Case No. 78517

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

v.

DR. NICHOLAS G. COLON,

Respondents.

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

APPELLANTS JAMES TAYLOR AND NEVADA GAMING CONTROL BOARD'S REPLY BRIEF

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I. INTRODUCTION

Nothing in Colon's Answering Brief changes the simple fact that Chief Taylor played a short clip of security camera footage depicting a male sitting at a blackjack table with a counting device in his hand. For the conduct depicted in the video, Colon was arrested and prosecuted for cheating. Chief Taylor described this as the only counting device recovered by GCB that year. Chief Taylor did not show Colon's face, did not identify him by name, did not refer to him as a cheater, and did not label him a "felon." That statement regarding the recovery of the counting device was a good faith statement made about a public figure on a matter of public concern, and warrants protection under NRS 41.660 et seq. This Court should reverse the District Court's denial of Taylor and GCB's Anti-SLAPP Special Motion to Dismiss.

II. LEGAL ARGUMENT

Just a month ago, this Court reversed a District Court's denial of an Anti-SLAPP Special Motion to Dismiss in the *Rosen v. Tarkanian* matter. *Rosen v. Tarkanian*, No. 73274, 2019 WL 679266135 *4 (Nev., Dec. 12, 2019). That decision reiterates Appellants' arguments in its Opening Brief here, and this Court should also reverse the District

Court's denial of Taylor and GCB's Anti-SLAPP Special Motion to Dismiss.

A. The standard of review here is de novo, and therefore Taylor and GCB were not limited only to Colon's claim of a lack of good faith

Colon argues that because his objections to Taylor and GCB's Anti-SLAPP Special Motion to Dismiss were premised on lack of good faith, that the Opening Brief on Appeal here should also only be limited to those arguments. Answering Br. at 19-22. However, the standard of review on an Anti-SLAPP Special Motion to Dismiss is de novo review, and therefore, consideration of the entire motion is properly before this Court. *Coker v. Sassone*, 135 Nev. 8, 11, 432 P.3d 746, 749 (2019).

B. Taylor's statement was substantially true

In *Rosen*, this Court reiterated that under the first prong, the defendant must establish by a preponderance of the evidence that his statements were true or made without knowledge of their falsity. *Rosen v. Tarkanian*, No. 73274, 2019 WL 679266135 *4 (Nev., Dec. 12, 2019). That is precisely what Taylor did in his Special Motion to Dismiss.

Taylor stated that the only counting device recovered that year by GCB was the counting device that was used by Colon while sitting at a

blackjack table at Green Valley Ranch, which was correctly depicted in the video clip played. We know what Taylor said because Taylor's talking points used during his presentation were contained in the PowerPoint notes. Taylor made that statement based on what he observed in the video, his knowledge that Colon was arrested by GCB for the conduct in the video, and his knowledge that no other counting devices were recovered by GCB that year.

While Colon wants to dispute the efficacy of a counting device that only counts in one direction as a tool to use while cheating at blackjack, that is not what is at issue here. Answering Br. at 14. It does not matter whether Colon actually intended to engage in cheating activities when he sat at a blackjack table with a counting device in his hand. What matters is that Taylor knew, through undisputed video footage, that Colon sat at a blackjack table with a counting device in his hand, was arrested and prosecuted for the conduct, and that that was the only counting device recovered by GCB that year.

C. Taylor's statement was made in good faith

Taylor relied on his observation of the video footage and GCB records, which he believed to be true, to come to the conclusion that the

counting device in Colon's hand was the only counting device recovered by GCB that year. This is a statement made in good faith, without knowledge of its falsity.

Furthermore, contrary to Colon's claims, Taylor is not now attempting to improperly use Colon's plea of *nolo* to prove that Colon is in fact a cheater. Instead, Taylor is using the proof of the arrest and conviction to demonstrate that by identifying the counting device in Colon's hand as the only counting device recovered by GCB that year, that he had a good faith basis for making that statement. A plea of *nolo contendre* "authorizes a court to treat the defendant as if he or she were guilty." *State v. Gomes*, 112 Nev. 1473, 1479, 930 P.2d 701, 705 (1996). Taylor was free to rely on the publically available arrest and plea as the truthful foundation in making the statement that that was the only counting device recovered by GCB that year.

