

IN THE SUPREME COURT OF THE STATE OF NEVADA

JASON T. SMITH,
Appellant,

vs.

KATY ZILVERBERG; AND
VICTORIA EAGAN,
Respondents.

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Elizabeth A. Brown
Clerk of Supreme Court

Case No. 80154

DC No.: A-19-798171-C

REPLY IN SUPPORT OF
MOTION TO EXPEDITE
APPEAL

Respondents Katy Zilverberg and Victoria Eagan, by and through their undersigned counsel respectfully submit this Reply in support of their Motion to Expedite the briefing, oral argument, and resolution of this appeal.

DATED this 18th day of February, 2020.

/s/ Margaret A. McLetchie

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Nev. R. App. P. 2 states that “[o]n the court’s own or a party’s motion, the court may—to expedite its decision or for other good cause—suspend any provision of these Rules in a particular case and order proceedings as the court directs....” To oppose expediting, Mr. Smith cites to out-of-jurisdiction authorities to imagine that this Court’s discretion is limited. It is not, and Mr. Smith’s arguments fail to overcome the obvious: there is a significant public policy goal to be furthered by quickly resolving this anti-SLAPP matter and clarifying the scope of permitted speech. Further, the legal issues have been briefed extensively and no prejudice will result from an expedited appeal. This Court should expedite briefing.

II. ARGUMENT

A. THIS COURT HAS DISCRETION TO EXPEDITE REVIEW.

By its plain language, Nev. R. App. P. 2 gives this Court two rationales for suspending any provision of its rules: “to expedite its decision or for other good cause.”¹ Thus, this Court has wide discretion to change the briefing schedule. *See Ybarra v. Filson*, 869 F.3d 1016, 1029 (9th Cir. 2017) (citing Nev. R. App. P. 2) (“the Nevada Rules of Appellate Procedure do not constrain the inherent authority of the Nevada Supreme Court[.]”). For instance, this Court has expedited

¹ “Other good cause” in fact implies that expediting decisions itself is “good cause.”

proceedings based on the movant's economic hardship and the paucity of unbriefed issues before the appellate court. *See Bd. of Cty. Comm'rs of Clark Cty. v. Las Vegas Disc. Golf & Tennis, Inc.*, 110 Nev. 567, 568–69, 875 P.2d 1045, 10465-46 (1994) (“appellants asked this court to expedite the appeal process because of the economic hardship to appellants and because the issues presented in this appeal were fully briefed in the court below[...] Cause appearing, we granted appellants’ request to expedite the appeal.”). Here, just as in that case, there is economic hardship to Respondents in the accrual of fees and costs and in the delays in enforcing the district court’s order granting them attorney’s fees and a statutory award. And here, the issues presented in Mr. Smith’s appeal have been briefed extensively in the district court. Indeed, Mr. Smith nowhere claims that expedited review would prejudice him.

This Court even has discretion to render an immediate decision in this matter pursuant to Nev. R. App. P. 2. *See Cook v. Maher*, 108 Nev. 1024, 1025, 842 P.2d 729, 729 (1992) (“[R]espondents filed a motion requesting this court to render an immediate decision in this case. Cause appearing, we grant this request. See NRAP 2. Although no briefs have yet been filed in this case, this court has received and reviewed the record on appeal. Disposition of this appeal turns upon our resolution of a single, purely legal issue.”). Here, disposition likewise turns on the resolution of purely legal issues. As Mr. Smith concedes, the “main issue in this case on appeal is whether [Mr. Smith] is a public figure[.]” (Opp., p. 4.) This Court, like the district

court, need not look past Mr. Smith’s Verified Complaint to answer this question. In the Complaint’s own words, Mr. Smith “is a well-known public figure in the thriving community and with the general public.” (**Addendum A**, ¶ 11.)

B. OTHER COURTS’ RULES ARE IRRELEVANT.

Mr. Smith’s arguments against expedited briefing rely entirely on irrelevant rules and cases. First, just because this case is not a criminal matter with mandatory expedited treatment, that does not change the fact that this Court can expedite some civil cases over others. Second, Mr. Smith’s citations to federal statutes, the Sixth Circuit Court of Appeals, and the Kansas and Illinois Supreme Court Rules regarding specific circumstances that merit expedited review in those jurisdictions (*see generally* Opp., p. 5) have even less bearing on whether this Court should exercise its discretion to expedite the instant appeal pursuant to Rule 2.²

Third, it is irrelevant that “[i]n Nevada, there is no specific statute or rule which provides for an expedited appeal in cases involving news media subpoenas.” (Opp., p. 4.) While First Amendment issues can merit expedited attention by this Court³, Mr. Smith’s argument is misplaced; there has never been a subpoena issued

² For example, Mr. Smith argues that because Ms. Zilverberg and Ms. Eagan have not met an imaginary threshold—stating an “issue of profound significance for such a preferential briefing or oral argument setting” (Opp., p. 2)—this Court should not expedite this appeal. There is no such limitation on this Court’s discretion.

