

1
2 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

3 * * *

4 MARK E. SMITH, AN
5 INDIVIDUAL, D/B/A LAKE TAHOE
6 WALL OF SHAME,

7 Appellant,

8 vs.

9 CARL LACKEY,

10 Respondent.

Electronically Filed
Supreme Court Case No. 2016-1142 a.m.
District Court Case No. CV17-00434
Elizabeth A. Brown
Clerk of Supreme Court

11 **JOINT APPENDIX**

12 **VOLUME IV**

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Lake Tahoe Wall of Shame

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https://www.facebook.com/lake Tahoe Wall of Shame x

Lake Tahoe Wall of Shame

Country Club Center is finished and I hope all my efforts save the Beach!

Like Comment

Christina Verdes
February 13 at 7:25pm

Our lovely community amenity, the Championship Golf Course, which is... See more

Like Comment

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Local Deals and Vouchers
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Black Bears
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(2) Lake Tahoe Wall of Shame x

Like Home Find Friends

(2) Lake Tahoe Wall of Shame x

Lake Tahoe Wall of Shame
Like Reply 10 hrs

Chasey Schaefer This theater has 10000 seats.
Like Reply 10 hrs

Carson Scott So Carl Lacey shows civilian volunteers to see bear traps with their personal vehicles (which is not insured by the State of NV per the Risk Management). He also took a tranquilized bear to Kinder Elementary School last year for his book show and said the bear was starting to wake up and was snoring in the end and the kids were laughing. Now all that? Wow.
Like Reply 10 hrs

Leslie Blue Lang He is dependable and should be removed from his job immediately... he is a murderer of the lowest form against disadvantaged creatures...
Like Reply 10 hrs

Richard Ricker Harshel You're hilarious, and obviously confused. They remove wildlife from situations where they will be euthanized, and release them back into the wild. The "murderers" to use your term, are the people that try to secure their garbage and private areas and exclude two urban rabbits.
Like Reply 10 hrs

Fast Check before you post.
Like Reply 10 hrs

Leslie Blue Lang Richard, don't want to banish with you and I do agree that our last out garage is truly the human effort... That being said there has not been a relocation since 1990. We do release them into the wild but it's not the home or garden can that they have. Billionaire when seems rather connected to it... please look up some articles written by the Nevada Dept of Wildlife for further info. They are better informed and very accurate in their explanations... go... This is just a case of my Fast Check information over the years about a subject that I am very passionate about...
Like Reply 10 hrs

Lake Tahoe Wall of Shame Richard, fast checking is a good idea. NDOV has more bears as a percent of the population than any other agency in North America. While advocates and hunters interference are the core problems, NDOV's incoherence aggravates the situation and they are actually the ones doing the killing.
Like Reply 10 hrs

Tiffany Jade Landrouts Ugh screw these stupid people!
Like Reply 10 hrs

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Lake Tahoe Wall of Shame

Christine Correll
 March 24 at 8:20pm · #
 On a good note, the fresh endocrine bath at
 Cooney Club Center is finished and I hope all my
 efforts save the Bears!

Like · Comments
Christine Wyder
 February 13 at 7:54am · #
 Our lovely, somewhat empty, fire Champagne
 Golf Course, which is... See more

PEOPLE ALSO LIKE

I Support Farmers Markets
 Community

Living Off The Grid
 Community

Groupon
 Local Travel Vendors

LIKED BY THIS PAGE

Mark E. Smith Foundation

Washoe County Sheriff's...

Advocating for Bears

English (US) Español Français (France) Português (Brasil) Deutsch Italiano

a comment in a 30-yr period. Meanwhile, which has more people and
 more bears. I'd say one bear and that was probably with no cubs
 and no cubs. Bears are killing bears and the solution, taking the
 abundant problem and reconditioning problem bears is...
 Like · Reply · 1 · 7 hrs · Edited

Linka Larson Amusement Why are these people (if you can call them that)
 making? They should be on trial in a court of law!!!
 Like · Reply · 1 · 7 hrs

Danielle Pridemore WTF? This lady guy has covered the tree many times.
 Why does he still have a job?
 Like · Reply · 2 · 5 hrs

Hearts Bessing Why does this guy still have a job, as well as an account
 agency, MCOU, but really?
 Like · Reply · 2 · 5 hrs

Lake Tahoe Wall of Shame Excuse me question!
 Like · Reply · 3 hrs

Bobby Marsh Lol Lake Tahoe wall of shame... you gotta be kidding me we
 have a local that puts... wow.
 Like · Reply · 6 hrs

Richard Riskey You have your role to play.
 Like · Reply · 1 · 5 hrs

Richard Riskey He has his role to play. Thanks to the uniformed,
 You're confused, and obviously ignorant. They remove wildlife from situations
 where they will be exterminated, and release them back into the wild. The
 "managers" to use your term, are the people that fail to secure their garbage
 and therefore make wild animals into urban settings.
 First Check before you post.
 Like · Reply · 5 hrs

Lake Tahoe Wall of Shame
 Apr 12 at 7:27 am · #



EXHIBIT "9"

EXHIBIT "9"

facebook

Search for people, places and things

Lake Tahoe Wall of Shame Timeline Now

Liked

Create Page

Lake Tahoe Wall of Shame 21 hours ago

An interesting psychological profile of Carl Lackey submitted by a professional who prefers to remain anonymous (knowing Carl, with good reason):

"Besides the [obvious] narcissist, controlling nature, [Lackey] likes conflict, has misogynistic tendencies, is oppositional, and carries some feelings of persecution and grandiosity. He wants to feel important so he'll associate with people he sees... See More

Like · Comment · Share

10 people like this.

Learn Dyer interesting. I did know that he is cruel and heartless. This helps to explain

BEAR League We've known Lackey for many years and it's uncanny how right on this profile is. Whoever wrote this is most definitely very skilled at reading people. There is evidence that Lackey 'accidentally' killed his first wife. (accidentally... ummm, where have we heard that before with deaths he's caused?)

Kyle Magin Or maybe they prefer to remain anonymous because it's cock psychology to judge a man based upon selected writings and interactions with the public instead of you know, taking the time to sit down with him. Maybe the profiler doesn't want to get shooed down for being truly unprofessional.

Tommy Paterson Sorry....but who is Carl Lackey. Perhaps a bit more info here would be helpful

Lake Tahoe Wall of Shame Kyle, in fact the profiler wants to hear feedback from people who know him better so that the profile can be improved. There is zero chance Lackey will submit to a proper psych interview so this is the only reasonable way a profile can be done. Understanding what makes him tick should help us interact with him. Those of us who know him well see a lot of truth in this profile, as the post from the BEAR League attests. So while you might call it a cock, those of us that must work with or around him are finding it both accurate and helpful.

Lake Tahoe Wall of Shame Tommy, if you read any other posts on this Wall you'll quickly learn who Lackey is.

Tommy Paterson OK...thank!

Tommy Paterson Got it! I hope some big mama bear decides to eat the worthless butt before he can look and lead on another bear!

Debbie Glantz And the story gets worse what are we doing having a person or thing like this working anywhere sounds to me like he's in need of some serious help and soon before us to hate

Tania Vasina Adams Tommy, Carl Lackey just needs to move on... and although I understand what you mean, no bear of ours would eat his worthless butt, our bears aren't blood thirsty.

Activity Recent

Lake Tahoe Wall of Shame created Tell Governor Sandoval & Deputy Director Hasdon...

Lake Tahoe Wall of Shame Tuesday via mobile

It's not too late - if you didn't have a chance to call Gov Sandoval and Deputy Director Hasdon yesterday, please do so today. The Killing MUST stop!

Like · Comment · Share

9 people like this.

View 5 more comments

Lake Tahoe Wall of Shame Please CALL and EMAIL your opinions, thoughts and complaints on MONDAY, MAY 20th. Let's FLOOD their offices with calls and messages so that they cannot ignore us!

Contact the Governor's office: Governor's office: Cory Hunt chunt@gov.nv.gov... See how Tuesday at 11:03am · Like

Victoria LeDoux Serpa Donell Tuesday at 11:54am via mobile · Like · 1

Write a comment... Press Enter to post

Now 2012 Launched

10 Chat

EXHIBIT "10"

EXHIBIT "10"

Lake Tahoe Wall of Shame Timeline Now

Lake Tahoe Wall of Shame

21 hours ago

An interesting psychological profile of Carl Lackey submitted by a professional who prefers to remain anonymous (knowing Carl, with good reason!):

"Besides the [obvious] narcissist, controlling nature, [Lackey] likes conflict, has misogynistic tendencies, is oppositional, and carries some feelings of persecution and grandiosity. He wants to feel important so he'll associate with people he sees ... See More

Like Comment Share

10 people like this.

Leanna Dyer interesting. I did know that he is cruel and heartless. This helps to explain.

21 hours ago · Like · 25

BEAR League We've known Lackey for many years and it's uncanny how right on this profile is. Whoever wrote this is most definitely very skilled at reading people. There is evidence that Lackey accidentally killed his first wife. (Accidentally...ummm, where have we heard that before with deaths he's caused?)

21 hours ago · Like · 27

Kyle Magin Or maybe they prefer to remain anonymous because it's crock psychology to judge a man based upon selected writings and interactions with the public instead of, you know, taking the time to sit down with him. Maybe the profile doesn't want to get shrouded down for being totally unprofessional.

21 hours ago · Like · 21

Tommy Patston Sorry...but who is Carl Lackey. Perhaps a bit more info here would be helpful.

20 hours ago · Like

Lake Tahoe Wall of Shame Kyle, in fact the profile means to hear feedback from people who know him better so that the profile can be improved. There is zero chance Lackey will submit to a proper psych interview so this is the only reasonable way a profile can be done, understanding what makes him tick should help us interact with him. Those of us who know him will see a lot of truth in this profile, as the post from The BEAR League attests. So while you might call it a crock, those of us that must work with or around him are finding it both accurate and helpful.

20 hours ago · Like · 24

Lake Tahoe Wall of Shame Tommy, if you need any other posts on this Wall you'll quickly learn who Lackey is.

20 hours ago · Like

Tommy Patston OK...thanks!

20 hours ago · Like · 21

Tommy Patston Got it! I hope some big mama bear decides to eat his worthless butt before he can lock and load on another bear!

20 hours ago · Like · 21

Debbie Glantz And the story gets worse when we are doing having a person or thing like this working anywhere sounds to me like he's in need of some serious help and soon before it's too late.

20 hours ago · Like · 24

Tania Vasina Adams Tommy, Carl Lackey just needs to move on... and although I understand what you mean, no bear of ours would eat his worthless butt, our bears aren't blood thirsty.

Activity

Recent

Lake Tahoe Wall of Shame created Tell Governor Sandoval & Deputy Director Hasbun...

Like

Lake Tahoe Wall of Shame

Tuesday via mobile

It's not too late - if you didn't have a chance to call Gov. Sandoval and Deputy Director Hasbun yesterday, please do so today. The killing MUST stop!

Like Comment Share

9 people like this.

View 5 more comments

Lake Tahoe Wall of Shame Please CALL and EMAIL your opinions, thoughts and complaints on MONDAY, MAY 20th. Let's FLOOD their offices with calls and messages so that they cannot ignore us!

Contact the Governor's official Governor's office: Cory Hunt chunt@gov.nv.gov... See here

Tuesday at 11:00am · Like

Victoria LeDoux Serpa Donell

Tuesday at 11:00am via mobile · Like · 21

Write a comment...
Press Enter to post.

EXHIBIT "11"

EXHIBIT "11"

**Northern Nevada Regional Intelligence Center
Washoe County, Nevada**

**UNCLASSIFIED // FOR OFFICIAL USE ONLY
ADVISORY BULLETIN**

Knowledge is Power



Date: May 29, 2013
Number: 13-057

**THREATS TOWARD NEVADA DEPARTMENT OF
WILDLIFE BIOLOGIST**

(U//FOUO) Multiple individuals have posted comments specifically targeted towards a biologist employed at the Nevada Department of Wildlife (NDOW) on a known social networking site. Some of the comments could be construed as threatening in nature.

(U//FOUO) In September of 2012, there was a sharp increase in the number of comments being posted on the site. In May of 2013, the tone of the comments escalated after, as part of his duties, the NDOW biologist euthanized a bear in Incline Village, Nevada. According to multiple media outlets, a bear that entered an Incline Village condominium on May 16, 2013, was tranquilized and then euthanized by wildlife officials who said the animal posed a danger to the public. The biologist who euthanized the animal said the decision was made not to capture and release the bear and instead euthanize it, because of the behavior it displayed in entering the structure.

(U//FOUO) Since the bear's euthanization, multiple individuals who have visited the social networking site have questioned the NDOW biologist's decision to euthanize the animal. Some have referred to him as a "murderous jerk" and a "rogue bear hunter." Other comments include:

- "So when does he get treed by dogs and shot out of said tree?"
- "Somebody should dart him and see how he likes it."
- "Can someone please shoot [the NDOW biologist] with a tranquilizer..."
- "...may he rot in hell."
- "You should accidentally shoot him with six to seven darts and see how he does."

(U//FOUO) According to one NDOW official, the biologist has received verbal threats in the past, when responding to bear calls. His NDOW email address and

Contact NNRIC

Lt. Mark Katre
Sgt. Lou Gazes
(775) 321-4902

911 Parr Blvd.
Reno, NV 89512

NNRIC@washoecounty.us

Board Members:

- Washoe County SO
- Reno PD
- FBI
- Sparks PD
- Washoe Co. School District PD
- UNR PD
- Reno Fire Dept.
- Sparks Fire Dept.
- North Lake Tahoe Fire Protection Dist.
- Sierra Fire Protection Dist.
- Nevada DPS
- Washoe County DA
- Washoe Co. Office of Emergency Management

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cellular telephone number were recently posted on the social networking site. Additionally, some individuals on the site have suggested going to his residence to post signs reading, "Bear Hunter," or, "Bear Killer."

(U//FOUO) According to the Nevada Department of Wildlife's website:

- Officials will first attempt to create an unfriendly environment for a bear nearing residences and neighborhoods through the use of traps and other non-lethal deterrents.
- Persistent or extremely bold bears that cause a potential public safety hazard may have to be euthanized.

(U//FOUO) Additionally, some individuals disagree with the black bear hunting season, which was instituted in 2011. The third season is scheduled to start in mid-September. Since its implementation, one individual commented on the social networking site, "He [the NDOW biologist] falsified statistics on Nevada's bear population and then used that to justify authorizing the hunt for the first time in Nevada's history."

(U//FOUO) Some individuals react emotionally to NDOW's euthanization policy and to the annual hunting season, lashing out verbally. Often times, a group of individuals will gather in the area of a bear call. The individuals within the group may attempt to intimidate, harass, or distract first responders, thereby creating officer safety concerns for the responding game wardens and law enforcement officers.

(U//FOUO) When responding to bear calls, Nevada Department of Wildlife wardens or other law enforcement authorities, are cautioned to maintain awareness of their surroundings.

(U) If you have any questions regarding this bulletin, please contact Intelligence Analyst Shannon Kelly at the Northern Nevada Regional Intelligence Center at (775) 321-4902.

(U) It should be noted that some of this information describes first amendment protected activities. Americans have constitutionally protected rights to assemble, speak, and petition the government. These rights are safeguarded. First amendment protected activities are only reported on for operational planning in the interest of assuring the safety and security of the demonstrators and the public.

1 **3790**

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10 Attorneys for Defendant:

11 MARK SMITH, an individual¹

12 **SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

13 **IN AND FOR WASHOE COUNTY**

14 CARL LACKEY,

) **Case No.: CV17-00434**

)

15 Plaintiff,

) **Dept. No.: 4**

)

16 vs.

)

17 BEAR LEAGUE, etc., et al.,

)

)

18 Defendants.

)

)

19)

20 **REPLY TO OPPOSITION TO SPECIAL MOTION TO**
21 **DISMISS/MOTION TO DISMISS**

22 COMES NOW, Defendant MARK SMITH, an individual (SMITH) and hereby submits
23 his Reply to the Opposition filed by Plaintiff CARL LACKEY ("LACKEY") and in support of
24 his Special Motion to Dismiss/Motion to Dismiss (the "Motion") filed in this action on June 5,

25 _____
¹ Erroneously named as MARK E. SMITH an individual and dba LAKE TAHOE WALL OF SHAME

2017.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

LACKEY has not alleged, and certainly cannot prove, that SMITH made a single comment about him, despite having been given multiple opportunities to do so. Nonetheless, LACKEY's Opposition asserts that the First Amended Complaint (FAC), which is based entirely on unsupported allegations that SMITH made statements concerning LACKEY, should survive the pending Motion. LACKEY's position is not supported by law or logic.

II. ARGUMENT

A. SMITH Has Not Published Any Comments Regarding LACKEY

1. The Communications Decency Act Immunizes SMITH From Liability for Third Party Comments on Lake Tahoe Wall of Shame's Facebook Page

Putting aside for a moment the fact that SMITH is not doing business as Lake Tahoe Wall of Shame as LACKEY alleges, which will be addressed below, SMITH is not responsible for third-party posts on Lake Tahoe Wall of Shame's Facebook page. *Supra*, II(A)(2). Citations to the Communications Decency Act (CDA), 47 U.S.C. § 230, and case law set forth in the Motion, which LACKEY fails to address, amply support this position. Additionally, however, a mere twenty-seven (27) days ago, the Ninth Circuit Court of Appeals again stated in unequivocal terms that "republishers" of information provided by another cannot be held liable for the purportedly defamatory nature of that information.

The district court properly dismissed Caraccioli's defamation, libel, false light, public disclosure of private facts, intrusion upon seclusion, intentional and negligent infliction of emotional distress, negligent supervision and retention, and California's Unfair Competition Law ("UCL") claims because the basis for each of these claims is Facebook's role as a "republisher" of material posted by a third party, and the claims are, therefore, barred by the Communications Decency Act ("CDA"). *See* 47 U.S.C. § 230(c)(1); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100-01 (9th Cir. 2009) (§ 230(c)(1) of the CDA "protects from liability (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under

a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider”). Contrary to Caraccioli’s argument, Facebook did not become the “information content provider” under § 230(c)(1) merely by virtue of reviewing the contents of the suspect account and deciding not to remove it. *See Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1170 (9th Cir. 2008) (en banc) (explaining that “determin[ing] whether or not to prevent [the] posting” of third-party material online is “precisely the kind of activity” covered by the CDA); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003) (explaining that through § 230(c)(1), “Congress granted most Internet services immunity from liability for publishing false or defamatory material so long as the information was provided by another party.”)

Caraccioli v. Facebook, Inc., 2017 U.S. App. LEXIS 10040, at *1-2 (9th Cir. June 6, 2017, No. 16-15610). Under the CDA, SMITH is not, as a matter of law, a publisher of content provided by third parties on Lake Tahoe Wall of Shame’s (or any other person’s or entity’s) Facebook pages.

2. SMITH Also Has No Personal Liability for Lake Tahoe Wall of Shame’s Comments

SMITH is also not a publisher of comments purportedly made by Lake Tahoe Wall of Shame. LACKEY’s entire theory of liability as to SMITH is premised on his false and unsupported assumption that SMITH is doing business as Lake Tahoe Wall of Shame. FAC ¶ 4. SMITH is not doing business as Lake Tahoe Wall of Shame, is not a creator or administrator of Lake Tahoe Wall of Shame’s Facebook page, and is not responsible for the management of content on Lake Tahoe Wall of Shame’s Facebook page. Smith Decl. ¶¶ 2-4. SMITH is not, therefore, responsible for content produced by Lake Tahoe Wall of Shame. LACKEY attempts to avoid this conclusion by feigning ignorance as to the clear meaning of SMITH’s Declaration. Oppo. 5:14-18. LACKEY argues that SMITH’s failure to expressly say that he did not author Lake Tahoe Wall of Shame’s Facebook posts leads the conclusion that he did author them. *Id.* at 16-18. This argument fails for multiple reasons.

First, SMITH has expressly stated that he is not a creator or administrator of Lake Tahoe Wall of Shame’s Facebook page. Smith Decl. ¶ 3. SMITH also expressly stated that he is “not

1 responsible for the management of content” on Lake Tahoe Wall of Shame’s Facebook page. *Id.*
2 at ¶ 4. Taken together, these statements lead to the conclusion that SMITH, who is not an
3 administrator of and has no managerial role as to the content of Lake Tahoe Wall of Shame’s
4 Facebook page, did not publish any comments on behalf of the Lake Tahoe Wall of Shame
5 thereon. Second, LACKEY has failed to produce any evidence to contradict SMITH’s assertions
6 as required under NRCP 56(e). Instead, LACKEY merely states in the Opposition that it is his
7 “position that Defendant Smith and Defendant Lake Tahoe Wall of Shame are one and the same.”
8 Oppo. 5:19-21. The only evidence that LACKEY produces in support of this position is an article
9 that LACKEY alleges indicates that SMITH and Lake Tahoe Wall of Shame “are one and the
10 same” but which actually states that SMITH “rallies bear lovers to trap sites on a website called
11 the Lake Tahoe Wall of Shame.” Oppo. 5:22-6:1; Ex. 3. The “evidence” that LACKEY points
12 to does not establish that SMITH is doing business as or controls any content of Lake Tahoe Wall
13 of Shame. Rather, it merely indicates that SMITH participates in the Lake Tahoe Wall of Shame
14 Facebook page like any other individual or entity that posts comments thereon under their own
15 profile. LACKEY’s unsupported position does not constitute evidence and is certainly
16 insufficient to raise a triable issue of fact as to SMITH’s role, if any, in the Lake Tahoe Wall of
17 Shame Facebook page.

18 **3. Conclusion**

19 With the foregoing in mind, LACKEY has failed to plead facts giving rise to liability for
20 SMITH as it relates to the comments of third parties, including Lake Tahoe Wall of Shame.
21 Additionally, neither the FAC nor the Opposition, including the voluminous unauthenticated
22 exhibits attached thereto, provide a separate basis upon which to impose liability on SMITH.²
23 Neither reference a single comment made by SMITH, which means that SMITH has not published
24

25 ² LACKEY incorrectly asserts that SMITH posted various comments but each comment was actually posted by Lake
Tahoe Wall of Shame.

1 anything at all and cannot be held liable for the following causes of action premised on publication
2 of comments regarding LACKEY: 1) defamation; 2) intentional infliction of emotional distress;
3 and 3) negligent infliction of emotional distress.

4 **B. All Comments Identified by LACKEY, None of Which Are Attributable to SMITH,**
5 **Address a Matter of Public Concern**

6 As an initial matter, because LACKEY has not alleged that SMITH made or is responsible
7 for any comments whatsoever, it is unnecessary for the Court to consider the content of the
8 comments that LACKEY relies upon in ruling on the present Motion to Dismiss. Nonetheless, it
9 is worth noting that LACKEY has completely failed to address the ample case law set forth in the
10 Motion which holds that both wildlife, including bears, and corruption of public officials are
11 expressly matters of public concern. Mot. 4:14-18:5. LACKEY's failure to address this case law
12 is a clear indication that he concedes that these matters are matters of public concern.

13 **C. LACKEY Apparently Concedes that He is a Public Figure, Thereby Requiring that**
14 **He Plead and Prove Actual Malice, Not Mere Negligence, as LACKEY Incorrectly**
15 **Asserts**

16 LACKEY fails to address his status as a public figure or limited purpose public figure and
17 in so doing appears to concede that he is, in fact, a public figure or limited purpose public figure.
18 Accordingly, in order to survive the present Motion, LACKEY must present *prima facie* evidence
19 that SMITH acted with "actual malice." *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 719,
20 547 P.3d 82, 90 (2002). Instead, without citation to any evidence whatsoever, LACKEY
21 ironically alleges that there is "no evidence" to support the comments purportedly made by BEAR
22 LEAGUE and other third parties. This is not the appropriate standard. A finding of actual malice
23 requires "clear and convincing proof that the defamatory falsehood was made with knowledge of
24 its falsity or with reckless disregard for the truth." *Gertz v. Welch*, 418 U.S. 323, 342 (1974).
25 LACKEY has not even alleged and certainly has not proven with *prima facie* evidence, as will be

1 addressed further below, that SMITH acted with actual malice. LACKEY has not set forth any
2 facts evidencing that SMITH acted with either knowledge that statements were false or with
3 reckless disregard for the truth of statements. In fact, again, LACKEY has not alleged that
4 SMITH made any statements at all.

5 **D. Whether the First Amendment Protects Communications that Violate the Federal**
6 **Stalking Statutes is Irrelevant Because No Comments Violating the Federal Stalking**
7 **Statutes are Attributed to SMITH**

8 As addressed *ad nauseam* above, SMITH has not made and is not responsible for any
9 statements concerning LACKEY. *Infra*, II(A). Accordingly, SMITH is not liable for any
10 comments that purportedly violate 18 U.S.C. § 2261A, and whether the First Amendment protects
11 comments violative of 18 U.S.C. § 2261A is completely irrelevant.

12 **E. LACKEY Has Not Submitted Any Evidence or Pled Sufficient Facts to Prevail on**
13 **His Claims**

14 The Motion is both a Special Motion to Dismiss under Nevada’s Anti-SLAPP statutes and
15 a Motion to Dismiss under NRCP 12(b)(5). LACKEY fails to survive each motion under the
16 relevant standards for each.

