IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVE SANSON, AN INDIVIDUAL; AND ROB LAUER, AN INDIVIDUAL,

Appellants,

v.

LAWRA KASSEE BULEN,

Respondent.

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SUPREME COURT CASE NO. 82393

Dist. Court Case No. A-18-784807-C

On Appeal from the Eighth Judicial District Court
Clark County, Nevada Department V, Hon. Veronica Barisich, Presiding

APPELLANTS' OPENING BRIEF

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DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1

Pursuant to NRAP 26.1, Appellants' counsel Adam J. Breeden, Esq. hereby discloses the following:

There are no corporations or business entities involved in this appeal and, therefore, there are no related or parent companies to disclose.

The only counsel appearing or expected to appear for the Appellants is Adam J. Breeden, Esq. of the Breeden & Associates, PLLC law firm. Appellants were represented at the District Court level by attorneys Kory Kaplan and Kyle Cottner of Kaplan Cottner.

The Appellants are not using a pseudonym.

Dated this 28th day of May, 2021.

BREEDEN & ASSOCIATES, PLLC

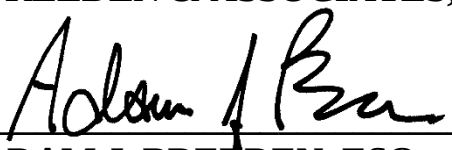

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

The basis of this Court's appellate jurisdiction is NRAP 3A(b)(8) as a special order after judgment awarding fees and costs but denying sanctions. The Appellants appeal from a District Court order entered on December 18, 2020 (ROA Vol. II at 447-452) with Notice of Entry of Order served on December 21, 2020 (ROA Vol. II at 453-461). The Notice of Appeal was filed and served on January 20, 2021, within 30 days of Notice of Entry of Order (ROA Vol. II at 466-467). The order appealed from adjudicated all post-judgment attorney fees, costs and sanctions issues under Nevada's Anti-SLAPP laws and left nothing further to be determined by the District Court.

ROUTING STATEMENT

This appeal presents a novel issue of law as to what legal standard and what factors the District Court should consider when determining whether the $10,000 discretionary sanction under NRS § 41.670(1)(b) should be awarded upon the granting of an Anti-SLAPP special motion to dismiss. There is currently no guidance for the District Courts on this issue of law which is unique to the State of Nevada.

Therefore, Appellants believe that this appeal concerns a question of first impression under Nevada law and a question of statewide public importance under NRAP 17(a)(13) and (14) and, therefore, this appeal should be retained by the Nevada Supreme Court. The case is otherwise presumptively assigned to the Nevada Court of Appeals.

I. STATEMENT OF ISSUES IN APPEAL

1. What legal standard applies or what factors should the District Court consider when determining whether the $10,000 discretionary sanction under NRS § 41.670(1)(b) should be awarded upon the granting of an Anti-SLAPP special motion to dismiss?

2. Did the District Court abuse its discretion under NRS § 41.670(1)(b) by denying statutory sanctions to successful Anti-SLAPP litigants when it summarily denied the sanctions?

II. STATEMENT OF THE CASE

Respondent Bulen filed a defamation lawsuit against the Appellants Sanson and Lauer, who published articles regarding her on their local political news websites. Sanson and Lauer prevailed on an Anti-SLAPP special motion to dismiss and Bulen's entire case was dismissed.[1]

Subsequently, Sanson and Lauer filed a motion for attorney's fees, costs and sanctions under the same Anti-SLAPP laws. While the District Court awarded attorney's fees and costs, the District Court with minimal analysis refused to award the discretionary $10,000 sanction to both Sanson and Lauer under NRS §

[1] The Respondent has appealed the dismissal under Nevada's Anti-SLAPP laws, see Bulen v. Lauer, Nevada Supreme Court Case No. 81854. This appeal remains pending. If this appeal were to be successful, the matter would be remanded to the District Court and this appeal would be potentially be moot.

41.670(1)(b). Sanson and Lauer now appeal the summary denial of these sanctions and seek to establish precedent regarding the importance of awarding these sanctions to further the overall goal of Nevada's Anti-SLAPP laws.

