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. A782057

On Appeal from the Eighth Judicial District Court

APPELLEE'S (DR. COLON'S) ANSWERING BRIEF ON APPEAL

NERSESIAN & SANKIEWICZ
Robert A. Nersesian
Nev. Bar No. 2762
Thea M. Sankiewicz
Nev. Bar No. 2788
528 South Eighth Street
Las Vegas, Nevada 89101
Telephone: 702-385-5454
Facsimile: 702-385-7667
Email: vegaslegal@aol.com
Attorneys for Respondent

I. NRAP 28(1) DISCLOSURE STATEMENT

This Brief is filed on behalf of Plaintiff/Appellee, Dr. Nicholas Colon ("Dr. Colon"), an individual. He was represented in the District Court by the attorney here appearing, to wit:

Nersesian & Sankiewicz
By Robert A. Nersesian
Nev. Bar No. 2762
528 S. 8th St.
Las Vegas, NV 89101
Ph: (702) 385-554
Fax: (702) 385-7667
E-mail: vegaslegal@aol.com

II. TABLE OF CONTENTS

III. TABLE OF AUTHORITIES

Court Rules:

Constitutions:

Statutes:

Cases:

Treatises:

IV. JURISDICTIONAL STATEMENT

While Dr. Colon takes no issue with the actual contents of the jurisdictional statement of Appellants/Defendants ("Defendants"), he does contend that the entirety of Nevada's anti-slapp statute is unconstitutional in the context of this case, and as a matter unauthorized by the constitution, the sole jurisdiction extant in this Court is to recognize such unconstitutionality and dismiss, not determine, the appeal.

V. ROUTING STATEMENT

Defendants' "Routing Statement, " Defendants' Brief, p. 1, is grossly deficient concerning the mandate of NRAP 28(a)(5). Appellee, Dr. Nicholas G. Colon ("Dr. Colon") proffers that this matter as constituted by Appellant does not fall squarely within any of the strictures of NRAP 17 for review by the Supreme Court or presumptive review by the Court of Appeals. As the following shows, nonetheless, this matter does involve an issue of first impression in the context of the constitutionality of Nevada's anti-slapp statute with reference to the Nevada Constitution. Specifically, it appears that the application of the anti-slapp statute to Dr. Colon's claim would squarely violate Nev. Const. Art. 1, § 3 mandating that "[t]he right of trial by Jury shall be secured to all and remain inviolate forever. If this issue need be determined (i.e., the Court finds that the District Court erred in its application of NRS 41.635 *et seq*), then a determinative issue of first impression looms over the result here, and jurisdiction should remain with the Supreme Court. Indeed, the currency of the anti-slapp statutes and their reverberating effects on the common law would warrant consideration by an *en banc* Court.

VI. ADDITIONAL ISSUES PRESENTED FOR REVIEW

1. Is it believable by a preponderance of the evidence that Taylor, the Board's expert on cheating at gambling, would not know and understand the metrics of card counting, or the methods of card counting using a device, such that he would

fail to recognize that the device in Dr. Colon's possession was not being used for card counting and was not being used illegally.

2. Do Nevada's anti-slapp statutes violate Art. 1, § 3 of the Nevada Constitution as applied to Dr. Colon when a gatekeeper function is provided to a judge allowing the judge to find, when questions of fact continue to appertain to the claimant's common law action, that the action is barred due to the judge's determination that in the judges opinion the claimant is unlikely to show by a preponderance of the evidence that his/her claim is meritorious at the preliminary stage.

VII. STATEMENT OF FACTS

A. PERTINENT FACTS

1. Plaintiff attended an event at G2E, including the presentation by Defendant, James Taylor ("Taylor").

2. Taylor works as the Deputy Chief of Enforcement for the Board and holds himself out as, and likely is, the Board's expert at cheating at gambling and player's violations of gambling statutes. AA p. 24, ¶ 1; ¶ 3; ¶ 7, *and see* Las Vegas Sun article at <https://lasvegassun.com/news/2016/sep/27/casino-crimes-vary-from-sophisticated-to-slapstick/> (Viewed 12/10/19). In short, no one attending his presentation(s) could conclude that anyone highlighted by him at one of his presentations could understand that the subject was anything other than a criminal.

2. James Taylor showed a video of Dr. Colon at the presentation labeling Dr. Colon as illegally using a device proscribed by NRS 465.075. Decision, AA 163-164; Dr. Colon Declaration, AA 77-78, ¶¶ 50-53. *accord* Taylor Declaration, ¶¶ 5, 9. The device at issue was not, and could not be, used illegally or used as a card counting device in violation of NRS 465.075. Declaration of Elliot Jacobson (expert), AA 61, ¶ 10, Declaration of Michael Aponte (expert), AA 63, ¶ 10, Declaration of Dr. Colon, at AA 75, ¶¶ 25-31.

10. As Taylor played the video of Dr. Colon while ascribing criminal attributes to his activity, persons in the audience recognized Dr. Colon as the person being described and indicted. AA 58, ¶ 6.

11. Other than at the presentation by Taylor, none of the Defendants have ever stated that the device in Dr. Colon's possession was a device which could be used to cheat at blackjack or violate NRS 465.075 or how it could be so used. Appellant's Appendix, *passim*.

