IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 80922
District Court Case No. A-19-804785-C

NICOLA SPIRTOS

Appellant/Defendant,

v.

ARMEN YEMENIDJIAN.

Respondent/Plaintiff.

RESPONDENT'S ANSWERING BRIEF

Appeal from the Eighth Judicial District Court, Clark County
The Honorable Susan Johnson, Department XXII
District Court Case No. A-19-804785-C

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JURISDICTIONAL AND ROUTING STATEMENT

The Court has jurisdiction under NRS 41.670(4) to review the district court's denial of a special motion to dismiss pursuant to NRS 41.660. The Court should retain jurisdiction because NRS 41.670(4) allows for an appeal "to the Supreme Court."

However, Appellant Nicolas Spirtos' ("Spirtos") answering brief asks this Court to reverse not only the district court's determination that he did not meet his burden under the first prong of NRS 41.660, but also its denial of Spirtos' motion to dismiss pursuant to NRCP 12(b)(5). Spirtos goes so far as to request a full reversal of the district court's order. (Opening Br. at 41.)

A denial of a motion to dismiss pursuant to NRCP 12(b)(5) is not an appealable order. *See* NRAP 3A(b); *Kirsch v. Traber*, 134 Nev. 163, 168, 414 P.3d 818, 822 (2018). Recognizing this, Spirtos attempts to reframe his denied NRCP 12(b)(5) motion as a request for this Court to make a determination that Yemenidjian did not met his burden under the second prong of NRS 41.660(3). This fares no better; the district court never addressed this issue because Spirtos failed to meet his burden under the first prong. This Court has repeatedly declined to decide whether the plaintiff met its burden under the second prong of NRS 41.660(3)(b) for the first time on appeal. *See, e.g. Abrams v. Sanson*, 136 Nev. 83, 91 n.3, 458 P.3d 062, 1069 n.3 (2020); *Stark v. Lackey*, 136 Nev. 38, 41, 458 P.3d, 342, 345

(2020). Therefore, the Court's jurisdiction is limited solely to the district court's determination the Spirtos did not meet his burden to show that his statements are entitled to protection under Nevada's anti-SLAPP statutes.

ISSUES ON APPEAL

1. Even though Spirtos submitted a declaration saying he did not make any statements about Armen Yemenidjian, former Assembly Speaker John Oceguera ("Oceguera") also submitted a declaration attesting to Spirtos' defamatory statements about Yemenidjian. On top of that, Spirtos admits to suggesting corruption, but self-servingly claims that he did not use Yemenidjian's name. Was the district court within its right to determine that Spirtos did not met his burden to show, by preponderance of the evidence, that his statements accusing others of corruption and crimes amounts to good faith communications that were truthful and made without knowledge of their falsehood, particularly when Spirtos admits that he had no factual basis for accusations of wrongdoing against Yemenidjian?

2. Was the district court within its power to determine that the baseless, defamatory statements Spirtos made to Oceguera in a private conversation constituted neither (a) an oral statement made in direct connection with an issue under judicial review under NRS 41.637(3) nor (b) a communication in direct connection with an issue of public interest in a place open to the public or in a public forum under NRS 41.637(4)?

I. INTRODUCTION

With his opening brief, Spirtos extensively criticizes Nevada's recreational marijuana application process in 2018, apparently trying to rationalize statements that he simultaneously claims he did not make. Like the current false cries of corruption in our nation's elections, Spirtos resorted to the same sort of tactics to rationalize why he and the company he then-managed, D.H. Flamingo, failed to win one of the coveted licenses for additional recreational marijuana operations.[1] This case is simple: Unwilling to accept his own failures in the application process – just as he was unwilling to do in his unsuccessful application for a medical marijuana license years earlier – Spirtos (who is known to have a volatile temper) went about blaming his competitors, accusing them of corrupting the process as an excuse for why he lost. One of the successful applicants were the Essence Companies, managed by Yemenidjian. And thus, Yemenidjian became the focus of Spirtos' smear. This included Spirtos' statements on January 18, 2019, at a ticketed event to celebrate the inauguration of Steve Sisolak, when he approached Oceguera, who works in the marijuana industry and has a relationship with Yemenidjian. Spirtos told Oceguera that Yemenidjian was involved in corruption, and accused Yemenidjian of criminal

[1] Indeed, the company formerly controlled by Spirtos, D.H. Flamingo, dropped its lawsuit alleging corruption in the licensing process, and in a subsequent trial by the remaining plaintiffs, the district court rejected their claims.

activity. Since then, Spirtos has conceded that he had no facts to support any such assertions.

Yemenidjian fought back against Spirtos' tactics, filing suit alleging claims for (1) Civil Conspiracy and (2) Slander Per Se. Spirtos moved to dismiss, submitting a declaration denying that he made the slanderous statements but, even if he did, arguing they would be protected under Nevada's anti-SLAPP statute. Alternatively, Spirtos argued that Yemenidjian's complaint failed under NRCP 12(b)(5). Yemenidjian's response included a declaration from Oceguera, directly contradicting Spirtos' self-serving statement. Further, Yemenidjian argued that the anti-SLAPP statute did not extend protections to baseless smears intended to further the speaker's personal interests.

The district court denied Spirtos' special motion to dismiss under NRS 41.660 because Spirtos had not met his burden under the first prong of the test and, as a result, the district court was not required to and did not address whether Yemenidjian had met his burden under the second prong. The district court also denied the motion to dismiss under NRCP 12(b)(5), a ruling Spirtos apparently hopes this Court will now review.

