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 OF THE PANEL'S AMENDED OPINION

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I. INTRODUCTION

Despite Colon's repeated attempts at invalidating Nevada's Anti-SLAPP statute, NRS 41.660 is constitutional, and is designed to protect individuals from meritless suits filed primarily to chill the defendant's exercise of First Amendment rights. This Court should remand this case back to the District Court for analysis of the second prong of the Anti-SLAPP statute, because the Court correctly concluded that Taylor's statement was a good faith statement made on a matter of public concern.

II. ARGUMENT

A. Nevada's Anti-SLAPP Statute, like California's, is Constitutional

"Statutes 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).

California courts have considered the question of whether there is any constitutional implication of an individual's right to a jury trial in considering an Anti-SLAPP special motion to dismiss. California courts have consistently rejected arguments similar to Colon's.

There are a number of California cases that have expressly held that the Anti-SLAPP statute does not unconstitutionally prohibit someone their right to a jury trial. "Anti-SLAPP is no impediment to redress of grievances or jury trial rights." *Klem v. Access Ins. Co.*, 17 Cal. App. 5th 595, 608, 225 Cal. Rptr. 3d 711, 722 (2017).

> [S]ection 425.16 does not bar a plaintiff from litigating an action that arises out of the defendant's free speech or petitioning. It subjects to potential dismissal only those causes of action as to which the plaintiff is unable to show a probability of prevailing on the merits (§425.16(b)), a provision we have read as requiring the court to determine only if the plaintiff has stated and substantiated a legally sufficient claim.

Equilon Enterprises v. Consumer Cause, Inc., 29 Cal. 4th 53, 63, 52 P.3d 685, 691 (2002).

"So construed, section 425.16 provides an efficient means of dispatching, early on in the lawsuit, [and discouraging, insofar as fees may be shifted,] a plaintiff's meritless claims." *Id.* Quoting *Paul for Council v. Hanyecz*, 85 Cal.App.4th 1356, 1364, 102 Cal.Rptr.2d 864 (2001).

"Section 425.16 is one of several California statutes providing a procedure for exposing and dismissing certain causes of action lacking

merit… properly construed section 425.16, subdivision (b) does not violate the right to a jury trial." *Lafayette Morehouse, Inc. v. Chron. Publ'g Co.*, 37 Cal. App. 4th 855, 867, 44 Cal. Rptr. 2d 46, 53 (1995).

Colon tries to distinguish the breadth of California case law upholding the constitutionality of that Anti-SLAPP statute by claiming that California's is too different from Nevada's to carry weight. Colon specifically challenges Nevada's two-step process, requiring first that the defendant demonstrate that his statement was a good faith statement made on a matter of public concern, and second the burden shifts to the plaintiff to demonstrate a probability of prevailing on his claims. NRS 41.660(3). Colon claims that Nevada is the only state to require this two-step process. However, Nevada's Legislature expressly stated that we are to look to California for guidance on the Anti-SLAPP jurisprudence. NRS 41.665. Further, in reviewing California's statutory language, it is clear that California also follows this two-step burden shifting requirement.

California's Anti-SLAPP statute requires:

> A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution

> in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

CAL. CIV. PROC. CODE § 425.16.

California and Nevada both require that before considering the merits of a plaintiff's claims, first the statement made must be in furtherance of a person's right of petition or free speech under the constitution in connection with a public issue. Nevada expressly states that it is the defendant's obligation to meet the burden before evaluating whether the plaintiff has a probability of prevailing on his claim.

Procedurally, courts have evaluated the California Anti-SLAPP statute as also being a two-step process:

> A court considering a motion to strike under the anti-SLAPP statute must engage in a two-part inquiry. First, the defendant must make a prima facie showing that the plaintiff's suit arises from an act in furtherance of the defendant's rights of petition or free speech. Second, once the defendant has made a prima facie showing, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the challenged claims.

Mindys Cosms., Inc. v. Dakar, 611 F.3d 590, 595 (9th Cir. 2010) quoting *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1110 (9th Cir. 2003)

(internal quotation marks omitted). See also *Safari Club Int'l v. Rudolph*, 862 F.3d 1113, 1119 (9th Cir. 2017).

Colon has given this Court no reason to look beyond California's laws and make a new determination regarding the constitutionality of this Anti-SLAPP statute. Nevada's Anti-SLAPP statute (like California's) is constitutional.