17 **1. Anti-SLAPP**

18 Nevada's Anti-SLAPP (Strategic Lawsuits Against Public Participation) statutes, NRS
19 41.635, et seq., permits a defendant to file a special motion to dismiss if the defendant can show
20 “by a preponderance of the evidence, that the claim is based upon a good faith communication in
21 furtherance of the right to petition or the right to free speech in direct connection with an issue of
22 public concern.” NRS 41.660(3)(a). A good faith communication is defined as any
23 “[c]ommunication made in direct connection with an issue of public interest in a place open to
24 the public or in a public forum, which is truthful or is made without knowledge of its falsehood.”
25 NRS 41.637(4). A special motion to dismiss under the Anti-SLAPP statutes is treated as a motion

1 for summary judgment. NRS 41.660(3)(a). To avoid summary judgment, once the defendant
2 makes this initial showing, the nonmoving party may not “rest upon the mere allegations or
3 denials of the [nonmoving party’s] pleading, but the [nonmoving party’s] response, by affidavits
4 or otherwise . . . must set forth specific facts showing that there is a genuine issue for trial.” NRCP
5 56(e). Put another way, once the moving party has met its burden, the burden shifts to the plaintiff
6 to show “with *prima facie* evidence a probability of prevailing on the claim.” NRS 41.660(3)(b).
7 *See Shapiro v. Welt*, No. 37636, No. 67596, 2017 Nev. LEXIS 1, at *7, 389 P.3d 262, 267 (2017).

8 There is no doubt that SMITH has shown by a preponderance of the evidence that
9 LACKEY’s claims, which are premised entirely on comments that are not attributable to SMITH
10 in any event, are “based upon a good faith communication in furtherance of the right to petition
11 or the right to free speech in direct connection with an issue of public concern.” SMITH has
12 provided ample case law to evidence that both wildlife and bribery of public officials are matters
13 of public concern. Mot. 4:14-18:5. Additionally, because SMITH has not made any statements
14 whatsoever, he has clearly established that no statements were made with actual malice as
15 required in order to be actionable due to LACKEY’s status as a public figure. Because SMITH
16 has met his initial burden, in order to survive the Anti-SLAPP Motion, LACKEY “by affidavits
17 or otherwise . . . must set forth specific facts showing that there is a genuine issue for trial.”

18 LACKEY has not set forth any evidence to meet his burden. LACKEY has not provided
19 any affidavits or other evidence showing that the statements made about him, which, again, are
20 not attributable to SMITH, are even false and he has certainly not set forth any evidence showing
21 that any statements were made with actual malice. Instead, LACKEY rests on the allegations set
22 forth in the FAC and the Opposition, which he is expressly prohibited from doing under NRCP
23 56(e). The statements of LACKEY’s counsel as set forth in the FAC and Opposition are not
24 evidence. *Jain v. McFarland*, 109 Nev. 465, 475-76, 851 P.2d 450, 457 (1993). LACKEY has
25 wholly failed to meet his burden to survive the Anti-SLAPP Motion and the FAC should,

1 therefore, be dismissed in its entirety as to SMITH.

2 **2. NRCP 12(b)(5)**

3 A claim should be dismissed under NRCP 12(b)(5) where plaintiff is “not entitled to relief
4 under any set of facts which could be proved in support of the claim.” *Hale v. Burkhardt*, 104
5 Nev. 632, 636, 764 P.2d 866, 868 (1988). Dismissal under NRCP 12(b)(5) is proper where the
6 non-moving party has pled insufficient facts to establish each element of a claim for relief.
7 *Stockmeier v. Nev. Dep’t of Corr. Psychological Review Panel*, 124 Nev. 313, 316, 183 P.3d 133,
8 135 (2008) (per curiam).

9 **a. Defamation-Based Claims (Claims One through Three)**

10 Causes of action one (1) through three (3) are premised on SMITH’s purportedly
11 defamatory comments about LACKEY. Compl. 8:1-9:27. In order to prevail on a claim for
12 defamation, whether in the form of slander or libel, a plaintiff must plead and prove: “(1) a false
13 and defamatory statement by defendant concerning the plaintiff; (2) an unprivileged publication
14 to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages.”
15 *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 481-82, 851 P.2d 459, 462 (1993) (citing Restatement
16 (Second) of Torts, § 558 (1977)). LACKEY has failed, either by way of the FAC or by way of
17 his Opposition to the Motion, which is a generous second bite at the apple, to allege that SMITH
18 himself made any comments or that SMITH is responsible for the comments of any third parties.

19 Additionally, it is clear that none of the posts attributed to Lake Tahoe Wall of Shame
20 constitute defamation. After scouring various Facebook pages in an effort to bolster the
21 unmeritorious FAC as to SMITH, LACKEY has turned up empty. Instead, he asks the Court to
22 rely on various third-party posts, which are not attributable to SMITH, including posts by Lake
23 Tahoe Wall of Shame itself. *See generally*, Oppo. The newly discovered Lake Tahoe Wall of
24 Shame posts are as follows:

25 1. “we Must rid Nevada of this monster who lives and is paid to kill bears” (May

21, 2013);

2. “We’ve found that reporting bad acts by NDOW employees never results in action. But exposing them to public scrutiny get the attention of senior NDOW management and sometimes even Governor Sandoval’s office. This is one of the core reasons that the Wall of Shame was created.” (date unknown)
3. Various posts on the Lake Tahoe Wall of Shame Facebook page to “feel free to share” reposted photos, to “please share your thoughts [as to the reposted photos] on the NDOW Facebook page,” and that “it is actually more effective if you and others send [the reposted photos] to the Governor, Senate, etc.,” (2013)³
4. . . . [I]n fact the profiler wants to hear feedback from people who know him better so that the profile can be improved. There is zero chance Lackey will submit to a proper psych interview so this is the only reasonable way a profile can be done; understanding what makes him tick should help us interact with him. Those of us who know him well see a lot of truth in this profile, as the post from The BEAR League attests. So while you might call it a crock, those of us that must work with or around him are finding it both accurate and helpful.” (unknown date).

Oppo. 3:18-19, Ex. 6, Ex. 7, Ex. 10. For the reasons set forth below, these statements do not constitute defamation.

The post identified as No. 1 above, contains only opinion and undeniable fact. “As a general rule, only assertions of fact, not opinion, can be defamatory.” 2014 Nev. Dist. LEXIS 662, *7 (2014). “In applying the totality of the circumstances test for determining whether a published statement constitutes an “opinion,” the court seeks to determine whether the allegedly defamatory statements are objectively capable of proof or disproof, for a reader cannot rationally view an unverifiable statement as conveying actual facts.” 50 Am. Jur. 2d Libel and Slander § 163. LACKEY is clearly not a literal monster. Rather, the term “monster” has been used by Lake Tahoe Wall of Shame, not SMITH, as a way of providing its opinion as to LACKEY. There is no question that whether someone is a “monster” cannot be verified. As a result, the use of the word “monster” to describe someone constitutes an opinion that cannot form the basis of a defamation claim. Given that LACKEY himself concedes that he is, in fact, paid to kill bears,

³ While no date was provided, it is evident from page 2 of the exhibit relied on (Exhibit 7) that these posts were made in 2013. Specifically, page 2 advertises an event that is to occur on Monday, May 20th. The last time that May 20th fell on a Monday was 2013, which fact is judicially noticeable. NRS 41.730.

1 statement No. 1 is not, as a matter of law, defamatory.

2 Statement Nos. 2 and 3 similarly fall far short of defamation. Both statements merely
3 encourage visitors of the Lake Tahoe Wall of Shame Facebook page to review the photos that
4 were reposted from another source to determine if they believe the content is worthy of reporting
5 to NDOW or another governmental authority. These comments do not contain false statements
6 and could not possibly damage LACKEY, both necessary elements of defamation. Rather, to the
7 extent that the content of the photos, which were posted by LACKEY in the first place, result in
8 members of the public reporting LACKEY's behavior, LACKEY has only himself to thank.
9 LACKEY's assertion that Lake Tahoe Wall of Shame's posts encouraging citizens to participate
10 in seeking governmental redress constitutes defamation is particularly troubling given that this
11 argument has been raised in response to an Anti-SLAPP Motion the very purpose of which is to
12 prevent unmeritorious complaints from interfering with free speech.

13 The only possible statement that could form the basis of a defamation claim in statement
14 No. 4 above, is the statement that "[t]here is zero chance that Lackey will submit to a proper psych
15 interview." The remainder of statement No. 4 does not contain anything else even close to
16 resembling a fact and instead contains merely opinion. LACKEY has not provided any evidence
17 that the aforementioned statement is false and cannot possibly allege or prove that such a
18 statement caused him damages. Accordingly, statement No. 4 does not constitute defamation.

19 As LACKEY has not alleged any publication by SMITH whatsoever and has also failed
20 to plead any defamatory statements, LACKEY has failed to plead sufficient facts to state a claim
21 for defamation and has also failed to plead facts to support claims for intentional or negligent
22 infliction of emotional distress based on any purported publication (the first through third causes
23 of action).

24 **b. Civil Conspiracy (Claim Four)**

25 Actionable civil conspiracy "consists of a combination of two or more persons who, by

1 some concerted action, intend to accomplish an unlawful objective for the purpose of harming
2 another, and damage results from the act or acts.” *Consol. Generator-Nevada v. Cummins*
3 *Engine Co.* (1998) 114 Nev. 1304, 1311, 971 P.2d 1251, 1256 (citations omitted). LACKEY has
4 not alleged any unlawful objective or any damage, as required. As set forth in the presently
5 pending Anti-SLAPP motions filed by all defendants in this matter, LACKEY has failed to allege
6 any defamatory objective or conduct by any party, and certainly not by two or more parties.
7 LACKEY has also failed to allege any resulting damage and fails to set forth specifically what
8 purported conspiratorial conduct SMITH engaged in. For these reasons, LACKEY has also failed
9 to allege sufficient facts to state a cause of action against SMITH for civil conspiracy.

10 **3. Statute of Limitations**

11 Equally damning to LACKEY under either of the aforementioned standards is the fact that
12 the statute of limitations has run on his purported claims. The statute of limitation to bring a claim
13 for defamation is two (2) years. NRS 11.190(4). “The general rule concerning statute of
14 limitation is that a cause of action accrues when the wrong occurs and a party sustains injuries for
15 which relief could be sought.” *Petersen v. Bruen*, 106 Nev. 271, 274, 792 P.2d 18, 20 (1990).
16 Where a party is alleging defamation *per se*, the purported defamation is actionable even without
17 proof of damages. *Pope v. Motel 6*, 121 Nev. 307, 315, 114 P.3d 277, 282 (2005). Accordingly,
18 where a party is alleging defamation *per se*, the cause of action accrues at the moment the
19 purportedly defaming comments are made.

20 Here, LACKEY is alleging defamation *per se*. Oppo. 17:3-5. Accordingly, such
21 purported defamation was actionable for two (2) years from its occurrence. LACKEY failed to
22 produce any evidence, either in the FAC or in the Opposition, to show that the Complaint was
23 brought within the requisite statute of limitations. *See generally*, FAC, Oppo. Instead, LACKEY,
24 merely attaches what appear to be several unauthenticated and undated screenshots to the
25 Opposition. *See generally*, Oppo. LACKEY does admit that one post from Lake Tahoe Wall of

1 Shame was made on May 21, 2013, it can be deduced that another was also made in 2013, and
2 the remaining posts have unknown posting dates according to LACKEY. Oppo. 3:18-19, Ex. 6,
3 Ex. 7. *Infra*, n. 3. Put another way, two of the three comments that LACKEY relies on cannot
4 form the basis of his allegations against SMITH because the statute of limitations has run on them
5 and LACKEY cannot identify when the third and fourth comments were made. Absent an
6 indication of when these purportedly defamatory posts were made on Facebook, LACKEY has
7 not shown a likelihood of prevailing on the merits under Anti-SLAPP and has also failed to plead
8 sufficient facts to state a claim under NRCP 12(b)(5). For this additional reason, dismissal of the
9 FAC with prejudice is warranted.

10 III. CONCLUSION

11 LACKEY has utterly failed to respond to the case law and fact analyses set forth in the
12 Motion, instead relying solely on legal conclusions with no factual basis whatsoever. LACKEY's
13 failure to address the arguments set forth in the Motion, including SMITH's lack of liability due
14 to the fact that he did not make and is not otherwise responsible for any comments about
15 LACKEY, is damning for LACKEY and warrants dismissal of the FAC in its entirety, with
16 prejudice. Given the clear frivolity and harassing nature of the FAC, and LACKEY's baseless
17 Opposition to the Motion, SMITH reasserts his request for attorney's fees under NRS 41.670.

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25 ///

IV. AFFIRMATION

The undersigned does hereby affirm that the preceding document does not contain the personal information of any person.

Dated: July 3, 2017

MOLSBY & BORDNER, LLP


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MARK SMITH, an individual

CERTIFICATE OF SERVICE

I am employed in the City of Reno, County of Washoe, State of Nevada by the law offices of MOLSBY & BORDNER, LLP. My business address is 6380 Mae Anne Avenue, Suite 7, Reno, Nevada 89523. I am over the age of 18 years and not a party to this action. On July 3, 2017, I served the following document: **REPLY TO OPPOSITION TO SPECIAL MOTION TO DISMISS/MOTION TO DISMISS** in the manner described below:

	BY FAX: by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
	BY HAND: by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
	BY MAIL: by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Reno, Nevada addressed as set forth below.
	BY OVERNIGHT MAIL: by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.
	BY PERSONAL DELIVERY: by causing personal delivery via courier of the document(s) listed above to the person(s) at the address(es) set forth below.
X	BY ECF FILING: by causing the document(s) to be electronically served via the court's electronic filing system to the following attorneys associated with this case.

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I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

/s/ *Melissa M. Paschal*

Melissa M. Paschal, CP

2645

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Attorneys for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

CARL LACKEY,

Plaintiff,

vs.

Case No.: CV17-00434

Dept. No.:4

BEAR LEAGUE, a California Corporation,
ANNE BRYANT, an individual, MARK E.
SMITH, an individual dba LAKE TAHOE
WALL OF SHAME, CAROLYN STARK, an
individual dba NDOW WATCH KEEPING
THEM TRANSPARENT and DOES 1-20,
INCLUSIVE,

Defendants.

**PLAINTIFF CARL LACKEY'S SUPPLEMENT TO OPPOSITION TO DEFENDANT
MARK E. SMITH'S SPECIAL MOTION TO DISMISS/MOTION TO DISMISS**

Plaintiff Carl Lackey hereby supplements *Plaintiff Carl Lackey's Opposition to Defendant Mark E. Smith's Special Motion to Dismiss/Motion to Dismiss*. In the Declaration of Mark E. Smith in Support of Special Motion to Dismiss/Motion to Dismiss, Mr. Smith declares that he is not "the creator nor an administrator for LAKE TAHOE WALL OF SHAME's Facebook

1 page” and has no responsibility “for the management of content on the LAKE TAHOE WAL OF
2 SHAME Facebook page.” (*Id.* at 2:6-9.) Unfortunately, Plaintiff has not had the opportunity to
3 conduct discovery to test the veracity of these declarations. Since filing his Opposition, Plaintiff
4 has discovered various articles on the internet that refute or, at the very least, place the question of
5 Mr. Smith’s ownership, operation and ability to control the content of the LAKE TAHOE WALL
6 OF SHAME in dispute. Attached hereto as Exhibit 12 are various articles and internet posting
7 Plaintiff recently discovered.

8 For instance, in a Tahoe Daily Tribune article dated June 3, 2013, it notes that “the Lake
9 Tahoe Wall of Shame was founded in 2011 as a forum for open, uncensored dialog, **site**
10 **spokesman Mark Smith** said in a previous article.” (Emphasis added.) Likewise, a July 27, 2013
11 article posted at laketahoenews.net and apparently on Kolo-TV notes “‘Tahoe Wall of Shame’
12 **administrator Mark Smith** says . . .” (Emphasis added.) In a September 4, 2011 article written
13 by the Associated Press, it notes that various Incline Village residents are taking pictures of people
14 who mismanage their garbage and post “the offenders’ names on a Facebook page called the ‘Lake
15 Tahoe Wall of Shame.’” It then goes on to notes that Mark Smith is the “Group leader” of the
16 residents that are posting the names on the Lake Tahoe Wall of Shame. On the nobearhuntnv.org
17 site it provides a number of bear photographs. At the bottom of the photograph page it states:

18 Most of the bear photos on our site have been donated by Mark Smith, founder of
19 the Mark E. Smith foundation and **co-founder of the Facebook page, Lake Tahoe**
20 **Wall of shame.** To learn of Tahoe wide efforts to improve human behavior and
21 discourage human/bear conflict, please visit Mark’s page at
<http://www.facebook.com/tbwallofshame>. (Emphasis added.)

22 Finally, posted on Lake Tahoe Wall of Shame’s Facebook page on May 18, 2013 is a
23 picture of a bear with a caption “Photo taken in Incline Village, May 18th, © 2013 Mark E. Smith,
24 all rights reserved. This posting confirms the statement quoted above from the nobearhuntnv.org
25 site. The posting was previously marked as part of Exhibit 3 to *Plaintiff Carl Lackey’s Opposition*
26 *to Defendant Mark E. Smith’s Special Motion to Dismiss/Motion to Dismiss.*

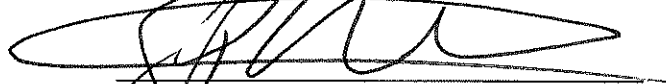
1 The foregoing, along with the evidence previously cited to in Plaintiff's Opposition, at the
2 very least, create a disputed issue of material fact as to whether Mark E. Smith managed or
3 manages the content of the LAKE TAHOE WALL OF SHAME Facebook page and was the
4 administrator and/or creator of the page.

5 **AFFIRMATION**

6 The undersigned hereby affirms that the preceding document does not contain the social
7 security number of any person.

8 **DATED** this 26th day of July, 2017.

9 **ROSE LAW OFFICE**

10 

11 SEAN P. ROSE, ESQ.

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22 Attorneys for Plaintiff

LIST OF EXHIBITS

Exhibit

Description

Pages

12

Various Articles and Internet Posting Regarding Mark E. Smith's
Relationship to Lake Tahoe Wall of Shame Facebook page

6

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Rose Law Office and
3 that on the date indicated below, I served a true copy of the foregoing *Plaintiff Carl Lackey's*
4 *Supplement to Opposition to Defendant Mark E. Smith's Special Motion to Dismiss/Motion to*
5 *Dismiss*, on the party(s) set forth below by:

6 _____ Placing an original or true copy thereof in a sealed envelope, postage prepaid
7 for collection and mailing in the United States Mail, at Reno, Nevada

8 _____ Hand Delivery

9 _____ Facsimile

10 Y _____ All parties signed up for electronic filing have been served electronically, all
11 others have been served by placing a true copy thereof in a sealed envelope
12 for collection and mailing in the United States mail, at Reno, Nevada, postage
13 prepaid, following ordinary business practices

14 addressed as follows:

15 Del Hardy, Esq.
16 Stephanie Rice, Esq.
17 Winter Street Law Group
18 96 & 98 Winter Street
19 Reno, NV 89503

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21 Durney & Brennan, Ltd.
22 6900 S. McCarran Blvd. Suite 2060
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24 Cameron D. Bordner, Esq.
25 Law Offices of Molsby & Bordner, LLP
26 6380 Mae Anne Ave., Unit 7
27 Reno, NV 89523

28 DATED this 26th day of July, 2017

Collette Zahniser
Collette Zahniser

EXHIBIT 12

EXHIBIT 12

Bear death, traps ignite controversy

by Axle Navas anavas@tahoe-dailytribune.com

June 3, 2013

Some Lake Tahoe Basin residents equate euthanizing a black bear to murder. For Nevada Department of Wildlife officials, it's an unavoidable part of the job.

The Lake Tahoe Wall of Shame, a Facebook page dedicated to bear awareness, targeted NDOW Biologist Carl Lackey after he killed a black bear May 17 that had entered an elderly woman's home. Some comments — posted both by anonymous and identified users — called for the department to fire Lackey while others threatened the biologist. It was enough to raise a red flag at NDOW.

"We're concerned that when we carry out what is ultimately our mission, our people are subject to over-the-line criticism," NDOW spokesman Chris Healy said. "We're extremely disturbed the public debate has gotten to this point. It's extremely disappointing and could lead to potential danger. I hope they're not using this forum to manipulate people into taking violent action."

The Lake Tahoe Wall of Shame was founded in 2011 as a forum for open, uncensored dialog, site spokesman Mark Smith said in a previous article. But threats aimed at the alleged shooter of another bear killed last fall forced administrators to change that policy. In that instance, Smith blocked some of the worst offenders from posting on the page.

When Smith learned that NDOW contacted law enforcement about the recent postings, he removed an anonymous profile of Lackey from the page's wall, but maintained that NDOW exaggerated the threats and the danger.

"I consider it an abuse of power and a violation of federal law ... for NDOW agents to invent 'threats' to manipulate public opinion. If they did receive a threat via telephone or Facebook it should be easy enough for them to identify the source. I suspect this will go nowhere because they, once again, invented this threat," Smith wrote in a Facebook message last week.

ONE STRIKE

Shortly before midnight May 16, a 3-year-old male black bear entered the home of a 92-year-old Incline Village resident.

The animal — named "Cloud" by locals — was a first-offender. The department typically follows a three-strike policy for nuisance bears, but in this case the animal was deemed dangerous because it broke into a house. As soon as Lackey heard the bear was inside, he knew he was going to kill it.

"A 300- to 400-pound bear doesn't belong in someone's home. That bear is going to continue that activity. If it were to injure someone, NDOW is on the line," Lackey said.

Lackey arrived at Incline Village around 12:35 a.m. Friday. He darted the bear as it attempted to exit the second-story window, and, after the animal climbed down the house, he freed it with his Karelian bear dog. The bear fell from the tree when the tranquilizer took effect — it was uninjured, Lackey said — at which point he shot the bear.

"People wonder why we can't relocate bears. I'm not going to relocate a bear that's broken into someone's home," he said.

LACKEY ARGUES THAT TRANSLOCATING A BEAR SETS NDOW UP FOR A POTENTIAL LAWSUIT AND HASN'T PROVEN EFFECTIVE. THE BEARS HAVE A TENDENCY TO RETURN TO THEIR ORIGINAL STOMPING GROUNDS.

But that doesn't mean wildlife officials kill every bear they deal with. In the past three years, NDOW has captured and released 238 bears for tagging or aversive conditioning purposes and killed 38, according to department statistics.

But it's those 38 deaths that spark the virulent public discourse. A 2010 study published in "Current Directions of Psychological Science" posited a tendency to anthropomorphize — projecting human qualities on objects or animals — leads people to deem nonhumans "worthy of moral care and consideration."

"FOR WILDLIFE PROFESSIONALS, ANTHROPOMORPHISM IS AN ANATHEMA TO THEM. INTERESTINGLY, WILDLIFE FOLKS (NDOW) APPLY EAR TAG NUMBERS TO BEARS WHILE THOSE ON THE OTHER SIDE OF THIS DEBATE APPLY NAMES LIKE 'CLOUD,'" HEALY WROTE IN AN EMAIL.

AVERSIVE CONDITIONING

NDOW set traps this week to capture a bruin and her two cubs that apparently broke into the garage of an Incline Village condominium. In that time, traps have been sprayed with Pine-Sol and at least one posting on the Lake Tahoe Wall of Shame called for people to patrol the traps with dogs to scare the bears away.

According to Healy, the traps were empty as of 3 p.m. Friday and will stay in place through the night. NDOW has no plans to kill the bears at the time, he said. But if the animals break into a home, that would change.

"The plan is to hopefully use aversive conditioning. With this female and the cubs, there's no plan to do them in," he said.

Tahoe Bear League Executive Director Ann Bryant said no Bear League members interfered with the traps, but she knows of people in the North Shore community who are unhappy with the situation and who fear the bears will be killed if captured.


"There's a lot of people in Incline Village who don't like those traps. They're appalled to see them," she said.

People have sabotaged NDOW traps before, according to Lackey. Most traps aren't used to kill bears, he said, but rather to tag them or use aversive conditioning on the animals.

"I've been dealing with this for 17 years, just not to this extent. Social media makes it worse. It's part of the job. I have to deal with people who want all the bears killed and I have to deal with people who think they're cute and cuddly. NDOW is in the middle," Lackey said.

Sierra Sun Editor Kevin MacMillian contributed to this report.

Incline neighbors disagree about problem bears

 laketahoenews.net/2013/07/incline-neighbors-disagree-about-problem-bears/

Published: July 27, 2013

By Kendra Kostecky, KOLO-TV

Controversy remains in an Incline Village neighborhood after a bear and her three cubs were trapped and relocated.

Locals who named the bear Jasper say she was not the intended target.

The young male nuisance bear is suspected of breaking into as many as a dozen home in the area. Some locals are worried it could strike again accidentally injuring dogs or children. They are reluctant to ask the Nevada Department of Wildlife for help removing it, after seeing bear activists harass their neighbor online and around their home.

The victims worked with NDOW, requesting a trap on their property after the aggressive bear began breaking into homes. Activists following the Bear League and the "Lake Tahoe Wall of Shame" Facebook page attempted to talk the homeowners out of working with the state. They say they believe 57 percent of bears that are trapped are killed. Wildlife officials say that's simply not true. They say most bears that are captured are subject to aversion training, which includes dogs and loud noises. The goal is to make the bears afraid of humans so they will stay away.

In this case, when activists were unable to talk the homeowners out of using a trap, they turned to social media. "Tahoe Wall of Shame" administrator Mark Smith says the goal of the page is to catch people who don't manage their trash, or that invite bears in to be killed. The homeowners where the trap was set say they had managed their trash, but their home was posted on the site for cooperating with NDOW. Angry followers targeted the family, who say dozens of nasty emails were sent to one of their employers. In addition, they say they feel intimidated by strangers driving by their home.

While Jasper and her cubs have been relocated, the second bear is still on the loose. Some residents say they're worried about what can happen if they encounter a bear in their home, but they are afraid to ask for help for fear of retaliation from misguided activists.

BREAKING NEWS | Trump bans transgender people in military; Bay Area outraged

News

'Wall of Shame' designed to help bears at Lake Tahoe

By ASSOCIATED PRESS |
September 4, 2011 at 12:42 pm

INCLINE VILLAGE, Nev. — A group of residents is resorting to a new strategy to help reduce the number of bear-human conflicts in their north Lake Tahoe community.

