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 *EN BANC*

RECONSIDERATION OF THE PANEL'S AMENDED OPINION

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PETITION

NOW COMES Plaintiff/Appellant, Dr. Nicholas Colon ("Plaintiff"), and herewith petitions pursuant to NRAP 40A for *en banc* reconsideration of the Decision of a panel of this Honorable Court issued July 30, 2020, and amended on December 30, 2020. This Petition is premised upon both grounds stated in NRAP 40A, to wit: 1) reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court and 2) the proceeding involves a substantial precedential, constitutional or public policy issue. Regarding uniformity, the Decision in this matter conflicts with *Rosen v. Tarkanian*, 453 P.3d 1220 (Nev. 2019) and other authority. Concerning the constitutional issue of the right to trial by jury, Nev. Const. Art. 1, § 3, presented in this case is an issue of first impression in Nevada and the Decision is at odds with the majority of jurisdictions that have considered the issue. Moreover, as shown below, the application in the Decision presents irreconcilable anomalies between the constitutional provision and its application. Certainly, a constitutional issue addressing and arguably denying an express civil right of the citizens of Nevada is of such gravity that it merits consideration of the entire Court with a decision that is internally consistent and consistent with plain meaning.

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POINTS AND AUTHORITIES

A. FACTS AND BACKGROUND

On July 30, 2020, a panel of this Honorable Court ("panel") filed its Opinion in this matter reversing the District Court's denial of Appellants/Defendants' (collectively "Defendants") Motion to Dismiss under Nevada's anti-SLAPP statute, NRS 41.635 to 41.670. *Taylor v. Colon*, 468 P.3d 820, 822 (Nev. 2020)("Opinion"). On December 30, 2020, the panel issued an order amending the Opinion and an Amended Opinion. ("Amd. Op.").

Plaintiff's claim is for defamation. App. 001-005. The undisputed facts include a presentation by Appellant/Defendant James Taylor ("Taylor") at a conference put on by Appellee/Defendant American Gaming Association ("Association") to approximately 300 attendees. It appears that Taylor spoke as a representative of his employer, the Appellant/Defendant Nevada Gaming Control Board ("Board").

Plaintiff premised his action on Taylor labeling Plaintiff as cheating at gambling. Such a statement, if false, is defamation *per se*.[1] The panel initially implied that Taylor had not labeled Plaintiff a "cheater." Opinion, pp. 11-12. In the

[1] *K-Mart Corp. v. Washington*, 109 Nev. 1180, 1192, 866 P.2d 274, 282 (1993), *receded from in part on unrelated grounds*, *Pope v. Motel 6*, 121 Nev. 307, 317, 114 P.3d 277, 283 (2005).

Amd. Op., this conclusion was effectively reversed with the panel expressing that the gist or sting of Taylor's words labeled Plaintiff a criminal. Amd. Op., p. 11.

The evidence was also overwhelming that the ascription of criminality to the device held by Plaintiff was false. The crime at issue was the alleged illegal use of a device under NRS 465.075. The device, a crowd counter, is not "designed, constructed, altered or programmed to obtain an advantage at playing any game in a licensed gaming establishment" as required by the statute thusly foreclosing criminality under the statute's express terms.

More importantly, undisputed evidence showed that the crowd counter could not be used in the prohibited manner. *See* Declaration ("Dec.") of Jacobson, App. 061, ¶ 10; Dec. of Aponte, App. 063, ¶ 10;[2] *accord* Plaintiff's Dec., App. 075; ¶¶ 29-31, 35. Plaintiff also presented a reasonable legal explanation for his possession of the device. Plaintiff's Dec., App. ¶¶ 32-35. But most telling, Taylor did not show, and has never claimed, that the device could be used in the strategy of card counting, although that is what he charged Plaintiff with in his communication. District Court Decision, App. 185: 20-22. Further, as expressly recognized by the District Court, Taylor never represents to the District Court that he did not know of the falsity of the communication. District Court Decision, App. 164: 5-6.

[2] Reference to these declarations evinces that both affiants are qualified experts at gaming.

