IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

v.

LAWRA KASSEE BULEN,

Respondent.

Electronically Filed
May 28 2021 01:31 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

SUPREME COURT CASE NO. 82393

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

ADDENDUM TO APPELLANTS' OPENING BRIEF ON APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT

VOLUME II

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Breeden & Associates, PLLC, and on the 28th day of May, 2021, a true and correct copy of the foregoing document was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system.

Additionally, a hard copy of the Appendix with all documents on CD-ROM was served on Respondent by placing a copy in the US Mail, postage pre-paid, on the same date to:

Brandon L. Phillips, Esq.
BRANDON L. PHILLIPS ATTORNEY AT LAW PLLC
1455 E. Tropicana Avenue, Suite 750
Las Vegas, Nevada 89119
Attorneys for Respondent

/s/ Kristy L. Johnson
Attorney or Employee of
Breeden & Associates, PLLC

EXHIBITS				
Bill	**Exhibit**		**Witness / Agency**	**Description**
	A	2		Agenda
	B	32		Attendance Roster
S.B. 161	C	1	Senator Michael Roberson	Written Testimony
S.B. 161	D	27	Senator Michael Roberson	Housing Market Study
S.B. 161	E	6	Josh Hicks	Presentation
S.B. 161	F	19	Josh Hicks	Solicitation Letters
S.B. 161	G	18	Josh Hicks	Chapter 40 Notices
S.B. 161	H	6	Josh Hicks	Frequently Asked Questions
S.B. 161	I	52	Josh Hicks	Case Studies
S.B. 368	J	3	Senator Donald G. Gustavson	Written Testimony
S.B. 368	K	2	Assemblyman John Ellison	Written Testimony
S.B. 383	L	2	Senator David R. Parks	Written Testimony
S.B. 383	M	13	Gail J. Anderson	Proposed Amendment
S.B. 31	N	15	Mindy Martini	Work Session Document
S.B. 111	O	5	Mindy Martini	Work Session Document
S.B. 131	P	3	Mindy Martini	Work Session Document
S.B. 226	Q	1	Mindy Martini	Work Session Document
S.B. 286	R	2	Mindy Martini	Work Session Document
S.B. 356	S	1	Mindy Martini	Work Session Document
S.B. 373	T	25	Mindy Martini	Work Session Document

Committee Action:
Do Pass_____
Amend & Do Pass_____
Other_____

Senate Committee on Judiciary
This measure may be considered for action during today's work session.
April 5, 2013

SENATE BILL 286
Provides immunity from civil action under certain circumstances. (BDR 3-675)
Sponsored by: **Senators Jones, Segerblom, and Kihuen, et al.**
Date Heard: **March 28, 2013**
Fiscal Impact: **Effect on Local Government: No.**
Effect on the State: No.

Senate Bill 286 defines the right to free speech in direct connection with an issue of public concern to be in a place open to the public or in a public forum. A person who engages in such communication is immune from any civil action for claims based upon that communication. If a civil action is sought and the person who engaged in the communication files a special motion to dismiss, the measure adds a process for the court to follow and provides that a court ruling on the motion must be made within 7 days after the motion is filed.

If a court grants a special motion to dismiss, the measure provides that in addition to reasonable costs and attorney's fees, the person against whom the action was brought shall receive $10,000. If, on the other hand, the court denies a special motion to dismiss and finds that the motion was frivolous or vexatious, the measure provides that the prevailing party shall receive: (1) reasonable costs and attorney's fees; (2) $10,000; and (3) any such additional relief as the court deems proper to punish and deter the filing of frivolous or vexatious motions. Finally, the measure provides that if the court denies a special motion to dismiss, an interlocutory appeal lies to the Supreme Court.

Amendments: Senator Jones (see attached).

SB 286 PROPOSED CONCEPTUAL AMENDMENT

By SENATOR JUSTIN JONES

Section 3, subsection 3(f) – make the following change: "Rule on the motion within [30] *7 judicial* days after the motion is ~~[filed]~~ *served upon the plaintiff or plaintiffs.*"

Reason: to address concern raised with sponsor by Eighth Judicial District Court.

Section 4, subsection 1(b) – make the following change: "*The court ~~[shall]~~ may award, in addition to reasonable costs and attorney's fees awarded pursuant to paragraph (a), ~~[the]~~ an additional amount ~~[of]~~ up to $10,000 to the person against whom the action was brought.*"

Reason: to address concerns regarding the additional mandatory penalty to be awarded to a prevailing party. The amended language makes the award discretionary and in an amount "up to" $10,000.

Section 4, subsection 2(b) – make the following change:

2. If the court denies a special motion to dismiss filed pursuant to NRS 41.660 and finds that the motion was frivolous or vexatious, the court shall award to the prevailing party~~[: (a) R]~~ its reasonable costs and attorney's fees incurred in responding to the motion. [;]
3. In addition to reasonable costs and attorney's fees awarded pursuant to subsection 2, the court may award:
~~[(b) The]~~ An additional amount ~~[of]~~ up to $10,000~~[, not including reasonable costs and attorney's fees awarded pursuant to paragraph (a)]~~; and
(c) Any such additional relief as the court deems proper to punish and deter the filing of frivolous or vexatious motions.

Reason: to address concerns regarding the additional mandatory penalty to be awarded to a prevailing party. The amended language makes the award discretionary and in an amount "up to" $10,000.

THE SEVENTY-FIFTH DAY

CARSON CITY (Friday), April 19, 2013

Senate called to order at 11:29 a.m.
President Krolicki presiding.
Roll called.
All present.

Prayer by Pastor Albert Tilstra, Seventh-day Adventist Church, Fallon.

Good morning, Lord. I ask that You give the Senators today the provisions of Your grace. Provide them with the grace of Your comfort to cheer, Your wisdom to teach, Your counsel to instruct and Your presence to inspire.

Prosper the works of their hands as You direct their steps. Lord, show them what needs to be changed and give them the courage and wisdom to do what is right for the people they represent. In all the work You elected them to do, help them to strive to fulfill Your purpose for this day and for this Session.

We pray in the Name of the Almighty.

AMEN.

Pledge of Allegiance to the Flag.

The President announced that under previous order, the reading of the Journal is waived for the remainder of the 77th Legislative Session and the President and Secretary are authorized to make any necessary corrections and additions.

REPORTS OF COMMITTEES

Mr. President:

Your Committee on Commerce, Labor and Energy, to which were referred Senate Bill Nos. 88, 208, 211, 267 and 496, has had the same under consideration, and begs leave to report the same back with the recommendation: Amend, and do pass as amended.

KELVIN ATKINSON, *Chair*

Mr. President:

Your Committee on Health and Human Services, to which were referred Senate Bill Nos. 410, 448 and 453, has had the same under consideration, and begs leave to report the same back with the recommendation: Amend, and do pass as amended.

JUSTIN C. JONES, *Chair*

Mr. President:

Your Committee on Judiciary, to which were referred Senate Bill Nos. 224, 286, 297, 307, 409, 414, 421, 463 and 478, has had the same under consideration, and begs leave to report the same back with the recommendation: Amend, and do pass as amended.

TICK SEGERBLOM, *Chair*

Mr. President:

Your Committee on Legislative Operations and Elections, to which was referred Senate Bill No. 228 and Senate Joint Resolution No. 13, has had the same under consideration, and begs leave to report the same back with the recommendation: Amend, and do pass as amended.

PAT SPEARMAN, *Chair*

MOTIONS, RESOLUTIONS AND NOTICES

Senator Smith moved that Senate Bill Nos. 88, 112, 141, 170, 172, 208, 209, 211, 217, 224, 228, 243, 246, 255, 267, 278, 280, 286, 297, 307, 312, 321, 362, 391, 409, 410, 414, 421, 424, 425, 441, 448, 453, 463, 478, 496, 503 and 504, just reported out of committee, be immediately placed on the Second Reading File.

Motion carried.

Senator Hardy moved that Senate Bill No. 92 be taken from the Secretary's Desk and placed on the General File for the next legislative day.

Motion carried.

Senator Atkinson moved that Senate Bill No. 496 be taken from the Second Reading File and placed on the Secretary's Desk.

Motion carried.

SECOND READING AND AMENDMENT

Senate Bill No. 88.

Bill read second time.

The following amendment was proposed by the Committee on Commerce, Labor and Energy:

Amendment No. 482.

Senator Hardy moved the adoption of the amendment.

Remarks by Senator Hardy.

Thank you, Mr. President. Amendment No. 482 to Senate Bill No. 88 deletes all of the provisions of the bill. It allows the Department of Motor Vehicles to remove the suspension of the registration of any motor vehicle for which the Department of Motor Vehicles cannot verify liability insurance without requiring the owner of the vehicle to pay a fee or administrative fine if the registered owner of the vehicles proves to the satisfaction of the Department of Motor Vehicles that the vehicle was dormant during the period in which the Department of Motor Vehicles was unable to verify the insurance coverage.

Amendment adopted.

Bill ordered reprinted, engrossed and to third reading.

Senate Bill No. 112.

Bill read second time.

The following amendment was proposed by the Committee on Health and Human Services:

Amendment No. 380.

Senator Kieckhefer moved the adoption of the amendment.

Remarks by Senator Kieckhefer.

Thank you, Mr. President. Amendment No. 380 to Senate Bill No. 112 requires the Legislative Committee on Health Care to study, during the 2013–2015 Legislative Interim, the implementation of Chapter 386 of *Statutes of Nevada 2011*, which relates to the issuing of a permit for a physician or health care facility to provide anesthesia and sedation services. The amendment further strikes all other provisions of the original bill.

Amendment adopted.

Bill ordered reprinted, engrossed and to third reading.

Amendment No. 339.
Senator Kihuen moved the adoption of the amendment.
Remarks by Senator Kihuen.
Thank you, Mr. President. Amendment No. 339 to Senate Bill No. 280 provides that if a past due obligation is 60 days or more past due, the association must mail a full statement of account showing all transaction history for the immediately preceding 24 months along with a schedule of fees that may be charged if payment is not received, and a proposed repayment plan. It provides that if payment in not received within 15 days after the mailing of the documents, the association must mail at least two letters, containing specific information. It also adds a provision that the association may foreclose a lien if the amount of delinquency exceeds 12 months of assessments for common expenses. Finally, the amendment provides for the right of redemption for the unit's owner, if the unit is owner occupied.

Amendment adopted.
Bill ordered reprinted, engrossed and to third reading.

Senate Bill No. 286.
Bill read second time.
The following amendment was proposed by the Committee on Judiciary:
Amendment No. 187.
Senator Kihuen moved the adoption of the amendment.
Remarks by Senator Kihuen.
Thank you, Mr. President. Amendment No. 187 to Senate Bill No. 286 clarifies that the court shall rule on the motion within seven judicial days after the motion is served upon the plaintiff. It also makes it permissive for the court to award an additional amount up to $10,000 under certain circumstances.

Amendment adopted.
Bill ordered reprinted, engrossed and to third reading.

Senate Bill No. 297.
Bill read second time.
The following amendment was proposed by the Committee on Judiciary:
Amendment No. 406.
Senator Kihuen moved the adoption of the amendment.
Remarks by Senator Kihuen.
Thank you, Mr. President. Amendment No. 406 to Senate Bill No. 297 retains the current one-year term of imprisonment for crimes committed against persons 60 years of age or older or against vulnerable persons.

Amendment adopted.
Bill ordered reprinted, engrossed and to third reading.

Senate Bill No. 307.
Bill read second time.
The following amendment was proposed by the Committee on Judiciary:
Amendment No. 241.
Senator Kihuen moved the adoption of the amendment.

SENATE BILL NO. 286–SENATORS JONES, SEGERBLOM, KIHUEN; AND FORD

MARCH 15, 2013

Referred to Committee on Judiciary

SUMMARY—Provides immunity from civil action under certain circumstances. (BDR 3-675)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: No.

~

EXPLANATION – Matter in ***bolded italics*** is new; matter between brackets [~~omitted material~~] is material to be omitted.

AN ACT relating to civil actions; providing immunity from civil action for certain claims based on the right to petition and the right to free speech under certain circumstances; establishing the burden of proof for a special motion to dismiss; providing for the interlocutory appeal from an order denying a special motion to dismiss; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law establishes certain provisions to deter frivolous or vexatious lawsuits (Strategic Lawsuits Against Public Participation, commonly known as "SLAPP lawsuits"). (Chapter 387, Statutes of Nevada 1997, p. 1363; NRS 41.635-41.670) A SLAPP lawsuit is characterized as a meritless suit filed primarily to discourage the named defendant's exercise of First Amendment rights. "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." (*Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795, 796 n.1 (9th Cir. 2012))

The Ninth Circuit Court of Appeals recently held that the provisions of NRS concerning such lawsuits only protect communications made directly to a governmental agency. The Ninth Circuit also held that, as written, these provisions of NRS provide protection from liability but not from trial. That distinction, when coupled with the lack of an express statutory right to an interlocutory appeal, led the court to conclude that these provisions of NRS do not provide for an immediate appeal of an order denying a special motion to dismiss a SLAPP lawsuit. (*Metabolic*, at 802)

Existing law provides that a person who engages in good faith communication in furtherance of the right to petition is immune from civil liability for claims based upon that communication. (NRS 41.650) **Section 2** of this bill expands the scope of

that immunity by providing that a person who exercises the right to free speech in direct connection with an issue of public concern is also immune from any civil action for claims based upon that communication.

Existing law defines certain communications, for purposes of statutory provisions concerning SLAPP lawsuits, as communications made by a person in connection with certain governmental actions, officers, employees or entities. (NRS 41.637) **Section 1** of this bill includes within the meaning of such communications those that are made in direct connection with an issue of public interest in a place open to the public or in a public forum. **Section 3** of this bill establishes the burden of proof for a dismissal by special motion of a SLAPP lawsuit. **Section 3** reduces from 30 days to 7 judicial days the time within which a court must rule on a special motion to dismiss.

Existing law requires, under certain circumstances, an award of reasonable costs and attorney's fees to the person against whom a SLAPP lawsuit was brought if a court grants a special motion to dismiss. (NRS 41.670) **Section 4** of this bill authorizes, in addition to an award of costs and attorney's fees, an award of up to $10,000 if a special motion to dismiss is granted. **Section 4** also provides that if a court finds that a special motion to dismiss was frivolous or vexatious, the court shall award the prevailing party reasonable costs and attorney's fees and may award an amount of up to $10,000 and any such additional relief as the court deems proper to punish and deter the filing of frivolous or vexatious motions.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 41.637 is hereby amended to read as follows:

41.637 "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"*** means any:

1. Communication that is aimed at procuring any governmental or electoral action, result or outcome;

2. Communication of information or a complaint to a Legislator, officer or employee of the Federal Government, this state or a political subdivision of this state, regarding a matter reasonably of concern to the respective governmental entity; ~~[or]~~

3. Written or oral statement made in direct connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law ~~[,]~~ ***; or***

4. Communication made in direct connection with an issue of public interest in a place open to the public or in a public forum,

➥ which is truthful or is made without knowledge of its falsehood.

Sec. 2. NRS 41.650 is hereby amended to read as follows:

41.650 A person who engages in 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*** is immune from ***any*** civil ~~[liability]~~ ***action*** for claims based upon the communication.

Sec. 3. NRS 41.660 is hereby amended to read as follows:

41.660 1. If an action is brought against a person 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) The person against whom the action is brought may file a special motion to dismiss; and

(b) The Attorney General or the chief legal officer or attorney of a political subdivision of this State may defend or otherwise support the person against whom the action is brought. If the Attorney General or the chief legal officer or attorney of a political subdivision has a conflict of interest in, or is otherwise disqualified from, defending or otherwise supporting the person, the Attorney General or the chief legal officer or attorney of a political subdivision may employ special counsel to defend or otherwise support the person.

2. A special motion to dismiss must be filed within 60 days after service of the complaint, which period may be extended by the court for good cause shown.

3. If a special motion to dismiss is filed pursuant to subsection 2, the court shall:

(a) ~~[Treat the motion as a motion for summary judgment;]~~ ***Determine whether the moving party has established, 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;***

(b) ***If the court determines that the moving party has met the burden pursuant to paragraph (a), determine whether the plaintiff has established by clear and convincing evidence a probability of prevailing on the claim;***

(c) If the court determines that the plaintiff has established a probability of prevailing on the claim pursuant to paragraph (b), ensure that such determination will not:

(1) Be admitted into evidence at any later stage of the underlying action or subsequent proceeding; or

(2) Affect the burden of proof that is applied in the underlying action or subsequent proceeding;

(d) Consider such evidence, written or oral, by witnesses or affidavits, as may be material in making a determination pursuant to paragraphs (a) and (b);

(e) Stay discovery pending:

(1) A ruling by the court on the motion; and

(2) The disposition of any appeal from the ruling on the motion; and

~~[(c)]~~ *(f)* Rule on the motion within ~~[30]~~ *7 judicial* days after the motion is ~~[filed.]~~ *served upon the plaintiff.*

4. If the court dismisses the action pursuant to a special motion to dismiss filed pursuant to subsection 2, the dismissal operates as an adjudication upon the merits.

Sec. 4. NRS 41.670 is hereby amended to read as follows:

41.670 *1.* If the court grants a special motion to dismiss filed pursuant to NRS 41.660:

~~[1.]~~ *(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.

~~[2.]~~ *(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.*

(c) The person against whom the action is brought may bring a separate action to recover:

~~[(a)]~~ *(1)* Compensatory damages;

~~[(b)]~~ *(2)* Punitive damages; and

~~[(c)]~~ *(3)* Attorney's fees and costs of bringing the separate action.

2. If the court denies a special motion to dismiss filed pursuant to NRS 41.660 and finds that the motion was frivolous or vexatious, the court shall award to the prevailing party reasonable costs and attorney's fees incurred in responding to the motion.

3. In addition to reasonable costs and attorney's fees awarded pursuant to subsection 2, the court may award:

(a) An amount of up to $10,000; and

(b) Any such additional relief as the court deems proper to punish and deter the filing of frivolous or vexatious motions.

4. If the court denies the special motion to dismiss filed pursuant to NRS 41.660, an interlocutory appeal lies to the Supreme Court.

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THE SEVENTY-EIGHTH DAY

CARSON CITY (Monday), April 22, 2013

Senate called to order at 12:01 p.m.
President Krolicki presiding.

President Krolicki requested that the Senate take a moment to reflect on the incident one week ago at the Boston Marathon and observe a moment of silence to support and consider those who lost their lives and those who were so badly injured.

Roll called.
All present.
Prayer by Pastor Peggy Locke, Fountainhead Foursquare Church, Carson City.

Because Your loving-kindness is better than life, my lips will praise You. So I will bless You as long as I live; I will lift up my hands in Your name.

Please pray with me. O God, Most High, Creator, Sustainer and Giver of Life, as we gather together today, representing the people of our great State of Nevada, we ask for Your discernment, understanding and wisdom as this Floor Session begins.

We pray for families and friends who have been affected by the tragedy in Boston this last week. We pray for healing in our Nation, that we stay strong in faith in the midst of terror and the continuing onslaught of the enemy.

We give You thanks, Lord, for Your abiding presence with us; that through the storms of life, You promise never to leave us nor forsake us. We pray for all those serving in harm's way—at home and abroad. Protect them and bless each one who strives for freedom and peace in our country.

We pray in Your most holy Name.

AMEN.

Pledge of Allegiance to the Flag led by Zoe Bertz.

The President announced that under previous order, the reading of the Journal is waived for the remainder of the 77th Legislative Session and the President and Secretary are authorized to make any necessary corrections and additions.

REPORTS OF COMMITTEES

Mr. President:

Your Committee on Commerce, Labor and Energy, to which were referred Senate Bill Nos. 252, 266, 327 and 352, has had the same under consideration, and begs leave to report the same back with the recommendation: Amend, and do pass as amended.

KELVIN ATKINSON, *Chair*

Mr. President:

Your Committee on Health and Human Services, to which were referred Senate Bill Nos. 221, 277 and 502, has had the same under consideration, and begs leave to report the same back with the recommendation: Amend, and do pass as amended.

JUSTIN C. JONES, *Chair*

Senate Bill No. 278 having received a two-thirds majority, Mr. President declared it passed.

Bill ordered transmitted to Assembly.

Senate Bill No. 283.

Bill read third time.

Remarks by Senator Hardy.

Thank you, Mr. President. Senate Bill No. 283 revises the Nevada Ethics in Government Law. When resolving certain requests for opinion, the Commission on Ethics shall treat comparable situations similarly and shall ensure that disposition of a request reasonably relates to the severity of the violation. The Commission shall consider certain factors when determining the amount of any civil penalty, including the seriousness of the violation, a person's history of previous warnings or violations, mitigating factors and any other matter justice may require. The definitions of "intentionally" and "knowingly" are revised to require proof of intent or reckless disregard and knowledge of the prohibition against the conduct. A two-thirds vote is required to impose a finding that a violation was willful.

Roll call on Senate Bill No. 283:

YEAS—21.

NAYS—None.

Senate Bill No. 283 having received a constitutional majority, Mr. President declared it passed.

Bill ordered transmitted to Assembly.

Senate Bill No. 286.

Bill read third time.

Remarks by Senator Jones.

Thank you, Mr. President. Senate Bill No. 286 modernizes our Anti-SLAPP (Strategic Lawsuit Against Public Participation) laws in response to the Ninth Circuit Court of Appeals decision from last year. It found that the existing statutes were limited in scope.

Senate Bill No. 286 defines the right to free speech in direct connection with an issue of public concern to be in a place open to the public or in a public forum. A person who engages in such communication is immune from any civil action for claims based upon that communication. If a civil action is sought and the person who engaged in the communication files a special motion to dismiss, the measure adds a process for the court to follow and provides that a court ruling on the motion must be made within seven judicial days after the motion is served upon the plaintiff.

As a result of our antiquated Anti-SLAPP laws, businesses were not moving to the State of Nevada or were seeking to move out of the State. This bill passed unanimously out of the Senate Committee on Judiciary. I urge your support.

Roll call on Senate Bill No. 286:

YEAS—21.

NAYS—None.

Senate Bill No. 286 having received a constitutional majority, Mr. President declared it passed.

Bill ordered transmitted to Assembly.

Senate Bill No. 297.

Bill read third time.

Remarks by Senator Brower.

NEVADA LEGISLATURE

Seventy-Seventh Session, 2013

ASSEMBLY DAILY JOURNAL

THE SEVENTY-NINTH DAY

CARSON CITY (Tuesday), April 23, 2013

Assembly called to order at 12:01 p.m.

Madam Speaker presiding.

Roll called.

All present and one vacant.

Prayer by the Chaplain, Pastor Dixie Jennings-Teats, First United Methodist Church, Carson City, Nevada.

Gracious One,

We come before You, trusting not in our own righteousness, but in Your great and manifold mercies. We see those mercies unfold in our personal lives; we see in the dawn of each new day the unfolding of blessings in the natural beauties of the Earth; and we give thanks.

Help the members of this body work in unity of spirit toward the good of all, that our communities and state might reflect an appreciation for each person, whether man or woman, child or adult, whatever race or religion, to allow each to live in dignity. Help us move together toward the common good. In the name of love, we pray.

AMEN.

Pledge of allegiance to the Flag.

Assemblyman Horne moved that further reading of the Journal be dispensed with, and the Speaker and Chief Clerk be authorized to make the necessary corrections and additions.

Motion carried.

REPORTS OF COMMITTEES

Madam Speaker:

Your Committee on Commerce and Labor, to which was referred Assembly Bill No. 486, has had the same under consideration, and begs leave to report the same back with the recommendation: Amend, and do pass as amended.

DAVID P. BOBZIEN, *Chair*

MESSAGES FROM THE SENATE

SENATE CHAMBER, Carson City, April 22, 2013

To the Honorable the Assembly:

It is my pleasure to inform your esteemed body that the Senate on this day passed Senate Bills Nos. 185, 229, 314.

Also, it is my pleasure to inform your esteemed body that the Senate on this day passed, as amended, Senate Bills Nos. 31, 88, 94, 103, 104, 107, 111, 112, 127, 141, 152, 170, 192, 208, 209, 211, 217, 224, 228, 243, 246, 267, 278, 283, 286, 297, 307, 312, 317, 318, 321, 325, 329, 343, 350, 359, 381, 409, 410, 414, 421, 424, 425, 428, 429, 441, 448, 449, 450, 453, 456, 478, 493, 496, 503; Senate Joint Resolution No. 13.

SHERRY L. RODRIGUEZ
Assistant Secretary of the Senate

MOTIONS, RESOLUTIONS AND NOTICES

NOTICE OF EXEMPTION

April 22, 2013

The Fiscal Analysis Division, pursuant to Joint Standing Rule 14.6, has determined the eligibility for exemption of: Senate Bill No. 498.

MARK KRMPOTIC
Fiscal Analysis Division

Senate Joint Resolution No. 13.

Assemblyman Horne moved that the resolution be referred to the Committee on Legislative Operations and Elections.

Motion carried.

Assemblyman Horne moved that Assembly Bill No. 421 be taken from the Chief Clerk's desk and placed at the top of the General File.

Motion carried.

Assemblyman Horne moved that Assembly Bill No. 113 be taken from the General File and placed on the Chief Clerk's desk.

Motion carried.

Assemblyman Horne moved that Assembly Bills Nos. 187 and 215 be taken from their positions on the General File and placed at the bottom of the General File.

Motion carried.

Assemblyman Horne moved that Assembly Bills Nos. 166, 167, and 405 be taken from their positions on the General File and placed at the top of the General File.

Motion carried.

Assemblyman Horne moved that all rules be suspended, reading so far had considered second reading, rules further suspended, and all bills reported out

Senate Bill No. 278.

Assemblyman Horne moved that the bill be referred to the Committee on Judiciary.

Motion carried.

Senate Bill No. 283.

Assemblyman Horne moved that the bill be referred to the Committee on Legislative Operations and Elections.

Motion carried.

Senate Bill No. 286.

Assemblyman Horne moved that the bill be referred to the Committee on Judiciary.

Motion carried.

Senate Bill No. 297.

Assemblyman Horne moved that the bill be referred to the Committee on Judiciary.

Motion carried.

Senate Bill No. 307.

Assemblyman Horne moved that the bill be referred to the Committee on Judiciary.

Motion carried.

Senate Bill No. 312.

Assemblyman Horne moved that the bill be referred to the Committee on Judiciary.

Motion carried.

Senate Bill No. 314.

Assemblyman Horne moved that the bill be referred to the Committee on Judiciary.

Motion carried.

