> 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.

Shapiro, 133 Nev. at 39, 389 P.3d at 268 (quoting *Piping Rock Partners, Inc. v. David Lerner Assocs., Inc.*, 946 F. Supp. 2d 957, 968 (N.D. Cal. 2013)). Applying these factors, we find that the sufficient degree of closeness between the challenged statements and the asserted public interest is lacking, as Coker fails to demonstrate how false advertising and the sale of counterfeit artwork, the challenged activity, is sufficiently related to the dissemination of creative works.[7] Additionally, Coker does not argue, nor do we find support in the record, that the focus of Coker's conduct was to increase access to creative works or advance the free flow of information. Without evidence suggesting otherwise, we conclude that his focus was to profit from the sale of artwork, and that increased access to creative work was merely incidental. Thus, we cannot conclude that selling counterfeit artwork online, while advertising it as original, is related to the asserted public interest of dissemination of creative works.

The case cited by Coker does not compel a different result. In *Maloney v. T3Media, Inc.*, the United States Court of Appeals for the Ninth Circuit granted a media company's anti-SLAPP motion after the company was sued for distributing unlicensed photographs of NCAA student-athletes. 853 F.3d 1004 (9th Cir. 2017). The Ninth Circuit discussed the

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[7]Regarding this factor, we further note that Coker defines his asserted public interest generally as the "free flow of information" and "[a] robust public domain," which can readily be categorized as broad and amorphous.

"public interest" element briefly in a footnote and summarily held that the activity was in the public interest "because the photographs memorialize cherished moments in NCAA sports history, and California defines 'an issue of public interest' broadly." *Id.* at 1009-10 n.3.

Following California's lead, we too define an issue of public interest broadly. However, Coker fails to explain how a holding specific to sports memorabilia is instructive here. We furthermore find nothing in the record or caselaw that justifies extending the definition of "an issue of public interest" to include the advertisement and sale of counterfeit artwork as original. Accordingly, we decline to do so. To hold otherwise in this case would risk opening the floodgates to an influx of motions disguising unlawful activity as protected speech. Finally, we reject Coker's general contention that the sole question under the first prong is whether the conduct is "expressive activity" and reiterate that courts determining whether conduct is protected under NRS 41.660 must look to statutory definitions, as opposed to general principles of First Amendment law. *See Delucchi v. Songer*, 133 Nev. 290, 299, 396 P.3d 826, 833 (2017) (adopting the Supreme Court of California's rationale that "courts determining whether conduct is protected under the anti-SLAPP statute look not to First Amendment law, but to the statutory definitions" (internal quotation marks omitted)). Codified in NRS 41.637, the Nevada Legislature has provided courts with four specific categories of speech activity that fall within NRS 41.660's purview. NRS 41.637 functions *solely* to clarify the meaning of NRS 41.660 and limit the scope of its protection. Thus, to hold that NRS 41.660 applies broadly to all expressive conduct, as Coker compels this court to do, would render the specific limits set forth in NRS 41.637 meaningless.

Having identified two grounds for dismissal at the first prong of the analysis, we find no reason to address the second prong concerning whether Sassone demonstrated the requisite probability of prevailing on his claims.

CONCLUSION

We therefore take this opportunity to clarify that the applicable standard of review under the 2015 version of NRS 41.660 is de novo. Upon an independent review of the record, we conclude that Coker has failed to demonstrate that the challenged claims arise from activity protected by NRS 41.660. Specifically, we find no evidence in his declaration, or otherwise, that confirms that he believed that the lithographs were originals. We further hold that advertising and selling counterfeit artwork as original work is not in direct connection with an issue of public interest.

Accordingly, we affirm the district court's denial of Coker's special motion to dismiss.

Parraguirre, J.

We concur:

Cherry, J.

Stiglich, J.

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.

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 25 day of ~~January~~ 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:

Name	Party
James Adams, Esq. Adams Law Group, Ltd. c/o James R. Adams, Esq. 5420 W. Sahara Ave. #202 Las Vegas, NV 89146	Counsel for Colon
Robert T. Robbins, Esq. 1995 Village Center Circle, Suite 190 Las Vegas, NV 89134	Counsel for Defendants

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

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Steven D. Grierson
CLERK OF THE COURT

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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

NOTICE OF ENTRY OF DECISION AND ORDER

PLEASE TAKE NOTICE that a Decision and Order from the Hearing on December 20, 2018, was entered in the above-entitled matter on the 26th day of February, 2019. A copy of

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said Decision and Order is attached hereto.

Dated this 26th day of February, 2019.

NERSESIAN & SANKIEWICZ

/s/ Robert A. Nersesian
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Email: vegaslegal@aol.com
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of February, 2019, pursuant to NRCP 5(b) and EDCR 8.05(f), the above referenced **NOTICE OF ENTRY OF DECISION AND ORDER** 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:

Aaron D. Ford
Attorney General
Theresa M. Haar (Bar No. 12158)
Senior Deputy Attorney General
Edward L. Magaw (Bar No. 9111)
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/s/ Rachel Stein
An employee of Nersesian & Sankiewicz

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).

