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IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK E. SMITH, an individual, D/B/A
LAKE TAHOE WALL OF SHAME,

Appellant,

vs.

CARL LACKEY,


Respondent.

Supreme Court Case No.: 74461

District Court Case No.: CV17-00434

APPELLANT'S OPENING BRIEF

Appeal from the Second Judicial District Court's denial of Appellant's Anti-SLAPP Special Motion to Dismiss pursuant to NRS 41.660.



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SHAME

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

2 ***

3 **MARK E. SMITH, an individual, D/B/A**
4 **LAKE TAHOE WALL OF SHAME,**

5 Appellant,

6 vs.

7 **CARL LACKEY,**

8 Respondent.

Supreme Court Case No.:74461

District Court Case No.: CV17-00434

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11 **NRAP 26.1 DISCLOSURE**

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

16
17 1. All parent corporations and publicly-held companies owning 10 percent or
18 more of the party's stock: None

19 2. Names of all law firms whose attorneys have appeared for the party or
20 amicus in this case (including proceedings in the district court or before an
21 administrative agency) or are expected to appear in this court:

22 Winter Street Law Group*

23 (*formerly Hardy Law Group)

1 Molsby & Bordner, LLP

2 Sean P. Rose, Esq.

3 Durney & Brennan, Ltd.

4 Hall Jaffee & Clayton, LLP

5
6 3. If litigant is using a pseudonym, the litigant's true name: None; however,
7 the First Amended Complaint erroneously names Appellant, MARK E. SMITH,
8 as an individual and doing business as the LAKE TAHOE WALL OF SHAME
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**IV.
JURISDICTIONAL STATEMENT**

A. Basis for Supreme Court's Appellate Jurisdiction

This Court has appellate jurisdiction over this matter pursuant to Nevada's Anti-SLAPP statutes, specifically, NRS 41.670(4) which provides, "If the court denies the special motion to dismiss filed pursuant to NRS 41.660, an interlocutory appeal lies to the Supreme Court."

B. Filing Dates Establishing Timeliness of Appeal

On October 23, 2017, the District Court denied MARK E. SMITH's Anti-SLAPP Special Motion to Dismiss /Motion to Dismiss. Vol. IV, JA 0226-JA 0240. On November 13, 2017, the Notice of Entry of Order was served on all parties. *Id.* at JA 0242-JA 0260. On November 13, 2017, MARK E. SMITH filed a Notice of Appeal. *Id.* at JA 0261-JA 0283. Such notice was timely under NRAP Rule 4(a)(1) because it was filed within thirty (30) days of service of the Notice of Entry of Order.

C. Order Appealing From

The October 23, 2017 Order at issue on appeal herein is the Order denying MARK E. SMITH's Anti-SLAPP Special Motion to Dismiss /Motion to Dismiss.

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**V.
ROUTING STATEMENT**

The statute authorizing this appeal, NRS 41.670, specifically provides that “[i]f the court denies the special motion to dismiss filed pursuant to NRS 41.660,” as occurred here, “an interlocutory appeal lies to the Supreme Court.” NRS 41.670(4). As such, this appeal should be presumptively retained by the Supreme Court.

In addition, Appellant herein respectfully believes this matter should be presumptively retained by the Nevada Supreme Court in accordance with NRAP 17(a)(11), concerning, “Matters raising as a principal issue a question of statewide public importance, or an issue upon which there is an inconsistency in the published decisions of the Court of Appeals or of the Supreme Court or a conflict between published decisions of the two courts.” Because this case deals with a newer era of technology, specifically social media, in connection with First Amendment rights, this matter rises to the level of a question of statewide public importance and also involves significant public policy issues, as it deals with the extent to which online speech, petitioning and association rights are protected under Nevada’s anti-SLAPP statutes.

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VI.

STATEMENT OF ISSUES ON APPEAL

1. Did the District Court abuse its discretion in denying Appellant, MARK E. SMITH'S Anti-SLAPP Special Motion to Dismiss pursuant to NRS 41.650 et. seq./Motion to Dismiss, when the causes of action set forth in the First Amended Complaint all arise out of Appellant's wildlife advocacy and seek to silence Appellant's speech, petitioning and association rights by attempting to hold Appellant liable for an alleged defamatory statement made by an unrelated third-party with similar wildlife advocacy efforts?