Several Incline Village residents are photographing business Dumpsters that are not properly closed and secured as required by a local ordinance and posting them with the offenders' names on a Facebook page called the "Lake Tahoe Wall of Shame."

There are currently at least 16 such photos of bins with unsecured trash on the page, the North Lake Tahoe Bonanza reported.

Group leader Mark E. Smith said he thinks bear-human conflicts would drop dramatically at Tahoe if businesses were more conscientious about securing their trash.

"The evidence suggests that trash is the primary attractant that leads bears out of the wilderness and, in turn, leads to interactions between humans and bears," he said. "Therefore, our biggest problem is the failure to enforce the trash ordinance."

Residents had similar problems securing trash from bears prior to 2008, when a campaign to strictly enforce the Incline Village General Improvement District's trash ordinance resulted in greater compliance, Smith said.

Smith is asking IVGID to do the same with local businesses, saying they're the culprit in the latest round of bear problems. The wall of shame surfaced after the controversial killing of a nuisance bruin in July that was captured at an Incline Village shopping center.

While many owners are being "very proactive" by complying with the ordinance, uncooperative businesses are being exposed on the wall of shame, Smith said.

"In the vast majority of cases, we are asking people to close the Dumpster and latch it," he said. "It's pretty simple stuff."

IVGID is committed to stepping up enforcement of the trash ordinance in the community, said Joe Pomroy, its director of public works.

"We are working with the businesses to educate them regarding the importance of shutting and latching Dumpsters," Pomroy told the North Lake Tahoe Bonanza. "If that fails, then we will fine them."

Fines are \$100 for a first offense and \$300 for repeat offenses.

SPONSORED CONTENT

4 Walmart Fresh BBQ Recipes to Kick Off Summer Fun

By Walmart ✨

There's nothing like the smell of barbecue wafting across a warm California breeze.

EXCLUSIVE: ARE NEVADA
OFFICIALS HAULING BEARS AWAY
FOR HUNTING?



Survival difficult enough for bear's
without hunt



Please ACT NOW and asks your
friends to do the same



Wildlife officials to conduct review of
state bear hunt

Hacked By Unknown



Letter: Bear hunt beneath dignity of
Nevada sportsman



Bear Advocates Urge Donations
Instead of Hunting Licenses



14 bears killed in Nevada's 3rd bear
hunt

Train People not Bears and We
Humans Can Live in Harmony with
Bears!



Sixteen bears killed in hunt, most thus
far



Welcome To Bear Country Video!



Solutions sought for growing bear
problem in Tahoe area

Lake Tahoe residents, NDOH differ
on bear management after latest
incident



Nevada's fourth season for black bear
hunting starts 9/14/2014



Bear commission isn't an unbiased
group

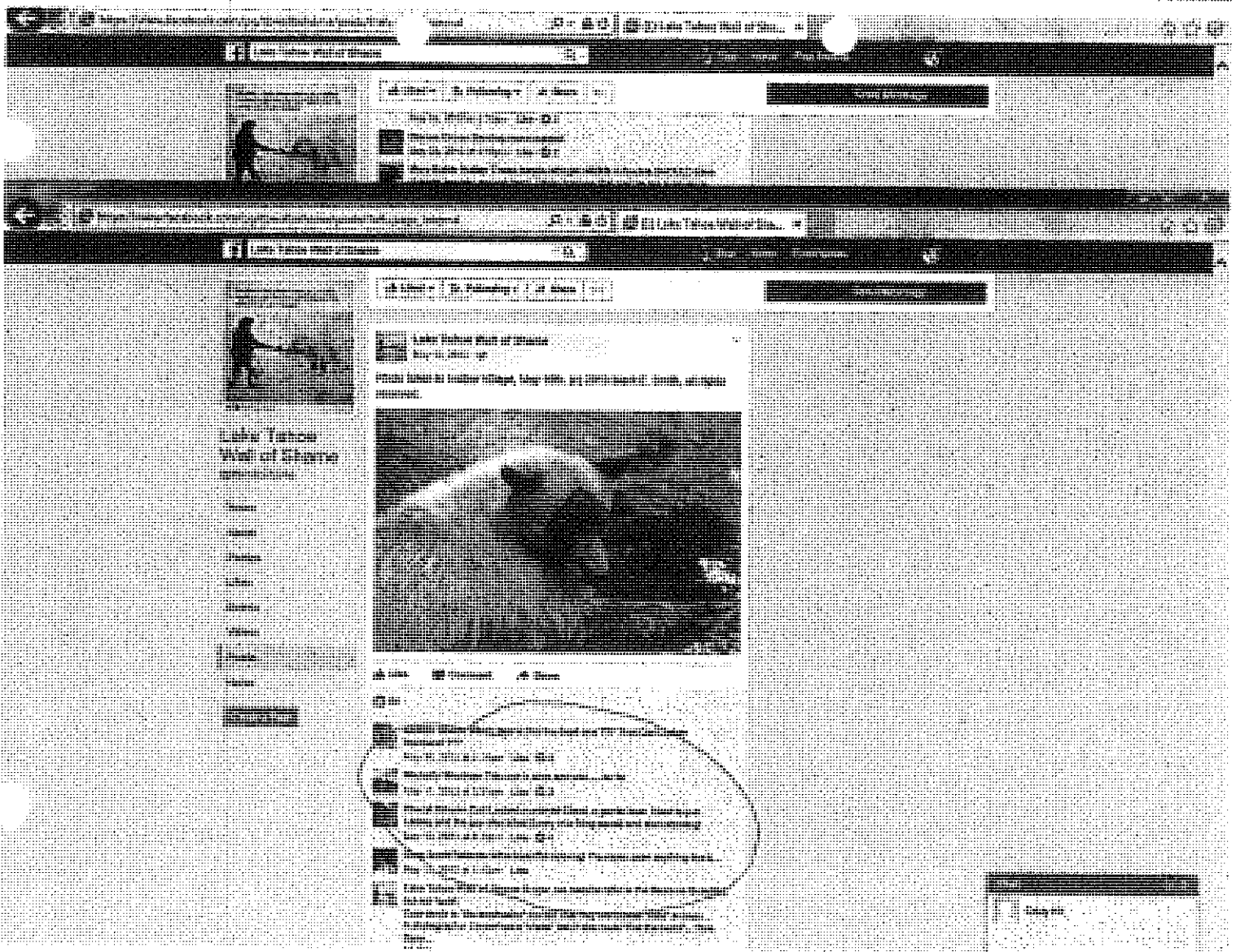


NDOH is subsidizing bear hunt
trapping

A special thanks to one of our favorite
photographers, Dotty Molt, who gave
nobearhuntnv.org permission to use one of
her landscape photos for the background of
our site. [Check out Dotty's beautiful website!](#)

Most of the bear photos on our site have
been donated by Mark Smith, founder of the
Mark E. Smith Foundation and co-founder of
the Facebook Page, Lake Tahoe Wall of
Shame. To learn of Tahoe-wide efforts to
improve human behavior and discourage
human/bear conflict, please visit Mark's page
at [http://www.marksfoundation.org](#)

Powered by
LakeTahoeWallOfShame.org



1 4185

COPY

2 JUDITH ANN SCHONLAU

3 CCR #18

4 75 COURT STREET

5 RENO, NEVADA

6
7 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

8 IN AND FOR THE COUNTY OF WASHOE

9 BEFORE THE HONORABLE CONNIE J. STEINHEIMER, DISTRICT JUDGE

10 -oOo-

11 CARL LACKEY,)

12 Plaintiff,)

13 vs.)

14 BEAR LEAGUE, ET AL,)

15 Defendants.)

CASE NO. CV17-00434

DEPARTMENT NO. 4

16
17 TRANSCRIPT OF PROCEEDINGS

18 ORAL ARGUMENTS

19 WEDNESDAY, JULY 26, 2017, 2:30 P.M.

20 Reno, Nevada

21
22 Reported By: JUDITH ANN SCHONLAU, CCR #18
23 NEVADA-CALIFORNIA CERTIFIED; REGISTERED PROFESSIONAL REPORTER
24 Computer-aided Transcription

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A P P E A R A N C E S

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BY: THOMAS BRENNAN, ESQ. 6900
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RENO,, NEVADA 89509

FOR DEFENDANT CAROLYN WINTER STREET LAW GROUP
STARK: BY: DEL HARDY, ESQ.

96 & 98 WINTER STREET
RENO, NEVADA 89503

FOR DEFENDANTS: ANNE MOLSBY & BORDNER, LLP
BRYANT, MARK E. SMITH BY: CAMERON D. BORDNER, ESQ.
and BEAR LEAGUE ROBIN D. SHOFNER, ESQ.

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1 RENO, NEVADA; WEDNESDAY, JULY 26, 2017; 2:30 P.M.

2 -oOo-

3 THE COURT: Thank you. Please be seated. This is
4 the time set for hearing. Are you ready to proceed?

5 MR. HARDY Yes, Your Honor.

6 MR. BRENNAN: Yes, Your Honor.

7 MS. SHOFNER: Yes, Your Honor

8 THE COURT: Okay. I think we should start with the
9 motion from Carolyn Stark, but we have used a little bit of
10 time. I do have a 4:00 o'clock, so we may have a little
11 shortage of time. If you could confine your argument to
12 fifteen minutes, I would appreciate it.

13 MR. HARDY: Good afternoon, Judge Steinheimer. Del
14 Hardy on behalf of Carolyn Stark. She also has the Facebook
15 page NDOW Watch, Keeping Them Transparent. Your Honor, we
16 brought this motion. As you know, it is an Anti-Slapp motion.
17 I am going to be very brief. You are going to learn, Your
18 Honor, there is absolutely not one allegation in the Complaint
19 or anything they are going to bring before you today that
20 Carolyn Stark committed any defamation whatsoever, not one
21 breath of it. What she's sued for in the Complaint is for some
22 statements other people made on her Facebook page. Those are
23 Paragraphs 14 Q, R, S, U and Y. Out of Paragraph 14 Q, R, S,
24 U and Y, those are all made by other people. We'll, we know

1 that the Communication Decency Act, 47 USC 230(c)(1) protects
2 and immunizes Carolyn Stark. She is not responsible for what
3 somebody else says on her Facebook page.

4 You have been provided the case law about that, the
5 Ebay case, and I know there was a response by other counsel in
6 the most recent 9th Circuit Court of Appeals case. Less now
7 than two months ago that came out. Why is Carolyn Stark even
8 being named here? It is to shut her up so that she doesn't
9 complain about the Nevada Department of Wildlife and the
10 treatment of bears, and about Mr. Lackey and what he does.
11 And that is exactly what Anti-Slapp is to do. It is to
12 overcome these lawsuits. We know the 1992 California
13 legislature was the first to enact an Anti-Slapp statute.
14 They said that because of the number of suits that are coming
15 out here to quiet people, that is why we have Anti-Slapp.
16 Well, Nevada has adopted that. We know under NRS 41.665 they
17 even refer to the California Anti-Slapp. What we also know is
18 that the Perot case tells us we are to look to California law
19 about that. We cited those cases to you.

20 There is absolutely nothing Carolyn Stark has done.
21 She's in the courtroom right now. This is Carolyn Stark, Your
22 Honor. She has done absolutely nothing against Carl Lackey.
23 She hasn't said one breath of defamation against him, not one
24 breath. There is nothing in the Complaint. The gravamen of

1 the Complaint is defamation is the first cause of action.
2 Negligence, emotional distress, civil conspiracy are all based
3 on this alleged defamation. Just because you say she defamed
4 somebody, show us the specific proof. We know our Anti-Slapp
5 statute says you must show proof. Once we come forward and
6 say -- We don't even have to say we have protected speech,
7 because we haven't said anything. She said absolutely
8 nothing.

9 And the other portion of it is the Federal statute
10 immunizes her from anything anybody else said. Although I
11 argue the paragraphs I have just cited to you are protected
12 speech, and I talked about that in the brief, the important
13 thing to remember is Carolyn Stark has not done anything,
14 hasn't said one breath of defamation period.

15 Secondly, she's immune from anything anybody else
16 said on the Facebook page. That is all. Thank you.

17 THE COURT: Do you want to oppose the motions
18 independently?

19 MR. BRENNAN: Your Honor, I will represent to the
20 Court right now we are going to submit this on the briefs. I
21 don't have any argument to make with response to any of this.
22 Once their fifteen minutes is up, I will rely on those.

23 THE COURT: Okay. We will move forward with the next
24 motion which is Anne Bryant.

1 MS. SHOFNER: Good afternoon. Robin Shofner on
2 behalf of Anne Bryant. We also filed a Motion to Dismiss on
3 behalf of Bear League and Mark Smith. For sake of efficiency,
4 I would like to treat the Mark Smith case first. If there is
5 any confusion, I am sure you will let me know.

6 THE COURT: No problem.

7 MS. SHOFNER: So, Your Honor, the rule under
8 Anti-Slapp is simple. First the defendants have to-- The
9 Court has to determine a Complaint is premised on a good faith
10 communication. If that is answered in the affirmative, then
11 the Anti-Slapp motion turns into a Motion for Summary Judgment
12 and the burden is on Plaintiff to establish a prima facie case
13 of the likelihood of prevailing on the merits. Here I think we
14 submitted substantial evidence it is based on good faith
15 communication. Specifically, the statute, NRS 41.637, defines
16 good faith communication as any communication made in direct
17 connection with an issue of public interest in a place open to
18 the public or in a public forum which is truthful or made
19 without knowledge of its falsehoods. The issues discussed in
20 the various cases cited to you by Mr. Lackey in his Complaint
21 and the Opposition to the Motion to Dismiss all relate to
22 matters of public concern, specifically conservation of
23 natural resources, specifically bears. And we cited at least
24 five cases, Your Honor, to establish that constitutes a matter

1 of public concern.

2 Additionally, in some of the posts cited to you are
3 issues of bribery of a public official. We also cited to the
4 Court many cases that stand for the proposition bribery of a
5 public official constitutes a matter of public concern. The
6 posts were all made on Facebook. It is public forum, and they
7 were all made without knowledge of their falsity.

8 Here, just as with Ms. Stark, neither Ms. Bryant nor
9 Mr. Smith have been alleged to make a single defamatory
10 comment whatsoever, none of the posts cited to, not a single
11 one. And we have many, many, many pages referring to any
12 posts by Mark Smith or Anne Bryant. The closest we have is a
13 citation to Lake Tahoe Wall of Shame. Lake Tahoe Wall of
14 Shame, to be honest with you, I scoured the record and looked
15 for any defamatory comments alleged by Lake Tahoe Wall of
16 Shame, and I don't see any that remotely arise to defamation.
17 Not having established that, the burden shifts to Mr. Lackey.
18 He's fallen far short of his burden. Specifically, he's not
19 even submitted a Declaration to this Court to establish the
20 allegations made against him by any party are false. That is
21 the number one thing Mr. Lackey needs to establish. He
22 submitted no evidence to the Court on that issue whatsoever.

23 Secondly, as pointed out previously, the
24 Communication Decency Act insulates Ms. Bryant and Mr. Smith

1 from any comments made on any Facebook page by any other
2 party.

3 Approximately four hours ago or so there was a
4 supplemental submission by the Plaintiff in this case,
5 Mr. Lackey. I would like to take a moment to address that.
6 Has the Court seen that supplemental?

7 THE COURT: I'm sorry?

8 MS. SHOFNER: Has the Court seen the supplemental?

9 THE COURT: I am aware it was filed. Apparently, it
10 went to Department 6, and we got it about 1:30, 2:00 o'clock,
11 so I haven't read it.

12 MS. SHOFNER: I want to address it briefly and kind
13 of characterize what it is. It is a supplemental submission
14 by Mr. Lackey that attempts to equate Mr. Smith with the Lake
15 Tahoe Wall of Shame. But what Plaintiff has failed to note,
16 Lake Tahoe Wall of Shame, itself, has not committed any
17 defamation. They are trying their darndest to equate those to
18 establish their cause or the likelihood of prevailing on the
19 merits on the defamation claim. So, Your Honor will have an
20 opportunity to go over the supplemental submission, and I
21 believe you will find the same.

22 One issue I want to address in the pleadings is
23 Mr. Lackey's status as a public figure. We briefed the matter,
24 so I won't take up much of the Court's time. The bottom line

1 is Mr. Lackey is a government official and that, in and of
2 itself, establishes he's a public official. He's also
3 voluntarily appeared in a national television program for
4 National Geographic. He has appeared for many interviews.
5 He's a spokesman for Pneu-Dart, a tranquilizing company. He
6 wears NDOW clothing. For each of those reasons, he's a public
7 official, and he is held to a higher standard when it relates
8 to defamation. Specifically, he has to plead and prove with
9 clear and convincing evidence actual malice. Mr. Lackey has
10 not put forth a single piece of evidence to establish any
11 words uttered about him by any party were uttered with malice.
12 No evidence whatsoever on that. He hasn't met his Motion for
13 Summary Judgment standard.

14 Your Honor, I believe that is all I have to say as
15 it relates to Anne Bryant and Mark Smith.

16 I would like to take a moment to talk about Bear
17 League. Bear League is a little different. In this case,
18 there are allegations by Mr. Lackey that Bear League, itself,
19 participated in what Mr. Lackey refers to as inflammatory
20 comments. Several of those comments dated from 2013 and,
21 therefore, are not actionable in and of themselves. For
22 instance, there is a post which is Exhibit 1 to Mr. Lackey's
23 Opposition that is dated May 21st, 2013. I also have a clear
24 copy of that, Your Honor. I know it was a little bit difficult

1 to read, but it was the same post if the Court wants a copy.

2 THE COURT: I think I can read it.

3 MS. SHOFNER: Your Honor is doing better than I am
4 then. Then there are comments related to Mr. Lackey's
5 deceased wife. That is marked as Exhibit 6. Those are also
6 from 2013, again, not actionable given the two-year Statute of
7 Limitations. So any comments made by Bear League that fall
8 within the Statute of Limitations, which we submitted a
9 Declaration by Anne Bryant showing that any comments by Bear
10 League about Mr. Lackey were made while under the impression
11 they were true. And, again, Mr. Lackey has not submitted any
12 evidence to show they were not true, not a Declaration, not an
13 article, nothing. So, again, as it relates to Bear League who
14 is making a good faith communication without knowledge of
15 their falsity, Mr. Lackey wholly failed to submit any evidence
16 he's likely to prevail on those claims.

17 For this reason, we ask the Motion, the Anti-Slapp
18 Motion to Dismiss be granted as to Bear League as well.

19 THE COURT: Which exhibits did you bring copies of?

20 MS. SHOFNER: I have a copy. I thought Exhibit 6 was
21 a little bit easier to read. Your Honor, on that one, I would
22 like to note the time stamp in the bottom right corner. When
23 you print something on your computer, it puts the time stamp.
24 That is Exhibit 6 bottom right-hand corner.

1 THE COURT: That is what is hard to read, is that
2 what you are saying?

3 MS. SHOFNER: It may be somewhat hard to read, but
4 it is absolutely from 2013. Let me grab my copy and see if it
5 is a little bit easier to read.

6 THE COURT: I just enlarged it.

7 MS. SHOFNER: Perfect.

8 THE COURT: It is fine. 5-23-2013.

9 MS. SHOFNER: Yes, Exhibit 6. Exhibit 1, which has
10 this picture of an adorable bear on it, is dated May 21st,
11 2013. It is a little faint. I have a copy of that if that
12 will make it a little bit easier to read.

13 THE COURT: On what page was the date?

14 MS. SHOFNER: The date, if I can show Your Honor,
15 right here, right above the picture of the bear. Then I can
16 hand this to you as well. They were a little fuzzy when they
17 got copied so many times.

18 THE COURT: I just want to see if I get it. Okay.
19 It says May 21, 2013.

20 MS. SHOFNER: That means, at least as it relates to
21 Exhibit 1 and Exhibit 6, you know, it is our opinion, Your
22 Honor, Bear Leagues' opinion it is not really worthy of the
23 Court's consideration to look over those comments. They
24 clearly fall outside the relevant Statute of Limitations,

1 especially as it relates to Exhibit 6 which we can see
2 Mr. Lackey, at least someone on his behalf printed it out in
3 2013.

4 THE COURT: Okay.

5 MS. SHOFNER: As to the remaining posts by Bear
6 League, as I indicated previously, Anne Bryant and Mark Smith
7 in particular, those comments were made under the belief they
8 were true, verified by multiple stories.

9 Based on all of the foregoing, Your Honor, we
10 believe it is evident we established a good faith
11 communication, and Mr. Lackey has fallen far short of his
12 burden to establish with prima facie evidence he's likely to
13 prevail on the merits. All he submitted to this Court were
14 various Facebook posts, none of which establish malice, none
15 of which indicate that these specific defendants made the
16 comments. And for each of those reasons, we believe the
17 Motion to Dismiss should be granted. We also believe,
18 regardless whether the Anti-Slapp Motion is granted, under
19 12(b)(5), failure to allege Ms. Bryant and Mr. Smith made any
20 comments whatsoever certainly warrants dismissal.

21 So I want to take a moment to remind the Court of
22 the ability to award attorney's fees in Anti-Slapp. We
23 believe, given Mr. Lackey's failure to even rebut the legal
24 allegations in the Opposition, such an award of fees is

1 particularly warranted here. Bear League, Anne Bryant, Mark
2 Smith and I am sure Carolyn Stark have incurred a lot of fees
3 to defend a suit that is clearly frivolous. Mr. Lackey has
4 not made any effort to establish that any comments were made
5 by any of these people. We would like to just, again, renew
6 our request for attorney's fees. On that, we submit.

7 THE COURT: Okay. Thank you. You don't have
8 anything, Mr. Brennan?

9 MR. BRENNAN: Your Honor, excuse me, no. I just urge
10 the Court to read our briefs thoroughly, and I know you will.
11 We'll submit it on that.

12 THE COURT: Okay. You all were delayed starting
13 today because of some settlement negotiations. How close are
14 you to resolving the case?

15 MR. HARDY: We are not at all, Your Honor.

16 MR. BRENNAN: With regard to Mr. Hardy's client, we
17 are not at all. I don't know with regard to -- We are close
18 with regard to Bear League, and maybe not quite so close with
19 regard to Mr. Smith. I don't honestly know whether it is worth
20 pursuing, but the gentlemen I know and lady I know that
21 represent these people, we certainly will continue to talk.

22 THE COURT: Okay. All right. I am going to take your
23 arguments into consideration. You didn't give me a lot more
24 than you gave me in writing, but we certainly have the

1 opportunity this way, and so I am going to take it under
2 submission, and I will rule on it. If you all reach a
3 resolution, please notify us immediately. It is going to take
4 a little bit of time. So we will be working on it in the
5 meantime. If there is nothing further for today, Court's in
6 recess.

7 (Whereupon, the proceedings were concluded.)

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1 STATE OF NEVADA,)
2) ss.
3 COUNTY OF WASHOE.)

4 I, Judith Anne Schonlau, Official Reporter of the
5 Second Judicial District Court of the State of Nevada, in and
6 for the County of Washoe, DO HEREBY CERTIFY:

7 That as such reporter I was present in Department
8 No. 4 of the above-entitled court on Wednesday, July 26, 2017,
9 at the hour of 2:30 p.m. of said day and that I then and there
10 took verbatim stenotype notes of the proceedings had in the
11 matter of CARL LACKEY vs. BEAR LEAGUE, ET AL, Case Number
12 CV17-00434.

13 That the foregoing transcript, consisting of pages
14 numbered 1-15 inclusive, is a full, true and correct
15 transcription of my said stenotypy notes, so taken as
16 aforesaid, and is a full, true and correct statement of the
17 proceedings had and testimony given upon the trial of the
18 above-entitled action to the best of my knowledge, skill and
19 ability.

20 DATED: At Reno, Nevada this 27th day of July, 2017.

21
22 /s/ Judith Anne Schonlau
23 JUDITH Anne SCHONLAU CSR #18
24

CASE NO. CV17-00434

**TITLE: CARL LACKEY VS. BEAR LEAGUE, ANNE
BRYANT, CAROLYN STARK, individually and as d.b.a.
NDOW WATCH KEEPING THEM TRANSPARENT, and
MARK SMITH, individually and as d.b.a. LAKE TAHOE
WALL OF SHAME**

**DATE, JUDGE
OFFICERS OF**

COURT PRESENT

APPEARANCES-HEARING

CONT'D TO

7/26/17

ORAL ARGUMENTS ON MOTIONS TO DISMISS

HONORABLE

CONNIE

STEINHEIMER

DEPT. NO.4

M. Stone

(Clerk)

J. Schonlau

(Reporter)

Thomas Brennan, Esq., represented the Plaintiff. Cameron Bordner, Esq., and Robin Shofner, Esq., represented the Defendants Bear League, Anne Bryant, and Mark Smith, individually and as d.b.a Lake Tahoe Wall of Shame. Del Hardy, Esq., represented Defendant Carolyn Stark, individually and as d.b.a. NDOW Watch Keeping Them Transparent.

Counsel advised the Court that despite the delay in the start of this hearing, counsel were unable to settle this matter but settlement discussions are ongoing between the Plaintiff and Defendants Smith, Bryant and Bear League.

Defendant Stark's Motion to Dismiss by counsel Hardy; presented argument.

Defendants Bryant and Smith's Motion to Dismiss by counsel Shofner; presented argument.

Defendant Bear League's Motion to Dismiss by counsel Shofner; presented argument.

Counsel Brennan submitted all Motions on the pleadings.

COURT took all Motions to Dismiss under advisement. Should any settlement be reached between any of the parties, counsel must notify the Court immediately.

Court recessed.

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

CARL LACKEY,

Plaintiff,

v.

BEAR LEAGUE, a California Corporation,
ANNE BRYANT, an individual, MARK E.
SMITH, an individual dba LAKE TAHOE
WALL OF SHAME, CAROLYN STARK,
individual dba NDOW WATCH KEEPING
THEM TRANSPARENT, and DOES 1-20
Inclusive.