B. RESPONSE TO DEFENDANT'S FACTS

Defendants failed to include a 'Statement of Facts' within their brief, and Dr. Colon is left with no opportunity to reply to the facts within Defendants' brief in an organized manner. Alleged facts, nonetheless, do appear throughout the Defendants' brief, many patently false, exaggerated, or misleading, and Dr. Colon will use this section to highlight admissions made by the Defendants as well point out such improprieties, and present any further and omitted facts pertinent to this appeal. For ease of following, the rebuttals to the Defendants' facts will track the Defendants' brief in a serial manner, first quoting the fact with page, and following with the true facts or context.

1. "James Taylor . . . made a presentation . . . which included the use of cheating devices in gaming. A 9-second video depicting the plaintiff Nicholas Colon sitting at a blackjack table with a counting device in his hand was used in Taylor's presentation. While showing the video, Taylor stated "Our only device this year was a counting device.""

Defendants' Brief, p. 1. This particular excerpt is stated to highlight the admissions made within it rather than to show error. First, the "video depicting . . . Nicholas Colon" was made in a presentation on the "use of cheating devices in gaming." Second, it admits that Dr. Colon is presented holding a "counting device." Third, it finishes with acknowledging that the device was a device in which the Nevada Gaming Control Board ("Board") was interested. Clearly, especially with reference to the context of the presentation, Taylor was labeling Dr. Colon to the audience as a felon illegitimately using a card counting device under NRS 465.075 and NRS 465.088. *And see* Decision at AA 194.

2. "Taylor used this video because Plaintiff was in fact arrested for the conduct depicted in the video, and was criminally prosecuted for that conduct, ultimately pleading to the crime of theft."

Defendants' Brief, p. Again, as confirming, this is an indication that Taylor was clearly holding out Dr. Colon as a cheater and intended to do so. More importantly, nonetheless, these facts were entirely incompetent, and Defendants' are acting improperly in raising them here.

3. In their issues presented, and argued in their brief, Defendants represent that "Taylor affirmatively stated his statements were true." Defendant's Brief, p. 2, ¶ 1. All of Taylor's representations to the District Court can be found at Taylor's Declaration, AA 24-25, and Taylor's actual statement as to truth was limited by

two express qualifiers. *See* Specifically, he averred the truth on the express basis of the information in the file of the Board, and also qualified it on his then current knowledge based on this file. Absent is any statement of his personal belief, and absent is any knowledge that he may have gained from other sources. In short, Taylor's declaration in inserting these qualifiers appears to be carefully constructed to maintain deniability of the relevant issues in Dr. Colon's opposition and Complaint. AA 25, ¶ 6.

4. Defendants repeatedly and falsely refer to the device used by Dr. Colon as a card counter. This is obviously a surreptitious attempt to color this Court's analysis and is patently false. The device at issue is a tally counter as noted by the common manufacturer. If "crowd counter" is searched on Amazon, a dozen+ examples of the device appear. Searching "clicker" will result in commercial offerings of the device. A search of "card counter" on the internet, however, does not have any results approaching the device at issue in this matter. Defendants simply present a made-up term in some twisted attempt to place this Court's inquiry where it should not be.

5. Defendants represent, "The District Court erred when it determined that Taylor's statement was not made in good faith, **simply because Colon disputed** whether he was actually cheating by sitting at a blackjack table with a counting device in his hand." Defendants' Brief, p. 12 (emphasis added). This statement has little to

nothing to do with the Court's ruling. Rather, Dr. Colon did not dispute whether he was cheating, but presented evidence that he was not and that Taylor's presentation of Dr. Colon as a criminal was false. This is a question to be answered by the Court, and is squarely within the District Court's charge under the anti-slapp statutes. NRS 41.660(3)(a). It was not a he said/she said determination as Defendants allude, but rather, a decision made on the evidence available as the statute mandates. Indeed, the District Court is directed to make a determination on the evidence presented whether Taylor showed that he did not know his statement was false by a preponderance of the evidence. Defendants actually maintain, therefor, that the District Court "erred" in applying the statute's clear terms.

6. Defendants raised in their anti-slapp motion, and repeatedly raise in their brief, the fact that Dr. Colon was arrested and pled to a crime. *See e.g.* Defendant's Brief, pp. 12-13.[1] Such facts are legally incompetent and inadmissible, and could not be taken into account by the District Court or this Court in rendering the decision. Here, the Defendants did not only disingenuously offer such evidence, but misrepresent and misrepresented it as well. Defendants relied upon an invalid record in the District Court, and compound this failure here. Defendants speak at length about the alleged plea agreement made by Dr. Colon. Taylor discusses it in

[1] And Defendants continue ignoring NRAP 28(e)(1), providing two paragraphs of factual statements without a single citation to their Appendixes.