III. STATEMENT OF FACTS

Respondent Bulen filed a Complaint against Appellants Sanson and Lauer on November 20, 2018. (ROA Vol. I at 1). The Complaint alleged that Bulen is a "campaign manager for Republican candidates and a real estate agent." (ROA Vol. I at 2, ¶ 5). It further alleged that Lauer "is a political writer" and Sanson is affiliated with a local political group, Veterans in Politics. (ROA Vol. I at 2, ¶ 6-7). The Complaint raised several causes of action sounding in defamation and false light related to articles published and/or written by Sanson and Lauer.[2]

The merits of Bulen's lawsuit were specious from the beginning. A lawsuit where a political campaign manager sues political journalists or activists is bound to have problems with the First Amendment's right to free political speech. Some of the allegations were obviously protected opinions of the writer(s), such as allegations that Bulen was "chased out of Republican Party groups" in other states. (ROA at Vol. I. at 3 ¶ 16). Another article claimed Bulen was the subject of an ethics complaint with a local real estate group and attached a copy of the complaint as

[2] The actual articles--not just the pleadings and motions describing them--appear in the record at ROA Vol. I at 164-167.

support for the story which, although disputed by Bulen, had a source. (ROA Vol. I at 4 ¶ 17-19). Another part of the Complaint alleged that Sanson and/or Lauer published an article which said "Kassee Bulen Attacks President Trump," wherein even the Complaint conceded the video is an actual interview given by Bulen but allegedly "heavily edited." (ROA Vol. I at 5, ¶20-21). In other words, the allegations were essentially that while the interview was one given by her, it was edited so as not to be flattering to Bulen. Another article cited a "campaign source" which questioned Bulen's credibility. (ROA Vol. I. at 6 ¶ 23.) Yet another article questioned Bulen for claiming to be of high skill as a realtor Las Vegas, despite the fact that she had only moved to Las Vegas in the past year and had not sold any homes in Las Vegas. (ROA Vol. I at 172). Another dispute alleged Bulen had committed crimes of the nature of assault in the state of Texas (ROA Vol. I at 174) but Bulen alleged that records of this offense had been sealed and therefore should not be discussed. (ROA Vol. I at 4 ¶ 16, 202). In other words, to many observers, it would appear that the articles and statements were commentary by journalists about a political campaign manager, many of which were simply of a factual nature or were protected opinions.

Given the obvious First Amendment issues with the Complaint, Sanson and Lauer filed a special motion to dismiss under Nevada's Anti-SLAPP laws. (ROA Vol. 1 at 199). The Court held a hearing on the special motion to dismiss on August

4, 2020. (Transcript at ROA Vol. II at 350-368). An order granting Sanson and Lauer's special motion to dismiss was entered on August 21, 2020. (ROA Vol. II at 369-374). The Order contained detailed findings of fact and conclusions of law which explained that the disputed communications were of public interest, made in the public forum, and consisted of protected speech. (ROA Vol. II at 370-371 ¶ 8-11) The Order continued to detail that Bulen's claims were without even "minimal merit" because the statements were "true, made without knowledge of falsehood, and/or were opinions that therefore could not be defamatory." (ROA Vol. II at 372 ¶ 16-17). Bulen has appealed the Order dismissing her case (Notice of Appeal ROA Vol. II at 421) and that appeal remains pending before this Court as *Bulen v. Lauer*, Sup. Ct. Case No. 81854.

After prevailing on their special motion to dismiss, Sanson and Lauer filed a timely post-judgment motion for an award of attorney's fees, litigation costs and sanctions under Nevada's Anti-SLAPP law. (ROA Vol. II at 389). This Motion sought a discretionary sanction of up to $10,000 per defendant under NRS § 41.670(1)(b) following a successful Anti-SLAPP special motion to dismiss. (ROA Vol. II at 392 & 394). In opposition to the $10,000 sanctions, Bulen only argued that the purpose of the sanctions is to deter "frivolous motions attempting to restrain free speech" (a legal standard not in the statute) and decried that Sanson and Lauer continued to "criticize the Plaintiff" and her counsel during litigation and thus did

not deserve any sanction. (ROA Vol. II at 418).