Senate Bill No. 317.

Assemblyman Horne moved that the bill be referred to the Committee on Transportation.

Motion carried.

Senate Bill No. 318.

Assemblyman Horne moved that the bill be referred to the Committee on Health and Human Services.

Motion carried.

MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Seventh Session
May 6, 2013

The Committee on Judiciary was called to order by Chairman Jason Frierson at 8:19 a.m. on Monday, May 6, 2013, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at nelis.leg.state.nv.us/77th2013. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman Jason Frierson, Chairman
Assemblyman James Ohrenschall, Vice Chairman
Assemblyman Richard Carrillo
Assemblywoman Lesley E. Cohen
Assemblywoman Olivia Diaz
Assemblywoman Marilyn Dondero Loop
Assemblywoman Michele Fiore
Assemblyman Ira Hansen
Assemblyman Andrew Martin
Assemblywoman Ellen B. Spiegel
Assemblyman Tyrone Thompson
Assemblyman Jim Wheeler

COMMITTEE MEMBERS ABSENT:

Assemblyman Wesley Duncan (excused)

GUEST LEGISLATORS PRESENT:

Senator Justin C. Jones, Clark County Senatorial District No. 9
Senator Tick Segerblom, Clark County Senatorial District No. 3

STAFF MEMBERS PRESENT:

Dave Ziegler, Committee Policy Analyst
Brad Wilkinson, Committee Counsel
Linda Whimple, Committee Secretary
Colter Thomas, Committee Assistant

OTHERS PRESENT:

Marc J. Randazza, Attorney, Randazza Legal Group
James McGibney, CEO, ViaView, Inc.
Wayne Carlson, Executive Director, Public Agency Risk Management Services, Inc.
Scott W. Anderson, Deputy for Commercial Recordings, Office of the Secretary of State
Scott Scherer, representing the Nevada Registered Agent Association
Robert C. Kim, representing the State Bar of Nevada
Peter C. Neumann, Private Citizen, Reno, Nevada
Robert T. Eglet, Private Citizen, Las Vegas, Nevada
Stephanie H. Allen, representing the Nevada District Judges Association
Chris Frey, Deputy Public Defender, Washoe County Public Defender's Office
Patterson Cashill, representing the Nevada Justice Association

Chairman Frierson:
[Roll was called. Protocol was explained.] Good morning, everyone. Welcome back to the Assembly Committee on Judiciary. We have four bills on the agenda for today, and I see Senator Jones here. I will open the hearing on Senate Bill 286 (1st Reprint) and accommodate you, and then we will get back on track.

Senate Bill 286 (1st Reprint): Provides immunity from civil action under certain circumstances. (BDR 3-675)

Senator Justin C. Jones, Clark County Senatorial District No. 9:
As guaranteed by the First Amendment, the right to petition our government for redress is one of the most important rights we have. Nevada recognizes this right and protects people who exercise their First Amendment right to petition. Specifically, Chapter 41 of the *Nevada Revised Statutes* (NRS) protects people from civil liability for claims based on protected communication. Generally speaking, protected communications must be made in good faith and be truthful, or at least made without knowing it is false. The provisions of NRS Chapter 41 are meant to deter frivolous lawsuits, commonly known as

strategic lawsuits against public participation (SLAPP). A SLAPP is a meritless lawsuit that a plaintiff initiates primarily to stop someone from exercising his First Amendment rights. When a plaintiff files a SLAPP, NRS Chapter 41 allows the defendant to file a special motion to dismiss the lawsuit. If the court grants the special motion, it must also award attorney's fees to the defendant. The defendant may also file a new lawsuit for compensatory damages, punitive damages, and attorney's fees and costs for bringing the new lawsuit.

In a recent decision, the Ninth Circuit Court of Appeals held that Nevada's anti-SLAPP provisions under NRS Chapter 41 only protect communications made directly to a governmental agency. The Court also held that Nevada provisions only protect defendants from liability, not from trial. Finally, the Ninth Circuit Court of Appeals concluded that in Nevada there is no right to immediate appeal, an order denying a special motion to dismiss a SLAPP.

I am introducing Senate Bill 286 (1st Reprint) to resolve these limitations. Beginning with section 1, the bill expands the type of protected communication to include the right to free speech if it is about an issue of public concern. Section 1 also protects communications about an issue of public interest made in public places. Section 2 expands the anti-SLAPP provisions to cover any civil action, not just liability. Section 3 specifies standards of proof for motions to dismiss a SLAPP and requires the court to rule on those motions within a specified period of time.

If a court grants a motion to dismiss a SLAPP, section 4 requires the court to grant the defendant, in addition to attorney's fees and costs, an additional amount of $10,000. If a court denies a motion to dismiss and finds it was frivolous, the bill requires the court to grant the plaintiff reasonable costs and attorney's fees for responding to the motion.

That is my presentation. I also have Marc Randazza in Las Vegas, who is one of the preeminent experts on this issue, if the Committee has any questions for me or Mr. Randazza.

Chairman Frierson:
Senator, do you want any comments from Las Vegas to be part of your introduction, or is that just someone available to answer questions?

Senator Jones:
I think he has a presentation. It is up to you, Mr. Chairman, whether you want to hear from him first or ask questions.

Chairman Frierson:
I would like to hear from him.

Marc J. Randazza, Attorney, Randazza Legal Group:
I am a First Amendment attorney. I am based in Nevada, but I practice nationwide. When you look at this bill, it is a pretty rare species of bill. This is probably the first bill you are going to see where you are passing something that is both proconsumer and probusiness simultaneously. This is not only going to protect consumers who want to exercise their right to free speech on government issues, commercial issues, and social issues, but it will also create an environment that will attract more tech jobs to this state. I represent a number of companies that engage in social media, social networking, online media, and traditional media. When I speak to them about where to generate bigger operations, where they should move, where they should be, the top of the list is always Washington, California, Oregon, and Texas, because these are states that have anti-SLAPP laws. I will tell you why that is important.

As I mentioned, I defend First Amendment cases nationwide. The right to free expression is severely hampered in states that do not have anti-SLAPP laws. Let me give you a comparison between two of the states where I do most of my work outside of Nevada, which would be Florida and California. A very long time ago, I had my very first SLAPP in Florida. A gentleman came into my office who had had a dispute with a contractor, and the contractor said, "What are you going to do about it? Go ahead and sue me. I have more money than you." He looked at his situation and said, "Yes, you are right. There is not much I can do about that. But I can warn other people not to do business with you," and he wrote a very truthful account of his experience, backed it up with documents, backed it up with evidence, and backed it up with letters from other people. He was completely within his rights. The contractor sued him for defamation and he came into my office and I said, "Yes, you can beat this," and we fought it, and we beat it. At the end of it, I handed him his win and he looked at me. It was a very formative day in my legal career. He looked at me and said, "Well, if I won, how come I am the one with my retirement fund completely empty? How come I am the one who is broke?" I said, "I am really sorry." In my inexperience as an attorney at the time, I really believed that if we were right, we would win. We did; he has a case named after him, which he said is about as good as having a disease named after him.

Now I have run into the opposite experience in California. I often get calls from people who say they are being sued in a similar case. There is competition from other lawyers to get that case, even when the person cannot afford to pay, because when you see that it is a valid use of a citizen's First Amendment rights they are being sued for, they have the security of knowing that an

anti-SLAPP law is standing behind them. If that case has been brought because of that citizen's exercise of their right to free expression, and it is a case that has no chance of winning, that case is going to be dispensed with early, with the cost of that case falling on the plaintiff. We need this in Nevada. We do not just need this because it is the right thing to do constitutionally. Your constitutional rights do not mean a whole lot if you cannot afford to exercise them.

One of my clients actually came here today. He will be speaking as well, if you would like to hear from him, but he runs a relatively mid-sized media company. He has 26-odd employees, a third of them in Washington, a third in California, and a third here. As they expand, they consider where they should move their operations. They have to consolidate somewhere. When they have those discussions and they ask me, I say, "You get frivolous lawsuit threats on a weekly basis." So far—knock on wood—they have not been sued. But when that happens, and it is inevitable that it is going to happen, if it happens here in Nevada, that can cripple a fledgling tech company like this. So when these tech companies are looking at where they want to be, where they want to create jobs, where is the environment friendly for them, they look at Washington, California, Texas, and they look at Nevada. Despite all of the great things that Nevada has to offer them, they know that they can be smothered in their cradle because of a lack of an anti-SLAPP law.

I think S.B. 286 (R1) is an example of some brilliant legislation. It is going to put us at the forefront, it is going to make us a leader in this area, and I cannot see any reservation that anyone could have to this bill, unless you are the kind of person who wants to run around suing people in frivolous defamation suits.

Assemblywoman Spiegel:
On page 4 of the bill, in section 4, subsection 1, paragraph (b), it talks about how the court may award, in addition to reasonable costs and attorney's fees, an amount of up to $10,000 to the person against whom the action was brought. I am wondering if they use that $10,000 in other states, or if it should be higher, or if it is higher in other places, to really be a detriment?

Marc Randazza:
As a First Amendment advocate, I certainly would not say it would be a bad thing to make that higher, but there is only one state that has statutory damages for violating the anti-SLAPP law, and that is Washington, and this is identical to Washington's bill. So I believe the $10,000 is imported directly from the Washington statute.

Senator Jones:
That is correct. The Washington statute made the $10,000 mandatory. There were some concerns raised on the Senate side about that, so we made it discretionary in the court, so it could be up to $10,000.

Assemblywoman Spiegel:
Would you entertain a discussion of making it higher?

Senator Jones:
I certainly would.

Assemblywoman Spiegel:
Thank you.

Chairman Frierson:
Are there any questions from the Committee? [There were none.] On page 4, line 1, reducing it from 30 days to 7 days, has there been any conversation with the courts about the practical ability for the courts to comply?

Senator Jones:
Yes. I had a discussion with Judge Elizabeth Gonzalez about that issue, and her concern had been that it needed to be after service. Originally, as drafted, the bill said seven days after the motion is filed. Her concern was making sure that the motion is actually served on the plaintiff before the seven days goes into effect. She did not have an issue with the seven days, as long as the plaintiff had been served with the motion. I have not talked with all the judges, but since I practiced before Judge Gonzalez a lot, and many of these go into business court, I figured that was a pretty good measure.

Chairman Frierson:
Thank you, Senator. I know there is a good deal of flexibility with the business courts. Are there any other questions from the Committee? [There were none.]

James McGibney, CEO, ViaView, Inc.:
We are a social media company. We are also involved in reality TV. We have a massive online media presence. This is very important to us because we get threatened with lawsuits on a daily basis. As you can imagine, companies like Facebook and Twitter, anyone who has a social online presence, is constantly hit with lawsuits. For example, Facebook is already protected by anti-SLAPP, and we would like to have the same thing in Nevada. Even if we go through a trial and it is determined that we are not held liable for something that was posted on our site, we are still going to spend on average $100,000 in attorney's fees. Being a company that makes a few million dollars a year, if we

get hit with three or four of these per year, we could pretty much be out of business. We have a presence in Washington, California, and Nevada, and we are actually thinking about going back to California because of the protections that are afforded there, but we do love Nevada. We are very hopeful that this gets passed.

Chairman Frierson:
Are there any questions from the Committee? [There were none.] Is there anyone else wishing to offer testimony in support? [There was no one.] Is there anyone wishing to offer testimony in opposition, either in Carson City or Las Vegas?

Wayne Carlson, Executive Director, Public Agency Risk Management Services, Inc.:
I had attorneys testify on the Senate side but, unfortunately, they are all out of town today, so I get the opportunity to try to clarify some of the things that we had concerns with in the bill. We supported the expansion under section 1 to private as well as public. We have had success with some of these cases where we have defended government entities against vexatious litigants, so it is an important bill from that standpoint to protect the private sector as well.

We have concerns under section 3, line 22, where they delete the existing process of motion for summary judgment, which we have used successfully and it has worked well. Our testimony was that we did not think it was necessary to substitute it. Part of the reason is because we have had successful awards from the Nevada Supreme Court fairly recently and they were supportive in analyzing the anti-SLAPP provisions. Because the courts have clarity, we thought this might introduce an element of uncertainty in terms of the success of those kinds of defense motions for summary judgment. We would suggest that the new language is not necessary because the existing process is successful.

The next area of concern is a practical matter. We have never been able to recover attorney's fees and costs under existing law because the vexatious litigants did not have any funds or they filed bankruptcy in order to avoid it. It is meaningless to have a fine in there that you cannot collect, and that is the practical reality of it. It was helpful to get that amended, but on the other hand, in section 2, it reverses that possibility. That reversal of the possibility of the defendant having to pay a fine in addition to attorney's fees causes us to pause because it is very subjective as to whether or not the motion is frivolous or vexatious, and we would then be in a position to have to very carefully consider

whether to even go forward with defending the case with a motion, whether it is a summary judgment or the proposed procedure. That is a concern that we have.

Adding the appeal under subsection 4 of section 3, that is probably useful. We support that. We are kind of mixed on the various elements of the bill, but we do not want to create a situation where it deters defendants from defending themselves because they could be subject to fines and penalties for trying to defend themselves from what are most of the time—the ones we have seen where we have used this defense—fairly frivolous and repetitive situations where the person just kept amending the suit every time they lost a motion. It creates a lot of litigation costs. We are realistic that we will likely not recover costs from most of these individuals, but it does cost us money, and we do not want to be in a situation where we are now abandoning that strategy to defend these cases because of a provision in the bill. I do not know how you fix it, but that is a concern that we have expressed.

Chairman Frierson:
It seems to me that you have two concerns that seem to counter each other. On the one hand, you were saying that you preferred it to be more like a motion for summary judgment, but on the other hand, you expressed concern about the defendant being exposed to attorney's fees. It also seems to me that by not necessarily making it a motion for summary judgment, you create a process by which a defendant could defend being hit with attorney's fees. It appears there is a balance attempted to be stricken here. There are two points. Number one is getting rid of the motion for summary judgment but creating this process. The court can still rule on it in a similar fashion with these things being considered and could dismiss the action in subsection 4 of section 3, so we do not seem to lose a great deal of that. By creating a process, if the defendant is exposed to attorney fees, then this at least creates a process where they could defend it.

Wayne Carlson:
I am not an attorney, so I cannot respond to all the details like that, but our attorney did address it in his memorandum, which is on the Nevada Electronic Legislative Information System (NELIS). On number four he says, "When a party moves for a special motion to dismiss under NRS 41.660(1), the party must first make a threshold showing that the lawsuit is based on good faith communications made in furtherance of the right to petition the government. A good faith communication is one which is truthful or made without knowledge of its falsehood."

In number five, he says, "The purpose of the anti-SLAPP legislation in Nevada is to allow a defendant to extricate himself from the litigation early on without being put to great expense, harassment, or interruption of his productive activities." If these other procedures are going to increase the cost to pursue an anti-SLAPP strategy, then it is defeating some of the effort to try to make it easier and cheaper for businesses or governments that are subjected to SLAPP to get out of those suits. So early and quick is the better way. That is why we thought this other process seemed to add cost.

Chairman Frierson:
Who is this letter from? I am not seeing it.

Wayne Carlson:
It is a memo. It says, "From SCB to file." That was Steve Balkinbush's testimony. I believe it is on NELIS.

Chairman Frierson:
If you are talking about NELIS over in the Senate, then we would not have it.

Wayne Carlson:
Yes. I am sorry.

Chairman Frierson:
If he would like that to be circulated to the Committee, he would have to make sure to send it over. At least now we have what you are referring to on record, so the Committee can certainly look at the exhibits over on the Senate side.

Are there any questions from the Committee? [There were none.] Is there anyone wishing to offer testimony in a neutral position either in Carson City or Las Vegas? [There was no one.] Mr. Jones, would you come back up for closing remarks?

Senator Jones:
Mr. Balkinbush was there for the original committee. I think the general sentiment was, "We are okay with how it is," and the Ninth Circuit Court has said that it does not protect people in the way that it should, and that is what this bill is trying to address.

With regard to the concerns that a public agency could be subject to additional cost as a result of this legislation, I would respectfully disagree, and also direct the Committee's attention to section 4, subsection 2, where it speaks of someone who files these special motions to dismiss. The additional fees and $10,000 penalty only apply if the court were to find that the motion was filed in

a frivolous or vexatious manner. Mr. Chairman, as you are aware, it is pretty hard to show that someone's filing of a motion was frivolous or vexatious. I think that those protections are in the bill for public agencies that might be filing these suits and will not deter them in that effect.

Chairman Frierson:
Thank you, Senator. I will direct the Committee that if they want to go back and look at the Senate side, they are more than welcome to do so for any of the exhibits.

[Also submitted but not discussed were (Exhibit C) and (Exhibit D).]

With that said, I will close the hearing on S.B. 286 (R1) and open the hearing on Senate Bill 60 (1st Reprint).

Senate Bill 60 (1st Reprint): Revises various provisions relating to businesses. (BDR 7-380)

Scott W. Anderson, Deputy for Commercial Recordings, Office of the Secretary of State:
Senate Bill 60 (1st Reprint) proposes several changes to Title 7 and Chapter 225 of the *Nevada Revised Statutes* (NRS) that will further standardize and refine the filing processes of the Secretary of State's Commercial Recordings Division. The bill also strengthens provisions relating to registered agent practices in the state. We have met with representatives of the Registered Agent Association and the State Bar of Nevada Business Law Section in coming up with a bill acceptable to all parties. I will touch on the major provisions of the bill and will be happy to answer any questions you may have as we go. As you can see, the bill is quite large due to the fact that the same provisions are repeated in the individual entity chapters within Title 7. Therefore, I will not cite each section specifically, but I will touch on the substance of the provisions contained in the multiple sections.

Section 2 of the bill adds a penalty to provisions previously added to the individual entity statutes for purporting to do business without proper registration. It adds to those that are only required to have a state business license—sole proprietors, general partnerships, and those required to have a business license but not required to file formation documents with the Secretary of State. This section mirrors those already in statute relating to business entities doing business in Nevada without proper registration and is necessary to ensure that the same penalties for noncompliance with the filing requirements apply to sole proprietors and general partnerships as they do for corporations, limited liability companies, and other Title 7 entities doing business in Nevada.

EXHIBITS

Committee Name: Committee on Judiciary

Date: May 6, 2013 **Time of Meeting: 8:19 a.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
S.B. 286 (R1)	C	Marc Randazza	Testimony
S.B. 286 (R1)	D	James A. McGibney	Testimony
S.B. 421 (R1)	E	Stephanie Allen	Letter from Judge James T. Russell
S.B. 421 (R1)	F	Stephanie Allen	Proposed Amendment
S.B. 441 (R1)	G	Robert Kim	Memorandum

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Reply to Las Vegas Office via Email or Fax

May 3, 2013

Nevada State Assembly
Assembly Chamber
Nevada State Legislative Building
401 S. Carson Street
Carson City, Nevada 89701

Re: Report to Assembly on Proposed Changes to Nevada's Anti-SLAPP Laws

Dear Esteemed Assemblymen and women:

Nevada stands among the states with largely ineffective Anti-SLAPP laws. NRS 41.635-670 (the "Anti-SLAPP Laws"). It stands in the shadows of California, Oregon, Washington, and Texas, which have passed far more effective legislation that acts not only to protect freedom of expression in those states, but which also act as an attraction to the establishment of business in those states.

Nevada's Anti-SLAPP Laws protects **only** "good faith communication in furtherance of the right to petition." NRS 41.650. This **limits** its scope to speech made to a government agency, or directly in connection with a matter under consideration by one of the government's arms. NRS 41.637. This is not enough.

With the dawn of the Internet's user-generated content era, individuals have found themselves in the crosshairs of SLAPPs brought over Constitutionally protected speech. Reviews on sites like Yelp! and Avvo beget crushingly expensive litigation by subjects of factual but unflattering reviews. These lawsuits primarily serve to harass and intimidate small defendants and the websites themselves while pummeling them with significant legal fees. Caught in the crossfire are Nevada's already backlogged and overburdened Courts, which must referee these one-sided fights.

Similarly, businesses have been faced with lawsuits over their own First Amendment protected activity, ranging from advertising and marketing practices to the management of their employees. This drives down the profits of these businesses and interferes with their ability to grow and hire new employees. Once again, Nevada's courts suffer the costs of these suits as well.

Broadened Anti-SLAPP Laws serve numerous public services. First, it protects the public – individuals and businesses alike – from going broke fighting meritless claims. Meritorious claims will still proceed; new Anti-SLAPP Laws will not mean the end of defamation law in Nevada. Anti-SLAPP statutes have had no impact upon meritorious defamation cases in California, Oregon, Texas, or Washington. Updating Nevada Anti-SLAPP laws will, however, mean that marginal and frivolous cases are kept out of the courts – and if they are brought, the costs will fall on the plaintiff who filed suit.

Second, the proposed changes to Nevada's Anti-SLAPP Laws create new safeguards to ensure the laws have effect. At any time, a defendant may require a plaintiff to post a bond for the estimated value of his or her attorneys' fees, provided the defendant can show a reasonable possibility of succeeding on an Anti-SLAPP motion. If the plaintiff cannot post a bond, the case is dismissed. This ensures that defendants who win Anti-SLAPP motions do not merely obtain pyrrhic victories.

Expanding the scope of Nevada's Anti-SLAPP Laws to apply to *all* speech about matters of public concern – not merely speech seeking government action – will benefit individuals and Nevada's courts. Abuses of the judicial process will be resolved privately with these motions, rather than requiring the courts to exercise close control over every single case before it. Businesses will be able to truncate or at least significantly limit questionable litigation, making more funds available for expansion and hiring. While there are numerous factors affecting the technology sector's growth over the last 20 years, it is not an accident that social media companies such as Yelp, Avvo, Twitter, Zynga, Facebook, and others are based in California and Washington – states with robust Anti-SLAPP statutes that protect a wide range of speech.

My law firm represents a large number of journalists and Internet technology companies. Despite the fact that we are headquartered in Las Vegas, we reluctantly advise clients to organize or incorporate in California, Oregon, and Washington so that they can benefit from those states' Anti-SLAPP statutes. Most significantly, individuals will be spared from personal bankruptcy and financial destruction arising from all-consuming litigation against a more powerful party.

The trend of litigation against Constitutionally protected speech within Nevada cannot be denied. Military veterans have been sued for expressing opposition to a Las Vegas family law attorney's position on the disposition of military benefits upon divorce. Anonymous commenters have been brought into court, and sought to be deprived of their Constitutional right to anonymity, for comments left on *Las Vegas Review-Journal* online articles. Nevada's own Righthaven LLC filed more than 200 lawsuits in Nevada's courts – and whenever attorneys stepped forward to litigate the issue of "Fair Use," or whether the interests of the First Amendment trumped Righthaven's dubious copyright claims, Righthaven lost *every single time*.[1]

Broadening Nevada's Anti-SLAPP Laws serves multiple public interests. While an increasing number of state and federal lawsuits feature litigants who are *pro se*, or not represented by an attorney, new Anti-SLAPP Laws will encourage access to justice. Because of the proposed fee-

[1] Because the proposed amendments to Nevada's Anti-SLAPP Laws are substantive, rather than procedural, they will apply in the United States District Court for the District of Nevada – where Righthaven filed its actions – as well as Nevada's state courts.

shifting and bond provisions, attorneys will compete to take these cases and vindicate their clients' free speech rights, rather than accept it – and quarantine it – in their *pro bono* allotment for the year. Most importantly, though, it will memorialize to Nevadans and the nation this State's commitment to truly open debate, free expression, and the sacrosanct principles enshrined in the First Amendment of the United States Constitution and Article I of the Nevada State Constitution.

Best regards,

Marc J. Randazza

Anti-SLAPP Statutes Are Both Business-Friendly and Pro-Consumer

I. Anti-SLAPP Statutes Kill Frivolous Lawsuits Early.
   a. Not just for defamation – Anti-SLAPP Statutes apply to any baseless state law claim based on free expression, such as tortious interference claims and false advertising actions (but allow meritorious suits to proceed).
   b. Protects Employers from firing employees with cause[1] and engaging in lawful pre-employment screening of employees,[2] but does not prohibit meritorious suits for unlawful conduct. Eliminating frivolous claims ensures meritorious ones receive faster and more thorough treatment.
   c. Makes more money available for growth, research, and development, and requires less money be spent defending lawsuits over Constitutionally protected behavior.

II. Anti-SLAPP Statutes are Journalism and Web-business friendly.
   a. While the tech boom of California had many causes, the benefit of a strong Anti-SLAPP statute has helped social platforms such as Facebook and Twitter prosper.
   b. Online review sites have used Anti-SLAPP statutes to avoid frivolous lawsuits and shift the costs of their defense onto plaintiffs who bring indefensible claims.[3]
   c. Traditional media such as the Las Vegas Review-Journal and Las Vegas Sun benefit from having a strong Anti-SLAPP statute to protect them from plaintiffs with poor cases hoping to strike it rich.[4]

III. SLAPP Suits Can Happen to Anyone.
   a. A Las Vegas attorney sued military veterans, including Nevadans, for defamation based on their disagreement with his position on how military benefits are divided in divorce. Many statements likely were not defamatory. Without a meaningful Anti-SLAPP statute, these veterans were forced to face the crushing costs of extensive litigation until proving their statements were not defamatory.
   b. Righthaven LLC also used copyright infringement claims to file more than 200 lawsuits in Nevada and seek up to $150,000 for incidental infringements; whenever litigated by attorneys, courts found these "infringements" to constitute First Amendment-protected fair use under the Copyright Act.[5]
   c. An Anti-SLAPP statute will not inhibit meritorious claims. However, it will discourage baseless claims, incentivize attorneys to assist the public, and make plaintiffs bring only their strongest claims before an overburdened judiciary.[6]

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[1] *Fontani v. Wells Fargo Investments, LLC*, 129 Cal. App. 4th 719 (2005); see *Dible v. Haight Ashbury Free Clinics, Inc.*, (2009) 170 Cal. App. 4th 843.

[2] *Mendoza v. ADP Screening and Selection Services, Inc.* (2010) 182 Cal. App. 4th 1644.

[3] *Davis v. Avvo, Inc.*, Case No. C11-1571RSM *2012 WL 1067640* at *1 (W.D. Wash. Mar. 28, 2012) (applying Washington's Anti-SLAPP statute to information found on attorney review website, which constituted a matter of public concern.)

[4] http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-fall-2009/anti-slapp-saves-day (discussing traditional print media's use of Anti-SLAPP statutes to repel frivolous defamation suits by public figures, public officers, and the like).

