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 ANSWER TO RESPONDENT'S PETITION FOR EN BANC RECONSIDERATION

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I. INTRODUCTION

This Court correctly determined that Chief Taylor's statement at issue constitute a good faith statement made on a matter of public concern and remanded this matter back to the district court for a determination on the second prong of NRS 41.660, whether Colon can make any showing on the merits of his claims.

Respondent is rehashing the same arguments he made in his Answering Brief, claiming that his burden of proof under the Anti-SLAPP statute is too taxing of a standard, and has asked this Court to deem the statute unconstitutional. However, the "preponderance of the evidence" standard that Respondent is complaining of is actually the defendant's preliminary burden under the first prong, which this Court has determined that Appellants have met. Once the burden shifts to the plaintiff, which this Court has correctly ordered the district court to consider, he must only demonstrate a prima facie showing of minimal merit of his claims.

Minimal merit is not an unconstitutionally high burden.

Respondent does not meet the requirements for en banc reconsideration under NEV. R. APP. P. 40A(a).

Nevada's Anti-SLAPP statute is constitutional.

This Court should deny Respondent's request here.

II. LEGAL STANDARD

En banc reconsideration is disfavored, and this court will only reconsider a matter when necessary to ensure consistency in our decisions or when the case implicates important precedential, public policy, or constitutional issues. NEV. R. APP. P. 40A(a).

III. LEGAL ARGUMENT

A. En banc reconsideration is not warranted

Respondent contends that en banc reconsideration is necessary here because Nevada's Anti-SLAPP statute is unconstitutional because should defendants prevail on their Special Motion to Dismiss, his client would be precluded from a jury trial. That is not compelling. Nevada's Anti-SLAPP statute is clearly constitutional and reconsideration is not required.

B. Nevada's Anti-SLAPP statute is constitutional

First, "[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). Respondent has failed to do so. The argument is without merit.

Nevada's Anti-SLAPP statute underwent its first major revision in 2013. The 2013 version of Nevada's Anti-SLAPP statute was based largely on Washington's statute, which included the heightened burden of proof for a plaintiff. In 2015, in direct response to the Washington Supreme Court's decision in *Davis v. Cox* (which was published during the 2015 Nevada Legislative Session), invalidating the Washington statute, the Nevada Legislature amended its Anti-SLAPP statute to ensure that its statute would not suffer the same fate.

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

prior version of the statute which required a heightened evidentiary standard similar to Washington's. Respondent's claim here regarding an unconstitutionally high burden would have passed muster in 2013, but with the 2015 amendment to the statute, fails. Any parallel that Respondent would like to draw between Washington's invalidated statute and Nevada's statute ends with the 2015 amendment.

Respondent also cites to Minnesota's invalidated Anti-SLAPP statute by citing to the *Leiendecker* decision. Petition for En Banc Reconsideration at 11. 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 also.

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, 38, 389 P.3d 262, 267 (2017). This Court reviewed the same 2015 version of the statute as is at issue here. The challenge to the constitutionality of the statute was rejected.

There is simply no support of Respondent'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.

C. Minimal merit is not an unconstitutionally high burden for a plaintiff to survive dismissal

Earlier this year, this Court answered its own question regarding the burden shifting standards under the Anti-SLAPP statute, and noted the difference between Nevada's constitutional statute and Washington's unconstitutional statute. "[W]e now hold that even under the preponderance standard, an affidavit stating that the defendant believed

the communications to be truthful or made them without knowledge of their falsehood is sufficient to meet the defendant's burden absent contradictory evidence in the record. *Cf. Davis v. Cox*, 183 Wash.2d 269, 351 P.3d 862, 867 (2015) (contrasting the more exacting summary judgment standard, which requires 'a legal certainty' that can be defeated by a dispute of a material fact, with a preponderance of the evidence burden, which examines 'whether the evidence crosses a certain threshold of proving a likelihood of prevailing on the claim')." *Stark v. Lackey*, 136 Nev. 38, 43, 458 P.3d 342, 347 (2020).