Defendants.

Case No. CV17-00434

Dept. No.: 4

**ORDER REGARDING MARK E. SMITH'S SPECIAL MOTION TO DISMISS/MOTION
TO DISMISS**

On March 31, 2017, Carl Lackey (hereinafter "Lackey") filed a *First Amended Complaint* (hereinafter "FAC"), by and through his undersigned counsel, Sean Rose, Esq. of the Rose Law Office and Thomas R. Brennan, Esq. of Durney & Brennan, Ltd., against Bear League, a California Corporation, Anne Bryant (hereinafter "Bryant", an individual, Mark E. Smith (hereinafter "Smith"), an individual dba Lake Tahoe Wall of Shame, Carolyn Stark (hereinafter "Stark") an individual dba NDOW Watch Keeping Them Transparent (hereinafter "NDOW WATCH"), and DOES defendants. The FAC sets forth four claims against all Defendants: Defamation, Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, and Civil Conspiracy. On June 5, 2017, Smith, by and through his counsel Cameron D. Bordner, Esq., and Robin D. Shofner, Esq., of Molsby & Bordner, LLP, filed *Special Motion to Dismiss/Motion to Dismiss*. Lackey filed an opposition on June 23, 2017. Smith filed a reply on July 3, 2017. Lackey filed a

1 supplement to his opposition on July 26, 2017. The Court heard oral arguments on July 26, 2017
2 and took the matter under advisement.

3 Smith asserts the FAC is subject to dismissal under Nevada's Anti-SLAPP statutes, NRS
4 41.635, et. seq, as well as 12(b)(5) for failure to state a claim. Smith alleges absent from the FAC
5 are any allegations that Smith published any comments whatsoever, and certainly not any
6 comments about or concerning Lackey. Smith contends he is not an administrator or responsible
7 party for Lake Tahoe Wall of Shame. As such, he is not responsible for comments posted on Lake
8 Tahoe Wall of Shame. Further, even assuming arguendo that Smith had any management control
9 over the page, such comments cannot be attributed to him under the Communications Decency
10 Act (hereinafter "CDA"), 11 U.S.C. 230(c)(1). In his capacity as an employee for Nevada
11 Department of Wildlife (hereinafter "NDOW"), a governmental organization, there is no doubt
12 Lackey is a public figure. Or at a minimum, Lackey is a limited purpose public figure and he must
13 plead and prove actual malice. Smith asserts he did not act with actual malice. Because the
14 preservation and treatment of bears is undoubtedly a matter of public concern, Smith contends, the
15 lone comment posted on Lake Tahoe Wall of Shame's Facebook page addresses the same.

16 Smith argues Lackey has failed to state a claim for defamation, as he has failed to allege
17 that Smith published any statements whatsoever. Similarly, Smith alleges, as Lackey has not
18 alleged any conduct by Smith, Lackey has failed to plead facts to establish the first element of
19 intentional infliction of emotional distress, extreme and outrageous conduct, and the second
20 element of a negligent infliction of emotional distress, breach of duty. Additionally, as with Smith,
21 Lackey has failed to allege any conduct of Bryant or Stark. Lackey has only alleged conduct by
22 one defendant, Bear League, as such, Lackey has also failed to allege how Smith purportedly acted
23 in concert for the conspiracy claim.

24 Lackey argues Nevada's Anti-SLAPP legislation only protects a defendant's First
25 Amendment free speech rights and not threats and fighting words. Further, Nevada's Anti-SLAPP
26 statute does not apply because the statements do not involve a public interest. The statements are
27 directed at Lackey who was simply performing his duties as a NDOW, Biologist III, who is under
28 the supervision of a Biologist IV. There are false statements alleged that Lackey is corrupt, taking

1 bribes, and illegally torturing and killing bears. Defendants threaten Lackey and his family with
2 both violence and murder. Lackey contends Smith's reliance on the CDA is misplaced, as Smith
3 is also an information content provider. Lackey asserts that Smith does business as Lake Tahoe
4 Wall of Shame and is essentially its voice. Lackey alleges just because Smith may not have created
5 the Facebook page or manage it does not mean that he did not author the posts. Even though
6 Lackey contends the burden has not shifted pursuant to Nevada's Anti-SLAPP legislation, Lackey
7 nonetheless argues, while providing additional evidence, he will be successful on his claims.

8 ANTI-SLAPP

9 "A SLAPP suit is a meritless lawsuit that a party initiates primarily to chill a defendant's
10 exercise of his or her First Amendment free speech rights." Stubbs v. Strickland, 129 Nev. Adv.
11 Op. 15, 297 P.3d 326, 329 (2013). "Under Nevada's anti-SLAPP statutes, a defendant may file a
12 special motion to dismiss if the defendant can show 'by a preponderance of the evidence, that the
13 claim is based upon a good faith communication in furtherance of the right to petition or the right
14 to free speech in direct connection with an issue of public concern.'" Shapiro v. Welt, 133 Nev.
15 Adv. Op. 6, 389 P.3d 262, 267 (2017)(quoting NRS 41.660(3)(a)). The term "good faith
16 communication" includes "[c]ommunication made in direct connection with an issue of public
17 interest in a place open to the public or in a public forum, which is truthful or is made without
18 knowledge of its falsehood." NRS 41.637(4). If a defendant makes this initial showing, the burden
19 shifts to the plaintiff to show "with prima facie evidence a probability of prevailing on the claim."
20 Id.; NRS 41.660(3)(b).

21 When determining whether the conduct is protected under the anti-SLAPP statute, the court
22 should not look to First Amendment law, but to Nevada's anti-SLAPP legislation. See Delucchi
23 v. Songer, 133 Nev. Adv. Op. 42, 396 P.3d 826, 833 (Nev. 2017). Thus, when analyzing whether
24 the defendant's conduct constitutes "good faith communication" the court must determine whether
25 "it falls within one of the four categories enumerated in NRS 41.637, and whether it is truthful or
26 is made without knowledge of its falsehood." Delucchi, 133 Nev. Adv. Op. at 15; 396 P.3d at
27 833(internal quotations omitted). However, if the alleged conduct is illegal as a matter of law,
28 then the conduct is not protected activity within the anti-SLAPP context.

1 To determine whether an issue is one of public interest as used in NRS 41.637(4), the
2 Nevada Supreme Court adopted the guiding principles California utilizes. Shapiro, 133 Nev. Adv.
3 Op. 6, 389 P.3d at 268 (citing Piping Rock Partners, Inc. v. David Lerner Assocs, Inc., 946
4 F.Supp.2d 957, 968 (N.D. Cal 2013). Specifically,

- 5 (1) “public interest” does not equate with mere curiosity;
6 (2) a matter of public interest should be something of concern to a substantial
7 number of people; a matter of concern to a speaker and a relatively small specific
8 audience is not a matter of public interest;
9 (3) there should be some degree of closeness between the challenged statements
10 and the asserted public interest—the assertion of a broad and amorphous public
11 interest is not sufficient;
12 (4) the focus of the speaker's conduct should be the public interest rather than a
13 mere effort to gather ammunition for another round of private controversy; and
14 (5) a person cannot turn otherwise private information into a matter of public
15 interest simply by communicating it to a large number of people.

16 Id.

17 The FAC attributes the following statement to Smith: “A department with no real interest
18 in wildlife other than to make it available to hunters and trappers...some might say they are
19 criminals against nature...they are certainly ignorant about it.” Commenter Sean Stansfield on
20 Lake Tahoe Wall of Shame’s Facebook Page. [FAC, Statement P].

21 First the Court considers whether the alleged conduct is illegal as a matter of law, and
22 therefore does not fall within the protection of Nevada’s anti-SLAPP legislation. 18 USC § 2261A
23 (the federal stalking statute) provides in relevant part, whoever,

24 (2) with the intent to kill, injure, harass, intimidate, or place under surveillance with
25 intent to kill, injure, harass, or intimidate another person, uses the mail, any
26 interactive computer service or electronic communication service or electronic
27 communication system of interstate commerce, or any other facility of interstate or
28 foreign commerce to engage in a course of conduct that--

(A) places that person in reasonable fear of the death of or serious bodily
injury to a person described in clause (i), (ii), or (iii) of paragraph (1)(A); or
(B) causes, attempts to cause, or would be reasonably expected to cause
substantial emotional distress to a person described in clause (i), (ii), or (iii)
of paragraph (1)(A),

shall be punished as provided in section 2261(b) of this title.

Here, the Court cannot conclude as a matter of law that the conduct was illegal. The Court
does not find that suggesting a government department is a “criminal against nature” places a
person in reasonable harm or fear of death or would cause a person severe emotional distress.

1 Second, the Court finds this statement was made in a public forum as it was made on
2 Facebook. Third, the Court considers the Shapiro factors to determine whether the statement was
3 made in the public interest. Smith's articulated public interest is conservation of natural resources,
4 specifically the preservation and treatment of bears, as well as bribery of a public official. The
5 Court finds this interest does not equate with mere curiosity.

6 In order to evaluate the degree of closeness between the asserted public interest and
7 speaker's statements/conduct, the Court must evaluate the specific statements (statement P)
8 attributed to Smith. When determining whether these statements are related to the public interest,
9 the court should focus on the specific nature of the speech rather than the generalities. The Court
10 questions whether there is a sufficient degree of closeness between this statement and purported
11 public interest of preserving wildlife or bribery of a public official. There is no indication of what
12 this "department" is (although, the Court presumes it is referring to the NDOW).

13 Nonetheless, even if this statement fell within the broadly stated public interest, in order to
14 shift the burden to Lackey, Smith must prove, by the preponderance of the evidence, that the
15 statements are true or were made without knowledge of their falsehood. See NRS 41.637; NRS
16 41.660. Here, there is no evidence provided that shows the statement is truthful or was made
17 without knowledge of its falsehood. In fact, Smith attests that he had no role in drafting or
18 publishing the comment of Sean Sarsfield on the Lake Tahoe Wall of Shame Facebook's page.
19 Therefore, the Court finds the first prong of NRS 41.660 has not been satisfied. Thus, the Court
20 does not find the burden shifts to Lackey to prove his likelihood of success on his claims. The
21 Court will deny Smith's motion to dismiss under Nevada's anti-SLAPP legislation.

22 NRCP 12

23 Next the Court considers Smith's 12(b) motion to dismiss. Although evidence was
24 provided for the purposes of the Anti-SLAPP motion, the Court will not convert the motion to
25 dismiss under into a motion for summary judgment by considering matters outside the pleadings
26 at this stage of the case.

27 NRCP 8 requires that a complaint contain a "(1) a short and plain statement of the claim
28 showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the

1 pleader seeks.” “A complaint must set forth sufficient facts to establish all necessary elements of
2 a claim for relief, so that the adverse party has adequate notice of the nature of the claim and relief
3 sought.” Hay v. Hay, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984).

4 Pursuant to NRCP 12(b)(5), a party may bring a motion to dismiss for failure to state a
5 claim upon which relief should be granted. A motion to dismiss should be granted only if “it
6 appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief.
7 Buzz Stew, LLC v. City of North Las Vegas, 124 Nev. 224, 181 P.3d. 670 (2008). As a notice-
8 pleading jurisdiction, the court must “liberally construe pleadings to place into issue matters which
9 are fairly noticed to the adverse party.” Hay, 100 Nev. at 198, 678 P.2d at 674. In ruling on a
10 motion to dismiss, the court must take all allegations in the complaint as true and draw all
11 inferences in favor of the complainant. Id.; Torres v. Nev. Direct Ins. Co., 131 Nev. Adv. Op. 54,
12 353 P.3d 1203, 1210 (2015). However, the court does not have to “assume the truth of legal
13 conclusions merely because they are cast in the form of factual allegations.” Hotel Employees &
14 Rest. Employees Int’l Union Welfare Fund v. Gentner, 815 F. Supp. 1354, 1357 (D. Nev. 1993).

15 ***Communications Decency Act***

16 First, the Court address arguments concerning the CDA, as Smith is of the position that the
17 statements/conduct alleged are not attributable to him by virtue of the statute. The CDA
18 immunizes interactive computer services or users from any cause of action that would make them
19 liable for publishing information provided by a third-party user of the service. See 47 U.S.C.A
20 230(c)(1)(“[n]o provider or user of an interactive computer service shall be treated as the publisher
21 or speaker of any information provided by another information content provider”).¹ The CDA
22 defines “interactive computer service” to mean, “any information service, system, or access
23 software provider that provides or enables computer access by multiple users to a computer server,
24 including specifically a service or system that provides access to the Internet and such systems

25
26 ¹ See also Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1122 (9th Cir.2003); Zeran v. America Online, Inc.,
27 129 F.3d 327, 330–31 (4th Cir.1997) (finding “lawsuits seeking to hold a service provider liable for its exercise of a
28 publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter
content—are barred”); Doe v. MySpace, Inc., 528 F.3d 413, 420 (5th Cir. 2008) (noting there is no liability under
the CDA for “decisions relating to the monitoring, screening, and deletion of content” by an interactive computer
service provider).

1 operated or services offered by libraries or educational institutions.” Courts have consistently
2 found Facebook operates as an interactive computer service.²

3 The CDA, however, does not immunize an interactive computer service if it also functions
4 as an information content provider for the portion of the statement or publication at issue.³
5 “Information content provider” means “any person or entity that is responsible, in whole or in part,
6 for the creation or development of information provided through the Internet or any other
7 interactive computer service.” 47 USC 230(3). A website may lose immunity under the CDA by
8 making a material contribution to the creation or development of content.⁴

9 Thus, passive websites or websites that permit comments (without encouraging or
10 developing the content at issue) have not been deemed information content providers for the
11 purposes of the CDA.⁵ Therefore, absent some solicitation/encouragement of the defamatory
12 remarks, an interactive website/user will not be liable for the content that originated from a third
13 party.

14 Here, the FAC alleges that Smith is doing business as Lake Tahoe Wall of Shame. The
15 FAC alleges a specific comment of a person (not Smith) on Lake Tahoe Wall of Shame’s Facebook
16 page as well as generally states that members of Lake Tahoe Wall of Shame, and Lake Tahoe Wall
17 of Shame (itself) has made and continues to make false statements regarding Lackey and initiates
18 public comment threads on Facebook slandering Lackey including accusing him of criminal
19

20 ² See e.g. Fraley v. Facebook, Inc., 830 F.Supp.2d 785, 801–02 (N.D.Cal.2011); Klayman v. Zuckerberg, 753 F.3d
21 1354, 1359 (D.C. Cir. 2014).

22 ³ Carafano, 339 F.3d at 1123-25 (47 USC 230(c)(1) would bar plaintiff’s claims unless defendant “created or
23 developed the particular information at issue”); see also Anthony v. Yahoo! Inc., 421 F.Supp. 2d 1257, 1262-1263
(N.D. Cal. 2006)(finding the CDA did not bar claims arising out of dating service’s alleged creation of false profiles
24 which induced plaintiff to maintain his membership there).

25 ⁴ Kimzey v. Yelp! Inc., 836 F.3d 1263, 1269 (9th Cir. 2016)(noting Roommates.Com, 521 F.3d at 1171, clarified “the
26 language used in Carafano [Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir.2003)] recognizing that a website could
27 be a developer of content where it encouraged users to provide illegal content”). In Fair Hous. Council of San
Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1172 (9th Cir. 2008), the court discussed when a website
28 may also act as an information content provider: “The salient fact in Carafano was that the website’s classifications
of user characteristics did absolutely nothing to enhance the defamatory sting of the message, to encourage defamation
or to make defamation easier: The site provided neutral tools specifically designed to match romantic partners
depending on their voluntary inputs. By sharp contrast, Roommate’s website is designed to force subscribers to divulge
protected characteristics and discriminatory preferences, and to match those who have rooms with those who are
looking for rooms based on criteria that appear to be prohibited by the FHA.”

⁵ See e.g. Stevo Design, Inc. v. SBR Mktg. Ltd., 919 F.Supp.2d 1112, 1125–26 (D. Nev. 2013); Spreadbury v.
Bitterroot Pub. Library, 856 F.Supp.2d 1195, 1198 (D. Mont. 2012); Piping Rock, 946 F.Supp.2d at 957.

1 conduct (accepting bribes and conspiracy). [FAC, at 3:18-28; 4: 1-7]]. It further alleges that Smith
2 and Lake Tahoe Wall of Shame published and encouraged statements. [FAC, at 8:14-19].

3 Facebook permits a comment by both the webpage as well as third party users. An original
4 post may contain a reply, as well as a reply to the reply, and can continue, the Court supposes,
5 indefinitely. Given the nature of Facebook, the Court cannot conclude for the purposes of a motion
6 to dismiss, that Smith did not encourage the third party user's statement. Therefore, at this time,
7 the Court cannot find Smith is immunized from liability for the third party comments under the
8 CDA.⁶

9 For the purposes of a motion to dismiss, that the Court is declining at this time in the
10 litigation to convert to summary judgment, the Court will not consider the evidence provided by
11 the parties that discusses Smith's role (or lack thereof) in Lake Tahoe Wall of Shame.

12 ***Defamation***

13 Pursuant to Rule 8, defamation must be pled by setting forth sufficient facts to demonstrate
14 the necessary elements of the claim so the defending party has adequate notice of the nature of the
15 claim.

16 Based on the substantial similarity between the language in F.R.C.P. 8(a) and N.R.C.P.
17 8(a), the court may look to decisions interpreting N.R.C.P. 8(a)'s federal counterpart for guidance,
18 especially the federal opinions that were decided prior the US Supreme Court's adoption of the
19 higher pleading standard as set forth in Ashcroft v. Iqbal, 556 U.S. 662 (2009) and Bell Atlantic
20 Corporation v. Twombly, 550 U.S. 544 (2007). Although, some federal courts, applying FRCP 8,
21 have required defamation to be pled with more specificity, such as dictating the claim must set
22 forth an adequate identification of the communication, who made the statements, to whom they
23 were made, and when the statements were made. See Bushnell Corporation v. ITT Corporation,
24 973 F.Supp. 1276 (D.Kan.1997); Decker v. Vermont Educ. Television, Inc., 13 F. Supp. 2d 569,

25
26 ⁶ See e.g. Hy Cite Corp v. badbusinessbureau.com, L.L.C., 418 F. Supp. 2d 1142, 1148-49 (D. Ariz. 2005)(declining
27 to grant defendants' motion to dismiss based on CDA immunity because plaintiffs alleged that defendants added
28 editorial comments, titles, and original content to third-party complaints posted on defendants' website); Whitney
Info. Network, Inc. v. Xcentric Venture, LLC, 199 Fed. Appx. 738, 744 (11th Cir. 2006)(finding whether Defendants
were entitled to CDA immunity remained in question because the complaint plead Defendants' involvement in
creating or developing the alleged defamatory content posted on their website.

1 573–74 (D. Vt. 1998);(Blanck v. Hager, 360 F. Supp. 2d 1137, 1160 (D. Nev. 2005), aff'd, 220
2 Fed. Appx. 697 (9th Cir. 2007).

3 Other federal courts have expressed disfavor about requiring a higher pleading requirement
4 as defamation is not covered by FRCP 9. See Okeke v. Biomat USA, Inc., 927 F. Supp. 2d 1021,
5 1027 (D. Nev. 2013); Rivera v. Allstate Ins. Co., 140 F. Supp. 3d 722, 728 (N.D. Ill. 2015).

6 As the Nevada Supreme Court has not adopted the higher pleading standards many courts
7 have advocated for as discussed *supra*, the Court will not do so here. However, to the extent a
8 claim for damages is not premised on defamation per se, special damages must be pled with
9 particularity. See NRCP 9; see also Branda v. Sanford, 97 Nev. 643, 646, 637 P.2d 1223, 1225
10 (1981).

11 The general elements of a defamation claim require a plaintiff to prove: “(1) a false and
12 defamatory statement by [a] defendant concerning the plaintiff; (2) an unprivileged publication to
13 a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages.
14 Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 718, 57 P.3d 82, 90 (2002). “Statements are
15 libel per se under Nevada law when they ‘naturally tend to degrade [the plaintiff] in the estimation
16 of his fellow men, or hold him out to ridicule or scorn, or would tend to injure him in his business,
17 occupation or profession.’” Flowers v. Carville, 292 F. Supp. 2d 1225, 1232 (D. Nev. 2003), aff'd,
18 161 Fed. Appx. 697 (9th Cir. 2006)(citing Talbot v. Mack, 41 Nev. 245, 169 P. 25 (1917)).

19 When a public figure or a limited public figure is involved, a plaintiff must plead and prove
20 actual malice as opposed to negligence. Pegasus, 118 Nev. at 719, 57 P.3d at 91. “General public
21 figures are those individuals who achieve such pervasive fame or notoriety that they become a
22 public figure for all purposes and in all contexts,” as well as those who hold government office.
23 Id. at 719; 91; Gertz v. Robert Welch, Inc., 94 S. Ct. 2997, 3008 (1974). A limited public figure
24 “voluntarily injects himself or is thrust into a particular public controversy or public concern, and
25 thereby becomes a public figure for a limited range of issues.” Id.; Bongiovi v. Sullivan, 122 Nev.
26 556, 573–74, 138 P.3d 433, 446 (2006).

27 The FAC generally alleges Smith is doing business as Lake Tahoe Wall of Shame. The
28 FAC states that Lake Tahoe Wall of Shame has and continues to initiate public comment threads

1 on its Facebook page slandering Lackey in his official capacity as a state employee and urging and
2 encouraging the public at large to shame and harass Lackey so that he will lose his job and/or feel
3 threatened enough to leave the community. The FAC alleges Lake Tahoe Wall of Shame acted
4 intentionally and with malice with the primary purpose being to harm, threaten, intimidate, cause
5 fear, anxiety, embarrassment and damage to his reputation by publishing false and vicious
6 comments accusing Lackey of criminal conduct (including accepting bribes and conspiracy)
7 designed to incite public outrage. The FAC lists some, but allegedly not all of the comments made
8 by Lake Tahoe Wall of Shame and the other defendants (see above for statements alleged
9 attributable to Smith dba Lake Tahoe Wall of Shame). The FAC asserts Lackey is either a limited
10 purpose public figure or a private individual. The FAC sets forth that Smith and Lake Tahoe Wall
11 of Shame published and encouraged statements despite having actual knowledge that such
12 statements were false, or with reckless disregard for their veracity. [FAC, at 8:14-19]. The FAC
13 states defendants know the inflammatory false information they were posting was malicious, false,
14 and accusatory of criminal conduct and had the purposes of harming, threatening, intimidating and
15 or harassing plaintiff and his livelihood. It further alleges Lackey has suffered damages and has
16 incurred attorneys' fees.

17 The specific statements attributed to Smith is Statement P. Generally, whether a statement
18 is capable of defamatory construction is a question of law. K-Mart Corp. v. Washington, 109 Nev.
19 1180, 886 P.2d 274 (1993). "Statements of opinion as opposed to statements of fact are not
20 actionable," however, "expressions of opinion may suggest that the speaker knows certain facts to
21 be true or may imply that facts exist which will be sufficient to render the message defamatory if
22 false." Pegasus, 118 Nev. at 714, 57 P.3d at 88. A "statement may be ambiguous or a 'mixed
23 type,' which is an opinion, which gives rise to the inference that the source has based the opinion
24 on underlying, undisclosed defamatory facts;" and when a statement is ambiguous, "the question
25 of whether it is a fact or evaluative opinion is left to the jury." Lubin v. Kunin, 117 Nev. 107, 113,
26 17 P.3d 422, 426 (2001).

27 Statement P critiques an unspecified "department" and not Lackey himself. As Lackey is
28 the plaintiff, and not NDOW or some other "department," the Court finds that this is not a

1 statement about the plaintiff by the defendant. Therefore, the Court finds, as a matter of law,
2 statement P is not actionable in this case for defamation. However, because the FAC generally
3 alleges the elements of defamation, and specifically states that Smith and Lake Tahoe Wall of
4 Shame published and encouraged the statements, the Court finds Lackey has stated a claim for
5 defamation. Lackey has put Smith on notice of the defamatory conduct by alleging defendants
6 have accused him of criminal conduct (accepting bribes and conspiracy), have slandered Lackey
7 in his official capacity, and made false statements of his character. These general allegations,
8 especially when read together with the specific examples provided, give Smith notice of the nature
9 of the defamation claim.

10 ***Civil Conspiracy***

11 Civil conspiracy “consists of a combination of two or more persons who, by some
12 concerted action, intend to accomplish an unlawful objective for the purpose of harming another,
13 and damage results from the act or acts.” Consol. Generator-Nevada, Inc. v. Cummins Engine Co.,
14 Inc., 114 Nev. 1304, 1311, 971 P.2d 1251, 1256 (1998). The FAC sets forth that defendants
15 continuously over the past several years have acted in concert with one another to accomplish the
16 goals of harassing and threatening Lackey. The FAC alleges Lackey feels the defendants and their
17 supporters pose a threat to his safety and as a result he has suffered damages. The Court finds
18 Lackey has properly alleged a claim for civil conspiracy against Smith. Lackey has pled the
19 unlawful objective is to harass and threaten Lackey. Further, in stating a claim for conspiracy,
20 Lackey incorporates by reference the other allegations in his complaint. See discussion *supra*,
21 discussing the conduct Smith has been specifically alleged to do, such as using Facebook to
22 encourage the public to shame and harass Lackey. In addition to the conduct attributed to Smith
23 (through Lake Tahoe Wall of Shame), the FAC likewise sets forth specific Facebook
24 threats/comments attributed to the other defendants.

