IN THE SUPREME COURT OF NEVADA

JASON T. SMITH, an individual, Appellant, vs. KATY ZILVERBERG, an individual; and VICTORIA EAGAN, an individual, Respondents.	Supreme Ct. No. 80154 Dist. Ct. Case No.: A-19-798171-C
JASON T. SMITH, an individual, Appellant, vs. KATY ZILVERBERG, an individual; and VICTORIA EAGAN, an individual, Respondents.	Supreme Ct. No. 80348 Dist. Ct. Case No.: A-19-798171-C

On Appeal from the Eighth Judicial Court for the County of Clark in Nevada
Case No. A-19-798171-C
Hon. Jim Crockett

APPELLANT'S REPLY BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the Justices of this court may evaluate possible disqualification or recusal.

Appellant, Jason T. Smith, is an individual, and thus there is no parent corporation or publicly held company that owns 10% on more of his stock. Appellant, Jason T. Smith, is not using a pseudonym.

The following law firm represented Appellant in the district court proceedings leading to this Appeal: Holley Driggs Walch Fine Puzey Stein & Thompson, with attorneys, Brian W. Boschee, Esq. and Kimberly P. Stein, Esq.

Following the filing for this Appeal, Ms. Stein changed law firms, and now Flangas Dalacas Law Group represents Appellant in this Appeal with Gus W. Flangas, Esq. and Kimberly P. Stein, Esq. as counsel.

Dated this 3rd day of August, 2020.

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ARGUMENT

1. The Court Should Disregard Respondents' Answering Brief

NRAP 28 (j) states that "[a]ll briefs under this Rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or ***scandalous*** matters." Further, NRAP 28 (j) provides that "[b]riefs that are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees or other monetary sanctions."

A review of Respondents' Answering Brief ("AB") shows the first 14 pages alone containing unsupported facts, misstatements of the record, but most concerning, is they merely contain a continued attack on Appellant, Jason T. Smith (hereinafter "Smith" or "Appellant"). Respondents are using the shield of the litigation privilege to continue to attack Smith. Examples include the first two lines starting under the Statement of the Case on Page 2:

> This case is about one thing only: Appellant Jason Smith's unlawful attempt to enlist the district court in his crusade to silence Respondents Katy Zilverberg and Victoria Eagan ("Respondents") after they spoke up about his bullying behavior in their shared business community. Filing this lawsuit itself was an act of bullying by Mr. Smith: while his complaint lacked merit, he hoped to use his superior financial position to litigate Ms. Zilverberg and Ms. Eagan into silence—a classic strategic lawsuit against public participation ("SLAPP").

There are no cites to the record, which is in violation of NRAP 28(e)(1). Continuing on page 3 of the AB, the first two full sentences state again without any cites to the

record that:

> However, as reflected by the evidence in district court, Mr. Smith's reputation in the thrifting community was not what it seemed. Hushed complaints about his anti-social and bullying behavior abounded in the thrifting community, but rarely saw the light of day due to Mr. Smith's well-earned reputation for retaliating against critics.

Again, what hushed complaints? What is the purpose of such statements, except a further attempt to defame Smith by Respondents and an attempt to sway this Court through unsubstantiated scandalous matters.

Continuing, on page 4 of the AB, in the first full sentence, "[t]he instant SLAPP vindicates Ms. Zilverberg's and Ms. Eagan's contentions that Mr. Smith will go to great lengths—including abusing the legal process—to retaliate against those who speak out about his behavior." Such statements are more than counsel arguing their position to advance their clients' interest.

Moreover, Respondents miscite the record in advancement of their arguments again in the Statement of Facts. First on page 11 of the AB 9, they argue that "Mr. Smith's harassment history is verified by the evidence submitted to the district court." Yet again, there is no cite to the record. Then, Respondents go on to argue:

> [a]ssuming, arguendo, that Ms. Zilverberg or Ms. Eagan stated Mr. Smith has a criminal record, any such alleged statement is substantially true or made without knowledge of its falsehood regardless of how much of the background check pertains to Mr. Smith or a different, identically-named individual. This is because Mr. Smith himself bragged about his criminal past. (1JA44 (citing 1JA211).) Thus, the 'gist' or 'sting' of any such statements (assuming they exist)—that Mr. Smith has engaged in past criminal behavior—is substantially true by Mr. Smith's own admission.