II. STATEMENT OF FACTS

This case stems from false and slanderous per se statements made by Dr. Nicola Spirtos ("Spirtos") intended to undermine a business rival who received

recreational cannabis licenses that Spirtos wanted. Yemenidjian is one of the leading executives in the legal cannabis business in the United States. He was the co-founder and CEO of Integral Associates d/b/a Essence ("Essence"). (App. 002.) Since starting the business in 2014, Yemenidjian has successfully spearheaded licensing applications in Nevada and California. (*Id.*) Being immersed in what it takes to be successful in this business, Essence, under Yemenidjian's direction, has made 15 different applications in the State of Nevada, first for medical marijuana and then later for recreational marijuana, and was awarded all 15 licenses. (App. 002-03.) In each of these application processes, Essence was graded as a top tier applicant, if not the highest ranked application. (*Id.*) The same is true in California, where Essence submitted seven different applications and was awarded all seven licenses. (App. 003.)

Compare Yemenidjian's track record to Spirtos' and the cannabis company he founded, D.H. Flamingo. (*Id.*) When Nevada first legalized medical cannabis, Spirtos sought to obtain a license and was rejected by the State as an operator. (*Id.*) He waged a legal campaign and reached out to those with whom he believed he had political clout in an attempt to overturn those results. (*Id.*) Ultimately, Spirtos was only able to enter the fledgling medical marijuana industry when the Nevada legislature increased the number of licenses so that Spirtos could get into the business by default, as opposed to based on qualifications or merits. (*Id.*)

Spirtos proceeded down the same path in 2018 when he and D.H. Flamingo sought a recreational license. (*Id*.) Rather than engage professional expertise after his prior rejection, Spirtos once again submitted a deficient application that he had personally prepared on his own. (*Id*.) Spirtos' unprofessional approach resulted in the same outcome: rejection by State licensing officials because he and his entity were less qualified than others. (*Id*.) Spirtos' application was ranked well below that of others who received licenses, including Essence. (*Id*.)

Just like his prior rejection for a deficient application, Spirtos once again reached out to his personal and political contacts to try to overturn the State's award. He contacted his close friend, George Kelesis, who served on the Nevada Tax Commission, the very body that oversees the department responsible for selecting the successful recreational licensees. (App. 003-04.) Despite the closeness of their relationship, Kelesis never disclosed his contacts with Spirtos who was seeking a license and challenging the State's decisions or the numerous private cell phone conversations with Spirtos about undoing the result of his unsuccessful application. (*Id*.) Instead, Kelesis proceeded to participate in tax commission meetings, parroting Spirtos' criticisms and spearheading critiques of the Department's selection process in a manner designed to benefit Spirtos. (*Id*.)

Spirtos did not stop at that. On January 18, 2019, Spirtos attended the Governor's Ball at Aria Hotel & Casino. (App. 004.) The Governor's Ball was a

ticked event and not open to the public. (*Id.*; App. 222.) While there, Spirtos spoke with John Oceguera, former speaker of the Nevada Assembly who worked in the cannabis industry, including with Yemenidjian.[2] (App. 004.) Spirtos claimed to Oceguera that Yemenidjian had engaged in outright corruption in order to secure the licenses, that Yemenidjian was "knee deep" in it. (*Id.*; App. 209 ¶ 8.) Spirtos' statement falsely accused Yemenidjian of criminal activity, just as he intended. (*Id.*) Spirtos' slanderous statement shocked Oceguera, and Oceguera understood these statements to be an attempt to undermine Yemenidjian and harm his business and reputation. (*Id.*) Yemenidjian believes that Spirtos made similar slanderous statements to others. (App. 004.)

When deposed in the licensing litigation, Spirtos admitted during his deposition that he had no basis for his slanderous statements about Yemenidjian. (App. 005; App. 219.) Spirtos, along with others, simply fabricated the story because they hoped it would generate adverse publicity and interfere with Yemenidjian's ability to perfect the awarded licenses. (App. 005.) Spirtos also hoped that ginning up allegations of impropriety against Yemenidjian and others

[2] Spirtos relies heavily on a self-serving declaration attached to his motion to dismiss stating that he did not make the slanderous statements. (App. 088-94.) Yemenidjian attached a declaration from Oceguera to his opposition, reiterating what he previously told Yemenidjian: Spirtos had accused Yemenidjian of being involved in criminal activity. (App. 209-10.)

would interfere with the State of Nevada's licensing process for recreational marijuana because Spirtos had not received a recreational license. (App. 005.)

It is ironic that Spirtos made these slanderous allegations considering his own actions he admitted under oath. In early January 2019, right around when he was slandering Yemenidjian, Spirtos arranged a meeting at the offices of the Nevada Department of Taxation in Las Vegas, ostensibly for purpose of reviewing the scoring of his application.[3] (App. 005.) In truth, Spirtos was actually attempting to dupe State agents with a series of questions prepared by Spirtos' legal counsel, despite Spirtos knowing there was ongoing litigation and these State agents were represented by legal counsel. (App. 005.) As he admitted in his deposition, Spirtos entered the State offices intentionally armed with a phone application to surreptitiously record the meeting and then proceeded to record his conversation

[3] Spirtos makes much of the findings of facts entered in D.H. Flamingo's suit related to the licensing process, which were entered after the District Court denied Spirtos' Special Motion to Dismiss and are therefore not properly part of the record on appeal. *Vacation Vill., Inc. v. Hilachi Am., Ltd.*, 111 Nev. 1218, 1220, 901 P.2d 706, 707 (1995); *see also* NRAP 10. Spirtos claims that the court's "findings demonstrate that Dr. Spirtos' ***opinions about the Department*** were true." (Opening Brief at 30, fn. 6.) Of course, the court's findings make no mention of any improper conduct by Yemenidjian, especially not the outright corruption that Spirtos' alleged that he was involved in during Spirtos' conversation with Oceguera. Moreover, Spirtos admits that he had breakfast with individuals from the Department while his application was pending, the very preferential treatment of which Spirtos has accused Yemenidjian. (App. 091 ¶ 11.)

with Department of Taxation agents on State property without their knowledge or consent. (App. 005.) Thus, it was Spirtos who engaged in unlawful conduct.[4]

On November 4, 2019, Yemenidjian filed suit against Spirtos alleging two causes of action for 1) Civil Conspiracy and 2) Slander Per Se. (App. 001-07.) On December 10, 2019, Spirtos filed his Special Motion to Dismiss Pursuant to NRS 41.660, or in the Alternative, Motion to Dismiss Pursuant to NRCP 12(b)(5). (App. 008-194.) Spirtos argued that, even though he denied making the slanderous statements, they would be protected under Nevada's anti-SLAPP statute. (App. 015-16.) The anti-SLAPP statute protects good faith communications made in direct connection with an issue of public interest made in a public forum. Additionally, Spirtos set forth a litany of arguments regarding the deficiency of Yemenidjian's Complaint under the NRCP 12(b)(5) pleading standards.[5] (App. 016-23.)