25 ***Intentional Infliction of Emotional Distress:***

26 The elements of a claim for intentional infliction of emotional distress are: 1) that the
27 defendant's conduct was extreme and outrageous; (2) that the defendant either intended or
28 recklessly disregarded the causing of emotional distress; (3) that the plaintiff actually suffered

1 severe or extreme emotional distress; and (4) that the defendant's conduct actually or proximately
2 caused the distress. Nelson v. City of Las Vegas, 99 Nev. 548, 555, 665 P.2d 1141, 1145 (1983).
3 “[E]xtreme and outrageous conduct is that which is outside all possible bounds of decency and is
4 regarded as utterly intolerable in a civilized community.” Maduike v. Agency Rent-A-Car, 114
5 Nev. 1, 4, 953 P.2d 24, 26 (1998).

6 Based on the allegations set forth above, the FAC alleges, defendants have engaged in
7 willful, malicious, wanton, and egregious conduct that was extreme and outrageous causing
8 emotional distress. The FAC alleges Lackey has suffered severe and extreme emotional distress as
9 a result of defendants’ conduct and remains fearful of physical harm or violence directed at him.
10 Taking the factual allegations set forth in the FAC as true, the Court finds Lackey has properly
11 stated a claim for intentional infliction of emotional distress against Smith as the FAC alleges,
12 among other allegations, that Lake Tahoe Wall of Shame (who Smith does business as) has
13 initiated public comment to encourage the public to shame and harass Lackey so he will lose his
14 job and/or feel threatened enough to leave the community, and that Smith and Lake Tahoe Wall
15 of Shame published and encouraged the statements. Here, the FAC alleges Smith (in addition to
16 Lake Tahoe Wall of Shame) engaged in tortious conduct by publishing and encouraging
17 statements. Thus, for purposes of a motion to dismiss, taking the allegations in light most favorably
18 to Lackey, the Court cannot find that Smith is shielded for tortious acts.⁷ Thus, a jury could find
19 this is extreme and outrageous conduct. The Court incorporates by reference the analysis of the
20 CDA and purported defamatory statements set forth above.

21 ***Negligent Infliction of Emotional Distress***⁷

22 A claim for negligent infliction of emotional distress requires a showing that defendant
23 owed a duty of care to the plaintiff, defendant breached that duty, the breach was the legal cause
24 of the plaintiff’s injuries, and plaintiff suffered serious emotional damages. Olivero v. Lowe, 116

26 ⁷ See: “Directors or officers of a corporation do not incur personal liability for torts of the corporation merely by
27 reason of their official position, **unless they participate in the wrong or authorize or direct that it be done.**”
United States Liab. Ins. Co. v. Haidinger-Hayes, Inc., 1 Cal. 3d 586, 595 (1970)(emphasis added).

28 ⁷ Although this third claim for relief is titled as “Intentional Infliction of Emotional Distress,” because the FAC
alleges that Defendants acted negligently under this heading, the Court assumes it should be titled “Negligent
Infliction of Emotional Distress.”

1 Nev. 395, 399, 995 P.2d 1023, 1026 (2000); Turner v. Mandalay Sports Entm't, LLC, 124 Nev.
2 213, 222, 180 P.3d 1172, 1178 (2008). The Nevada Supreme Court has cited favorable in Turner,
3 supra, the explanation of the duty required when a person complains they are the direct victim of
4 emotional distress in Moon v. Guardian Postacute Services, Inc., 116 Cal. Rptr. 2d 218, 220–21
5 (2002):

6 The distinction between the “bystander” and the “direct victim” cases is found in
7 the source of the duty owed by the defendant to the plaintiff. ‘Bystander’ claims
8 are typically based on breach of a duty owed to the public in general, whereas a
9 right to recover for emotional distress as a ‘direct victim’ arises from the breach of
a duty that is assumed by the defendant or imposed on the defendant as a matter of
law, or that arises out of the defendant's preexisting relationship with the plaintiff.

10 “In cases where emotional distress damages are not secondary to physical injuries, but
11 rather, precipitate physical symptoms, either a physical impact must have occurred or, in the
12 absence of physical impact, proof of ‘serious emotional distress’ causing physical injury or illness
13 must be presented.” Barmettler v. Reno Air, Inc., 114 Nev. 441, 448, 956 P.2d 1382, 1387 (1998).

14 Throughout, the FAC alleges defendants acted negligently in causing severe and emotional
15 distress, and Lackey suffered severe and emotional distress as a result of Defendants’ negligence.
16 However, the Court finds the FAC has failed to plead that Smith owed Lackey a duty. As such,
17 the Court finds Lackey has failed to state a claim for negligent infliction of emotional distress.

18 Based on the forgoing, and good cause appearing,

19 IT IS HEREBY ORDERED that Mark E. Smith’s *Special Motion to Dismiss brought under*
20 *NRS 41.635 et seq.* is DENIED.

21 IT IS HEREBY FURTHER ORDERED that Mark E. Smith’s *Special Motion to Dismiss*
22 *brought under NRCP 12* is DENIED as to claims of defamation, civil conspiracy and intentional
23 distress, and GRANTED as to the claim of Negligent Infliction of Emotional Distress, said claim
24 shall be DISMISSED.

25 ///

26 ///

27 ///

28 ///

1 IT IS HEREBY FURTHER ORDERED that Mark E. Smith shall file an Answer to the
2 First Amended Complaint within twenty (20) days of the date of this Order.

3 DATED this 23 day of October, 2017.

4 Connie J. Steinhauser
5 DISTRICT JUDGE
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CERTIFICATE OF SERVICE

CASE NO. CV17-00434

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 23 day of October, 2017, I filed the **ORDER REGARDING MARK E. SMITH'S SPECIAL MOTION TO DISMISS/MOTION TO DISMISS** with the Clerk of the Court.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

 Personal delivery to the following: [NONE]

 X **Electronically filed with the Clerk of the Court, using the eFlex system which constitutes effective service for all eFiled documents pursuant to the eFile User Agreement.**

SEAN ROSE, ESQ. for CARL LACKEY

THOMAS BRENNAN, ESQ. for CARL LACKEY

DEL HARDY, ESQ. for CAROLYN STARK DBA NDOWL WATCH KEEPING THEM TRANSPARENT

CAMERON BORDNER, ESQ. for BEAR LEAGUE, MARK E SMITH, ANNE BRYANT

 Transmitted document to the Second Judicial District Court mailing system in a sealed envelope for postage and mailing by Washoe County using the United States Postal Service in Reno, Nevada: [NONE]

 Placed a true copy in a sealed envelope for service via:

 Reno/Carson Messenger Service – [NONE]

 Federal Express or other overnight delivery service [NONE]

DATED this 23 day of October, 2017.



CASE NO. CV17-00434

**TITLE: CARL LACKEY VS. BEAR LEAGUE, ANNE
BRYANT, CAROLYN STARK, individually and as d.b.a.
NDOW WATCH KEEPING THEM TRANSPARENT, and
MARK SMITH, individually and as d.b.a. LAKE TAHOE
WALL OF SHAME**

**DATE, JUDGE
OFFICERS OF**

COURT PRESENT

APPEARANCES-HEARING

CONT'D TO

5/24/17

CONFERENCE CALL

HONORABLE

CONNIE

STEINHEIMER

DEPT. NO.4

M. Stone

(Clerk)

Not Reported

Sean Rose, Esq., represented the Plaintiff. Cameron Bordner, Esq., represented the Defendants Bear League, Anne Bryant, and Mark Smith, individually and as d.b.a Lake Tahoe Wall of Shame. Del Hardy, Esq., represented Defendant Carolyn Stark, individually and as d.b.a. NDOW Watch Keeping Them Transparent.

Court noted receipt of the recently filed Request for Submission and advised counsel that she has a home in Incline Village and has had bears enter her home. The Court further indicated that she has no bias in presiding over this case, but wanted counsel to determine if a different Judge would be better suited to preside over this case.

Counsel Bordner asked questions of the Court.

COURT directed counsel to notify the Court in writing by 3:00 p.m. on Tuesday, May 30, 2017 whether or not their client(s) wish this Court to recuse itself from the case.

Court recessed.

1 **CODE: 2540**
2 DEL HARDY, ESQ. (SBN 1172)
3 STEPHANIE RICE, ESQ. (SBN 11627)
4 WINTER STREET LAW GROUP
5 96 & 98 Winter Street
6 Reno, Nevada 89503
7 Telephone: (775) 786-5800
8 Fax: (775) 329-8282

9 *Attorneys for Defendant Mark E. Smith*

10
11
12 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
13 **IN AND FOR THE COUNTY OF WASHOE**

14 CARL LACKEY,

15 Plaintiff,

16 vs.

17 BEAR LEAGUE, a California Corporation,
18 ANNE BRYANT, an individual, MARK E.
19 SMITH, an individual dba LAKE TAHOE WALL
20 OF SHAME, CAROLYN STARK, an individual
21 dba NDOW WATCH KEEPING THEM
22 TRANSPARENT, and DOES 1-20, INCLUSIVE.

23 Defendants.

CASE NO.: CV17-00434

DEPT. NO.: 4

24 **NOTICE OF ENTRY OF ORDER REGARDING MARK SMITH'S**
25 **SPECIAL MOTION TO DISMISS/MOTION TO DISMISS**

26 NOTICE IS HEREBY GIVEN that an ORDER was entered in the above-entitled matter on
27 October 23, 2017, a copy of which is attached hereto.

28 Dated this 13th day of November, 2017.



DEL HARDY, ESQ. (SBN 1172)
STEPHANIE RICE, ESQ. (SBN 11627)
WINTER STREET LAW GROUP
Attorneys for Defendant

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of WINTER STREET LAW GROUP,
3 96 & 98 Winter Street, Reno, Nevada 89503, and that on this date I served the foregoing
4 document(s) described as **NOTICE OF ENTRY OF ORDER (AS TO MARK E. SMITH)** on all
5 parties to this action by:

6 X Placing an original or true copy thereof in a sealed envelope placed for collection
7 and mailing in the United States Mail, at Reno, Nevada, postage paid, following
8 ordinary business practices.
9 Personal Delivery
10 Facsimile (FAX)
11 Federal Express or other overnight delivery
12 Messenger Service
13 Certified Mail with Return Receipt Requested
14 X Electronically filed

15 addressed as follows:

16 **Sean P. Rose, Esq.**
17 **Rose Law Office**
18 **150 W. Huffaker Lane, Suite 101**
Reno, NV 89511
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Cameron Bordner, Esq.
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19 **Thomas R. Brennan, Esq.**
20 **Durney & Brennan, Ltd.**
21 **6900 S. McCarran Blvd., Suite 2060**
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F: 775-322-3014

Robin Shofner, Esq.
Molsby & Bordner, LLP
1830 15th Street, Ste. 100
Sacramento, CA 95811

22 **AFFIRMATION**

23 Pursuant to NRS 239B.030, the undersigned does hereby affirm that the proceeding
24 document and attached exhibits, if any, do not contain the Social Security Number of any
25 person.

26 DATED this 13th day of November, 2017.

27 
28 **EMPLOYEE OF WINTER STREET LAW GROUP**

1 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

2 IN AND FOR THE COUNTY OF WASHOE

3 IN THE MATTER OF THE ESTATE OF:
4 CARL LACKEY v. BEAR LEAUGE, et al

5 CASE NO. CV17-00434

6 DEPT. NO. 4

7 EXHIBIT INDEX

8 EXHIBIT #	DESCRIPTION	LENGTH
9 1	Order regarding Mark E. Smith's Special Motion to Dismiss/Motion to Dismiss	15

EXHIBIT 1

EXHIBIT 1

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

CARL LACKEY,

Plaintiff,

v.

BEAR LEAGUE, a California Corporation,
ANNE BRYANT, an individual, MARK E.
SMITH, an individual dba LAKE TAHOE
WALL OF SHAME, CAROLYN STARK,
individual dba NDOW WATCH KEEPING
THEM TRANSPARENT, and DOES 1-20
Inclusive.

Defendants.

Case No. CV17-00434

Dept. No.: 4

**ORDER REGARDING MARK E. SMITH'S SPECIAL MOTION TO DISMISS/MOTION
TO DISMISS**

On March 31, 2017, Carl Lackey (hereinafter "Lackey") filed a *First Amended Complaint* (hereinafter "FAC"), by and through his undersigned counsel, Sean Rose, Esq. of the Rose Law Office and Thomas R. Brennan, Esq. of Durney & Brennan, Ltd., against Bear League, a California Corporation, Anne Bryant (hereinafter "Bryant", an individual, Mark E. Smith (hereinafter "Smith"), an individual dba Lake Tahoe Wall of Shame, Carolyn Stark (hereinafter "Stark") an individual dba NDOW Watch Keeping Them Transparent (hereinafter "NDOW WATCH"), and DOES defendants. The FAC sets forth four claims against all Defendants: Defamation, Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, and Civil Conspiracy. On June 5, 2017, Smith, by and through his counsel Cameron D. Bordner, Esq., and Robin D. Shofner, Esq., of Molsby & Bordner, LLP, filed *Special Motion to Dismiss/Motion to Dismiss*. Lackey filed an opposition on June 23, 2017. Smith filed a reply on July 3, 2017. Lackey filed a

1 supplement to his opposition on July 26, 2017. The Court heard oral arguments on July 26, 2017
2 and took the matter under advisement.

3 Smith asserts the FAC is subject to dismissal under Nevada's Anti-SLAPP statutes, NRS
4 41.635, et. seq, as well as 12(b)(5) for failure to state a claim. Smith alleges absent from the FAC
5 are any allegations that Smith published any comments whatsoever, and certainly not any
6 comments about or concerning Lackey. Smith contends he is not an administrator or responsible
7 party for Lake Tahoe Wall of Shame. As such, he is not responsible for comments posted on Lake
8 Tahoe Wall of Shame. Further, even assuming arguendo that Smith had any management control
9 over the page, such comments cannot be attributed to him under the Communications Decency
10 Act (hereinafter "CDA"), 11 U.S.C. 230(c)(1). In his capacity as an employee for Nevada
11 Department of Wildlife (hereinafter "NDOW"), a governmental organization, there is no doubt
12 Lackey is a public figure. Or at a minimum, Lackey is a limited purpose public figure and he must
13 plead and prove actual malice. Smith asserts he did not act with actual malice. Because the
14 preservation and treatment of bears is undoubtedly a matter of public concern, Smith contends, the
15 lone comment posted on Lake Tahoe Wall of Shame's Facebook page addresses the same.

16 Smith argues Lackey has failed to state a claim for defamation, as he has failed to allege
17 that Smith published any statements whatsoever. Similarly, Smith alleges, as Lackey has not
18 alleged any conduct by Smith, Lackey has failed to plead facts to establish the first element of
19 intentional infliction of emotional distress, extreme and outrageous conduct, and the second
20 element of a negligent infliction of emotional distress, breach of duty. Additionally, as with Smith,
21 Lackey has failed to allege any conduct of Bryant or Stark. Lackey has only alleged conduct by
22 one defendant, Bear League, as such, Lackey has also failed to allege how Smith purportedly acted
23 in concert for the conspiracy claim.

24 Lackey argues Nevada's Anti-SLAPP legislation only protects a defendant's First
25 Amendment free speech rights and not threats and fighting words. Further, Nevada's Anti-SLAPP
26 statute does not apply because the statements do not involve a public interest. The statements are
27 directed at Lackey who was simply performing his duties as a NDOW, Biologist III, who is under
28 the supervision of a Biologist IV. There are false statements alleged that Lackey is corrupt, taking

1 bribes, and illegally torturing and killing bears. Defendants threaten Lackey and his family with
2 both violence and murder. Lackey contends Smith's reliance on the CDA is misplaced, as Smith
3 is also an information content provider. Lackey asserts that Smith does business as Lake Tahoe
4 Wall of Shame and is essentially its voice. Lackey alleges just because Smith may not have created
5 the Facebook page or manage it does not mean that he did not author the posts. Even though
6 Lackey contends the burden has not shifted pursuant to Nevada's Anti-SLAPP legislation, Lackey
7 nonetheless argues, while providing additional evidence, he will be successful on his claims.

8 ANTI-SLAPP

9 "A SLAPP suit is a meritless lawsuit that a party initiates primarily to chill a defendant's
10 exercise of his or her First Amendment free speech rights." Stubbs v. Strickland, 129 Nev. Adv.
11 Op. 15, 297 P.3d 326, 329 (2013). "Under Nevada's anti-SLAPP statutes, a defendant may file a
12 special motion to dismiss if the defendant can show 'by a preponderance of the evidence, that the
13 claim is based upon a good faith communication in furtherance of the right to petition or the right
14 to free speech in direct connection with an issue of public concern.'" Shapiro v. Welt, 133 Nev.
15 Adv. Op. 6, 389 P.3d 262, 267 (2017)(quoting NRS 41.660(3)(a)). The term "good faith
16 communication" includes "[c]ommunication made in direct connection with an issue of public
17 interest in a place open to the public or in a public forum, which is truthful or is made without
18 knowledge of its falsehood." NRS 41.637(4). If a defendant makes this initial showing, the burden
19 shifts to the plaintiff to show "with prima facie evidence a probability of prevailing on the claim."
20 Id.; NRS 41.660(3)(b).

21 When determining whether the conduct is protected under the anti-SLAPP statute, the court
22 should not look to First Amendment law, but to Nevada's anti-SLAPP legislation. See Delucchi
23 v. Songer, 133 Nev. Adv. Op. 42, 396 P.3d 826, 833 (Nev. 2017). Thus, when analyzing whether
24 the defendant's conduct constitutes "good faith communication" the court must determine whether
25 "it falls within one of the four categories enumerated in NRS 41.637, and whether it is truthful or
26 is made without knowledge of its falsehood." Delucchi, 133 Nev. Adv. Op. at 15; 396 P.3d at
27 833(internal quotations omitted). However, if the alleged conduct is illegal as a matter of law,
28 then the conduct is not protected activity within the anti-SLAPP context.

1 To determine whether an issue is one of public interest as used in NRS 41.637(4), the
2 Nevada Supreme Court adopted the guiding principles California utilizes. Shapiro, 133 Nev. Adv.
3 Op. 6, 389 P.3d at 268 (citing Piping Rock Partners, Inc. v. David Lerner Assocs, Inc., 946
4 F.Supp.2d 957, 968 (N.D. Cal 2013). Specifically,

- 5 (1) “public interest” does not equate with mere curiosity;
- 6 (2) a matter of public interest should be something of concern to a substantial
7 number of people; a matter of concern to a speaker and a relatively small specific
8 audience is not a matter of public interest;
- 9 (3) there should be some degree of closeness between the challenged statements
10 and the asserted public interest—the assertion of a broad and amorphous public
11 interest is not sufficient;
- 12 (4) the focus of the speaker's conduct should be the public interest rather than a
13 mere effort to gather ammunition for another round of private controversy; and
- 14 (5) a person cannot turn otherwise private information into a matter of public
15 interest simply by communicating it to a large number of people.

16 Id.

17 The FAC attributes the following statement to Smith: “A department with no real interest
18 in wildlife other than to make it available to hunters and trappers...some might say they are
19 criminals against nature...they are certainly ignorant about it.” Commenter Sean Stansfield on
20 Lake Tahoe Wall of Shame's Facebook Page. [FAC, Statement P].

21 First the Court considers whether the alleged conduct is illegal as a matter of law, and
22 therefore does not fall within the protection of Nevada's anti-SLAPP legislation. 18 USC § 2261A
23 (the federal stalking statute) provides in relevant part, whoever,

24 (2) with the intent to kill, injure, harass, intimidate, or place under surveillance with
25 intent to kill, injure, harass, or intimidate another person, uses the mail, any
26 interactive computer service or electronic communication service or electronic
27 communication system of interstate commerce, or any other facility of interstate or
28 foreign commerce to engage in a course of conduct that--

(A) places that person in reasonable fear of the death of or serious bodily
injury to a person described in clause (i), (ii), or (iii) of paragraph (1)(A); or
(B) causes, attempts to cause, or would be reasonably expected to cause
substantial emotional distress to a person described in clause (i), (ii), or (iii)
of paragraph (1)(A),

shall be punished as provided in section 2261(b) of this title.

Here, the Court cannot conclude as a matter of law that the conduct was illegal. The Court
does not find that suggesting a government department is a “criminal against nature” places a
person in reasonable harm or fear of death or would cause a person severe emotional distress.

1 Second, the Court finds this statement was made in a public forum as it was made on
2 Facebook. Third, the Court considers the Shapiro factors to determine whether the statement was
3 made in the public interest. Smith's articulated public interest is conservation of natural resources,
4 specifically the preservation and treatment of bears, as well as bribery of a public official. The
5 Court finds this interest does not equate with mere curiosity.

6 In order to evaluate the degree of closeness between the asserted public interest and
7 speaker's statements/conduct, the Court must evaluate the specific statements (statement P)
8 attributed to Smith. When determining whether these statements are related to the public interest,
9 the court should focus on the specific nature of the speech rather than the generalities. The Court
10 questions whether there is a sufficient degree of closeness between this statement and purported
11 public interest of preserving wildlife or bribery of a public official. There is no indication of what
12 this "department" is (although, the Court presumes it is referring to the NDOW).

13 Nonetheless, even if this statement fell within the broadly stated public interest, in order to
14 shift the burden to Lackey, Smith must prove, by the preponderance of the evidence, that the
15 statements are true or were made without knowledge of their falsehood. See NRS 41.637; NRS
16 41.660. Here, there is no evidence provided that shows the statement is truthful or was made
17 without knowledge of its falsehood. In fact, Smith attests that he had no role in drafting or
18 publishing the comment of Sean Sarsfield on the Lake Tahoe Wall of Shame Facebook's page.
19 Therefore, the Court finds the first prong of NRS 41.660 has not been satisfied. Thus, the Court
20 does not find the burden shifts to Lackey to prove his likelihood of success on his claims. The
21 Court will deny Smith's motion to dismiss under Nevada's anti-SLAPP legislation.

22 NRCP 12

23 Next the Court considers Smith's 12(b) motion to dismiss. Although evidence was
24 provided for the purposes of the Anti-SLAPP motion, the Court will not convert the motion to
25 dismiss under into a motion for summary judgment by considering matters outside the pleadings
26 at this stage of the case.

27 NRCP 8 requires that a complaint contain a "(1) a short and plain statement of the claim
28 showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the

1 pleader seeks.” “A complaint must set forth sufficient facts to establish all necessary elements of
2 a claim for relief, so that the adverse party has adequate notice of the nature of the claim and relief
3 sought.” Hay v. Hay, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984).

4 Pursuant to NRCP 12(b)(5), a party may bring a motion to dismiss for failure to state a
5 claim upon which relief should be granted. A motion to dismiss should be granted only if “it
6 appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief.
7 Buzz Stew, LLC v. City of North Las Vegas, 124 Nev. 224, 181 P.3d. 670 (2008). As a notice-
8 pleading jurisdiction, the court must “liberally construe pleadings to place into issue matters which
9 are fairly noticed to the adverse party.” Hay, 100 Nev. at 198, 678 P.2d at 674. In ruling on a
10 motion to dismiss, the court must take all allegations in the complaint as true and draw all
11 inferences in favor of the complainant. Id.; Torres v. Nev. Direct Ins. Co., 131 Nev. Adv. Op. 54,
12 353 P.3d 1203, 1210 (2015). However, the court does not have to “assume the truth of legal
13 conclusions merely because they are cast in the form of factual allegations.” Hotel Employees &
14 Rest. Employees Int’l Union Welfare Fund v. Gentner, 815 F. Supp. 1354, 1357 (D. Nev. 1993).

15 *Communications Decency Act*

16 First, the Court address arguments concerning the CDA, as Smith is of the position that the
17 statements/conduct alleged are not attributable to him by virtue of the statute. The CDA
18 immunizes interactive computer services or users from any cause of action that would make them
19 liable for publishing information provided by a third-party user of the service. See 47 U.S.C.A
20 230(c)(1)(“[n]o provider or user of an interactive computer service shall be treated as the publisher
21 or speaker of any information provided by another information content provider”).¹ The CDA
22 defines “interactive computer service” to mean, “any information service, system, or access
23 software provider that provides or enables computer access by multiple users to a computer server,
24 including specifically a service or system that provides access to the Internet and such systems

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26 ¹ See also Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1122 (9th Cir.2003); Zeran v. America Online, Inc.,
27 129 F.3d 327, 330–31 (4th Cir.1997) (finding “lawsuits seeking to hold a service provider liable for its exercise of a
28 publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter
content—are barred”); Doe v. MySpace, Inc., 528 F.3d 413, 420 (5th Cir. 2008) (noting there is no liability under
the CDA for “decisions relating to the monitoring, screening, and deletion of content” by an interactive computer
service provider).

1 operated or services offered by libraries or educational institutions.” Courts have consistently
2 found Facebook operates as an interactive computer service.²

3 The CDA, however, does not immunize an interactive computer service if it also functions
4 as an information content provider for the portion of the statement or publication at issue.³
5 “Information content provider” means “any person or entity that is responsible, in whole or in part,
6 for the creation or development of information provided through the Internet or any other
7 interactive computer service.” 47 USC 230(3). A website may lose immunity under the CDA by
8 making a material contribution to the creation or development of content.⁴

9 Thus, passive websites or websites that permit comments (without encouraging or
10 developing the content at issue) have not been deemed information content providers for the
11 purposes of the CDA.⁵ Therefore, absent some solicitation/encouragement of the defamatory
12 remarks, an interactive website/user will not be liable for the content that originated from a third
13 party.

14 Here, the FAC alleges that Smith is doing business as Lake Tahoe Wall of Shame. The
15 FAC alleges a specific comment of a person (not Smith) on Lake Tahoe Wall of Shame’s Facebook
16 page as well as generally states that members of Lake Tahoe Wall of Shame, and Lake Tahoe Wall
17 of Shame (itself) has made and continues to make false statements regarding Lackey and initiates
18 public comment threads on Facebook slandering Lackey including accusing him of criminal
19

20 ² See e.g. Fraley v. Facebook, Inc., 830 F.Supp.2d 785, 801–02 (N.D.Cal.2011); Klayman v. Zuckerberg, 753 F.3d
1354, 1359 (D.C. Cir. 2014).