his declaration before the District Court. AA 25, ¶ 11. Plaintiff entered a nolo contendere plea to the charges trumped up by the Board with respect to the alleged crime raised by the Defendant. Court Record at AA 69, 9/12/17 entry. Per NRS 48.125(2), "Evidence of a plea of nolo contendere . . . to the crime charged or any other crime is not admissible in a civil or criminal proceeding involving the person who made the plea or offer."[2] In offering/ attempting to offer Dr. Colon's plea, Defendants patently violated this rule and introduced incompetent evidence into the proceeding. This was raised in the proceeding in the District Court (*see* AA 44: 11-20), and despite express notice that the plea cannot be "evidence" in this case, Defendants again violate this statute. The same is true with the statements that Dr. Colon had been arrested. This is not evidence. Neither Taylor, the District Court, nor this Court can place any reliance upon Dr. Colon being arrested in support of a conclusion that Dr. Colon had committed any crime. Simply, a mere arrest, especially a lone arrest, is not evidence that the person arrested actually committed any criminal conduct. This is because arrest "happens to the innocent as well as the guilty." *United States v. Zapete-Garcia*, 447 F.3d 57, 60-61 (1st Cir. 2006) *quoting Michelson v. United States,* 335 U.S. 469, 482, (1948). *See also United States v.*

[2] Likewise, any reference to the criminal complaint is also barred as inadmissible hearsay. Obviously, a criminal complaint," itself, is hearsay and inadmissible. *Damascus Bakery, Inc. v. Elwell*, CIV. 08-1568 WJM, 2010 WL 3359526 (D.N.J. Aug. 25, 2010).

Cordova, 829 F. Supp. 2d 1342, 1353 (N.D. Ga. 2011)("An arrest is not evidence of a crime. . . ."). Defendants rely on a patently incompetent set of facts. In summary, Taylor offers the following alleged evidence in support of not being aware that his statements were false:

1. A nolo-condendere plea by Dr. Colon;
2. An arrest of Dr. Colon; and
3. Charges being proffered against Dr. Colon.

Each element of evidence offered is patently inadmissible under well-established rules of evidence. Stripped of its character as evidence, Taylor literally offers nothing to support his alleged conclusion that he did not know that his statements were false.

7. "Colon admitted, both in his Opposition and at oral argument that he is a public figure." Defendants' Brief, p. 4. This is false to a level to be sanctionable. Dr. Colon made no such admission, and in fact, argued the exact opposite in the District Court. Defendant, American Gaming Association ("AGA") brought a motion to dismiss in the District Court arguing that Dr. Colon was a public figure. Dr. Colon's Appendix ("DCA"), p. 1. Contrary to the Defendants' allusion, in his Opposition Dr. Colon showed that he was not a public figure. Dr. Colon's Opposition, DCA p. 10, at 13-15. The Court denied AGA's motion. DCA p. 19. Clearly, the Defendants are aware that Dr. Colon disputes this contention, yet

present to this Court that he admits, not disputes, the contention. And this is done without citation in patent violation of NRAP 28(E)(1).

VIII. SUMMARY OF ARGUMENT

The District Court properly found and held that statements by Taylor as a representative of the Board appearing in a presentation sponsored by the American Gaming Association to 300 attendees[3] of the 2018 G2E[4] were not "good faith" communications, and therefore, did not warrant anti-slapp protection. In Taylor's presentation in a section addressing cheating through using statutorily prohibited devices at gaming, Taylor played a video of Dr. Colon and spoke to Dr. Colon's activities labeling him a felon. Taylor's assertion was that in possessing a ubiquitous tally counter while , Dr. Colon As the District Court correctly noted, Taylor, more probably than not, recognized that Dr. Colon did not use the device as proscribed by NRS 465.075, but Taylor said he did. As the District Court held,

---

[3] AA 25, ¶ 8

[4]The event's press release holds G2E out as follows: "G2E is the world's largest and premier gaming event where gaming executives, buyers, and industry professionals meet each fall in Las Vegas to conduct serious business. It's the most in-depth source of new products, networking, ideas and information on the planet. It takes place in the laboratory for the industry, Las Vegas, where you can see it in action and have fun doing it. If you are currently doing business in or want to begin doing business in the casino-entertainment industry, you can't afford to miss being a part of the industry's number one event. G2E showcases 600+ exhibitors, 100+ conference sessions, exciting special events and F&B at G2E, the only F&B event for the gaming industry."
See <http://www.gamingmeets.com/event/global-gaming-expo-g2e-2018/> (Viewed 11/21/19)

this finding foreclosed any further analysis under the anti-slapp statute, and the law required that the motion be denied.

Further, Defendant's attempt to provide a smokescreen in avoidance of this foundational issue by providing expansive explanations as to how the further terms of the anti-slapp statute are not met. This is done disingenuously as Dr. Colon solely relied upon the lack of a "good faith communication," which, in its absence, forecloses relief under the anti-slapp statutes.

Finally, the District Court addressed the expansive argument by Dr. Colon that the anti-slapp statute violates Nevada's constitutional right to trial by jury, and is therefore unconstitutional. AA . Should this Court reverse the findings of the District Court regarding the lack of a "good faith communication" by Taylor, this issue becomes ripe for decision as it is obviously a complete defense to the Defendants' anti-slapp motion.

Finally, Defendants omit that, in addition to the nolo plea entered by Dr. Colon, the case was ultimately dismissed. AA 69. That is, Dr. Colon did not actually plea to anything, but rather agreed to a nolo submission ultimately resulting in the entire eradication of the criminal proceedings against him. This says nothing and does not support Taylor's alleged lack of knowledge in any way. Rather, to be dismissed is an indication that Dr. Colon did nothing and did not admit to any material element of the alleged crime Taylor painted him with.