(AB at 11-12).

Yet a review of the alleged record shows only an unsubstantiated, unauthenticated document, which was not admitted at the hearing on the Motion to Dismiss (Joint Appendix ("JA") at 346, Vol. 3) nor even discussed. It was merely a purported screenshot of a Facebook post. Not to mention, Respondents misquoting the conversation, wherein Smith stated, "he never got caught." (JA at 211, Vol. 1). Further, the district court acknowledged that "[t]here was an e-mail and couple of conversations I think would be inadmissible." (JA at 357:6-7, Vol. 2).

On page 45 of the AB, Respondents, again with no cite to the record, state that "Mr. Smith did not bother to specify actual statements made by Respondents, let alone provide evidence of statements in which Respondents claimed Mr. Smith has a criminal record."

Of further importance, however, is that Respondents miscite the allegations of the underlying defamation claim with regards to the to the criminal record. The issue is not whether Smith has a criminal record in general. The issue is that Respondents have falsely alleged to the public that Smith has a criminal record of restraining orders and a verified history of harassment, which Smith does not. (*Id.* at 224:1-15, Vol. 2). Again, further diversion tactics to move away from the real issue here.

Most concerning is the allegation that Smith "grossly mischaracterizes the

district court's findings, stating that 'the district court relied on evidence on [sic] which the district court admitted was false or unsubstantiated, without allowing an evidentiary hearing or discovery.'" (AB at 13). The district court acknowledged that some of the statements made by Respondents were false, but stated as he believed Respondents were acting in good faith, he could rely on these facts. (JA at 357:17-24; 359:24; 360:1-9, Vol. 2). Ironically, the district court stated that he believed that the Respondents "would in fact concede that some of their information turned out to be incorrect." (JA at 360:10-11, Vol. 2). Moreover, Respondents never withdrew the false information provided; in fact, as even in their AB, Respondents' continue to cite to such false statements.

Here Respondents, neglected to fulfill their responsibility to cogently argue, and present relevant authority, free from "burdensome, irrelevant, immaterial or ***scandalous*** matters." As such, this Court should sanction the Respondents and strike their Answering Brief and should overturn the order granting Respondents' anti-SLAPP motion.

2. Respondents' Statements Were Not Made in Direct Connection with an Issue of a Public Concern

Respondents leap from mischaracterizations of the record to adding a new argument to attempt to support their conclusion that Respondents' statements were made as an issue of public concern by attempting to take a private dispute and make it public through publication. Yet, as found in *Pope v. Fellhauer*, 2019 WL 1313365,

437 P.3d 171 (Nev. March 21, 2019), private disputes do not qualify as public interest.

Respondents now argue for the first time in this case that Smith is an educator and administrator of on-line thrifting groups and arguing that such criticism by Respondents was a mere "on-the-job performance." (AB at 29). Yet again, there is no cite to such evidence of this fact in the record. On this basis alone, Respondents cannot show that this suit arises of activity in connection with an assessment of his job performance. Unlike *Abrams v. Sanson,* 136 Nev. Adv. Op. 9, 458 P.3d 1062, 1068 (2020), Smith is not an attorney and the statements at issue in this matter involve the allegation that Smith is "an abusive bully" and falsely inferring, among other things, that Smith is predatory and has harassed individuals. (JA at 223:10-20, Vol. 2). Again, we are also faced with a violation of NRAP 28(j). And again, this does not make this a matter of public concern.

In *Shapiro v. Welt*, 133 Nev. 35, 39, 389 P.3d 262, 268 (quoting *Piping Rock Partners, Inc. v. David Lerner Assocs., Inc.*, 946 F.Supp.2d 957, 968 (N.D. Cal. 2013), aff'd, 609 F. App'x 497 (9th Cir. 2015)), the Nevada Supreme Court adopted guiding principles articulated by California courts on what distinguishes a private interest from a "public interest." However, the definition of "public interest" must be independently examined as to the "content, form, and context" of the speech "revealed by the whole record." *Dunn & Bradstreet, Inc. v. Greenmoss Builders,*

Inc., 472 U.S. 749, 761 (1985).