The District Court heard the motion for post-judgment fees, costs and sanctions on October 6, 2020. (Transcript at ROA Vol. II 435-446). The District Court granted in part and denied in part the motion. Attorney fees of $16,415 and costs of $281.84 were awarded to Sanson and Lauer for a total award of $16,696.84, later reduced to a written order. (ROA Vol. II at 447-451). However, the $10,000 additional sanction was denied. In the written order, no analysis of why the $10,000 per defendant sanctions were denied was given at all, only a cursory statement that "Defendants' Motion for additional sanctions in the form of an award of $10,000 per Defendant is hereby DENIED." (ROA Vol. II at 451). The transcript of the hearing contains only slightly more analysis, with the District Court orally stating "[a]s to the second section, as to what the Court may award up to $10,000, I am going to deny that part of the motion. I don't believe the action was brought in bad faith or for any ill reason." (ROA Vol. II at 445).

Unfortunately, there is no guidance under Nevada law as to what legal standard or what factors the District Court should consider when assessing a motion for the $10,000 sanctions. Sanson and Lauer now appeal the denial of the $10,000 per Defendant sanction. They request that this appellate court provide further guidance to the district courts and litigants state-wide as to when said sanctions should be awarded and they urge a legal standard or factors weighing heavily in

favor of sanction awards to fulfill the Anti-SLAPP law's purpose in deterring suits filed for improper purposes.

IV. SUMMARY OF THE ARGUMENT

Appellants Sanson and Lauer maintain that the District Court erred and failed to fulfill the deterrent nature of Nevada's Anti-SLAPP laws when it held that some bad faith, vexatious or frivolous nature of the Complaint must be found *in addition* to the suit being a SLAPP lawsuit in order to award the $10,000 sanctions. This legal standard is not set forth in the law and is counter to the legislative purpose of the sanctions. Sanson and Lauer urge this Court to adopt a legal standard that presumes the sanctions should be awarded and otherwise clarify the factors the District Court should consider when assessing sanctions.

V. ARGUMENT

A. Nevada's Anti-SLAPP laws Present Important, State-Wide Issues of Public Policy and Protection of Free Speech

"A SLAPP [Strategic Lawsuit Against Public Policy] lawsuit is characterized as 'a meritless suit filed primarily to chill the defendant's exercise of First Amendment rights.'" *Dickens v. Provident Life and Acc. Ins. Co.*, 117 Cal. App. 4th 705, 11 Cal. Rptr. 3d 877, 882 (Ct. App. 2004) (quoting *Wilcox v. Superior Court (Peters)*, 27 Cal. App. 4th 809, 33 Cal. Rptr. 2d 446, 449 n.2 (Ct. App. 1994). The hallmark of a SLAPP lawsuit is that it is filed to obtain a financial advantage over one's adversary by increasing litigation costs until the adversary's case is weakened

or abandoned. *U.S. Ex Rel. Newsham v. Lockheed Missiles*, 190 F.3d 963, 970 (9th Cir. 1999). SLAPP lawsuits create a chilling effect on free speech because a speaker may fear a meritless but expensive lawsuit for stating the truth or opinion.

Anti-SLAPP laws recognize that although a SLAPP lawsuit might eventually get dismissed, the "costs associated with defending such suits" result in a scenario wherein "defendants are put to great expense, harassment, and interruption of their productive activities." RCW § 4.24.525 legislative findings of intent (b) & (c) (Washington Senate Bill 6395 (2010) 61st Leg. at § 1, Addendum at 227). Therefore, an Anti-SLAPP law seeks to expedite adjudication of the merit of a disputed SLAPP case and to award damages to the affected defendant. "Nevada's anti-SLAPP statute was enacted in 1993, shortly after California adopted its statute, and both statutes are similar in purpose and language." *John v. Douglas Cty. Sch. Dist.*, 125 Nev. 746, 752, 219 P.3d 1276, 1281 (2009). However, nearly twenty years after its enactment, the United States Court of Appeals for the Ninth Circuit in *Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795 (9th Cir. 2012), noted certain weaknesses in Nevada's anti-SLAPP statute, including the lack of the right to an immediate appeal, ambiguity over whether an immunity right existed for defendants, and lack of clarity as to the standard for granting or denying a special motion to dismiss. This led to concerns that Nevada's Anti-SLAPP laws had lagged behind other states and had limited practical effect.