Evidence before the District Court also demonstrated that Taylor was the Board's expert on the criminal application of Nevada's gaming laws as he was the Deputy Chief for the Enforcement Division of the Nevada Gaming Control Board. App. 027. That is, he is second in command of the law enforcement arm of the Board. *Accord* "About" Statement, <https://gaming.nv.gov/index.aspx?page=46> (Viewed 10/19/20), *and see* Taylor Declaration, App. 024, ¶ 3. As he was speaking on the subject of "Scams Cheats, and Blacklists," this minimally establishes that he holds himself out as an expert on such matters by admission. Taylor has twenty-five years of experience as a law enforcement officer. App. 024, ¶ 2. This was the seventh such presentation he had made. Taylor Declaration, App. 025, ¶ 7, *and see* <https://www.reviewjournal.com/business/casinos-gaming/basic-casino-cheating-scams-hardest-to-catch-gaming-experts-say/> (viewed 10/19/20) and <https://lasvegassun.com/news/2014/may/22/casino-gaming-cheats-are-increasingly-sophisticate/> (viewed 10/19/20) for other descriptions of these earlier presentations where Taylor was held out as the State's expert on cheating.[3] In short, the evidence showed that Taylor, by position, training, experience, and reputation, was a person

[3] As an aside, it is demonstrable that Taylor made false or misleading statements in his Declaration. At App. 25, ¶ 25, Taylor swears to Plaintiff pleading to a crime without mentioning that the plea was a submission under a *nolo* plea with no acknowledgement of guilt. App. 069, ¶ last. Certainly, his attorneys necessarily knew that this was inadmissible under NRS 48.125(2), but the statement was constructed in a way to attempt to avoid Taylor's evident violation of the statute.

who necessarily knew what could and could not be used in violation of NRS 465.075. And the District Court so found. That is, someone in his position would necessarily recognize that the possession of the crowd counter was not criminal, and therefore, he knew his communication was false. *See* District Court Decision, App. 186: 6-8 ("[T]he evidence shows that Mr. Taylor most likely knew that the crowd counter could not be used as a cheating device . . ..").

On *de novo* review on appeal, the panel of this Court issued a decision finding that Appellants demonstrated that Taylor's presentation was made in good faith. Amd. Op. 12-13. The Decision recognizes that this is to be made on the evidence presented to the court to the exclusion of any jury based on a preponderance of the evidence. This basis for such finding was violative of both the Plaintiff's right to a trial by jury and, in application, it conflicts with other authority mandating the procedure for reaching such a conclusion. Moreover, the breadth of the Amd. Op. encompasses the entire anti-SLAPP statute, and while there appears within the Amd. Op. an implication that it does not, the language in the Amd. Op. clearly states that it does.

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B. ANALYSIS

1. THE DECISION'S DETERMINATION THAT NEVADA'S CONSTITUTIONAL RIGHT TO TRIAL BY JURY WAS NOT INFRINGED BY THE APPLICATION OF ITS ANTI-SLAPP STATUTE RUNS CONTRARY TO THE MAJORITY RULE AND IGNORES SUBSTANTIVE AND IMPORTANT RIGHTS AND PROTECTIONS HELD BY LITIGANTS

The right to trial by jury is ingrained in our civilization. Sir William Blackstone called it the "best preservative of English liberty." 3 William Blackstone, *Commentaries*. Infringing on this right was one of the foundational complaints of the American Founders when they declared independence from King George III. *The Declaration of Independence* ¶ 20. Our founding fathers included the right to trial by jury in The Bill of Rights. U.S. Const. Amd. 7. Clearly, the protections afforded in the Nevada Constitution are of the highest order, and protection of them is the charge of every branch of Nevada government. And here, we are dealing with infringement of a fundamental and sacred constitutional right. *See Awada v. Shuffle Master, Inc.*, 123 Nev. 613, 621, 173 P.3d 707, 712 (2007).

In Nevada, our original constitutional convention found this right so sacrosanct as to include it in Nevada's founding document. It is construed as the very same right found in the United States Constitution. *Andersen v. Eighth Judicial Dist. Court*, 448 P.3d 1120, 1123 (Nev. 2019). This right continues today, and since Nevada's founding in 1864 it has constrained the legislature and the courts from infringing upon a right to a jury.