D. Colon is a public figure

Colon is now attempting to backtrack from his notoriety in the gaming community, by claiming that if he is a public figure, then anyone else who committed a crime is also a public figure. Answering Br. at 22. That is not what gave Colon the status of being a public figure or limited

purpose figure. "A limited-purpose public figure is a person who voluntarily injects himself or is thrust into a particular public controversy or public concern, and thereby becomes a public figure for a limited range of issues." *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 720, 57 P.3d 82, 91 (2002). This is a question of law, and the court's determination is based "on whether the person's role in a matter of public concern is voluntary and prominent." *Bongiovi v. Sullivan*, 122 Nev. 556, 572 (2006). Colon here is a public figure (or limited purpose public figure) within the gaming industry.

Instead, in the District Court, Colon claimed that even though his face was never shown and his name was never used, because he is such a famous card counter who is an expert on the topic, and is a published author on the topic, that he was immediately recognized by those who saw Taylor's presentation at G2E. APP038. This is the precise definition of a public figure. Therefore, he was required to meet the heightened standard of actual malice when trying to demonstrate fault. Colon cannot do so.

E. NRS 41.660 is constitutional

Colon is continuing to challenge Nevada's Anti-SLAPP Statute's constitutionality because if Appellants' Special Motion to Dismiss were granted, it would deprive Colon of a jury trial. Answering Br. at 31-35.

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

During the 2013 Legislative session, Nevada's Anti-SLAPP statute underwent a major revision, making it more in line with states that encourage and protect free speech, like California, Washington, and Oregon. The Anti-SLAPP statute is designed to protect free speech and the public exchange of ideas against meritless suits designed to chill that free speech. *John v. Douglas Cty. Sch. Dist.*, 125 Nev. 746, 752, 219 P.3d 1276, 1280 (2009). The 2013 version of Nevada's Anti-SLAPP Statute was based largely on Washington's statute, which included the heightened burden of proof for a plaintiff, requiring a demonstration of

clear and convincing evidence by the plaintiff to survive a special motion to dismiss.

However, in direct response to the Washington Supreme Court's decision in *Davis v. Cox*, invalidating the Washington statute in May 2015, the Nevada Legislature amended its Anti-SLAPP Statute to ensure that its statute would not suffer the same fate during the 2015 Legislative session. 183 Wash.2d 269, 351 P.3d 862 (2015).

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

Colon also cites to Minnesota's invalidated Anti-SLAPP statute by citing to the *Leiendecker* decision. However, Minnesota, like Washington, required the heightened standard that the responding party must convince the trier of fact by clear and convincing evidence that the movant is not immune in order to stave off dismissal. *Leiendecker v. Asian Women United of Minn.*, 895 N.W.2d 623, 635 (Minn. 2017) citing Minn. Stat. Ann. § 554.02(2). That heightened burden of proof was found in the 2013 version of Nevada's Anti-SLAPP statute, but was removed in the 2015 revision, which is the version of the statute at issue here.

Instead, in 2015, Nevada took a step back from the heightened burden of proof as Washington and Minnesota had, and looked towards California's lesser burden for a plaintiff to survive dismissal. In reality, to accept Colon's argument, this Court would have to believe that California's Anti-SLAPP statute is unconstitutional too. A few months ago, this Court confirmed that Nevada's Anti-SLAPP statute is modeled on California's. *See Coker v. Sassone*, 135 Nev. ____, 432 P.3d 746 (Jan. 3, 2019). California's Anti-SLAPP Statute is constitutional. *See Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106 (1999). Nevada's is as well.

One of the earliest challenges to California's Anti-SLAPP statute occurred in *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106 (1999). The plaintiff there argued that the state's Anti-SLAPP statute deprived a plaintiff of his right to a jury trial by forcing him to prove his case at the early stages of litigation. The court dismissed this argument, finding that the statute only required a showing of minimal merit as to a plaintiff's claims, not to definitely prove them. *See id.* at 1122-23. The *Briggs* court also cited with approval the public policy underlying a broad application of the statute. *See id.* at 1121-22. It is the distinction between a showing of minimal merit as opposed to establishing affirmatively by clear and convincing evidence that is the difference between why Washington and Minnesota's statutes were found to be unconstitutional, while California's statute, and therefore Nevada's is constitutional.

The District of Columbia directly considered the *Davis* decision in determining whether DC's Anti-SLAPP statute were constitutional. *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213 (D.C. 2016), as amended (Dec. 13, 2018). There, the District of Columbia Court of Appeals held:

> An interpretation that puts the court in the position of making credibility determinations and weighing the evidence to

> determine whether a case should proceed to trial raises serious constitutional concerns because it encroaches on the role of the jury. In view of this concern, we apply the canon of constitutional avoidance, 'an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts.' This canon leads us to interpret the phrase 'likely to succeed on the merits,' undefined in the D.C. Anti-SLAPP statute, in a manner that does not supplant the role of the fact-finder, lest the statute be rendered unconstitutional.