As a result of the *Ferrell* decision, Nevada substantially overhauled its anti-SLAPP laws in 2013. (Hearing before the Nevada Senate Judiciary Committee, 77th Session (2013) [Statement of Senator Justin Jones], Addendum at 22 "The purpose of S.B. 286 is to address concerns raised by the Ninth Circuit Court of Appeals [with existing Nevada law]…"). Senate Bill 286 was enacted as a way to define "the right to free speech in direct connection with an issue of public concern" and to make the speaker "immune from any civil action for claims based on that communication." Bill Summary, Nevada Senate Bill 286, 77th Session 2013, Addendum at 13). The Nevada Legislature considered Senate Bill 286 carefully and heard testimony in particular from several sources, including a First Amendment attorney and an ACLU attorney in support of said bill. (Hearing before the Nevada Senate Judiciary Committee, 77th Session (2013) [Statements of Marc Randazza, Esq. and Allen Lichtenstein, Esq.] Addendum at 22-28, 40-42).

Senate Bill 286, later codified into NRS § 41.635-670, was based in part on laws in effect in California, Florida, Washington and Oregon. (Hearing before the Nevada Senate Judiciary Committee, 77th Session (2013) [Statement of Marc Randazza] Addendum at 26-27). Most germane to this appeal, the state of Washington has enacted a law, RCW 4.24.525(6)(a)(ii), that requires a *mandatory* sanction award of $10,000 to be granted to every party who prevails on an anti-SLAPP special motion to dismiss. This $10,000 sanction is *in addition* to any

attorney's fees and costs awarded to the prevailing defendant. The sanction is mandatory under Washington state law, there is no discretion of the court to refuse to award it. The $10,000 sanction is sometimes referred to as a "bounty" for a successful SLAPP lawsuit defendant.

When Nevada 2013 Senate Bill 286 was being debated, the original draft mirrored Washington state law and contained a mandatory $10,000 sanction upon the granting of an Anti-SLAPP special motion to dismiss. (Bill Draft, Nev. Senate Bill 286, 77th Session (2013) Addendum at 17, 39, 134-135). However, several legislators objected to the mandatory nature of the sanction. (Hearing before the Nevada Senate Judiciary Committee, 77th Session (2013) [Statements of Senators Justin Jones and Mark Hutchison] Addendum at 113-114) and instead Section 4 of the bill was amended such that the district court had discretion to make a sanctions award of an amount up to $10,000. (Hearing before the Nevada Senate Judiciary Committee, 77th Session (2013) Addendum at 113-114, 117, 124, 134-135) Thus, the revised language is unique to Nevada and provides the district court with discretion to award nothing at all or even an amount of less than $10,000 as warranted. This section of Senate Bill 286 was later codified into NRS § 41.670(1)(b) which reads as follows, with the prefatory language left for context:

> NRS 41.670 Award of reasonable costs, attorney's fees and monetary relief under certain circumstances; separate action for damages; sanctions for frivolous or vexatious special motion to dismiss; interlocutory appeal.

> 1. If the court grants a special motion to dismiss filed pursuant to NRS 41.660:
>
> (a) The court shall award reasonable costs and attorney's fees to the person against whom the action was brought, except that the court shall award reasonable costs and attorney's fees to this State or to the appropriate political subdivision of this State if the Attorney General, the chief legal officer or attorney of the political subdivision or special counsel provided the defense for the person 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.*

B. Although the Statutory Sanction is Discretionary, the District Court may abuse that Discretion if it Denies the Sanctions in an Arbitrary or Capricious manner or by not Considering all Relevant Factors

NRS § 41.670(1)(b) states that the District Court "may" award an additional sanction of not more than $10,000 to the person against whom the suit was brought. Use of the word "may" in a statute indicates that the court has discretion. *State Emps. Ass'n v. Daines*, 108 Nev. 15, 19, 824 P.2d 276, 278 (1992) ("in statutes, 'may' is permissive…"). However, where the District Court does not properly exercise its discretion or denies a discretionary request for an arbitrary or capricious reason without explanation, it is abuse of discretion and can be overturned by a higher court. *Pandelis Constr. Co. v. Jones-Viking Assocs.*, 103 Nev. 129, 132, 734 P.2d 1236, 1238 (1987) (finding it "constitutes an abuse of discretion for a court to give no reason for its refusal to award fees."); *Bergmann v. Boyce*, 109 Nev. 670,