21 ³ Carafano, 339 F.3d at 1123–25 (47 USC 230(c)(1) would bar plaintiff’s claims unless defendant “created or
22 developed the particular information at issue”); see also Anthony v. Yahoo! Inc., 421 F.Supp. 2d 1257, 1262–1263
(N.D. Cal. 2006)(finding the CDA did not bar claims arising out of dating service’s alleged creation of false profiles
which induced plaintiff to maintain his membership there).

23 ⁴ Kimzey v. Yelp! Inc., 836 F.3d 1263, 1269 (9th Cir. 2016)(noting Roommates.Com, 521 F.3d at 1171, clarified “the
24 language used in Carafano [Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir.2003)] recognizing that a website could
be a developer of content where it encouraged users to provide illegal content”). In Fair Hous. Council of San
Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1172 (9th Cir. 2008), the court discussed when a website
25 may also act as an information content provider: “The salient fact in Carafano was that the website’s classifications
of user characteristics did absolutely nothing to enhance the defamatory sting of the message, to encourage defamation
26 or to make defamation easier: The site provided neutral tools specifically designed to match romantic partners
depending on their voluntary inputs. By sharp contrast, Roommate’s website is designed to force subscribers to divulge
27 protected characteristics and discriminatory preferences, and to match those who have rooms with those who are
looking for rooms based on criteria that appear to be prohibited by the FHA.”

28 ⁵ See e.g. Stevo Design, Inc. v. SBR Mktg. Ltd., 919 F.Supp.2d 1112, 1125–26 (D. Nev. 2013); Spreadbury v.
Bitterroot Pub. Library, 856 F.Supp.2d 1195, 1198 (D. Mont. 2012); Piping Rock, 946 F.Supp.2d at 957.

1 conduct (accepting bribes and conspiracy). [FAC, at 3:18-28; 4: 1-7)]. It further alleges that Smith
2 and Lake Tahoe Wall of Shame published and encouraged statements. [FAC, at 8:14-19].

3 Facebook permits a comment by both the webpage as well as third party users. An original
4 post may contain a reply, as well as a reply to the reply, and can continue, the Court supposes,
5 indefinitely. Given the nature of Facebook, the Court cannot conclude for the purposes of a motion
6 to dismiss, that Smith did not encourage the third party user's statement. Therefore, at this time,
7 the Court cannot find Smith is immunized from liability for the third party comments under the
8 CDA.⁶

9 For the purposes of a motion to dismiss, that the Court is declining at this time in the
10 litigation to convert to summary judgment, the Court will not consider the evidence provided by
11 the parties that discusses Smith's role (or lack thereof) in Lake Tahoe Wall of Shame.

12 ***Defamation***

13 Pursuant to Rule 8, defamation must be pled by setting forth sufficient facts to demonstrate
14 the necessary elements of the claim so the defending party has adequate notice of the nature of the
15 claim.

16 Based on the substantial similarity between the language in F.R.C.P. 8(a) and N.R.C.P.
17 8(a), the court may look to decisions interpreting N.R.C.P. 8(a)'s federal counterpart for guidance,
18 especially the federal opinions that were decided prior the US Supreme Court's adoption of the
19 higher pleading standard as set forth in Ashcroft v. Iqbal, 556 U.S. 662 (2009) and Bell Atlantic
20 Corporation v. Twombly, 550 U.S. 544 (2007). Although, some federal courts, applying FRCP 8,
21 have required defamation to be pled with more specificity, such as dictating the claim must set
22 forth an adequate identification of the communication, who made the statements, to whom they
23 were made, and when the statements were made. See Bushnell Corporation v. ITT Corporation,
24 973 F.Supp. 1276 (D.Kan.1997); Decker v. Vermont Educ. Television, Inc., 13 F. Supp. 2d 569,

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26 ⁶ See e.g. Hy Cite Corp v. badbusinessbureau.com, L.L.C., 418 F. Supp. 2d 1142, 1148-49 (D. Ariz. 2005)(declining
27 to grant defendants' motion to dismiss based on CDA immunity because plaintiffs alleged that defendants added
28 editorial comments, titles, and original content to third-party complaints posted on defendants' website); Whitney
Info. Network, Inc. v. Xcentric Venture, LLC, 199 Fed. Appx. 738, 744 (11th Cir. 2006)(finding whether Defendants
were entitled to CDA immunity remained in question because the complaint plead Defendants' involvement in
creating or developing the alleged defamatory content posted on their website.

1 573–74 (D. Vt. 1998);(Blanck v. Hager, 360 F. Supp. 2d 1137, 1160 (D. Nev. 2005), aff'd, 220
2 Fed. Appx. 697 (9th Cir. 2007).

3 Other federal courts have expressed disfavor about requiring a higher pleading requirement
4 as defamation is not covered by FRCP 9. See Okeke v. Biomat USA, Inc., 927 F. Supp. 2d 1021,
5 1027 (D. Nev. 2013); Rivera v. Allstate Ins. Co., 140 F. Supp. 3d 722, 728 (N.D. Ill. 2015).

6 As the Nevada Supreme Court has not adopted the higher pleading standards many courts
7 have advocated for as discussed *supra*, the Court will not do so here. However, to the extent a
8 claim for damages is not premised on defamation per se, special damages must be pled with
9 particularity. See NRCP 9; see also Branda v. Sanford, 97 Nev. 643, 646, 637 P.2d 1223, 1225
10 (1981).

11 The general elements of a defamation claim require a plaintiff to prove: “(1) a false and
12 defamatory statement by [a] defendant concerning the plaintiff; (2) an unprivileged publication to
13 a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages.
14 Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 718, 57 P.3d 82, 90 (2002). “Statements are
15 libel per se under Nevada law when they ‘naturally tend to degrade [the plaintiff] in the estimation
16 of his fellow men, or hold him out to ridicule or scorn, or would tend to injure him in his business,
17 occupation or profession.” Flowers v. Carville, 292 F. Supp. 2d 1225, 1232 (D. Nev. 2003), aff'd,
18 161 Fed. Appx. 697 (9th Cir. 2006)(citing Talbot v. Mack, 41 Nev. 245, 169 P. 25 (1917)).

19 When a public figure or a limited public figure is involved, a plaintiff must plead and prove
20 actual malice as opposed to negligence. Pegasus, 118 Nev. at 719, 57 P.3d at 91. “General public
21 figures are those individuals who achieve such pervasive fame or notoriety that they become a
22 public figure for all purposes and in all contexts,” as well as those who hold government office.
23 Id. at 719; 91; Gertz v. Robert Welch, Inc., 94 S. Ct. 2997, 3008 (1974). A limited public figure
24 “voluntarily injects himself or is thrust into a particular public controversy or public concern, and
25 thereby becomes a public figure for a limited range of issues.” Id.; Bongiovi v. Sullivan, 122 Nev.
26 556, 573–74, 138 P.3d 433, 446 (2006).

27 The FAC generally alleges Smith is doing business as Lake Tahoe Wall of Shame. The
28 FAC states that Lake Tahoe Wall of Shame has and continues to initiate public comment threads

1 on its Facebook page slandering Lackey in his official capacity as a state employee and urging and
2 encouraging the public at large to shame and harass Lackey so that he will lose his job and/or feel
3 threatened enough to leave the community. The FAC alleges Lake Tahoe Wall of Shame acted
4 intentionally and with malice with the primary purpose being to harm, threaten, intimidate, cause
5 fear, anxiety, embarrassment and damage to his reputation by publishing false and vicious
6 comments accusing Lackey of criminal conduct (including accepting bribes and conspiracy)
7 designed to incite public outrage. The FAC lists some, but allegedly not all of the comments made
8 by Lake Tahoe Wall of Shame and the other defendants (see above for statements alleged
9 attributable to Smith dba Lake Tahoe Wall of Shame). The FAC asserts Lackey is either a limited
10 purpose public figure or a private individual. The FAC sets forth that Smith and Lake Tahoe Wall
11 of Shame published and encouraged statements despite having actual knowledge that such
12 statements were false, or with reckless disregard for their veracity. [FAC, at 8:14-19]. The FAC
13 states defendants know the inflammatory false information they were posting was malicious, false,
14 and accusatory of criminal conduct and had the purposes of harming, threatening, intimidating and
15 or harassing plaintiff and his livelihood. It further alleges Lackey has suffered damages and has
16 incurred attorneys' fees.

17 The specific statements attributed to Smith is Statement P. Generally, whether a statement
18 is capable of defamatory construction is a question of law. K-Mart Corp. v. Washington, 109 Nev.
19 1180, 886 P.2d 274 (1993). "Statements of opinion as opposed to statements of fact are not
20 actionable," however, "expressions of opinion may suggest that the speaker knows certain facts to
21 be true or may imply that facts exist which will be sufficient to render the message defamatory if
22 false." Pegasus, 118 Nev. at 714, 57 P.3d at 88. A "statement may be ambiguous or a 'mixed
23 type,' which is an opinion, which gives rise to the inference that the source has based the opinion
24 on underlying, undisclosed defamatory facts;" and when a statement is ambiguous, "the question
25 of whether it is a fact or evaluative opinion is left to the jury." Lubin v. Kunin, 117 Nev. 107, 113,
26 17 P.3d 422, 426 (2001).

27 Statement P critiques an unspecified "department" and not Lackey himself. As Lackey is
28 the plaintiff, and not NDOW or some other "department," the Court finds that this is not a

1 statement about the plaintiff by the defendant. Therefore, the Court finds, as a matter of law,
2 statement P is not actionable in this case for defamation. However, because the FAC generally
3 alleges the elements of defamation, and specifically states that Smith and Lake Tahoe Wall of
4 Shame published and encouraged the statements, the Court finds Lackey has stated a claim for
5 defamation. Lackey has put Smith on notice of the defamatory conduct by alleging defendants
6 have accused him of criminal conduct (accepting bribes and conspiracy), have slandered Lackey
7 in his official capacity, and made false statements of his character. These general allegations,
8 especially when read together with the specific examples provided, give Smith notice of the nature
9 of the defamation claim.

10 ***Civil Conspiracy***

11 Civil conspiracy "consists of a combination of two or more persons who, by some
12 concerted action, intend to accomplish an unlawful objective for the purpose of harming another,
13 and damage results from the act or acts." Consol. Generator-Nevada, Inc. v. Cummins Engine Co.,
14 Inc., 114 Nev. 1304, 1311, 971 P.2d 1251, 1256 (1998). The FAC sets forth that defendants
15 continuously over the past several years have acted in concert with one another to accomplish the
16 goals of harassing and threatening Lackey. The FAC alleges Lackey feels the defendants and their
17 supporters post a threat to his safety and as a result he has suffered damages. The Court finds
18 Lackey has properly alleged a claim for civil conspiracy against Smith. Lackey has pled the
19 unlawful objective is to harass and threaten Lackey. Further, in stating a claim for conspiracy,
20 Lackey incorporates by reference the other allegations in his complaint. See discussion *supra*,
21 discussing the conduct Smith has been specifically alleged to do, such as using Facebook to
22 encourage the public to shame and harass Lackey. In addition to the conduct attributed to Smith
23 (through Lake Tahoe Wall of Shame), the FAC likewise sets forth specific Facebook
24 threats/comments attributed to the other defendants.

25 ***Intentional Infliction of Emotional Distress:***

26 The elements of a claim for intentional infliction of emotional distress are: 1) that the
27 defendant's conduct was extreme and outrageous; (2) that the defendant either intended or
28 recklessly disregarded the causing of emotional distress; (3) that the plaintiff actually suffered

1 severe or extreme emotional distress; and (4) that the defendant's conduct actually or proximately
2 caused the distress. Nelson v. City of Las Vegas, 99 Nev. 548, 555, 665 P.2d 1141, 1145 (1983).
3 "[E]xtreme and outrageous conduct is that which is outside all possible bounds of decency and is
4 regarded as utterly intolerable in a civilized community." Maduik v. Agency Rent-A-Car, 114
5 Nev. 1, 4, 953 P.2d 24, 26 (1998).

6 Based on the allegations set forth above, the FAC alleges, defendants have engaged in
7 willful, malicious, wanton, and egregious conduct that was extreme and outrageous causing
8 emotional distress. The FAC alleges Lackey has suffered severe and extreme emotional distress as
9 a result of defendants' conduct and remains fearful of physical harm or violence directed at him.
10 Taking the factual allegations set forth in the FAC as true, the Court finds Lackey has properly
11 stated a claim for intentional infliction of emotional distress against Smith as the FAC alleges,
12 among other allegations, that Lake Tahoe Wall of Shame (who Smith does business as) has
13 initiated public comment to encourage the public to shame and harass Lackey so he will lose his
14 job and/or feel threatened enough to leave the community, and that Smith and Lake Tahoe Wall
15 of Shame published and encouraged the statements. Here, the FAC alleges Smith (in addition to
16 Lake Tahoe Wall of Shame) engaged in tortious conduct by publishing and encouraging
17 statements. Thus, for purposes of a motion to dismiss, taking the allegations in light most favorably
18 to Lackey, the Court cannot find that Smith is shielded for tortious acts.⁷ Thus, a jury could find
19 this is extreme and outrageous conduct. The Court incorporates by reference the analysis of the
20 CDA and purported defamatory statements set forth above.

21 ***Negligent Infliction of Emotional Distress⁷***

22 A claim for negligent infliction of emotional distress requires a showing that defendant
23 owed a duty of care to the plaintiff, defendant breached that duty, the breach was the legal cause
24 of the plaintiff's injuries, and plaintiff suffered serious emotional damages. Olivero v. Lowe, 116

25
26 ⁷ See: "Directors or officers of a corporation do not incur personal liability for torts of the corporation merely by
27 reason of their official position, unless they participate in the wrong or authorize or direct that it be done."
United States Liab. Ins. Co. v. Haidinger-Hayes, Inc., 1 Cal. 3d 586, 595 (1970)(emphasis added).

28 ⁷ Although this third claim for relief is titled as "Intentional Infliction of Emotional Distress," because the FAC
alleges that Defendants acted negligently under this heading, the Court assumes it should be titled "Negligent
Infliction of Emotional Distress."

1 Nev. 395, 399, 995 P.2d 1023, 1026 (2000); Turner v. Mandalay Sports Entm't, LLC, 124 Nev.
2 213, 222, 180 P.3d 1172, 1178 (2008). The Nevada Supreme Court has cited favorable in Turner,
3 supra, the explanation of the duty required when a person complains they are the direct victim of
4 emotional distress in Moon v. Guardian Postacute Services, Inc., 116 Cal. Rptr. 2d 218, 220-21
5 (2002):

6 The distinction between the "bystander" and the "direct victim" cases is found in
7 the source of the duty owed by the defendant to the plaintiff. 'Bystander' claims
8 are typically based on breach of a duty owed to the public in general, whereas a
9 right to recover for emotional distress as a 'direct victim' arises from the breach of
a duty that is assumed by the defendant or imposed on the defendant as a matter of
law, or that arises out of the defendant's preexisting relationship with the plaintiff.

10 "In cases where emotional distress damages are not secondary to physical injuries, but
11 rather, precipitate physical symptoms, either a physical impact must have occurred or, in the
12 absence of physical impact, proof of 'serious emotional distress' causing physical injury or illness
13 must be presented." Barmettler v. Reno Air, Inc., 114 Nev. 441, 448, 956 P.2d 1382, 1387 (1998).

14 Throughout, the FAC alleges defendants acted negligently in causing severe and emotional
15 distress, and Lackey suffered severe and emotional distress as a result of Defendants' negligence.
16 However, the Court finds the FAC has failed to plead that Smith owed Lackey a duty. As such,
17 the Court finds Lackey has failed to state a claim for negligent infliction of emotional distress.

18 Based on the forgoing, and good cause appearing,

19 IT IS HEREBY ORDERED that Mark E. Smith's *Special Motion to Dismiss brought under*
20 *NRS 41.635 et seq.* is DENIED.

21 IT IS HEREBY FURTHER ORDERED that Mark E. Smith's *Special Motion to Dismiss*
22 *brought under NRCP 12* is DENIED as to claims of defamation, civil conspiracy and intentional
23 distress, and GRANTED as to the claim of Negligent Infliction of Emotional Distress, said claim
24 shall be DISMISSED.

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1 IT IS HEREBY FURTHER ORDERED that Mark E. Smith shall file an Answer to the
2 First Amended Complaint within twenty (20) days of the date of this Order.

3 DATED this 23 day of October, 2017.

4 Connie J. Stinham
5 DISTRICT JUDGE
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CERTIFICATE OF SERVICE

CASE NO. CV17-00434

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 23 day of October, 2017, I filed the **ORDER REGARDING MARK E. SMITH'S SPECIAL MOTION TO DISMISS/MOTION TO DISMISS** with the Clerk of the Court.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

 Personal delivery to the following: [NONE]

 X Electronically filed with the Clerk of the Court, using the eFlex system which constitutes effective service for all eFiled documents pursuant to the eFile User Agreement.

SEAN ROSE, ESQ. for CARL LACKEY

THOMAS BRENNAN, ESQ. for CARL LACKEY

DEL HARDY, ESQ. for CAROLYN STARK DBA NDOWL WATCH KEEPING THEM TRANSPARENT

CAMERON BORDNER, ESQ. for BEAR LEAGUE, MARK E SMITH, ANNE BRYANT

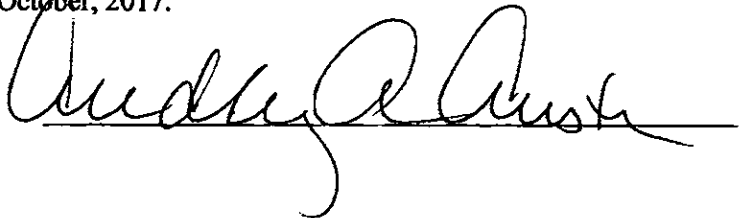
 Transmitted document to the Second Judicial District Court mailing system in a sealed envelope for postage and mailing by Washoe County using the United States Postal Service in Reno, Nevada: [NONE]

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 Reno/Carson Messenger Service – [NONE]

 Federal Express or other overnight delivery service [NONE]

DATED this 23 day of October, 2017.



CODE: \$2515
DEL HARDY, ESQ. (SBN 1172)
STEPHANIE RICE, ESQ. (SBN 11627)
WINTER STREET LAW GROUP
96 & 98 Winter Street
Reno, Nevada 89503
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Fax: (775) 329-8282
Attorneys for Defendant Mark E. Smith

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

CARL LACKEY,

Plaintiff,

vs.

BEAR LEAGUE, a California Corporation,
ANNE BRYANT, an individual, MARK E.
SMITH, an individual dba LAKE TAHOE WALL
OF SHAME, CAROLYN STARK, an individual
dba NDOW WATCH KEEPING THEM
TRANSPARENT, and DOES 1-20, INCLUSIVE.

Defendants.

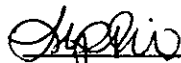
CASE NO.: CV17-00434

DEPT. NO.: 4

NOTICE OF APPEAL

Notice is hereby given that Defendant, MARK E. SMITH, by and through his counsel, STEPHANIE RICE, ESQ. and WINTER STREET LAW GROUP, hereby appeals to the Supreme Court of Nevada from the Order denying Defendant Mark E. Smith's Special Motion to Dismiss/ Anti-SLAPP pursuant to NRS Chapter 41 and NRCP 12 as to claims of defamation, civil conspiracy and intentional infliction of emotional distress, entered herein on November 13, 2017.

DATED this 13th day of November, 2017.



STEPHANIE RICE, ESQ. (SBN 11627)
WINTER STREET LAW GROUP
Attorneys for Defendant
Mark E. Smith

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of WINTER STREET LAW GROUP, 96 & 98 Winter Street, Reno, Nevada 89503, and that on this date I served the foregoing document(s) described as **NOTICE OF APPEAL** on all parties to this action by:

☒ Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, at Reno, Nevada, postage paid, following ordinary business practices.

☐ Personal Delivery

☐ Facsimile (FAX) and/or Email:

☐ Federal Express or other overnight delivery

☐ Messenger Service

☐ Certified Mail with Return Receipt Requested

☒ Electronically filed

addressed as follows:

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Robin Shofner, Esq.
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Sacramento, CA 95811

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the proceeding document and attached exhibits, if any, do not contain the Social Security Number of any person.

DATED this 13th day of November, 2017.


AN EMPLOYEE OF WINTER STREET LAW GROUP

1 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

2 IN AND FOR THE COUNTY OF WASHOE

3 IN THE MATTER OF THE ESTATE OF:
4 CARL LACKEY v. BEAR LEAUGE, et al

CASE NO. CV17-00434

5 DEPT. NO. 4

EXHIBIT INDEX

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EXHIBIT #	DESCRIPTION	LENGTH
7 1	Notice of Entry of Order	19

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EXHIBIT 1

EXHIBIT 1

1 **CODE: 2540**

2 DEL HARDY, ESQ. (SBN 1172)
3 STEPHANIE RICE, ESQ. (SBN 11627)
4 WINTER STREET LAW GROUP
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9 *Attorneys for Defendant Mark E. Smith*

10
11
12
13 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
14 **IN AND FOR THE COUNTY OF WASHOE**

15 CARL LACKEY,

16 Plaintiff,

17 vs.

18 BEAR LEAGUE, a California Corporation,
19 ANNE BRYANT, an individual, MARK E.
20 SMITH, an individual dba LAKE TAHOE WALL
21 OF SHAME, CAROLYN STARK, an individual
22 dba NDOW WATCH KEEPING THEM
23 TRANSPARENT, and DOES 1-20, INCLUSIVE.

24 Defendants.

CASE NO.: CV17-00434

DEPT. NO.: 4

25 **NOTICE OF ENTRY OF ORDER REGARDING MARK SMITH'S**
26 **SPECIAL MOTION TO DISMISS/MOTION TO DISMISS**

27 NOTICE IS HEREBY GIVEN that an ORDER was entered in the above-entitled matter on
28 October 23, 2017, a copy of which is attached hereto.

Dated this 13th day of November, 2017.



DEL HARDY, ESQ. (SBN 1172)
STEPHANIE RICE, ESQ. (SBN 11627)
WINTER STREET LAW GROUP
Attorneys for Defendant

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of WINTER STREET LAW GROUP,
3 96 & 98 Winter Street, Reno, Nevada 89503, and that on this date I served the foregoing
4 document(s) described as **NOTICE OF ENTRY OF ORDER (AS TO MARK E. SMITH)** on all
5 parties to this action by:

6 X Placing an original or true copy thereof in a sealed envelope placed for collection
7 and mailing in the United States Mail, at Reno, Nevada, postage paid, following
8 ordinary business practices.
9 Personal Delivery
10 Facsimile (FAX)
11 Federal Express or other overnight delivery
12 Messenger Service
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14 X Electronically filed

15 addressed as follows:

16 **Sean P. Rose, Esq.**
17 **Rose Law Office**
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F: 775-322-3014

Robin Shofner, Esq.
Molsby & Bordner, LLP
1830 15th Street, Ste. 100
Sacramento, CA 95811

22 **AFFIRMATION**

23 Pursuant to NRS 239B.030, the undersigned does hereby affirm that the proceeding
24 document and attached exhibits, if any, do not contain the Social Security Number of any
25 person.

26 DATED this 13th day of November, 2017.

27 
28 **EMPLOYEE OF WINTER STREET LAW GROUP**

1 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

2 IN AND FOR THE COUNTY OF WASHOE

3 IN THE MATTER OF THE ESTATE OF:
4 CARL LACKEY v. BEAR LEAUGE, et al

5 CASE NO. CV17-00434

6 DEPT. NO. 4

7 EXHIBIT INDEX

8 EXHIBIT #	DESCRIPTION	LENGTH
9 1	Order regarding Mark E. Smith's Special Motion to Dismiss/Motion to Dismiss	15

EXHIBIT 1

EXHIBIT 1

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

CARL LACKEY,

Plaintiff,

v.

BEAR LEAGUE, a California Corporation,
ANNE BRYANT, an individual, MARK E.
SMITH, an individual dba LAKE TAHOE
WALL OF SHAME, CAROLYN STARK,
individual dba NDOW WATCH KEEPING
THEM TRANSPARENT, and DOES 1-20
Inclusive.

Defendants.

Case No. CV17-00434

Dept. No.: 4

**ORDER REGARDING MARK E. SMITH'S SPECIAL MOTION TO DISMISS/MOTION
TO DISMISS**

On March 31, 2017, Carl Lackey (hereinafter "Lackey") filed a *First Amended Complaint* (hereinafter "FAC"), by and through his undersigned counsel, Sean Rose, Esq. of the Rose Law Office and Thomas R. Brennan, Esq. of Durney & Brennan, Ltd., against Bear League, a California Corporation, Anne Bryant (hereinafter "Bryant", an individual, Mark E. Smith (hereinafter "Smith"), an individual dba Lake Tahoe Wall of Shame, Carolyn Stark (hereinafter "Stark") an individual dba NDOW Watch Keeping Them Transparent (hereinafter "NDOW WATCH"), and DOES defendants. The FAC sets forth four claims against all Defendants: Defamation, Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, and Civil Conspiracy. On June 5, 2017, Smith, by and through his counsel Cameron D. Bordner, Esq., and Robin D. Shofner, Esq., of Molsby & Bordner, LLP, filed *Special Motion to Dismiss/Motion to Dismiss*. Lackey filed an opposition on June 23, 2017. Smith filed a reply on July 3, 2017. Lackey filed a

1 supplement to his opposition on July 26, 2017. The Court heard oral arguments on July 26, 2017
2 and took the matter under advisement.