In *Pope*, this Court looked to the *Shapiro* factors and independently examined the content, form, and context of the speech at issue, and determined that Mr. Pope was simply making public his private feud with the Fellhausers. Here, it was Respondents' burden to prove that the anti-SLAPP statute even applies to this case. *John v. Douglas Cty. Sch. Dist*., 125 Nev. 746, 753, 219 P.3d 1276, 1284 (Nev. 2009). Whether the lawsuit is based on good faith communications in furtherance of the right to free speech in connection with an issue of public concern is a "threshold" issue that the Respondents had to demonstrate via a preponderance of the evidence. *See id*. at 1282; NRS 41.660(3)(a). Respondents failed to do so, and the district court merely took it for granted that Respondents' communications were issues of public interest. (JA at 502:9-11, Vol. 3).

It is not the right to free speech in general that is protected by the anti-SLAPP statute. Rather, it is "the right to free speech in direct connection with an issue of public concern." NRS 41.660(3)(a); see also NRS 41.637(4) (protecting truthful communications "in direct connection with an issue of public interest").

The legislative history of Nevada's anti-SLAPP statute shows that "public interest" was not intended to cover private disputes between former business associates. Originally, Nevada's anti-SLAPP statute covered only good faith communications in furtherance of the right to petition or influence governmental

entities. See NRS 41.637 (1997). However, the statute was amended in 2013 to extend protection to "a person who exercises the right to free speech in direct connection with an issue of public concern." 2013 Nevada Laws Ch. 176 (S.B. 286). To this end, the definition of "[g]ood faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern" includes not only the first three prongs related to petitioning a governmental entity, but also a fourth prong defined as a "[c]ommunication made in direct connection with an issue of public interest in a place open to the public or in a public forum." NRS 41.637(4). When the Nevada legislature added this fourth prong, it was expressly concerned about too expansive a reading of the phrase "public interest." *See* Nevada Senate Committee Minutes, 3/28/2013, available on Westlaw.

> **Senator Hutchison:**
> If the issue of public concern is defined so broadly, it seems that any lawsuit could be defined that way. For example, partner disputes in commercial litigation could be a matter of public concern, right? Then we are now modifying the motion to dismiss standards for almost anything. Will we now have a lot of cases under this definition?
> **Mr. Randazza:**
> This bill drafted with the proposed amendments is not so broad that it encompasses every method of conduct in the State. It will just encompass whether a citizen is exercising his or her First Amendment rights.
> **Senator Hutchison:**
> In exercising a citizens First Amendment rights on an issue of public concern, you admit the definition is very broad?
> **Mr. Randazza:**
> Correct. If I am speaking out about how an investigation is going, of course that is a matter of public concern. If I am speaking about the lack of a traffic

> light at an intersection, that is a matter of public concern. If I am speaking out about how a neighbor can mow his or her lawn, then that is not a matter of public concern.
> **Senator Hutchison:**
> ***What about how I treat my partners in my law firm? Is that a matter of public concern?*** Could it be construed that way?
> **Mr. Randazza**:
> ***You may not have the privilege of making that a private matter. If it is a matter of internal politics at your law firm, that is a matter of private concern. However, if the Las Vegas Sun begins to report on a strike at your law firm and your associates are picketing in front of the building, then it has become a matter of public concern***.
>
> Nevada Senate Committee Minutes, 3/28/2013 (emphasis added).

"Public interest" was never intended to cover private disputes between former business partner and internal politics – hence the word "public."

Apart from the above three categories, the definition of "public interest" has been construed in certain limited circumstances to encompass not only strictly "governmental matters, but also private conduct that impacts ***a broad segment of society*** and/or that ***affects a community in a manner similar to that of a governmental entity***." *Damon v. Ocean Hills Journalism Club*, 85 Cal.App.4th 468, 479 (Cal. Ct. App. 2000) (emphases added); s*ee also Du Charme v. Int'l Bhd. of Elec. Workers, Local* 45, 1 Cal.Rptr.3d 501, 507 (Cal. Ct. App. 2003) ("Although matters of public interest include legislative and governmental activities, they may also include activities that involve private persons and entities, especially ***when a large, powerful organization may impact the lives of many individuals***.") (internal quotation marks and citation omitted) (emphasis added).