[5] See generally www.righthavenlawsuits.com.

[6] Nevada's Anti-SLAPP statute exists to "filter[] unmeritorious claims in an effort to protect citizens from costly retaliatory lawsuits arising from their right to free speech[.]" *John v. Douglas County Sch. Dist.*, 219 P.3d 1276,1282 (Nev. 2009).

Anti-SLAPP Statutes Lower Public Expenses and Save Money

I. Anti-SLAPP Statutes Reduce Caseload and Judicial Burden
   a. Anti-SLAPP statutes are like super motions to dismiss. When an action is only at the pleading stage, an Anti-SLAPP motion can dispose of the entire action without lengthy discovery – something that can last years on a court docket and occupy the time of discovery commissioners.
   b. Nevada's Courts have a long-standing backlog from Clark County to Washoe County.[7] This problem is especially acute in Southern Nevada, where courts have already taken emergency actions to ameliorate the backlog of open cases.[8]

II. Anti-SLAPP Statutes Have a Track Record of Working
   a. California's Anti-SLAPP statute is 20 years old this year and has served the state well in that time.[9]
   b. Washington's Anti-SLAPP statute was first adopted in 1989, and its scope has only been broadened since its inception.[10]
   c. By 2010, 26 states had passed Anti-SLAPP statutes.[11] States with Anti-SLAPP statutes include Texas, Oregon, California, Washington, and the District of Columbia. More states keep adding Anti-SLAPP statutes, while less-protective federal legislation is proposed.[12]

III. Anti-SLAPP Statutes Apply in Federal Cases, Reducing Case Burdens Across-the-Board.
   a. Substantive Anti-SLAPP statutes like the one proposed to the legislature can apply in federal court.[13]
   b. This reduces the gamesmanship of trying to force Nevadans to litigate in more formal Federal court in order to avoid the Anti-SLAPP statute's application.
   c. This also ensures that Nevadans, or non-residents haled into Nevada's Federal courts, receive the benefit of the state's Anti-SLAPP protections, including the requirement for out-of-state plaintiffs to post a bond in support of their action or abandon it entirely.

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[7] *Nevada Judges Struggle to Keep Up With Backlog*, Las Vegas Sun (Feb. 17, 2004), *available at* http://www.lasvegassun.com/news/2004/feb/17/nevada-judges-struggle-to-keep-up-with-backlog/ (*last accessed* Mar. 24, 2013).

[8] Order Regarding Civil Case Filings, Order No. 11-03 (Mar. 2, 2011), *available at* http://www.clarkcountycourts.us/clerk/rules/JCAO-1103.pdf (*last accessed Mar*. 24, 2013).

[9] http://www.casp.net/uncategorized/2012-marks-20-years-of-protections-against-slapps/

[10] R.C.W. § 4.24.510.

[11] David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, Loyola L.R., Vol. 43:373 at 394 n. 81 (2010).

[12] James J.S. Holmes, *Anti_SLAPP Statutes Spread Across the Nation*, Media Law Bulletin (Nov. 2011), *available at* http://www.sdma.com/anti-slapp-statutes-spread-across-the-nation-11-10-2011/ (*last accessed* Mar. 24, 2013).

[13] *Newsham v. Lockheed Missiles and Space Company* 190 F.3d 963 (9th Cir. 1999).

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The Anti-SLAPP Statute: A New Defense For Developers?

By Daniel P. Dain (http://pview.findlaw.com/view/2521885_1) of Goodwin Procter LLP (http://pview.findlaw.com/view/2625194_1)

A little noticed Superior Court decision in December may have broad implications for developers of real estate. In dismissing a lawsuit filed by members of the community against a real estate developer in Pierce v. Mulhern, [1] the Superior Court recognized apparently for the first time in Massachusetts that real estate developers are afforded the protections of the Massachusetts anti-SLAPP statute. [2] As the realities of real estate development in the Commonwealth mandate active public engagement by developers, through hearings with governmental agencies or meetings with community groups, the decision in Pierce largely shields such activity from direct legal action.

"SLAPP" is an acronym for "strategic litigation against public participation," and the law is meant to protect those who participate in a public process from retaliatory litigation, typically alleging causes of action such as defamation or tortious interference with contractual relations/prospective business opportunity, that itself may be meritless, but the defense against which may be very costly. The anti-SLAPP law has historically been the domain of those petitioning against, not proponents of, development. Indeed, the Supreme Judicial Court, in the leading case interpreting the anti-SLAPP statute, wrote, "The typical mischief that the legislature intended to remedy was lawsuits directed at individual citizens of modest means for speaking publicly against development projects." [3] The Supreme Judicial Court identified a single case as the "impetus" for the introduction of the anti-SLAPP legislation in 1994 in Massachusetts. In that case, a developer sued 15 citizens of Rehoboth who, ostensibly concerned with the protection of wetlands, had signed a petition against a permit for the construction of six single-family residences. The suit was eventually dismissed, but not before the 15 citizens had incurred thousands of dollars in legal fees defending against the action.

The anti-SLAPP law works this way: The target of a SLAPP suit files a "special motion to dismiss." The movant must show that the claims in the suit are solely "based on" the exercise of the "right of petition under the constitution of the United States or of the commonwealth." [4] The statute defines "petitioning activity" broadly to include just about any public statement concerning an issue pending before a governmental body. If the initial showing is made, then the burden shifts to the party who brought the suit to establish (1) that the petitioning activity "was devoid of any reasonable factual support or any arguable basis in law"; and (2) that the petitioning activity caused actual injury to the party who brought the lawsuit. [5] This burden shifting imposes a high hurdle: to prove, without the benefit of discovery, the total lack of merit of the petitioning activity. Failure to meet this burden subjects the party who brought the lawsuit to paying the target's legal fees and costs. [6]

In the recent Superior Court case, Pierce, members of the community appealed a special permit issued by the Winchester Zoning Board of Appeals to the developer of a proposed assisted living facility. The Superior Court vacated the special permit on procedural grounds and remanded the matter back to the Zoning Board of Appeals. The developer, however, rather than returning to the ZBA to try to secure another special permit that the members of the community likely would just appeal again, asked the ZBA to sponsor Warrant Articles for Town Meeting to amend the Town's by-laws in such a way that a special permit would not be necessary to proceed with the proposed facility. The members of community filed a contempt complaint against the developer, its principals and attorney, the ZBA and the Town, alleging that the failure to return to the ZBA for a new special permit violated the remand order.

The developer filed a special motion to dismiss under the anti-SLAPP statute arguing that the contempt complaint was based solely on the petitioning activity to the Town Meeting. The members of the community filed an opposition brief arguing that the developer was trying to turn the anti-SLAPP statute on its head, that the "intention" of the statute was to "protect the rights of individual members of the public," not big developers.

The Superior Court disagreed with this concern, finding nothing in the statute to limit its protections only to private citizens. [7] The court found that the developer had made its initial showing that the contempt complaint was based solely on the petitioning activity. With the burden then shifted to the members of the community, the court found that they had not established the lack of a factual or legal basis for the petitioning activity. The court observed that "As a result of what [the developer] perceived as ambiguities in the Town's zoning bylaws, the [developer] sought to clarify or change those bylaws through proposed Warrant Articles that would accommodate the Project." [8] The Superior Court dismissed the lawsuit.

To get projects built in the Commonwealth, developers are compelled to participate in a variety of public forums. The Superior Court's decision in Pierce protects developers from direct attacks against that public participation.

Footnotes

1. Civil Action No. 2001-2825-C.
2. M.G.L. c. 231, § 59H.
3. Duracraft Corp. v. Holmes Products Corp., 427 Mass. 156, 161 (1998).
4. M.G.L. c. 231, § 59H; Duracraft, 427 Mass. at 165.
5. M.G.L. c. 231, § 59H.
6. Id.
7. Memorandum and Order at 5.
8. Id. at 7.

THE WALL STREET JOURNAL.
WSJ.com

JUNE 1, 2010, 9:48 AM ET

Online Venters Rejoice: Federal Anti-SLAPP Law Taking Shape

That airline lose your luggage (again)? A rental-truck outfit overcharge you unjustifiably? That bedbug exterminator spray everywhere except where the bedbugs roam?

In a fit of pique, you might be inclined to take your complaints online, to create an "Acme BugsAway Stinks!" group on Facebook or maybe even film your own Howard Beale-like tirade and put it up on YouTube.

If you do, know that a complaint from the object of your ire might soon be on its way. And maybe a lawsuit.

The NYT on Tuesday has a story on the trend of companies fighting back against consumers who vent online, mostly in the form of defamation suits.

According to the story, those who vent online may often be protected by the First Amendment. But the Constitution doesn't always carry the day — the threat of a suit is often enough to get angry consumers to pull down their remarks.

Many states have what are called anti-SLAPP laws — laws that ban these types of suits. (SLAPP stands for "Strategic Lawsuit Against Public Participation.) Congress is thinking about passing its own.

The bill, in the House Subcommittee on Courts and Competition Policy, would, according to the NYT, enable a defendant who believes he is being sued for speaking out or petitioning on a public matter to seek to have the suit dismissed.

Under the proposed law, if a case is dismissed for being a SLAPP suit, the plaintiff would have to pay the other side's legal fees.

"Just as petition and free speech rights are so important that they require specific constitutional protections, they are also important enough to justify uniform national protections against Slapps," said Mark Goldowitz, director of the California Anti-Slapp Project, which helped draft the bill.

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Measuring the Impact of Anti-SLAPP Legislation on Monitoring and Enforcement

Posted by Evan Mascagni in Recent SLAPP News | 0 comments

Nov 09, 11 

The B.E. Journal of Economic Analysis & Policy published an article measuring the impact of anti-SLAPP legislation on regulator monitoring and enforcement, using US data on monitoring and enforcement activity under the Clean Air Act from 1978-2005.

The main findings: "We find strong evidence that anti-SLAPP laws are associated with increases in regulator monitoring and enforcement activity under the Clean Air Act. In fact, we find that state inspections increase by almost 50% after a state passes anti-SLAPP legislation and that the ratio of findings of noncompliance to inspections more than doubles in the presence of anti-SLAPP legislation." (p. 1.)

The article concludes that "Anti-SLAPP laws drive real changes in regulator behavior in environmental enforcement, even in settings with low citizen involvement in the form of civil suits" and that anti-SLAPP legislation "is good for air quality." (p. 14.) It also discusses plans for future related research.

You can download the full article by Bevin Ashenmiller (Occidental College) and Catherine Shelley Norman (Johns Hopkins University) here:
http://www.bepress.com/bejeap/vol11/iss1/art67/

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A Uniform Act Limiting Strategic Litigation Against Public Participation: Getting It Passed
Society Of Professional Journalists Baker and Hostetler LLP
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Introduction | SLAPPs: A Statement of the Problem | Building A Broad Coalition | A Uniform Act Limiting Strategic Litigation Against Public Participation

Fifteen years have passed since the first anti-SLAPP statute was passed in Washington State, and as of spring 2004, 21 states have some type of anti-SLAPP legislation in place. These facts will both benefit and hinder us as we bring our Model Act out into the world. On one hand, we are able to learn from the experiences of others in drafting and passing these statutes, and we have years of anti-SLAPP success stories to draw upon when making our cases. On the other hand, opponents of the legislation will be well equipped to highlight so-called "abuse" of these statutes – which may include, in their views, large media entities using anti-SLAPP motions to fight defamation lawsuits.

In light of this latter point, it is crucial that the journalism community thoughtfully considers the role it will assume in pushing for the future enactment of anti-SLAPP legislation. Without a doubt, media entities and press organizations, as among the more well-heeled and well-respected advocates of these statutes, must use their influence with the public and the government to gain recognition and support of the legislation. However, to the extent it is still possible given the countless examples of anti-SLAPP statutes benefiting the media, these groups need to downplay any personal interest in the legislation and focus on its capacity for empowering the "little guy" and the First Amendment in general.

As we keep our goals and roles in mind, we can also benefit from these tips, which several anti-SLAPP experts – including California Anti-SLAPP Project director Mark Goldowitz and Tom Newton, counsel for the California Newspaper Publishers Association – have offered.

Enlist An Influential Government Supporter. Particularly in governments that are very pro-business or otherwise disinclined to support anti-SLAPP legislation, such legislation is likely to stall without the push of at least one powerful government leader who is strongly invested in its success. In California, Senator Bill Lockyer, a democrat from Alameda County and then-head of the state Judiciary Committee, was inspired by Pring's and Penelope Canan's seminal article on SLAPPs and made it a mission of sorts to enact an anti-SLAPP law in California. A similar role was played by democratic Senator James J. Cox in Louisiana. In Washington State, then-Governor Booth Gardner and his attorney general, Kenneth Eikenberry, pushed for introduction of legislation.

In those cases, the lawmakers initiated the legislation, but we can try to jump-start the efforts in other states by honing in on effective champions for our cause. In the state legislatures, members of the judiciary committees are likely candidates, especially those who have an intellectual bent or have shown themselves to be strong supporters of First Amendment interests. Senator Lockyer was one such man, a former schoolteacher who strongly believed in freedom of thought. Another approach might be to pinpoint some powerful examples of citizens being victimized by SLAPPs (see "Tell A Good Story" below) and target those citizens' representatives, or other legislators who might be particularly affected by their stories.

On the executive front, if it is not possible to engage the governor or another powerful official

directly, it might be fruitful to bring the issue to a potentially interested agency or even a citizen advisory group that has access to agency officials. In Oregon, the idea for an anti-SLAPP statute originated with the citizen involvement advisory committee to the Department of Land Conservation and Development. The committee made a recommendation to the Land Conservation and Development Commission, the Department's public policy decision-making body, and the Commission directed an investigation and appropriate action. Ultimately, the Department drafted a proposal for the legislation and sought sponsors.

Enunciate The Problem. Both in enlisting government support and building a coalition (see "Build A Coalition" below), it is important that we effectively explain what SLAPPs are and why something must be done. Attached as an appendix is a sample "Statement of the Problem," adapted from one prepared by the Communications and Public Affairs Program of the Oregon Department of Land Conservation and Development. It will be most effective if we personalize our "Statements," bearing in mind each state's unique composition and challenges.

Build A Coalition. The single most important lobbying strategy, cited by all the experts, was building the broadest possible coalition to push for passage of the legislation. Media, environmental and civil rights groups are the most frequent supporters of anti-SLAPP legislation, but groups defending the rights of women and the elderly are also potentially strong advocates, as are municipalities and neighborhood and civic associations. Appendix B, which lists the supporters of the California statute, shows the great variety of groups that are sympathetic to anti-SLAPP legislation.

Several states found it useful to develop more formal coalitions, providing organizational structure to harness the power of the myriad supporters. The California Anti-SLAPP Project began as such a coalition and has continued as the lead proponent of improvements to the California statute. New Mexico also had a formal coalition, the NoSLAPP Alliance, which coordinated the statewide media and lobbying campaign.

Finally, in addition to recognizing potential allies, it is important for anti-SLAPP proponents to recognize their likely opponents. Developers and building industry associations are the No. 1 opponents of anti-SLAPP legislation, not surprising given that the quintessential SLAPP involves a developer suing a citizen for his criticism of a development project. Representatives of business, including chambers of commerce, also tend to oppose anti-SLAPP legislation, as did the Trial Lawyers Association in California, though there are certainly arguments as to why anti-SLAPP legislation would benefit its constituency.

Tell A Meaningful Story. Politicians are politicians, and they will be most likely to get behind legislation that makes them look compassionate. Therefore, it is crucial to set off on the lobbying trail with some good stories about SLAPP victims, stories that will outrage lawmakers in their injustice and present them with possible "poster children" for the new legislation. Even more effective is to enlist the victims themselves to tell their own stories.

In California, Senator Lockyer was swayed by the story of Alan LaPointe, a Contra Costa County man who led community opposition to a proposed waste-burning plant. LaPointe spoke against the plant at district meetings and before a grand jury, and was the lead plaintiff in a taxpayer's action filed in 1987 based on an allegedly improper use of public funds for feasibility studies for the proposed plant. The sanitation district cross-complained against LaPointe personally for interference with prospective economic advantage.

In Washington State, the anti-SLAPP legislation was named "The Brenda Hill Bill" after a woman who reported her subdivision developer to the state for failure to pay its tax bill. The developer filed foreclosure proceedings on Hill's home and sued her for defamation, seeking $100,000. Her story swayed both the governor and the legislator who brought the bill, Holly Myers.

In a related matter, point out specific examples of how the current system is insufficient. In New York, legislators passed the anti-SLAPP statute out of frustration over how the legal system was addressing SLAPPs, which were common especially in the real estate context. For example, a developer sued nine Suffolk County homeowner groups and sixteen individuals after they had testified against town approval of a proposed housing development. The developer alleged various tort claims and sought more than $11 million in damages. More than three years later, the case was finally dismissed on appeal.

Channel Your Power Effectively. Media and journalism groups are essential participants in

Anti-SLAPP: Protect Free Speech
Official Secrets Act bill
FOI Groups
Annual FOI Reports
FOI Committee Roster

FOI FYI: SPJ's FOI Committee Blog
– North Carolina paper Cherokee Scout withdraws request for gun records, grovels for forgiveness (http://blogs.spjnetwork.org/foi/2013/02/26/north-carolina-paper-cherokee-scout-withdraws-request-for-gun-records-grovels-for-forgiveness/)
– University of Wyoming will make presidential finalists public, despite new law (http://blogs.spjnetwork.org/foi/2013/02/23/university-of-wyoming-will-make-presidential-finalists-public-despite-new-law/)
– Utah city makes 'confidential' settlement in Taser death suit (http://blogs.spjnetwork.org/foi/2013/01/07/utah-city-makes-confidential-settlement-in-taser-death-suit/)

FOI Committee

This committee is the watchdog of press freedoms across the nation. It relies upon a network of volunteers in each state organized under Project Sunshine. These SPJ members are on the front lines for assaults to the First Amendment and when lawmakers attempt to restrict the public's access to documents and the government's business. The committee often is called upon to intervene in instances where the media is restricted.

Freedom of Information Committee Chair

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Bio (click to expand)

the anti-SLAPP movement, says Goldowitz, because they are a commonly SLAPPed group with a relatively large bank of resources and a significant amount of influence. However, it is crucial that these groups know when and how to use their power. Because of their resources and contacts, media groups should probably play a key role in coalition-building, but the media would probably do best to step back and let their allies tell their own SLAPP stories. The tale of a poor woman fighting a big developer will almost always have more resonance than the travails of a large newspaper facing a baseless libel suit – even by the same developer.

The exception to the hands-off approach should be in running editorials and op-ed pieces. Newspapers and other media have an unmatched ability to reach large numbers of people, and such outreach is crucial to a successful anti-SLAPP campaign. For example, in California, more than two dozen newspapers published editorials in favor of the anti-SLAPP legislation. Op-ed pieces written by coalition allies or SLAPP victims are also powerful. The key is to emphasize the First Amendment benefits of anti-SLAPP legislation while downplaying the possibility that it could be exploited by the media itself.

Play The Politics. Even in situations fairly conducive to the passage of anti-SLAPP legislation, the political stars have to align. In California, two situations having nothing to do with SLAPPs boosted the anti-SLAPP effort immeasurably. First, on the second attempt to pass the legislation, it was merged with another bill that made permanent liability protections for volunteer officers and directors of non-profit organizations. Support for the bill more than doubled, with organizations such as the Red Cross, the United Way, and dozens of local chambers of commerce joining. Increased pressure from all sides contributed to Governor Pete Wilson's decision to sign the bill in 1992 on its third attempt.

Second, when the democrats took control of both houses of the California legislature in 1997, certain anti-SLAPP allies, such as the ACLU and environmental groups, saw a boost in their lobbying influence. This contributed in part to the California coalition's ability to push through an amendment to the anti-SLAPP statute clarifying that its provisions should be interpreted broadly.

Certainly we as political outsiders are limited in the amount of maneuvering we can achieve – and politicians are limited ethically in the steps they can take. But it is always worth using our imaginations and keeping an eye out for situations that may improve the climate for passage of anti-SLAPP legislation.

Be Patient. It can take time to pass anti-SLAPP legislation. In California and Pennsylvania, it took three tries to generate enough momentum and support to achieve success. A first attempt can be effective, even if it doesn't lead to a law, if it gets the issue on the radar screens of lawmakers and citizens. Sometimes, we might have to wait until one political party makes an exit, or the right sponsor comes along.

Be Willing to Compromise. A little bit of give-and-take is essential in the legislative process. In California, in exchange for Governor Wilson's signature on the anti-SLAPP bill, Senator Lockyer agreed to introduce remedial legislation to make mandatory a permissive provision for awarding attorney's fees and costs to a plaintiff who prevailed on a motion to strike. (The remedial legislation has not passed.) In New Mexico, the bill was on the verge of dying in the Senate when a last-minute compromise was brokered which, among other things, changed the definition of what speech would be immunized.

As in New Mexico or Pennsylvania – where the statute was greatly watered down before passage – the results of compromise may be harsh. But keep in mind that where passage of the desired language does not seem possible, it might be better to get some kind of statute on the books. Once that happens, some of the opposing pressure may lift and it may be easier to pass amendments that will bring the statute in line with our goals.

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Appendix A
SLAPPs: A Statement of the Problem

What is a SLAPP Suit?

The essence of a SLAPP suit is the transformation of a debate over public policy – including such local issues as zoning, environmental preservation, school curriculum, or consumer protection – into a private dispute. A SLAPP suit shifts a political dispute into the courtroom, where the party speaking out on the issue must defend his or her actions. Although SLAPP suits may arise in many different contexts, they share a number of features:

1. The conduct of the targets that are sued is generally constitutionally protected speech intended to advance a view on an issue of public concern. In most cases, a SLAPP suit is filed in retaliation for public participation in a political dispute. The plaintiff is attempting to intimidate a political opponent and, if possible, prevent further public participation on the issue by the person or organization.

2. Targets typically are individuals or groups that are advancing social or political interests of some significance and not acting solely for personal profit or commercial advantage.

3. The filers are individuals or groups who believe their current or future commercial interests may be negatively affected by the targets' actions. Though developers and other commercial entities are the most common SLAPP plaintiffs, they are not the only ones. For example, in Oklahoma, a group supporting tort reform was the subject of a class action libel suit filed by trial lawyers, and in California, county officials filed a $42 million SLAPP against a local citizen because of his opposition to a proposed incinerator project.

4. The actions tend to be based on one or more of the following torts: defamation (libel or slander); business torts (interference with contract, business relationships or economic advantage, or restraint of trade); misuse of process (abuse of process or malicious prosecution); civil rights violations (due process, takings, or equal protection); or conspiracy to commit one or more of the above acts.

5. Damages sought are often in the millions of dollars. According to a study by the Denver Political Litigation Project, the average demand was for $9.1 million. See Penelope Canan and George Pring, SLAPPs: Getting Sued for Speaking Out 217 (Philadelphia: Temple University Press, 1996).

6. Almost all SLAPP suits are eventually dismissed or decided in favor of the defendants. Canan and Pring reported that targets win dismissals at the very first trial court appearance in about two-thirds of the cases. Id. at 218. By all accounts, the number of SLAPP suits has increased during the past 30 years. Examples of SLAPP suits from around the country reveal the extent of the practice:

— In Rhode Island, a woman filed comments on proposed groundwater rules, raising concerns about possible contamination from a local landfill. The landfill operators sued her for defamation and tortious interference with prospective business contracts, seeking both compensatory and punitive damages.

— In Pennsylvania, a couple wrote letters to their United States Senator, state health officials, and CBS News complaining about conditions at a local nursing home. The state investigated and eventually revoked the nursing home's license. The nursing home then sued the couple, the Senator, and a state health department official.

— In Minnesota, a retired United States Fish and Wildlife Service employee mobilized his neighbors against a proposed condominium development on a small lake. After the rezoning request was rejected, the developer sued him, alleging he had made false statements that damaged the developer's business reputation.

— In Texas, a woman confined to her home by illness spoke out publicly against a nearby landfill. In response, the landfill owners filed a $5 million defamation suit against the woman and her husband.

— In California, a group of small cotton farmers bought newspaper advertising opposing a proposed ballot measure supported by the nation's largest cotton agribusiness. The corporation sued the farmers for libel, requesting $2.5 million in damages.

— In California, a $63 million lawsuit was filed by a developer who claimed that the Beverly Hills League of Women Voters had unlawfully stymied his 10-acre project.

— In Washington, The Nature Conservancy was sued for $2.79 million by seaweed farm developers after it had inventoried potential natural areas in San Juan County, identified lands that should be preserved (including the plaintiffs'), and turned the study over to the county as a recommendation.

Isn't Action Involving Public Participation And Petition Already Protected By The Constitution? Why Is A Special Anti-SLAPP Provision Needed?

Two constitutional doctrines, both founded on the First Amendment, protect the sort of speech and conduct that is targeted by SLAPPs. The first, the New York Times v. Sullivan doctrine, provides that a person cannot be found liable for a false statement about a public figure on a matter of public concern unless the statement was made with "actual malice," that is, with knowledge that it was false or with reckless disregard for its truth or falsity. The second, the Noerr-Pennington doctrine, provides that petitioning activity is shielded from liability as long as it is genuinely aimed at procuring favorable government action.

Under both these doctrines, a defendant seeking to promptly dispose of a lawsuit files a motion to dismiss, in which the defendant argues that the plaintiff's allegations in the complaint do not state a viable claim. The burden of persuasion lies with the defendant, and the facts alleged are presumed to be true, though later inquiries will be intensely fact-specific. For those reasons, and because the right to sue is itself constitutionally protected, a judge generally will not dismiss a lawsuit at this stage. Most often, the judge will allow the plaintiff to proceed with discovery, including depositions during which the plaintiff's attorney may question the defendant's knowledge, beliefs, and motives.

The problem with the current legal framework is that it takes too long to get SLAPP suits dismissed. According to Dr. Pring, the average SLAPP suit proceeds for 40 months – more than three years. During this time, the suit inflicts massive emotional and financial harm on the defendant, and often the defendant withdraws completely from action involving public participation and petition. By the time the SLAPP suit is dismissed, the plaintiff has thus achieved its goals of retaliation and silencing protected speech.

What Will Anti-SLAPP Legislation Do?