3 Smith asserts the FAC is subject to dismissal under Nevada's Anti-SLAPP statutes, NRS
4 41.635, et. seq, as well as 12(b)(5) for failure to state a claim. Smith alleges absent from the FAC
5 are any allegations that Smith published any comments whatsoever, and certainly not any
6 comments about or concerning Lackey. Smith contends he is not an administrator or responsible
7 party for Lake Tahoe Wall of Shame. As such, he is not responsible for comments posted on Lake
8 Tahoe Wall of Shame. Further, even assuming arguendo that Smith had any management control
9 over the page, such comments cannot be attributed to him under the Communications Decency
10 Act (hereinafter "CDA"), 11 U.S.C. 230(c)(1). In his capacity as an employee for Nevada
11 Department of Wildlife (hereinafter "NDOW"), a governmental organization, there is no doubt
12 Lackey is a public figure. Or at a minimum, Lackey is a limited purpose public figure and he must
13 plead and prove actual malice. Smith asserts he did not act with actual malice. Because the
14 preservation and treatment of bears is undoubtedly a matter of public concern, Smith contends, the
15 lone comment posted on Lake Tahoe Wall of Shame's Facebook page addresses the same.

16 Smith argues Lackey has failed to state a claim for defamation, as he has failed to allege
17 that Smith published any statements whatsoever. Similarly, Smith alleges, as Lackey has not
18 alleged any conduct by Smith, Lackey has failed to plead facts to establish the first element of
19 intentional infliction of emotional distress, extreme and outrageous conduct, and the second
20 element of a negligent infliction of emotional distress, breach of duty. Additionally, as with Smith,
21 Lackey has failed to allege any conduct of Bryant or Stark. Lackey has only alleged conduct by
22 one defendant, Bear League, as such, Lackey has also failed to allege how Smith purportedly acted
23 in concert for the conspiracy claim.

24 Lackey argues Nevada's Anti-SLAPP legislation only protects a defendant's First
25 Amendment free speech rights and not threats and fighting words. Further, Nevada's Anti-SLAPP
26 statute does not apply because the statements do not involve a public interest. The statements are
27 directed at Lackey who was simply performing his duties as a NDOW, Biologist III, who is under
28 the supervision of a Biologist IV. There are false statements alleged that Lackey is corrupt, taking

1 bribes, and illegally torturing and killing bears. Defendants threaten Lackey and his family with
2 both violence and murder. Lackey contends Smith's reliance on the CDA is misplaced, as Smith
3 is also an information content provider. Lackey asserts that Smith does business as Lake Tahoe
4 Wall of Shame and is essentially its voice. Lackey alleges just because Smith may not have created
5 the Facebook page or manage it does not mean that he did not author the posts. Even though
6 Lackey contends the burden has not shifted pursuant to Nevada's Anti-SLAPP legislation, Lackey
7 nonetheless argues, while providing additional evidence, he will be successful on his claims.

8 ANTI-SLAPP

9 "A SLAPP suit is a meritless lawsuit that a party initiates primarily to chill a defendant's
10 exercise of his or her First Amendment free speech rights." Stubbs v. Strickland, 129 Nev. Adv.
11 Op. 15, 297 P.3d 326, 329 (2013). "Under Nevada's anti-SLAPP statutes, a defendant may file a
12 special motion to dismiss if the defendant can show 'by a preponderance of the evidence, that the
13 claim is based upon a good faith communication in furtherance of the right to petition or the right
14 to free speech in direct connection with an issue of public concern.'" Shapiro v. Welt, 133 Nev.
15 Adv. Op. 6, 389 P.3d 262, 267 (2017)(quoting NRS 41.660(3)(a)). The term "good faith
16 communication" includes "[c]ommunication made in direct connection with an issue of public
17 interest in a place open to the public or in a public forum, which is truthful or is made without
18 knowledge of its falsehood." NRS 41.637(4). If a defendant makes this initial showing, the burden
19 shifts to the plaintiff to show "with prima facie evidence a probability of prevailing on the claim."
20 Id.; NRS 41.660(3)(b).

21 When determining whether the conduct is protected under the anti-SLAPP statute, the court
22 should not look to First Amendment law, but to Nevada's anti-SLAPP legislation. See Delucchi
23 v. Songer, 133 Nev. Adv. Op. 42, 396 P.3d 826, 833 (Nev. 2017). Thus, when analyzing whether
24 the defendant's conduct constitutes "good faith communication" the court must determine whether
25 "it falls within one of the four categories enumerated in NRS 41.637, and whether it is truthful or
26 is made without knowledge of its falsehood." Delucchi, 133 Nev. Adv. Op. at 15; 396 P.3d at
27 833(internal quotations omitted). However, if the alleged conduct is illegal as a matter of law,
28 then the conduct is not protected activity within the anti-SLAPP context.

1 To determine whether an issue is one of public interest as used in NRS 41.637(4), the
2 Nevada Supreme Court adopted the guiding principles California utilizes. Shapiro, 133 Nev. Adv.
3 Op. 6, 389 P.3d at 268 (citing Piping Rock Partners, Inc. v. David Lerner Assocs, Inc., 946
4 F.Supp.2d 957, 968 (N.D. Cal 2013). Specifically,

- 5 (1) “public interest” does not equate with mere curiosity;
- 6 (2) a matter of public interest should be something of concern to a substantial
7 number of people; a matter of concern to a speaker and a relatively small specific
8 audience is not a matter of public interest;
- 9 (3) there should be some degree of closeness between the challenged statements
10 and the asserted public interest—the assertion of a broad and amorphous public
11 interest is not sufficient;
- 12 (4) the focus of the speaker’s conduct should be the public interest rather than a
13 mere effort to gather ammunition for another round of private controversy; and
- 14 (5) a person cannot turn otherwise private information into a matter of public
15 interest simply by communicating it to a large number of people.

16 Id.

17 The FAC attributes the following statement to Smith: “A department with no real interest
18 in wildlife other than to make it available to hunters and trappers...some might say they are
19 criminals against nature...they are certainly ignorant about it.” Commenter Sean Stansfield on
20 Lake Tahoe Wall of Shame’s Facebook Page. [FAC, Statement P].

21 First the Court considers whether the alleged conduct is illegal as a matter of law, and
22 therefore does not fall within the protection of Nevada’s anti-SLAPP legislation. 18 USC § 2261A
23 (the federal stalking statute) provides in relevant part, whoever,

24 (2) with the intent to kill, injure, harass, intimidate, or place under surveillance with
25 intent to kill, injure, harass, or intimidate another person, uses the mail, any
26 interactive computer service or electronic communication service or electronic
27 communication system of interstate commerce, or any other facility of interstate or
28 foreign commerce to engage in a course of conduct that--

(A) places that person in reasonable fear of the death of or serious bodily
injury to a person described in clause (i), (ii), or (iii) of paragraph (1)(A); or
(B) causes, attempts to cause, or would be reasonably expected to cause
substantial emotional distress to a person described in clause (i), (ii), or (iii)
of paragraph (1)(A),

shall be punished as provided in section 2261(b) of this title.

Here, the Court cannot conclude as a matter of law that the conduct was illegal. The Court
does not find that suggesting a government department is a “criminal against nature” places a
person in reasonable harm or fear of death or would cause a person severe emotional distress.

Second, the Court finds this statement was made in a public forum as it was made on Facebook. Third, the Court considers the Shapiro factors to determine whether the statement was made in the public interest. Smith's articulated public interest is conservation of natural resources, specifically the preservation and treatment of bears, as well as bribery of a public official. The Court finds this interest does not equate with mere curiosity.

In order to evaluate the degree of closeness between the asserted public interest and speaker's statements/conduct, the Court must evaluate the specific statements (statement P) attributed to Smith. When determining whether these statements are related to the public interest, the court should focus on the specific nature of the speech rather than the generalities. The Court questions whether there is a sufficient degree of closeness between this statement and purported public interest of preserving wildlife or bribery of a public official. There is no indication of what this "department" is (although, the Court presumes it is referring to the NDOW).

Nonetheless, even if this statement fell within the broadly stated public interest, in order to shift the burden to Lackey, Smith must prove, by the preponderance of the evidence, that the statements are true or were made without knowledge of their falsehood. See NRS 41.637; NRS 41.660. Here, there is no evidence provided that shows the statement is truthful or was made without knowledge of its falsehood. In fact, Smith attests that he had no role in drafting or publishing the comment of Sean Sarsfield on the Lake Tahoe Wall of Shame Facebook's page. Therefore, the Court finds the first prong of NRS 41.660 has not been satisfied. Thus, the Court does not find the burden shifts to Lackey to prove his likelihood of success on his claims. The Court will deny Smith's motion to dismiss under Nevada's anti-SLAPP legislation.

NRCP 12

Next the Court considers Smith's 12(b) motion to dismiss. Although evidence was provided for the purposes of the Anti-SLAPP motion, the Court will not convert the motion to dismiss under into a motion for summary judgment by considering matters outside the pleadings at this stage of the case.

NRCP 8 requires that a complaint contain a “(1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the

1 pleader seeks.” “A complaint must set forth sufficient facts to establish all necessary elements of
2 a claim for relief, so that the adverse party has adequate notice of the nature of the claim and relief
3 sought.” Hay v. Hay, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984).

4 Pursuant to NRCP 12(b)(5), a party may bring a motion to dismiss for failure to state a
5 claim upon which relief should be granted. A motion to dismiss should be granted only if “it
6 appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief.
7 Buzz Stew, LLC v. City of North Las Vegas, 124 Nev. 224, 181 P.3d. 670 (2008). As a notice-
8 pleading jurisdiction, the court must “liberally construe pleadings to place into issue matters which
9 are fairly noticed to the adverse party.” Hay, 100 Nev. at 198, 678 P.2d at 674. In ruling on a
10 motion to dismiss, the court must take all allegations in the complaint as true and draw all
11 inferences in favor of the complainant. Id.; Torres v. Nev. Direct Ins. Co., 131 Nev. Adv. Op. 54,
12 353 P.3d 1203, 1210 (2015). However, the court does not have to “assume the truth of legal
13 conclusions merely because they are cast in the form of factual allegations.” Hotel Employees &
14 Rest. Employees Int’l Union Welfare Fund v. Gentner, 815 F. Supp. 1354, 1357 (D. Nev. 1993).

15 *Communications Decency Act*

16 First, the Court address arguments concerning the CDA, as Smith is of the position that the
17 statements/conduct alleged are not attributable to him by virtue of the statute. The CDA
18 immunizes interactive computer services or users from any cause of action that would make them
19 liable for publishing information provided by a third-party user of the service. See 47 U.S.C.A
20 230(c)(1)(“[n]o provider or user of an interactive computer service shall be treated as the publisher
21 or speaker of any information provided by another information content provider”).¹ The CDA
22 defines “interactive computer service” to mean, “any information service, system, or access
23 software provider that provides or enables computer access by multiple users to a computer server,
24 including specifically a service or system that provides access to the Internet and such systems

25
26 ¹ See also Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1122 (9th Cir.2003); Zeran v. America Online, Inc.,
27 129 F.3d 327, 330–31 (4th Cir.1997) (finding “lawsuits seeking to hold a service provider liable for its exercise of a
28 publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter
content—are barred”); Doe v. MySpace, Inc., 528 F.3d 413, 420 (5th Cir. 2008) (noting there is no liability under
the CDA for “decisions relating to the monitoring, screening, and deletion of content” by an interactive computer
service provider).

1 operated or services offered by libraries or educational institutions.” Courts have consistently
2 found Facebook operates as an interactive computer service.²

3 The CDA, however, does not immunize an interactive computer service if it also functions
4 as an information content provider for the portion of the statement or publication at issue.³
5 “Information content provider” means “any person or entity that is responsible, in whole or in part,
6 for the creation or development of information provided through the Internet or any other
7 interactive computer service.” 47 USC 230(3). A website may lose immunity under the CDA by
8 making a material contribution to the creation or development of content.⁴

9 Thus, passive websites or websites that permit comments (without encouraging or
10 developing the content at issue) have not been deemed information content providers for the
11 purposes of the CDA.⁵ Therefore, absent some solicitation/encouragement of the defamatory
12 remarks, an interactive website/user will not be liable for the content that originated from a third
13 party.

14 Here, the FAC alleges that Smith is doing business as Lake Tahoe Wall of Shame. The
15 FAC alleges a specific comment of a person (not Smith) on Lake Tahoe Wall of Shame’s Facebook
16 page as well as generally states that members of Lake Tahoe Wall of Shame, and Lake Tahoe Wall
17 of Shame (itself) has made and continues to make false statements regarding Lackey and initiates
18 public comment threads on Facebook slandering Lackey including accusing him of criminal
19

20 ² See e.g. Fraley v. Facebook, Inc., 830 F.Supp.2d 785, 801–02 (N.D.Cal.2011); Klayman v. Zuckerberg, 753 F.3d
1354, 1359 (D.C. Cir. 2014).

21 ³ Carafano, 339 F.3d at 1123-25 (47 USC 230(c)(1) would bar plaintiff’s claims unless defendant “created or
22 developed the particular information at issue”); see also Anthony v. Yahoo! Inc., 421 F.Supp. 2d 1257, 1262-1263
(N.D. Cal. 2006)(finding the CDA did not bar claims arising out of dating service’s alleged creation of false profiles
which induced plaintiff to maintain his membership there).

23 ⁴ Kimzey v. Yelp! Inc., 836 F.3d 1263, 1269 (9th Cir. 2016)(noting Roommates.Com, 521 F.3d at 1171, clarified “the
24 language used in Carafano [Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir.2003)] recognizing that a website could
be a developer of content where it encouraged users to provide illegal content”). In Fair Hous. Council of San
25 Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1172 (9th Cir. 2008), the court discussed when a website
may also act as an information content provider: “The salient fact in Carafano was that the website’s classifications
26 of user characteristics did absolutely nothing to enhance the defamatory sting of the message, to encourage defamation
or to make defamation easier: The site provided neutral tools specifically designed to match romantic partners
27 depending on their voluntary inputs. By sharp contrast, Roommate’s website is designed to force subscribers to divulge
protected characteristics and discriminatory preferences, and to match those who have rooms with those who are
looking for rooms based on criteria that appear to be prohibited by the FHA.”

28 ⁵ See e.g. Stevo Design, Inc. v. SBR Mktg. Ltd., 919 F.Supp.2d 1112, 1125–26 (D. Nev. 2013; Spreadbury v.
Bitterroot Pub. Library, 856 F.Supp.2d 1195, 1198 (D. Mont. 2012; Piping Rock, 946 F.Supp.2d at 957.

1 conduct (accepting bribes and conspiracy). [FAC, at 3:18-28; 4: 1-7)]. It further alleges that Smith
2 and Lake Tahoe Wall of Shame published and encouraged statements. [FAC, at 8:14-19].

3 Facebook permits a comment by both the webpage as well as third party users. An original
4 post may contain a reply, as well as a reply to the reply, and can continue, the Court supposes,
5 indefinitely. Given the nature of Facebook, the Court cannot conclude for the purposes of a motion
6 to dismiss, that Smith did not encourage the third party user's statement. Therefore, at this time,
7 the Court cannot find Smith is immunized from liability for the third party comments under the
8 CDA.⁶

9 For the purposes of a motion to dismiss, that the Court is declining at this time in the
10 litigation to convert to summary judgment, the Court will not consider the evidence provided by
11 the parties that discusses Smith's role (or lack thereof) in Lake Tahoe Wall of Shame.

12 ***Defamation***

13 Pursuant to Rule 8, defamation must be pled by setting forth sufficient facts to demonstrate
14 the necessary elements of the claim so the defending party has adequate notice of the nature of the
15 claim.

16 Based on the substantial similarity between the language in F.R.C.P. 8(a) and N.R.C.P.
17 8(a), the court may look to decisions interpreting N.R.C.P. 8(a)'s federal counterpart for guidance,
18 especially the federal opinions that were decided prior the US Supreme Court's adoption of the
19 higher pleading standard as set forth in Ashcroft v. Iqbal, 556 U.S. 662 (2009) and Bell Atlantic
20 Corporation v. Twombly, 550 U.S. 544 (2007). Although, some federal courts, applying FRCP 8,
21 have required defamation to be pled with more specificity, such as dictating the claim must set
22 forth an adequate identification of the communication, who made the statements, to whom they
23 were made, and when the statements were made. See Bushnell Corporation v. ITT Corporation,
24 973 F.Supp. 1276 (D.Kan.1997); Decker v. Vermont Educ. Television, Inc., 13 F. Supp. 2d 569,

25
26 ⁶ See e.g. Hy Cite Corp v. badbusinessbureau.com, L.L.C., 418 F. Supp. 2d 1142, 1148-49 (D. Ariz. 2005)(declining
27 to grant defendants' motion to dismiss based on CDA immunity because plaintiffs alleged that defendants added
28 editorial comments, titles, and original content to third-party complaints posted on defendants' website); Whitney
Info. Network, Inc. v. Xcentric Venture, LLC, 199 Fed. Appx. 738, 744 (11th Cir. 2006)(finding whether Defendants
were entitled to CDA immunity remained in question because the complaint plead Defendants' involvement in
creating or developing the alleged defamatory content posted on their website.

1 573–74 (D. Vt. 1998); Blanck v. Hager, 360 F. Supp. 2d 1137, 1160 (D. Nev. 2005), aff'd, 220
2 Fed. Appx. 697 (9th Cir. 2007).

3 Other federal courts have expressed disfavor about requiring a higher pleading requirement
4 as defamation is not covered by FRCP 9. See Okeke v. Biomat USA, Inc., 927 F. Supp. 2d 1021,
5 1027 (D. Nev. 2013); Rivera v. Allstate Ins. Co., 140 F. Supp. 3d 722, 728 (N.D. Ill. 2015).

6 As the Nevada Supreme Court has not adopted the higher pleading standards many courts
7 have advocated for as discussed *supra*, the Court will not do so here. However, to the extent a
8 claim for damages is not premised on defamation per se, special damages must be pled with
9 particularity. See NRCP 9; see also Branda v. Sanford, 97 Nev. 643, 646, 637 P.2d 1223, 1225
10 (1981).

11 The general elements of a defamation claim require a plaintiff to prove: “(1) a false and
12 defamatory statement by [a] defendant concerning the plaintiff; (2) an unprivileged publication to
13 a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages.
14 Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 718, 57 P.3d 82, 90 (2002). “Statements are
15 libel per se under Nevada law when they ‘naturally tend to degrade [the plaintiff] in the estimation
16 of his fellow men, or hold him out to ridicule or scorn, or would tend to injure him in his business,
17 occupation or profession.” Flowers v. Carville, 292 F. Supp. 2d 1225, 1232 (D. Nev. 2003), aff'd,
18 161 Fed. Appx. 697 (9th Cir. 2006)(citing Talbot v. Mack, 41 Nev. 245, 169 P. 25 (1917)).

19 When a public figure or a limited public figure is involved, a plaintiff must plead and prove
20 actual malice as opposed to negligence. Pegasus, 118 Nev. at 719, 57 P.3d at 91. “General public
21 figures are those individuals who achieve such pervasive fame or notoriety that they become a
22 public figure for all purposes and in all contexts,” as well as those who hold government office.
23 Id. at 719; 91; Gertz v. Robert Welch, Inc., 94 S. Ct. 2997, 3008 (1974). A limited public figure
24 “voluntarily injects himself or is thrust into a particular public controversy or public concern, and
25 thereby becomes a public figure for a limited range of issues.” Id.; Bongiovi v. Sullivan, 122 Nev.
26 556, 573–74, 138 P.3d 433, 446 (2006).

27 The FAC generally alleges Smith is doing business as Lake Tahoe Wall of Shame. The
28 FAC states that Lake Tahoe Wall of Shame has and continues to initiate public comment threads

1 on its Facebook page slandering Lackey in his official capacity as a state employee and urging and
2 encouraging the public at large to shame and harass Lackey so that he will lose his job and/or feel
3 threatened enough to leave the community. The FAC alleges Lake Tahoe Wall of Shame acted
4 intentionally and with malice with the primary purpose being to harm, threaten, intimidate, cause
5 fear, anxiety, embarrassment and damage to his reputation by publishing false and vicious
6 comments accusing Lackey of criminal conduct (including accepting bribes and conspiracy)
7 designed to incite public outrage. The FAC lists some, but allegedly not all of the comments made
8 by Lake Tahoe Wall of Shame and the other defendants (see above for statements alleged
9 attributable to Smith dba Lake Tahoe Wall of Shame). The FAC asserts Lackey is either a limited
10 purpose public figure or a private individual. The FAC sets forth that Smith and Lake Tahoe Wall
11 of Shame published and encouraged statements despite having actual knowledge that such
12 statements were false, or with reckless disregard for their veracity. [FAC, at 8:14-19]. The FAC
13 states defendants know the inflammatory false information they were posting was malicious, false,
14 and accusatory of criminal conduct and had the purposes of harming, threatening, intimidating and
15 or harassing plaintiff and his livelihood. It further alleges Lackey has suffered damages and has
16 incurred attorneys' fees.

17 The specific statements attributed to Smith is Statement P. Generally, whether a statement
18 is capable of defamatory construction is a question of law. K-Mart Corp. v. Washington, 109 Nev.
19 1180, 886 P.2d 274 (1993). "Statements of opinion as opposed to statements of fact are not
20 actionable," however, "expressions of opinion may suggest that the speaker knows certain facts to
21 be true or may imply that facts exist which will be sufficient to render the message defamatory if
22 false." Pegasus, 118 Nev. at 714, 57 P.3d at 88. A "statement may be ambiguous or a 'mixed
23 type,' which is an opinion, which gives rise to the inference that the source has based the opinion
24 on underlying, undisclosed defamatory facts;" and when a statement is ambiguous, "the question
25 of whether it is a fact or evaluative opinion is left to the jury." Lubin v. Kunin, 117 Nev. 107, 113,
26 17 P.3d 422, 426 (2001).

27 Statement P critiques an unspecified "department" and not Lackey himself. As Lackey is
28 the plaintiff, and not NDOW or some other "department," the Court finds that this is not a

1 statement about the plaintiff by the defendant. Therefore, the Court finds, as a matter of law,
2 statement P is not actionable in this case for defamation. However, because the FAC generally
3 alleges the elements of defamation, and specifically states that Smith and Lake Tahoe Wall of
4 Shame published and encouraged the statements, the Court finds Lackey has stated a claim for
5 defamation. Lackey has put Smith on notice of the defamatory conduct by alleging defendants
6 have accused him of criminal conduct (accepting bribes and conspiracy), have slandered Lackey
7 in his official capacity, and made false statements of his character. These general allegations,
8 especially when read together with the specific examples provided, give Smith notice of the nature
9 of the defamation claim.

10 ***Civil Conspiracy***

11 Civil conspiracy "consists of a combination of two or more persons who, by some
12 concerted action, intend to accomplish an unlawful objective for the purpose of harming another,
13 and damage results from the act or acts." Consol. Generator-Nevada, Inc. v. Cummins Engine Co.,
14 Inc., 114 Nev. 1304, 1311, 971 P.2d 1251, 1256 (1998). The FAC sets forth that defendants
15 continuously over the past several years have acted in concert with one another to accomplish the
16 goals of harassing and threatening Lackey. The FAC alleges Lackey feels the defendants and their
17 supporters pose a threat to his safety and as a result he has suffered damages. The Court finds
18 Lackey has properly alleged a claim for civil conspiracy against Smith. Lackey has pled the
19 unlawful objective is to harass and threaten Lackey. Further, in stating a claim for conspiracy,
20 Lackey incorporates by reference the other allegations in his complaint. See discussion *supra*,
21 discussing the conduct Smith has been specifically alleged to do, such as using Facebook to
22 encourage the public to shame and harass Lackey. In addition to the conduct attributed to Smith
23 (through Lake Tahoe Wall of Shame), the FAC likewise sets forth specific Facebook
24 threats/comments attributed to the other defendants.

25 ***Intentional Infliction of Emotional Distress:***

26 The elements of a claim for intentional infliction of emotional distress are: 1) that the
27 defendant's conduct was extreme and outrageous; (2) that the defendant either intended or
28 recklessly disregarded the causing of emotional distress; (3) that the plaintiff actually suffered

1 severe or extreme emotional distress; and (4) that the defendant's conduct actually or proximately
2 caused the distress. Nelson v. City of Las Vegas, 99 Nev. 548, 555, 665 P.2d 1141, 1145 (1983).
3 "[E]xtreme and outrageous conduct is that which is outside all possible bounds of decency and is
4 regarded as utterly intolerable in a civilized community." Maduikie v. Agency Rent-A-Car, 114
5 Nev. 1, 4, 953 P.2d 24, 26 (1998).

6 Based on the allegations set forth above, the FAC alleges, defendants have engaged in
7 willful, malicious, wanton, and egregious conduct that was extreme and outrageous causing
8 emotional distress. The FAC alleges Lackey has suffered severe and extreme emotional distress as
9 a result of defendants' conduct and remains fearful of physical harm or violence directed at him.
10 Taking the factual allegations set forth in the FAC as true, the Court finds Lackey has properly
11 stated a claim for intentional infliction of emotional distress against Smith as the FAC alleges,
12 among other allegations, that Lake Tahoe Wall of Shame (who Smith does business as) has
13 initiated public comment to encourage the public to shame and harass Lackey so he will lose his
14 job and/or feel threatened enough to leave the community, and that Smith and Lake Tahoe Wall
15 of Shame published and encouraged the statements. Here, the FAC alleges Smith (in addition to
16 Lake Tahoe Wall of Shame) engaged in tortious conduct by publishing and encouraging
17 statements. Thus, for purposes of a motion to dismiss, taking the allegations in light most favorably
18 to Lackey, the Court cannot find that Smith is shielded for tortious acts.⁷ Thus, a jury could find
19 this is extreme and outrageous conduct. The Court incorporates by reference the analysis of the
20 CDA and purported defamatory statements set forth above.

