

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

DR. NICHOLAS G. COLON,

Respondent.

) **Supreme Court No. 78517**

) District Court Case No. 2019-00017

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Clerk of Supreme Court

On Appeal from the Eighth Judicial District Court

APPELLEE'S (DR. COLON'S) 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 13th day of December, 2019.

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12 **DISTRICT COURT**
13 **CLARK COUNTY, NEVADA**

14 DR. NICHOLAS G. COLON,

15 Plaintiff,

16 vs.

17 JAMES TAYLOR, NEVADA GAMING
18 CONTROL BOARD, AMERICAN GAMING
19 ASSOCIATION, AND DOES I-XX,

20 Defendants.

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

**AMERICAN GAMING ASSOCIATION'S
MOTION TO DISMISS COMPLAINT**

Hearing Date:
Hearing Time:

21 Defendant American Gaming Association ("AGA") hereby files this motion to dismiss
22 complaint pursuant to NRCP 12(b)(5). For the reasons set forth herein, the AGA requests that the
23 Court dismiss this action as to the AGA.
24
25
26
27
28

1 This Motion is based upon the record in this matter, the Points and Authorities that follow,
2 the attached exhibits and any argument of counsel entertained by the Court.

3 DATED this 17th day of December, 2018.

4 McDONALD CARANO LLP

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15 **NOTICE OF MOTION**

16 TO: ALL PARTIES AND THEIR COUNSEL OF RECORD:

17 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will
18 bring the foregoing **AMERICAN GAMING ASSOCIATION'S MOTION TO DISMISS**
19 **COMPLAINT** on for hearing on the ____ day of January 23, 2019, at the hour of
20 9:00 am .m., or as soon thereafter as counsel may be heard.

21 DATED this 17th day of December, 2018.

22 McDONALD CARANO LLP

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POINTS AND AUTHORITIES

I. INTRODUCTION

In a factually threadbare complaint, Dr. Nicholas Colon (“Dr. Colon”), an author and consultant in the gaming industry, alleges defamation against various defendants because a video purportedly depicting him was used as an example in a presentation on gambling cheating. One of the defendants Dr. Colon names is the American Gaming Association (“AGA”), which Dr. Colon alleges was involved in hosting the convention that contained the lecture in which a speaker (unaffiliated with the AGA) showed the allegedly defamatory video. Even if Dr. Colon’s underlying defamation claim is meritorious (a proposition the AGA disputes) the AGA has no liability here. Other than an unsupportable and legally conclusory statement, Dr. Colon does not allege any facts, which if proven, show that the AGA published the allegedly defamatory statement. Further, as a public figure within the gaming industry, Dr. Colon was required to allege facts, which if proven, would show the AGA acted with actual malice as to Dr. Colon. He pled no such facts. Accordingly, his complaint fully fails to allege two necessary elements of a cognizable defamation claim and his Complaint should therefore be dismissed as to the AGA.

II. STATEMENT OF FACTS

The Complaint alleges as follows:¹

Dr. Colon alleges the AGA hosted the Global Gaming Expo (the “Expo”) in Las Vegas. Complaint (“Compl.”) at ¶ 5. Dr. Colon alleges that on October 2, James Taylor (“Mr. Taylor”) gave a presentation called “Scams, Cheats and Black Lists: Current Fraud and Casino Crimes” at the Expo. *Id.* at ¶¶ 2, 3. Dr. Colon alleges that during this presentation, Mr. Taylor showed a video as an example of casino cheating that depicted Dr. Colon. *Id.* at ¶¶ 6-7. Dr. Colon alleges the example Mr. Taylor showed was not of Dr. Colon cheating, but instead of using a counter to count the people in the casino. *Id.* at ¶¶ 13-14. He alleges Mr. Taylor acted with fraud, oppression, and malice in defaming Dr. Colon. *Id.* at ¶ 23. Dr. Colon is an author, consultant, and executive

¹ The AGA disputes many of these facts but accepts them as true for purposes of this motion to dismiss pursuant to NRCP 12(b)(5).

1 working in the gaming industry. *Id.* at ¶ 1. He alleges Dr. Taylor’s presentation has hurt his
2 reputation in the gaming industry. *Id.* at ¶ 17.