856 P.2d 560 (Nev. 1993) ("where a trial court exercises its discretion in clear disregard of the guiding legal principles, this action may constitute an abuse of discretion."); *Willmes v. Reno Mun. Court*, 118 Nev. 831, 835, 59 P.3d 1197, 1200 (2002) (concluding that a court's failure to exercise its available discretion can constitute a manifest abuse of discretion); *Goodman v. Goodman*, 68 Nev. 484, 487-88, 236 P.2d 305, 306 (1951) ("if the discretion is abused, the abuse may be reviewed and corrected by a higher tribunal"). Sanson and Lauer assert that such an abuse of discretion occurred in this case when they were denied the sanctions award.

C. This Court should Adopt a Legal Standard and Factors for the District Court's to Consider which Encourages Issuance of the Discretionary $10,000 Sanctions in Anti-SLAPP Cases

There is virtually no guidance as to how NRS § 41.670(1)(b) is to be applied in terms of what legal standard should be used or what factors the district court should consider when assessing part or all the $10,000 sanction. There is nothing in the legislative history. The discretionary "bounty" sanction is unique to Nevada law, so no other state laws or decisions are persuasive. This is an issue of first impression under Nevada law.

In terms of case law applying the statute, the only real discussion of substance as to the sanction comes from an unpublished Nevada United States District Court opinion, *Banerjee v. Cont'l Inc.*, Case No. 2:17-cv-00466 (Nev. Dist.) (unpublished). (Addendum at 1-10). In that case, the defendant prevailed on a Nevada Anti-SLAPP

special motion to dismiss a complaint and moved for fees and sanctions under the law. While the court granted the motion for fees in part, it denied the $10,000 in statutory damages sought, the same scenario that occurred in the present case before the court. The court in *Banerjee* acknowledged that "[t]he Nevada statute does not outline the parameters of when a court should award statutory damages under [NRS] § 41.670(1)(b)." The federal court then continued to say that the overall statute "suggests" that the sanction is akin to "punitive damages" or the standard under NRS § 41.670(c) that a sanction may be awarded if the court finds the filing to be "frivolous or vexatious." (Addendum at 9). Therefore, the court in *Banerjee* found that the statutory sanctions award under NRS § 41.670(1)(b) is also "aimed at frivolous or vexatious conduct that warrants a type of punitive…award." On that basis, the *Banerjee* court denied further sanctions in that case. Thus, the *Banerjee* opinion (1) puts the onus on the prevailing to defendant to establish the plaintiff exhibited a higher level of "frivolous or vexatious" behavior beyond what already exists in a typical SLAPP suit, (2) reads a frivolous or vexatious requirement into the statute which does not exist under the plain statutory text, and (3) ignores the fact that the legislature chose to use that language for NRS § 41.670(2)-(3) but intentionally omitted that language under NRS § 41.670(1)(b).

Neither the parties nor the District Court cited to *Banerjee* in the proceedings below. Sanson and Lauer cite to it now only to stress that guidance from a Nevada

appellate court on the correct legal standard is needed so NRS § 41.670(1)(b) can be correctly applied. At oral argument in this case, the District Court clearly wanted counsel to focus on "why I should award an additional up to $10,000…" since there was no real guidance for the correct standard. (ROA Vol. II at 437). In denying the sanctions, the only analysis the District Court gave was that "I don't believe the action was brought in bad faith or for any ill reason," (ROA Vol. II at 445), so it is clear that the District Court read some "bad faith" type language into the statute which does not actually exist in the plain language. The District Court's written order contained no additional analysis and simply stated in a conclusory manner that "Defendants' Motion for additional sanctions in the form of an award of $10,000 per Defendant is hereby denied." (ROA Vol. II at 451).

Sanson and Lauer believe that the District Court's analysis is incorrect. First, Sanson and Lauer should not have borne the burden of establishing why sanctions were warranted. The purpose of the Anti-SLAPP law and all its fee-shifting and sanctions provisions is to deter SLAPP lawsuits. Therefore, Sanson and Lauer believe the correct way to apply NRS § 41.670(1)(b) would be to presume that the sanctions are appropriate and put the burden on the plaintiff, who has just lost a special motion to dismiss after filing a SLAPP suit, to explain why the sanctions should *not* be warranted. This is the statutory construction that fulfills the intent of the statute.