IX. ARGUMENT

A. INTRODUCTION

Before the Court is the Board's expert on cheating and devices claiming that he, in good faith, can assert that Dr. Colon was in possession of a cheating device. This statement cannot be in "good faith" if the Defendant cannot show by a preponderance of the evidence that he did not know that the device could not be used in violation of NRS 465.075. Taylor is the man, by position and by his seven presentations at North America's largest gaming event who would best know "the topic of *use of a cheating device* under NRS 465.075(1)." Declaration of Taylor, AA 25 at ¶ 9. As the District Court noted,

> The communication that the crowd counter was a cheating device was not truthful. There is no evidence that Mr. Taylor was without knowledge of [his communication's] 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. Taylors statements do not constitute a good faith communication.

Decision, AA 164.

The review here is *de novo.* ***Rosen v. Tarkanian***, 135 Nev. Adv. Op. 59, 5 (2019) *Coker v. Sassone*, 432 P.3d 746, 749 (Nev. 2019) A claim of ineffective assistance of counsel presents a mixed question of law and fact that is subject to independent review. However, a district court's factual findings will be given

deference by this court on appeal, so long as they are supported by substantial evidence and are not clearly wrong. This does not necessarily mean that the conclusion is reached in a vacuum, and certainly the Court can take into consideration the fact that a prior judicial officer had no issue and easily determined the matter. Moreover, there are indication that even in a *de novo* review, there is no prohibition to deferring to the initial fact finder on issues of fact, and even, that some deference should be accorded. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). Regardless of how the standard is applied, nonetheless, here the Defendants failed to carry their burden in in this Court as well as the District Court.

B. DEFENDANTS' BRIEF IS GROSSLY DEFECIENT

Reference to NRAP 28(a) provides a succinct list of that which must appear in Defendants' Opening Brief. The Defendants Opening Brief before this Court omits the mandated "Statement of facts," and "summary of argument" mandated. The Routing Statement provided by Defendants ignores the entirety of the mandate under NRAP 28(a)(5) and NRAP 17. While NRAP 28(e)(1) commands that "every assertion in briefs regarding matters in the record shall be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found," Defendants provide pages of hyperbole and conclusions without any citation whatsoever. *See* Defendants' Brief, pp. 1-2 (referred to by Defendants'

as "backdrop"), pp. 3-4 (Defendants' statement of the case). Simply, Defendants' Brief is grossly deficient under the mandates of NRAP 28.

C. DEFENDANTS' STATEMENTS WERE DEFAMATORY OF PLAINTIFF AND FALSE

Recently (yesterday) this Court addressed Nevada's anti-slapp legislation in the matter of *Rosen v. Tarkanian*, 135 Nev. Adv. Op. 59 (2019). Like here, the movant claimed that her statements were not false or defamatory. *See* Defendant's Brief, pp. 18-20 for an analogous argument. This Court made clear the evaluative premise on which the statements are to be evaluated, and held: "It is not the literal truth of 'each word or detail used in a statement which determines whether or not it is defamatory; rather, the determinative question is whether the "gist or sting" of the statement is true or false." Here Dr. Colon clearly averred that he was labeled a criminal and a cheater by Taylor. Colon Declaration, App. 78, 79, ¶¶ 55-58. Further, Taylor acknowledges that the video of Dr. Colon and the statements made in his presentation were made during his presentation on "*Scams, Cheats and Blacklists.*" Even if Taylor never said in quotes, "Dr. Colon was cheating on the video, and is a cheater and a criminal," this is the inescapable "gist or sting" of his presentation.

Adding to this is the document found in DCA p. 24. This is available on the DVD noted in AA 29,[5] which is a Power-point used at Taylor's presentation. As can be seen at DCA p. , there is text below this image seen at AA 30, and it is accessed by clicking on the screen of the DVD provided. It appears to provide notes for Taylor's commentary to be conveyed at his presentation. In accord with the Declaration of Dr. Colon, at lines 1-2, Taylor planned on stating that the Board's only device seized that year was the device at issue, and which was a "card counting device." That is, it was expressly identified as a felonious device under NRS 465.075. This, coupled with Dr. Colon's Declaration, establishes beyond any reasonable doubt that Taylor expressly identified Dr. Colon as a cheater and a criminal to approximately 300 other people involved in Dr. Colon's legitimate business disputes. He made sure to point out that Dr. Colon was arrested. It is difficult to envision a more damning or injurious action under the "gist or sting" of the statements made.

With this in mind, all of the verbal legerdemain Taylor seeks to interpose cannot remove the "gist or sting" of his presentation concerning Dr. Colon. Not one of the 300 or so persons in attendance could conclude anything other than the person on the Power-point video, Dr. Colon, was a cheater and a felon. Add to this

[5] Dr. Colon presumes this was provided to the Court with the record. If the Defendants' omitted this referenced physical exhibit in the items provided in the appendix, on notice a copy of the same will be provided.

the gravitas of the person making the statements, and defamation at its worst is shown.

As amply supported and found by the District Court, the statements that this was a cheating device or even a card counting device were amply demonstrated to be false. Defendants never dispute that the device cannot be used as a card counting device. Plaintiff provides three expert opinions that it cannot be so used. There is no evidence supporting Defendants' statements. False and defamatory statements were made by Taylor directed at Dr. Colon.