It was recognized at the State's constitutional convention that it was the government of the State that would come after the guarantee. As noted by an esteemed founder, Thomas Fitch,[4] at the 1864 convention,

> Men who are engaged in the profession of the law do not naturally respect the jury system. They come so much in contact with the evils of that system that they are willing to do anything in order to mitigate them. But, nevertheless, the people are wedded to the jury system, and I do not think we could adopt any clause which would be so hurtful to the chances of the adoption of our constitution . . .."

Official Report of the Debates and Proceedings in the Constitutional Convention of the State of Nevada Assembled at Carson City, July 4th, 1864. And before this Court is the very caution raised.

In the Amd. Op. a litany of cases purport to address the question posed in this case, but they do not. The premise in the Amd. Op. is that anti-SLAPP statutes have been found constitutional in a number of states. There is, nonetheless, a discrepancy between the anti-SLAPP statutes found not to infringe on the right to trial by jury, and those that find that the statutes do infringe upon the right to a trial by jury. None of the decisions cited in the Amd. Op. uphold the constitutionality of a state's anti-SLAPP statute where **a court** is to determine an issue of fact by a preponderance of

[4] Washoe County District Attorney, Nevada Representative to the United States House of Representatives, Arizona legislature, California legislature, U.S. Senate delegate from Utah Territory, and hired defender of Brigham Young, and Morgan and Wyatt Earp. He earned the published moniker of the Silver-Tongued Orator of the Pacific Slope.

the evidence, and all the cases cited in the Decision or by the Plaintiff indicate that such an anti-SLAPP statute is unconstitutional.

For example, the Amd. Op. cites to *Landry's, Inc. & Hous. Aquarium, Inc. v. Animal Legal Def. Fund*, 566 S.W.3d 41, 67 (Tex. App. 2018), for the proposition that "a movant's burden to establish a valid defense by a preponderance of the evidence under Texas' equivalent anti-SLAPP statutes does not violate a plaintiffs (sic) right to a jury trial." Amd. Op. 8. It does not. The *Landry* court expressly finds that the alleged question of fact is immaterial to the disposition of the case, and there is no constitutional analysis appended to the decision. *Landry's*, 566 S.W.3d at 50("[W]e do not reach those arguments."). Simply, the alleged factual issues raised were non-justiciable and irrelevant, the constitutional issue was never reached, and any reliance on *Landry* is misplaced.

Looking to another case relied upon in the Amd. Op., *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. Conspicuously absent from the statute was any provision analogous to NRS 41.637 requiring an adjudication of a good faith communication.[5] In order to save the constitutionality of the statute, the court of appeal literally rewrote language requiring an evidentiary conclusion (calling it a

[5] The same absence is conspicuous in the California anti-SLAPP scheme as well.

construction) by 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.

Addressing the case upon which the panel relies, *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106, 1123, 81 Cal. Rptr. 2d 471, 481, 969 P.2d 564, 574 (1999), there the Court 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 . . .." But Briggs suffers the same distinction as *Mann*, *supra*. California does not have a first prong to its anti-SLAPP analysis. In deciding a factual issue under a preponderance of the evidence standard, the province of the jury is directly invaded under the Nevada scheme.

There is no basis for finding that a diminished standard under prong-two relieves the burdensome standard under prong one from constitutional infirmity. The analysis of the other states does not apply to the panel decision, a preponderance of the evidence standard is stated as to the application of prong one under the statutes,

and the fact that this is to be determined by the court, and not a jury, violates the right to a trial by jury regardless of what other states do with their analysis effectively limited to prong two.

The law highlights one factor: If an issue of liability is to be decided on the basis of a preponderance of the evidence determined by a judge, then the right to a jury is infringed. Here, if it is shown by a preponderance of the evidence that the alleged defamation was not made in a good faith communication, a defendant has no safe harbor at any level under Nevada's anti-SLAPP statutes. Taking this analysis away from the jury and giving it to the court directly violates Nevada's constitution.