3 **III. LEGAL ARGUMENT**

4 **A. Legal Standard**

5 Pursuant to Rule 12(b)(5) of the Nevada Rules of Civil Procedure, a defendant is entitled
6 to dismissal when the complaint fails to state a claim upon which relief can be granted. In
7 considering the dismissal of a complaint, this Court must “determine whether or not the challenged
8 pleading sets forth allegations sufficient to make out the elements of a right to relief.” *Bemis v.*
9 *Estate of Bemis*, 114 Nev. 1021, 1024, 967 P.2d 437, 439-40 (1998) (citing *Edgar v. Wagner*, 101
10 Nev. 226, 227, 699 P.2d 110, 111 (1985)).

11 “A complaint must set forth sufficient facts to establish all necessary elements of a claim
12 for relief, so that the adverse party has adequate notice of the nature of the claim and relief
13 sought.” *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984) (citing *Johnson v. Travelers*
14 *Ins. Co.*, 89 Nev. 467, 472, 515 P.2d 68, 71 (1973); *Branda v. Sanford*, 97 Nev. 643, 648, 637
15 P.2d 1223, 1227 (1981)). In making that determination, the Court is required to accept all *factual*
16 allegations as true, and to draw all inferences in favor of the non-moving party. *Buzz Stew, LLC*
17 *v. City of North Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). This Court will accept
18 Dr. Colon’s factual allegations as true, however, these “allegations must be legally sufficient to
19 constitute the elements of the claim asserted.” *Garcia v. Prudential Ins. Co. of Am.*, 129 Nev. 15,
20 19, 293 P.3d 869, 872 (2013). These holdings clearly require that a complaint must contain at
21 least some facts, not merely legal conclusions, in order to give the defending party adequate notice
22 of the claim.

23 **B. Dr. Colon’s Complaint Fails to Allege Facts that, If True, Would Be Sufficient** 24 **to Establish A Claim for Defamation Against the AGA.**

25 “The general elements of a defamation claim require a plaintiff to prove: (1) a false and
26 defamatory statement by [a] defendant concerning the plaintiff; (2) an unprivileged publication to
27 a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages.”
28

1 *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 718, 57 P.3d 82, 90 (2002) (internal quotations
2 omitted).

3 The degree of fault a plaintiff must prove depends on the plaintiff and the nature of the
4 alleged defamatory statements – when the plaintiff is a “public figure,” the plaintiff must prove
5 actual malice, rather than negligence. *See New York Times Co. v. Sullivan*, 84 S. Ct. 710, 726
6 (1964) (noting “[t]he constitutional guarantees require, we think, a federal rule that prohibits a
7 public official from recovering damages for a defamatory falsehood relating to his official conduct
8 unless he proves that the statement was made with ‘actual malice...’”); *see also Gertz v. Robert*
9 *Welch, Inc.*, 418 U.S. 323, 342–43, 94 S.Ct. 2997 (1974) (applying public official standard to
10 “public figures”). A defendant makes a statement with actual malice only “with knowledge that
11 it was false or with reckless disregard for its veracity.” *Pegasus*, 706 Nev. at 722, 57 P.3d 82
12 (citing *New York Times Co.*, 376 U.S. at 279–80, 84 S.Ct. 710). A plaintiff must prove actual
13 malice by clear and convincing evidence. *See id.* at 721–22, 57 P.3d 82 (noting “[t]he question of
14 actual malice goes to the jury only if there is sufficient evidence for the jury, by clear and
15 convincing evidence, to reasonably infer that the publication was made with actual malice.”).

16 As Dr. Colon is a public figure, the “actual malice” standard applies. *See Pegasus*, 706
17 Nev. at 722, 57 P.3d 82; *see also Gertz*, 418 U.S. at 342–43, 94 S.Ct. 2997. Dr. Colon has failed
18 to allege facts sufficient to establish either that (1) the AGA published any statement regarding
19 Dr. Colon, or that (2) the AGA did so with actual malice. Accordingly, Dr. Colon’s complaint
20 should be dismissed as to the AGA.

21 1. Dr. Colon is a Public Figure for Purposes of This Action.