As *Rosen* was so recently issued, it is likely that the Defendants will attempt to place substantial reliance on the opinion. There is no reliance to be had. This Court found that the defendants' statements in *Rosen*, after extensive analysis of the communication, had a "gist and sting" which imparted a substantial likelihood that the defendants did not make a "knowingly false" representation concerning the plaintiff. In contrast, the Defendants here communicated a gist and sting which was demonstrably false. Further, considering the status of Taylor and the other evidence set forth above, he likely, if not certainly, knew that the "gist and sting" of the opprobrium he foisted on Dr. Colon was false. In this sense, the analysis in *Rosen* as contrasted with the facts here, fully support the legitimacy of the District Court's denial of Defendants special motion to dismiss.

D. THE DISTRICT COURT CORRECTLY FOUND THAT THE STATEMENTS MADE BY TAYLOR REGARDING DR. COLON'S ALLEGED CRIMINAL ACTIVITY WERE NOT MADE IN GOOD FAITH

A communication made with knowledge of its falsity is, by definition, not a good faith communication. Simply, with respect to statements made, "knowledge of falsehood" entirely eliminates any issue with respect to an anti-slapp motion, and dismissal cannot be warranted when a knowingly false statement is made. *See Rosen v. Tarkanian*, 135 Nev. Adv. Op. 59 (2019)*Coker v. Sassone*, 432 P.3d 746, 750 (Nev. 2019), adopting and citing to *Shapiro v. Welt*, 389 P.3d 262, 265 (Nev. 2017)("[N]o communication falls within the purview of NRS 41.660 unless it is 'truthful or is made without knowledge of its falsehood.'"; *Pope v. Fellhauer*, 2019 Nev. Unpub. LEXIS 331, *4-*5, 437 P.3d 171 (Nev. 2019).

To show a "good faith communication" under the anti-slapp statute, NRS 41.660(3)(a) requires that the movant establish "by a preponderance of the evidence, that the claim is based upon a good faith communication . . .." Under NRS 41.660(3)(a), only "[i]f the court determines that the moving party has met the burden pursuant to paragraph (a)" does the Court move to the second stage and "determine whether the plaintiff has demonstrated with prima facie evidence a probability of prevailing on the claim." *And see*, *Coker*, *supra*, noting that absent fulfillment of this test, the entire matter is outside the "purview" of an anti-slapp motion. In other words, upon a failure to establish by a preponderance of the

evidence that the communication at issue was a "good faith" communication, is there any need or purpose of addressing the second phase of the motion.

Looking to the statements by Taylor, there is no basis to bring or maintain an anti-slapp motion if Taylor had knowledge that the device in Dr. Colon's possession could not be used to practice card counting at blackjack. The test is whether the communication is "'truthful or is made without knowledge of its falsehood.'" *Coker*, *id.* As to whether the statement is truthful, the District Court correctly found that it was not. As the District Court noted, the Defendants never demonstrated or presented any evidence that the device at issue could be used to count cards, cheat, or otherwise violate NRS 465.075.

Against this failure of any evidence from Defendants, Dr. Colon presented three affidavits from qualified gaming experts averring that the device could not be used as Taylor represented. Declaration of Elliot Jacobson, AA 61, ¶ 10, Declaration of Michael Aponte, AA 63, ¶ 10, Declaration of Dr. Colon, at AA 75, ¶¶ 25-31. In addition to this information, perhaps the most telling indication that the tally counter could not be used as a prohibited device is the complete lack of any explanation from the Defendants as to how it could be so used. A failure to respond is evidence that a point is conceded. *See Smith v. Muncy*, No. 95-6098, 1996 U.S. App. LEXIS 19095, at *6 (6th Cir. July 1, 1996). Simply, it is safe and proper to conclude that when faced with the three affidavits stating that the device

could not be used as represented, it was critical that Taylor address this in his reply if there was any lack of veracity in those affidavits. He did not so reply, and effectively conceded that the tally counter could not be used as a cheating device or a device prohibited under NRS 465.075. Thus, it was clearly demonstrated that the presentation by Taylor implicating plaintiff in criminal activity was false, there was no evidence to the contrary, and the only conclusion available under the evidence is that it is impossible for Taylor to demonstrate that his characterization of Dr. Colon as a felon was not true.

This takes the inquiry to the second half of the test from *Coker*. Did Taylor demonstrate by a preponderance of the evidence that he made the statement without knowledge of its falsity. Looking to the evidence above, can it seriously be maintained by the Deputy Chief of Enforcement for the Board that he lacks even a rudimentary understanding of card counting. Note that in their Brief, p. 11, Defendants acknowledge that it is "cheating and cheating devices . . . which fall[ ] squarely under the purview of Taylor's responsibilities as Deputy Chief of Enforcement with the GCB." In light of the ubiquity of the method and his necessary understanding of the practice in order to enforce and manage agents in enforcing NRS 465.075, it is clear that Taylor understood the nature of the practice and its parameters. It strains credulity to conclude that he did not know that which the three experts swore to. It strains credulity that he did not understand the simple

fact that a device that adds, but does not subtract, and could not assist in the practice of card counting. Even the file Taylor allegedly reviewed necessarily recognized that the device could not be used for cheating once he examined the device and saw that it could not subtract. *See* Declaration of Arrest, AA 87 ("Typically card counting works by assigning a value to each card and then adding or subtracting starting from zero. By keeping a running count . . .."). Simply, by definition, he is the guy with the Board who must know that the tally counter could not be used illegally in blackjack, and considering his position, he must have known this as the tally counter is incapable of keeping a running count.[6] *And see* Declaration of Elliot Jacobson (expert), AA 61, ¶ 10, Declaration of Michael Aponte (expert), AA 63, ¶ 10, Declaration of Dr. Colon, at AA 75, ¶¶ 25-31.

