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 OF AMENDED DECISION

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

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

The Amended Opinion overlooks the application of Plaintiff's facts (evidence) to the questions presented in violation of the anti-SLAPP statute and established precedent. Specifically, it dismisses evidence bearing directly upon the truth of the averments of James Taylor ("Taylor").

Contrary to the Amended Opinion, the Appellee, Nicholas Colon ("Colon") presented, and the trial court did correctly apply, evidence in its determination that Taylor did not believe that Colon had cheated.

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

II. ARGUMENT IN SUPPORT OF THE PETITION FOR REHEARING

A. INTRODUCTION

The Amended Decision (as well as the original Decision) depart from foundational and immutable precepts of the common law and American jurisprudence. Perhaps the most foundational principle in Western law is the concept of evidence. As noted in Black's Law Dictionary, this is simply any

"probative matter." It is, nonetheless, strictly constrained in the courts to relevant evidence. NRS 48.025 ("Evidence which is not relevant is not admissible.").

Since time immemorial in cases at law under the common law, "the jury, not the Court, must determine what the evidence proves." Stephenson v. Dickson, 24 Pa. 148, 152 (1854); COMMENTARIES ON THE LAWS OF ENGLAND, Book III, PRIVATE WRONGS, Ch. 23, Sir William Blackstone (Clarendon Press, 1768)("[A] writ . . . commanding the sheriff "that he cause to "come here . . . twelve free and lawful men . . . by whom the "truth of the matter may be better known . . . to recognize the truth of the issue between the said parties.") (emphasis added)).[1] And here, that right is ensconced in an applicable constitution. Nev. Const. Art. 1 § 3.

B. THE AMENDED DECISION MISAPPREHENDS THE NATURE OF EVIDENCE IN ADDRESSING THE IMPORT OF A SELF-SERVING DECLARATION REGARDING KNOWLEDGE

In the Amended Decision, this Court writes,

> Colon failed to contradict Taylor's claim of good faith. Colon points to declarations that, if believed, would establish that the specific counting device he was caught with cannot be used to cheat at blackjack. But these

[1] Over the centuries concerning common law actions, the sole exception to this has been the concept of summary judgment by which a court can take a case from the jury and summarily issue a judgment for a party. There is a critical limit to this authority, and that is that the court must make a determination that "no reasonable jury" could, under the evidence, resolve the issue other than for the proponent. *Lee v. GNLV Corp.*, 117 Nev. 291, 296, 22 P.3d 209, 212 (2001); *Droge v. AAAA Two Star Towing, Inc.*, 102 U.C.C. Rep. Serv. 2d (Callaghan) 177 n. 11, 136 Nev. Adv. Rep. 33 n. 11 (Nev. App. 2020).

> declarations did not address the correct issue at prong one, which is **whether Taylor *believed* Colon had been caught with a cheating device**, and not whether he was correct.

(Italics in original, other emphasis added).[2] The Amended Decision misapprehends the arguments made by Colon under the evidence. In contradistinction to the statement in the Amended Decision, Colon vigorously contested, and the argument and evidence showed, that Taylor knew/believed that the device was not a cheating device and correlatively, that possession of the device was not a crime.

As noted, in making the determination of the truth of an issue, that determination must be made on "relevant evidence." Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence," NRS 48.015; *Brant v. State*, 130 Nev. 980, 984-85, 2014). Here, the determinative "fact that is of consequence" to the continuation of this action by Colon under Nevada's anti-SLAPP legislation is as follows: When labeling Colon a cheater for possessing a crowd counter, did Taylor know/believe that the device was incapable of violating NRS 465.075, the illegal device statute.

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[2] While the Amended Decision couches the conclusion on Taylor's "belief," the anti-SLAPP statute addresses Taylor's "knowledge," rather than "belief." NRS 41.637, final sentence. This may actually be two sides of the same coin, and Colon argued evidence on the language of the statute, to wit: "Knowledge." Regardless, a person who has "knowledge" of a statement's falsehood cannot have a belief in the statement's truth.

