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) PETITION FOR REHEARING

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I. POINTS OF LAW OR FACT MISAPPREHENDED OR OVERLOOKED IN THE OPINION

The Opinion misapprehends the method for determining facts in an anti-slapp motion.

The Opinion overlooks the application of Plaintiff's facts (evidence) to the questions presented in violation of the anti-slapp statute and established precedent.

Contrary to the Opinion, the trial court and this court did determine facts critical to the claims of Appellee, Nicholas Colon ("Plaintiff").

In holding that a determination by a mere preponderance is analogous to the standard for dismissal or summary judgment, the Opinion misapplies the outlines of judicial authority and supplants a jury function.

II. ARGUMENT IN SUPPORT OF THE PETITION FOR REHEARING

A. INTRODUCTION

The Opinion of July 30, 2020 ("Opinion"_ should be reheard as its reasoning is inconsistent, it has failed to apply the rule of law, and finally, it patently ignores facts at the forefront of the issues before the Court. Indeed, in finding immunity for Defendant, James Taylor ("Taylor") the Opinion applies a one-sided standard never applied in the annals of jurisprudence. Further, as to the right to jury trial, the Opinion suffers from internal inconsistencies, and misstates the effect of Nevada's anti-slapp statute.

B. THE DECISION OF THE DISTRICT COURT FINDING NO GOOD FAITH COMMUNICATION WAS CORRECT, AND THE COURT FAILED TO APPLY THE MANDATED TESTS IN REVERSING THE DISTRICT COURT

From any perspective, if the defendant fails to show by "a preponderance of the evidence" that the communication was a "good faith communication" under NRS 41.637, then the anti-slapp motion must be denied. *Compare* NRS 41.637 with NRS 41.650, *and see Rosen v. Tarkanian*, 453 P.3d 1220, 1221 (Nev. 2019).[1] In this respect, both the case law and the applicable statute, NRS 41.660(3)(a) and NRS 41.660(3)(d), require the Court's analysis of all the evidence on whether the statement is made in good faith is shown by a preponderance, but the Court's analysis approaches the determination on Taylor's word with no analysis of the evidence on the basis of a preponderance. Instead, its analysis evaluates Taylor's evidence to the exclusion of the Plaintiff's evidence, and this is unwarranted.

To do this the Opinion cites to the portion of *Rosen v. Tarkanian*, 453 P.3d 1220, 1223 (Nev. 2019) providing that "in determining good faith, this court considers "all of the evidence submitted **by the defendant** in support of his or her anti-SLAPP motion."" Opinion, p. 11 (Emphasis added). This was stated in the context of the trial court in *Rosen* to consider evidence submitted by the defendant,

[1] For an abbreviated explanation of the application of the anti-slapp legislation, a flowchart of the statutes application is attached as Addendum 1.

and in no sense a statement that such evidence is to be evaluated to the exclusion of the contrary evidence. Simply, the charge to determine by a preponderance in the statute and in precedent require that the charge to the Court is to consider 'all the evidence before the Court bearing on the anti-slapp motion. Indeed, as expressly stated in NRS 41.660(3)(d), "[The Court shall] [c]onsider such evidence, written or oral, by witnesses or affidavits, as may be material in making a determination pursuant to paragraphs (a)[2] and (b). The Opinion, in limiting the evidence to the "evidence submitted by the defendant" misapprehended the statute and limited its application far more narrowly than its terms require.

As to requiring that all evidence be considered, this is also required by the application of the "preponderance" standard mandated in the statute. The meaning of a "preponderance of the evidence" in Nevada, and universally provides that a "[p]reponderance of the evidence means such evidence as, **when weighed with that opposed to it,** has more convincing force and the greater probability of truth." *Bonacci v. State*, 96 Nev. 894, 898 n.6, 620 P.2d 1244, 1247 (1980)(emphasis added); *State v. Johnson*, 2019 MT 277N, ¶ 1, 398 Mont. 447, 455 P.3d 456 (Mont. 2019); *Thornton v. State*, 139 Ga. App. 483, 487, 228 S.E.2d 919, 922 (1976); *State v. Stockett*, 278 Or. 637, 640 n.3, 565 P.2d 739, 741 (1977). Here, as mentioned at the onset, questions are always determined on "all the evidence," but

[2] This is the reference to the determination of the "good faith communication."

even despite the express direction in the statute to the contrary, the Court here has determined the question solely on the basis of one side's evidence. That is not determining whether there was a good faith communication, but instead, determining that the communicator has the unilateral authority to declare himself immune, even with a lie.