There is also another factor added to this. That is that both the Board and Taylor played fast and loose with the evidence of criminal activity. It is beyond dispute that Taylor had access to, and the Board had possession of, video of Dr. Colon's play at the blackjack table on the night he was arrested. *See* AA 29 and

[6] Note that this further confirms the artful and calculated drafting of his affidavit where he limits his knowledge to that in the file with the Board, conspicuously omitting his own personal knowledge and understanding of the game. Discussion, *supra* and Declaration of Taylor, AA 25, ¶ 6. Pointedly, he states that the knowledge he professes is conditional on the Board's file. He omits stating that the file was accurate, and in his position, he is the person with knowledge and experience superior to those who compiled the file. The affidavit is dissembling, and Taylor knew the representation that Dr. Colon was a felon was false.

AA 30. In the criminal matter against Dr. Colon, discovery was requested and received. *See* AA 83-91. There was no video provided. A follow-up attempt to get video was met with the reply that there was no video of Dr. Colon. Declaration of Dr. Colon, AA 76-77, ¶¶ 38-42. This was clearly untrue in light of AA 29 and AA 30. Dr. Colon was also certain that the video of his play would show that he never even looked at the device while playing, and the video would have provided conclusory evidence that he was not using the tally counter or cheating. Declaration of Dr. Colon, ¶¶ 42-43. The fact that the video was withheld from Dr. Colon presents a clear violation of his rights under *Brady v. Maryland*, 373 U.S. 83, 84 (1963). The only explanation for the Board withholding such evidence in connection with the criminal matter is that they would have been exculpatory, and provides an indication that the Board recognized the innocence of Dr. Colon.

In this matter, Taylor has doubled down on this secreting of evidence. He prepared his power-point for G2E, and necessarily had the video of Dr. Colon's play. This is evident as he edited out a nine second clip. AA 29, AA 30, and Taylor Declaration, AA 25, ¶ 9. He could have presented the entire video surveillance of Dr. Colon's play in the District Court, but did not. Again, the likely explanation is that the complete video would have been entirely exculpatory of Taylor's claim of Dr. Colon's criminal activity. And Taylor, having reviewed the Board's files and edited the video surveillance would have been aware of this, but apparently he

purposefully withheld this relevant information in order to forward his assertion that he did not know his statements concerning Dr. Colon were false. In short, there is deep and compelling evidence that Taylor knew his presentation concerning Dr. Colon was false.

Against this evidence, the question is whether Taylor can show by a preponderance of evidence that he did not know his statements were false. Clearly, the plethora of evidence implicating Taylor's knowledge of falsity outweighs the bare denial of his attorneys as well as the equivocal denial in Taylor's declaration. The District Court was correct, and under the evidence in the record, Taylor has failed in his burden to show a "good faith communication." This ends the matter, and the denial of the Defendants' anti-slapp motion was appropriate and should be affirmed.

E. DR. COLON SOLELY ARGUED THE LACK OF A GOOD FAITH COMMUNICATION IN HIS OPPOSITION TO THE DEFENDANTS' ANTI-SLAPP MOTION, AND LARGE SWATHS OF DEFENDANTS' BRIEF ARE SIMPLY IRRELLEVANT TO THE ISSUES PRESENTED.

The issue here is best exemplified by the statement at Defendants' Brief, pp. 9-10, providing:

> [O]nce the defendant meets its burden on the first prong, [a "good faith communication] 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 is unable to meet this burden.

This is a case where the Defendants never met the burden of the "first prong" referenced by Defendants in the District Court, and as shown above, Defendants cannot meet this "first prong" in this Court. If the "first prong" is not met, then, as Defendants acknowledge, there is no burden shifting to the plaintiff, here Dr. Colon. *Rosen v. Tarkanian*, 135 Nev. Adv. Op. 59, 5 (2019)("Only after a movant has shown that he or she made the statement in good faith do we move to prong two and evaluate "whether the plaintiff has demonstrated with prima facie evidence a probability of prevailing on the claim.").[7]

Simply, any purview of the anti-slapp statutes has disappeared after the failure to show a "good faith communication," and any further inquiry on the motion is irrelevant. *See Coker v. Sassone*, 432 P.3d 746, 750 (Nev. 2019).

Still, Defendants speak at length about the issues being a matter of public concern under NRS 41.637(4).