As to the statement in the Amended Decision, the Court's rationale is that "Colon did not address the correct issue at prong one," to wit: Did Taylor know/believe that the device could not be used as a cheating device. Contrarywise, based on evidence, Colon directly addressed and devoted entire paragraphs of evidence analysis addressing the knowledge/belief of Taylor as to whether Colon was, or was not, not cheating. *See* APP047: 3-23; App. 048-49: 7-2. Moreover, it is Taylor's likely knowledge/belief that there was no cheating upon which the District Court made its determination. APP173 ("[T]he evidence shows that Mr. Taylor **most likely knew that the crowd counter could not be used as a cheating device.**"). Taylor's Opening Brief on Appeal, p. 11, (emphasis added). Taylor's knowledge of falsity of his statement was also presented in Appellee's Answering Brief on Appeal, pp. 15-20. Certainly, the Amended Decision fails to recognize or analyze this evidence, and excises the arguments concerning Taylor's knowledge/belief from the record in its decision in asserting that the argument and evidence did not exist. That is, in contradistinction to the Amended Opinion, Colon and the District Court directly addressed "whether Taylor *believed* Colon had been caught with a cheating device."

The Court also demands an impossible standard regarding the "good faith" of a communication when it demands that the declarations directly dispute the belief of the publisher. No one can ever aver as to the subjective knowledge or

belief of another person. *State v. Witucki*, 420 N.W.2d 217, 222 (Minn. App. 1988)("[I[t is improper to testify as to the subjective intention or knowledge of another . . .."); *Thompson v. Wainwright*, 787 F.2d 1447, 1457 (11th Cir. 1986)(Accepting the District Court's ruling that a "witness could not testify to the subjective intentions of another person . . .."); *Fairow v. State*, 943 S.W.2d 895, 899 (Tex. App. 1997)("[I]f the trial court determines that a proffered lay-witness opinion is an attempt to communicate the actual subjective mental state of the actor, the court should exclude the opinion because it could *never* be based on personal knowledge." (Emphasis in original)); *and see King Drug Co. of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797, 2015 U.S. Dist. LEXIS 150151, at *48 (E.D. Pa. Nov. 5, 2015). In short, the Amended Opinion expressly cites the lack of a challenge to the belief in the "declarations," but the law actually forecloses such a challenge. Simply, if any of the "declarations" had stated that 'Taylor did not believe that Colon was cheating,' that portion of the declaration would have been clearly incompetent, and Colon cannot be faulted for not presenting incompetent evidence in response to the Defendants' anti-SLAPP motion.

Rather, such determinations are made on the evidence. *See Babcock & Wilcox Co. v. Nolton*, 58 Nev. 133, 143 (1937); *AT&T Universal Card Servs. v. Mercer (In re Mercer)*, 246 F.3d 391, 409 (5th Cir. 2001). It is error to disregard evidence bearing on the subjective belief of a proponent. *Meyer v. Workers' Comp.*

Appeals Bd., 204 Cal. Rptr. 74, 77 (1984). Indeed, "objective proof is evidence of subjective belief." *See Wilson v. Am. Chain & Cable Co.*, 364 F.2d 558, 563 (3d Cir. 1966). Here there is an abundance of the subjective knowledge of Taylor supporting the fact that he knew the sting of his statements concerning Colon were false regardless of a Declaration purporting to state the obverse.

Taylor is of a status where the fact that the crowd-counter could not be used in violation of NRS 465.075 provides indicia that Taylor knew that the device couldn't be a prohibited device. Before this Court is Taylor's party admission that "Taylor's presentation focused on cheating and cheating devices, **which falls squarely under the purview of Taylor's responsibilities** as Deputy Chief of Enforcement with the GCB." (Emphasis added).[3] This raises a simple issue as follows: Can the executive whose responsibilities for the Gaming Control Board include superior knowledge of, and "responsibility" for, "cheating and cheating devices" believe that a device which cannot, at any level, be used for cheating be a cheating device? The inability of the crowd counter to be so used is evidence, indeed critical evidence, providing a baseline that Taylor, the Board's expert on "cheating and cheating devices" knew that the crowd counter was not a cheating

[3] Note also, for someone in this position to believe that something is a cheating device, he must, by definition, be able to explain how. This Taylor never attempts, and this omission and inability to support his purported lack of belief is further evidence of his knowledge that the crowd-counter could not be used to cheat.

device. Simply, on this evidence, considering his acknowledged responsibility, the trier of fact is authorized to conclude that someone in Taylor's position could not and did not lack the understanding of card counting such that he could believe that the crowd counter was capable of violating NRS 465.075. Yet the Amended Decision erroneously asserts that this was not addressed.