Essentially, anti-SLAPP legislation identifies the speech and conduct that should be protected – defined as "action involving public participation and petition" – and provides a procedure for speedy review of lawsuits that are filed as a result of such protected action. In particular, the proposed legislation permits a suspecting SLAPP victim to file a special motion to strike, which must be heard within 60 days. At the hearing, the SLAPP must be dismissed unless the filer establishes a probability of prevailing. The proposed legislation also states that discovery will be stayed pending a decision on the motion to strike. A prevailing victim is entitled to his attorney's fees and costs, and a court may issue other sanctions to deter similar conduct in the future by the filer or others similarly situated.

The proposed legislation also features protections for those who file legitimate suits and find themselves the subject of special motions to strike. The court will not dismiss a suit if the filer produces substantial evidence to support a prima facie case. Furthermore, the filer is entitled to his attorney's fees and costs if the court finds that the motion to strike was frivolous or filed in bad faith.

Although arguments can be made against anti-SLAPP legislation, such statutes represent a legislative decision that, even though citizen communications may at times be self-interested or incorrect, public participation and petition are essential to our democratic process and must be protected from the threat of SLAPP suits.

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Appendix B
Building A Broad Coalition: Anti-SLAPP Proponents In California
American Civil Liberties Union
American Lung Association of California
Bar Association of San Francisco
California Association of Nonprofits
California Association of Professional Liability Insurers
California Association of Zoos and Aquariums
California Common Cause (good government group)
California First Amendment Coalition
California First Amendment Project (predecessor of CASP)

California League of United Latin American Citizens
California Legislative Council For Older Americans
California Newspaper Publishers Association
California School Employees Association
California Thoracic Society
Center for Law in the Public Interest
City and County of Los Angeles
City of Napa
City of San Diego
City of San Francisco
City of San Mateo
Complete Equity Markets, Inc. (professional insurance company)
Concerned Citizens for Environmental Health
Consumers Union
Friends of the River (statewide river conservation organization)
Golden State Manufactured-Home Owners League
Greenlining Coalition (multi-ethnic community leaders)
Land Utilization Alliance
Neighborhood and civic associations
Planning and Conservation League (California environmental org.)
Public Advocates (public-interest law firm)
Queen's Bench (women's lawyers association in San Francisco)
Sierra Club, Ventana Chapter
Women Lawyers of Alameda County

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A Uniform Act Limiting Strategic Litigation Against Public Participation

PREFATORY NOTE

The past 30 years have witnessed the proliferation of Strategic Lawsuits against Public Participation ("SLAPPs") as a powerful mechanism for stifling free expression. SLAPPs defy simple definition. They are initiated by corporations, companies, government officials, and individuals, and they target both radical activists and typical citizens. They occur in every state, at every level in and outside of government, and address public issues from zoning to the environment to politics to education. They are cloaked as claims for defamation, nuisance, invasion of privacy, and interference with contract, to name a few. For all the diversity of SLAPPs, however, their unifying features make them a dangerous force: They are brought not in pursuit of justice, but rather to ensnare their targets in costly litigation that distracts them from the controversy at hand, and to deter them and others from engaging in their rights of speech and petition on issues of public concern.

To limit the detrimental effects of SLAPPs, 21 states have enacted laws that authorize special and/or expedited procedures for addressing such suits, and ten others are considering or have previously considered similar legislation. Though grouped under the "anti-SLAPP" moniker, these statutes and bills differ widely in scope, form, and the weight they accord First Amendment rights vis a vis the constitutional right to a trial by jury. Some "anti-SLAPP" statutes are triggered by any claim that implicates free speech on a public issue, while others apply only to speech in specific settings or concerning specific subjects. Some statutes provide for special motions to dismiss, while others employ traditional summary procedures. The burden of proof placed on the responding party, whether discovery is stayed pending consideration, and the availability of attorney's fees and damages all vary from state to state. Perhaps as a result of the confusion these variations engender, anti-SLAPP measures in many states are grossly under-utilized.

The Uniform Act Limiting Strategic Litigation Against Public Participation seeks to remedy these flaws by enunciating a clear process through which SLAPPs can be challenged and their merits evaluated in an expedited manner. The Act sets out the situations in which a special motion to strike may be brought, a uniform timeframe and other procedures for evaluating the special motion, and a uniform process for setting and distributing attorney's fees and other damages. In so doing, the Act ensures that parties operating in more than one state will face consistent and thoughtful adjudication of disputes implicating the rights of speech and petition.

Because often conflicting constitutional considerations bear on anti-SLAPP statutes, the Act is in many respect an exercise in balance. The triggering "action involving public participation and petition" is defined so that the special motion to strike may be employed against all true SLAPPs without becoming a blunt instrument for every person who is sued in connection with the exercise of his or her rights of free speech or petition. To avoid due process concerns, the responding party's burden of proof is not overly onerous, yet steep enough to weed out truly baseless suits. Finally, to reduce the possibility that the specter of an anti-SLAPP motion will deter the filing of valid lawsuits, the fee-shifting structure is intended to ensure proper compensation without imposing purely punitive measures. In these ways and more, the Act serves both the citizens' interests in free speech and petition and their rights to due process.

SECTION 1. FINDINGS AND PURPOSES

(a) FINDINGS. The Legislature finds and declares that

(1) there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances;

(2) such lawsuits, called "Strategic Lawsuits Against Public Participation" or "SLAPPs," are typically dismissed as groundless or unconstitutional, but often not before the defendants are put to great expense, harassment, and interruption of their productive activities.

(3) the costs associated with defending such suits can deter individuals and entities from fully exercising their constitutional rights to petition the government and to speak out on public issues;

(4) it is in the public interest for citizens to participate in matters of public concern and provide information to public entities and other citizens on public issues that affect them without fear of reprisal through abuse of the judicial process;

(5) an expedited judicial review would avoid the potential for abuse in these cases.

(b) PURPOSES. The purposes of this Act are

(1) to strike a balance between the rights of persons to file lawsuits and to trial by jury and the rights of persons to participate in matters of public concern;

(2) to establish an efficient, uniform, and comprehensive method for speedy adjudication of SLAPPs;

(3) to provide for attorney's fees, costs, and additional relief where appropriate.

Comment

The findings bring to light the costs of baseless SLAPPs – their harassing and disruptive effect and financial burdens on those forced to defend against them, and the danger that such lawsuits will deter individuals and entities from speaking out on public issues and exercising their constitutional right to petition the government. The stated purposes make clear that that drafters also recognize important interests opposing the speedy disposal of lawsuits, particularly the right of an individual to due process and evaluation of his or her claim by a jury of peers. Thus, the primary intent of the Act is not to do away with SLAPPs, but to limit their detrimental effects on the First Amendment without infringing on citizens' due process and jury trial rights.

Though a statement of findings and purposes is not required in many states (only about half of the anti-SLAPP laws in effect have them), several states have put such statements to good use. They can be invaluable in helping courts interpret the reach of the statute. This has been particularly evident in California, the epicenter of anti-SLAPP litigation. For example, in 1999, the United States Court of Appeals for the Ninth Circuit found the legislative findings crucial to its holding that the statute may properly be applied in federal court. See United States ex rel. Newsham v. Lockheed Missiles and Space Co., 190 F.3d 963, 972-73 (9th Cir. 1999). If the statute were strictly procedural, the court noted, choice-of-law considerations would likely deem it inapplicable in federal court. However, because of California's "important, substantive state interests furthered by anti-SLAPP statute," which are enunciated in Cal. Civ. Proc. Code 425.16(a), the court held that the anti-SLAPP statute should be applied in conjunction with the Federal Rules of Civil Procedure. Id.

The Supreme Court of California also has deemed the legislative findings useful in determining many of the most important questions that have arisen from application of the anti-SLAPP

statute. In Briggs v. Eden Council for Hope and Opportunity, the Court examined whether a party moving to strike a cause of action arising from a statement made before, or in connection with an issue under consideration by, a legally authorized official proceeding was required to demonstrate separately that the statement concerned an issue of public significance. 969 P.2d 564, 565 (Cal. 1999). The court found that the 425.16(a) findings evinced an intent broadly to protect petition-related activity; to require separate proof of the public significance of the issue in such cases would result in the exclusion of much direct petition activity from the statute's protections, contrary to the clear legislative intent. Id. at 573-74. In Equilon Enterprises, LLC v. Consumer Cause, Inc., the same court found that requiring a moving party to demonstrate that the action was brought with an "intent to chill" speech would contravene the legislative intent by lessening the statute's effectiveness in encouraging public participation in matters of public significance. 52 P.2d 685, 689 (Cal. 2002).

The benefits of statements of findings and purposes have been seen outside California as well. In Hawks v. Hinely, an appellate court in Georgia cited the General Assembly's stated findings in holding that statements made in a petition itself – not just statements concerning the petition – trigger the safeguards of the anti-SLAPP statute. 556 S.E.2d 547, 550 (Ga. App. 2001). In Globe Waste Recycling, Inc. v. Mallette, the Supreme Court of Rhode Island found that legislative intent, as recorded in the statute, indicated that statements for which immunity is claimed need not necessarily be made before a legislative, judicial, or administrative body under the terms of the statute. 762 A.2d 1208, 1213 (R.I. 2000). Finally, in Kauzlarich v. Yarbrough, an appellate court in Washington held that the legislative findings indicated that the Superior Court Administration is an "agency," and thus communications to that entity trigger the immunity protection and other benefits of the anti-SLAPP statute. 20 P.3d 946 (Wash. App. 2001).

SECTION 2. DEFINITIONS

As used in this Act,

(a) "Claim" includes any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing requesting relief;

(b) "Government" includes a branch, department, agency, instrumentality, official, employee, agent, or other person acting under color of law of the United States, a state, or subdivision of a state or other public authority;

(c) "Moving party" means a person on whose behalf the motion described in Section 4 is filed seeking dismissal of a claim;

(d) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity.

(e) "Responding party" means a person against whom the motion described in Section 4 is filed.

Comment

Most SLAPPs present themselves as primary causes of action, with the moving party as the defendant to the original SLAPP suit and the responding party as the plaintiff. However, "claim," "moving party," and "responding party" are defined so the protections of the statute extend to other, less common situations. For example, the moving party may be a plaintiff in the underlying action if the SLAPP claim is a counter-claim. See, e.g., Simmons v. Allstate Ins. Co., 92 Cal. App. 4th 1068 (Cal. Ct. App. 2001); Wilcox v. Superior Court, 27 Cal. App. 4th 809 (Cal. Ct. App. 1994). Alternatively, the moving and responding parties may be co-defendants or co-plaintiffs in the underlying action if the SLAPP claim is a cross-claim.

Similarly, while the quintessential SLAPPs are brought by corporate entities against individuals, the definition of "person" in the Act is not so limited. A "person" eligible to be a moving or responding party under the Act may be an individual or a wide range of corporate or other entities. Thus, the evaluation of a SLAPP claim is properly focused on the substance of the claim rather than peripheral matters such as the status of the parties. With the same purpose in mind, "government" is defined broadly to ensure that action in furtherance of the right of petition is not construed to include only interaction with administrative agencies.

SECTION 3. SCOPE; EXCLUSION

(a) SCOPE. This Act applies to any claim, however characterized, that is based on an action involving public participation and petition. As used in this Act, an "action involving public participation and petition" includes

(1) any oral statement made, or written statement or other document submitted, in a legislative, executive, or judicial proceeding or other proceeding authorized by law;

(2) any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other proceeding authorized by law;

(3) any oral statement made, or written statement or other document submitted, that is reasonably likely to encourage, or to enlist public participation in an effort to effect, consideration or review of an issue in a legislative, executive, or judicial proceeding or other proceeding authorized by law;

(4) any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern; or

(5) any other conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.

(b) EXCLUSION. This Act shall not apply to any action brought by the attorney general, district attorney, or city attorney, acting as a public prosecutor, to enforce laws aimed at public protection.

Comment

This section is the core of the statute, defining what First Amendment activities will trigger the protections stated herein. First, the claim must be "based on" an action involving public participation and petition. The existing California statute uses the terminology "arising from," but in response to confusion over that language, the California Supreme Court has held that "the critical point is whether the plaintiff's cause of action itself was based on an act in furtherance of the defendant's right of petition or free speech." City of Cotati v. Cashman, 52 P.3d 695 (Cal. 2002). The use of "based on" in this Act is designed to omit that confusion and clarify that there must be a real – not simply temporal – connection between the action involving public participation and petition and the legal claim that follows.

The term "action involving public participation and petition" is modeled after the defining language in the existing New York and Delaware anti-SLAPP statutes and is designed to reinforce the model statute's main focus: to protect the public's right to participate in the democratic process through expression of their views and opinions. This terminology is also designed to avoid the confusion engendered by the existing California statute – which is triggered by a cause of action arising from an "act in furtherance of person's right of petition or free speech . . . in connection with a public issue" – over whether the statute only applies to activity addressing a matter of public concern. As discussed below, this statute is not so limited.

The first three subsections contain no requirement that the statements made relate to a matter of public concern. This is consistent with the California Supreme Court's holding in Briggs v. Eden Council for Hope and Opportunity, 969 P.2d 564 (Cal. 1999). In that case, two owners of residential rental properties sued a nonprofit corporation over statements made by employees of the defendant in connection with the defendant's assistance of a tenant in pursuing an investigation of the plaintiffs by the Department of Housing and Urban Development. The California Supreme Court held that the section "broadly encompasses participation in official proceedings, generally, whether or not such participation remains strictly focused on Ôpublic' issues." Id. at 571.

Subsection (4) is drawn from the existing California statute and its progeny and offers protection for statements made in a place open to the public or a public forum in connection with an issue of public concern. The statute does not attempt to define "a place open to the public" or "a public forum," out of concern that such a definition would be unintentionally restrictive. This provision clearly encompasses those spaces historically considered public forums – such as parks, streets, and sidewalks Ð but on the fringes, there has been more confusion. In particular, courts have disagreed on whether a publication of the media constitutes a public forum, such that a lawsuit stemming from a media publication would be subject to an anti- SLAPP motion. Compare Zhao v. Wong, 48 Cal. App. 4th 1114 (Cal. Ct. App. 1996) (holding

private newspaper publishing falls outside concept of public forum), and Lafayette Morehouse, Inc. v. Chronicle Publishing Co., 37 Cal. App. 4th 855 (Cal. Ct. App. 1995) (same), with Baxter v. Scott, 845 So. 2d 225 (La. Ct. App. 2003) (holding professor's website is public forum), Seelig v. Infinity Broadcasting Corp., 97 Cal.App.4th 798 (Cal. Ct. App. 2002) (holding radio talk show is public forum), M.G. v. Time Warner, 89 Cal.App.4th 623 (Cal. Ct. App. 2001) (holding magazine is public forum), and Damon v. Ocean Hills Journalism Club, 85 Cal.App.4th 468 (Cal. Ct. App. 2000) (holding residential community newsletter is public forum). Courts are encouraged to consider this and related issues with an eye toward the purposes of the statute and the intent that it be construed broadly (see Section 8 below).

Finally, Subsection (5) is designed to capture any expressions of the First Amendment right of free speech on matters of public concern and right of petition that might not fall under the other categories. This includes all such conduct, such as symbolic speech, that might not be considered an oral or written statement or other document. This provision resembles the corresponding provision in the existing California statute, which covers "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." See Cal. Code Civ. Proc. ¤ 425.16(e)(4). However, this provision has been modified to make clear that conduct falling within the right to petition the government need not implicate a matter of public concern. This broad provision has been held to include speech published in the media, and is intended to do so here. See M.G. v. Time Warner, 89 Cal.App.4th at 629.

It is likely that most situations which the proposed statute is designed to address will be addressed by the five subdivisions discussed above. However, as written, the list is not exclusive. A court has jurisdiction to find that the protections of this Act are triggered by a claim based on actions that do not fall within these subdivisions, if the court deems that the claim has the effect of chilling the valid exercise of freedom of speech or petition and that application of the Act would not unduly hinder the constitutional rights of the claimant.

Subsection (b) provides that enforcement actions by the government will not be subject to anti-SLAPP motions. This exclusion is intended to ensure that the statute's protections do not hinder the government's ability to enforce consumer protection laws. In People v. Health Laboratories of North America, 87 Cal. App. 4th 442 (Cal. Ct. App. 2001), the Court of Appeals of California upheld a similar provision in the California statute against an equal protection challenge. The court noted that the exclusion is consistent with the purposes of the statute, as a public prosecutor is not motivated by retaliation or personal advantage, and it held that the provision is rationally related to the legitimate state interest of ensuring the government may pursue actions to enforce its laws uniformly. The language from the existing California statute has been modified to make clear that the exception does not apply only to civil enforcement actions initiated in the name of the people of the state.

SECTION 4. SPECIAL MOTION TO STRIKE; BURDEN OF PROOF

(a) A party may bring a special motion to strike any claim that is based on an action involving public participation and petition, as defined in Section 3.

(b) A party bringing a special motion to strike under this Act has the initial burden of making a prima facie showing that the claim against which the motion is based on an action involving public participation and petition. If the moving party meets this burden, the burden shifts to the responding party to establish a probability of prevailing on the claim by presenting substantial evidence to support a prima facie case. If the responding party meets this burden, the court shall deny the motion.

(c) In making a determination under subsection (b), the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(d) If the court determines that the responding party has established a probability of prevailing on the claim,

(1) the fact that the determination has been made and the substance of the determination may not be admitted into evidence at any later stage of the case; and

(2) the determination does not affect the burden of proof or standard of proof that is applied in the proceeding.

(e) The Attorney General's office or any government body to which the moving party's acts were directed may intervene to defend or otherwise support the moving party.

Comment

Section 4 sets out the expedited process through which "a claim that is based on an action involving public participation and petition" may be evaluated. Subsection (a) states that a party subject to such a claim may file a special motion to strike that claim. Many existing anti-SLAPP statutes provide for adjudication through motions to dismiss or motions for summary judgment. This Act mimics the existing California statute in choosing terminology that makes clear that this Motion is governed by special procedures that distinguish it from other dispositive motions.

Subsection (b) delineates the allocation of the burden between the moving and responding parties. The moving party first must make a prima facie showing that the claim is based on an action involving public participation and petition, as defined in Section 3. The moving party need not show that the action was brought with the intent to chill First Amendment expression or has such a chilling effect, though such a showing might be necessary if the action does not fit into one of the five specified categories in Section 3.

If the moving party carries its burden, the responding party must establish a probability of prevailing on its claim. This standard is higher than the standard of review for a traditional motion to dismiss; in addition to stating a legally sufficient claim, the responding party must demonstrate that the claim is supported by a prima facie showing of facts that, if true, would support a favorable judgment. See Briggs v. Eden Council for Hope and Opportunity, 969 P.2d 564 (Cal. 1999); Matson v. Dvorak, 40 Cal. App. 4th 539 (Cal. Ct. App. 1995). In so doing, the responding party should point to competent, admissible evidence.

In evaluating whether the responding party has put forth facts establishing a probability of prevailing, the court shall also consider defenses put forth by the moving party. As Subsection (c) makes clear, at all stages in this examination the court must consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

Existing and proposed state statutes that allocate a similar burden of proof to the responding party have faced constitutional challenges. In New Hampshire in 1994, a senate bill modeled on the existing California statute was presented to the state Supreme Court, which found that it was inconsistent with the state's constitution. See Opinion of the New Hampshire Supreme Court on an Anti-SLAPP Bill, 641 A.2d 1012 (1994). The court found that the statute's provision for court consideration of the pleadings and affidavits denied a plaintiff who is entitled to a jury trial the corresponding right to have all factual issues resolved by a jury. In the face of similar concerns, the Rhode Island General Assembly amended its statute in 1995 to do away with the "special motion to dismiss" provision and its "preponderance of the evidence" standard. See Hometown Properties, Inc. v. Fleming, 680 A.2d 56 (R.I. 1996).

The opinion of the New Hampshire Supreme Court evinces a misunderstanding of a court's role in evaluating a motion to strike and response. The court does not weigh the parties' evidence at this preliminary stage, but rather determines whether the responding party has passed a certain threshold by pointing to the existence of evidence that creates a legitimate issue of material fact. See Lafayette Morehouse, Inc. v. Chronicle Publishing Co., 37 Cal. App. 4th 855 (Cal. Ct. App. 1995); Dixon v. Superior Court, 30 Cal. App. 4th 733 (Cal. Ct. App. 1994); see also Lee v. Pennington, 830 So. 2d 1037 (La. Ct. App. 2002) ("The only purpose of [the state statute] is to act as a procedural screen for meritless suits, which is a question of law for the court to determine at every stage of a legal proceeding."). The court's analysis is not unlike that which it would undertake in examination of a summary judgment motion. Furthermore, the court may permit a responding party to conduct discovery after the filing of a special motion to strike if the responding party needs such discovery to establish its burden under the Act. See Section 5, infra.

Subsection (d) provides that if a responding party is successful in defeating a special motion to strike, its case should proceed as if no motion had occurred. The evaluation of a special motion to strike is based on the examination of evidence, the veracity of which is assumed at this preliminary stage but has not been established. Thus, the survival of a motion to strike is not a reflection of the validity of the underlying claim, and evidence of the survival of a motion to strike is inadmissible as proof of the strength of the claim. Likewise, the special motion to strike should in no way alter the burden of proof as to the underlying claim.

A variation of subsection (e) is included in almost every existing anti-SLAPP statute and

provides that the attorney general's office or the government body to which the moving party's acts were directed may intervene to defend or otherwise support the moving party. Many of the most troubling SLAPPs are brought by a powerful party against a relatively powerless individual or group. Though the government's role is purely discretionary, this provision is designed to grant more targets of SLAPPs the resources needed to fight baseless lawsuits.

SECTION 5. REQUIRED PROCEDURES

(a) The special motion to strike may be filed within 60 days of the service of the most recent complaint or, in the court's discretion, at any later time upon terms it deems proper. A hearing shall be held on the motion not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(b) All discovery and any pending hearings or motions in the action shall be stayed upon the filing of a special motion to strike under Section 3. The stay of discovery shall remain in effect until the entry of the order ruling on the motion. Notwithstanding the stay imposed by this subsection, the court, on motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted.

(c) Any party shall have a right of expedited appeal from a trial court order on the special motion or from a trial court's failure to rule on the motion in a timely fashion.

Comment

The procedures set out in Section 5 are designed to facilitate speedy adjudication of anti-SLAPP motions, one of the main goals of this Act. Subsection (a) states that unless the court deems it proper to appoint a later deadline, a special motion to strike must be filed within 60 days of service of the most recent amended complaint – or the original complaint, if it has not been amended. The motion must be heard by the court within 30 days of service of the motion to the opposing party, unless the docket conditions of the court require a later hearing. The court may not delay the hearing date merely for the convenience of one or both parties.

Subsection (b) provides for a stay of discovery and all other pending motions from the time a special motion to strike is filed until the entry of the order ruling on the motion. This stay is designed to mitigate the effects of SLAPP suits brought for the purpose of tying up the SLAPP victim's time and financial resources. However, it is also understood that in some situations the party opposing the special motion to strike will need discovery in order to adequately frame its response to the motion, and restricting discovery in these situations might raise constitutional concerns. In addition, there will be times when a stay on all other pending motions will be impractical.

Thus, the court is permitted, on motion and for good cause shown, to permit limited discovery and/or the hearing of other motions. Relevant considerations for the judge when evaluating "good cause" include whether the responding party has reasonably identified material held or known by the moving party that would permit it to demonstrate a prima facie case, see Lafayette Morehouse Inc. v. Chronicle Publishing Co., 37 Cal. App. 4th 855, 868 (Cal. Ct. App. 1995), and whether the materials sought are available elsewhere, see Schroeder v. City Council of City of Irvine, 97 Cal. App. 4th 172 (Cal. Ct. App. 2002). The requirement for a timely motion is intended to be enforced; responding parties will not be permitted to raise the issue for the first time on appeal or when seeking reconsideration. See Evans v. Unkow, 38 Cal. App. 4th 1490 (Cal. Ct. App. 1995).

Subsection (c) makes clear that an order granting or denying a special motion to strike is immediately appealable. This provision is modeled after the 1999 amendment to the existing California statute that was intended to give the moving party -- the party the statute was designed to protect Ð- the same ability as the responding party to challenge an adverse trial court ruling. Originally, the California statute permitted the responding party to appeal the grant of a motion to strike, while the moving party could only challenge the denial through petition for a writ in the court of appeals, a process that is disfavored and rarely successful.

SECTION 6. ATTORNEY'S FEES, COSTS, AND OTHER RELIEF

(a) The court shall award a moving party who prevails on a special motion to strike made under Section 3, without regard to any limits under state law:

(1) costs of litigation and any reasonable attorney's fees incurred in connection with the motion; and

(2) such additional relief, including sanctions upon the responding party and its attorneys or law firms, as the court determines shall be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

(b) If the court finds that the special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award reasonable attorney's fees and costs to the responding party.

Comment

The attorney's fee provisions are a central feature of the Uniform Act, designed to create the proper incentives for both parties considering lawsuits arising out of the First Amendment activities of another, and parties pondering how to respond to such lawsuits. Subsection (a) sets out the costs, fees, and other relief recoverable by a moving party who succeeds on a special motion to strike under this statute. It provides that a prevailing movant is entitled to recover reasonable attorney's fees and costs, and that the court should issue such other relief, including sanctions against the responding party or its attorneys, as the court deems necessary to deter the responding party and others from similar suits in the future. Subsection (b) counterbalances (a) by providing mandatory fee-shifting to the responding party if the court finds that the special motion to strike is frivolous or brought with intent to delay.

Nearly every state anti-SLAPP statute includes a section providing for mandatory or discretionary fee-shifting for the benefit of a prevailing movant. The main purpose of such provisions is to discourage the bringing of baseless SLAPPs by "plac[ing] the financial burden of defending against so-called SLAPP actions on the party abusing the judicial system." Poulard v. Lauth, 793 N.E.2d 1120, 1124 (Ind. Ct. App. 2003); see also Ketchum v. Moses, 17 P.3d 735, 745 (Cal. 2001). Another important purpose of such provisions is to encourage private representation of parties defending against SLAPPs, even where the party might not be able to afford fees. See id. Thus, fees are recoverable even if the prevailing defendant is represented on a pro bono basis, see Rosenaur v. Scherer, 88 Cal. App. 4th 260, 287 (Cal. Ct. App. 2001).

By "reasonable attorney's fees," the statute refers to those fees that will adequately compensate the defendant for the expense of responding to a baseless lawsuit. See Robertson v. Rodriguez, 36 Cal. App. 4th 347, 362 (Cal. Ct. App. 1995). The statute permits the use of the lodestar method for calculating reasonable fees. The lodestar method provides for a baseline fee for comparable legal services in the community that may be adjusted by the court based on factors including (1) the novelty and difficulty of the questions involved; (2) the skill displayed by the attorneys; (3) the extent to which the nature of the litigation precluded other employment of the attorneys; and (4) the contingent nature of the fee award. See Ketchum, 17 P.3d at 741. Even if the lodestar method is not followed strictly, the court may take those and other factors – such as a responding party's bad-faith tactics – into account in determining "reasonable" fees.