21 *Negligent Infliction of Emotional Distress*⁷

22 A claim for negligent infliction of emotional distress requires a showing that defendant
23 owed a duty of care to the plaintiff, defendant breached that duty, the breach was the legal cause
24 of the plaintiff's injuries, and plaintiff suffered serious emotional damages. Olivero v. Lowe, 116

25
26 ⁷ See: "Directors or officers of a corporation do not incur personal liability for torts of the corporation merely by
27 reason of their official position, unless they participate in the wrong or authorize or direct that it be done."
United States Liab. Ins. Co. v. Haidinger-Hayes, Inc., 1 Cal. 3d 586, 595 (1970)(emphasis added).

28 ⁷ Although this third claim for relief is titled as "Intentional Infliction of Emotional Distress," because the FAC
alleges that Defendants acted negligently under this heading, the Court assumes it should be titled "Negligent
Infliction of Emotional Distress."

1 Nev. 395, 399, 995 P.2d 1023, 1026 (2000); Turner v. Mandalay Sports Entm't, LLC, 124 Nev.
2 213, 222, 180 P.3d 1172, 1178 (2008). The Nevada Supreme Court has cited favorable in Turner,
3 supra, the explanation of the duty required when a person complains they are the direct victim of
4 emotional distress in Moon v. Guardian Postacute Services, Inc., 116 Cal. Rptr. 2d 218, 220–21
5 (2002):

6 The distinction between the “bystander” and the “direct victim” cases is found in
7 the source of the duty owed by the defendant to the plaintiff.’ ‘Bystander’ claims
8 are typically based on breach of a duty owed to the public in general, whereas a
9 right to recover for emotional distress as a ‘direct victim’ arises from the breach of
a duty that is assumed by the defendant or imposed on the defendant as a matter of
law, or that arises out of the defendant’s preexisting relationship with the plaintiff.

10 “In cases where emotional distress damages are not secondary to physical injuries, but
11 rather, precipitate physical symptoms, either a physical impact must have occurred or, in the
12 absence of physical impact, proof of ‘serious emotional distress’ causing physical injury or illness
13 must be presented.” Barmettler v. Reno Air, Inc., 114 Nev. 441, 448, 956 P.2d 1382, 1387 (1998).

14 Throughout, the FAC alleges defendants acted negligently in causing severe and emotional
15 distress, and Lackey suffered severe and emotional distress as a result of Defendants’ negligence.
16 However, the Court finds the FAC has failed to plead that Smith owed Lackey a duty. As such,
17 the Court finds Lackey has failed to state a claim for negligent infliction of emotional distress.

18 Based on the forgoing, and good cause appearing,

19 IT IS HEREBY ORDERED that Mark E. Smith’s *Special Motion to Dismiss brought under*
20 *NRS 41.635 et seq.* is DENIED.

21 IT IS HEREBY FURTHER ORDERED that Mark E. Smith’s *Special Motion to Dismiss*
22 *brought under NRCP 12* is DENIED as to claims of defamation, civil conspiracy and intentional
23 distress, and GRANTED as to the claim of Negligent Infliction of Emotional Distress, said claim
24 shall be DISMISSED.

25 ///

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28 ///

1 IT IS HEREBY FURTHER ORDERED that Mark E. Smith shall file an Answer to the
2 First Amended Complaint within twenty (20) days of the date of this Order.

3 DATED this 23 day of October, 2017.

4 Connie J. Stinham
5 DISTRICT JUDGE
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CERTIFICATE OF SERVICE

CASE NO. CV17-00434

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 23 day of October, 2017, I filed the **ORDER REGARDING MARK E. SMITH'S SPECIAL MOTION TO DISMISS/MOTION TO DISMISS** with the Clerk of the Court.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

 Personal delivery to the following: [NONE]

 X **Electronically filed with the Clerk of the Court, using the eFlex system which constitutes effective service for all eFiled documents pursuant to the eFile User Agreement.**

SEAN ROSE, ESQ. for CARL LACKEY

THOMAS BRENNAN, ESQ. for CARL LACKEY

DEL HARDY, ESQ. for CAROLYN STARK DBA NDOWL WATCH KEEPING THEM TRANSPARENT

CAMERON BORDNER, ESQ. for BEAR LEAGUE, MARK E SMITH, ANNE BRYANT

 Transmitted document to the Second Judicial District Court mailing system in a sealed envelope for postage and mailing by Washoe County using the United States Postal Service in Reno, Nevada: [NONE]

 Placed a true copy in a sealed envelope for service via:

 Reno/Carson Messenger Service – [NONE]

 Federal Express or other overnight delivery service [NONE]

DATED this 23 day of October, 2017.



1 CODE: 1310
2 DEL HARDY, ESQ. (SBN 1172)
3 STEPHANIE RICE, ESQ. (SBN 11627)
4 WINTER STREET LAW GROUP
5 96 & 98 Winter Street
6 Reno, Nevada 89503
7 Telephone: (775) 786-5800
8 *Attorneys for Defendant Mark E. Smith*

9
10 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

11 **IN AND FOR THE COUNTY OF WASHOE**

12 **CARL LACKEY,**

13 Plaintiff,

14 vs.

15 BEAR LEAGUE, a California Corporation,
16 ANNE BRYANT, an individual, MARK E.
17 SMITH, an individual dba LAKE TAHOE WALL
18 OF SHAME, CAROLYN STARK, an individual
19 dba NDOW WATCH KEEPING THEM
20 TRANSPARENT, and DOES 1-20, INCLUSIVE.

21 Defendants.

CASE NO.: CV17-00434

DEPT. NO.: 4

22 **CASE APPEAL STATEMENT**

23 COMES NOW, Defendant Mark E. Smith, by and through his undersigned attorneys,
24 hereby respectfully submits this Case Appeal Statement as follows:

25 **1. Name of appellant(s) filing this case appeal statement:**

26 Defendant, MARK E. SMITH

27 **2. Identify the judge issuing the decision, judgment, or order appealed from:**

28 The Honorable Judge Connie Steinheimer

3. Identify each appellant and the name and address of counsel for each appellant:

Appellant Herein:

MARK E. SMITH

Counsel Name & Address:

DEL HARDY, ESQ.
STEPHANIE RICE, ESQ.
RICHARD SALVATORE, ESQ.
WINTER STREET LAW GROUP
96 & 98 Winter Street
Reno, Nevada 89503

1 **4. Identify each respondent and the name and address of appellate counsel, if**
2 **known, for each respondent (if the name of a respondent's appellate counsel is**
3 **unknown, indicate as much and provide the name and address of that**
4 **respondent's trial counsel):**

5 Respondent Herein: CARL LACKEY

6 Appellate Counsel: Unknown

7 Respondents' Trial Counsel: SEAN P. ROSE, ESQ.
8 Rose Law Office
9 150 W. Huffaker Lane, Suite 101
10 Reno, Nevada 89511
11 Trial Counsel for Above-Named Respondent

12 THOMAS R. BRENNAN, ESQ.
13 Durney & Brennan, Ltd.
14 6900 S. McCarran Blvd., Suite 2060
15 Reno, Nevada 89509
16 Trial Counsel for Above-Named Respondent

17 **5. Indicate whether any attorney identified above in response to question 3 or 4 is**
18 **not licensed to practice law in Nevada and, if so, whether the district court granted**
19 **that attorney permission to appear under SCR 42:**

20 At all times herein, all attorneys identified in response to questions 3 and 4 above
21 are believed to be licensed to practice law in Nevada. There was no grant of
22 permission to appear under SCR 42 granted by the District Court in this matter.

23 **6. Indicate whether appellant was represented by appointed or retained counsel in**
24 **the district court:**

25 Appellant herein was represented by retained counsel in the District Court.

26 **7. Whether appellant is represented by appointed or retained counsel on appeal:**

27 Appellant herein is represented by retained counsel on appeal.

28 **8. Indicate whether appellant was granted leave to proceed in forma pauperis, and**
the date of entry of the district court order granting such leave:

N/A, appellant herein was never granted leave to proceed in forma pauperis.

1 **9. Indicate the date the proceedings commenced in the district court (e.g., date**
2 **complaint, indictment, information, or petition was filed):**

3 Plaintiff Carl Lackey filed the Complaint on March 1, 2017.

4 **10. Provide a brief description of the nature of the action and result in the district**
5 **court, including the type of judgment or order being appealed and the relief**
6 **granted by the district court:**

7 This is a case where Carl Lackey, an employee of the Nevada Department of Wildlife
8 ("NDOW") and public figure responsible for the bear population in Northern Nevada, filed this
9 action against Appellant and others, to silence public comment and communications regarding
10 Mr. Lackey and his actions on behalf of NDOW, matters of public concern in Northern Nevada
11 and the surrounding areas.

12 Mr. Lackey filed the present action against Appellant Smith herein alleging claims for
13 defamation, intentional infliction of emotional distress, negligent infliction of emotional
14 distress, and civil conspiracy. Mr. Lackey's entire suit rests upon allegations that Defendants
15 Bear League, a California Corporation, Ann Bryant, an individual, Mark E. Smith an, individual
16 dba Lake Tahoe Wall of Shame, and Carolyn Stark, an individual dba NDOW Watch Keeping
17 Them Transparent, "published false and malicious comments" regarding Mr. Lackey.

18 However, noticeably absent from Mr. Lackey's First Amended Complaint are any
19 allegations that Appellant Mr. Smith published any comments whatsoever, and certainly not
20 any comments about or concerning Mr. Lackey.

21 Instead, Mr. Lackey, in a clear effort to discourage Defendants' free speech and free
22 assembly rights under the First Amendment, premises his entire suit on comments purportedly
23 posted by the Bear League and comments posted by various third parties on the Bear League's
24 Lake Tahoe Wall of Shame's and NDOW Watch Keeping them Transparent's respective social
25 media (Facebook) pages.

26 However, Mr. Smith did not create and is not an administrator or responsible party for
27 either one of the subject social media (Facebook) pages; and, as such, comments posted on the
28

1 subject Facebook pages cannot be attributed to Mr. Smith under even the most generous
2 interpretation of the term "publication". Further, assuming arguendo that Mr. Smith had any
3 management control over either social media pages, which Mr. Smith has at all times herein
4 expressly denied, such comments cannot be attributed to Mr. Smith under the Communications
5 Decency Act. 11 U.S.C. § 230(c)(1). Accordingly, Mr. Smith filed a Special Motion to Dismiss
6 pursuant to Nevada's Anti-SLAPP statutes. See, NRS 41.635, et seq. and NRCP 12.

7 This is exactly the type of case that the Anti-SLAPP (Strategic Lawsuits Against Public
8 Participation) was designed to protect. Thereafter, instead of ruling on the matter within
9 twenty (20) judicial days after the motion was served on the Plaintiff pursuant to NRS
10 41.660(3)(f), on June 30, 2017, the District Court Ordered that the matter be set for oral
11 arguments. Oral arguments were held on July 26, 2017 after which, the District Court took the
12 matter under advisement. The District Court then issued its Order denying Appellant's Special
13 Motion to Dismiss as to the three (3) claims on appeal herein (Defamation, Intentional Infliction
14 of Emotional Distress and Civil Conspiracy) and granted the same as to an additional cause of
15 action for Negligent Infliction of Emotional Distress on October 23, 2017. A Notice of Entry of
16 Order was filed thereon on November 13, 2017. Accordingly, Appellant herein files the instant
17 interlocutory appeal of this anti-SLAPP matter in accordance with NRS 41.670(4).

18 **11. Indicate whether the case has previously been the subject of an appeal to or**
19 **original writ proceeding in the Supreme Court and, if so, the caption and Supreme**
20 **Court docket number of the prior proceeding:**

21 This case has not previously been the subject of an appeal or original writ
22 proceeding in the Supreme Court.

23 **12. Indicate whether this appeal involves child custody or visitation:**

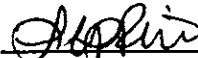
24 This appeal does not involve child custody or visitation.

25 **13. If this is a civil case, indicate whether this appeal involves the possibility of**
26 **settlement:**

27 While the undersigned is always hopeful that the possibility of settlement exists
28

1 in all matters, in light of the contentious nature of this action, the realistic
2 possibility of settlement in this case is unlikely, but always available for
3 consideration.

4 DATED this 13th day of November, 2017.

5 
6 STEPHANIE RICE, ESQ. (SBN 11627)
7 DEL HARDY, ESQ. (SBN 1172)
8 *Attorneys for Appellant, Mark E. Smith*

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of WINTER STREET LAW GROUP, 96 & 98 Winter Street, Reno, Nevada 89503, and that on this date I served the foregoing document(s) described as **CASE APPEAL STATEMENT** on all parties to this action by:

☒ Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, at Reno, Nevada, postage paid, following ordinary business practices.

☐ Personal Delivery

☐ Facsimile (FAX) and/or Email:

☐ Federal Express or other overnight delivery

☐ Messenger Service

☐ Certified Mail with Return Receipt Requested

☒ Electronically filed

addressed as follows:

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150 W. Huffaker Lane, Suite 101
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Reno, NV 89509
F: 775-322-3014

Robin Shofner, Esq.
Molsby & Bordner, LLP
1830 15th Street, Ste. 100
Sacramento, CA 95811

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the proceeding document and attached exhibits, if any, do not contain the Social Security Number of any person.

DATED this 13th day of November, 2017


AN EMPLOYEE OF WINTER STREET LAW GROUP

1 **ANAC**
MICHAEL R. HALL
2 Nevada Bar No. 005978
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3 MICHAEL J. SHANNON
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7 FAX (702)316-4114

8 *Attorneys for Defendant,*
Mark E. Smith, erroneously named as Mark E. Smith dba
9 *Lake Tahoe Wall of Shame*

10 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
11 **IN AND FOR THE COUNTY OF WASHOE**

12 CARL LACKEY,

13 Plaintiff,

14 vs.

15 BEAR LEAGUE, a California Corporation;
16 ANNE BRYANT, an individual; MARK E.
SMITH, an individual dba LAKE TAHOE WALL
17 OF SHAME; CAROLYN STARK, an individual
dba NDOW WATCH KEEPING THEM
18 TRANSPARENT and DOES 1-20, inclusive,
19 Defendants.

CASE NO.: CV17-00434
DEPT NO.: 4

**DEFENDANT, MARK E. SMITH,
ERRONEOUSLY NAMED AS MARK E.
SMITH DBA LAKE TAHOE WALL OF
SHAME'S ANSWER TO PLAINTIFF'S
FIRST AMENDED COMPLAINT**

20 Defendant, MARK E. SMITH, erroneously named as MARK E. SMITH dba LAKE TAHOE
21 WALL OF SHAME ("Defendant"), by and through his attorneys, MICHAEL R. HALL, ESQ. and
22 MICHAEL J. SHANNON, ESQ., of the law firm of HALL JAFFE & CLAYTON, LLP, hereby answers
23 Plaintiff's First Amended Complaint as follows:

24 **PARTIES**

25 1. Answering Paragraph 1 of the First Amended Complaint, this Answering Defendant is
26 without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations
27 contained therein, and accordingly, those allegations are hereby denied.

28 ///

2. Paragraphs 2, 3, 5 and 6 of the First Amended Complaint do not call for a response from this Answering Defendant. To the extent these Paragraphs are construed as calling for a response from this Answering Defendant, this Answering Defendant denies the allegations.

3. Answering Paragraph 4 of the First Amended Complaint, this Answering Defendant admits he is an individual residing in Incline Village, Washoe County, State of Nevada. This Answering Defendant denies each and every remaining allegation in Paragraph 4.

FACTUAL ALLEGATIONS

4. Answering Paragraphs 7, 8, 9 and 10 of the First Amended Complaint, this Answering Defendant is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained therein, and accordingly, those allegations are hereby denied.

5. Answering Paragraphs 11, 12, 13 and 14 of the First Amended Complaint, this Answering Defendant denies each and every allegation pertaining to himself. As to the remaining allegations, this Answering Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained therein, and therefore denies those allegations made against the other Defendants.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(Defamation – Against all Defendants)

6. Answering Paragraph 15 of the First Amended Complaint, this Answering Defendant repeats and incorporates herein by reference those responses to Paragraphs 1 through 14 above.

7. Answering Paragraph 16 of the First Amended Complaint, this Answering Defendant admits Plaintiff is either a limited purpose public figure or public figure. This Answering Defendant denies that Plaintiff is a private individual thrust into an area of public concern.

8. Answering Paragraphs 17, 19, 20, 21 and 22 of the First Amended Complaint, this Answering Defendant denies each and every allegation pertaining to himself. As to the remaining allegations, this Answering Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained therein, and therefore denies those allegations made against the other Defendants.

9. Answering Paragraph 18 of the First Amended Complaint, this Answering Defendant admits Nevada law provides for a cause of action based on defamation, the elements of which are defined by applicable statutory and case law.

10. Answering Paragraph 23 of the First Amended Complaint, this Answering Defendant denies all allegations.

SECOND CLAIM FOR RELIEF

(Intentional Infliction of Emotional Distress – Against all Defendants)

11. Answering Paragraph 24 of the First Amended Complaint, this Answering Defendant repeats and incorporates herein by reference those responses to Paragraphs 1 through 23 above.

12. Answering Paragraphs 25, 26 and 27 of the First Amended Complaint, this Answering Defendant denies each and every allegation pertaining to himself. As to the remaining allegations, this Answering Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained therein, and therefore denies those allegations made against the other Defendants.

13. Answering Paragraph 28 of the First Amended Complaint, this Answering Defendant denies all allegations.

THIRD CLAIM FOR RELIEF

(Intentional Infliction of Emotional Distress – Against all Defendants)

14. As the Court has dismissed Plaintiff's Cause of Action for Negligent Infliction of Emotional Distress (inaccurately labeled "Intentional Infliction of Emotional Distress" as Plaintiff's Third Claim for Relief) against Defendants, no response is necessary to Paragraphs 29, 30, 31, 32 and 33. To the extent any response is deemed necessary, this Answering Defendant denies each and every allegation contained in Paragraphs 29, 30, 31, 32 and 33.

FOURTH CLAIM FOR RELIEF

(Civil Conspiracy)

15. Answering Paragraph 34 of the First Amended Complaint, this Answering Defendant repeats and incorporates herein by reference those responses to Paragraphs 1 through 33 above.

/ / /

1 16. Answering Paragraphs 35, 36 and 37 of the First Amended Complaint, this Answering
2 Defendant denies all allegations.

3 **AFFIRMATIVE DEFENSES**

4 As and for his affirmative defenses in this case, this Answering Defendant asserts the following:

5 **FIRST AFFIRMATIVE DEFENSE**

6 Plaintiff's First Amended Complaint, and each and every claim set forth therein, fails to state facts
7 sufficient to constitute a cause of action upon which relief may be granted.

8 **SECOND AFFIRMATIVE DEFENSE**

9 Plaintiff's First Amended Complaint, and each and every cause of action set forth therein, is
10 barred by the applicable statute(s) of limitation.

11 **THIRD AFFIRMATIVE DEFENSE**

12 Plaintiff's First Amended Complaint, and each and every cause of action set forth therein, is
13 barred by the Doctrine of Unclean Hands.

14 **FOURTH AFFIRMATIVE DEFENSE**

15 Plaintiff's First Amended Complaint, and each and every cause of action set forth therein, is
16 barred by the Doctrine of Estoppel.

17 **FIFTH AFFIRMATIVE DEFENSE**

18 Plaintiff has failed to mitigate his damages, if any.

19 **SIXTH AFFIRMATIVE DEFENSE**

20 If Plaintiff suffered or sustained any injury, damage, or detriment, the same was proximately and
21 legally caused and contributed to by the negligence of Plaintiff in that, at the time and place set forth in
22 the First Amended Complaint, Plaintiff failed to exercise that degree of care and caution which ordinarily
23 prudent persons would exercise under the sane and/or similar circumstances.

24 **SEVENTH AFFIRMATIVE DEFENSE**

25 Plaintiff's injuries and damages, if any, were caused and/or contributed to by persons and/or
26 entities over which this Answering Defendant had no control or responsibility.

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1 **EIGHTH AFFIRMATIVE DEFENSE**

2 At all times mentioned in Plaintiff's First Amended Complaint, Plaintiff was aware of any
3 inherent risk to himself and reputation and assumed said risk by failing to take precautions in the conduct
4 of himself. Plaintiff's assumption of said risk bars any recovery herein.

5 **NINTH AFFIRMATIVE DEFENSE**

6 The statements and writings attributed to this Answering Defendant, if any, concerning the
7 Plaintiff were made without knowledge of any statement and/or writing's falsity.

8 **TENTH AFFIRMATIVE DEFENSE**

9 This action is barred by NRS 41.660 *et seq.*

10 **ELEVENTH AFFIRMATIVE DEFENSE**

11 The statements and writings attributed to this Answering Defendant, if any, were privileged as
12 Plaintiff is a public figure.

13 **TWELFTH AFFIRMATIVE DEFENSE**

14 The statements and writings attributed to this Answering Defendant, if any, were privileged as
15 Plaintiff is a limited public figure.

16 **THIRTEENTH AFFIRMATIVE DEFENSE**

17 Plaintiff has failed to allege facts sufficient to constitute malice in fact and/or actual malice
18 against this Answering Defendant, as defined at N.R.S. 41.332 *et seq.*

19 **FOURTEENTH AFFIRMATIVE DEFENSE**

20 The statements and writings attributed to this Answering Defendant, if any, were opinion and,
21 thus, privileged.

22 **FIFTEENTH AFFIRMATIVE DEFENSE**

23 The statements and writings attributed to this Answering Defendant, if any, are protected by the
24 First Amendment to the United States Constitution.

25 **SIXTEENTH AFFIRMATIVE DEFENSE**

26 The statements and writings attributed to this Answering Defendant, if any, were in the
27 community interest and, thus, privileged.

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1 **SEVENTEENTH AFFIRMATIVE DEFENSE**

2 The statements and writings attributed to this Answering Defendant, if any, were in the public
3 interest and, thus, privileged.

4 **EIGHTEENTH AFFIRMATIVE DEFENSE**

5 The statements and writings attributed to this Answering Defendant, if any, are protected by the
6 governmental communications privilege(s) as set forth at N.R.S. 41.635 *et seq.*

7 **NINETEENTH AFFIRMATIVE DEFENSE**

8 Plaintiff's prayer for punitive damages constitutes an excessive fine under the Eighth Amendment
9 to the United States Constitution.

10 **TWENTIETH AFFIRMATIVE DEFENSE**

11 Plaintiff's prayer for punitive damages constitutes a violation of due process guarantees under the
12 Fourth Amendment to the United States Constitution.

13 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

14 Plaintiff's prayer for punitive damages constitutes an excessive punishment under the Eighth
15 Amendment to the United States Constitution.

16 **TWENTY-SECOND AFFIRMATIVE DEFENSE**

17 Plaintiff's First Amended Complaint, and each and every cause of action set forth therein, is
18 barred by the Doctrine of Laches.

19 **TWENTY-THIRD AFFIRMATIVE DEFENSE**

20 Plaintiff's prayer for punitive damages constitutes an excessive punishment under the Nevada
21 State Constitution, Art. I, §1.

22 **TWENTY-FOURTH AFFIRMATIVE DEFENSES**

23 Plaintiff's prayer for punitive damages constitutes an excessive fine under the Nevada State
24 Constitution, Art. I, §1.

25 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

26 Plaintiff's First Amended Complaint, and each and every cause of action set forth therein,
27 constitute a violation of free speech liberties, as guaranteed under the Nevada State Constitution, Art. I,
28 §9.

1 **TWENTY-SIXTH AFFIRMATIVE DEFENSE**

2 This action is barred by the Communications Decency Act of 1996, 47 U.S.C. Sec. 230, *et seq.*

3 **TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

4 Pursuant to NRCP 11, all possible affirmative defenses may not have been alleged insofar as
5 sufficient facts are not available after reasonable inquiry from the filing of Plaintiff's First Amended
6 Complaint and, therefore, this Answering Defendant reserves the right to amend his Answer to allege
7 additional affirmative defenses, delete or change the same as subsequent discovery and investigation
8 warrant.

9 WHEREFORE, this Answering Defendant prays for relief as follows:

- 10 1. That Plaintiff take nothing by virtue of his First Amended Complaint on file herein;
11 2. That a judgment of dismissal be entered in favor of this Answering Defendant;
12 3. That this Answering Defendant be dismissed from this action and awarded costs incurred
13 and reasonable attorneys' fees; and,
14 4. That this Answering Defendant be awarded such other and further relief as the Court
15 deems just and proper in the premises.


16 **AFFIRMATION**

17 **Pursuant to NRS 239B.030**

18 The undersigned does hereby affirm that this document does not contain the social security
19 number of any person.

20 DATED this 13th day of November, 2017.

21 HALL JAFFE & CLAYTON, LLP

22
23 By 
24 MICHAEL J. SHANNON
25 Nevada Bar No. 005978
26 MICHAEL J. SHANNON
27 Nevada Bar No. 007510
28 7425 Peak Drive
Las Vegas, Nevada 89128
*Attorneys for Defendant,
Mark E. Smith, erroneously named as Mark E. Smith
dba Lake Tahoe Wall of Shame*

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the 13th day of November, 2017, I served a copy of the foregoing
3 **DEFENDANT, MARK E. SMITH, ERRONEOUSLY NAMED AS MARK E. SMITH DBA LAKE**
4 **TAHOE WALL OF SHAME'S ANSWER TO PLAINTIFF'S FIRST AMENDED COMPLAINT**
5 via U.S. Mail, in a sealed envelope, to the following counsel of record and/or parties, and that postage
6 was fully prepaid thereon:

7 Sean P. Rose, Esq.
8 ROSE LAW OFFICE
150 West Huffaker Lane, Suite 101
Reno, Nevada 89511

9 -and-

10 Thomas R. Brennan, Esq.
DURNEY & BRENNAN, LTD.
6900 South McCarran Boulevard, Suite 2060
11 Reno, Nevada 89509
12 *Attorneys for Plaintiff*

13 *Erin L Adams*

14 An Employee of
15 HALL JAFFE & CLAYTON, LLP
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