B. This Court correctly determined that Taylor's statement was a good faith communication on a matter of public concern

Chief Taylor, in a 121 slide powerpoint presentation to gaming convention attendees, showed a 9-second video clip of an individual sitting at a blackjack table with a counting device in his hand. Taylor did not use the individual's name, show his face, display his booking photo following his arrest, or intimate that he had been convicted of any crime. Taylor described that as the only cheating device recovered that year by the Gaming Control Board. The fact remains that that was the only cheating device recovered by the GCB that year. It was recovered when Colon was arrested by AGENCY on DATE at Green Valley Ranch. Colon was arrested for Use or Possession of a Cheating Device to Obtain an Advantage at a Gaming Establishment and Cheating at Gaming on

May 16, 2017 for the very conduct depicted in the video clip shown during Taylor's G2E presentation. Colon's Complaint admits that he did possess a device used for counting and he does not challenge that he had previously been removed from properties for card counting.

The first prong, which is the only prong at issue here, is whether Taylor in his presentation made a good faith statement on a matter of public concern. 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. The Enforcement Division is the GCB's law enforcement division, with the primary responsibility to conduct criminal and regulatory investigations, gather intelligence on organized crime groups involved in gaming related activities, and make recommendations on candidates for the "List of Excluded Persons." "[S]tatements warning consumers of fraudulent or deceptive business practices constitute a topic of widespread public interest, so long as they are provided in the context of information helpful to consumers." *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 262 (9th Cir. 2013).

Here, Taylor was presenting on fraudulent behavior, cheating activities, and cheating devices in the gaming context at a gaming expo. This clearly constitutes a statement made concerning the public interest. While California's anti-SLAPP law, similar to Nevada's, provides no statutory definition of "an issue of public interest," California courts have established guiding principles for what distinguishes a public interest from a private one: (1) "public interest" does not equate with mere curiosity; (2) a matter of public interest should be something of concern to a substantial number of people; a matter of concern to a speaker and a relatively small specific audience is not a matter of public interest; (3) there should be some degree of closeness between the challenged statements and the asserted public interest—the assertion of a broad and amorphous public interest is not sufficient; (4) the focus of the speaker's conduct should be the public interest rather than a mere effort to gather ammunition for another round of private controversy; and (5) a person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people. *Shapiro v. Welt*, 133 Nev. 35, 39, 389 P.3d 262, 268 (2017), citing *Piping Rock Partners,*

Inc. v. David Lerner Assocs., Inc., 946 F.Supp.2d 957, 968 (N.D. Cal. 2013), aff'd, 609 Fed.Appx. 497 (9th Cir. 2015).

This was not a small, niche presentation, consisting of nothing more than curiosity of a few onlookers. G2E is a large expo, with over 26,000 people focused on the gaming industry, and Mr. Taylor's presentation was well attended. The focus of the presentation was on cheating, fraud, and devices used in cheating, as investigated by the GCB. The short 9-second video depicting Plaintiff featured him sitting at a blackjack table with a counting device in his hand. The statement made was simply that the counting device in his hand was the only counting device obtained that year. This was a statement made to a substantial number of people all working in or interested in the gaming industry, with the entirety of the presentation focusing on GCB's law enforcement responsibilities of identifying and arresting individuals for cheating, using cheating devices, and engaging in fraud or theft. The entire presentation was made on a matter of public concern. Taylor and GCB therefore met the first prong of the Anti-SLAPP statute.

Taylor made his statement in good faith. His declaration stated that he obtained the video clip from GCB, which was part of an official investigation. He also stated that he knew Colon was arrested for and plead nolo to a crime relating directly to the conduct depicted in the video. All of those facts support a finding that this was a good faith statement made on a matter of public concern.

Whether this particular counting device is an effective tool in card counting is irrelevant. The fact remains that Colon was on video holding the counting device in his hand while at a blackjack table, Colon was arrested for possession of that device while at the blackjack table, the device was seized as a cheating device by the GCB, and Colon plead nolo to a reduced crimes related to possessing the counting device while at a blackjack table. Taylor made the statement regarding the counting device in good faith and was on a matter of public concern.

III. CONCLUSION

Nothing in Colon's petition overcomes the presumption of the validity of Nevada's Anti-SLAPP statute. Taylor's statement was a good faith statement made on a matter of public concern. This case should be

remanded back to the District Court for findings on the second prong of the statute.

DATED this 19th day of April, 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 foregoing document via the Clerk of the Court by using the electronic filing system on the 19th day of April, 2021.

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