Second, Sanson and Lauer believe the district court erred in finding that the complaint was not "brought in bad faith or for any ill reason." (ROA Vol. II at 445) By definition a SLAPP lawsuit is an abusive "meritless lawsuit that a party initiates primarily to chill a defendant's exercise of his or her First Amendment free speech rights" *Stubbs v. Strickland*, 129 Nev. 146, 150, 297 P.3d 326, 329 (2013). SLAPP lawsuits seek not to address the merits of the suit as much as to punish the defendant and deter others with the heavy financial burden of the attorney's fees and costs of defending the SLAPP lawsuit itself. *John v. Douglas Cty. Sch. Dist.*, 125 Nev. 746, 752, 219 P.3d 1276, 1280 (2009) ("The hallmark of a SLAPP lawsuit is that it is filed to obtain a financial advantage over one's adversary by increasing litigation costs until the adversary's case is weakened or abandoned."). The Nevada Supreme Court has squarely called all SLAPP suits "wasteful and abusive litigation." *Id.* at 757. The rationale for the very 2013 amendments to the Anti-SLAPP law at issue in this case were to financially deter these lawsuits. Thus, when the *Banerjee* court and the District Court in this action decide that issuance of the sanctions *also* requires a finding of a "frivolous or vexatious" filing or the district court in this case requires further proof of "bad faith" or "ill reason," those decisions miss the mark because *by definition* a SLAPP lawsuit is a meritless, wasteful, abusive lawsuit filed for an improper purpose.

As detailed to the Nevada legislature, defending SLAPP suits often results in

a "pyrrhic victory"[3] where the defendant is still saddled with debts from defending the abusive lawsuit, thus serving the plaintiff's goal of financially punishing the defendants regardless of losing the case. (Hearing before the Nevada Senate Judiciary Committee, 77th Session (2013) (Statement of Marc Randazza) Addendum at 22-23). The present case presents a fine example of this result and the very need to award the sanction in addition to attorney's fees. Sanson and Lauer incurred nearly $17,000 in attorney's fees and costs defending the suit and are still incurring fees and costs defending Bulen's appeal[4] and trying to recover the sanctions denied them in this appeal. Moreover, based on the District Court's order denying the $10,000 sanctions, the most the defendants will ever do is break even by recovering the fees and costs they incurred in defending the suit. Due to the denial of sanctions, Sanson and Lauer will not recover any money for *their own* wasted time in defending the claim or the risk that the plaintiff will not pay the money judgments against her, which has actually happened in this case (Bulen has, to date, paid not $1 of the fees and costs awarded against her). Moreover, because a special motion to dismiss must by statute be filed within sixty days of service of

[3] The term pyrrhic victory is used to describe a situation where a person prevails but nevertheless suffers overwhelming negative consequences due to the engagement. The term gets its name after King Pyrrhus of Epirus, whose army suffered so many irreplaceable casualties in defeating the Romans during the Pyrrhic War that he could not continue to fight them.

[4] *Bulen v. Lauer & Sanson,* Sup. Ct. Case No. 81854.

the complaint, the amount of attorney's fees and costs awarded would be minimal at that stage, likely $20,000 or less as in this case. To many large corporations and wealthy litigants, $20,000 is practically nothing to pay if the price is buying the silence of the defendant and showing the defendant that if they speak, they will be sued. Indeed, this is the exact purpose of the $10,000 sanction under Washington law and even one Nevada legislator was worried that a $10,000 sanction *wasn't enough* to deter SLAPP lawsuits. (Hearing before the Nevada Senate Judiciary Committee, 77th Session (2013) (Statement of Assemblywoman Ellen Spiegel) Addendum at 134) ("I am wondering if they use that $10,000 in other states, or if it should be higher…to really be a detriment?"). This is because, frankly, to a billion-dollar company or a multi-millionaire, $10,000 isn't much of a sanction at all. The $10,000 sanction was designed to deter SLAPP lawsuits, but that goal cannot be achieved where the district court simply arbitrarily refuses to award those sanctions to protect the defendants.