³ For example, this Court has expedited matters concerning the First Amendment by allowing them to proceed as petitions rather than appeals in the ordinary course. *See, e.g., Las Vegas Review-Journal v. Eighth Judicial Dist. Court in & for Cty. of Clark*,

in this case and Ms. Zilverberg and Ms. Eagan do not contend that they are members of the news media. Mr. Smith again misses the point: the First Amendment and Nevada’s anti-SLAPP statute protect journalists and non-journalists alike from plaintiffs like Mr. Smith who seek to abuse the legal system. As the anti-SLAPP statute reflects in its mandate that the district court hold expedited hearings (*see, e.g.* Nev. Rev. Stat. 41.660(3)(f)), speedy resolution of cases like this one promotes free speech—and this Court may expeditiously resolve a case like this one for that reason.

C. THE MOTION TO EXPEDITE IS TIMELY.

Without authority from Nevada to support his false claim that the Motion was untimely, Mr. Smith argues that “[i]n the Third Circuit, expedited appeals are governed by Local Appellate Rule 4.1, which provides [a 14-day window for moving to expedite the appeal and imposes other procedural constraints.]” (Opp., p. 6.) The Nevada Rules of Appellate Procedure, applicable here (*see* Nev. R. App. P. 1(a)), do not have such procedural limitations. Moreover, Mr. Smith ignores that this case was in the Court’s Settlement Program. Ms. Eagan and Ms. Zilverberg participated in that process in good faith and hoped to avoid further briefing and fees in this case.

D. RESPONDENTS DO NOT HAVE ILL MOTIVE.

Nothing in the Nevada Rules of Appellate Procedure conditions expediting an

134 Nev. 40, 46, 412 P.3d 23, 28, *reh’g denied* (Mar. 6, 2018), *reconsideration en banc denied* (Mar. 21, 2018), *cert. denied sub nom. Hartfield v. Eighth Judicial Dist. for Nevada, Clark Cty.*, 139 S. Ct. 148, 202 L. Ed. 2d 35 (2018).

appeal on the movant’s “real motive”— which, according to Mr. Smith, is “an attempt to collect on [Respondents’] award of attorney’s fees quicker.” (Opp., p. 6.) In any case, such a “motive” would be consistent with the aims of Nevada’s anti-SLAPP statute, which is to make a speaker “immune *from any civil action* for claims based upon the communication.” Nev. Rev. Stat. § 41.650 (emphasis added). Being immune from any civil action—not merely from damages—means being expediently compensated for fees and costs. Expedited briefing is both procedurally and substantively proper. In fact, it is Mr. Smith who appears to want to delay the resolution of this matter to avoid paying what he owes due to his frivolous lawsuit, which he barely endeavored to defend in district court—hoping instead that he could delay and rely on the relative lack of Respondents’ relative lack of resources.

III. CONCLUSION

This Court should expedite the disposition of this appeal and order as follows:

- (1) opening brief due 14 calendar days after the Court’s order granting the Motion;
- (2) answering brief due 14 calendar days after the opening brief is filed; and (3) reply brief due 7 calendar days after the answering brief is filed.

DATED this 18th day of February, 2020.

/s/ Margaret A. McLetchie

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing REPLY IN SUPPORT OF MOTION TO EXPEDITE APPEAL was filed electronically with the Nevada Supreme Court on the 18th day of February, 2020. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

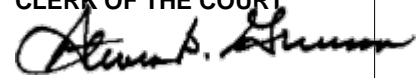
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ADDENDUM A



CASE NO: A-19-798171-C
Department 20

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DISTRICT COURT

COUNTY OF CLARK, NEVADA

JASON T. SMITH, an individual,

Plaintiff,

Case No:
Dept. No.:

COMPLAINT

v.

KATY ZILVERBERG, an individual;
VICTORIA EAGAN, an individual; and DOES I
through X, inclusive, and ROE
CORPORATIONS I through X, inclusive,

Defendants.