Following a hearing and taking the matter under advisement, the district court rejected Spirtos' arguments. (App. 351-65.) First, and relevant to this appeal, the district court found that Spirtos' statements did not constitute protected speech under

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[4] *See* NRS 331.220 (it is "unlawful" for a person to engage in any kind of surreptitious electronic surveillance on the grounds of any facility owned or leased by the State of Nevada).

[5] Yemenidjian filed his Opposition on January 6, 2020 (App. 195-222) and Spirtos filed his Reply on January 16, 2020 (App. 223-315).

Nevada's anti-SLAPP statutory scheme and denied his motion to dismiss under NRS 41.660. (App. 355-59.) Second, the district court determined that Spirtos' statements to Oceguera were not protected under the litigation privilege. (App. 359-61.) Finally, the district court found that the Complaint had adequately stated claims for conspiracy and slander per se, as well pleading the basis for a claim for punitive damages, under NRCP 12(b)(5). (App. 361-64.) Spirtos filed the present appeal on March 26, 2020 pursuant to NRS 41.670(4). (App. 383-84.)

III. LEGAL ARGUMENT

A. Dr. Spirtos Has Not Met His Burden To Show By A Preponderance Of The Evidence That His Defamatory Statements Are Protected By The Anti-SLAPP Statutes.

The issues on appeal are limited only to whether the district court properly determined that Spirtos did not met his burden under NRS 41.660(3)(a) to "establish[] by a preponderance of the evidence, that the claim is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern; . . . ." "A preponderance of the evidence requires that the evidence lead the fact-finder to conclude that 'the existence of the contested fact is more probable than its nonexistence.'" *In re Parental Rights as to M.F.*, 132 Nev. 209, 217, 371 P.3d 995, 1001 (2016) (quoting *Brown v. State*, 107 Nev. 164, 166, 807 P.2d 1379, 1381 (1991)).

Spirtos' complete reliance on a self-serving declaration – a declaration that is

directly contradicted by Oceguera's declaration – is insufficient to meet his burden to show that his statements alleging Yemenidjian was engaged in corruption were truthful or made without knowledge of their falsehood under NRS 41.637. Additionally, the statements made in a private conversation between Spirtos and Oceguera do not fall within any of the categories of protected communications related to public concerns under NRS 41.637. The district court correctly denied Spirtos' special motion to dismiss after determining Spirtos had not met his burden under the first prong of NRS 41.660(3).

B. Spirtos' Slanderous Statements Are Not Good Faith Communications That Were Truthful Or Made Without Knowledge Of Their Falsehood.

Almost in passing, Spirtos argues that his declaration denying that he mentioned Yemenidjian to Oceguera "satisfies the good faith component of the first prong of the anti-SLAPP analysis." (Opening Br. at 29.) Relying on the Court's recent ruling in *Taylor v. Colon*,[6] a ruling that has since been amended, Spirtos disavows any obligation to show that his statements were made in good faith because of his self-serving, and contradicted, declaration. Whether a statement was made in good faith is a threshold issue in determining whether a statement is protected under Nevada's anti-SLAPP statute, and Spirtos' denials that he made statements about

[6] 468 P.3d 820 (Nev. 2020).

Yemenidjian is not sufficient to meet his burden to show by a preponderance of the evidence that his statements were made in good faith.

A statement is made in good faith if it is "truthful or without knowledge of its falsehood." NRS 41.647. "Under the first prong of the anti-SLAPP statute, we evaluate 'whether the moving party has established, by a preponderance of the evidence,' that he or she made the protected communication in good faith." *Rosen v. Tarkanian*, 133 Nev. 436, 438, 453 P.3d 1220, 1223 (2019) (quoting NRS 41.660(3)(a)). Spirtos must meet the preponderance of the evidence standard by providing evidence to show " that 'the existence of the contested fact is more probable than its nonexistence.'" *In re Parental Rights as to M.F.*, 132 Nev. at 217, 371 P.3d at 1001. Spirtos' contested affidavit does not meet that standard. Although the Court has held that "even under the preponderance standard, an affidavit stating that the defendant believed the communications to be truthful or made without knowledge of their falsehood is sufficient to meet the defendant's burden," that is only applicable if there is no "contradictory evidence in the record." *Stark v. Lackey*, 136 Nev. at 41, 458 P.3d at 347.

1. Spirtos' denial in his declaration is contradicted.

Spirtos' denial in his declaration is insufficient to meet his burden to show that his statements about Yemenidjian's involvement in corruption and allegations that he had committed a crime were made in good faith. (App. 093, ¶ 21.) Despite

his claims that he never mentioned Yemenidjian to Oceguera, Oceguera's declaration specifically rebuts Spirtos' blanket declaration:

> During our conversation, Dr. Spirtos stated that Armen Yemenidjian was knee deep in the corruption at the center of the licensing process for recreational cannabis licenses that the State of Nevada had awarded in early December 2018. I was taken aback about the allegation that Mr. Yemenidjian had supposedly corrupted the process. I was sufficiently startled by Dr. Spirtos' statements that insinuated a crime that I subsequently spoke with Mr. Yemenidjian about Dr. Spirtos' accusation. I understand now that Dr. Spirtos is denying making any reference to Armen Yemenidjian and insinuations of corruption. ***Respectfully, any such denials are simply not true***."[7]

(App. 208-9, ¶¶ 8, 9 (emphasis added).) Oceguera's declaration contradicts Spirtos' denials that he did not reference Yemenidjian, making it impossible for Spirtos to meet his burden to show he made the statements in good faith under NRS 41.660(3)(a).