However, "where the issue is of interest to only a private group, organization, or community, the protected activity must occur in the context of an ongoing controversy, dispute, or discussion, such that its protection would ***encourage participation*** in matters of ***public significance***." *D.C. v. R.R.*, 106 Cal.Rptr.3d 399, 426 (Cal. Ct. App. 2010) (emphases added).

Here, Respondents' defamatory statements were not complaints to a licensing board or government entity. Rather Respondents vilified their former boss and competitor online. Protecting his false and defamatory statements would not encourage participation in matters of public significance; rather, it would protect and encourage per se libel. As found in *Pope*, private disputes do not qualify as public interest.

In *Price v. Operating Engineers Local Union No. 3*, 125 Cal.Rptr.3d 220, 223 (Cal.Ct. App. 2011), certain union members posted flyers containing disparaging statements about *Price* in his neighborhood. The court affirmed the denial of defendants' anti-SLAPP motion, as defendants failed to show that their "disparaging statements regarding Price involve an issue of public, as opposed to private, interest" and therefore "failed to meet [their] threshold burden under the anti-SLAPP statute." *Id*. at 222. As the court explained, "[n]o evidence shows that the [defendants'] statements about Price, contained in the flyers, were made in connection with a public figure, a topic of widespread community interest or prior media coverage, or

even a topic of interest to a substantial number of people." *Id*. at 227. The fact that union members prepared and distributed the statements in the flyer "does not turn [their] personal attack on Price into a public issue or an issue of public interest." *Id*. at 228. Nor did the defendants' statements about Price concern "a topic of ongoing discussion within the . . . Rancho Cordova community or Price's neighbors." *Id*. Even though the flyers urged Price's neighbors to "'[c]omplain to Cobble Oaks about the sort of person they've let in your community,'" the defendants' statements were not aimed "to engage Cobble Oaks residents or visitors in any discussion that was of public interest." *Id*. at 223, 228.

The instant case is the same. Respondents' statements purportedly warning others about Smith and complaining about what type of person he is to deal with, simply do not concern an issue of public interest. "Matters of interest only to the Property owner, neighbors and prospective buyers" are not matters of public interest. *Leonard v. Aruda*, No. A143518, 2015 WL 5095967, at *6 (Cal. Ct. App. Aug. 28, 2015).

In *Ernst v. Kauffman*, 50 F.Supp.3d 553, 557 (D. Vt. 2014) *amended on reconsideration*, No. 5:14-CV-59, 2016 WL 1610608 (D. Vt. Apr. 20, 2016), the plaintiffs were a lesbian couple whose neighbors were openly hostile to them. An anonymous nine-page letter was sent to numerous town residents, school and planning boards, and local newspapers and stated, among other negative comments,

that "plaintiffs were 'felons who are running scams,'" that one "was a drug addict who lied about her mother's illness to avoid court dates, and that plaintiffs do not pay their creditors or their taxes." *Id*. at 557. In denying defendants' anti-SLAPP motion to dismiss, the court first rejected that the "letter was distributed in connection with" a planning commission review of zoning regulations and a school board's consideration of school unification merely because the letter mentioned that plaintiffs "'have been passing themselves off as involved citizens and very concerned about town direction and in particular with Zoning, the schools and the environment.'" *Id*. at 560. Likewise, here, the Court should reject Respondents' attempts to rely on the fact that they were trying to warn others or have the authorities intervene. (AB at 11). Yet, Respondents did not use their posts to contact law enforcement or even file for a restraining order themselves. Respondents do not even attempt to argue that his posts are connected "with an issue under consideration by a legislative, executive, or judicial body" or that they were aimed at procuring governmental action. *Cf*. NRS 41.637(1)-(3).

The Court should see Respondents' statements for what they are: not comments focused on the public interest, but "rather . . . a mere effort 'to gather ammunition for another round of [private] controversy.'" *Weinberg v. Feisel*, 2 Cal.Rptr.3d 385, 392 (Cal. Ct. App. 2003) (*quoting Connick v. Myers*, 461 U.S. 138, 148 (1983)).