Specifically, in *Rosen* this Court determined that "the relevant inquiry in prong one of the anti-SLAPP analysis is whether a **preponderance of the evidence**" supports a determination that the prong is met. That is, is it shown by a preponderance of the evidence that Taylor believed "the gist of the story" is true. *Rosen* at 1224 (emphasis added). Correlatively, if a preponderance of the evidence, not a preponderance of Taylor's evidence to the exclusion of the Plaintiff's evidence, shows that Taylor did not believe that the "gist of the story" was true, then there can be no "good faith communication." Truly, the fact that all of Taylor's evidence must be considered is merely a recognition that the law provided that all evidence before the Court must be considered.[3] Here, the Opinion relies

[3] It is also worth noting that in *Rosen* the Court never even got to the question as to whether or not the Defendant knew the statement was false as it found the "gist or sting" of the defendant's statements to be substantially true. *Compare Rosen* at 1224 with NRS 41.650, final line.

solely upon the affidavit of Taylor to the exclusion of all other evidence weighing on the issue.[4]

Here the Plaintiff maintained that, by a preponderance of the evidence, the communication by James Taylor can neither be truthful nor made without knowledge of its falsehood. As the Opinion acknowledges, if this can be shown at that level by the Plaintiff, then the anti-slapp motion must be denied. Opinion, p 9.

At the onset of applying this test, as acknowledged by the Court, the "gist or sting" of the communication at issue must be determined. Here Plaintiff maintains that the defamation was an accusation of criminality and cheating ascribed to Plaintiff. Although the Opinion seems to suggest that there was no "gist or sting" of criminality or cheating applicable to Plaintiff in the communication, the evidence that the "gist or sting" was to so characterize Plaintiff is, in a word, overwhelming.

The evidence overlooked and not applied to the analysis includes:

1. The subject upon which Taylor was speaking was "Scams and Cheats" thusly presenting Taylor as an expert. App. 24, ¶ 5.

[4] Curiously, the Opinion relies extensively upon Taylor's denial that he called the Plaintiff a cheater. Taylor admits that he showed the video of the Plaintiff during the section of his presentation entitled "use of a cheating device." App. p. 25, ¶ 9. This is the "sting" referenced in *Rosen* and irredeemably labels the Plaintiff a felon regardless of the denial at App. p. 25, ¶ 10. It is the functional equivalent of calling the Plaintiff a cheater, and in the context of this case, Taylor's denial is irrelevant as his admissions provide all that is required.

2. As part of the presentation, Taylor spoke to the status of NRS 465.075, a felony statute, which was the only subject matter he spoke which would involve the alleged device at issue in this case.
3. He was obviously speaking as an expert and is the deputy chief of enforcement for the Nevada Gaming Control Board. As such, he was necessarily the person to direct and oversee the persons who allegedly called the crowd counter a cheating device and was the superior authority on such matters. *See* Taylor Declaration, app. pp. 24-25.
4. Plaintiff was depicted to an audience of over 300 as a person in possession of a device, to wit: The crowd/tally counter taken from Plaintiff. *Id* at ¶¶ 5, 8.
5. Therefore, in referring to the crowd/tally counter in Plaintiff's possession, the "gist or sting" of such communication was to label the device possessed by the Plaintiff as a device possessed in violation of NRS 465.101.
6. This is further borne out by background on the power-point produced by Plaintiff disclosing Taylor's talking points and clearly indicating that he was speaking to the crowd counter as a cheating

device in violation of NRS 465.101, a criminal statute. Appellee's Appendix, p. 24, ¶ 9.

7. There was no evidence that the item could be used as a cheating device.

8. "There is no evidence that Mr. Taylor was without knowledge" of the falsehood that the crowd counter was a cheating device, "as Mr. Taylor does not make any such claims in his affidavit. District Court Decision, app. p. 154: 5-6, *and compare* Taylor Affidavit, app. pp. 24-25.