**VII.
STATEMENT OF THE CASE**

Respondent, CARL LACKEY ("LACKEY"), filed his First Amended Complaint ("FAC") against MARK E. SMITH ("SMITH") and others¹ on March 31, 2017 based on one specific purported defamatory statement made by an unrelated third-party that LACKEY alleges gives rise to a myriad of damages, including reputational damage, emotional distress and attorney's fees. *See generally*, Vol. I, JA 0011-JA 0021. The entirety of LACKEY's claims against SMITH are premised on a lone comment posted on a public Facebook page called the LAKE TAHOE WALL OF SHAME, that doesn't even reference LACKEY, let alone defame him. Vol. I, JA 0016, ¶¶p. LACKEY does not once even allege that SMITH made any comments at all and certainly not any comments concerning LACKEY. Vol. I, JA 0011-JA 0021.

Further, SMITH was apparently erroneously named in this action as doing business as the LAKE TAHOE WALL OF SHAME; however, SMITH is not the creator or even an administrator of the LAKE TAHOE WALL OF SHAME public Facebook page. Vol. I, JA 0082 at ¶¶2-3. As such, on June 5, 2017, SMITH filed an

¹ With respect to the other parties sued by LACKEY in this action, CAROLYN STARK, an individual and allegedly doing business as NDOW WATCH KEEPING THEM TRANSPARENT, currently has a similar appeal pending in this Court, Case No. 74449; and, the BEAR LEAGUE and ANNE BRYANT reached a non-monetary settlement after the Court denied their similar Anti-SLAPP Special Motions to Dismiss.

1 Anti-SLAPP Special Motion to Dismiss/Motion to Dismiss pursuant to NRS
2 41.660 et. seq. and NRCP 12(b)(5). (“Motion”).

3 On October 23, 2017, the District Court denied SMITH’s Motion as to all
4 but LACKEY’s claim for Negligent Infliction of Emotional Distress, which was
5 dismissed (and has not been appealed). Vol. IV, JA 0226-JA 0240. On November
6 13, 2017, the Notice of Entry of Order was served on all parties. *Id.* at JA 0242-JA
7 0260.
8

9 **VIII.**
10 **STATEMENT OF FACTS**

11 The facts of this case are crystal clear, much like the errors committed by the
12 District Court in denying Appellant, MARK E. SMITH’s (“SMITH”), Anti-
13 SLAPP Special Motion to Dismiss/Motion to Dismiss.

14 **Anti-SLAPP/Defamation**

15 LACKEY’s FAC asserts claims against SMITH for Defamation, Intentional
16 Infliction of Emotional Distress, Negligent Infliction of Emotional Distress
17 (dismissed by the District Court) and Civil Conspiracy. *See generally*, Vol. I, JA
18 0011-JA 0021. Neither LACKEY’s original Complaint, nor his FAC were
19 verified. *Id.*; *See also*, Vol. I, JA 0001-JA 0010. At no time did LACKEY provide
20 a Declaration or Affidavit in support of his claims in this action. *See generally*,
21 Vol. I, JA 0030-Vol. IV, JA 0225.
22
23

1 LACKEY is a biologist employed by the Nevada Department of Wildlife.
2 Vol. I, JA 0013, ¶7. LACKEY is basically in charge of the bear population in the
3 State of Nevada for NDOW. SMITH is a wildlife advocate and conservationist of
4 natural resources, “specifically the preservation and treatment of bears.” Vol. IV,
5 JA 0230:3-4.
6

7 In his FAC, LACKEY alleges that SMITH, “is an individual, residing in
8 Incline Village, Washoe County, State of Nevada and is doing business as LAKE
9 TAHOE WALL OF SHAME.” Vol. I, JA 0012 at ¶4. In support of Motion,
10 SMITH submitted a Declaration under penalty of perjury refuting LACKEY’s
11 allegation stating, “I was named herein erroneously as MARK E. SMITH, an
12 individual dba LAKE TAHOE WALL OF SHAME” and, “I am neither the creator
13 nor an administrator for LAKE TAHOE WALL OF SHAME’s Facebook page.”
14 Vol. I, JA 0082 at ¶2 and 3; See also, Vol. I, JA 0030 at Fn. 1, (“Erroneously
15 named as MARK E. SMITH an individual and dba LAKE TAHOE WALL OF
16 SHAME”).
17