22 There are two types of public figures: “[g]eneral public figures are those individuals who
23 ‘achieve such pervasive fame or notoriety that [they] become[] a public figure for all purposes
24 and in all contexts.’” *Pegasus*, 118 Nev. at 719, 57 P.3d 82 (quoting *Gertz*, 418 U.S. at 351, 94
25 S.Ct. 2997). “Limited public figures are individuals who have only achieved fame or notoriety
26 based on their role in a particular public issue.” *Id.* (quoting *Gertz*, 418 U.S. at 351-52, 94 S.Ct.
27 2997). An otherwise private figure becomes a limited public figure when he “voluntarily
28 injects himself or is thrust into a particular public controversy or public concern, and thereby

1 becomes a public figure for a limited range of issues.” *Pegasus*, 118 Nev. at 720, 57 P.3d 82. This
2 is a question of law, and the court’s determination is based “on whether the person’s role in a
3 matter of public concern is voluntary and prominent.” *Bongiovi v. Sullivan*, 122 Nev. 556, 572
4 (2006). Dr. Colon here is a limited purpose public figure within the gaming industry.

5 First, Dr. Colon “is a gaming author, consultant, and executive addressing and operating
6 in the gaming industry.” Compl. at ¶ 1. Next, Dr. Colon has developed a “reputation within the
7 [gaming] industry.” *Id.* at ¶ 17. Indeed, Dr. Colon has represented himself as an expert in the
8 industry in a number of publications.² Dr. Colon has therefore “voluntarily inject[ed]
9 himself...into a... public concern,” namely Nevada’s gaming industry, and is therefore a limited
10 public figure with respect to the gaming industry. *See Pegasus*, 118 Nev. at 720, 57 P.3d 82.

11 2. The AGA Did Not Publish Any Statement Regarding Dr. Colon.

12 Dr. Colon alleges a single factual allegation in support of his naming the AGA a defendant
13 in this action: “The event was hosted and put on by the American Gaming Association, which
14 association played a material part in seeking speakers, choosing subjects, and otherwise acting as
15 a publisher of the information conveyed at the Expo.” Compl. at ¶ 5. Dr. Colon does not reference
16 the AGA anywhere else in the Complaint. *See generally, id.* A publication is an “act by which
17 the defamatory matter is intentionally or negligently communicated.” Restatement (Second) of
18 Torts § 577. Accordingly, the AGA’s act of allegedly hosting a talk is not nearly sufficient to
19 make the AGA a publisher of statements made in that talk.

20 When courts have held parties liable for the defamation of third parties, they have done so
21 under circumstances far different than here. *See, e.g., Hellar v. Bianco*, 111 Cal.App.2d 424, 426,
22 244 P.2d 757 (Cal. Ct. App. 1952). In *Heller*, the Court found a tavern could be liable for
23 defamatory statements written on its walls if it “knowingly permit[ed] such matter to remain after
24

25
26 ² *See, e.g.,*
27 <https://www.forbes.com/sites/greatspeculations/people/nicholascolon/archive/#5fd8a66d7337>
28 <https://www.entrepreneur.com/author/nicholas-g-colon>
<http://www.aleaconsultinggroup.com/nicholas-g-colon/>
<http://www.casinocitytimes.com/home.cfm?id=763>

1 reasonable opportunity to remove the same.” *Id.* This would be because “the owner of the wall
2 or his lessee is guilty of **republishing** of the libel. *Id.* (emphasis added). Notably, the Court did
3 not find that having libel on one’s own property makes one a publisher of that libel. *See id.* The
4 liability of the tavern in *Heller* only arose when the tavern knowingly permitted the libel to remain
5 long enough to be considered republication in its own right. *See id.*

6 Indeed, courts will not generally hold principals responsible for defamation committed by
7 their agents. *Farrior v. H.J. Russell & Co.*, 45 F. Supp. 2d 1358, 1363 (N.D. Ga. 1999) (“A
8 corporation is not liable for the slanderous utterances of an agent acting within the scope of his
9 employment, unless it affirmatively appears that the agent was expressly directed or authorized to
10 slander the plaintiff.”)