With respect to "good faith" in an anti-slapp motion, the burden is on the movant to show by a preponderance of the evidence that it was not known that the statement was untrue. Here the record shows that the Defendants failed to

[7] Note that the Defendants assert that the District Court erred in not providing a proper evaluation of the second prong. As indicated in *Rosen*, such evaluation is to occur only after the District Court finds contrary to its finding here on the first prong, and as the first prong was resolved in favor of Dr. Colon, any evaluation of the balance of the claim in determining the anti-slapp motion should not occur and would be error by the District Court if it was considered.

demonstrate that Taylor's knowledge was anything other than knowledge that his statements concerning Dr. Colon were false. Indeed, in the anti-slapp motion, Taylor never even states that he believed that Dr. Colon was a gaming cheat or that he did not know that the device which he ascribed to Dr. Colon was incapable of being used as a cheating device at blackjack. Taylor Declaration, AA 24-25. That is, there is no evidence submitted by Taylor that he subjectively did not know that the device was not a cheating device.

F. DR. COLON MEETS THE SECOND PRONG UNDER NEVADA'S ANTI-SLAPP LEGISLATION

Dr. Colon will not burden this Court with an overly explicit analysis here. Functionally all of the Defendants arguments under this theory are moot as the first prong of the analysis has not been met. *See* ***Rosen v. Tarkanian***, 135 Nev. Adv. Op. 59 (2019). Nonetheless, to highlight a few points, the following is provided and it is evident that Dr. Colon has shown a likelihood of success on the underlying claim.

First, as to actual malice concerning a public figure, as conceded by Defendants, this is shown on a demonstration that the defamatory communication is known to be false. This is the same test as analyzed above, and it is met.

Nonetheless, the claim that Dr. Colon is a "public figure" is patently false. To apply Defendants' analysis, anyone alleged to have committed a crime is a

public figure. Obviously this is ridiculous. Alternatively, Defendants claim that Dr. Colon is a limited public figure because Taylor spoke of him in front of three hundred persons. Defendants cannot create a public figure through the defamatory communication, and then seek safe harbor because they illegitimately scandalized the claimant. Clearly, there is no basis to label Dr. Colon a public figure on this basis.

As to Dr. Colon's credentials, they do not make him a public figure. Under the test from *Bongiovi v. Sullivan*, 122 Nev. 556, 574, 138 P.3d 433, 446 (2006), Dr. Colon falls far short of meeting the test for being a public figure, even under the facts Defendants presents. Simply, there is no public interest in Dr. Colon in this stage of his career in any sense.

And concerning ultimate success on the merits, three experts and expansive evidence shows that the gist of Taylor's pronouncements concerning Dr. Colon were false. They also ascribed felonious criminality to Dr. Colon. There is no countervailing evidence that the gist of Taylor's presentation was not false. And considering his status, it cannot be claimed that he made his statements with anything less than reckless disregard for the truth. The District Court was correct in denying the anti-slapp motion of the Defendants, and should be affirmed here.

/ / /

G. AS APPLIED IN THIS CASE THE ANTI-SLAPP STATUTES IMPINGE UPON THE INVIOLATE RIGHT TO TRIAL BY JURY IN THE NEVADA CONSTITUTION

As evident from *Rosen v. Tarkanian*, 135 Nev. Adv. Op. 59 (2019), under Nevada's anti-slapp statutes the trial judge is charged with being a gatekeeper, applying burdens of proof to the evidence presented, and determining whether a plaintiff's common law action for defamation can proceed. And these burdens of proof are a preponderance of the evidence. *Id*.

Dr. Colon 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, *and accord* Nev. Const. Art. 6, § 12. 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 it is adopted and mandated by its constitution and NRS 1.030. 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 and the right to have juries determine issues of fact. 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; Nev. Const. Art. 6, § 12. 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), *and see Hudson v. Las Vegas,* 81 Nev. 677, 680 409 P.2d 245, 246-47 (1965). This rule, as ensconced in our constitution, 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.[8]

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).

---

[8] 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 and the law under NRS 1.030

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,

> "[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).[9] Yet, with the anti-slapp statutes, transferred a large swath of defamation

---

[9] *See also Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 581 (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

actions to the judicial officer addressing the claim. In short, the legislature attempted to circumvent and severely limit 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 (1989). Nevertheless, these are not concerns for the judicial branch of government in addressing the constitutionality of a matter. *See id., and see* 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 objectives -- or the hallmarks -- of democratic government . . .").[10]

---

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.

[10] In Chadha the United States Supreme Court addressed the congress' reservation of a future veto to legislation following its implementation. The Supreme Court

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 or first amendment protections unrecognized at the time of its enactment. 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 even exists with reference to the anti-slapp functions. The hallmark of the law is, in fact, to install the judicial officer addressing the case as a gatekeeper foreclosing questions of fact from reaching the jury. And if a right to a jury trial under the common law existed in 1864 (1776 for

---

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.

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 on the facts, and the burdens and weighing of evidence are to 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 founding of our State.

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, Taylor, knew that his statements were false. Moreover, after this determination is made, the court is charged with applying burdens and determining facts under the second prong of the anti-slapp statutes. The Court will be required to weigh the affidavits of Aponte, Jacobson, and Colon, 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.