Much confusion has arisen in the application of California's anti-SLAPP statute over what constitutes a "prevailing" defendant or moving party, particularly where the responding party voluntarily dismisses the underlying case prior to a court's ruling on the special motion to strike. The authors of this statute agree with the majority of California courts that proper disposition of these situations requires the court to make a determination of the merits of the motion to strike. See Pfeiffer Venice Properties v. Bernard, 107 Cal. App. 4th 761, 768 (Cal. Ct. App. 2002); Liu v. Moore, 69 Cal. App. 4th 745, 755 (Cal. Ct. App. 1999). If the court finds that the moving party would have succeeded on its motion to strike, it shall award the moving party reasonable attorney's fees and costs. This interpretation does not provide a disincentive for responding parties to dismiss baseless lawsuits, because if the responding party timely dismisses, the moving party will likely have incurred less in fees and costs than it would have if the responding party pursued its lawsuit to a ruling on the motion to strike.

One California court has held that where the responding party voluntarily dismisses prior to a ruling on the special motion to strike, the responding party could prove it prevailed by showing "it actually dismissed because it had substantially achieved its goals through a settlement or other means, because the [moving party] was insolvent, or for other reasons unrelated to the probability of success on the merits." Coltrain v. Shewalter, 66 Cal. App. 4th 94, 107 (Cal. Ct. App. 1998). This analysis is flawed because it places impoverished moving parties in the position of having to fight baseless SLAPP suits out of their own pockets because the responding party

can at any time dismiss the SLAPP on the grounds that the moving party is insolvent and thereby avoid paying attorney's fees.

Another question that has arisen in the interpretation of the California statute is how the fee award is to be assessed if the moving party's victory is partial or limited in comparison to the litigation as a whole. In such cases, the prevailing movant is entitled to a fee award reduced by the court to reflect the partial or limited victory. See ComputerXpress, Inc. v. Jackson, 93 Cal. App. 4th 993, 1019 (Cal. Ct. App. 2001). Finally, the government, if it prevails on a special motion to strike, is entitled to recover its fees and costs just as a private party would. See Schroeder v. City Council of City of Irvine, 99 Cal. App. 4th 174, 197 (Cal. Ct. App. 2002).

Subsection (a)(2), which gives the court discretion to apply additional sanctions upon the responding party, is modeled after a provision in Guam's anti-SLAPP statute. Several state statutes (though notably not California's) provide for additional sanctions beyond fees and costs in various circumstances, with most requiring a showing that the responding party brought its lawsuit with the intent to harass. See, e.g., 10 Delaware Code ¤ 8138(a)(2); Minnesota Statutes ¤ 554.04(2)(b). Such intent-based provisions are ineffective because they place a heavy burden of proof on moving parties when, in fact, most SLAPP lawsuits by definition are brought with an intent to harass. The provision in this Act lifts the heavy burden from the moving party but at the same time makes clear that additional relief is not to be applied in every case Ð only when the court finds that an extra penalty would serve the purposes of the Act.

Just as subsection (a) is designed to deter the filing of baseless SLAPPs, subsection (b) is intended to deter parties who find themselves on the receiving end of valid lawsuits from filing special motions to strike that have no chance of success and show some evidence of bad faith on the part of the movant. The court should grant reasonable attorney's fees to the responding party when, for example, the moving party cannot in good faith maintain that the underlying conduct constitutes "action involving public participation and petition." See Moore v. Shaw, 116 Cal. App. 4th 182, 200 (Cal. Ct. App. 2004).

As a final matter, a moving party who prevails on a special motion to strike under this Act will recover attorney's fees and costs related to a successful appeal on the issue. Dove Audio, Inc. v. Rosenfeld, Meyer & Susman, 47 Cal. App. 4th 777, 785 (Cal. Ct. App. 1996); Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 659 (Cal. Ct. App. 1996). In addition, a moving party may recover reasonable fees in connection with an appeal even when the responding party does not pursue the appeal to a final determination. Wilkerson v. Sullivan, 99 Cal. App. 4th 443, 448 (Cal. Ct. App. 2002).

SECTION 7. RELATIONSHIP TO OTHER LAWS

Nothing in this Act shall limit or preclude any rights the moving party may have under any other constitutional, statutory, case or common law, or rule provisions.

SECTION 8. UNIFORMITY OF APPLICATION AND CONSTRUCTION

This Act shall be applied and construed liberally to effectuate its general purpose to make uniform the law with respect to the subject of this Act among States enacting it.

SECTION 9. SEVERABILITY OF PROVISIONS

If any provision of this Act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 10. SHORT TITLE

This Act may be cited as the Uniform Act Limiting Strategic Litigation Against Public Participation.

SECTION 11. EFFECTIVE DATE

This Act takes effect ..... .

[Top]

Las Vegas Sun

Nevada judges struggle to keep up with backlog

Tuesday, Feb. 17, 2004 | 11:38 a.m.

CARSON CITY -- District Court judges in Clark County lost a little ground last year in their battle to keep up with a backlog of cases.

The 33 District Court judges decided 78,064 cases in the 2003 fiscal year, which ended June 30. That was 840 fewer cases than the previous year.

Still they managed to stay ahead of the 77,136 new cases, up 14 percent from the previous year.

"We're busy. We're trying to stay on top of this," Chief District Judge Michael Douglas said. He said the public, the Nevada Supreme Court and the Legislature want the judiciary to be accountable and that's what the judges in Clark County are striving for.

The numbers were part of an annual report on the state's judiciary released today that said that District Court judges statewide disposed of 105,154 cases last fiscal year, an increase of 8,809 from fiscal 2002. The report measured rulings on nontraffic cases.

Even though Clark County courts lost some ground, they outpaced their counterparts in Washoe County per capita by 61 percent, the study showed.

The 78,064 cases, an average of 2,366 per judge, was 61 percent more than the 17,609 in Washoe County, or 1,467 cases on average for each of the 12 judges.

"If they had more filing, they would have disposed of more cases," Douglas said of Washoe County judges.

In Washoe County the 17,609 cases disposed of compared with 8,892 in the previous year or nearly doubled. Ron Longtin, administrator for the court in Washoe County, said the judges disposed of a big backlog.

The report shows Nevada has fewer District Court judges per 100,000 population than seven other Western states. While California has 4.3 judges in what is called Superior Court, per 100,000 population, there are just 2.7 in Nevada.

But the report also shows there are 1,501 cases filed per Superior Court judge in California, compared to the 1,375 for District Court judges in Nevada.

The Nevada Supreme Court, according to the report, decided 1,889 cases last fiscal year, down from the 1,906 in the prior fiscal year. It was the lowest number of ruling in the last four years. It breaks down to an average of 269 decisions per justice.

But the backlog of cases also declined to 1,426, the lowest number in the last four years. The report said Nevada has more cases filed per justice, at 258, than most other appellate courts, based on figures from the National Center for State Courts.

The study noted that Nevada is one of 11 states that does not have an intermediate court of appeals, something the Nevada Supreme Court has been pushing. The 2003 Legislature approved a proposed constitutional amendment to allow creation of an intermediate court of appeals. It would have to be approved by the 2005 Legislature and then placed on the 2006 ballot for ratification by the voters.

Justice Deborah Agosti, who was chief justice when the annual report was finalized, said the courts in Nevada "are productive, proactive and constantly striving to improve the effective delivery of justice to our citizens."

Ron Titus, chief of the administrative office of the court, said computerized case management systems in many courts have improved the ability to track and report caseloads.

Titus reported there were 114,540 new cases filed last fiscal year in the district courts, more than 8,000 from fiscal 2002. Criminal filings actually decreased from 12,191 in 2002 to 12,001 in fiscal 2003. New civil suits increased from 24,143 to 28,077; family court cases rose from 43,885 to 52,258 and juvenile nontraffic cases inched up to 22,2043 from 22,148.

The report said there were 182,671 new nontraffic cases filed in the justice courts in the state. It said 48,228 were disposed of. But the number of decisions did not include the Las Vegas Justice Court, where there were 104,889 new cases but there was no report available on the number of decisions made.

In addition there were 416,505 traffic and parking violations filed with 353,548 cases disposed of in justice courts.

There were 314,159 cases filed in the municipal courts in Nevada, with decisions made in 301,193.

archive

Las Vegas Sun
2360 Corporate Cir. Henderson, NV 89074

LEGAL DEFENSE TRUST TRAINING BULLETIN

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JUNE 2007 (2 OF 2)

CALIFORNIA ANTI-SLAPP STATUTE APPLIES TO ROUTINE ADMINISTRATIVE MANDAMUS PETITIONS

An Analysis Of The Holding And Effect Of Vergos v. McNeal

By Michael P. Stone
and Marc J. Berger

A dramatic example of legislative intentions gone astray can be derived in a line of recent California appellate decisions culminating in the case of *Vergos v. McNeal* (2007) 146 Cal. App. 4th 1387. Based on *Vergos* and a few other recent cases, it now appears that nearly all petitions for administrative mandamus are subject to the anti-SLAPP motion procedure, with no limiting principle whatsoever. The case law developments that led to the *Vergos* holding stand as a monument to the futility of legislation as a remedy for power imbalances among the economic strata of society.

The anti-SLAPP statute was enacted in 1992 to deter the type of litigation for which its acronym stands: "Strategic lawsuits against public participation." This acronym referred to a growing tendency for powerful land development interests to bring defamation actions against environmental activists to deter the activists from exercising their legal rights to challenge large-scale development plans. It was widely perceived that these powerful real estate interests were using their financial resources to impose intolerable litigation costs on activists, so as to intimidate them from participating in the public proceedings where the developers' plans were under consideration.

To accomplish the purpose of the statute, the legislature authorized a "Special Motion to Strike" any complaint or cause of action that seeks to impose liability for statements made or

actions taken in an exercise of constitutionally-protected speech or the First Amendment right to petition the government for redress of grievances. The Special Motion to Strike is filed as the defendant's first responsive pleading. If the motion shows that the complaint seeks to impose liability for a statement made or action taken in an exercise of the right of free speech or petition, then the complaint or cause of action will be immediately stricken, with a mandatory award of attorney fees in favor of the defendant, unless in opposition the plaintiff demonstrates a probability of prevailing on the merits of the claim.

This statute was thought to be an effective deterrent against the lawsuits it targeted, because in those suits, developers were bringing claims against activists without a goal of prevailing on the merits, but for the collateral purpose of discouraging political opposition by forcing the opponent to incur intolerable litigation expenses. So, imposing a requirement of showing minimal merit acted as a precaution against suits that have financial intimidation as their only goal, while shifting responsibility for attorney fees would deprive the developers of the greatest single benefit they otherwise receive from the tactic of bringing litigation for the sole purpose of financial intimidation.

While the legislature primarily intended to attach consequences to the tactics of powerful developers and other corporate interests, the statute as drafted contained no limitation of the classes of plaintiffs who could be subject to an anti-SLAPP motion, and no limit on the size or power of the defendants who could bring the motion. Instead, the Special Motion to Strike could be filed by any defendant who could establish that the conduct on which the alleged liability is based is protected by the First Amendment rights of free speech and petition. And, there is no statutory requirement governing the size or power of the plaintiffs against whom the motion can be filed. Any defendant whose alleged liability arose from constitutionally protected speech or petitioning, no matter how powerful, could bring an anti-SLAPP motion against any plaintiff, no matter how weak and powerless the plaintiff might be.

The anti-SLAPP statute, originally designed as a tool to protect weak interests from being intimidated by powerful interests, has now itself become a tool by which powerful institutions and interests can in some cases intimidate economically weak and relatively powerless individuals. Combined with a

concurrent trend in federal law, which has eliminated constitutional protection for the work-related speech of public employees, while creating a doctrine of "free speech" protection for the government itself, the new interpretations of the anti-SLAPP statute have vastly eroded the ability of public employees to obtain hearing and evidentiary review of disciplinary sanctions imposed on them by their employers. The new interpretation rendered in the *Vergos* opinion will apparently make all actions for administrative mandamus subject to a Special Motion to Strike. This would vastly erode the ability of public employees to obtain hearing and evidentiary review of disciplinary sanctions imposed on them by their employers. It would seem to similarly affect administrative mandamus petitions seeking to challenge governmental decisions to revoke or suspend professional licenses. It may subject a private employee's action for wrongful termination to a Special Motion to Strike, if the private employer claims that the act of terminating the employee was an exercise of free speech.

In *Vergos,* counsel for the Regents of the University of California devised the idea of using the anti-SLAPP statute to protect employers from administrative mandamus. Exploiting a few recent precedents that treat the government as a "person" for First Amendment purposes, the Regents persuaded the Court of Appeal to recognize that the act of terminating or disciplining a public employee for cause is an exercise of free speech by the government, and consequently, an employee who cannot make a preliminary showing of a probability of prevailing on the merits of the claim can be required to pay the employer's attorney fees.

I. *VERGOS v. McNEAL* HOLDS THAT THE ANTI-SLAPP STATUTE PROTECTS A HEARING OFFICER SUED FOR DENYING A GRIEVANCE.

In *Vergos*, the plaintiff brought an action against Julie McNeal, the Director of Operations and Maintenance at University of California at Davis, for sex harassment and failure to prevent sex harassment. Defendants also included the harasser and the Regents, but the Court of Appeal only reviewed the denial of McNeal's anti-SLAPP motion.

Plaintiff Randy Vergos was an inspector, planner and estimator, working under Allen Tollefson, who worked under McNeal. Vergos filed an internal grievance, alleging sex harassment against Tollefson. McNeal, acting as hearing officer for Vergos' grievance, denied the grievance, and wrote to Tollefson that it was more likely that Vergos' allegations did not occur. McNeal refused to take any action

to protect McNeal from Tollefson. 146 Cal. App. 4th at 1390-1391.

McNeal was named as an individual defendant in Vergos' cause of action based on 42 USC § 1983. The pleading alleged that McNeal, acting as agent for the Regents and under color of state law, denied Vergos' grievance, thus violating Vergos' right to be free of discrimination and harassment, and that the Regents did not properly train McNeal in acting as a hearing officer to decide grievances. *Id.* at 1391-1392.

McNeal filed an anti-SLAPP motion challenging the § 1983 claim, alleging that the Complaint arose from her activities of hearing, processing and deciding plaintiff's grievances, in furtherance of her own First Amendment right of petition and free speech. *Id.* at 1392. McNeal's anti-SLAPP motion alleged that she permissibly delegated the investigation of Vergos' sex harassment claims, received a report that the claims were unsubstantiated, had no reason to believe the investigator was biased, was not biased herself, and communicated the results of the investigation to Vergos, who then failed to appeal the denial through available further steps of the grievance process. *Id.* at 1392-1393.

The trial court denied the anti-SLAPP motion on the grounds the claim was based on McNeal's hearing, processing and deciding of Vergos' grievance, and was "not based on the content of what Defendant stated in any proceeding or the exercise of the right to petition...." *Id.* at 1394.

The Court of Appeal reversed and remanded with instructions to grant the anti-SLAPP motion and award attorney fees to McNeal. The appellate court agreed with McNeal that her "statements and communicative conduct in handling plaintiff's grievances ... are protected" by the anti-SLAPP statute, "because they (1) were connected with an issue under review by an official proceeding authorized by law; and (2) furthered the right to petition of plaintiff and similarly situated employees." *Id.*

The court reasoned that *Code of Civil Procedure*, § 425.16(e)(2) authorized an anti-SLAPP motion where the action arises from "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." *Id.* at 1395, italics omitted. Also taking into account sub § (e)(1), authorizing an anti-SLAPP motion where the action arises from "any written or oral

statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law," the appellate court held that neither § (e)(1) nor (e)(2) "require the defendant to show a public issue or issue of public interest." *Id.* at 1395, citing *Briggs v. Eden Council* (1999) 19 Cal. 4th 1106, 1116-1117, 1123. The court stated that for communications made in official proceedings, "it is the context or setting itself that makes the issue a public issue." *Id.*

The plaintiff argued that an action does not "arise" from petitioning or speech activity merely because it follows such activity, and that here, he was suing McNeal for aiding and abetting harassment. *Id.* at 1396. But the court observed that plaintiff's own pleading complained of McNeal's hearing, processing and deciding of plaintiff's grievances. *Id.* Noting that the trial court had denied the motion on the basis that the claim against McNeal was based on McNeal's conduct, not the content of her statements, the appellate court disagreed, since "hearing, processing and deciding of the grievances ... are meaningless without a communication of the adverse results." *Id.* at 1397.

II. *SAN RAMON v. CONTRA COSTA COUNTY:* GOVERNMENT ACTION IS NOT PROTECTED BY SLAPP IF IT DOES NOT IMPLICATE FREE SPEECH AND PETITION

The appellate court distinguished *San Ramon v. Contra Costa County Employees' Retirement Assn.* (2004) 125 Cal. App. 4th 343, which held that an action seeking judicial review of the decision of a public entity is not subject to an anti-SLAPP motion merely because the decision is taken by a vote after discussion at a public meeting. The court in *San Ramon* observed that the public entity's action (of increasing required contributions to a pension fund) was not in itself an exercise of the right of free speech or petition.

The court in *Vergos* noted that plaintiffs relied on *San Ramon* because it "recognized that government bodies may invoke § 425.16 where appropriate, just like any private litigant, and its holding was based on the conclusion that the Board's act [i.e. the change in pension contributions] did not implicate free speech or the right to petition." *Id.* at 1063. The court in *Vergos* rejected plaintiff's argument because *San Ramon* disavowed deciding any issue concerning suits against individuals. *Id.*

The foregoing observation in *Vergos* means (1) the court appears to agree that government bodies may invoke the anti-SLAPP statute the

same as individuals; and (2) an individual acting on behalf of the government is entitled to invoke the anti-SLAPP statute. The court concluded, "We agree with McNeal that a narrow reading of the statute in plaintiff's favor could result in public employees' reluctance to assume the role of hearing officer in such cases, and thus thwart the petitioning activities of employees with grievances." *Id.*

Finally, the court also agreed with defendant "that she acted in furtherance of the right to petition within the meaning of § 425.16 even though it was not her own right to petition at stake." *Id.* The court elaborated that the anti-SLAPP statute "does not require that a defendant moving to strike ... demonstrate that its protected statements or writings were made on its own behalf (rather than, for example, on behalf of its clients or the general public)." *Id.*, citation omitted.

The court specifically declined to recognize an exception to the anti-SLAPP statute and reasoned that "Hearing officers in official proceedings deserve the protection of the anti-SLAPP statute." *Id.*

The *San Ramon* opinion dodges both of the broader propositions' implications of extending the anti-SLAPP statute to protect the government. The court noted that amicus briefs had argued that the government itself has no First Amendment free speech rights, but since the case before it required only a ruling that the particular act of increasing pension contributions did not implicate free speech, the court was not reaching the larger question posed, as to whether the First Amendment protects the government itself. The opinion also acknowledges that dicta in *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal. App. 4th 713, in finding the civil damages action before it to be a SLAPP suit, had noted that a petition for administrative mandamus would be the "proper" remedy, thus implying that such a petition would not be a SLAPP suit. But contrary to that court's view, the fact that administrative mandamus is the proper remedy does not exempt it from the anti-SLAPP statute, since it is well-established that an administrative mandamus petition can be found subject to the anti-SLAPP statute. See, e.g., *Moraga-Orinda Fire Protection Dist. v. Weir* (2004) 115 Cal. App. 4th 477.

III. THE GOVERNMENT IS NOW RECOGNIZED AS A "PERSON" FOR FIRST AMENDMENT PURPOSES.

The interpretation of the anti-SLAPP statute found in *Vergos* thus has its roots in *Mission Oaks*, *Moraga-Orinda*, and *Schroeder v. Irvine*

City Council (2002) 97 Cal. App. 4th 174. *Mission Oaks* recognizes in passing that administrative mandamus is the proper remedy to challenge a denial of a land development permit, 65 Cal. App. 4th at 730, but does not say that this exempts a petition from the reach of the anti-SLAPP statute. *Schroeder*, ironically, recognizes that "SLAPP suits are brought to obtain an economic advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff." 97 Cal. App. 4th at 182. Yet the court resoundingly endorsed the government's right to invoke the anti-SLAPP statute, rejected an argument by amicus curiae that the government has no First Amendment rights, and held that a government official's act of voting is an act of free speech. *Id.* at 192, fn. 3.

Moraga-Orinda acknowledges that the anti-SLAPP statute was intended to apply to large corporations that can provoke prolonged litigation, not to an individual's relatively simple mandamus petition. But the court held that no such limitation appears on the face of the statute, and legislative history is irrelevant because the statute is unambiguous, and in any event, the history shows the statute is to be broadly applied. 115 Cal. App. 4th at 482 and fn. 4.

The newly-broadened judicial interpretation of the anti-SLAPP statute now imposes a major risk on any employee contemplating whether to seek judicial review of termination or other employment discipline. Can the employee avoid the anti-SLAPP statute by refraining from suing for damages, and limiting the remedy to reinstatement? No, because SLAPP has already been applied to petitions for civil harassment, which do not seek damages. *Thomas v. Quintero* (2005) 126 Cal. App. 4th 635, 642.

Can the employee avoid the anti-SLAPP statute by filing the mandamus petition against the governmental body only, without naming any officials? No, because the *San Ramon* and *Vergos* decisions hold that the government itself has a constitutional right of petition, which it would be exercising every time it takes disciplinary action against an employee.

The *Vergos* decision, by granting the government a constitutional freedom of speech and petition, has now extended the anti-SLAPP statute to the point where it applies to every petition for administrative mandamus, and probably to every suit that challenges a government decision. In that sense, *Vergos* takes another step in the readjustment of the balance of power between individuals and

government that was recently signaled by the United States Supreme Court in *Garcetti v. Ceballos* (2006) 126 S.Ct. 1951. The *Ceballos* decision took away an individual's constitutional protection for job-related speech, by recognizing it as speech of the government, in which the individual has no interest. *Ceballos* tells individual government employees they must say only what the employer wants them to say, or be terminated and replaced with someone who will. Decisions such as *Vergos* complete the transfer of power by recognizing that the constitutional freedom of speech, which previously protected the employee making the communication, now fully protects the government entity that dictates the content of what its employees may express in their job-related communications.

Thus the *Vergos* decision protects a hearing officer from liability for a decision against the employee, but *Ceballos* leaves the hearing officer with no protection against the employer for making a decision in favor of the employee. Under this scheme, it seems unlikely that any hearing officer would dare decide a case contrary to a governmental employer's interests. And of course, *San Ramon* protects not only the hearing officer, but also the governmental employer itself, in an administrative mandamus action.

IV. ROUTINE ADMINISTRATIVE MANDAMUS PETITIONS ARE NOW SUBJECT TO THE ANTI-SLAPP STATUTE.

It therefore seems that in view of the *San Ramon* and *Vergos* decisions, all employers served with petitions for administrative mandamus challenging employment decisions, are entitled to file an anti-SLAPP motion on the basis of § 425.16(e)(1), as a "written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;" and (2) as a "written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." The employee must then make a preliminary showing of likelihood of prevailing on the merits, or the petition is summarily stricken with an award of attorney fees to the employer.

It is not entirely certain that *Vergos* will trigger a flood of anti-SLAPP motions to counter administrative mandamus petitions. The rule is a windfall that public employers do not really need, and as a practical matter, the government will not often be in a position to be able to execute a judgment for attorney fees against a terminated employee.

From the perspective of judicial economy, an anti-SLAPP motion to challenge a petition for administrative mandamus is quite wasteful, requiring the judge to rule on the same evidence twice: first under the probability of prevailing standard, then under the applicable substantive standard, be it independent judgment or substantial evidence. Where the matter is to be decided by the judge sitting without a jury (*Code of Civil Procedure*, § 1094.5), the preliminary showing of probability to prevail on the merits is equal to the final showing: the court merely predicts what the court will do, then does it.

There are actually at least two procedural advantages an employer would receive from filing an anti-SLAPP motion to strike a mandamus petition. First, if the governmental entity is able to drag its feet in preparing the hearing transcripts, so they are not available in time for the anti-SLAPP motion to be heard, the court can strike the petition on the basis that plaintiff failed to show a probability of prevailing, that the anti-SLAPP statute places the burden on plaintiff to immediately demonstrate the requisite probability of prevailing, and the court is not required to go beyond the pleadings and any declarations then available to make its ruling (CCP §§ 425.16(b)(2) and 425.16(g)). This may sound draconian, but no more so than the underlying rule of *Vergos* itself.

But even assuming the hearing transcript is available, an anti-SLAPP motion unilaterally gives the employer a free dress rehearsal for its defense, which the employee is incidentally forced to finance. If the employer prevails on the motion, the case is over and the employee owes attorney fees. But if the employee survives the motion under the "probability" standard, the ruling will educate the employer as to where it needs to improve its arguments. The anti-SLAPP motion thus gives the employer a second chance to present its legal arguments, a luxury the employee never receives.

It is difficult to predict how widespread the use of anti-SLAPP motions will be against mandamus petitions. Some governmental bodies will not want to bother chasing their fired employees for attorney fees. Others will want to use the tactic for its intimidating effect. When this happens, the anti-SLAPP regime will have come full circle, as a weapon for the government to intimidate individuals who seek to use the courts to question its decisions.

That the government itself has a right to freedom of speech is a perverse twist of

constitutional construction. It does not follow from treating the government as a fictitious "person" for some purposes, that the government itself has a right to claim the benefit of the constitutional freedom of speech. It is the government's raw power to silence an individual that makes it necessary, and even possible, to recognize a freedom of speech. The constitutional freedom of speech specifically means a protection against being silenced by the government. It means the government is restricted from prohibiting, punishing, or imposing burdens on, expressive communication of individuals. The only effect of recognizing a freedom of speech is to restrict the government from doing something it has the raw power to do. It is because of this raw governmental power to silence individuals that the body politic has deemed a constitutional protection necessary and appropriate. Governmental speech does not need this constitutional protection, which would amount to protection from itself. The anomaly of the outcome that flows from the recognition of a governmental right of free speech is compounded by treating the termination of an employee as an act of communication. It is true that the termination is communicated to the employee. But the termination is not effected by telling the employee about it, the termination is effected by no longer paying the employee or accepting a tender of work performance. Even if the First Amendment may protect an employer's statement that the employee is fired, it should not protect the official conduct involved in separating the employee from the position.