Finally, of note, in those courts where the determination of a fact issue must be shown by a preponderance as determined by a court, the courts have no problem finding the unconstitutionality of such a requirement. *See Leiendecker v. Asian Women United of Minn.*, 895 N.W.2d 623 (Minn. 2017); *Davis v. Cox*, 183 Wash. 2d 269, 295, 351 P.3d 862 (2015); and *Op. of Justices*, 138 N.H. 445, 451, 641 A.2d 1012, 1015 (1994): *Hi-Tech Pharm., Inc. v. Cohen*, 208 F. Supp. 3d 350, 355 (D. Mass. 2016)(Finding that judicially determining a preponderance in an anti-SLAPP suit infringes on the right to trial by jury as it involves "[c]redibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge."); *accord In re Gawker Media LLC*, 571

B.R. 612, 633 (Bankr. S.D.N.Y. 2017).[6] Certainly, this split of authority on the general question merits review by the full Court on this critical constitutional issue. And considering the fact that Nevada is currently the only state apparently recognizing that court can make a specific and critical factual determinations based on a preponderance of the evidence without violating the claimant's right to a trial by jury, the need for such full review is even more compelling.

2. CONCERNING PRONG ONE OF THE ANTI-SLAPP STATUTES, THE DECISION APPLIES A STANDARD CONTRARY TO APPLICABLE NEVADA AND NATIONAL PRECEDENT IN DETERMINING THAT APPELLANTS SHOWED THAT THEY HAD A LIKELIHOOD OF PROVING A GOOD FAITH COMMUNICATION

Even if the test from the anti-SLAPP statutes passes constitutional muster, the panel decision runs afoul of Nevada precedent in its application of that test. Nevada precedent expressly provides that a determination of whether or not Plaintiff survives an anti-SLAPP motion can turn on a preponderance of the evidence standard as to whether a communication is made in good faith. *Rosen v.*

[6]There the court noted:

> [T]he special motion requires the Court to evaluate the facts and make factual findings in determining whether the plaintiff has shown a probability of success. Thus, the court must decide disputed factual issues without the benefit of a trial and its attendant protections not the least of which is the ability to cross-examine witnesses. It is not surprising that the highest courts of two states have concluded that comparable anti-SLAPP statutes violate the right to a jury trial under that particular state's constitution.

Tarkanian, 453 P.3d 1220, 1223 (Nev. 2019). The Amd. Op., admittedly, tips its hat to this standard, but fails to apply it.

The analysis in the Amd. Op. approaches the determination of good faith on Taylor's word with no analysis of the evidence on the basis of a preponderance. Nonetheless, such analysis is an absolute requirement. NRS 41.660(3)(a).

Instead, the panel's analysis evaluates Taylor's evidence to the exclusion of Plaintiff's evidence. This is clear when the Amd. Op. states, "We do not weigh the evidence, but instead accept the plaintiffs (sic) submissions as true and consider only 'whether any contrary evidence from the defendant establishes its entitlement to prevail as a matter of law.'" Amd. Op. 9. The decision essentially says that the Plaintiff's evidence is irrelevant, and any colorable assertion of good faith by the proponent establishes good faith regardless of contrary evidence.

Curiously, a determination of a preponderance is impossible at law without weighing the evidence as the Amd. Op. states the Court will not do ("We do not weigh the evidence."). But in deciding by a preponderance, as the Amd. Op. purports to do, weighing the evidence is its very charge. 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); *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 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.

In making this statement the Amd. Op. relies upon *Coker v. Sassone*, 432 P.3d 746, 750 (Nev. 2019), which was a denial of an anti-SLAPP motion to dismiss. The context in *Coker* was that the Defendant had failed to come forward with any evidence that the statement was in good faith, and the language relied upon in the decision was pointing out that that was a burden on the defendant. The District Court found the current circumstances to parrot the facts in *Coker*. *Compare Coker* with District Court Decision, App. pp 194-195. It did not suggest, as the panel adopted, that the decision be made solely on the basis of whether the Defendant's evidence demonstrates, to the exclusion of Plaintiff's evidence, that

the statement was made in good faith, but included Plaintiff's evidence in the evaluation as the law requires.[7]

In this respect, how can a preponderance, as Nevada's statute requires, be made by only looking at the evidence on one side of the equation. Simply, it cannot, and the Amd. Op. contradicts the test in *Rosen*, *supra.*

On this, the Decision states,

> Taylor's declaration states that he acquired all of the information, videos, and photographs used in his presentation through GCB investigations, and that the information contained in his presentation was true and accurate. This declaration shows that the gist of Taylor's presentation was either truthful or made without knowledge of its falsehood.