18 In his FAC, LACKEY alleges that the “BEAR LEAGUE, LAKE TAHOE
19 WALL OF SHAME and LAKE TAHOE WALL OF SHAME [*sic*] and NDOW
20 WATCH KEEPING THEM TRANSPARENT acted intentionally and with malice
21 with the primary purpose being to harm, threaten, intimidate, cause fear, anxiety,
22 embarrassment and damage to Plaintiff’s reputation by publishing false and vicious
23

1 comments accusing Plaintiff of criminal conduct (including accepting bribes and
2 conspiracy), designed to incite public outrage;” and then articulates twenty-six
3 allegedly defamatory statements. Vol. I, JA 0014:2-JA 0017:28. The FAC fails to
4 allege that any one of the allegedly defamatory statements set forth therein was
5 made by Appellant, SMITH. *Id.* See also, Vol. I, JA 0032:10-11, (“Noticeably
6 absent from the FAC are any allegations that SMITH published any comments
7 whatsoever, and certainly not any comments about or concerning LACKEY.”).
8 The FAC seeks to hold SMITH responsible for a specific third-party statement by
9 alleging that SMITH and the LAKE TAHOE WALL OF SHAME are one in the
10 same; however, such assertion is unequivocally false. Vol. I, JA 0082, ¶2-4.
11
12

13 However, in ruling on SMITH’s Motion, the District Court analyzed one
14 statement made by an unrelated third-party that was posted to the LAKE TAHOE
15 WALL OF SHAME’s public Facebook page as follows: “ ‘A department with no
16 real interest in wildlife other than to make it available to hunters and trappers ...
17 some might say they are criminals against nature ... they are certainly ignorant
18 about it.’ Commenter Sean Stansfield on Lake Tahoe Wall of Shame’s
19 Facebook Page.” [Emphasis Added]. Vol. IV, JA 0229:12-15. In his FAC, this is
20 the one and only specific statement LACKEY alleges SMITH should somehow be
21 held liable for. Vol. I, JA 0011-JA 0021.
22
23

1 Absolutely nothing in the above statement apparently made by non-party,
2 Sean Stansfield, makes any reference or infers it is speaking about or is any way
3 related to LACKEY. *Id.* See also, Vol. IV, JA 0230:11-12, (“There is no indication
4 of what this ‘department’ is (although, the Court presumes it is referring to the
5 NDOW)”).

6
7 SMITH “had no role in drafting or publishing the comment of Sean
8 S[tan]sfield on the LAKE TAHOE WALL OF SHAME Facebook page identified
9 in the First Amended Complaint in ¶14p [and] ... was not even aware of the
10 comment until ... this lawsuit.” [Emphasis Added]. Vol. I, JA 0082 at ¶5.

11
12 In evaluating whether the statement made by non-party Sean Stansfield on
13 LAKE TAHOE WALL OF SHAME’s public Facebook page was related to an
14 issue of public concern, the District Court held, “The Court questions whether
15 there is a sufficient degree of closeness between this statement and [the] purported
16 public interest of preserving wildlife or bribery of a public official.” Vol. IV, JA
17 0230:9-11.

18
19 The District Court went on to find, “Nonetheless, even if this statement fell
20 within the broadly stated public interest, in order to shift the burden to LACKEY,
21 SMITH must prove, by the preponderance of the evidence, that the statements are
22 true or were made without knowledge of their falsehood.” *Id.* at JA 0230:13-15.
23

1 In ultimately denying SMITH's Anti-SLAPP Special Motion to Dismiss, the
2 District Court concluded,

3 "Here, there is no evidence provided that shows the statement is
4 truthful or was made without knowledge of its falsehood. In fact,
5 **Smith attests that he had no role in drafting or publishing the**
6 **comment of Sean S[tan]sfield on the Lake Tahoe Wall of Shame**
7 **Facebook's page.** Therefore, the Court finds the first prong of NRS
8 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."

9 [Emphasis Added]. *Id.* at JA 0230:16-21.² As an initial matter, the District Court
10 committed plain error by finding "there is no evidence provided that shows the
11 statement is truthful or was made without knowledge of its falsehood;" as
12 SMITH's declaration expressly affirmed that he didn't even know about the
13 comment at the time it was made, so he could not have known of its purported
14 falsehood at the time it was made when he didn't even know about the comment.
15 *Id.* See, Vol. I, JA 0082, ¶5 (SMITH "was not even aware of the comment until ...
16 this lawsuit").
17
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20 ² The District Court failed to meaningfully address whether the subject statements
21 constituted "opinions" as opposed to purported statements of fact. "Opinions are
22 constitutionally protected and cannot form the basis of a defamation-type claim."
23 [Citations Omitted]. *Daniel v. Wayans*, 8 Cal. App. 5th 367, 397, 213 Cal. Rptr. 3d
865, 891 (Ct. App. 2017). As such, because the one specific statement alleged in
the FAC to be attributable to SMITH (albeit erroneously so) is a clear statement of
opinion, the District Court erred in failing to meaningfully address this.