11 Here, Dr. Colon does not allege the AGA communicated or republished any defamatory
12 statement. *See generally*, Complaint. Instead, Dr. Colon claims the AGA is liable for the allegedly
13 defamatory statements made by a speaker, simply by virtue of allegedly hosting the speaker. Dr.
14 Colon does not make any allegation that the AGA knew what Mr. Taylor would say or that it
15 republished his statements in any way. Dr. Colon does not allege Mr. Taylor was acting as the
16 AGA’s agent and that the AGA directed him to defame Dr. Colon. There is nothing in the
17 complaint beyond a conclusory statement that the AGA is the publisher of statements made at an
18 event it organized. This is not publication. *See* Restatement (Second) of Torts § 577; *see also*
19 *Heller*, 111 Cal.App.2d at 426, 244 P.2d 757. Accordingly, Dr. Colon has not properly alleged
20 that the AGA published any defamatory statement, a required element of a Dr. Colon’s claim
21 against the AGA. Dr. Colon’s claim therefore fails and should be dismissed as to Dr. Colon.

22 3. The AGA Did Not Act with Actual Malice as to Dr. Colon.

23 A publisher of a statement acts with actual malice only if the publisher makes the statement
24 “with knowledge that it was false or with reckless disregard for its veracity.” *Pegasus*, 706 Nev.
25 at 722, 57 P.3d 82 (citing *New York Times Co.*, 376 U.S. at 279–80, 84 S.Ct. 710). Even if Dr.
26 Colon could establish the AGA was a publisher of the video in Mr. Taylor’s presentation (which
27 he cannot), Dr. Colon was still required to allege the AGA acted with actual malice, and it is not
28 enough if only Mr. Taylor acted with actual malice. *See Pegasus*, 118 Nev. at 718, 57 P.3d 82

(identifying the elements of defamation in Nevada). Dr. Colon has not alleged that the AGA knew Mr. Taylor would make defamatory statements as to Dr. Colon. *See generally*, Compl. Dr. Colon has not alleged that the AGA acted with reckless disregard to the veracity of statement it published – nor could he, because the AGA did not publish any statements regarding Dr. Colon whatsoever. Dr. Colon has thus failed to adequately plead a second necessary element of a viable defamation claim and his Complaint should accordingly be dismissed as to the AGA.

IV. CONCLUSION

Accordingly, AGA respectfully requests that this Motion be granted and Dr. Colon's Complaint be dismissed as to the AGA.

DATED this 17th day of December, 2018.

McDONALD CARANO LLP

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1 CERTIFICATE OF SERVICE

2 I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on or
3 about the 17th day of December, 2018, a true and correct copy of the foregoing **AMERICAN**
4 **GAMING ASSOCIATION'S MOTION TO DISMISS COMPLAINT** was electronically
5 served with the Clerk of the Court via the Clark County District Court Electronic Filing Program
6 which will provide copies to all counsel of record registered to receive such electronic notification.

7
8 /s/ CaraMia Gerard

9 An employee of McDonald Carano LLP
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1 The person making the publication and his employers are cited. The audience to the
2 communication is described. This is a claim for defamation, and to call it "threadbare" is,
3 simply, false.

4 II. REPLY TO AMERICAN GAMING'S STATEMENT OF FACTS

5 American states, "Dr. Colon alleges the example Mr. Taylor showed was not of Dr.
6 Colon cheating, , but instead of (sic) using a counter to count the people in the casino."
7 Defendant's Brief, p. 3: 22-24. American's citation to the complaint does not support this
8 conclusion, and the statement is untrue. At no point does Plaintiff allege he was actually using
9 the tally counter in any sense at the time of the events on the video. Rather, he was merely in
10 possession of this ubiquitous device which was an attachment on his key chain for when he was
11 counting casino patrons for profit metrics of the gaming floor.¹
12

13 III. COUNTER-STATEMENT OF FACTS

14 Throughout its brief American relies upon Plaintiff being a "public figure" for the
15 evaluation of the defamation claim. Here is Plaintiff's public resume as stated in a publication
16 where he is an author and blogger:
17

18 As an 18 year veteran of the casino industry, Nicholas has been
19 involved in all aspects of gaming, from advantage player/manager
20 with the infamous M.I.T Blackjack teams, to a consultant to the
21 "house" in the capacity of gaming mathematician and data scientist.
22 Nicholas has been a visiting lecturer at DUKE, Clemson, and
23 Michigan State Universities. He's also a published author in
24 the game-theory arena, with an emphasis on economic applications,
25 and is a contributor to many casino gaming and financial sites and
26 publications, including WizardofOdds.com, Forbes, and Bloomberg.

27 ¹Specifically, past articles written by Plaintiff and published in national media have evaluated
28 casino efficiency in slot gaming. A casino with 20% of their machines in use versus a casino
with 50% of their machines in use have a far different efficiency on the return on play, and this
is the single largest profit center for most casinos.