**(Arbitration Exemption; Amount in
Controversy Exceeds \$50,000.00; Injunctive
Relief)**

Plaintiff Jason T. Smith ("Plaintiff" or "Smith"), an individual, by and through counsel of record, the law firm of Holley Driggs Walch Fine PuzeY Stein & Thompson, hereby alleges and complains against Defendant Katy Zilverberg ("Zilverberg") and Victoria Eagan ("Eagan", collectively with Zilverberg referred to herein as "Defendants") as follows:

THE PARTIES

1. Plaintiff Jason T. Smith is, and was at all relevant times to this action, an adult resident of Clark County, Nevada.

2. Upon information and belief, Defendant Katy Zilverberg is, and was at all relevant times to this action, an adult resident of Clark County, Nevada.

///

3. Upon information and belief, Defendant Victoria Eagan is, and was at all relevant times to this action, an adult resident of Clark County, Nevada.

4. The true names and capacities, whether individual, corporate, associate, or otherwise of Defendants herein designated as Does I through X and Roe Corporations I through X, inclusive, are not known to Plaintiff at this time and are therefore named as fictitious defendants. Plaintiff will seek to amend this Complaint to allege the true names and capacities of Does I through X and Roe Corporations I through X when and as ascertained.

JURISDICTION AND VENUE

5. Court has subject matter jurisdiction over this case and venue is proper in Clark County, because Defendants are Clark County, Nevada residents and because the claims at issue involve defamatory statements that were published in, among many other places, Clark County, Nevada.

GENERAL ALLEGATIONS

6. Plaintiff repeats, realleges, and incorporates by reference the preceding paragraphs of this Complaint as though fully set forth herein.

7. Plaintiff has been coined "America's #1 thrifter" and currently tours the country teaching others how to thrift and buy and sell online.

8. Plaintiff was the star of Spike TV's Thrift Hunters and now hosts two (2) YouTube shows Thrifty Business & Selling Past Your Expiration Date, Being Thrifty Over 50.

9. Plaintiff has well-known and trusted connections with Ebay and WorthPoint, the leading online resource for finding, valuing and pricing your antiques and collectibles with.

10. Plaintiff has also recently made guest appearances on the hit television series, Pawn Stars.

11. Plaintiff is a well-known public figure in the thrifting community and with the general public.

12. Plaintiff has sustained a profitable business as an entrepreneur and expert in the thrifting community, providing advice and expertise to individuals relating to thrifting and buying

1 and selling online. Plaintiff's business relies on his reputation in the thrifting community and with
2 the public.

3 13. Defendants are members of the thrifting community are both full-time eBay sellers.

4 14. Upon information and belief, Defendants are engaged and currently living together
5 in Las Vegas, Nevada.

6 15. Defendants are also avid YouTubers and have a consistent presence on various
7 social media platforms, including Instagram, Twitter, and Facebook.

8 16. Plaintiff has a prior relationship with Defendants as members of the thrifting
9 community and was formerly friends with Defendants.

10 17. Zilverberg also previously worked for Smith in his business.

11 18. After the fallout of their friendship with Plaintiff, Defendants have engaged in a
12 vengeance to slander and defame Plaintiff.

13 19. On or about June 14, 2018, Defendant Zilverberg posted a video on YouTube
14 entitled "Jason T Smith is an abusive bully" (the "YouTube Video"), wherein Defendant
15 Zilverberg goes on an approximately 33-minute rant about Plaintiff and makes countless
16 misstatements and false allegations regarding Plaintiff and his character, all in a clear intentional
17 attempt to damage Plaintiff's business.

18 20. Defendant Zilverberg makes false statements that Plaintiff has and will try to "take
19 people down." Defendant Zilverberg makes false statements that even go as far as to state that
20 Plaintiff has, and will, find out where people live in order to "take them down," inferring that
21 Plaintiff is predatory.

22 21. Defendant Zilverberg also falsely states that Plaintiff has, and will, intentionally get
23 persons thrown out of various business events, again to allegedly "take people down" and
24 Defendant Zilverberg even makes statements that Plaintiff has caused individuals to want to
25 commit suicide.

26 ///

27 ///

22. These statements made by Defendant Zilverberg falsely infer, among other things, that Plaintiff is predatory and has stalked individuals, which has a severe effect on his reputation and has damaged his business.

23. Defendant Zilverberg has continued to promote and publicize the YouTube video across her social media platforms and Defendant Eagan has continued to endorse Defendant Zilverberg's statements in the YouTube video across her social media platforms.