In anti-SLAPP cases where the issue is not of interest to the public at large, but rather to a limited, but definable portion of the public (a private group, organization, or community), the constitutionally protected activity must, at a minimum, occur in the context of an ongoing controversy, dispute or discussion, such that it warrants protection by a statute that embodies the public policy of encouraging participation in matters of public significance. *Du Charme*, 1 Cal.Rptr.3d at 507 (Cal. Ct. App. 2003). Likewise, here, Respondents post that Smith is an abusive bully" (JA at 223:10-20, Vol. 2) or that Smith has and will try to "take people down" (*id.* at 223:10-20, Vol. 2), were not statements encouraging public participation or any action at all. Respondents did not ask readers or listeners to do anything at all. The statements that are the basis of this lawsuit are merely false informational statements defaming Smith. Respondents did not report a crime of endangering the safety of others. Rather, as Respondents' own argument highlights, they merely "spoke up about his bullying behavior in their shared business community" (AB at 2) and "she warned the thrifting community and the general public that Mr. Smith engaged in hypocritical behavior, heaping abuse on his perceived enemies and intimidating them into silence in various ways." (AB at 3).

As California courts have pointed out, it would be ironic indeed to accord "wrongful accusations of criminal conduct, which are among the most clear and egregious types of defamatory statements, . . . the most stringent protections

provided by law." *Weinberg v. Feisel*, 2 Cal.Rptr.3d 385, 388 (Cal. Ct. App. 2003). This "would be inconsistent with the purpose of the anti-SLAPP statute and would duly undermine the protection accorded by" laws prohibiting slander and libel. *Id*. Here again, Respondents submitted no evidence that they filed charges against Smith. There were no allegations that Respondents' statements were made in the interest of public safety.

Respondents further argue that Smith is a public figure and as such automatically implicates this matter as one of a "public interest." Yet, their own case as cited, *D.C.*, 106 Cal.Rptr.3d at 417, provides that you need more than a person in the public eye, but to affect a large numbers of people beyond the direct and to involve a topic of widespread, public interest. Further, Respondents do not show that there was an extensive interest in Smith beyond the thrifting community. *Nygard, Inc. v. Uusi-Kerttula*, 72 Cal.Rptr.3d 210, 220 (Cal. Ct. App. 2008) (concluding that issue of public interest was involved where defendants' evidence showed that "there is 'extensive interest' in Nygård—'a prominent businessman and celebrity of Finnish extraction'—among the Finnish public"). It is not enough to show Smith was on TV a few years ago.

Respondents continue to rely on irrelevant points here. Respondents ignore the issue that Respondents' posts were false and implied false accusations. *See Wong v. Tai Jing*, 117 Cal.Rptr.3d 747, 759-60 (Cal. Ct. App. 2010) (affirming the

denial of a reviewer's anti-SLAPP motion as to their dentist's libel claim because the dentist made a showing of probable success on her claim that the reviewer's post implied false accusations.). The anti-SLAPP statute is meant to protect only truthful speech about matters of public concern. *Id*.

3. Respondents' Statements Are False and Were Made with Knowledge of Falsity

The phrase as part of the *Shapiro* factors: "made without knowledge of its falsehood" has a well-settled and ordinarily understood meaning. The declarant must be unaware that the communication is false at the time it was made. *Shapiro,* 133 Nev. at 38. There is "no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc*. 418 U.S. 323, 338 (1974).

Here, the district court acknowledged that some of the statements made by Respondents were false. (JA at 357:17-24; 359:-24; 360: 1-9, Vol. 2). While Respondents now attempt to argue that based on *Rosen v. Tarkanian*, 135 Nev. Adv. Op. 59, 453 P.3d 1220, 1223 (2019), as long as the 'gist' of the story, or the portion of the story that carries "the 'sting' of the [statement], is true," then all statements were made without knowledge of falsity. This ignores the facts here or the actual holding of *Rosen*. Here, the record shows that the statements at issue were made with knowledge of falsity. The district court acknowledged that "[t]here was an e-mail and couple of conversations I think would be inadmissible." (JA at 357:6-7, Vol. 2). Yet, these were the alleged factual support regarding Smith having a criminal past

and having restraining orders against him. The district court stated that he believed that the Respondents "would in fact concede that some of their information turned out to be incorrect." (JA at 360:10-11, Vol. 2).