9. There is an omission of any evidence that the device could be used as a cheating device. Record, *passim*.

10. The only evidence cited by Taylor is inadmissible hearsay, and although apparently relied upon by the Opinion, was incompetent for consideration under both the hearsay rule and the best evidence rule. *See* Taylor Affidavit, app. 24-25, NRS 51.065(1), and NRS 52.235. Thus, Taylor presented no competent evidence to contradict, let alone disprove, Plaintiff's evidence.

11. Although he necessarily had expansive video in his possession in order to prepare his power-point presentation, Taylor did not dispute nor show any evidence that the Plaintiff ever so much as

looked at the alleged counting device while playing. The absence of such evidence in light of the edited video Taylor possessed is further evidence that Taylor was hiding the fact that he knew that the Plaintiff was not using a cheating device. *Accord* App. p. 29 and video.

12. Taylor's lack of credibility was also shown in the context that he was representing to the crowd at the conference that I had been given a trespass warning at Green Valley Ranch on ten previous occasions (all such instances would necessarily be documented) which was false and with no information that it was true. *Compare* Plaintiff's Declaration, App.") p. 79, ¶ 62, App. pp. 24-25; App. 24, last sentence. (Note, were this representation even close to true, Plaintiff would have been arrested for trespassing pursuant to NRS 207.200.

The mandated preponderance of the evidence standard required that this body of evidence be weighed against Taylor's claim that he believed the truth of his assertion. It was not, and indeed, none of it even entered into the calculation within the Opinion. Thus, the Opinion misapprehended the standard, applied the wrong standard, and reached an improper result.

C. IN FINDING THAT THE RIGHT TO TRIAL BY JURY IS UNIMPINGED IN THE DECISION, THE OPINION IS INTERNALLY INCONSISTENT, FAILS TO APPRECIATE THE ACTIONS TO BE TAKEN BY THE COURT, AND AGAIN, APPLIES AN ERRONEOUS STANDARD

Prong one, as the Court defines it, provides that the court must determine whether or not the statement made by the defendant is false. It also provides that, upon so finding, it must determine whether the defendant made the statement absent knowledge of its falsity. NRS 41.637. Against this, the Opinion holds, "Because the district court need not make any findings of fact specifically regarding a plaintiffs underlying claim and cannot defeat a plaintiffs underlying claim under prong one, we determine that prong one itself does not render the jury-trial right practically unavailable." But the court must determine whether or not the statement is false by a preponderance of the evidence. That is a finding of fact specifically regarding Plaintiff's underlying claim. *Simpson v. Mars Inc.*, 113 Nev. 188, 190 (1997). Simply, the Opinion misapplies the law in making this conclusion.

Moreover, the Opinion also states with citation, that the constitution "guarantees the right to have factual issues determined by a jury." Opinion, p. 4. A preponderance of the evidence is a jury question, and since the founding of our State, is only subject to being upset if there is "a preponderance of evidence against the finding of the jury so great as to satisfy us that there was either an absolute mistake on their part, or that they acted under the influence of prejudice, passion or

corruption." *State v. Yellow Jacket Silver Mining Co.*, 5 Nev. 415, 420 (1870). That is the constitutional standard for the right to trial by jury as such right is to be construed under the common law as of Nevada's entry into the union. *Aftercare of Clark Cty. v. Justice Court*, 120 Nev. 1, 5, 82 P.3d 931, 933 (2004). Here, the statute amended the common law in certain cases to have a judge determine the efficacy of plaintiff's claims by a mere preponderance, thusly exploding the requirement that a preponderance is a jury's determination. This statute does violate Nevada's right to trial by jury, and in failing to recognize the extreme expansion of the trial court's (and appellate court's) ability to weigh the evidence and determine a preponderance, the law has been misapplied and the statute is unconstitutional as written and as applied.

The other perspective forwarded also misapplies the law regarding the right to trial by jury. Again, it is undisputed and confirmed in the Opinion that Nevada's constitutional right to a trial by jury ""Guarantees the right to have factual issues determined by a jury."" Opinion, p. 4 *citing to Tam v. Eight Judicial District Court*, 131 Nev. 792, 796 (2015). Against this, the Opinion discusses two circumstances where there are exceptions to the right to a trial by jury, to wit: 1) Where the claimant has failed to state a claim upon which relief can be granted; and 2) Where there is no "genuine issue of material fact suitable for a jury to resolve." *Id.* The method of application of the first prong of the test for anti-slapp

immunity squarely violates this precept in the context of the case presented as it is solely the court that weighs the evidence as to whether the defendant knew his statement was false.