24. Since the time of the YouTube Video, Defendants and their agents, i.e. close friends and family, have continued to post false and defamatory statements about Plaintiff in an attempt to destroy his reputation and damage his business.

25. Recently, on or about April 25, 2019, Defendant Eagan posted statements on her Facebook that Plaintiff has multiple restraining orders against him. This post was endorsed by Defendant Zilverberg.

26. Defendants have falsely alleged to the public that Plaintiff has a criminal record, which Plaintiff does not. These statements have a severe impact on Plaintiff's reputation and business in the community.

27. Defendants have and will continue to post false and defamatory statements about Plaintiff.

28. The false statements published by Defendants available to countless millions of people with access to Defendants' websites and other media, the exact number of whom actually read and/or heard the defamatory statements being unknown at this time to Plaintiff.

29. The false and defamatory information was published by the Defendants with the intent to harm the Plaintiff's reputation due to the personal history between the Defendants and the Plaintiff. The Defendants made the decision to publish the false information through their websites and social media platforms, and therefore all of the Defendants are the publishers of the information as a matter of law.

30. Defendants knew or should have known that the false and defamatory statements were not true prior to publishing them.

31. Defendants' publication of the false and defamatory statements constitutes defamation per se because the statements were published to harm Plaintiff's personal and business reputation.

32. Defendants' false publications/statements are libelous and slanderous on their face. The statements have a clear tendency to injure Plaintiff personally and in his occupation. Defendants' statements about Plaintiff naturally harm Plaintiff's reputations by impugning and placing into doubt his honesty and integrity, and the false statements have had the natural effect of decreasing the number of people willing to engage in business with Plaintiff, thereby negatively impacting Plaintiff's business.

33. As a proximate result of Defendants' false publications/statements, Plaintiff has suffered loss of his reputation and business relations, all to his general damages in an amount in excess of \$15,000, the exact amount to be proven at trial.

34. As a proximate result of Defendants' false publications/statements, Plaintiff has suffered loss of his reputation and business relations, all to his special damages in an amount in excess of \$15,000, the exact amount to be proven at trial.

35. As a proximate result of Defendants' false publications/statements, Plaintiff has been required to retain the undersigned counsel to prosecute the instant action and is entitled to an award of his reasonable attorneys' fees and costs associated with the instant action.

FIRST CLAIM FOR RELIEF
(Defamation Per Se)

36. Plaintiff repeats, realleges, and incorporates by reference the preceding paragraphs of this Complaint as though fully set forth herein.

37. Plaintiff has enjoyed a good reputation, both generally and in his occupation, for a number of years.

38. Plaintiff is a public figure and a leader in the thrifting community. Plaintiff is well-known and trusted in the thrifting community, as well as in the general public.

39. Plaintiff's business consumes of touring the country to provide advice and expertise to individuals in the area of thrifting, eBay, and buying and selling online.

40. Plaintiff's business depends on his reputation for trustworthiness, honesty, and reliability.

41. Defendants have made and/or endorse false statements that Plaintiff has multiple restraining orders against him, and Defendant have continued to make statements inferring that Plaintiff is predatory and malicious.

42. These statements are all false and defamatory and constitute defamation per se because the statements are harmful to the Plaintiff's personal and business reputation. Defendants' false publications were disseminated to anyone with access to the internet and Defendants' websites and other media.

43. The statements published by Defendants are available to countless millions of people with access to Defendants' websites and social media platforms, the exact number of whom actually read and/or heard the defamatory statements being unknown at this time to Plaintiff.

44. The statements/publications are false as they pertain to Plaintiff, as Plaintiff does not have any restraining orders against him, Plaintiff predatory in any manner, nor has Plaintiff tried to "take anyone down."

45. Defendants' false publications/statements are libelous and slanderous on their face. The statements have a clear tendency to injure Plaintiff personally and in his occupation. Defendants' statements about Plaintiff naturally harm Plaintiff's reputation by impugning and placing into doubt his honesty and integrity, and the false statements have had the natural effect of decreasing the number of people willing to engage in business with Plaintiff, thereby negatively impacting Plaintiff's business.

46. As a proximate result of Defendants' false publications/statements, Plaintiff has suffered loss of his reputation all to his general damages in an amount in excess of \$15,000, the exact amount to be proven at trial.

47. As a further proximate result of Defendants' false publications/statements, Plaintiff has suffered the following special damages: the false publications/statements have had the natural effect of decreasing the number or individuals willing to engage in business with Plaintiff, thereby

decreasing Plaintiff's business. Plaintiff has been specially damaged in an amount in excess of \$15,000, the exact amount to be proven at trial.