Despite Spirtos' reliance on this Court's recent case, *Taylor v. Colon*, a review of the facts of that case and the evidence provided by defendants only highlight the disparities between statements that are protected by Nevada's anti-SLAPP statute

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[7] Spirtos' attempts to distinguish the allegations in Yemenidjian's Complaint (App. 004, ¶¶ 17-19) and Oceguera's declaration (App. 208-09, ¶¶ 8-9) are meritless semantics. Both the Complaint and Declaration state that Spirtos accused Yemenidjian of engaging in corrupt acts in order to secure a license for recreational marijuana. The corruption Spirtos alleged Yemenidjian engaged in – without any factual basis – would have been a crime. The statements were slanderous *per se*, accusing Yemenidjian of a crime and "impugning a person for lack of fitness for trade, business, or profession." *K-Mart Corp. v. Washington*, 109 Nev. 1180, 1192, 866 P.3d 274, 282 (1993).

and the slanderous gossip Spirtos is attempting to avoid responsibility for. In *Taylor*, the defendant made "a presentation about cheating in the gaming industry for 300 attendees of an international gaming conference . . . ." 468 P.3d at 826. Based on a nine-second clip during the presentation, the plaintiff brought a suit for defamation because he believed that "many attendees were able to identify the depicted individual as himself." *Id*. at 822.

After finding that defendant's public presentation was made in direct connection with an issue of public interest,[8] the Court reviewed plaintiff's declaration about the presentation. "[Defendant'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." *Id*. at 826. The record does not indicate that there was any admissible evidence presented to dispute defendants' claims that he did not say plaintiff was a cheater. *Id*. at 823.

That is in stark contrast to this case, where there is a competing declaration undermining Spirtos' claims that he did not make the statements. Although the Court in *Taylor* recognized the difficulties for a defendant who denies making the statement (*id*. at 826), the Court's Amended Opinion clarified that a declaration alone

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[8] As discussed *supra*, the differences between a public presentation about cheating in the gaming industry and Spirtos' scurrilous whispers at a political event could not be starker.

is insufficient to meet a defendant's burden under the first prong of the anti-SLAPP statute when there is ***contradictory evidence in the record***. (*See* Order Amending Opinion, Case No. 78517, Dec. 31, 2020.) The Court's Amended Opinion in *Taylor* relied on its decision in *Stark v. Lackey*, where the Court found that a defendant had met her burden under the first prong because her "affidavit made it more likely than not that the communications were truthful or made without knowledge of their falsehood, ***and there is no evidence in the record to the contrary***, ..." 136 Nev. at 44, 458 P.3d at 347 (emphasis added). But here, there is direct evidence contradicting Spirtos, and he is therefore not entitled to the protections of the anti-SLAPP statute.

2. Spirtos has admitted his statements were not factual.

Spirtos also cannot show that his statements about Yemenidjian were truthful or made without knowledge of their falsehood because ***he has conceded that they would be knowingly false***. During his testimony in other proceedings, Spirtos admitted that he lacked any facts upon which to make an accusation about Yemenidjian's involvement in corruption or committing a crime. (APP. 219 ("Q: Do you have any facts that Mr. Yemenidjian has committed any crime whatsoever? A: No . . . .").). By Spirtos' own admissions, the statements he made to Oceguera were knowingly false. Spirtos cannot show by a preponderance of the evidence that

his statements to Oceguera were made in good faith because they were not truthful or made without knowledge of their falsehood.

3. Spirtos' claims that his accusations were merely an opinion do not provide him protections from liability.

Spirtos next argues that because his statements that Yemenidjian was knee deep in corruption and had committed a crime were an opinion, it is inherently a statement made without knowledge of its falsehood and therefore falls within the anti-SLAPP statutes. (Open. Br. at 27, *citing Abrams v. Sanson*, 458 P.3d 1062 (Nev. 2020).) This theory has many flaws, not least of which is Spirtos' admission that he has no facts upon which to base what he is now downplaying as "opinion." Additionally, Spirtos never argued at the district court that his statements were made in good faith, let alone they were made in good faith because they were an opinion. (*See* App. 015-16; App. 226-29.)[9] The Court should decline to consider Spirtos' new argument on appeal.

Even if the Court were to consider whether Spirtos' latest spin was an opinion, he has failed to show by a preponderance of the evidence that his statement was made in good faith. There is no "wholesale exemption for anything that might be labeled as opinion." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1997). If a

[9] Spirtos did argue that his statements were an opinion in the context of the second prong of the test under NRS 41.637(3)(b), whether Yemenidjian had presented prima facie evidence of prevailing on his claim. (App. 230-31.)

statement "contains no language that would alert the reader that the statement is merely one of an opinion," whether or not the speaker thought it was an opinion is not relevant. *Miller v. Jones*, 114 Nev. 1291, 1296-97, 970 P.2d 571, 575 (1998). While Spirtos cites cases for the proposition that "[a] statement constitutes an opinion if a reasonable listener would not understand it to be a statement of existing fact," (Op. Br. at 27), courts do not need to resort to the reasonable man standard. Instead, Spirtos spoke to Oceguera, with whom he has a longstanding relationship. (App. 209, ¶ 5.) Oceguera did not understand Spirtos' statements to be opinions; rather, he understood them to be "allegations that Mr. Yemenidjian had supposedly corrupted the process." (App. 209, ¶ 8.) In fact, he was "sufficiently startled by Dr. Spirtos' statements that insinuated a crime that [he] subsequently spoke with Mr. Yemenidjian about Dr. Spirtos' accusations." (*Id*.) These statements were not intended to be heard as an opinion, nor were they received by Oceguera as one. Spirtos wanted Oceguera to understand that he was accusing Yemenidjian of corruption and a crime as an excuse for how Yemenidjian won licenses and Spirtos did not. This is not an instance where the Court is called to interpret an ambiguous allegation of impropriety. Spirtos told ***at least*** one person that Yemenidjian had committed a crime who interpreted the statement as such. He cannot now hide behind his claims that it was an unsupported opinion in order to find safe harbor for spreading lies.