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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 25 day of ~~January~~ 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:

Name	Party
James Adams, Esq. Adams Law Group, Ltd. c/o James R. Adams, Esq. 5420 W. Sahara Ave. #202 Las Vegas, NV 89146	Counsel for Colon
Robert T. Robbins, Esq. 1995 Village Center Circle, Suite 190 Las Vegas, NV 89134	Counsel for Defendants

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

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AARON D. FORD
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Attorneys for Defendants James Taylor and Nevada Gaming Control Board

DISTRICT COURT

CLARK COUNTY, NEVADA

DR. NICHOLAS G. COLON Plaintiff, vs. JAMES TAYLOR, NEVADA GAMING CONTROL BOARD, AMERICAN GAMING ASSOCIATION, AND DOES I-XX, Defendant(s).	Case No. A-18-782057-C Dept. No. XXIX

NOTICE OF APPEAL

Notice is hereby given that Defendants, James Taylor and Nevada Gaming Control Board, by and through counsel, Aaron D. Ford, Attorney General of the State of Nevada, Theresa M. Haar, Senior Deputy Attorney General and Edward L. Magaw, Deputy Attorney General, hereby appeals to the Supreme Court of Nevada from the Decision and

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Order entered in this action on the 26th day of February, 2019, a copy of which is attached hereto as Ex. A.

DATED this 1st day of April, 2019.

AARON D. FORD
Attorney General

By: /s/ THERESA M. HAAR
Theresa M. Haar (Bar No. 12158)
Senior Deputy Attorney General
Edward L. Magaw (Bar No. 9111)
Deputy Attorney General
Attorneys for Defendants
James Taylor and Nevada
Gaming Control Board

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court by using the electronic filing system on the 1st day of April, 2019.

I certify that the following participants in this case are registered electronic filing systems users and will be served electronically:

Robert A. Nersesian
Thea Marie Sankiewicz
Nersesian & Sankiewicz
528 S. Eighth St.
Las Vegas, NV 89101
Attorneys for Plaintiff

/s/ TRACI PLOTNICK
Traci Plotnick, an employee of the
Office of the Attorney General

EXHIBIT A

EXHIBIT A

NOED
Robert A. Nersesian
Nevada Bar No. 2762
Thea Marie Sankiewicz
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Attorneys for Plaintiff

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

NOTICE OF ENTRY OF DECISION AND ORDER

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said Decision and Order is attached hereto.

Dated this 26th day of February, 2019.

NERSESIAN & SANKIEWICZ

/s/ Robert A. Nersesian
Robert A. Nersesian
Nev. Bar No. 2762
Thea M. Sankiewicz
Nev. Bar No. 2788
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Facsimile: 702-385-7667
Email: vegaslegal@aol.com
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of February, 2019, pursuant to NRCP 5(b) and EDCR 8.05(f), the above referenced **NOTICE OF ENTRY OF DECISION AND ORDER** 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:

Aaron D. Ford
Attorney General
Theresa M. Haar (Bar No. 12158)
Senior Deputy Attorney General
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Attorneys for Defendants James Taylor and Nevada Gaming Control Board

Jeff Silvestri, Esq. (NSBN 5779)
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Attorneys for American Gaming Association

/s/ Rachel Stein
An employee of Nersesian & Sankiewicz

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.

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 25 day of ~~January~~ 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:

Name	Party
James Adams, Esq. Adams Law Group, Ltd. c/o James R. Adams, Esq. 5420 W. Sahara Ave. #202 Las Vegas, NV 89146	Counsel for Colon
Robert T. Robbins, Esq. 1995 Village Center Circle, Suite 190 Las Vegas, NV 89134	Counsel for Defendants

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

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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. XXIX

NOTICE OF APPEAL

Notice is hereby given that Defendant American Gaming Association appeals to the Supreme Court of Nevada from the Decision and Order entered February 26, 2019, notice of which was filed on February 26, 2019, and which defendants James Taylor and Nevada Gaming Control Board appealed from on April 1, 2019, a true and correct copy of which is attached hereto.

DATED this 5th day of April, 2019.

McDONALD CARANO LLP

By: /s/ *Jeff Silvestri*
Jeff Silvestri, Esq. (NSBN 5779)
Jason Sifers, Esq. (NSBN 14273)
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
Attorneys for Defendant American Gaming Association

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on or about the 5th day of April, 2019, a true and correct copy of the foregoing **NOTICE OF APPEAL** was electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

/s/ CaraMia Gerard
An employee of McDonald Carano LLP

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

4810-4755-0355, v. 1

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

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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.

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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 25 day of ~~January~~ 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:

Name	Party
James Adams, Esq. Adams Law Group, Ltd. c/o James R. Adams, Esq. 5420 W. Sahara Ave. #202 Las Vegas, NV 89146	Counsel for Colon
Robert T. Robbins, Esq. 1995 Village Center Circle, Suite 190 Las Vegas, NV 89134	Counsel for Defendants

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

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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*_____
Robert A. Nersesian
Nev. Bar No. 2762
Thea M. Sankiewicz
Nev. Bar No. 2788
528 S. 8th St.
Las Vegas, NV 89101
Attorneys for plaintiff

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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Attorney General
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Senior Deputy Attorney General
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Deputy Attorney General
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/s/ Rachel Stein
An employee of Nersesian & Sankiewicz