1 <<https://www.lasvegasadvisor.com/gambling-with-an-edge/about-nicholas-colon/>> (viewed
2 1/2/19). A *Google* search for the Plaintiff under his name ("Nicholas Colon") turns up virtually
3 no articles about him in the popular press or any press, save for author biographies prior to the
4 publication of the defamatory statements on 10/2/17.

5
6 Further, as to this being a matter where the Plaintiff is purportedly a limited-purpose
7 public figure for application of defamation law, Plaintiff would have to assert himself into a
8 controversy of public concern. What is the controversy? At best, it is "cheating" at gambling.
9 Where has Dr. Colon ever inserted himself into any public debate or controversy concerning
10 this subject matter? American points to no such incidence, and there does not appear to be any
11 such incidence. Rather, Plaintiff was unwillingly dragged into the matter and inserted himself
12 into nothing. Prior to the defamation, all he did was legally play blackjack at a public casino.
13 That's is contrary to Plaintiff putting himself into a public controversy at all stages.

14 IV. ANALYSIS

15 A. PLAINTIFF IS NOT A PUBLIC FIGURE

16 1. THIS IS NOT THE PROPER FORUM TO RAISE THE 17 PUBLIC FIGURE AFFIRMATIVE DEFENSE

18
19 Per Defendant, what Plaintiff has done is hold himself out as an expert in casino gaming.
20 Nothing in American's false presentation concerning the Plaintiff alludes to, involves, or even
21 touches upon Plaintiff injecting himself into anything involving the incidents of October 2,
22 2017. All Plaintiff did which resulted in the lies being published about him was to legally play
23 blackjack at Green Valley Ranch, and get roped into false charges through Taylor's employer.
24 Plaintiff is not a limited purpose public figure.

25
26 Further, nothing in the publication by Taylor turned or touched upon Plaintiff's notoriety
27 or Plaintiff's public personal. The factors which could even arguably give rise to a
28 determination that the Plaintiff is a limited purpose public figure are not involved in the issues

1 presented by Taylor, and the fact that Plaintiff was defamed was entirely ancillary, and even
2 wholly unrelated to, Plaintiff's status as a gambling expert.

3 This is a motion to dismiss. The standard on the determination requires, as
4 admitted by American, that the court is required to "accept all factual allegations as true, and to
5 draw all reasonable inferences in favor of the non-moving party." (Emphasis in original).

6 American's Brief, p. 4: 15-16. Doing so, there is no basis upon which the motion to dismiss can
7 be granted. Defendant does not point to a single element of the claim which is not addressed in
8 the Complaint. In other words, even under American's construction, Plaintiff does present a
9 claim upon which relief can be granted.

11 The only true challenge made to the Plaintiff's Complaint is that Defendant maintains,
12 factually, that the Plaintiff is a public figure, be it generally or for a limited purpose. The facts
13 he relies upon do not appear in the pleadings, and the Complaint, necessarily, does not and is
14 not required to anticipate alleged affirmative defenses. Thus, there is no basis to dismiss the
15 claim under NRCP 12(5). See Bristol Bay Prods., LLC v. Lampack, 312 P.3d 1155, 1164 (Colo.
16 2013); Ind. State Dist. Council of Laborers v. Brukardt, No. M2007-02271-COA-R3-CV, 2009
17 Tenn. App. LEXIS 269, at *19 (Tenn. App. 2009); Alyse v. Sprosty, No. 06-21075-CIV, 2007
18 U.S. Dist. LEXIS 93613, at *5 (S.D. Fla. Dec. 20, 2007).

20 Admittedly, an exception exists to this rule, and when, on the face of the pleading the
21 affirmative defense is evident, then a motion to dismiss can be entertained for failing to state a
22 claim. For this to be appropriate, the facts pled in the complaint must "'leave no doubt' that the
23 plaintiff's action is barred by the asserted defense." Bank of N.Y. Mellon v. Noreen, No. 13-
24 11118-MLW, 2014 U.S. Dist. LEXIS 126611, at *11, 115 A.F.T.R.2d (RIA) 1603 (D. Mass.
25 2014); Chapin Revenue Cycle Mgmt., LLC v. JDA eHealth Sys., No. 8:11-cv-858-T-33AEP,
26 2012 U.S. Dist. LEXIS 17372, at *12 (M.D. Fla. 2012) ("A defendant may raise an affirmative
27
28