Spirtos' continued insistence that he has facts to support his statements about corruption in the licensing process further undermine his attempts to avoid liability. "[E]xpressions of opinion may suggest that the speaker knows certain facts to be true or may imply that facts exist will be sufficient to render the message defamatory if false." *K-Mart Corp.*, 109 Nev. at 1192, 866 P.2d at 282 (citing *Milkovich*, 497 U.S. at 13); *see also Lubin v. Kunin*, 117 Nev. 107, 112-13, 17 P.3d 422, 426 (2001). The court in *Bentley v. Button*, which Spirtos relies on in his opening brief, found that statements were not protected as opinions for purposes of liability based on defendant's continued insistence that he had facts to support his opinions. 94 S.W.3d 561, 583-84 (Tex. 2002). "[Defendant] identified eight discrete instances that he said showed [plaintiff's] corrupt conduct in office. He cited to details himself, and attempted to elicit factional and expert testimony from other witnesses, not merely to substantiate his personal opinions, but to prove his statements true . . . [Defendant's] consistent position at trial that his accusations of corruption were true is a compelling indication that he himself regarded his statements as factual and not mere opinion, right up until the jury returned its verdict." *Id.*

Here, Spirtos continues to list the considerations he claims led him to believe that the licensing process was corrupted (excepting of course anything to support his allegation against Yemenidjian). (*See* Opening Br. 2-5, 8-11, 29-30; App. 011-17, App. 119.) Spirtos claims in his declaration that his opinion is based upon numerous

considerations, and he shared his opinion not just with Oceguera but with others. (App. 093, ¶¶ 20-21.) Based on his continual reliance on these "considerations" to support his statements, Spirtos likely alluded to or directly referenced them to support his statements about corruption and Yemenidjian's involvement. He did this in an effort to lend credibility to his smear and to show that he has support for his position. Thus, Spirtos' own attempted rationalization only further confirms that he was making defamatory statements of fact.

Spirtos has not met his burden to show, by a preponderance of the evidence, that his statements to Oceguera about Yemenidjian were made in good faith. Hardly. To the extent that Spirtos submitted a declaration that absolves himself of any wrongdoing, the other party to the conversations directly contradicted his self-serving statements. Based on this Court's decisions in *Taylor v. Colon* and *Stark v. Lackey*, the contradicted declaration alone is insufficient to satisfy Spirtos' burden under NRS 41.660. The statements were not factual or made without knowledge of a falsehood; Spirtos admitted he had no evidence to support his assertion that Yemenidjian committed a crime. Spirtos also cannot claim for the first time that his statements were an opinion and therefore are not false or in bad faith. Oceguera, the recipient of the defamatory statements, did not consider them to be an opinion, but an allegation that Yemenidjian had committed a crime. Additionally, Spirtos' continued insistence that he has support for his statements shows that he intended

for his statements to be heard as facts. In all, Spirtos fails to show that his statements were made in good faith as required by NRS 41.660.

C. Dr. Spirtos Also Cannot Prove That Statements Were Made In Furtherance Of The Right To Petition Or The Right To Free Speech In Direct Connection With An Issue Of Public Concern.

Nevada's anti-SLAPP statutes are intended to protect communications related to issues of public concern. NRS 41.637. In addition to showing that Spirtos' statements about Yemenidjian's involvement in corruption were made in good faith, he must also show by a preponderance of the evidence that they fall into one of four categories set forth in NRS 41.637. Spirtos' statements were nothing more than a failed applicant's jealousy with a successful one, hoping to undermine Yemenidjian's success for his own financial advantage. In trying to wedge his petty defamatory statements into the categories set out in NRS 41.637, Spirtos would all but render the protections for communications related to the public interest so broad as to encapsulate all defamatory speech. The Court should reject Spirtos' tortured interpretations and continue to ensure that NRS 41.637 is not abused.

1. Spirtos' statements were not made in direct connection with an issue under judicial consideration.

The district court correctly determined that "there was nothing to suggest the oral communication" fell within NRS 41.637(3) and therefore Spirtos' statements to Oceguera were not entitled to anti-SLAPP protections. (App. 375:18-20.) Spirtos' proposed interpretation of NRS 41.637(3) is so broad that it would render the anti-

SLAPP statute meaningless. Under NRS 41.637(3), "[w]ritten or oral statement[s] made in ***direct connection*** with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law; . . . which is truthful or made without knowledge of its falsehood" are protected from liability and subject to a special motion to dismiss. (Emphasis added.)

To constitute a protected statement, "the statement must (1) relate to the substantive issues in the litigation and (2) be directed to persons having some interest in the litigation." *Patin v. Ton Vinh Lee*, 134 Nev. 722, 726, 429 P.3d 1248, 1251 (2018). This Court has already warned against construing NRS 41.637(3) too broadly:

> If we were to accept [defendant's] arguments that simply referencing a jury verdict in a court case is sufficient to be in direct connection with an issue under consideration by a judicial body, we would essentially be providing anti-SLAPP protections to any act having any connection however remote with a judicial proceeding. Doing so would not further the anti-SLAPP statute's purpose of protecting the rights of litigants to the utmost freedom of access to the courts without the fear of being harassed subsequently by derivative tort actions.