Respondents statements even alleged that Smith has caused people to want to commit suicide. (JA at 223:10-20, Vol. 2). This statement is not only false, but it implicates Smith as criminal. This far exceeds any scope protected as free speech and goes far beyond mere opinion testimony. Yet, Respondents do not present any substantive evidence to establish this statement is true, because once again it is entirely false. The district court found this evidence to show that this was Respondents' belief, despite finding most of it to be false. (*Id*. at 492, Vol. 3).

The district court argued that Smith did not provide his own evidence, except for a declaration. (*Id*. at 346, Vol. 2). This argument is misplaced for at least two reasons. First, Respondents never denied making the statements and thus it was unnecessary to submit further proof. Second, Nevada's anti-SLAPP statute directs courts to consider only "evidence, written or oral, ***by witnesses or affidavits***, as may be material." NRS 41.660(3)(d) (emphasis added). Given the directive to consider only oral testimony by witnesses or written testimony by affidavits, Smith was merely complying with the statute's requirement by submitting an affidavit testifying as to the contents of Respondents' posts. While Nevada's statute previously provided that the court should treat the anti-SLAPP motion "as a motion

for summary judgment," NRS 41.660(3)(a) (1997), this was changed when the statute was amended in 2013. *See* 2013 Nevada Laws Ch. 176 (S.B. 286). Indeed, anti-SLAPP motions cannot be true motions for summary judgment because the court is also instructed to "[s]tay discovery pending" both "[a] ruling by the court on the motion" and "[t]he disposition of any appeal." NRS 41.660(e). Thus, "'the court is to consider the pleadings, and supporting and opposing affidavits stating the facts upon which liability is premised,' nothing more." *Diamond Ranch Acad., Inc. v. Filer*, No. 2:14-CV-751-TC, 2016 WL 633351, at *5 (D. Utah Feb. 17, 2016) (*quoting New.Net, Inc. v. Lavasoft*, 356 F.Supp.2d 1090, 1099 (C.D. Cal. 2004)). As such, Smith was merely complying with the statutory directive by submitting a declaration testifying to the statements made by Respondents. *See John*, 219 P.3d at 1287 (finding party's declaration "procedurally sufficient").

As the moving party, Respondents bore "the initial burden of production and persuasion." *Id.* at 1282. Indeed, it was and is Respondents burden to "prove[] that Nevada's anti-SLAPP statute applies to the case." *Id*. at 1284. Even if Respondents had met that burden and even if the burden of production had shifted to the Smith to show that he has a meritorious claim, "at all times, the burden of persuasion is on the defendant." *Id.*

4. The District Court Incorrectly Held that Smith Failed to Meet his Burden

Assuming Respondents met their initial burden, only then would the burden shift to Smith as to prong two and evaluate "whether the plaintiff has demonstrated with prima facie evidence a probability of prevailing on the claim." *Rosen*, 135 Nev. Adv. Op. 59, 453 P.3d at 1223; see NRS 41.660(3)(b). While the Court need not reach this stage, Smith has demonstrated with prima facie evidence a probability of prevailing on the claim.

Again, unfortunately the district court argued that Smith did not provide his own evidence, except for a declaration, and argued that no evidence was thus provided. (*Id*. at 346, Vol. 2). This ignores the statutory directive. *See John*, 219 P.3d at 1287 (finding party's declaration "procedurally sufficient"). As such, if it is determined that the second prong even applies, then this matter should be sent back down to the district court to consider the evidence.

5. The District Court Abused Its Discretion in Determining Respondents' Awards

This court has repeatedly recognized the similarities between California's and Nevada's anti-SLAPP statutes, routinely looking to California courts for guidance in this area. *Coker v. Sassone*, 135 Nev. Adv. Op. 2 (Jan. 3, 2019). The issue in this matter is if this Court finds this is a SLAPP suit and upholds the district court's ruling, this Court still needs to review the grant of attorneys' fees, costs and statutory

awards. The reasonableness of the award is the primary issue.