To put it simply: the employer has a constitutional right to tell the employee, "You're fired," but that statement does not fire the employee any more than a murderer can be executed by telling him, "You're dead."

Stay safe!

Michael P. Stone is the firm's founding partner and principal shareholder. He has practiced almost exclusively in police law and litigation for 27 years, following 13 years as a police officer, supervisor and police attorney.

Marc J. Berger is the firm's senior law and motion and writs and appeals specialist. He has been associated with Michael P. Stone since 1986.

JUSTICE COURT, LAS VEGAS TOWNSHIP

CLARK COUNTY, NEVADA

FILED

IN THE ADMINISTRATIVE MATTER REGARDING CIVIL CASE FILINGS

ORDER # 11-03

BY

WHEREAS, Rule 6.5(b) of the Justice Court Rules for the Las Vegas Township (JCRLV) requires the Chief Judge to "[a]ssure quality and continuity of services necessary to the operation of the court" and to "[s]upervise the court's calendar"; and

WHEREAS, during the last few months of last year, the Court was faced with a heightened backlog of civil cases to be processed due to significant staff shortages and budgetary constraints, along with a difficult conversion to a new case management system; and

WHEREAS, the backlog was so severe that former Chief Judge Ann Zimmerman previously authorized the temporary closure of the Civil Customer Service Counter in order for staff to focus on eliminating that backlog; and

WHEREAS, it has come to the Court's attention that many civil cases during the applicable time period were not processed with sufficient time for attorneys to be able to comply with the dictates of JCRCP 4(i); and

WHEREAS, JCRCP 4(i) declares that if service of the summons and complaint is not made upon a defendant "within 120 days after the filing of the complaint," the action must be dismissed as to that defendant without prejudice upon the court's own initiative; and

WHEREAS, the rule further contemplates that a party may file a motion to enlarge the time for service, based upon a showing of good cause why such service was not made within the 120-day period; and

WHEREAS, the rule declares that "[u]pon a showing of good cause, the court shall extend the time for service and set a reasonable date by which service should be made"; and

WHEREAS, the Court believe that all affected cases during the applicable time period should be granted an extension of time for service based upon the "good cause" related to the prior backlog in the Civil Division; therefore,

IT IS HEREBY ORDERED that, for all civil cases filed during the period of **July 1, 2010, through December 31, 2010,** plaintiffs will be entitled to an extension of time to serve the summons and complaint, without having to file a motion to request that extension of time; and

IT IS HEREBY ORDERED that the civil cases governed by this Order shall be those cases set forth at Exhibit "A," which is a lengthy separate document that is on file with the Las Vegas Justice Court Clerks' Office and available for public inspection; and

IT IS HEREBY ORDERED that the extension of time granted by this Order shall remain in effect until **June 15, 2011;** and

IT IS FURTHER ORDERED that if a civil case was filed during the period of July 1, 2010, through December 31, 2010, and that case was subsequently dismissed for failure to comply with JCRCP 4(i), this Order may be cited as a basis for a Motion to Set Aside the Dismissal; and

IT IS FURTHER ORDERED that all civil cases encompassed by this Order may be subject to future dismissal under JCRCP 4(i) if service of the summons and complaint is not made within the extension of time granted by this Order; and

IT IS FURTHER ORDERED that this Order shall be effective immediately and shall remain in effect unless amended or rescinded by a subsequent administrative Order.

Dated this 2nd **day of** March **, 2011.**

KAREN BENNETT-HARON

CHIEF JUDGE OF THE LAS VEGAS JUSTICE COURT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LARRY JOE DAVIS, JR., an individual, Plaintiff, v. AVVO, INC., a Washington corporation, d/b/a Avvo.com, Defendants.	CASE NO. C11-1571RSM ORDER ON SPECIAL MOTION TO STRIKE, PURSUANT TO RCW 4.24.535

This matter is before the Court for consideration of a special motion to strike filed by defendant Avvo, Inc. ("Avvo"). Dkt. # 47. This motion is brought pursuant to Washington's "anti-SLAPP" law, RCW 4.24.525.[1] Plaintiff has opposed the motion. After careful consideration of the record and the parties' memoranda, the Court has determined for the reasons set forth herein that the motion shall be granted.

BACKGROUND

[1] "SLAPP" in the statutory context is an acronym for Strategic Lawsuits Against Public Participation. In passing RCW 4.24.525, the legislature expressed a concern over lawsuits "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." RCW 4.24.525, Notes, 2010 c 118. The statute provides for the rapid resolution of a special motion, filed by the defendant, to strike the SLAPP.

Plaintiff Larry Joe Davis, Jr., is a Florida attorney, board-certified in Health Law. According to the website of the Florida State Bar Association, board certification is a program by which licensed attorneys may become recognized for special knowledge, skill and proficiency in a designated area of practice.[2] The certification process involves earning a passing grade on an examination, peer review assessment, and satisfaction of the certification area's continuing legal education requirements. A Florida attorney who is board certified may use the designation "Board Certified," "Expert," or "Specialist." *Id*.

Defendant Avvo operates a website that provides profiles of many lawyers, doctors, and dentists in the U.S., including area of practice or specialty, disciplinary history, experience, peer endorsements, and client or patient reviews. The lawyer section of the website is searchable by area of practice and location.[3] The information is gathered from publicly available material, including state bar associations, state courts, and lawyers' and firms' websites. Declaration of Joshua King, Dkt. # 9, Exhibit 16. The profile contains an Avvo numerical rating (zero to ten), calculated mathematically from information in the lawyer's profile, including years in practice, disciplinary actions, professional achievements, and industry recognition. *Id*., Exhibit 25. The rating is intended to guide the public in finding a suitable qualified lawyer. *Id*., Exhibit 3. An attorney cannot change his rating by request to Avvo, but he or she may register on the Avvo website, "claim" his or her profile, and update information regarding work experience, practice areas, and professional achievements, any of which may change the rating. *Id*. Clients may submit reviews, which may also change the rating.

Plaintiff filed this action for libel and violation of two Florida statutes in Florida state court on August 26, 2010. Dkt. # 2. He asserted in that complaint that he first learned of his Avvo profile and rating on August 19, 2010, when a prospective client called him to ask for help with an employment issue involving a hostile environment claim. Complaint, Dkt. # 2, ¶ 9. She told plaintiff she called him because he was the "lowest rated employment lawyer" and she assumed he would be "desperate for

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[2] http://www.floridabar.org/divcom/pi/certsect.nsf/certifications, accessed on March 22, 2012.

[3] http://www.avvo.com/find-a-lawyer?ref=homepage accessed on March 22, 2012.

employment." *Id*., ¶ 11.

Plaintiff informed the caller that he was not a "low-ranking employment lawyer" but rather a Board Certified health law attorney, and declined to represent her. *Id*., ¶ 12. After concluding the telephone call, plaintiff visited the Avvo.com website and saw that his practice area was depicted by a "pie chart" which stated "100% employment/labor law." He then went to log on to his profile page and "attempt to correct the misinformation, which included an incorrect business address and blatantly incorrect practice area." *Id*., ¶ 14. He alleges that after "participating in the Avvo.com website," he saw his rating go from 4.3 to 5.0. *Id*., ¶ 15. Then, over the next several days, he attempted to "delist" himself from the website entirely, but was unable to do so. *Id*., ¶ 16. As a result of his efforts, according to plaintiff, his rating dropped to 3.7, accompanied by a "caution" in red letters. *Id*. Plaintiff has provided "screen shots" of other attorneys' profiles, but none of his own to demonstrate these changes. Declaration of Larry Joe Davis, Jr., Dkt. # 20, Exhibits 1, 2, 3. The Court notes that at this time, plaintiff's profile page displays no photograph, and shows a rating of 4.4, a "concern" in red letters, together with the statement, also in red, that "this lawyer has been disciplined by a state licensing authority," together with a link to more information regarding the disciplinary action.[4] Plaintiff's area of practice is still listed on his profile as "100% employment/labor" despite the fact that he has the power to change that entry. There are two very positive five-star client reviews.

Plaintiff filed an amended complaint shortly after filing the original, and served a copy on defendant on September 14, 2010. Dkt. # 3. The amended complaint changed the date that plaintiff learned of his Avvo profile and low rating to August 17, 2010, deleted the causes of action for libel, and added a claim of invasion of privacy/false light. Dkt. # 3. The action was removed to the United States District Court for the Middle District of Florida on October 19, 2010, on the basis of the parties'

[4] http://www.avvo.com/attorneys/33701-fl-larry-davis-1295960.html accessed on March 22, 2012.

diversity.[5] Dkt. # 1.

After defendant filed a motion to dismiss for failure to state a claim pursuant to Fed.R.Civ.Proc. 12(b)(6), plaintiff filed a Second Amended Complaint. Dkt. ## 8, 12. The Second Amended Complaint was stricken by the court for failure to obtain leave of court before filing, as required by Fed.R.Civ.P. 15(a)(2). Dkt. # 14. Defendant then moved pursuant to 28 U.S.C. § 1404(a) to transfer the action to this district pursuant to a forum selection clause on the Avvo.com website, and other factors. Dkt. # 15. Before the court ruled on the motion to transfer, plaintiff sought leave to amend his complaint a third time. Dkt. # 21. The motion was granted, and plaintiff filed his Third Amended Complaint on April 25, 2011. Dkt. # 26. The Third Amended Complaint, which is now the operative complaint in this case, asserts three causes of action under Florida law regarding the alleged misrepresentation of plaintiff's address and practice area, and the use of his photograph in his profile. He does not challenge his rating or the mention of disciplinary action.

After the Third Amended Complaint was filed, defendant filed, in rapid succession, a motion to strike designated paragraphs of the Third Amended Complaint (Dkt. # 30), a motion to dismiss for lack of subject matter jurisdiction and/or failure to state a claim (Dkt. # 31), and a renewed motion to transfer venue to the Western District of Washington (Dkt. # 32). The motion to transfer was granted and the case was transferred to this Court on September 29, 2011. Dkt. ## 43, 44. The Florida district court specifically found that plaintiff, a licensed and board-certified attorney, agreed to the Terms of Use on the Avvo.com website, including the forum selection clause, when he registered and logged in to update his profile. Order, Dkt. # 43, p. 7.

After transfer, defendant did not renew the previously-filed motion to strike and motion to dismiss for lack of subject matter jurisdiction in this Court. Instead, on November 2, 2011, defendant

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[5] Although the amended complaint did not plead a sum certain as damages, defendant met the burden on removal of establishing that the jurisdictional amount of $75,000 has been met by pointing to a settlement demand for $145,000 (with an apology) or $175,000 (without an apology) presented by plaintiff after he filed suit. Notice of Removal, Dkt. # 1. A defendant may use the amount demanded by the plaintiff as settlement as evidence that the amount in controversy exceeds the jurisdictional minimum. *Conn v. Petsmart, Inc.,* 281 F. 3d 837, 840 (9th Cir. 2002). Plaintiff's demand was not clearly excessive in light of the fact that his amended complaint includes requests for actual damages, punitive and exemplary damages, and statutory attorneys fees on four separate claims. Dkt. # 3.

filed the motion to strike the complaint pursuant to RCW 4.24.525 that is currently before the Court for consideration. This Court has jurisdiction over the matter pursuant to 28 U.S.C. § 1332(a)(1).

DISCUSSION

I. Legal Standard

The Washington anti-SLAPP Act is intended to address lawsuits brought primarily to chill the valid exercise of the constitutional rights of free speech and petition for redress. The legislature found that it is in the public interest for citizens to participate in matters of public concern, and to provide information on public issues that affect them without fear of reprisal through abuse of the judicial process. RCW 4.24.525; Senate Bill 6395, Laws of 2010, Ch. 118, § 1.

The law provides, in relevant part, that "[a] party may bring a special motion to strike any claim that is based on an action involving public participation" as defined in the statute. RCW 4.24.525(4)(a). The section applies to "any claim, however characterized, that is based on an action involving public participation and petition." RCW 4.24.525(2). An action involving public participation includes "[a]ny oral statement made . . . in a place open to the public or a public forum in connection with an issue of public concern" and "other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern. . ." RCW 4.24.525(2) (d) and (e).

An anti-SLAPP law provides relief to a defendant which is in the nature of immunity from suit. *Batzel v. Smith*, 333 F. 3d 1018, 1025 (9th Cir. 2003) (addressing California's anti-SLAPP statute.) In passing the law, the Washington legislature noted concern regarding both the chilling effect on the valid exercise of the constitutional right of freedom of speech, and the chilling effect of "the costs associated with defending such suits." RCW 4.24.525, notes 2010 Ch. 118. The statute accordingly provides for an award of attorneys' fees and costs, plus a statutory award of $10,000, to a defendant who prevails on an anti-SLAPP motion. RCW 4.24.525(6)(a)(i), (ii). Conversely, if the Court finds that the anti-SLAPP motion to strike was frivolous or brought solely to cause unnecessary delay, costs, attorneys' fees, and $10,000 shall be awarded to the opposing party. RCW 4.24.525.(6)(b)(i), (ii). The special motion to strike is therefore not without risk to the moving party.

To prevail on the special motion to strike, the defendant bears the initial burden of showing, by a

preponderance of the evidence, that the plaintiff's claim is based on an action involving public participation or petition. If this burden is met, the burden shifts to the plaintiff to establish, by clear and convincing evidence, a probability of prevailing on the claim. If the plaintiff meets this burden, the motion to strike will be denied. RCW 4.24.525.(4)(b).

II. Analysis

The Court has no difficulty finding that the Avvo.com website is "an action involving public participation," in that it provides information to the general public which may be helpful to them in choosing a doctor, dentist, or lawyer. Further, members of the general public may participate in the forum by providing reviews of an individual doctor or lawyer on his or her profile page. The profile pages on the Avvo.com website constitute a "vehicle for discussion of public issues . . . distributed to a large and interested community." *New York Studio, Inc. v. Better Business Bureau of Alaska, Oregon, and Western Washington*, 2011 WL 2414452 at *4 (W.D.Wash. June 13, 2011). Therefore the burden shifts to plaintiff to show, by clear and convincing evidence, a probability of prevailing on his Florida state law claims.

Before turning to plaintiff's claims, the Court must consider his assertion that this motion is untimely. He contends that since the Third Amended Complaint was filed and served on April 25, 2011, the deadline to file this motion was June 26, 2011, pursuant to RCW 4.24.525(5)(a). The cited section states, in relevant part, "The special motion to strike may be filed within sixty days of the service of the most recent complaint, or, in the court's discretion, at any later time upon terms it deems proper." RCW4.24.525(5)(a). The use of the term "may" instead of the mandatory "shall" means that this is not a firm deadline to be applied in all cases. In light of the fact that the action was not transferred to this Court until September 20, 2011, the Court finds that the November 2, 2011 filing is timely.

Plaintiff's Third Amended Complaint asserts three causes of action under Florida law: (1) false advertising, in violation of Fla. Stat. § Section 817.41; (2) unauthorized use of a likeness for a commercial purpose, in violation of Fla. Stat. § 540.08; and (3) violation of the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.204 ("FDUTPA"). Third Amended Complaint, Dkt. # 26, pp. 10-12. Defendant asserts, in the first instance, that Washington law, not Florida law, applies to all

of plaintiff's claims, because he specifically agreed to that under the Terms of Use when he registered on the Avvo.com website.

The Terms of Use agreement states, in relevant part, that

> These Site Terms and your use of the Site shall be governed by and construed in accordance with the law of the State of Washington applicable to agreements made and to be entirely performed within the State of Washington (even if your use is outside the State of Washington), without resort to its conflict of law provisions. You agree that with respect to any disputes or claims . . . any action at law or in equity arising out of or relating to the Site or these Site Terms shall be filed only in the state and federal courts located in King County, Washington. . . .

Declaration of Joshua King, Dkt. # 16, ¶¶ 3-9, Exhibit 1. As noted above, the district court in Florida held that plaintiff is bound by the Terms of Use when it enforced the forum selection clause. The court also addressed the enforceability of the choice of law provision, noting that

> Washington and Florida courts review the enforceability of choice of law provisions under a standard similar to that set forth in Section 187 of the Restatement (Second) of Conflict of Laws (*i.e.*, whether a choice of law clause would violate the public policy of the state with the materially greater interest).

Order of Transfer, Dkt. # 46, p. 8 (*citing In re DirecTV Early Cancellation Litigation*, 738 F. Supp. 2d 1062, 1088-90 (C.D.Ca. 2010)). The court found that the Washington Consumer Protection Act, RCW 19.86.020 (WCPA), and the FDUTPA are "substantially similar," and that even if this Court were to apply the WCPA to plaintiff's claims, and "assuming that the WCPA is more restrictive than the FDUCPA," the enforcement of the forum selection clause would not deprive plaintiff of his day in court. *Id*.

This Court applies the choice-of-law principles of the transferor court. *Shannon-Vail Five, Inc., v. Bunch*, 270 F. 3d 1207, 1210 (9th Cir. 2001). Florida law holds that contractual choice of law provisions are presumptively valid. *Gaisser v. Portfolio Recovery Associates, LLC*, 593 F. Supp. 2d 1297, 1300 (S.D.Fla. 2009). "Florida enforces choice-of-law provisions unless the law of the chosen forum contravenes strong public policy." *Mazzoni Farms, Inc., v. E.I. DuPont de Nemours & Co.,* 761 So. 2d 306, 311 (Fla. 2000). Nowhere does plaintiff argue that analysis of his claims under Washington law would contravene strong public policy. He simply contends that "section 501.211 [of

the Florida Statues] is not waivable by any [Terms of Use]." Plaintiff's Response, Dkt. # 6.[6] That assertion is not responsive to the choice of law question. Further, the Florida district court's determination that the WCPA and FDUTPA are substantially similar,[7] and that application of Washington law would not be unfair to plaintiff, constitutes a finding that such application would not contravene strong public policy. This Court therefore finds that the choice-of-law clause is enforceable, and that the WCPA, not the FDUTPA shall apply to plaintiff's claims.[8]

The WCPA's citizen suit provision states that "[a]ny person who is injured in his or her business or property" by a violation of the act may bring a civil suit for injunctive relief, damages, attorney fees and costs, and treble damages. RCW 19.86.090. To prevail on a private WCPA claim, plaintiff must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to the plaintiff's business or property, and (5) causation. *Panag v. Farmers Insurance Co. of Washington* , 166 Wash. 2d 27, 37 (2009) (*citing Hangman Ridge Stables, Inc., v. Safeco Title Insurance Co.,* 105 Wn. 2d 778, 784 (1986). The causation element may be met by demonstrating that the deceptive acts "induced the plaintiff to act or refrain from acting," and the plaintiff's damages were "brought about by such action or failure to act." *Fidelity Mortgage Co. v. Seattle Times Co.*, 131 Wash. App. 462, 468-69 (2005).

In the Third Amended Complaint, plaintiff identifies the deceptive acts or practices as the misrepresentation of his practice area, together with the misappropriation of his image and placement on his profile page. He claims that his listing on the website was "deceptive to the public, to consumers, to

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[6]Section 501.211 provides a private right of action under the FDUTPA to "anyone aggrieved by a violation of this part." Fla.Stat. § 501.211(1).

[7] The court compared Fla.Stat. § 501.204(1), which prohibits "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce" with RCW 19.86, which prohibits "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Order of Transfer, Dkt. # 43, p. 8.

[8] Treating plaintiff's claims under the WCPA instead of the FDUTPA is not prejudicial to plaintiff in terms of the ruling on this motion to strike. The private right of action under the FDUTPA is tempered by a provision requiring the plaintiff to post a bond to indemnify the defendant for damages, including attorney's fees, in the event the action is found to be frivolous, lacking in legal or factual merit, or brought for the purpose of harassment. Fla.Stat. 501.211(3).

other lawyers, and specifically to the potential client referenced herein." Third Amended Complaint, Dkt. # 26, ¶ 43. He asserts that this misrepresentation of his practice area is an attempt by Avvo.com to "coerce lawyers by illegal and tortious conduct, on an epidemic scale, to correct mislistings" and is "an actionable trade practice." *Id*., ¶ 41.

As noted by the Florida district court, both the WCPA and the FDUTPA require that the deceptive act occur in trade or commerce. This Court has previously held that Avvo.com does not engage in "trade" or "commerce." *John Henry Browne v. Avvo, Inc.*, 525 F. Supp. 2d 1249, 1254 (W.D.Wash. 2007).

> "Trade" and "commerce" are defined as "the sale of assets or services. . . . Avvo collects data from public sources, attorneys, and references, rates attorneys (where appropriate), and provides both the underlying data and the ratings to consumers free of charge. No assets or services are sold to people who visit the site in the hopes of finding a lawyer and no charge is levied against attorneys or references who choose to provide information. It is hard to imagine how an information clearinghouse and/or ratings service could be considered "commerce". . . . Instead, plaintiffs argue that Avvo's offer to sell advertising space to attorneys transforms all of defendants' activities into trade or commerce. The advertising program is separate and distinct from the attorney profiles that are the subject of plaintiffs' complaint.

Id. The Court ruled that "Avvo's publication of information and ratings based on available data is not 'trade or commerce' and cannot form the basis of a CPA claim." *Id*.

Plaintiff seeks to distance his claim from this result by asserting that "[i]n the *Browne* opinion, this Court stated at 1254 that the placement of paid advertising in a free listing of brokerage rates would make such list commercial speech." Plaintiff's Response, Dkt. # 50, p. 8 (*citing Fidelity Mortgage Corp. v. Seattle times Co*., 131 Wash. App. at 470. This statement mischaracterizes the ruling in *Browne*. Referring to *Fidelity Mortgage*, the Court stated that "the court found that a newspaper's publication of mortgage rates from various lenders was not, in the absence of payment from the lenders, trade or commerce. On the other hand, the same rate chart could be considered trade or commerce if the newspaper accepted an advertising fee in exchange for including a lender in the chart." *Browne*, 525 F. Supp. 2d at 1254. The Court thus distinguished a hypothetical situation where a newspaper accepted a fee for "including a lender in the chart" from the Avvo.com website where the free attorney profiles and the advertising images on the right side of the webpage are "separate and distinct."

Plaintiff thus cannot assert a claim under the WCPA for the alleged misrepresentation of his practice area or the use of his image, as these are part of his profile which under *Browne* is not "trade or commerce." However, in his response to the motion to strike, he clarifies that his claim concerns a different "deceptive act or practice" that he contends is related to Avvo's business model. This argument arises from his allegation in the Third Amended Complaint at ¶ 41, noted above, that the misrepresentation of his practice area is an intentional act by Avvo to induce him to register on the website to correct the misrepresentation.[9] "This profile-based content-based ad space is on information and belief, one of two primary revenue generators for Defendants, the other being the Avvo Pro membership (to stop the targeted ads, of course.)" Plaintiff's Response, Dkt. # 50, p. 9. Plaintiff thus contends that lawyers are induced to apply for "Pro" membership to prevent competitor's ads from appearing on their profile pages. He states, "That is, in fact, apparently one of the primary selling points of the Avvo Pro membership." *Id.,* 8. The Court accepts this as plaintiff's statement of the deceptive act or practice which forms the basis of his WCPA claim.

Plaintiff has presented no evidence, let alone clear and convincing evidence, to demonstrate that there is any probablily of prevailing on his WCPA claim. He points to no evidence in the record to support the conclusory allegations regarding Avvo's advertisements. Indeed, he has provided no evidence at all; he has merely "verified" the allegations set forth in his Third Amended Complaint. Affidavit of Larry Joe Davis, Dkt. # 51. A complaint is not evidence. Plaintiff has submitted no separate declaration of facts within his personal knowledge which support his claims, as contemplated under RCW 4.24.525(4)(c) (In determining whether a party has established by clear and convincing evidence a probability of prevailing on a claim, "the court shall consider the pleadings and supporting and opposing affidavits stating the facts.") Instead of presenting an affidavit, plaintiff asserts in his response that "[i]f one were to search on Avvo for a particular well-known lawyer, such as a well-known Board Certified

[9] This allegation of an intentional act to "coerce" lawyers contradicts the pleading at ¶ 38 that the mistake is simply the result of careless programming. "Avvo.com's computer program was not designed properly, and in a rush to list and rate '90% of lawyers in the United States' allowed the program to run rampant making reckless mistakes, as was the case here and with the other Board Certified lawyers mentioned herein." Third Amended Complaint, Dkt. # 26, ¶ 38.

Health Lawyer, when one is directed to that lawyer's page, one would likely see an advertisement for a competing lawyer, as Plaintiff did in August 2010, which competing lawyer has paid Avvo to have that ad placed on the listed lawyer's page." Plaintiff's Response, Dkt. # 50, p. 9. These speculations as to what "one would likely see," are not evidence. Nor has plaintiff alleged how this allegedly deceptive act of Avvo induced him to act or refrain from acting in some manner, so as to establish causation for his loss. *Fidelity Mortgage Co.,* 131 Wash. App. at 468. Finally, he has not alleged any actual damages caused by the deceptive act.

In his complaint, plaintiff pleads in general terms that "Defendant's actions have damaged Plaintiff individually, as well as many other lawyers in Florida, and Defendant's actions have misled consumers in Florida." Third Amended Complaint, Dkt. # 26, ¶ 51. He requests "actual damages" in addition to declaratory and injunctive relief, but nowhere in the complaint does he state what monetary loss he actually suffered. While plaintiff purports to represent the interests of other Florida attorneys and the general public in this matter, he may only request monetary damages for his own losses.

In his response to the motion to strike, he clarifies that he was "directly damaged by the time wasted on the phone with a potential client that had been misled by the Avvo.com site." Plaintiff's Response, Dkt. # 50, p. 11. He estimates his loss at one-half hour of his time, which he bills at $350 an hour, for a total of $175. He asserts there were other calls, so his damages are "not de minimus or speculative, especially on a massive scale." *Id*. The problem, however, is not that his loss is de minimus, but that it does not flow from the alleged deceptive act. According to the allegations of the complaint, the prospective client called him, and wasted his time, solely because of his profile; she erroneously thought he was a "low-ranking" attorney who practiced "100% employment law." Third Amended Complaint, Dkt. # 26, ¶ 22. Under *Browne*, information on the profile page cannot serve as the basis for a WCPA claim. Plaintiff is fully aware of this, as he seeks to distinguish his consumer fraud claim and escape the *Browne* bar by defining the alleged deceptive act as arising from the advertisements placed on the profile page. Yet he has alleged no damages flowing from that deceptive act. Indeed, it would be contrary to the allegations of the complaint for him to do so, as he alleges that the prospective client called him in spite of the advertisements of other attorneys on his page, not

because of them.