Added to the cases cited by Colon from other jurisdictions wherein the provisions of an anti-slapp statute were found to violate the constitutional right to a trial by jury, another reported Opinion so holding exists in *Op. of Justices*, 138 N.H. 445, 451, 641 A.2d 1012, 1015 (1994). There the New Hampshire Supreme Court was addressing the constitutionality of a proposed anti-slapp statute, and held:

> Unlike [summary judgment or dismissal] wherein the court does not resolve the merits of a disputed factual claim, the procedure in the proposed bill requires the trial court to do exactly that. In determining whether a plaintiff has met the burden of showing a probability of prevailing on the merits of his or her claim, the trial court that hears the special motion to strike is required to weigh the pleadings and affidavits on both sides and adjudicate a factual dispute. Because a plaintiff otherwise entitled to a jury trial has a right to have all factual issues resolved by the jury, the procedure in the proposed bill violates part I, article 20 [jury trial of right].

As is evident, this unanimous Opinion of the New Hampshire Supreme Court dovetails directly with the Opinion's citation to *Tam v. Eight Judicial District Court*, 131 Nev. 792, 796 (2015). Moreover, as it highlights the jury's duty to determine when a preponderance is met, it is at odds with the analysis of this court.

Moreover, the test under the first prong is as follows: "[I]f the defendant can show "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." *Shapiro v. Welt*, 389 P.3d 262, 267 (Nev. 2017)(Emphasis added). Note that this ruling applying a preponderance of the evidence specifically includes the demonstration that the communication be a "good faith communication." Clearly, a determination based upon applying "evidence" under a burden of proof is being made by the trial court, and a question of fact is implicated.

In addition to saying that this factual determination is not the determination of a question of fact, the Opinion also states that the determination "cannot defeat plaintiff's underlying claim," if it does not affect plaintiff's claim. Here the underlying claim is defamation. The elements of the claim are: "(1) a false and defamatory statement by defendant concerning the plaintiff; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages." *Simpson v. Mars Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997). Under the anti-slapp statute, a good faith communication is one which is either likely (preponderance) true or made without knowledge of its falsity. The first half of the determination (likely true) directly determines the first element of a claim for defamation, and the second half of the determination

(knowledge of the falsity) squarely affects the third element of plaintiff's claim.

Curiously, the Opinion also states that the District Court "does not make any finding of fact" in determining whether the anti-slapp defense applies. It determines by a preponderance that at least one of the elements of the claim is not supported by a preponderance of the evidence. Obviously, this is a question of fact, and the Opinion misapprehends the law when it finds that no questions of fact are determined in the application of the anti-slapp statute.

Perhaps most determinative here is the Opinions alleged low standard for moving forward even when a good faith communication is found by a preponderance. Looking at this standard, to put forth a prima facie claim for defamation, the "plaintiff must prove, (1) a false and defamatory statement by defendant concerning the plaintiff; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages." *Simpson v. Mars Inc.*, 113 Nev. 188, 190 (1997). Plaintiff has also put forth prima facie evidence supporting each element.

The first element is a "**false and defamatory statement**." It is undisputed that Taylor made a presentation that Plaintiff was in possession of a cheating device. He was also discussing this very subject as violative of NRS 465.075. Plaintiff presented direct evidence from two previously qualified experts that the device was not a device violative of NRS 465.075. Further, Plaintiff presented an

analysis under which it was logically inconsistent to term the device at issue as a cheating device or a device which violates NRS 465.075. Taylor presented no evidence whatsoever that the device could be used or possessed in violation of NRS 465.075. Plaintiff presented substantial and prima facie evidence under which a jury could find that Taylor made "a false and defamatory statement concerning the plaintiff."

The second element is the **unprivileged publication**. While Taylor attempted to claim a public figure privilege, neither the Opinion nor the district court decision find any import to the alleged privilege, and neither public figure nor privilege is mentioned in either document. Simply, Plaintiff thrust himself into nothing and is not a public figure concerning this or by reason of alleged fame. *See Bongiovi v. Sullivan*, 122 Nev. 556, 574, 138 P.3d 433, 446 (2006), and Plaintiff soundly demonstrated in the district court that there was no privilege issue. This is not an element applicable to the instant case, and as not being an element, Plaintiff has made the prima facie showing to get past the second element.