6. THE WEIGHT OF PURSUASIVE AUTHORITY AND TREND CONCERING ANTI-SLAPP LEGISLATION SUPPORTS THE UNCONSTITUTIONALITY OF ANTI-SLAPP LEGISLATION

Two published decisions have addressed the right to trial by jury in the context of anti-slapp legislation, and each found the statute unconstitutional, to wit: *Leiendecker v. Asian Women United of Minn.*, 895 N.W.2d 623 (Minn. 2017) and *Davis v. Cox*, 183 Wash. 2d 269, 295, 351 P.3d 862 (2015).

In *Leiendecker*, the Minnesota Supreme Court had previously decided the matter under the anti-slapp legislation which is functionally indistinguishable from the legislation in Nevada. On remand, the plaintiff raised the constitutionality of the legislation for the first time. On looking to the Minnesota Constitution, the parameters of the review were set as follows: "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."" *Leiendecker v. Asian Women United of Minn.*, 895 N.W.2d 623, 634 (Minn. 2017). This essentially parrots the test in Nevada. Moreover, Nevada's constitution also "guarantees "the right to have factual issues determined by a jury."" *Tam v. Eighth Judicial Dist. Court*, 358 P.3d 234, 238 (Nev. 2015). *Leindecker* concluded that the analogous anti-slapp legislation " 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. . . . [T]he role of resolving disputed facts belongs to the jury, not the court." *Leindecker* at 635. Here the court is to weigh evidence and make a factual determination on disputed facts at, at least, two levels. Nevada's anti-slapp statute cannot be reconciled with Nev. Const. Art. 1 § 3, and it is unconstitutional.

Turning to *Davis v. Cox*, 183 Wash. 2d 269, 295, 351 P.3d 862 (2015). In *Davis* the offending portion of the anti-slapp statutes was similar to *Leindecker* and implicated exactly that which Nevada's statutes require. Specifically, it violates the right to trial by jury because it "requires the trial court to weigh the evidence and make a factual determination of plaintiffs' "probability of prevailing on the claim." *Id at* 280, 867. It is also worthy to note that the *Davis* court distinguished an assertion that the allowance of summary judgment to be issued by a court imparts a conclusion that the statute is not unconstitutional. *Davis* distinguished this proposition by simply pointing out that a summary judgment standard relies upon no "genuine" issue of fact, while the anti-slapp statute allows dismissal even when a genuine issue of fact might be present. This, as the decision imparts and as logic dictates, infringes directly upon the right to trial by jury. So too here.

As an example of how the provision violates the right to trial by jury, everyone is familiar with that which a preponderance of the evidence imparts. In

applying this standard, the test is met on a finding of 50.000001% versus 49.000009%. Clearly, on reaching a conclusion, no one could say that there is no "genuine" issue of fact, but in the context of the anti-slapp motion, it is the court which makes this determination to the exclusion of the peers of the claimant. Clearly, there is no analogy to summary judgment and an anti-slapp special motion to dismiss. More importantly, in weighing a preponderance of the evidence, having one person make the conclusion over competing facts voids the entire concept of that which is to be protected under Nev. Const. Art. 1 § 3. A Nevada jury requires a consensus of the panel, and a claimant has a right to have the questions determined by a consensus (six of eight). The law changes the balance to one of one, and that one is even prohibited from determining questions of fact. The anti-slapp statutes are unconstitutional, and the matter should be remanded for ordinary proceedings in civil law claims ultimately being presented to a jury.

X. CONCLUSION

For the reasons stated above, Dr. Colon requests that this Court affirm the District Court's denial of Defendants' special motion to dismiss. Should the Court find that the special motion to dismiss falls within the proscriptions of Nevada's anti-slapp statute, Dr. Colon requests that the Court find that NRS 41.635 *et seq*, violates Nev. Const. Art. 1 § 3, and direct that the special motion to dismiss be

denied as the relief would infringe on Dr. Colon's constitutional right to trial by jury on his claim.

Dated this 13th day of December, 2019

Nersesian & Sankiewicz

/s/ Robert A. Nersesian
Nev. Bar No. 2762
528 S. 8th St.
Las Vegas, NV 89101
(702) 385-5454
(702) 385-7667-fax
Vegasleagal@aol.com
Attorneys for Respondents

XI. ATTORNEY'S CERTIFICATE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 16 in fourteen-point Times New Roman font.
2. I further certify that this brief complies with the volume limitations of NRAP 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 14,000 words, and does in fact, as calculated, contain 9344 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 13th day of December, 2019

Nersesian & Sankiewicz

/s/ Robert A. Nersesian
Nev. Bar No. 2762
528 S. 8th St.
Las Vegas, NV 89101
(702) 385-5454
(702) 385-7667-fax
Vegasleagal@aol.com
Attorneys for Respondents

XII. 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 Appeellee's (Dr. Colon's) Answering Brief via the Clerk of the Court by using the electronic filing system on the 13th day of December, 2019.

AARON D. FORD
Attorney General
THERESA M. HAAR
Special Assistant Attorney General
State of Nevada Office of the Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
Attorneys for Appellants
James Taylor and Nevada Gaming Control Board

Jeff Silvestri
Jason Sifers
McDonald Carano LLP
2300 W. Sahara Ave., Ste. 1200
Las Vegas, Nevada 89102
Attorneys for Appellants
American Gaming Association

/s/ Rachel Stein
an employee of Nersesian & Sankiewicz