Plaintiff has failed to produce any evidence that would demonstrate a probability of prevailing on his WCPA claim. Nor has he brought forth any evidence to support his false advertising and misuse of his likeness claims, or argued any elements of these torts under Washington law. Plaintiff was put on notice by the Order of Transfer that he is bound by the Terms of Use, and as an experienced attorney he should have anticipated that this Court would find him bound by the choice of law provisions therein. Yet he chose to oppose the motion to strike solely under Florida law, and failed to come forward with any evidence to support his claims even under Florida law. As plaintiff has not produced clear and convincing evidence to demonstrate a probability of prevailing on any of his claims, the motion to strike under RCW 4.24.525 shall be granted as to all claims.

CONCLUSION

Defendant has met the burden under RCW 4.24.525(4)(b) of demonstrating that plaintiff's claims are based on an action involving public participation or petition in an issue of public concern. The burden therefore shifts to plaintiff to show, by clear and convincing evidence, a probability of prevailing on his claim. Plaintiff has failed to produce or point to such evidence. The special motion to strike (Dkt. # 47) is accordingly GRANTED as to all claims, and this action is DISMISSED.

Pursuant to RCW 4.24.525(6)(a)(I) and (ii), defendant as the prevailing party is entitled to costs of litigation and reasonable attorney's fees incurred in connection with each successful motion, together with a statutory award of ten thousand dollars. Defendant shall accordingly make application to the Court for reasonable attorney's fees incurred in bringing the motion to transfer venue (Dkt. # 32) and this motion (Dkt. # 47). Such application shall be filed within three weeks of the date of this Order, and shall be noted on the Court's calendar for the third Friday thereafter so plaintiff may have an opportunity to respond.

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Judgment shall be entered after the Court has determined the amount of reasonable attorney's fees and shall include such amount.

Dated this 28 day of March 2012.

RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

Dear Members of the Assembly Judiciary Committee:

I am the president and founder of ViaView Incorporated, an Internet social media company based in Las Vegas, Nevada. ViaView and its subsidiaries operate popular websites including BullyVille, an online resource dedicated to overcoming bullying; SlingerVille, an online community for tattoo and body art fans; and CheaterVille, an Internet community dedicated to addressing the problems of infidelity. I have been heartened by the state's efforts to recruit an increasing number of technical and Internet-based jobs, as I would like to expand my business. However, the lack of a meaningful anti-SLAPP statute within Nevada poses a material threat to ViaView's growth and continued success in the state, and I have been considering a move to a state with a more favorable set of legal protections. Moreover, it has deprived Nevada businesses of additional business that ViaView could provide it, and cost the state additional tax revenue.

Every week, ViaView receives numerous legal threats arising from the material that third parties post on its numerous websites. Often, these people threaten to sue ViaView for defamation, based entirely on what third parties – whose identities are unknown even to my company – have written. While ViaView's online services are in the fortunate enough to be protected from liability for the actions of third persons by federal law – 47 U.S.C. § 230 – the company is still besieged by legal threats. Even despite the protections of § 230, I personally know of one other social media website owner who was sued over statements made by third parties, and has suffered severe financial consequences. Currently, raising a free speech defense for ViaView's activities within Nevada is costly, and plaintiffs are incentivized to sue companies like ViaView for nuisance settlements because the costs of defense are so high. As a result, ViaView has a constant need for counsel to respond to these legal demands, consuming resources that would otherwise go to hiring new employees or developing ViaView's line of products and services.

Additionally, many companies that create their own content are not fortunate enough to receive the protections of § 230. These small businesses and individuals – bloggers, Internet journalists, and content-producing start-ups – are in a far more vulnerable position than ViaView. For people and entities in this position, defending their free speech rights and Constitutionally protected activity could lead to complete financial ruin.

The proposed amendments to Nevada's current anti-SLAPP laws found in SB 286 provide a powerful method for ViaView (and other companies) to grow without fearing the costs of a frivolous lawsuit. The proposed changes to Nevada's anti-SLAPP statute broaden the range of protected conduct to include ViaView's social media services. As a result, when faced with frivolous litigation for its First Amendment-protected activity, ViaView could quickly dispose of the case. What's more, it would be able to recover its

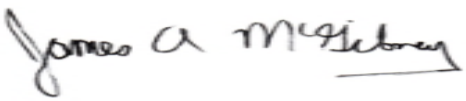
costs and attorneys' fees from the person who brought the action, so that the funds spend defending the company can be recaptured and re-invested in the business. The additional $10,000 mandatory payment included in SB 286 should serve to deter these lawsuits altogether. To the extent it does not, though, this money will help ViaView even more quickly recover the costs of a lawsuit brought against its Constitutionally protected activity.

The passage of SB 286 would ensure more funds are kept within Nevada. Currently, ViaView hosts all of its websites in California in order to avail itself of that state's anti-SLAPP statute. As a small business owner in Southern Nevada, I have seen how local businesses feed one another, and how a nascent home-grown tech sector has tried to establish itself within Las Vegas. I would much prefer to send my hosting fees to a company down the street, rather than one in another state. Doing so would help a local hosting company grow and create jobs (and generate taxation revenue for the state). As it stands, though, California's anti-SLAPP law is so far superior to Nevada's that ViaView cannot bear the legal risk of having all of its digital content – which anyone on the Internet can access – physically based in Nevada. If SB 286 passes, that will change – and likely not just for ViaView, but other companies as well.

As the president of an Internet company, I constantly keep apprised of legal developments that could affect my business. Strong anti-SLAPP statutes like those in California and Washington have helped protect the technology and Internet companies in those states from all kinds of frivolous, wasteful lawsuits that attempt only to target those companies' lawful and First Amendment-protected activities. (I have no problem with – and encourage – meritorious litigation, which SB 286 will not affect.)

Both Southern and Northern Nevada have seen the beginning of direct investment from technology and Internet companies, with Amazon and Zappos increasing their presence in Southern Nevada and Apple making a significant commitment to the Northern portion of the State. In a vacuum, SB 286 alone will not stimulate a technology boom. However, SB 286 is an essential of the ecosystem needed to grow small technology and Internet businesses (which expand into big businesses) that will employ Nevadans in high-technology, desirable jobs, just as they have in California and Washington.

If SB 286 becomes law, ViaView and other businesses like it will finally be able to exhale a sigh of relief and expand within Nevada. By removing the specter of financial ruin in the form of a lawsuit brought to punish Fist Amendment-protected activity, more employees can be hired, and more business can be repatriated to the state. I strongly urge this Committee to give SB 286 its utmost consideration and pass this bill. Thank you for your time and consideration.



James A. McGibney

ViaView, Inc 10620 Southern Highlands Parkway, Las Vegas, NV 89141

MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Seventh Session
May 14, 2013

The Committee on Judiciary was called to order by Chairman Jason Frierson at 8:17 a.m. on Tuesday, May 14, 2013, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at nelis.leg.state.nv.us/77th2013. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman Jason Frierson, Chairman
Assemblyman James Ohrenschall, Vice Chairman
Assemblyman Richard Carrillo
Assemblywoman Lesley E. Cohen
Assemblywoman Olivia Diaz
Assemblywoman Marilyn Dondero Loop
Assemblyman Wesley Duncan
Assemblywoman Michele Fiore
Assemblyman Ira Hansen
Assemblyman Andrew Martin
Assemblywoman Ellen B. Spiegel
Assemblyman Tyrone Thompson
Assemblyman Jim Wheeler

COMMITTEE MEMBERS ABSENT:

None

someone can apply for citizenship as opposed to the district attorney having too much work, I will jump to the side of the person applying for citizenship.

Assemblyman Ohrenschall:
The conceptual amendment is a change from the amendment in the work session, because it changes the limit from 365 days to 364 days. You would be limiting the group of people who might seek this type of relief. That would address some of the concern about caseload. If it is a meritorious claim for lowering it, nothing mandates the prosecutor to file or apply to oppose this. It is only when they feel it is unwarranted. We are talking about sentences that were already served. They are not looking at getting out of their sentence.

Chairman Frierson:
Is there any other discussion on the bill? I am seeking a motion to amend and do pass with the conceptual amendment. In a practical sense, we are talking about a day.

> ASSEMBLYWOMAN DIAZ MOVED TO AMEND AND DO PASS SENATE BILL 169 (1ST REPRINT).
>
> ASSEMBLYWOMAN SPIEGEL SECONDED THE MOTION.
>
> THE MOTION PASSED. (ASSEMBLYMEN DUNCAN, HANSEN, AND WHEELER VOTED NO.)

Ms. Spiegel will do the floor statement.

Next on our work session we have Senate Bill 286 (1st Reprint).

Senate Bill 286 (1st Reprint): Provides immunity from civil action under certain circumstances. (BDR 3-675)

Dave Ziegler, Committee Policy Analyst:
Senate Bill 286 (1st Reprint) was sponsored by Senator Jones. It was heard in this Committee on May 6, 2013. This bill relates to strategic lawsuits against public participation, also known as SLAPP suits. [Continued to read from work session document (Exhibit M).]

Chairman Frierson:
Is there any discussion on this bill? [There was none.]

ASSEMBLYMAN CARRILLO MOVED TO DO PASS SENATE BILL 286 (1ST REPRINT).

ASSEMBLYWOMAN DIAZ SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

Mr. Duncan will do the floor statement.

Next on our work session we have Senate Bill 347.

Senate Bill 347: Requires the Advisory Commission on the Administration of Justice to consider certain matters relating to parole. (BDR S-1050)

Dave Ziegler, Committee Policy Analyst:
Senate Bill 347 was sponsored by Senator Brower. It was heard in this Committee on April 29, 2013. This bill requires the Advisory Commission on the Administration of Justice to include on an agenda a discussion of items relating to parole. [Continued to read from work session document (Exhibit N).]

Chairman Frierson:
Is there any discussion on this bill? [There was none.]

ASSEMBLYMAN CARRILLO MOVED TO DO PASS SENATE BILL 347.

ASSEMBLYMAN OHRENSCHALL SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

Mr. Wheeler will do the floor statement.

Next on our work session we have Senate Bill 419.

Senate Bill 419: Revises provisions relating to marriage. (BDR 11-1107)

EXHIBITS

Committee Name: Committee on Judiciary

Date: May 14, 2013 **Time of Meeting: 8:17 a.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
S.B. 118	C	Brett Kandt	Letter in Support
S.B. 389 (R1)	D	Senator Segerblom	Proposed Amendment by Venicia Considine
S.B. 389 (R1)	E	Venicia Considine	Written Testimony
S.B. 389 (R1)	F	Mary Law	Written Testimony
S.B. 424 (R1)	G	Senator Segerblom	Pictures
S.B. 424 (R1)	H	Jennifer DiMarzio-Gaynor	Proposed Amendment
S.B. 71	I	Dave Ziegler	Work Session Document
S.B. 103 (R1)	J	Dave Ziegler	Work Session Document
S.B. 106 (R1)	K	Dave Ziegler	Work Session Document
S.B. 169 (R1)	L	Dave Ziegler	Work Session Document
S.B. 286 (R1)	M	Dave Ziegler	Work Session Document
S.B. 347	N	Dave Ziegler	Work Session Document
S.B. 419	O	Dave Ziegler	Work Session Document

Committee Action:
Do Pass_____
Amend & Do Pass_____
Other_____

Assembly Committee on Judiciary

This measure may be considered for action during today's work session.

May 14, 2013

SENATE BILL 286 (R1)
Provides immunity from civil action under certain circumstances. (BDR 3-675)

Sponsored by:	**Senators Jones, Segerblom, Kihuen, et al.**
Date Heard:	**May 6, 2013**
Fiscal Impact:	**Effect on Local Government: No.**
	Effect on the State: No.

Senate Bill 286 relates to strategic lawsuits against public participation ("SLAPP suits"). The bill provides that a person who engages in 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 is immune from civil action for claims based on the communication.

With respect to a special motion to dismiss a SLAPP suit, if the moving party establishes that the suit is based on such good faith communication and that the moving party has a probability of prevailing, S.B. 286 requires the court to ensure that the determination is not entered into evidence in a subsequent proceeding, and to rule on the motion within seven judicial days after the motion is served on the plaintiff.

If a court grants a special motion to dismiss, the measure authorizes the court to award reasonable costs and attorney's fees and an amount up to $10,000 to the person against whom the action was brought. If the court denies a special motion to dismiss and finds that the motion was frivolous or vexatious, the measure provides that the prevailing party shall receive reasonable costs and attorney's fees and may be granted an amount up to $10,000 and any such additional relief as the court deems proper.

Amendments: None.

Assembly Committee: Judiciary
Exhibit: M Page 1 of 1 Dat
Submitted by: Dave Ziegler

NEVADA LEGISLATURE

Seventy-Seventh Session, 2013

ASSEMBLY DAILY JOURNAL

THE ONE HUNDRED AND SECOND DAY

CARSON CITY (Thursday), May 16, 2013

Assembly called to order at 12:19 p.m.

Madam Speaker presiding.

Roll called.

All present except Assemblymen Hambrick and Pierce, who were excused.

Prayer by the Chaplain, Pastor Norm Milz, Shepherd of Sierra Lutheran Church, Carson City, Nevada.

Almighty God and Father, thank You for the opportunity to serve the citizens of Nevada today as we meet in this Chamber to discuss bills that have been presented to us. Help us take the responsibility to make decisions and move bills from this Chamber to the Senate and ultimately to the Governor's desk.

O' Lord, the time for this Session is soon to be completed. We need Your guidance to help us conclude boldly and fairly, making sure that all the citizens of this state are treated with equality as our own nation's Constitution states. Help us put aside our own priorities and make our focus priorities which are for the good of all.

Guide our discussions that we may seek each other out and work together, no matter what side of the aisle or political party we find another member of this Chamber.

We also come to You today asking for Your help and assistance to the brave people of Texas as they have gone through incredible weather yesterday. Give comfort to those who have experienced loss of family, friends, and possessions.

All these things we bring to You trusting in Your love and grace, in the Name of Your Son, Jesus Christ.

AMEN.

Pledge of allegiance to the Flag.

Assemblyman Horne moved that further reading of the Journal be dispensed with, and the Speaker and Chief Clerk be authorized to make the necessary corrections and additions.

Motion carried.

REPORTS OF COMMITTEES

Madam Speaker:

Your Committee on Commerce and Labor, to which were referred Senate Bills Nos. 29, 35, 40, 41, 47, 114, 127, 153, 154, 155, 268, 288, 310, 351, 438, 496, 497, 506, 507, has had the same under consideration, and begs leave to report the same back with the recommendation: Do pass.

DAVID P. BOBZIEN, *Chair*

Madam Speaker:

Your Committee on Education, to which were referred Senate Bill No. 125, 345, has had the same under consideration, and begs leave to report the same back with the recommendation: Amend, and do pass as amended.

ELLIOT T. ANDERSON, *Chair*

Madam Speaker:

Your Committee on Government Affairs, to which were referred Senate Bills Nos. 26, 74, 272, 284, 342, 404, has had the same under consideration, and begs leave to report the same back with the recommendation: Do pass.

Also, your Committee on Government Affairs, to which was referred Senate Bill No. 122, has had the same under consideration, and begs leave to report the same back with the recommendation: Amend, and do pass as amended.

TERESA BENITEZ-THOMPSON, *Chair*

Madam Speaker:

Your Committee on Health and Human Services, to which were referred Senate Bills Nos. 86, 97, 98, 453, has had the same under consideration, and begs leave to report the same back with the recommendation: Do pass.

MARILYN DONDERO LOOP, *Chair*

Madam Speaker:

Your Committee on Judiciary, to which were referred Senate Bills Nos. 27, 71, 103, 130, 136, 286, 347, 356, 365, 409, 419, 432, has had the same under consideration, and begs leave to report the same back with the recommendation: Do pass.

Also, your Committee on Judiciary, to which was referred Senate Bill No. 9, has had the same under consideration, and begs leave to report the same back with the recommendation: Amend, and do pass as amended.

JASON FRIERSON, *Chair*

Madam Speaker:

Your Committee on Legislative Operations and Elections, to which was referred Assembly Bill No. 444, has had the same under consideration, and begs leave to report the same back with the recommendation: Amend, and do pass as amended.

Also, your Committee on Legislative Operations and Elections, to which was referred Senate Bill No. 458, has had the same under consideration, and begs leave to report the same back with the recommendation: Do pass.

JAMES OHRENSCHALL, *Chair*

Madam Speaker:

Your Committee on Natural Resources, Agriculture, and Mining, to which were referred Senate Bills Nos. 148, 433, 434, has had the same under consideration, and begs leave to report the same back with the recommendation: Do pass.

SKIP DALY, *Chair*

Madam Speaker:

Your Committee on Taxation, to which were referred Senate Bills Nos. 7, 8, 48, 215, 216, 281, 509, has had the same under consideration, and begs leave to report the same back with the recommendation: Do pass.

IRENE BUSTAMANTE ADAMS, *Chair*

Madam Speaker:

Your Committee on Transportation, to which were referred Senate Bills Nos. 317, 335, has had the same under consideration, and begs leave to report the same back with the recommendation: Do pass.

RICHARD CARRILLO, *Chair*

MESSAGES FROM THE SENATE

SENATE CHAMBER, Carson City, May 15, 2013

To the Honorable the Assembly:

It is my pleasure to inform your esteemed body that the Senate on this day passed Assembly Bills Nos. 12, 22, 179, 206, 331, 492.

Also, it is my pleasure to inform your esteemed body that the Senate on this day passed, as amended, Senate Bills Nos. 447, 467.

SHERRY L. RODRIGUEZ
Assistant Secretary of the Senate

MOTIONS, RESOLUTIONS AND NOTICES

Senate Concurrent Resolution No. 4.

Assemblywoman Dondero Loop moved the adoption of the resolution.

Remarks by Assemblywoman Dondero Loop.

ASSEMBLYWOMAN DONDERO LOOP:

Thank you, Madam Speaker. Senate Concurrent Resolution No. 4 encourages the Department of Health and Human Services and the Commissioner of Insurance to work with health care providers and insurers to develop a patient-centered medical home model of care and to adopt a payment system that allows for the implementation of this model of care in Nevada. A copy of the resolution is required to be transmitted to the Director of the Department of Health and Human Services, the Commissioner of Insurance, and the Nevada Academy of Family Physicians.

Resolution adopted.

Assemblyman Horne moved that Assembly Bill No. 444; Senate Bills Nos. 7, 8, 9, 26, 27, 29, 35, 40, 41, 47, 48, 71, 74, 86, 97, 98, 103, 114, 122, 125, 127, 130, 136, 148, 153, 154, 155, 215, 216, 268, 272, 281, 284, 286, 288, 310, 317, 335, 342, 345, 347, 351, 356, 365, 404, 409, 419, 432, 433, 434, 438, 453, 458, 496, 497, 506, 507, 509, just reported out of committee, be placed on the Second Reading File.

Motion carried.

Assemblyman Horne moved that the Assembly suspend section 4 of Assembly Standing Rule No. 57 through May 17, 2013, for the purpose of allowing the committees to take final action on bills and resolutions on the same day they are heard.

Senate Bill No. 216.
Bill read second time and ordered to third reading.

Senate Bill No. 268.
Bill read second time and ordered to third reading.

Senate Bill No. 272.
Bill read second time and ordered to third reading.

Senate Bill No. 281.
Bill read second time and ordered to third reading.

Senate Bill No. 284.
Bill read second time and ordered to third reading.

Senate Bill No. 286.
Bill read second time and ordered to third reading.

Senate Bill No. 288.
Bill read second time and ordered to third reading.

Senate Bill No. 310.
Bill read second time and ordered to third reading.

Senate Bill No. 317.
Bill read second time and ordered to third reading.

Senate Bill No. 335.
Bill read second time and ordered to third reading.

Senate Bill No. 342.
Bill read second time and ordered to third reading.

Senate Bill No. 345.
Bill read second time.

The following amendment was proposed by the Committee on Education:

Amendment No. 610.

AN ACT relating to education; creating the Advisory Council on Science, Technology, Engineering and Mathematics; prescribing the membership and duties of the Council; requiring the Council to submit to the State Board of Education, the Governor and the Legislature a written report which includes recommendations concerning the instruction and curriculum in courses of study in science, technology, engineering and mathematics in public schools in this State; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Section 1 of this bill creates the Advisory Council on Science, Technology, Engineering and Mathematics within the Department of

NEVADA LEGISLATURE

Seventy-Seventh Session, 2013

ASSEMBLY DAILY JOURNAL

THE ONE HUNDRED AND THIRD DAY

CARSON CITY (Friday), May 17, 2013

Assembly called to order at 7:08 p.m.

Madam Speaker presiding.

Roll called.

All present except Assemblymen Diaz, Hogan, and Pierce, who were excused.

Prayer of the Chaplain, Reverend Jeffrey D. Paul, read by the Chief Clerk of the Assembly, Susan Furlong.

O' Lord our Governor, whose glory is in all the world: We commend the state of Nevada to Your care, that we may dwell in Your peace. Grant to the Assembly and to all in authority wisdom and strength to know and do Your will. Fill us all with a love of truth and righteousness and make us mindful of our calling to serve this people; one God, world without end.

AMEN.

Pledge of allegiance to the Flag.

Assemblyman Horne moved that further reading of the Journal be dispensed with, and the Speaker and Chief Clerk be authorized to make the necessary corrections and additions.

Motion carried.

REPORTS OF COMMITTEES

Madam Speaker:

Your Committee on Commerce and Labor, to which were referred Senate Bills Nos. 162, 180, 198, 267, 287, 402, has had the same under consideration, and begs leave to report the same back with the recommendation: Do pass.

DAVID P. BOBZIEN, *Chair*

Madam Speaker:

Your Committee on Education, to which was referred Senate Bill No. 305, 392, 443, has had the same under consideration, and begs leave to report the same back with the recommendation: Amend, and do pass as amended.

ELLIOT T. ANDERSON, *Chair*

Roll call on Senate Bill No. 81:
YEAS—39.
NAYS—None.
EXCUSED—Diaz, Hogan, Pierce—3.
Senate Bill No. 81 having received a constitutional majority, Madam Speaker declared it passed.
Bill ordered transmitted to the Senate.

Senate Bill No. 86.
Bill read third time.
Remarks by Assemblywoman Dondero Loop.

ASSEMBLYWOMAN DONDERO LOOP:
Senate Bill 86 expands programs providing respite care or relief for informal caretakers to include any person with Alzheimer's disease or other related dementia, regardless of the age of the person.

Roll call on Senate Bill No. 86:
YEAS—39.
NAYS—None.
EXCUSED—Diaz, Hogan, Pierce—3.
Senate Bill No. 86 having received a constitutional majority, Madam Speaker declared it passed.
Bill ordered transmitted to the Senate.

MOTIONS, RESOLUTIONS AND NOTICES

Assemblyman Horne moved that Senate Bills Nos. 97, 98, 102, 103, 104, 105, 108, 110, 114, 117, 122, 127, 130, 136, 140, 148, 153, 154, 155, 157, 158, 159, 163, 175, 185, 189, 215, 216, 227, 237, 264, 268, 272, 274, 281, 284, 286, 288, 304, 309, 310, 317, 325, 335, 342, 343, 344, 345, 347, 351, 356, 365, 382, 388, 393, 404, 409, 419, 420, 432, 433, 434, 438, 441, 453, 458, 460, 476, 489, 496, 497, 503, 505, 506, 507, 509; Senate Joint Resolution No. 12; Senate Bills Nos. 78, 101, 191, 60, be taken from the General File and placed at the top of the General File for the next legislative day.
Motion carried.

UNFINISHED BUSINESS

SIGNING OF BILLS AND RESOLUTIONS

There being no objections, the Speaker and Chief Clerk signed Assembly Bills Nos. 12, 13, 16, 22, 41, 45, 57, 85, 108, 111, 179, 206, 252, 331, 350, 356, 492; Assembly Resolution No. 12; Senate Bill No. 139; Senate Joint Resolution No. 5.

NEVADA LEGISLATURE

Seventy-Seventh Session, 2013

ASSEMBLY DAILY JOURNAL

THE ONE HUNDRED AND FOURTH DAY

CARSON CITY (Saturday), May 18, 2013

Assembly called to order at 2:05 p.m.

Madam Speaker presiding.

Roll called.

All present except Assemblymen Diaz, Hogan, Martin, and Pierce, who were excused.

Prayer by the Chaplain, Pastor Norm Milz, Shepherd of Sierra Lutheran Church, Carson City, Nevada.

God and Father, as we meet in this afternoon time, may we look at what this Chamber has done over the past week. May we feel confident as an Assembly we have passed bills that are for the good of every citizen of the whole state of Nevada. If there is some way we have not done this, forgive us and help us to correct this in the near future.

We thank You for the opportunity to serve. May we daily work to fulfill this opportunity with honor. This is an awesome responsibility and one not to be taken lightly. May we never forget what is said on our State Seal, which reminds us of why we serve, "For the Good of the Country."

As we conclude this week, our time together as an Assembly is quickly coming to a conclusion. May panic to pass bills not cause us to lose focus on what we have been elected to do. May we work together to do things that will be for the betterment of this entire state. Guide our comments that we may be courteous and caring at all times, especially toward those with whom we do not agree.

All this we bring to You trusting in Your love and grace, in the Name of Your Son, Jesus Christ.

AMEN.

Pledge of allegiance to the Flag.

Assemblyman Horne moved that further reading of the Journal be dispensed with, and the Speaker and Chief Clerk be authorized to make the necessary corrections and additions.

Motion carried.

Senate Bill No. 274 having received a constitutional majority, Madam Speaker declared it passed.

Bill ordered transmitted to the Senate.

Senate Bill No. 281.

Bill read third time.

Remarks by Assemblyman Grady.

ASSEMBLYMAN GRADY:

Thank you, Madam Speaker. Senate Bill 281 provides an exemption from property taxes for the buildings, furniture, equipment, and land used by the Thunderbird Lodge Preservation Society until June 30, 2033. They now have the ability to apply and they do get their money. This saves two steps: (1) applying, and (2) they get their money back. This is a good bill, and I do urge your support.

Roll call on Senate Bill No. 281:

YEAS—38.

NAYS—None.

EXCUSED—Diaz, Hogan, Martin, Pierce—4.

Senate Bill No. 281 having received a constitutional majority, Madam Speaker declared it passed.