Id. at 726-27, 429 P.3d at 1251-52 (citations omitted). Not every statement that can be linked in any way to litigation is entitled to protections.

Spirtos is hoping to expand NRS 41.637(3) to similarly broad levels as the Court rejected in *Patin*. Yes, his rejected entity had filed suit prior to his conversation with Oceguera, but corruption was hardly a substantive issue in the litigation at the time. Spirtos concedes that only four of the 127 paragraphs even

mention the word "corrupt." (Op. Br. at 22.) Even then, these references just refer to general allegations that the process had not been properly administered. (*See, e.g.*, App. 187, ¶ 100 ("The public interest favors Plaintiff/Petitioners because the action and decisions of an agency of the State should comply with Nevada laws and regulations, ***should be free of any corruption***, and should not be arbitrary and capricious." (emphasis added).) To the extent they're mentioned, any inferences of corruption are related to the department's process, not any impropriety on the part of other applications. There are no causes of action based on corruption. Corruption, let alone Yemenidjian's involvement in corruption, was not a substantive issue in the litigation when Spirtos made his false statements to Oceguera.

The Court's decision in *Patin* illustrates the outer limits of protections under NRS 41.637(3), and Spirtos' slander does not fall within it. In *Patin*, the plaintiff brought a claim of defamation per se based on defendant's post on her website about a case that a plaintiff was previously involved in. Defendant moved to dismiss, in part based on her contention that the post fell under NRS 41.637(3). After reviewing cases from California applying the analogous statute, the Court found that the post did not constitute a statement in ***direct connection*** under consideration by a judicial body. 134 Nev. at 725, 429 P.3d at 1250-51. The Court made it clear that having some relationship, no matter how tenuous, to an issue under consideration by a judicial body is not sufficient. *Id*. at 726-27, 429 P.3d at 1251-52. Similarly here,

the generic reference in a complaint that the process should be free of corruption does not provide cover for Spirtos' statements expressly directed at Yemenidjian.

Spirtos' statements to Oceguera also fail to satisfy the second prong of the test adopted in *Patin*. The statement must "be directed to persons having some interest in the litigation." *Id*. at 726, 429 P.3d at 1251. How broadly Spirtos casts his net to find Oceguera's purported interest only highlights Oceguera's lack of involvement in the litigation. He was not a party to the litigation. He was not an owner of any of the entities involved. Instead, Spirtos claims that Oceguera had an interest in the litigation because he was a consultant to a successful applicant and a board member of an unsuccessful one. (Opening Br. at 22-23.) Because either of these entities could have been impacted by the outcome of the ligation, Spirtos claims that Oceguera has an "interest" in the litigation. (*Id*.) By this reasoning, every single person with any connection to the marijuana industry would have had an interest in the litigation, leaving Spirtos free to defame Yemenidjian to any one of them with impunity. Just as with the first part of the test set forth in *Patin*, Spirtos' interpretation of NRS 41.637(3) is so overbroad as to lose all meaning.

2. Spirtos' frustrations about his failed application does not create a public interest.

The district court, however, correctly determined that Spirtos' statements were not protected communications. NRS 41.637(4) protects truthful "[c]ommunications made in ***direct connection*** with an issue of public interest in a place open to the

public or in a public forum, . . ." (emphasis added). This Court should also reject Spirtos' arguments that his personal conversation with a long-time friend at a ticketed event was a communication about a public interest, and therefore falls under NRS 41.637(4). His statement that "Armen Yemenidjian was knee deep in corruption at the center of the licensing process," a statement borne out of frustration that his own application was rejected, is not the type of statements the statute was intended to protect.

There is no doubt that there may be instances where statements related to public corruption could fall under NRS 41.637(4). However, there is no bright line rule. Instead, this Court adopted a set of guiding principles to determine whether statements relate to an issue of public interest:

> (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 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.

Coker v. Sassone, 135 Nev. 8, 13, 432 P.3d 746, 750 (2019) (citing *Shapiro v. Welt*, 133 Nev. 35, 39, 389 P.3d 262, 268 (2017)) (emphasis added).

Applying these principles, it becomes clear why Spirtos analyzed the broad,

amorphous concept of public corruption rather than the actual statements he made to Oceguera. (Opening Br. at 23-25.) Spirtos' slanderous statements about Yemenidjian were not intended to be in the public interest; it was an attempt to advance his own business interests. While Spirtos now frames his statements as related to public corruption, Spirtos was frustrated that his own deficient application for a recreational marijuana license had been rejected. Spirtos was hoping to get ammunition for his plan to receive a license through litigation, just like he did when he obtained his medical marijuana license. No matter how many times Spirtos repeats his slanderous statements about Yemenidjian, he cannot turn it into a public interest under NRS 41.637(4).

The Court recently recognized that it had not developed a test to determine whether a statement is made in a place open to the public or in a public forum. *Kosor v. Olympia Comps.*, 136 Nev. Adv. Op. 83 (Dec. 31, 2020). That ambiguity, however, goes to statements made at HOA meetings and posted on certain websites. *Id*. at *6-7. The district court accurately considered the scope when determining that Spirtos' one-on-one conversation with Oceguera "was not made 'in a place open to the public or in a public forum.' Indeed, while there were perhaps hundreds, if not thousands of attendees at a governor's inaugural ball, such an event or party is either by invitation or paid ticket, meaning not just anyone may come and join. Notwithstanding that point, *even if* the Ball were considered a 'public forum,' the

statement allegedly was made private to Mr. Oceguera." (App. 376:15-19.) A plain reading of NRS 41.637(4) should exclude private conversations like the one between Spirtos and Oceguera.