Thus, Defendants escape liability on the mere affidavit of Defendant without any analysis of the countervailing evidence the District Court used to determine a preponderance. *Accord* District Court Decision, App. 185-186.

If, as the Court stated, it accept[s] the plaintiffs (sic) submissions as true," then it is true that the crowd counter cannot be used criminally, and it is true that it cannot be used in counting cards. Against this, the Amd. Op. accepts an averment from Taylor providing that based on the record in the Gaming Control Board's

[7] Note that the Amd. Op. suggests that it is irrelevant that the most qualified person in Nevada concerning what is and is not illegal concerning gaming crimes does not have an opinion as to whether that which he called cheating is in fact cheating. This omission is the Plaintiff's evidence of knowledge and it is not irrelevant.

files, the statements were true. But Taylor conspicuously avoided stating that he, personally, believed they were true, and the "accepted" evidence of Plaintiff shows that those records were necessarily false. Moreover, Taylor played a game with his affidavit stating that his presentation was a true and accurate presentation of the information maintained by the Nevada Gaming Control Board. App. 25: 2-3. This is no different than Taylor stating that he found misinformation in the information maintained by the Nevada Gaming Control Board, and published the misinformation while knowing the information was false. Nothing indicates, one way or another, whether he believed the information was true. In this sense, his affidavit parrots the *Coker* defendant's assertions, and like the Court in *Coker*, the District Court correctly denied the anti-SLAPP motion. District Court Decision, App. 173: 6-7. Simply, when all the evidence is considered and a preponderance of the evidence standard is applied, the District Court's determination that "Mr. Taylor most likely knew that the crowd counter could not be used as a cheating device" is foursquare an appropriate conclusion. District Court Decision, App. 173:7-8.

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. The Amd. Op. correctly notes that this is the proponent's (here Taylor's) burden, but fails to apply two other required factors.

First, this determination must be made on all material evidence before the court. NRS 41.660(3)(d). Secondly, it ignores the converse, which is a war between the parties' evidence, weighed and applied by the court, to make this determination. This is a material part of the validity of the claim, outright disabling to the defense in its application, and of equal import to the analysis under each prong.

The mandated preponderance of the evidence standard required that all the 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 Amd. Op. Thus, the Amd. Op., misapprehended the standard, applied the wrong standard, and reached an improper result. It should be subjected to *en banc* consideration to address these issues and inconsistencies.

The Amd. Op. also departs from Nevada precedent in remanding the matter back to the district court for determination of prong two under the anti-SLAPP statutes. *See* Amd. Op. Conclusion. In *Rosen v. Tarkanian*, 453 P.3d 1220, 1221 (Nev. 2019), this Court addressed a situation where a district court was reversed in its finding of a lack of a good faith communication. The "preponderance" standard was recognized and applied. The question of the right to a trial by jury of this issue was not raised. The decision made it clear that upon finding a good faith communication, the only issue remaining (prong two) was whether there was evidence under which a plaintiff could make out a *prima facie* case where a jury

could determine that the claim in favor of the plaintiff. *Rosen,* 453 P.3d at 1225; Amd. Op. 7, ¶ 1. That determination in *Rosen* was made by the appellate court without remand.

Per *Rosen*, in a defamation case this is to be determined on whether the claim is supported in each of the elements for defamation listed as "(1) a false and defamatory statement by [a] 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." *Id.* Here, the evidence is overwhelming that the statement (using a device to gain an advantage at gambling) is false. Two qualified experts opined that the device could not be so used. The Plaintiff stated that it could not be so used, and he was not using it for such purpose. Despite extant video of Plaintiff's play, no video has been produced showing that he even looked at the alleged device. No one has claimed that it could be so used. Element one is met under any standard.