1 defense in a motion to dismiss only "where the existence of the defense can be judged on the
2 face of the complaint." (citations omitted)); and see Alyse, Bristol Bay, supra. In this sense this
3 is not actually an exception, but rather, the facts pled establish the affirmative defense. Truly,
4 review of the actual pleading must 'leave no doubt' that the plaintiff's action is barred by the
5 asserted defense." Noreen, supra at *11. Nothing in Plaintiff's complaint alludes that he is any
6 type of public figure, and the exception has no place in the current motion.
7

8 2. NOTWITHSTANDING THE IMPROPRIETY OF THE PRESENT MOTION, THERE IS
9 NO DEMONSTRATION THAT THE PLAINTIFF IS ANY TYPE OF PUBLIC FIGURE
10 SUPPORTING AMERICAN'S ALLEGED DEFENSE²

11 The current matter is governed by Bongiovi v. Sullivan, 122 Nev. 556, 574, 138 P.3d
12 433, 446 (2006), and Plaintiff is not a public figure of any nature. In Bongiovi, Sullivan, the
13 defendant, Bongiovi, had published that the plaintiff, Sullivan, a plastic surgeon, had a patient
14 die on his operating table and that Sullivan was under investigation for this occurrence.
15 Presumably the defendant did not know if this was true or false, but made the statement,
16 nonetheless. The defendant was a competing plastic surgeon to the plaintiff. The defendant
17 claimed that plaintiff, Sullivan, was a limited purpose public figure, and therefore, subject to the
18 malice standard upon which American relies. The district court disagreed and held that plaintiff,
19 Sullivan, was not a public figure

20 In support of the assertion that the plaintiff was a limited purpose public figure, the
21 following evidence was presented:

22 Sullivan testified at length about his accomplished career. He testified
23 that he had a national reputation as a skilled and caring plastic

24
25 ² In a reply, American may attempt to assert that the Plaintiff acknowledged that he was a public
26 figure at the oral argument on the prior anti-slapp motion. This would not be true. What Plaintiff
27 asserted was that it was irrelevant in the context of that motion because the defense to the anti-
28 slapp motion was that regardless of the status of the Plaintiff, the anti-slapp motion was not
cognizable for the reason that there existed no good-faith communication, and Plaintiff showed
by a preponderance of the evidence that Taylor knew his statements concerning the Plaintiff's
alleged cheating were false when made.

1 surgeon, went to the top-rated medical school in the country, was
2 trained at the top-rated plastic surgery school in the country, part of
3 his training was at the leading cosmetic surgery hospital in the
4 country, where he later became chief and ran the residency program,
5 was selected for a prestigious fellowship, was Chief of Plastic
6 Reconstructive Surgery of Wayne State University's Children's
7 Hospital of Michigan, had published numerous articles and abstracts,
8 contributed to chapters in books and textbooks, and belonged to
9 specialized medical groups. He traveled to Nepal and Africa on his
10 own expense to provide medical care. He was the subject of
11 newspaper articles because of a surgery performed on an infant. Other
12 doctors testified that Sullivan had a national reputation and was
13 prominent in the plastic surgery field.

14 Id. On these facts the Court held that Sullivan was neither a limited purpose public figure nor a
15 public figure in any sense.

16 Defendant relies heavily on the fact that the Plaintiff holds himself out as an expert at
17 gaming. Even assuming that this is true, that does not make him a public figure in any sense.

18 Like Sullivan in Bongiovi, being an expert does not give rise to being a public figure. Sullivan
19 also was maligned in his profession, and on this basis, the defendant sought to claim that he was
20 a public figure. Like here, the Court in Bongiovi noted that Bongiovi did not invite debate or
21 thrust himself into anything prior to the defamatory statements being made. Like Sullivan in
22 Bongiovi, the Plaintiff here is neither a public figure nor a limited purpose public figure, but
23 rather, the victim of, first, a false arrest, and later, a gratuitous false statement directly affecting
24 his profession. There is no evidence or reason to find the Plaintiff a public figure of any nature,
25 and the motion to dismiss should be denied.