Colon's declarations also directly address this possibility, and therefore, make this fact of consequence (Taylor's actual knowledge) more likely fulfilling the requirements of NRS 48.015. *See* Colon Declaration, ¶¶ 14, 29, 40, and 43. Thus, this is relevant evidence countering Taylor's averment of lack of knowledge as to the falsity of his statement.

Further evidence making Taylor's alleged belief a false statement abounds. As shown in the papers, Taylor withheld information critical to the question of the alleged guilt of Colon; e.g. the unedited video reviewed and edited by Taylor was not produced here, nor in the discovery in the criminal proceeding against Colon. Indeed, in Colon's declaration, he was told that the prosecution falsely asserted that no video of his play existed, yet it was obviously in Taylor's hands for editing. *Id* at ¶ 42. Colon Declaration, APP077, ¶¶ 40-42.[4] Taylor also did not produce it in this matter. In Nevada, there is a presumption that "evidence willfully suppressed

[4] Note that the lie from the prosecutor in the criminal case as averred to by Colon further supports that the video would show a lack of cheating by Colon, and as Taylor edited this video, certainly he was aware of this fact as well.

would be adverse if produced." NRS 47.250(3). Colon swore that the entire video would be sans evidence of cheating. Colon Declaration, APP077, ¶ 40.[5] Despite inarguably possessing this video, it has never been produced. Applying the presumption, at least in his reply in the District Court, Taylor should have produced it and his failure to do so raises the presumption that it would support Taylor's belief that Colon was not cheating or using a cheating device. Thus, there is evidence showing that Taylor had available, and reviewed, evidence directly contrary to his averment.

Added to this are Taylor's proven misrepresentations and improper actions within his declaration. For example, Taylor testifies that he only learned of the identity of Colon following his presentation identifying Colon as a cheater. Taylor Declaration, APP025, ¶ 9. Yet, in ¶ 11 of the same Declaration, Taylor admits that he knew who Colon was at the time he prepared for his presentation at G2E, rendering his prior representation false. At this paragraph Taylor flagrantly violated NRS 48.125. *See* APP069. He did so while grievously omitting the fact that the action against Colon had actually been dismissed. *Compare* Taylor

[5] Also note that Taylor necessarily reviewed this entire video as he edited it in preparation for his presentation. He necessarily would have looked for the evidence of use of the crowd counter in his presentation. It is obvious that he found none as his excerpted clip contained no such use, and because he has failed to produce the video. This is further evidence that he knew that his presentation of Colon as a cheater was false.

Declaration, ¶ 11 with Colon Declaration APP077, ¶ 46; and District Court Opposition, at APP067, exhibit 5 (showing the charges against Colon as "Dismissed before prelim[inary hearing]). Clearly, this leaves the Taylor Declaration, at a minimum, suspect.

There is also the nature of Taylor's declaration as a self-serving declaration claiming innocence. The Amended Decision gives such a declaration special weight. However, in the face of contrary evidence such as that set forth above, the law requires that such a declaration not only not receive special weight, but rather, that such a declaration be looked to as suspect concerning averments of subjective belief or knowledge. *Matter of Sheridan*, 57 F.3d 627, 633-34 (7th Cir. 1995); *Assenza v. Horowitz*, 888 N.Y.S.2d 705, 707 (Sup. Ct. 2009); *United Leasing, Inc. v. Flores (In re Flores)*, Nos. 16-70112, 16-7023, 2018 Bankr. LEXIS 2326, at *21 (Bankr. S.D. Tex. Aug. 6, 2018); *Hoffner v. Bradshaw*, 622 F.3d 487, 500 (6th Cir. 2010). Thus, the Amended Decision misapplies the manner in which averments concerning knowledge or belief are to be addressed under the law.

Other defeciencies in Taylor's Declaration bear negatively upon Taylors veracity. For example, it includes a swath of additional incompetent statement upon which the Amended Decision apparently relies. For example, he supports his alleged belief on the basis of the contents of the Board's file on the matter. Taylor Declaration, APP025, ¶ 6 ("based on the information maintained by the Nevada

Gaming Control Board."). Thus, he presents knowledge premised entirely upon hearsay to the exclusion of his personal knowledge and evaluation. Moreover, the in this regard, Taylor's statements wholly rely upon incompetent evidence as it presents information outside evidence as barred by NRS 52.235, the best evidence rule. This also belies any assertion that Taylor's conclusion is based on personal knowledge, and in including the phrase "based upon" in his declaration, he rendered his declaration incompetent. Indeed, as noted above, so far as the recordings are concerned, Taylor appears to have gone out of his way to prevent this evidence from coming before the trial court, and the Gaming Control Board did likewise regarding the criminal proceedings against Colon. Any consideration given to the averments of Taylor premised upon this information is therefore improper.