"On review of an award of attorney fees after trial, the normal standard of review is abuse of discretion. However, de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law." *Carver v. Chevron U.S.A., Inc*., 97 Cal.App.4th 132, 142.) (2002).

The attorney's fees provisions of NRS 41.670 are intended "to compensate a defendant for the expense of responding to a SLAPP suit." *Robertson v. Rodriguez***,** 36 Cal.App.4th 347, 362, (1995). To this end, the provision "is broadly construed so as to effectuate the legislative purpose of reimbursing the prevailing defendant for expenses incurred in extracting herself from a baseless lawsuit." *Wilkerson v. Sullivan*, 99 Cal.App.4th 443, 446 (2002).

In *Lafayette Morehouse, Inc. v. Chronicle Publishing Co*. 39 Cal.App.4th 1379 (1995), the court found based on legislative history the language of section 425.16, subdivision (c), as well as the overall language of the provision demonstrates "the Legislature intended that a prevailing defendant on a motion to strike be allowed to recover attorney fees and costs only on the motion to strike, not the entire suit." (*Ibid*.; *see also Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1362, 102 Cal.Rptr.2d 864, fn. 4 [Section 425.16, subdivision (c), "has been held to provide

for an award of only those fees and costs incurred in connection with the motion to strike, not the entire action"].)

In the case of *569 E. Cty. Blvd. LLC v. Backcountry Against the Dump, Inc*., 6 Cal.App.5th 426, 212 Cal.Rptr.3d 304 (2016), the California Court of Appeals held that "a fee award under the anti-SLAPP statute may not include matters unrelated to the anti-SLAPP motion, such as ... summary judgment research," because such matters are not "incurred in connection with the anti-SLAPP motion." *Backcountry, supra* at 310–11. The Ninth Circuit cited favorably to *Backcountry* in the case of *Century Sur. Co. v. Prince*, 782 F. App'x 553, 558 (9th Cir. 2019) and denied attorney's fees for work that was not related to the anti-SLAPP Motion (only attorneys' fees and costs directly attributable to the anti-SLAPP motion(s) are recoverable). Just recently, the United States District Court for the State of Nevada required the attorneys seeking their fees to revise their billing statements to remove any entries not directly related to the anti-SLAPP motion. *Walker v. Intelli-heart Servs., Inc.*, No. 318CV00132MMDCLB, 2020 WL 1694771, at *2 (D. Nev. Apr. 7, 2020).

The issue here is that the district court did not scrutinized the attorneys' billing records. This is not only a *Brunzell v. Golden Gate National Bank*, 85 Nev. 345 (1969), argument. Here, the attorneys' fees and costs awarded did not solely relate to the responding to a SLAPP suit. Respondents submitted fees for two (2) prior

counsel, neither of which worked on the anti-SLAPP motion in an amount awarded of $7,287 alone. (JA at 484: 11-17, Vol. 3.) The trial court abused its discretion by refusing to even review the award of additional fees and costs and awarding Respondents the amount requested without any analysis for reasonableness or relation to the statute.

Further, a review of the award for attorneys' fees in the amount of $69,002.53 for one motion shows an exorbitant number of hours spent on one anti-SLAPP motion, an excessive number of attorneys involved, and many hours consulting Respondents in this matter. The attorneys' fees awarded were excessive, unreasonable, and some of the charges were not related to the anti-SLAPP motion.

Pursuant to NRS 41.670(1)(b), "[i]f the court grants a special motion to dismiss filed pursuant to NRS 41.660: (b) The court **may** award, in addition to reasonable costs and attorney's fees awarded pursuant to paragraph (a), an amount of up to $10,000 to the person against whom the action was brought." (Emphasis added). Because NRS 41.670(1)(b) uses the word "may," the Court is not required to grant the Defendant's requests for this additional amount. *See Walker v. Intelli-heart Servs., Inc*., No. 318CV00132MMDCLB, 2020 WL 1694771, at *2 (D. Nev. Apr. 7, 2020).