26 Further, this case is in its infancy. There has been no discovery. Even if this case were to
27 be converted to a motion for summary judgment under NRCP 56(f), the Plaintiff is entitled time
28 to develop counter-proofs. NRCP 12(b), final sentence. Just as one example, it is known that
American put out a pamphlet describing the speakers and the subjects at their event. Plaintiff is
not currently in possession of that pamphlet, but knows it contains American's logo and

1 describes their event as a presentation by Taylor discussing cheating. The scope of American's
2 knowledge also likely includes the ability to review the power-point presented by Taylor,
3 inclusive of the false cheating allegations. Certainly, at this point, at best American's ultimate
4 liability is in limbo or shown to be likely. Again, a dismissal is contraindicated at this point.

5
6 Additionally, the determination of the status of the Plaintiff is premature. As addressing
7 the precise question raised by American, it has been held:

8 The question of whether Plaintiff is a limited-purpose public figure is
9 a question of fact—"difficult and fact-specific"—not suitable for
10 resolution under Rule 12(b)(6). See Schiavone Constr. Co. v. Time,
11 Inc., 619 F. Supp. 684, 702 (D.N.J. 1985); see also Marcone, 754
12 F.2d at 1082. As a result, courts regularly find that the determination
13 of a litigant's status as a public or private figure should be deferred
14 until summary judgment when a full factual record can be
15 developed. See, e.g., Gillon v. Bernstein, No. 12-cv-04891, 2013 U.S.
16 Dist. LEXIS 130420, 2013 WL 5159625, at *5 (D.N.J. Sept. 12,
17 2013) ("While the Complaint notes that Gillon has appeared on at
18 least two television programs, . . . the Court finds it appropriate to
19 defer the public figure inquiry until after the record has been more
20 fully developed through discovery."); Trivedi v. Slawecki, No. 4:11-
21 CV-02390, 2012 U.S. Dist. LEXIS 169128, 2012 WL 5987410, at *3
22 (M.D. Pa. Nov. 28, 2012) (finding that the question of public figure
23 status "is more appropriately resolved at the summary judgment stage
24 on the basis of record evidence").

25 Woods Servs. v. Disability Advocates, Inc., No. 18-296, 2018 U.S. Dist. LEXIS 77752, at *13
26 (E.D. Pa. 2018). American's motion is not even ripe for consideration.

27 **B. AMERICAN CAN BE LIABLE FOR THE STATEMENTS OF TAYLOR**

28 Finally, American contends that it cannot be liable as a publisher of the defamation
because its only participation was that of holding a conference for discussion. It was not for
discussion, it was for presentation. This is evident from the very nature of the anti-slapp motion
where Taylor was speaking to 300 paying attendees to hear his presentation. Presumably, at this
stage, that money went to American. They also likely paid a fee to Taylor and other presenters
rendering them responsible in respondeat superior for the statements made by Taylor. These

1 facts have not yet been developed, but provide a clear basis for liability. Moreover, as the actual
2 publisher, any non-liability of American would have to be based upon qualified privileges not
3 yet asserted or fleshed out, and which might not even be applicable concerning the foregoing.
4 Plaintiff's allegations do state a claim, and dismissal is unwarranted.

5 Contrary to the representations of American, they did not merely host a speaker. As
6 affirmatively stated by American the event was "presented"³ by American.⁴
7 <<http://www.globalgamingexpo.com/Join-Us/>> (viewed 1/3/19). Clearly, there are facts that can
8 be developed under the pleadings through discovery which will support Plaintiff's claims for
9 liability. At present, a claim is stated, there are no privileges or other arguments before the court
10 save for the assertion that Plaintiff is a public figure - - a disputed proposition. Dismissal is
11 unwarranted.
12

13 III. CONCLUSION

14 For the reasons set forth above, Defendants' anti-slap motion fails, and should be
15 denied.
16

17 Dated this 4th day of January, 2019.

18 Nersesian & Sankiewicz

19 /s/ Robert A. Nersesian

20 Robert A. Nersesian

21 Nev. Bar No. 2762

22 Thea M. Sankiewicz

23 Nev. Bar No. 2788

24 528 S. 8th St.

25 Las Vegas, NV 89101

26 Attorneys for plaintiff

27 ³ American attempts to limit its responsibility by claiming it was merely an organizer of the
28 event. If, as it expressly stated in literature, it "presented" the event, it owns the defamation.
Defendant's authority is inapposite.