A review of instances where the Court has determined statements fall under NRS 41.637(4) further highlight just how far afield Spirtos' one on one communication is. In *Taylor*, a researched presentation to 300 people about gambling constitutes a protected statement in public. 486 P.3d at 826. Statements posted to a website about a judge's behavior in the courtroom was found to be directly related to a public interest in a public forum in *Abrams v. Sanson*. 136 Nev. at 87, 458 P.3d at 1066-67. The Court recently determined that statements made at HOA meetings in a large planned community were in the public interest because "each of [defendant's] criticisms of Olympia fundamentally related back to his strident support for democratic participation in and governance over the large residential community where he resided, which undoubtedly goes beyond ***the airing of some trivial private dispute between private parties***." *Kosar*, 136 Nev. Adv. Op. at *5 (emphasis added). The Court should not now expand NRS 41.637(4) to Spirtos' private conversation about a private dispute.

In all, Spirtos did not meet his burden to show, by a preponderance of the evidence, that his defamatory statements about Yemenidjian's purported involvement in corruption and criminal activity was protected by the anti-SLAPP

statute such that Yemenidjian's lawsuit should be dismissed. Spirtos' self-serving declaration was directly contradicted by Oceguera; Spirtos cannot show that these statements were made in good faith, particularly because he later conceded that he had no support for his allegations against Yemenidjian. Spirtos' attempts to gossip and spread lies also do not fall within any of the four categories enumerated in NRS 41.637. Spirtos' tortured and expansive interpretation directly contradicts the Court's prior opinions explaining the necessary relationship. A tenuous relationship to a litigation is not enough, nor is a broad amorphous public interest. Therefore, Spirtos has not met his burden under the first prong of NRS 41.660 to show by a preponderance of the evidence that Yemenidjian's defamation claim was based upon a good faith communication in direct connection with an issue of public concern.

D. Dr. Spirtos' Motion To Dismiss Pursuant To NRCP 12(b)(5) Is Not Before This Court.

Much of Spirtos' argument in his opening brief asks this Court to determine whether Yemenidjian met his burden under the second prong of NRS 41.660(3)(b). (Opening Br. 31-41.) A review of the underlying briefing, however, shows that Spirtos advanced these arguments as part of his request for alternative relief under NRCP 12(b)(5), not in relation to his special motion to dismiss under NRS 41.660. (*See* App. 010-11, App. 016-23 (discussing Spirtos' request for relief under NRCP 12(b)(5)); App. 232-43 (same).) Additionally, the district court's order addressed – and denied – these arguments under the NRCP 12(b)(5) standard. (App. 381 ("In

addition, the Complaint does state a claim for which relief may be granted with respect to the First Cause of Action (civil conspiracy). It also states a claim for which relief may be granted with respect to the Second Cause of Action (slander *per se*), . . ."

Spirtos must be aware that the Court does not have jurisdiction to hear denials of motions to dismiss under NRCP 12(b)(5). *See* NRAP 3A(b) (setting out appealable determinations); *Kirsch v. Traber*, 134 Nev. 163, 168, 414 P.3d 818, 822 (2018). That is why he shifts the arguments that he previously sought as relief under NRCP 12(b)(5) to these new arguments that Yemenidjian did not show a probability of prevailing on the merits under NRS 41.660(3)(b). Regardless, since these issues were not argued below, they are deemed to have been waived and should not be considered on appeal. *Delores v. State, Emp't Sec. Div.*, 134 Nev. 258, 261, 416 P.3d 259, 262 (2018). The Court should not consider Spirtos' repackaged arguments made in an attempt to give this Court jurisdiction to consider the district court's denial under NRCP 12(b)(5).

The Court should also not consider Spirtos' general arguments about whether or not Yemenidjian met his burden under the second prong of the anti-SLAPP motion to dismiss. Pursuant to NRS 41.660(3), only once a defendant meets his burden to show, by a preponderance of the evidence that the statements were protected under the anti-SLAPP statute should the district court consider whether

the plaintiff met his burden. The district court did not address this issue below, because it determined that Spirtos' failed to meet his burden under the first prong of the test. (App. 368-381.) This Court has previously declined to consider whether the plaintiff met his burden under the second prong for the first time on appeal. *See, e.g. Abrams v. Sanson*, 136 Nev. at 91 n.3, 458 P.3d at 1069 n.3; *Stark v. Lackey*, 136 Nev. at 41, 458 P.3d at 345. The Court similarly should not consider Spirtos' arguments for the first time here.[10]

E. The Litigation Privilege Does Not Protect These Slanderous Statements.

Much like his analysis of NRS 41.637(3), Spirtos widely construes the scope and purpose of the litigation privilege in an attempt to avoid liability for his statements to Oceguera. Spirtos leans into his broad interpretation of a significant interest: "The entire industry had a significant interest in the litigation because it would have been affected by D.H. Flamingo's request for an order revoking the licenses awarded by the Department and requiring the Department to redo the application process." (Opening Br. at 33.) Spirtos' interpretation of the litigation privilege would allow him to say whatever he would like about his competitors while

[10] Despite the lack of jurisdiction to consider the denial of a motion pursuant to NRCP 12(b)(5), and the Court's prior decisions to not consider the second prong of the test under NRS 41.660(3), and without waiving his arguments about jurisdiction, Yemenidjian responds to Spirtos' meritless arguments out of an abundance of caution.

hiding behind the shield of a pending lawsuit.

The purpose of the litigation privilege is to protect litigation participants from liability for their advocacy before the courts. *Fink v. Oshins*, 118 Nev. 428, 433, 49 P.3d 640, 643 (2000). The privilege exists so as to protect the merits of judicial proceedings, because the law has made the policy choice that it is better to promote zealous advocacy before the courts despite the risk of potential abuse with false statements. *Id*.