In addition, the Nevada statute does not outline the parameters of when a court should award statutory damages under § 41.670(1)(b), other than committing it to

the court's discretion. See NRS 41.670(1)(b) (stating the court "may" award up to $10,000); *see also Butler v. State*, 102 P.3d 71, 81 (Nev. 2004) (en banc) (interpreting the word "may" in a statute as conferring discretion).

However, the remainder of § 41.670 offers clues to when such an award is warranted. *See Banerjee v. Cont'l Inc*., No. 217CV00466APGGWF, 2018 WL 4469006, at *6 (D. Nev. Sept. 17, 2018), appeal dismissed, No. 18-17030, 2019 WL 5305500 (9th Cir. Sept. 18, 2019).

A defendant whose anti-SLAPP motion is successful may bring a separate action against the plaintiff for compensatory damages, punitive damages, and attorney's fees and costs for the separate action. *Id*. *citing* NRS 41.670(1)(c). That suggests that the statutory damage award in the original action may be the analog to compensatory and punitive damages recoverable in a separate action. *Id*. Further, when a defendant's anti-SLAPP motion is unsuccessful, the court may award reasonable fees and costs to the plaintiff if it finds the motion was "frivolous or vexatious." *Id. citing* NRS 41.670(2). It may also award up to $10,000 along with "such additional relief as the court deems proper to punish and deter the filing of frivolous or vexatious motions." *Id. citing* NRS 41.670(3). Thus, it appears the $10,000 statutory award is aimed at frivolous or vexatious conduct that warrants a type of punitive (and perhaps in the right case, compensatory) award. *Id*. In the instant case, the suit brought by the Smith against the Respondents does not

constitute frivolous or vexatious conduct that warrants any type of a punitive award.

In this matter, Respondents uttered several false and defamatory statements about Smith. The district court even found the statements about Smith to be false. The suit brought by Smith against Respondents was not frivolous or vexatious conduct that warrants any type of punitive award such as the $10,000 pursuant to NRS 41.670(1)(b). Smith brought suit against Respondents for damages to his reputation caused by Respondents' false and defamatory statements. Clearly, Smith's suit was brought in good faith.

The party seeking the award bears the burden of establishing entitlement to such award. *See Century Sur. Co. v. Prince*, No. 216CV2465JCMPAL, 2018 WL 1524433, at *5 (D. Nev. Mar. 28, 2018), vacated, 782 F. App'x 553 (9th Cir. 2019). The district court never provided any basis for such an award pursuant to NRS 41.670(1)(b).

At a minimum, this Court should reduce the attorneys' fees and costs awarded by the amounts for the two (2) prior counsel and the additional amount awarded above the $46,872.34 requested in the Motion for Attorneys' Fees, Costs and a Statutory Awards pursuant to NRS 41.660.

CONCLUSION

Respondents posted false and defamatory statements online in a vindictive attempt to harm Smith, their competitor. This case is nothing more than a private

dispute between former business associates. Just because Respondents chose to air their complaints on the internet does not turn this dispute into an issue of public interest. To the contrary, both the blatant falsity and the worldwide publication of such statements make them libelous on their face.

Because Respondents' statements do not constitute an issue of public interest and because the Smith claims are meritorious, the Court should overturn the order granting Respondents' anti-SLAPP motion. At a minimum, this Court should remand this case for further discovery and an evidentiary hearing. Even if this Court upholds the ruling on the anti-SLAPP motion, this Court must still reduce the granting of attorneys' fees, costs and statutory awards.

Dated this 3rd day of August, 2020.

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RULE 28.2 CERTIFICATE OF COMPLIANCE

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 Microsoft Word in 14 Point Times New Roman.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and contains 5629 words; and

Finally, I hereby certify that I have read this *Appellant's Reply Brief* and to the best of my knowledge and information, and belief, it is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. I further certify that this *Appellant's Reply 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 or 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 3rd day of August, 2020.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, on this 3rd day of August, 2020, the **APPELLANT'S REPLY BRIEF,** which was electronically filed with the Clerk of the Nevada Supreme Court, was served upon each of the parties to appeals 80154 and 80348 via electronic service in accordance with Administrative Order 14-2 and through the Supreme Court of Nevada's electronic filing addressed to the following:

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