Element 2 is an unprivileged communication to a third person. No privilege has been asserted by the defendant. Taylor communicated his statements ascribing cheating to the Plaintiff to 300 persons. The publication is admitted and element two is met.

Element three requires fault, at least amounting to negligence. Plaintiff presented Taylor's status showing that someone in his position would have known

that the statements were false. Taylor indicates that he made no independent analysis of the truth of the statements, but relied upon third parties. There is also the entire analysis found in the Appellee's (Plaintiff's) Answering Brief, pp. 16-19. Strong, if not compelling, evidence of fault amounting to at least negligence, is present here.

And the final element is a given. Here the gist of the statements recognized in the Amd. Op. confirm an entitlement to presumed damages. *K-Mart Corp. v. Washington*, 109 Nev. 1180, 1192, 866 P.2d 274, 282 (1993), *receded from in part on unrelated grounds*, *Pope v. Motel 6*, 121 Nev. 307, 317, 114 P.3d 277, 283 (2005). In short, the record before the panel shows that Plaintiff met the burden under prong two for each element of the defamation claim to be decided by a jury in favor of Plaintiff which establishes the lack of entitlement to anti-SLAPP relief on Taylor's motion.

Rosen notes that the determination of the denial of an anti-SLAPP motion is on *de novo* review. *Rosen*, 453 P.3d at 1222. The foregoing was before the panel when it reversed the denial of Taylor's anti-SLAPP motion. There was more than enough evidence before the panel in order for it to conduct a *de novo* review under the second prong of the anti-SLAPP statutes and deny Taylor's motion under the *de novo* review. This did not occur, and the panel decision errs in remanding the

matter rather than just denying the matter under the Plaintiff's demonstration that prong two of the anti-SLAPP statutes cannot be met by Taylor.

3. *EN BANC* CONSIDERATION IS ALSO WARRANTED DUE TO THERE BEING AN INCOMPLETE OPINION BEING THE ONLY PUBLISHED DECISION ON THE ISSUES PRESENTED

One other factor commands *en banc* reconsideration. Currently, the original opinion is published. The Amended Opinion is not. As currently constituted, the public record on this matter is incomplete, and a unified and single opinion is necessary.

C. CONCLUSION

This case merits full court consideration under Nevada's appellate procedures. There is a jury question here, but a jury has been denied even though the Nevada Constitution requires that a jury not be denied.

Further, we have a situation where a District Court and the Supreme Court panel reached diametrically opposed conclusions on the very same issues applying what appears to be the same law and the same facts. It is a question of fact that both determined, clearly implying a right to a jury trial, but neither find such right. This must be cleared up, and again, *en banc* review appears appropriate.

Wherefore, Plaintiff request that *en banc* review be authorized, that supplemental briefing occur, and that matters at this level of importance be scheduled for full hearing and oral argument. Alternatively, it is requested that the

panel decision be reversed, that the Court direct that Taylor's anti-SLAPP motion be denied, and that the matter be remanded to proceed in course.

DATED this 25th day of March, 2021.

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CERTIFICATE OF COMPLIANCE
PURSUANT TO RULE 40A

1. I hereby certify that the Petition for En Banc Reconsideration and supporting points and authorities 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:

_X_ It has been prepared in proportionally spaced typeface using Microsoft Word in Times New Roman, 14 pt.

____ It has been prepared in a monospaced typeface using ___ with ___.

2. I further certify that this brief complies with the page- or type volume limitations of 40A because it is either:

_X_ Proportionately spaced, has a typeface of 14 points or more, and contains 4635 words; or

___ Monospaced, has 10.5 or fewer characters per inch, and contains____ words or lines of text; or

_ _ Does not exceed 10 pages.

DATED this 25th day of March, 2021

Nersesian & Sankiewicz

/s/ Robert A. Nersesian
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Nersesian & Sankiewicz, and on the 25th day of March, 2021, a true and correct copy of the foregoing APPELLEE'S (DR. COLON'S) PETITION FOR EN BANC CONSIDERATION OF THE PANEL'S AMENDED OPINION was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system:

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