Sanson and Lauer believe the District Court and the *Banerjee* court got the sanctions decision-making process backward. They believe the burden should be placed on the *losing plaintiff* who initiated the litigation to explain why the $10,000 sanctions should *not* be awarded, rather than placing the burden on the victimized defendants to explain why sanctions should be awarded. Moreover, factors such as the economic loss or reputational loss to the defendants should be weighed, as well

as the plaintiff's ability or inability to pay the additional sanctions. Bulen never even argued she was financially unable to pay the sanction and apparently has had no difficulty paying an attorney to both litigate the district court action and another appeal before this Court. Both Defendants were described as "political journalists" to the district court (ROA Vol. II at 440) and even Bulen's counsel conceded they "run a political website…" (ROA Vol. II at 361). Political speech is among the most protected and sacrosanct forms of free speech recognized in the United States and Nevada. *Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov't*, 120 Nev. 712, 722, 100 P.3d 179, 187-88 (2004) (First Amendment protection is "at its zenith" for "core political speech.") See also Nev. Const. Art. I, Sec. 9 ("Every citizen may freely speak, write and publish his sentiments on all subjects…"). It is also noteworthy that Sanson has been a victim of serial SLAPP lawsuits against him and has repeatedly prevailed in court. *E.g., Abrams v. Sanson*, 136 Nev. Adv. Rep. 9, 458 P.3d 1062 (Nev. 2020) (affirming dismissal of virtually all claims filed against Sanson by local attorney under Anti-SLAPP laws); *Veterans in Politics Int'l v. Willick*, 457 P.3d 970 (Nev. 2020) (reverse and remand for further consideration of Sanson's Anti-SLAPP special motion to dismiss). These factors, i.e., a suit filed against political journalists one of whom had repeatedly had to defended frivolous SLAPP lawsuits against him, weigh heavily in favor of sanctions yet none were awarded in this case. Moreover, the obvious goal of the sanctions is to deter further

litigation. This case shows that Bulen was not deterred at all. She has continued to litigate against Sanson and Lauer hoping to wear them down. They have struggled to find counsel to oppose Bulen's appeal. Counsel for this appeal, Mr. Breeden, agreed to appear pro bono only because he felt the law regarding Anti-SLAPP sanctions was not being liberally applied to fulfill its purpose and our courts needed an appellate decision regarding how the sanctions should be applied. None of these factors, which include (1) the public's interest in deterring SLAPP lawsuits, (2) whether the plaintiff has been adequately deterred from vexatiously litigating, (3) whether the plaintiff has the financial resources to pay sanctions, (4) whether the defendant has the financial resources to litigate, (5) whether the defendant is a journalist or was sued for political speech, (6) the time, effort and expense to the defendant in defending the action, including any damage to the defendant's business or "chilling effect" of the suit, and (7) whether the defendant has been targeted by multiple lawsuits to silence him/her, were properly weighed by the district court in arriving at its decision.

The flaw of the District Court's decision in this case and the earlier federal *Banerjee* decision is that they apparently required some finding of vexatious or frivolous filing *beyond* what a SLAPP suit already inherently has. Yet our laws and court rules already have numerous cases and court rules to deter frivolous suits. NRCP 11 (allowing sanctions for filings "presented for any improper purpose, such

as to harass, cause unnecessary delay, or needlessly increase the cost of litigation"), EDCR 7.60 (allowing sanctions for conduct which is "obviously frivolous, unnecessary or unwarranted"). If the court interprets NRS § 41.670(1)(b) to simply be redundant of NRCP 11 and similar rules, what is the point of having NRS § 41.670(1)(b) at all?

Additionally, within the same statute we have a provision that actually does require a finding of a "frivolous or vexatious," NRS § 41.670(2)-(3), in order to award sanctions, fees and costs. That provision of the statute requires that if the District Court is going to grant sanctions against the defendant after *denying* a special motion to dismiss, it must make the "frivolous or vexatious" finding regarding the unsuccessful motion. However, the statute intentionally lacks this "frivolous or vexatious" finding requirement under NRS § 41.670(1)(b) when the court *grants* the special motion to dismiss. By omitting the higher requirement of a "frivolous or vexatious" finding when a special motion to dismiss is *granted*, rules of statutory construction state that it must be assumed the legislature omitted that requirement for a reason, i.e. it did not want a frivolous or vexatious finding to have to be made to award sanction when the special motion to dismiss was *granted*.