⁴ Plaintiff hesitates to attach papers to this motion as it does not consent to a conversion to a
summary judgment motion at this early stage of the proceedings.

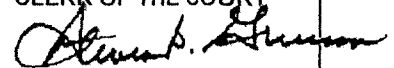
CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of January, 2019, pursuant to NRCP 5(b) and EDCR 8.05(f), the above referenced **PLAINTIFF'S OPPOSITION TO DEFENDANT, AMERICAN GAMING'S 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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8
9 **DISTRICT COURT**
CLARK COUNTY, NEVADA

10 DR. NICHOLAS G. COLON,

11 PLAINTIFF,

12 vs.

13 JAMES TAYLOR, NEVADA GAMING
14 CONTROL BOARD, AMERICAN GAMING
15 ASSOCIATION, AND DOES I-XX,

16 DEFENDANTS.

)
)
)
) Case No. A-18-782057-C
) Dept. No. 29
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17
18 **NOTICE OF ENTRY OF ORDER**

19 PLEASE TAKE NOTICE that an **ORDER DENYING THE MOTION OF**
20 **AMERICAN GAMING ASSOCIATION TO DISMISS FOR FAILURE TO STATE A**
21 **CLAIM UPON WHICH RELIEF CAN BE GRANTED** was entered in the above-entitled

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28
Nersesian & Sankiewicz

528 SOUTH EIGHTH STREET
LAS VEGAS, NEVADA 89101

Case Number: A-18-782057-C

1 matter on the 14th day of March, 2019. A copy of said Order is attached hereto.

2 DATED this 14th day of March, 2019.

3 Nersesian & Sankiewicz

4 /s/ Robert A. Nersesian

5 Robert A. Nersesian

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14 *Attorneys for Plaintiff*

15 **CERTIFICATE OF SERVICE**

16 I hereby certify that on the 14th day of March, 2019, pursuant to NRCP 5(b) and
17 EDCR 8.05(f), the above referenced **Notice of Entry of Order** was served via e-service
18 through the Eighth Judicial District Court e-filing system, and that the date and time of the
19 electronic service is in place of the date and place of deposit in the mail and by depositing the
20 same into the U.S. Mail in Las Vegas, Nevada, postage prepaid, addressed as follows:

21 Aaron D. Ford
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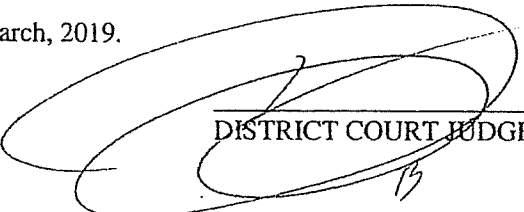
FINDINGS

Review of the Complaint on file shows that the Plaintiff has stated a claim upon which relief can be granted as to American Gaming Association.

ORDER

The Complaint on file states a claim upon which relief can be granted, and American Gaming Associations motion to dismiss is, therefore, denied.

Dated this 6 day of March, 2019.



DISTRICT COURT JUDGE

Approved as to form:

OFFICE OF THE ATTORNEY GENERAL

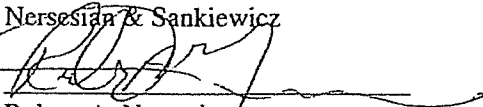
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Respectfully submitted by:

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FINDINGS

Review of the Complaint on file shows that the Plaintiff has stated a claim upon which relief can be granted as to American Gaming Association.

ORDER

The Complaint on file states a claim upon which relief can be granted, and American Gaming Associations motion to dismiss is, therefore, denied.

Dated this ____ day of March, 2019.

DISTRICT COURT JUDGE

Approved as to form:

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Its been a few years since we've had a device of that caliber. Our only device this year was a Card counting device. I've heard of these things my whole career. Always hoped I would catch someone with a device in their shoe or something.

not illegal

2017-7653L another guest told floorman that suspect was using a hand held device to track cards. Could hear clicking sounds while playing next to him. Played with right hand under the table. Suspect saw floorman on phone so took chips and left. As walked away could see a silver device in his hand. Surveillance confirmed he was betting with the count 25-50 if count near zero but 150 to 300plus as the count grew. Playing under another name. Upon detention found he'd been previously 86d 10 times from property for counting cards.