Competitive Enter. Inst. v. Mann, 150 A.3d 1213, 1235–36 (D.C. 2016), as amended (Dec. 13, 2018), *quoting FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). This Court should do the same.

Dealing with a similar issue regarding the Texas Anti-SLAPP statute, Tex. Civ. Prac. & Rem. Code §27.003 et seq., the court in *Deaver v. Desai*, 483 S.W.3d 668 (Tex. App. 2015) found that the evidentiary requirements of that state's statutes did not create any constitutional problems. The Texas statute requires a plaintiff to "establish[] by clear and specific evidence a prima facie case for each essential element of the claim in question." Tex. Civ. Prac. & Rem. Code §27.005. While daunting at first blush, Texas courts have interpreted this language to mean that a plaintiff must merely provide evidence that is "unambiguous, sure, or free from doubt" and that is "explicit or relating to a particular named thing." *Desai*, at 675. The court there stated that "[t]hese terms do not

impose an elevated evidentiary standard, nor do they categorically reject the consideration of circumstantial evidence." *Id.* While this case did not explicitly deal with a constitutional challenge, the standards recited by the court establish that it would withstand constitutional scrutiny. In 2018, the Texas Court of Appeals did directly consider the constitutionality of the Anti-SLAPP statute as it pertains to fact-finding and a right to a trial by jury and rejected each of the plaintiff's constitutional challenges. *Landry's, Inc. v. Animal Legal Def. Fund*, 566 S.W.3d 41, 67 (Tex. App. 2018), reh'g denied (Dec. 31, 2018). This finding was consistent with the holding in *Desai*.

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

OEA v. Parks, 253 Ore. App. 558, 567 (2012)). It specified that, for the statute to remain constitutional, "'the trial court may not weigh the plaintiff's evidence against the defendant's' and 'may consider defendant's evidence only insofar as necessary to determine whether it defeats plaintiff's claim as a matter of law.'" *Lane*, 274 Ore. App. At 652 (*quoting Young v. Davis*, 259 Ore. App. 497, 501 (2013)).

In 2017, this Court exercised its discretion in the *Shapiro v. Welt* case to review de novo the Anti-SLAPP statute's constitutionality for the first time on appeal. *Shapiro v. Welt*, 133 Nev. 35, 39, 389 P.3d 262, 268 (2017). This Court reviewed the same 2015 version of the statute as is at issue here. And this Court found the Anti-SLAPP statute to be constitutional. This Court should do so here again.

There is simply no support of Colon's claim that the Anti-SLAPP statute interferes with his right to a trial by jury. The District Court's role in determining the merits of a Special Motion to Dismiss under NRS 41.660 et seq. does not supplant the jury's role as fact finder in a trial.

F. Appellants did not violate *Brady*, nor does that have any bearing on the case at hand

Colon claims that he was not provided the entirety of the security camera footage from the incident at Green Valley Ranch during his

underlying criminal case, which was prosecuted by the Clark County District Attorney's Office, and therefore GCB or the undersigned somehow violated *Brady v. Maryland*. Answering Brief at 19. Neither the Office of the Attorney General nor GCB was the prosecutor in that case and therefore could not have violated *Brady*. Furthermore, Chief Taylor is not required in this case to present any more of the security camera footage than the short clip he used during his presentation at G2E, which was provided.

G. Appellants' Opening Brief did not violate Rule 28

Colon claims that, despite frequent citations to the accompanying appendix, that Appellants failed to make appropriate citations, and therefore filed a deficient brief. Answering Brief at 11. This is simply not accurate. Appellants' Opening Brief is compliant with Rule 28 and makes frequent, accurate references to the Record on Appeal. This is not a basis upon which Appellants' appeal should be denied.

III. CONCLUSION

Chief Taylor showed an accurate video of an individual who was arrested and criminally prosecuted for use of a counting device at a blackjack table in a single slide during his presentation at G2E in 2017.

Taylor made the statement that that was the only counting deice recovered that year by GCB in good faith, based on his knowledge of the file maintained by GCB. Colon is a public figure, who cannot demonstrate that Taylor made that statement with actual knowledge of its falsity. This Court should reverse the District Court's denial of Taylor and GCB's Anti-SLAPP Special Motion to Dismiss, finding that the statement made is protected under NRS 41.660 et seq.

This Court should also reiterate that the Anti-SLAPP Statute, as amended in 2015 is constitutional.

DATED this 13th day of January, 2020.

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CERTIFICATE OF COMPLIANCE

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 Microsoft Word 2010 in 14 pt. font and Century Schoolbook; or

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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 January, 2020.

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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 January, 2020.

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