The third element is "**fault, amounting to at least negligence**." Here the Plaintiff has as evidence the omission by the Taylor in that Taylor never states that he did not know the crowd counter was not capable of being a cheating device. A failure to deny a fact when it would be natural to do so under the circumstances is evidence of the truth. *Raffel v. United States*, 271 U.S. 494, 497 (1926)("His failure

to deny or explain evidence of incriminating circumstances of which he may have knowledge, may be the basis of adverse inference, and the jury may be so instructed.")*Avery v. Stewart*, 136 N.C. 426, 432-33, 48 S.E. 775, 777-78 (1904)(When a party is charged with knowledge of a fact alleged . . . he should meet the allegation with frankness and candor, and any evasion in his answer to it may be taken as in the nature of an admission, or at least as evidence, of its truth."); *Commonwealth v. Karmendi*, 188 A. 752, 754 (Penn. 1937)("There is a settled principle that omission to speak and act when it would be natural so to do is competent evidence."). Indeed, considering how easy it would have been to say, "I believed that the crowd counter was a cheating device," in relying on the reports of his less knowledgeable underlings, Taylor is flirting with the classic evasive answer. *And see* District Court Decision, app. p. 163: 20-22. This, with other evidence (Taylor is an expert; logically, the crowd counter would not violate the device statute, and it strains credulity that Taylor does not understand card counting as the district court found, Taylor secreted the recordings he had from the court, etc.) demonstrates that Plaintiff had the prima facie evidence to show fault amounting to negligence.

The fourth element is "**actual or presumed damages**." Considering the fact that the nature of the communication here was that Plaintiff feloniously possessed a device which violated NRS 465.075, the presumed damages are present as a

matter of law. *K-Mart Corp. v. Washington*, 109 Nev. 1180, 1192, 866 P.2d 274, 282 (1993)("[F]alse statements made involving [ ] the imputation of a crime" encompass presumed damages). Thus, Plaintiff presented prima facie evidence of each element of his defamation claim. That is what the Opinion says is needed to go to the jury, and in taking this case from the jury and ascribing its evaluation to a judicial officer, Plaintiff's right to trial by jury was destroyed.

Against this body of evidence, the Opinion also holds, "A plaintiff who has failed to meet this burden would not have been entitled to a jury trial, even absent an anti-SLAPP motion to dismiss. The burden under the anti-slapp statute is to show that the evidence does not show that the Plaintiff is likely to succeed. Absent the anti-slapp statute, Plaintiff's burden towards a jury is to show that no reasonable jury could conclude that Plaintiff proved his case. Clearly, Plaintiff's right to trial by jury has been impinged.

It is also worth noting that all Taylor does is state that he relied upon the Board's file in making his presentation. He is the titular and functional boss of the individuals compiling those reports. Under his job and status, he is the person charged with recognizing and correcting erroneous reports. He had no basis to rely upon them, and he cannot escape his responsibility through willful ignorance. His affidavit at best pleads willful ignorance, and at worst, is a patent demonstration of evasive and disingenuous averments. *Accord IBEW Local 396 v. Cent. Tel. Co.*, 94

Nev. 491, 493 n.2, (1978). This was a critical factor in the district court's decision, yet ignored here. There was no basis to ignore this factor, and reconsideration is appropriate.

III. CONCLUSION

This case presents the perfect storm for affirming and strengthening the right to trial by jury in Nevada. It represents an individual who was injured by a State official for which the only recognizable goal would be self-aggrandizement with no legitimate government ends actually served by the actions. As the Opinion notes, the right to a trial by jury has "served as a check against unbridled despotism throughout American history and is protected as a fundamental right under Nevada's constitution. This is a case encompassing these concerns, and for the reasons set forth above, the panel should reconsider its decision and issue a revised opinion affirming the district court.

Dated this 31st day of August, 2020

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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 40(b)(4), it does not exceed 4667 words, and does in fact, as calculated, contain 4008 words.

3. Finally, I hereby certify that I have read this petition for rehearing, 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

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sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 31st day of August, 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 Appeellee's (Dr. Colon's) Petition for Rehearing via the Clerk of the Court by using the electronic filing system on the 31st day of August, 2020.

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ADDENDUM 1

ANTI-SLAPP FLOWCHART