Sanson and Lauer urge this Court to find that the District Court, when assessing whether it should award the discretionary sanction of up to $10,000 under NRS § 41.670(1)(b) should begin with the assumption that such sanctions should be

awarded in order to bring about the deterrent effect of Nevada's Anti-SLAPP law. If the losing plaintiff then opposes the sanctions, the District Court should then consider further factors such as (1) the public's interest in deterring SLAPP lawsuits, (2) whether the plaintiff has been adequately deterred from vexatiously litigating, (3) whether the plaintiff has the financial resources to pay sanctions, (4) whether the defendant has the financial resources to litigate, (5) whether the defendant is a journalist or was sued for political speech, (6) the time, effort and expense to the defendant in defending the action, including any damage to the defendant's business or "chilling effect" of the suit, and (7) whether the defendant has been targeted by multiple lawsuits to silence him/her.

Finally, an interpretation of NRS § 41.670(1)(b) that encourages the District Court to liberally and often award the additional sanctions of up to $10,000 is the only statutory construction that makes sense. Statutes are to be construed so as to fulfill the public policy and legislative intent behind the statutory scheme. *Irving v. Irving*, 122 Nev. 494, 496, 134 P.3d 718, 720 (2006) ("When a statute is ambiguous, we look to the Legislature's intent in interpreting the statute. Legislative intent may be deduced by reason and public policy."). Here, the entire statutory scheme of the Anti-SLAPP laws is to discourage SLAPP suits and compensate defendants who are forced to defend them. Courts should "avoid statutory interpretation that renders language meaningless or superfluous" and "whenever possible…will interpret a rule

or statute in harmony with other rules or statutes," *Watson Rounds v. Eighth Judicial Dist. Court*, 131 Nev., Adv. Op. 79, 358 P.3d 228, 232 (2015), e.g., *Williams v. State Dep't of Corr.*, 133 Nev. 594, 596, 402 P.3d 1260, 1262 (2017). Yet if the legislature meant to require a bad faith, vexatious or frivolous finding to award sanctions when the special motion to dismiss is granted, why did the legislature expressly use those words under NRS § 41.670(2)-(3) (when the motion is denied) but leave them out of the statute under NRS § 41.670(1)(b) (when the motion is granted)? Clearly, an interpretation that both statutes require a bad faith, vexatious or frivolous finding to award sanctions renders the "vexatious and frivolous" language in NRS § 41.670(2)-(3) superfluous. It would seem clear that by intentionally omitting that language in NRS § 41.670(1)(b), the legislature meant a for sanctions to be more freely granted when the special motion to dismiss is granted, since SLAPP lawsuits by their very definition are wasteful and abusive litigation.

VI. CONCLUSION

In closing, this Court is now faced with a legal issue truly unique to Nevada law as to how NRS § 41.670(1)(b) should be interpreted and applied. However, the only logical interpretation of NRS § 41.670(1)(b) is one that fulfills the strong public policy of Nevada's Anti-SLAPP laws and deters the filing of SLAPP lawsuits. With this appeal, Sanson and Lauer ask this Court to adopt an approach that favors the award of these sanctions and to reverse the decision of the District Court and remand

for further consideration of the Anti-SLAPP sanctions, which are particularly appropriate in this case which featured a political consultant trying to silence political journalists and activists.

Respectfully submitted this 28th day of May, 2021.

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CERTIFICATION PURSUANT TO NRAP 28.2

1. 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:

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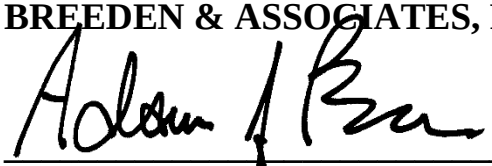
Dated this 28th day of May, 2021.

BREEDEN & ASSOCIATES, PLLC



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of May 2021, I served a copy of the foregoing legal document entitled **APPELLANT'S OPENING BRIEF** via the method indicated below:

X	Pursuant to NRAP 25(c), by electronically serving all counsel and e-mails registered to this matter on the Supreme Court Electronic Filing System.
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	Via receipt of copy (proof of service to follow)

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/s/ Kristy Johnson
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