Outside the courthouse, however, the litigation privilege has a limited application, and is only implicated when a statement is made relating to the litigation and if the recipient of the communication has a "significant interest" in the litigation, such as when lawyers or litigants communicate outside the courtroom regarding a potential settlement. *Id*. at 436, 49 P.3d at 645-46. "In order to determine whether a person who is not directly involved in the judicial proceedings may still be 'significantly interested in the proceeding,' the district court must review 'the recipient's legal relationship to the litigation, not their interest as an observer.'" *Shapiro v. Welt*, 133 Nev. at 41, 389 P.3d at 269 (quoting *Jacobs v. Adelson*, 130 Nev. 408, 416, 325 P.3d 1282, 1287 (2014)). The statement must also be sufficiently relevant to the litigation in order to fall within the litigation privilege. *Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 62, 657 P.2d 101, 105 (1983).

The district court properly determined that Spirtos was "not entitled to the

protections of the absolute litigation privilege as it relates to his statements made to Mr. Oceguera in January 2019." (App. 378.) The district court recognized that Oceguera may have had some interest the litigation as an observer, but it was not sufficient to constitute the significant interest necessary for the litigation privilege to apply. (*Id*.) This Court has previously drawn a comparison between statements relating to an issue before a judicial body under NRS 41.637(3) and the litigation privilege. *Patin*, 134 Nev. at 727 n.4, 429 P.3d at 1252 n.4 (noting that a defendant's "argument that the statement is protected by the absolute litigation privilege fails for the same reason"). Oceguera's general involvement in the marijuana industry is not enough to create the necessary significant interest in the litigation for the absolute litigation privilege to apply.

F. Yemenidjian's Complaint Has Stated Claims Upon Which Relief Can Be Granted.

1. Conspiracy.

The district court correctly determined that Yemenidjian adequately pled a cause of action for civil conspiracy. The Complaint alleged that "Spirtos and others have undertaken a campaign to lie about and slander Mr. Yemenidjian." (App. 005.) Because this issue was before the district court on a motion to dismiss, the district court was required to accept the allegations as true. *Buzz Stew, LLC v. City of N. Las Vegas*, 123 Nev. 224, 228, 181 P.3d 670, 672 (2008). The district court determined that this allegation met the pleading standard, and "the co-conspirators

need not be specifically identified, and the reference to 'others' are enough to state a claim for which relief may be granted . . . ." (App. 380.)

Spirtos argues that Yemenidjian's Complaint alleges a conspiracy of one, a legal impossibility. (Opening Br. at 37.) That is not accurate. As the district court noted, however, the complaint references, but does not name, the other co-conspirators. As for *Morris v. Bank of America*, the sole Nevada case which Spirtos relies upon to support his argument, the deficiencies in that complaint did not rise to meet the necessary pleading standard under NRCP 8(a). 110 Nev. 1274, 1276 n.1, 886 P.2d 454, 455 n.1 (1994). This includes failing to identify *any party* to the conspiracy or the unlawful objective of the conspiracy. *Id*. By contrast, Yemenidjian's complaint does just what the law requires, detailing Spirtos' conduct that was intended to harm Yemenidjian.[11]

Spirtos' also advances the argument for dismissal of the conspiracy claim because it is duplicative of the claim for slander per se. (Opening Br. 39-40.) This both ignores the law that acts can give rise to more than one cause of action and misconstrues the claims. While his claim for slander per se arises out of Spirtos' statement to Oceguera, the claim for civil conspiracy is broader. As the complaint

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[11] Spirtos' remaining arguments all rely on out of jurisdiction case law intended to impose a heightened pleading burden, one that does not exist here. Again, Nevada is a notice pleading state, and a complaint need only give "fair notice of the nature and basis of the claim." *Vacation Vil., Inc. v. Hitachi Am., Ltd.*, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994).

alleges, Spirtos and the Doe and Roe Defendants undertook a campaign to undermine Yemenidjian and his business. Through his backroom maneuvering, Spirtos worked to slander and spread lies about Yemenidjian to harm him in his business. The district court correctly determined that Yemenidjian had adequately pled a claim for civil conspiracy and, again, this Court lacks jurisdiction to review a denial of a motion to dismiss under NRCP 12(b)(5). The district court's order should not be disturbed.

2. Punitive damages.

The district court recognized that Yemenidjian's complaint identifies the basis for his prayer for punitive damages: despite knowing that there were no facts to support his statements, Spirtos slandered Yemenidjian. (App. 380-81; App. 005 ¶ 22-23.) Spirtos told Oceguera that Yemenidjian was involved in outright corruption in order to secure licenses. Spirtos intended to falsely accuse Yemenidjian of criminal activity in an attempt to undermine him and harm his reputation and business. This is the type of behavior that punitive damages were intended to punish and to discourage. NRS 42.005. Indeed, that is why Nevada law places no cap on the amount of punitive damages for slander. *Id*. Nevada's Legislature has determined that the type of conduct undertaken by Spirtos here is so repugnant to a civilized society that the potential amount of punitive damages should be unlimited. The district court's order denying Spirtos' motion to dismiss is legally

sound.

IV. CONCLUSION

This Court should affirm the district court's denial of Spirtos' special motion to dismiss pursuant to NRS 41.660. The anti-SLAPP statutes are intended to limit liability for statements about issues of public concern. Spirtos failed to meet his burden to show, by a preponderance of the evidence, that his statements slandering Yemenidjian and accusing him of committing a crime were made in good faith, or fell within any of the categories set out in NRS 41.637. Because Spirtos did not meet his burden under the first prong, the Court, consistent with past decisions, should not consider whether Yemenidjian met his burden under the second prong. Similarly, the Court should also find that it does not have jurisdiction to review the district court's denial of Spirtos' request for alternative relief under NRCP 12(b)(5) and decline to consider Spirtos' repackaged arguments.

DATED this 20th day of January 2021.

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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 Office Word 2007 in size 14 font in Times New Roman.

I further certify that I have read this brief and it complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains approximately 8,406 words.

Finally, I hereby certify that to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in this brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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 20th day of January 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 20th day of January, 2021, I electronically filed and served by electronic mail a true and correct copy of the above and foregoing **RESPONDENT'S ANSWERING BRIEF** properly addressed to the following:

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