Respondent is unable to point to any other state's Anti-SLAPP statute that has been invalidated as unconstitutional that has the low burden Nevada and California require. Instead, the only unconstitutional statutes are those with the high burden such as Washington and Minnesota, which Nevada explicitly disavowed.

Also this year, this Court addressed the standard for the second prong, the prong that Respondent is seemingly most concerned about. In *Abrams v. Sanson*, this Court confirmed that to survive an Anti-SLAPP Special Motion to Dismiss, he must demonstrate that his claims have "minimal merit." *Abrams v. Sanson*, 136 Nev. 83, 91, 458 P.3d 1062, 1069

(2020) *quoting Navellier v. Sletten*, 29 Cal.4th 82, 124 Cal.Rptr.2d 530, 52 P.3d 703, 712-13 (2002) (establishing the "minimal merit" burden for a plaintiff). Minimal merit is a far cry from the unconstitutionally heightened burden of legal certainty that Respondent is complaining of here, and is a notably different standard from the invalidated Washington and Minnesota statutes. "As our emerging anti-SLAPP jurisprudence makes plain, the statute poses no obstacle to suits that possess minimal merit." *Navellier v. Sletten*, 29 Cal. 4th 82, 93, 52 P.3d 703, 712 (2002). If a plaintiff's complaint does not demonstrate minimal merit, he is simply not entitled to a jury trial.

This Court defined minimal merit, consistent with California jurisprudence, noting "the plaintiff must demonstrate that his or her 'claims have minimal merit,' which requires showing that the 'complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if Plaintiff's evidence is credited.'" *Omerza v. Fore Stars, Ltd*, 455 P.3d 841 (Nev. 2020) *quoting Bikkina v. Mahadevan*, 193 Cal. Rptr. 3d 499, 511 (Ct. App. 2015).

A defamatory statement made against a public figure at its core is a knowingly false statement made without regard for the truthfulness.

If a plaintiff complaining of defamation can make a showing that the statement was knowingly false, then they have demonstrated minimal merit. On the other hand, a statement that is substantially true, made without knowledge of falsity, or opinion is not defamatory and cannot support even minimal merit. That demonstration of minimal merit is not an unreasonably high burden.

It is the defendant who has to make a heightened showing of the preponderance of the evidence that their statement was made in good faith and was on a matter of public concern. The plaintiff must only make a prima facie showing that the claims alleged in their complaint have minimal merit.

D. Respondent has not provided any opinions that are not consistent

En banc reconsideration is unwarranted where legal opinions are consistent. *Skender v. Brunsonbuilt Const. & Dev. Co.*, 171 P.3d 745, 746 (2007). As outlined above, this Court has issued a series of consistent opinions regarding the burden of proof required first by the defendant, then by the plaintiff, and these all pass constitutional muster.

Furthermore, all of the out-of-state cases that Respondent has cited to fall under one of two categories: consistent with Nevada and California

law or consistent with the invalidated Washington statute, which Nevada no longer follows. The only cases that Respondent can point to that claims to be inconsistent with this Court's ruling in this matter are those states whose Anti-SLAPP statute is more consistent with Washington or Minnesota. There are no states that have invalidated their Anti-SLAPP statutes on constitutional grounds that have the same burden of proof as Nevada and California. This does not serve as a basis for this Court to grant en banc reconsideration.

E. Respondent is rehashing arguments already raised

"Matters presented in the briefs and oral arguments may not be reargued in the petition." NEV. R. APP. P. 40A(c). Respondent has raised all of these arguments already in their Answering Brief filed on December 13, 2019. *See* Respondent's Answering Brief at 26-35.

IV. CONCLUSION

This Court came to the correct conclusion when it reversed the district court's denial of Appellants' Special Motion to Dismiss, determining that Appellants met their burden, and ordered the case back to the district court for further findings on the second prong of NRS 41.660. Respondent is now attempting to challenge this Court's order by

challenging the constitutionality of the Anti-SLAPP statute. NRS 41.660 is constitutional, no en banc reconsideration is warranted here. This matter should be remanded back to the district court for further findings consistent with this Court's July 30, 2020 order.

DATED this 4th day of December, 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 4th day of December, 2020.

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