The record abounded with evidence that Taylor did know and believe that Colon had not cheated at the time of Taylor's G2E presentation. Further, as the sole evidence to the contrary, Taylor's declaration was incompetent and extremely suspect on numerous bases. There is no stretch whatsoever in recognizing that a trier of fact is free to conclude that a determination "which falls squarely under the purview of Taylor's responsibilities as Deputy Chief of Enforcement with the GCB" is within the parameters of naturally discerning cheating devices and the operation of the game of blackjack. Taylor's denial of knowledge that his

communication falsely accused Colon of cheating is tantamount to a denial that he is the expert on cheating at the Board, and is shown, by evidence, to likely be false. Regardless of the standard (preponderance or no reasonable jury), Colon demonstrated that he is likely to succeed in demonstrating that Taylor did not undertake a "good faith" communication because he knew his representation of Colon's malfeasance was false.

C. THE DECISIONAL BASIS FOR THE AMENDED DECISION IS INTERNALLY INCONSISTENT

At p. 11 of the Amended Decision, the Court modifies the original decision and expressly holds that the gist/sting of Taylor's presentation is that the person on the video was cheating. Amended Decision, p. 11. Nonetheless, the Court grants the anti-SLAPP motion on the declaration of Taylor noting, in part, that he never called Colon a "cheater," finding that this denial invites the Court to undermine the 'gist or sting" which is otherwise clear. *Id*. In expressly recognizing that the "gist or sting" of the communication labeled Colon a criminal, to claim that this assertion can be mitigated, as the Court does, is inconsistent with the finding that the statement was defamatory if false and known to be false.

D. THE IMMUTABLE CONSTITUTIONAL RIGHT TO TRIAL BY JURY IS UPENDED IN THE DECISION AND AMENDED DECISION

The Amended Decision, at p. 4, provides: "The constitution "guarantees the right to have factual issues determined by a jury."" When faced with evidence on

both sides regarding whether the proponent of a communication knows it was false, the Amended Decision also effectively acknowledges that this is a question of fact. Amended Decision, p. 12 (Contradictory evidence in the record can undermine an averment of good faith). After acknowledging that the constitution requires that questions of fact are to be determined by a jury, the Amended Opinion then holds contrary to a question of fact appearing in the matter. This internal inconsistency warrants rehearing and reconsideration.

Also, as noted originally, numerous other courts have found analogous anti-SLAPP statutes unconstitutional as an invasion of the right to trial by jury. Contrarywise, the Amended Decision provides a litany of cases purporting to challenge these other courts and expressly stating that their anti-SLAPP statutes are "equivalent" to the Nevada anti-SLAPP statutes. The Amended Decision misapprehends the construction of these other statutes, and on the critical issue presented, they are in no means equivalent. Specifically, the Amended Decision and Nevada's anti-SLAPP statute place a burden on the plaintiff to show a court that they are likely to succeed by a "preponderance." Of the cases cited, this critical distinction shows that application of Nevada's anti-SLAPP statute is analogous to those courts finding the statute violates the right to trial by jury, and more importantly, the cases cited found that the fact that a test equivalent to summary

judgment (i.e., no reasonable jury could conclude) saved those statutes from such constitutional infirmity.

For example, in *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1236 (D.C. 2016), the Court was addressing an anti-slapp statute which required that the Plaintiff "demonstrate[] that the claim is likely to succeed on the merits." *Id* at 1227. While the statute may be equivalent, the court saved the statute by rewriting out the "likely to succeed" language, and substituting its test providing "whether a jury properly instructed on the applicable legal and constitutional standards could reasonably find that the claim is supported in light of the evidence that has been produced or proffered in connection with the motion." *Id* at 1232. That is, they applied a summary judgment standard in order for the anti-SLAPP statute to be constitutionally consistent with the right to trial by jury.