Bill ordered transmitted to the Senate.

MOTIONS, RESOLUTIONS AND NOTICES

Assemblyman Horne moved that Assembly Bills Nos. 1, 31, 67, 139, 151, 436, 499; Senate Bills Nos. 4, 55, 60, 73, 78, 80, 100, 101, 111, 112, 133, 134, 143, 155, 162, 167, 170, 176, 178, 180, 181, 185, 191, 198, 202, 206, 217, 233, 237, 258, 267, 276, 284, 285, 286, 287, 288, 304, 305, 309, 310, 315, 317, 318, 325, 335, 338, 342, 343, 344, 345, 347, 350, 351, 356, 365, 371, 382, 388, 392, 393, 402, 404, 409, 419, 420, 432, 433, 434, 437, 438, 441, 443, 448, 449, 453, 457, 458, 459, 460, 476, 488, 489, 496, 497, 503, 505, 506, 507, 509; Senate Joint Resolutions Nos. 1, 12, 13, 14; Senate Joint Resolution No. 15 of the 76th Session; be taken from the General File and placed on the General File for the next legislative day.

Motion carried.

Assemblyman Horne moved that Senate Bills Nos. 31, 106, and 243, just reported out of committee, be placed on the Second Reading File.

Motion carried.

SECOND READING AND AMENDMENT

Senate Bill No. 31.

Bill read second time.

The following amendment was proposed by the Committee on Judiciary:

Amendment No. 659.

NEVADA LEGISLATURE

Seventy-Seventh Session, 2013

ASSEMBLY DAILY JOURNAL

THE ONE HUNDRED AND SIXTH DAY

CARSON CITY (Monday), May 20, 2013

Assembly called to order at 1:17 p.m.

Madam Speaker presiding.

Roll called.

All present except Assemblywomen Pierce and Woodbury, who were excused.

Prayer by the Chaplain, Pastor Albert Tilstra, Seventh-Day Adventist Church, Fallon, Nevada.

We pray for the members of this body, its officers, and all those who share in its work. We remember that You never were in a hurry nor lost Your inner peace when under pressure. But, we are only human. We feel the strain of meeting deadlines, and we chafe under frustration. We need poise and peace of mind, and only You can supply the deepest needs of tired bodies, jaded spirits, and frayed nerves.

Give to us Your peace and refresh us in our weariness, that this may be a good day with much done and done well.

AMEN.

Pledge of allegiance to the Flag.

Assemblyman Horne moved that further reading of the Journal be dispensed with, and the Speaker and Chief Clerk be authorized to make the necessary corrections and additions.

Motion carried.

REPORTS OF COMMITTEES

Madam Speaker:

Your Committee on Government Affairs, to which were referred Senate Bills Nos. 20, 22, 25, 39, 66, 135, 236, 436, 440, has had the same under consideration, and begs leave to report the same back with the recommendation: Amend, and do pass as amended.

TERESA BENITEZ-THOMPSON, *Chair*

Senate Bill No. 243 having received a two-thirds majority, Madam Speaker declared it passed, as amended.

Bill ordered transmitted to the Senate.

MOTIONS, RESOLUTIONS AND NOTICES

Assemblyman Frierson moved that Assembly Bill No. 499; Senate Bills Nos. 60, 80, 155, 162, 198, 237, 258, 267, 276, 284, 285, 286, 287, 288, 304, 305, 309, 310, 315, 317, 318, 325, 335, 338, 342, 343, 344, 345, 347, 350, 351, 356, 365, 371, 382, 388, 392, 393, 402, 404, 409, 419, 420, 432, 433, 434, 437, 438, 441, 443, 448, 449, 453, 457, 458, 459, 460, 476, 488, 489, 496, 497, 503, 505, 506, 507, 509; Senate Joint Resolutions Nos. 1, 12, 13; Senate Joint Resolution No. 15 of the 76th Session, be taken from the General File and placed on the General File for the next legislative day.

Motion carried.

REPORTS OF COMMITTEES

Madam Speaker:

Your Committee on Commerce and Labor, to which were referred Senate Bills Nos. 36, 94, 208, 235, 252, 266, 493, has had the same under consideration, and begs leave to report the same back with the recommendation: Amend, and do pass as amended.

DAVID P. BOBZIEN, *Chair*

MOTIONS, RESOLUTIONS AND NOTICES

Assemblyman Frierson moved that Senate Bills Nos. 36, 94, 208, 235, 252, 266, and 493, just reported out of committee, be placed on the Second Reading File.

Motion carried.

SECOND READING AND AMENDMENT

Senate Bill No. 36.

Bill read second time.

The following amendment was proposed by the Committee on Commerce and Labor:

Amendment No. 649.

AN ACT relating to employment; establishing provisions for the collection of money owed to the Employment Security Division of the Department of Employment, Training and Rehabilitation; ~~[establishing a waiting period of 1 week as an additional condition of eligibility for unemployment compensation benefits;]~~ revising provisions concerning unemployment compensation fraud; providing for the transfer of an employer's liabilities to the Division upon the transfer of the employer's trade or business; prohibiting the relief of an employer's record for experience rating of charges for benefits under certain circumstances; assigning liability for the payment

NEVADA LEGISLATURE

Seventy-Seventh Session, 2013

ASSEMBLY DAILY JOURNAL

THE ONE HUNDRED AND SEVENTH DAY

CARSON CITY (Tuesday), May 21, 2013

Assembly called to order at 1:12 p.m.

Madam Speaker presiding.

Roll called.

All present except Assemblymen Horne, Pierce, and Woodbury, who were excused.

Prayer by the Chaplain, Pastor Albert Tilstra, Seventh-Day Adventist Church, Fallon, Nevada.

Keep strong our faith in the power of prayer as we unite our petitions in this sacred moment. We have asked for Your guidance in difficult decisions many times; they have not been answered in the way we had hoped. Many of the situations and relationships which we have asked You to change have remained the same.

Forgive us for thinking, therefore, that You are unwilling to help us in our dilemmas or that there is nothing You can do. Remind us, O' God, that when we plug in an electric iron and it fails to work, we do not conclude that electricity has lost its power nor do we plead with the iron. We look at once to the wiring to find what has broken or blocked the connection with the source of power.

May we do the same with ourselves, that You can work through us to do Your will.

This we ask in the Name of the One who is all powerful.

AMEN.

Pledge of allegiance to the Flag.

Assemblyman Frierson moved that further reading of the Journal be dispensed with, and the Speaker and Chief Clerk be authorized to make the necessary corrections and additions.

Motion carried.

REPORTS OF COMMITTEES

Madam Speaker:

Your Committee on Commerce and Labor, to which were referred Senate Bills Nos. 220, 319, has had the same under consideration, and begs leave to report the same back with the recommendation: Amend, and do pass as amended.

DAVID P. BOBZIEN, *Chair*

A person is immune from any civil liability for any action taken with respect to carrying out the provisions of this bill if the actions are taken in good faith and without malicious intent. The bill further requires a person who possesses the information required to be submitted to a local law enforcement agency to keep the information confidential. A person who knowingly and willfully violates this requirement is guilty of a gross misdemeanor. Thank you, Madam Speaker.

Roll call on Senate Bill No. 235:
YEAS—39.
NAYS—None.
EXCUSED—Horne, Pierce, Woodbury—3.
Senate Bill No. 235 having received a constitutional majority, Madam Speaker declared it passed, as amended.
Bill ordered transmitted to the Senate.

Senate Bill No. 266.
Bill read third time.
Remarks by Assemblywoman Bustamante Adams.

ASSEMBLYWOMAN BUSTAMANTE ADAMS:
Thank you, Madam Speaker. Senate Bill 266 prohibits each health care plan and insurance policy, other than the State Plan for Medicaid, that provides coverage for both chemotherapy administered intravenously or by injection and orally administered chemotherapy from making the monetary limits of coverage to the insured for orally administered chemotherapy different than other types of chemotherapy.

Roll call on Senate Bill No. 266:
YEAS—39.
NAYS—None.
EXCUSED—Horne, Pierce, Woodbury—3.
Senate Bill No. 266 having received a constitutional majority, Madam Speaker declared it passed, as amended.
Bill ordered transmitted to the Senate.

Madam Speaker announced if there were no objections, the Assembly would recess subject to the call of the Chair.

Assembly in recess at 3:04 p.m.

ASSEMBLY IN SESSION

At 3:06 p.m.
Madam Speaker presiding.
Quorum present.

MOTIONS, RESOLUTIONS AND NOTICES

Assemblyman Frierson moved that Assembly Bill No. 436; Senate Bills Nos. 76, 80, 94, 162, 236, 262, 267, 276, 284, 285, 286, 287, 288, 304, 305, 309, 310, 315, 317, 318, 325, 335, 338, 342, 343, 344, 345, 347, 350, 351,

356, 365, 371, 382, 388, 392, 393, 402, 404, 409, 414, 419, 420, 421, 432, 433, 434, 436, 437, 438, 440, 441, 443, 448, 449, 450, 453, 457, 458, 459, 460, 476, 488, 489, 493, 496, 497, 503, 505, 506, 507, 509; Senate Joint Resolutions Nos. 1, 9, 12, 13; Senate Joint Resolution No. 15 of the 76th Session, be taken from the General File and placed on the General File for the next legislative day.

Motion carried.

UNFINISHED BUSINESS

Signing of Bills and Resolutions

There being no objections, the Speaker and Chief Clerk signed Assembly Concurrent Resolution No. 3; Senate Bills Nos. 7, 8, 11, 12, 13, 14, 17, 19, 23, 24, 26, 28, 29, 30, 32, 35, 37, 40, 41, 45, 46, 47, 48, 51, 53, 61, 65, 71, 74, 77, 79, 81, 86; Senate Concurrent Resolution No. 4.

GUESTS EXTENDED PRIVILEGE OF ASSEMBLY FLOOR

On request of Assemblyman Bobzien, the privilege of the floor of the Assembly Chamber for this day was extended to the following students and chaperones from Bailey Charter Elementary: Nicole Acebu, Samuel Avalos-Medina, Alycia Buchanan de Rodriguez, Maya Chamberlain, Alondra Cisneros Villa, Chevelle Erspamer, Gerome Garrett, Jr., Jaycee Goins, Llajayra Gomez Diaz, Graciela Herrera, Christian Hernandez Martinez, Emily Linebeck, Collin Manser, Makayla Martin, Nickolas Provencio, Armando Ramirez, Keyonni Wasington, Keyonni Washington, Nora Williams-Pavlatos, Anthony Bejarano, Viridiana Carmona-Palomino, Carlos Castaneda Estrada, Justin Cruz-Noguera, Jose Diaz, Iris Josephson, Katie Lawrence, Rickson Lenon, Skyler Lujan, Elizabeth Marquez, Xzorion Morgan, Michael Neve, Jacob Rodriguez Gutierrez, Citlaly Ruiz Ruvalcaba, Mauryha Saldana, Rachelle Solorzano Plascencia, Elizabeth Hoops, Lindsey Angus, Deloras McKay, Joann Wood, Thya Slusher, Kaci Lujan, Amie Erspamer, Alondra Cisneros, Lekeya Washington, Cecilia Medina, Michael Rodriguez, Samantha Manser, Jessica Middleton, and Justin Williams.

On request of Assemblyman Sprinkle, the privilege of the floor of the Assembly Chamber for this day was extended to the following students and chaperones from Legacy Christian School: Daniel Cline, Derek Cooley, Madelynn Uhrik, Anjelica Myers, William Ryan, Eric Stutzman, Lauren Vanderslice, Logan Lorentzen, Logan Fulton, Lisa Stone, Cyndi Cooley, Joleen Cline, and Jeff Myers.

NEVADA LEGISLATURE

Seventy-Seventh Session, 2013

ASSEMBLY DAILY JOURNAL

THE ONE HUNDRED AND EIGHTH DAY

CARSON CITY (Wednesday), May 22, 2013

Assembly called to order at 12:05 p.m.

Madam Speaker presiding.

Roll called.

All present except Assemblywoman Pierce, who was excused.

Prayer by the Chaplain, Pastor Albert Tilstra, Seventh-Day Adventist Church, Fallon, Nevada.

The time is ticking by pretty fast as we are seeing the deadlines for this session of the Legislature. It is so easy to become confused and then live in cross-purposes to our central aims, and because of that, we are at cross-purposes with each other. Take us by the hand and help as to see things from Your viewpoint that we may see them as they really are. We come to choices and decisions with a prayer on our lips for our wisdom fails us. Give to these, Your servants, Your wisdom. We ask this in Your Name.

AMEN.

Pledge of allegiance to the Flag.

Assemblyman Horne moved that further reading of the Journal be dispensed with, and the Speaker and Chief Clerk be authorized to make the necessary corrections and additions.

Motion carried.

MOTIONS, RESOLUTIONS AND NOTICES

By Assemblymen Kirkpatrick, Aizley, Elliot Anderson, Paul Anderson, Benitez-Thompson, Bobzien, Bustamante Adams, Carlton, Carrillo, Cohen, Daly, Diaz, Dondero Loop, Duncan, Eisen, Ellison, Fiore, Flores, Frierson, Grady, Hambrick, Hansen, Hardy, Healey, Hickey, Hogan, Horne, Kirner, Livermore, Martin, Munford, Neal, Ohrenschall, Oscarson, Pierce, Spiegel, Sprinkle, Stewart, Swank, Thompson, Wheeler and Woodbury; Senators Denis, Atkinson, Brower, Cegavske, Ford, Goicoechea, Gustavson,

Senate Bill No. 286.
Bill read third time.
Remarks by Assemblyman Duncan.

ASSEMBLYMAN DUNCAN:
Thank you, Madam Speaker. Senate Bill 286 defines the right to free speech in direct connection with an issue of public concern to be in a place open to the public or in a public forum. A person who engages in such communication is immune from any civil action for claims based upon that communication. If a civil action is sought and the person who engaged in the communication files a special motion to dismiss, the measure adds a process for the court to follow and provides that a court ruling on the motion must be made within seven judicial days after the motion is served upon the plaintiff.

If a court grants a special motion to dismiss, the measure provides that in addition to reasonable costs and attorney's fees, the court may award an amount up to $10,000 to the person against whom the action was brought. If the court denies a special motion to dismiss and finds that the motion was frivolous or vexatious, the measure provides that the prevailing party shall receive reasonable costs and attorney's fees and may be granted an amount up to $10,000 and any such additional relief as the court deems proper to punish and deter the filing of frivolous or vexatious motions. Finally, the measure provides that if the court denies a special motion to dismiss, an interlocutory appeal lies to the Supreme Court. Thank you, Madam Speaker.

Roll call on Senate Bill No. 286:
YEAS—41.
NAYS—None.
EXCUSED—Pierce.
Senate Bill No. 286 having received a constitutional majority, Madam Speaker declared it passed.
Bill ordered transmitted to the Senate.

MOTIONS, RESOLUTIONS AND NOTICES

Assemblyman Horne moved that Assembly Bill No. 67 be taken from its position on the General File and placed at the top of the General File.
Motion carried.

GENERAL FILE AND THIRD READING

Assembly Bill No. 67.
Bill read third time.
Remarks by Assemblyman Frierson.

ASSEMBLYMAN FRIERSON:
Thank you, Madam Speaker. Assembly Bill 67 defines the crime of sex trafficking separately from the crime of pandering. It authorizes the court to order videotaped depositions of a victim of sex trafficking and establishes a rebuttable presumption that good cause exists for such an order. Assembly Bill 67 authorizes a victim of sex trafficking or human trafficking to bring a civil action against the person who caused or profited from the act of trafficking. The bill makes other related changes to the statutes on criminal procedure crimes and punishments and grants the Attorney General concurrent jurisdiction to prosecute any offense involving pandering and sex trafficking without leave of the court.

NEVADA LEGISLATURE

Seventy-Seventh Session, 2013

SENATE DAILY JOURNAL

THE ONE HUNDRED AND NINTH DAY

CARSON CITY (Thursday), May 23, 2013

Senate called to order at 12:24 p.m.

President Krolicki presiding.

Roll called.

All present.

Prayer Reverend Neal T. Anderson, Unitarian Universalist Fellowship of Northern Nevada, Reno.

In the spirit of love, compassion, diversity and unity, let us pray.

Spirit of Life, God of many names, be in our hearts and minds as we come together to pray for our State and its legislators. You come together as legislators out of many religious traditions; let us know and understand that we each come from our own tradition today to lift our spirits in unity knowing we are part of an interconnected web of life. Let us acknowledge and embrace our oneness. Let us understand that by being and praying together, each in our unique and sacred way, we strengthen our bonds of friendship and solidarity across our diversity.

Let us pray together this afternoon that we may be loving and able stewards of this State and our shared world. We pray that we acknowledge, respect and celebrate our differences as we seek out our common ground; each of us working toward the good of all. We recognize that there is hurt and sorrow, deeds that perplex us and actions for which we can find no justification. Yet, we also know that there is untold good, folks who work every day for the benefit of all people. Let us stand with them, and let us pray for them.

Spirit of Life, ours are the hands that must do your work. We are the ones who must comfort the sick and lift up the poor; we are the ones who must challenge traditions to bring about justice. Strengthen our resolve. We pray to live out our faiths, each within our own traditions as doers of good works. We ask that we remember to cherish each other, to taste and savor our relationships, to understand that what we know of the sacred we know through these bodies and through these connections of friendship and love.

On this day, we celebrate Jean Ford. May we remember her dedication and love for this State and strive to live up to her example, and so many others in whose footsteps we follow. May we be reminded by our common mean that we are strongest when we work together in incarnating beloved community.

In the name of all we find sacred and holy, may it be so.

AMEN.

Pledge of Allegiance to the Flag.

The President announced that under previous order, the reading of the Journal is waived for the remainder of the 77th Legislative Session and the

President and Secretary are authorized to make any necessary corrections and additions.

REPORTS OF COMMITTEES

Mr. President:

Your Committee on Commerce, Labor and Energy, to which was referred Assembly Bill No. 349, has had the same under consideration, and begs leave to report the same back with the recommendation: Amend, and do pass as amended.

KELVIN ATKINSON, *Chair*

Mr. President:

Your Committee on Government Affairs, to which were referred Assembly Bill Nos. 303, 364 and 448, has had the same under consideration, and begs leave to report the same back with the recommendation: Do pass.

DAVID R. PARKS, *Chair*

Mr. President:

Your Committee on Natural Resources, to which was referred Assembly Bill No. 264, has had the same under consideration, and begs leave to report the same back with the recommendation: Amend, and do pass as amended.

AARON D. FORD, *Chair*

MESSAGES FROM THE ASSEMBLY

ASSEMBLY CHAMBER, Carson City, May 22, 2013

To the Honorable the Senate:

I have the honor to inform your honorable body that the Assembly on this day passed Senate Bills Nos. 80, 284, 285, 286, 287, 288, 304, 309, 310, 317, 318, 325, 335, 338, 342, 343, 344, 350, 351.

Also, I have the honor to inform your honorable body that the Assembly on this day passed Assembly Bill No. 304.

Also, I have the honor to inform your honorable body that the Assembly on this day passed, as amended, Assembly Bills Nos. 67, 301, 405, 408, 410, 414, 424, 436.

Also, I have the honor to inform your honorable body that the Assembly amended, and on this day passed, as amended, Senate Bill No. 38, Amendment No. 682; Senate Bill No. 54, Amendment No. 607; Senate Bill No. 141, Amendment No. 729; Senate Bill No. 209, Amendment No. 712; Senate Bill No. 228, Amendment No. 780; Senate Bill No. 252, Amendments Nos. 648, 797; Senate Bill No. 273, Amendment No. 720; Senate Bill No. 305, Amendment No. 609; Senate Bill No. 345, Amendment No. 610, and respectfully requests your honorable body to concur in said amendments.

MATTHEW BAKER
Assistant Chief Clerk of the Assembly

President Krolicki announced that if there were no objections, the Senate would recess subject to the call of the Chair.

Senate in recess at 12:54 p.m.

SENATE IN SESSION

At 4:47 p.m.
President Krolicki presiding.
Quorum present.

Senate Bill No. 286–Senators Jones, Segerblom, Kihuen; and Ford

CHAPTER 176

[Approved: May 27, 2013]

AN ACT relating to civil actions; providing immunity from civil action for certain claims based on the right to petition and the right to free speech under certain circumstances; establishing the burden of proof for a special motion to dismiss; providing for the interlocutory appeal from an order denying a special motion to dismiss; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law establishes certain provisions to deter frivolous or vexatious lawsuits (Strategic Lawsuits Against Public Participation, commonly known as "SLAPP lawsuits"). (Chapter 387, Statutes of Nevada 1997, p. 1363; NRS 41.635-41.670) A SLAPP lawsuit is characterized as a meritless suit filed primarily to discourage the named defendant's exercise of First Amendment rights. "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." (*Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795, 796 n.1 (9th Cir. 2012))

The Ninth Circuit Court of Appeals recently held that the provisions of NRS concerning such lawsuits only protect communications made directly to a governmental agency. The Ninth Circuit also held that, as written, these provisions of NRS provide protection from liability but not from trial. That distinction, when coupled with the lack of an express statutory right to an interlocutory appeal, led the court to conclude that these provisions of NRS do not provide for an immediate appeal of an order denying a special motion to dismiss a SLAPP lawsuit. (*Metabolic*, at 802)

Existing law provides that a person who engages in good faith communication in furtherance of the right to petition is immune from civil liability for claims based upon that communication. (NRS 41.650) **Section 2** of this bill expands the scope of that immunity by providing that a person who exercises the right to free speech in direct connection with an issue of public concern is also immune from any civil action for claims based upon that communication.

Existing law defines certain communications, for purposes of statutory provisions concerning SLAPP lawsuits, as communications made by a person in connection with certain governmental actions, officers, employees or entities. (NRS 41.637) **Section 1** of this bill includes within the meaning of such communications those that are made in direct connection with an issue of public interest in a place open to the public or in a public forum. **Section 3** of this bill establishes the burden of proof for a dismissal by special motion of a SLAPP lawsuit. **Section 3** reduces from 30 days to 7 judicial days the time within which a court must rule on a special motion to dismiss.

Existing law requires, under certain circumstances, an award of reasonable costs and attorney's fees to the person against whom a SLAPP lawsuit was brought if a court grants a special motion to dismiss. (NRS 41.670) **Section 4** of this bill authorizes, in addition to an award of costs and attorney's fees, an award of up to $10,000 if a special motion to dismiss is granted. **Section 4** also provides that if a court finds that a special motion to dismiss was frivolous or vexatious, the court shall award the prevailing party reasonable costs and attorney's fees and may award an amount of up to $10,000 and any such additional relief as the court deems proper to punish and deter the filing of frivolous or vexatious motions.

EXPLANATION – Matter in ***bolded italics*** is new; matter between brackets [~~omitted material~~] is material to be omitted.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. **NRS 41.637** is hereby amended to read as follows:

41.637 "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"*** means any:

1. Communication that is aimed at procuring any governmental or electoral action, result or outcome;

2. Communication of information or a complaint to a Legislator, officer or employee of the Federal Government, this state or a political subdivision of this state, regarding a matter reasonably of concern to the respective governmental entity; [~~or~~]

3. Written or oral statement made in direct connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law [~~.~~] ***; or***

4. Communication made in direct connection with an issue of public interest in a place open to the public or in a public forum,

➥ which is truthful or is made without knowledge of its falsehood.

Sec. 2. **NRS 41.650** is hereby amended to read as follows:

41.650 A person who engages in 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*** is immune from ***any*** civil [~~liability~~] ***action*** for claims based upon the communication.

Sec. 3. **NRS 41.660** is hereby amended to read as follows:

41.660 1. If an action is brought against a person 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) The person against whom the action is brought may file a special motion to dismiss; and

(b) The Attorney General or the chief legal officer or attorney of a political subdivision of this State may defend or otherwise support the person against whom the action is brought. If the Attorney General or the chief legal officer or attorney of a political subdivision has a conflict of interest in, or is otherwise disqualified from, defending or otherwise supporting the person, the Attorney General or the chief legal officer or attorney of a political subdivision may employ special counsel to defend or otherwise support the person.

2. A special motion to dismiss must be filed within 60 days after service of the complaint, which period may be extended by the court for good cause shown.

3. If a special motion to dismiss is filed pursuant to subsection 2, the court shall:

(a) [~~Treat the motion as a motion for summary judgment;~~] ***Determine whether the moving party has established, 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;***

(b) ***If the court determines that the moving party has met the burden pursuant to paragraph (a), determine whether the plaintiff has established by clear and convincing evidence a probability of prevailing on the claim;***

(c) If the court determines that the plaintiff has established a probability of prevailing on the claim pursuant to paragraph (b), ensure that such determination will not:

(1) Be admitted into evidence at any later stage of the underlying action or subsequent proceeding; or

(2) Affect the burden of proof that is applied in the underlying action or subsequent proceeding;

(d) Consider such evidence, written or oral, by witnesses or affidavits, as may be material in making a determination pursuant to paragraphs (a) and (b);

(e) Stay discovery pending:

(1) A ruling by the court on the motion; and

(2) The disposition of any appeal from the ruling on the motion; and

~~[(c)]~~ ***(f)*** Rule on the motion within ~~[30]~~ ***7 judicial*** days after the motion is ~~[filed.]~~ ***served upon the plaintiff.***

4. If the court dismisses the action pursuant to a special motion to dismiss filed pursuant to subsection 2, the dismissal operates as an adjudication upon the merits.

Sec. 4. **NRS 41.670** is hereby amended to read as follows:

41.670 ***1.*** If the court grants a special motion to dismiss filed pursuant to NRS 41.660:

~~[1.]~~ ***(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.

~~[2.]~~ ***(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.***

(c) The person against whom the action is brought may bring a separate action to recover:

~~[(a)]~~ ***(1)*** Compensatory damages;

~~[(b)]~~ ***(2)*** Punitive damages; and

~~[(c)]~~ ***(3)*** Attorney's fees and costs of bringing the separate action.

2. If the court denies a special motion to dismiss filed pursuant to NRS 41.660 and finds that the motion was frivolous or vexatious, the court shall award to the prevailing party reasonable costs and attorney's fees incurred in responding to the motion.

3. In addition to reasonable costs and attorney's fees awarded pursuant to subsection 2, the court may award:

(a) An amount of up to $10,000; and

(b) Any such additional relief as the court deems proper to punish and deter the filing of frivolous or vexatious motions.

4. If the court denies the special motion to dismiss filed pursuant to NRS 41.660, an interlocutory appeal lies to the Supreme Court.