48. Further, Plaintiff is entitled to special damages because the publications/statements are defamation per se as they have the natural effect of damaging Plaintiff's professional reputation.

49. Defendants' false publications/statements were published with malice as Defendants knew that these publications/statements were false when made and/or had reason to doubt the truthfulness of these publications/statements when made. Further, Defendants' personal history and animosity toward Plaintiff was the reason for Defendants' publication of these defamatory publications/statements on their websites and social media platforms, again demonstrating Defendants' malice. Thus, Plaintiff is entitled to an award of punitive damages against Defendants.

50. As a result of the aforementioned conduct on the part of Defendants, it has been necessary for Plaintiff to hire an attorney to prosecute this matter, such that an award of reasonable attorney's fees is appropriate in this matter.

SECOND CLAIM FOR RELIEF
(Conspiracy)

51. Plaintiff repeats, realleges, and incorporates by reference the preceding paragraphs of this Complaint as though fully set forth herein.

52. Upon information and belief, Defendant Zilverberg and Defendant Eagan have both explicitly tactically conspired to harm Plaintiff and his reputation and have each made and/or endorsed one another's defamatory statements with the intention of harming Plaintiff.

53. Upon information and belief, Defendants acted in concert, and intended to accomplish the unlawful objectives described herein for the purpose of harming Plaintiff.

54. As a proximate result of the conduct of Defendants as herein alleged, Plaintiff has been damaged in excess of \$15,000.00.

55. Defendants engaged in willful, malicious, intentional, oppressive and despicable conduct and acted with willful and conscious disregard of Plaintiff's rights and welfare, thereby

justifying an award of punitive and exemplary damages.

56. As a result of the aforementioned conduct on the part of Defendants, it has been necessary for Plaintiff to hire an attorney to prosecute this matter, such that an award of reasonable attorney's fees is appropriate in this matter.

THIRD CLAIM FOR RELIEF
(Preliminary and Permanent Injunction)

57. Plaintiff repeats, realleges, and incorporates by reference the preceding paragraphs of this Complaint as though fully set forth herein.

58. Immediate and irreparable injury will result to Plaintiff unless this Court enters an injunction, pursuant to NRCP 65, enjoining Defendants and their agents, servants, employees, attorneys, subsidiaries and any other individual or entity in active concert or participation with it who receives actual notice of the order, from publishing the aforementioned defamatory statements/publications.

59. Defendants' actions in publishing the aforementioned defamatory statements/publications are causing irreparable harm to Plaintiff because (1) injuries related to Plaintiff's potential loss of business cannot be readily quantified and relief may never be forthcoming; and (2) Defendants' continuing conduct in publishing the defamatory statements/publications inflicts injury to Plaintiff's goodwill, reputation, and his business.

60. Plaintiff has a likelihood of success on the merits given that there is no dispute that Defendants have published false statements of fact about Plaintiff that are defamatory on their face. Plaintiff has a likelihood of success as to defamation per se due to the fact that the aforementioned defamatory statements/publications involve misstatements about Plaintiff's criminal history, including misstatements that he has restraining orders against him, as well as misstatements intentionally directed to harm Plaintiff's business and his reputation.

61. In view of the fact that the damage Plaintiff has sustained, and continues to sustain, as a result of Defendants' unlawful activities, Plaintiff has no adequate remedy at law.

62. Accordingly, Plaintiff is entitled to a judgment enjoining Defendants from publishing the aforementioned defamatory statements regarding Plaintiff.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that the Court enter judgment as follows:

1. Awarding Plaintiff actual damages from Defendants in an amount in excess of \$15,000.
2. Awarding Plaintiff special damages from Defendants in an amount in excess of \$15,000.
3. Awarding Plaintiff punitive damages from Defendants in an amount in excess of \$15,000.
4. Issuing an order preliminarily and permanently enjoining Defendants' and their respective agents, servants, officers, directors, employees and all persons acting in concert with them, directly or indirectly, from publishing the defamatory statements about the Plaintiff articulated in this Complaint;
5. Awarding Plaintiff his reasonable attorneys' fees and costs incurred in bringing and maintaining this action;
6. Awarding such other and further relief as this Court may deem just, proper and equitable.

Dated this 9th day of July, 2019.

**HOLLEY, DRIGGS, WALCH,
FINE, PUZEY, STEIN & THOMPSON**

/s/Kimberly P. Stein

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