Despite this clear language, in order to save the constitutionality of the statute, the Court of Appeal literally rewrote this language (calling it a construction) requiring only that the Plaintiff demonstrate, Within the Amended Decision, at p. *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106, 1123, 81 Cal. Rptr. 2d 471, 481, 969 P.2d 564, 574 (1999); *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213 (D.C. 2016); and *Handy v. Lane Cty.*, 360 Or. 605, 607, 385 P.3d 1016, 1017 (2016). In *Handy* the Oregon Supreme Court went into the legislative history of Oregon's anti-slapp legislation, and determined that the standard applicable on a

plaintiff was functionally identical to the standard on a summary judgment motion. That is, if a reasonable trier of fact could find the issue in favor of the proponent, then the anti-slapp statutes would not bar suit. This was critical in the Court finding the statute constitutional, and the Court expressly noted that this was an addition to the statute at variance with California's statute in order to uphold the constitutionality of the anti-slapp legislation. Nevada did not make this addition, Nevada's statute requires proof by a preponderance, and the *Handy* decision, too, supports the analysis that the Nevada anti-slapp legislation is unconstitutional as a violation of the right to trial by jury.

Looking to *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1236 (D.C. 2016), the Court was addressing an anti-slapp statute which required that the Plaintiff "demonstrate[] that the claim is likely to succeed on the merits." *Id* at 1227. Despite this clear language, in order to save the constitutionality of the statute, the Court of Appeal literally rewrote this language (calling it a construction) requiring only that the Plaintiff demonstrate, "whether a jury properly instructed on the applicable legal and constitutional standards could reasonably find that the claim is supported in light of the evidence that has been produced or proffered in connection with the motion." *Id* at 1232. That is, the burden to defeat an anti-slapp motion is not "likely to succeed on the merits" as the statute states, but whether the plaintiff has presented evidence sufficient to defeat a classic summary judgment motion.

The case of *Briggs v. Eden Council for Hope & Opportunity*, 969 P.2d 564, 574 (Cal. 1999), also cited in the Amended Decision as equivalent, took language similar to Nevada's anti-slapp language and noted a, "potential deprivation of jury trial that might result were [section 425.16 and similar] statutes construed to require the plaintiff first to *prove* the specified claim to the trial court . . .." That is what the preponderance of the evidence test does here. To address this recognized unconstitutionality, the *Briggs* court also rewrote the statute and held that it reads "the statutes as requiring the court to determine only if the plaintiff has stated and substantiated a legally sufficient claim." This is a materially different standard than that applied in the Decision here, and again, in surviving a challenge under the right to a trial by jury, the California court altered its statute from the test here to a statute which was distinctly not "equivalent" to the Nevada statute or practice.

The final decision the Amended Decision applies is *Landry's, Inc. & Hous. Aquarium, Inc. v. Animal Legal Def. Fund*, 566 S.W.3d 41, 67 (Tex. App. 2018). The *Landry* court expressly found that the alleged question of fact is immaterial to the disposition of the case, and there is no constitutional analysis appended to the decision. There is, simply, no finding or consideration of the constitutional question, and the case cannot apply here.

In short, all anti-SLAPP statutes surviving constitutionality place a burden on the plaintiff to establish a claim at the level to defeat summary judgment. Anti-

SLAPP statutes stricken on constitutional grounds place a higher burden on the plaintiff, some analogous to the burden of a preponderance here, and are unconstitutional. The Amended Decision errs in finding the constitutional statutes "equivalent" to the Nevada statutes when, in fact, they are materially different on the very issue of the plaintiff's burden as applied.

III. CONCLUSION

The Amended Decision, while providing a different analysis concerning the establishment of good faith, continues with its holding rendering Nevada's anti-SLAPP statute a get out of jail free card to any defendant willing to swear that he believed his statement was true. Affidavits and declarations are limited to personal knowledge, but the Amended Decision requires an averment challenging the subjective belief of the defendant—something that a plaintiff can never swear to with personal knowledge. In doing so, it dismisses all evidence tending to show that the denial of knowledge was a false denial. This is not the test, and the Amended Decision essentially renders the anti-SLAPP statute an absolute immunity statute even if a defendant knows his statements are false so long as he will swear to the contrary. Clearly, the legislature did not intend to create absolute immunity, and the Amended Decision should be reheard, reconsidered, and reversed.

Further, under the Amended Decision's own words ("The constitution "guarantees the right to have factual issues determined by a jury.""), the Amended Decision makes a judicial decision on a factual issue sans jury. The law cannot provide both, and as one is constitutional, the right to trial by jury should win out.

Dated this 19th day of January, 2021

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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 40(b)(3) 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, contains no more than 4147 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 sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 19th day of January, 2021

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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 of Amended Decision via the

Clerk of the Court by using the electronic filing system on the 19th day of January, 2021.

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