1 In his Motion, SMITH asserted that he could not be held liable for
2 statements of third-parties under the Communications Decency Act ("CDA"). Vol.
3 I, JA 0042:21-23, stating, ("Under the Communication Decency Act (CDA), '[n]o
4 provider or user of an interactive computer service shall be treated as the publisher
5 or speaker of any information provided by another information content
6 provider.' 11 USC §230(c)(1)") [Emphasis Added]. Despite the evidence
7 submitted to the contrary, with respect to the claim of Defamation, the District
8 Court concluded,
9

10 "Here, the FAC alleges that Smith is doing business as Lake Tahoe
11 Wall of Shame. The FAC alleges a specific comment of a person (not
12 Smith) on Lake Tahoe Wall of Shame's Facebook_page as well as
13 *generally states* that members^[3] of Lake Tahoe Wall of Shame, and
14 Lake Tahoe Wall of Shame (itself) has made and continues to make
15 false statements regarding Lackey and initiates public comment
16 threads on Facebook slandering Lackey including accusing him of
17 criminal conduct (accepting bribes and conspiracy). It further alleges
18 that Smith and Lake Tahoe Wall of Shame published and encouraged
19 statements. . . . [T]he Court cannot conclude for the purposes of a
20 motion to dismiss, that Smith did not encourage the third party user's
21 statement. Therefore, at this time, *the Court cannot find Smith is*
22 *immunized from liability* for the third party comments under the
23 CDA."

3 As a practical matter, to the extent the District Court refers to "members" of
LAKE TAHOE WALL OF SHAME's public Facebook page, there are no
"members" of a public Facebook page. A public Facebook page is more akin to an
online newspaper publication where the public can submit comments, letters to the
editors, opinion pieces, etc.

1 (Citations Omitted). [Emphasis Added]. *Id.* at JA 0042:14-JA 0043:8.⁴ There are
2 absolutely no allegations of any specific conduct or actions taken either by SMITH
3 or by NDOW WATCH to identify how or what SMITH purportedly did to
4 encourage statements. *See generally*, Vol. I, JA 0011-JA 0021. The District Court
5 simply ruled on the general and unsupported allegation, despite the admissible
6 evidence provided to explicitly dispute the generalized statement. Vol. I, JA 0082,
7 ¶5 (SMITH “was not even aware of the comment until ... this lawsuit”)
8 [Emphasis Added]. How could SMITH work in concert with others or encourage
9 the specific statement alleged when he did not even know about it?
10

11 Despite the above findings of the Court with respect to the allegedly
12 defamatory statement made by Sean Stansfield, the District Court found the
13 statement was not actionable because it was apparently about some “unspecified
14 ‘department’ and not LACKEY himself.” *Id.* at JA 0235:27-JA 0236:2.
15

16 LACKEY further alleges in his FAC that,

17 “Defendants, and each of them, utilized Defendants BEAR LEAGUE,
18 LAKE TAHOE WALL OF SHAME ... and NDOW WATCH
19 KEEPING THEM TRANSPARENT Facebook pages and blogs to
20 publish false and defamatory statements of and concerning Plaintiff
21 and threatening his livelihood... . Defendants ANNE BRYANT,
MARK E. SMITH, CAROLYN STARK, BEAR LEAGUE, LAKE
TAHOE WALL OF SHAME and NDOW WATCH KEEPING

22 ⁴ The Court further stated, “For the purposes of a motion to dismiss, that the Court
23 is declining at this time in the litigation to convert to summary judgment, the Court
will not consider the evidence provided by the parties that discusses SMITH’s role
(or lack thereof) in LAKE TAHOE WALL OF SHAME.” Vol. IV, JA 0233:9-12.

1 THEM TRANSPARENT and LAKE TAHOE WALL OF SHAME
2 published and encouraged the statements despite having actual
3 knowledge that such statements were false, or with reckless disregard
4 for their veracity, to the extent that a reasonable person would likely
5 understand the remarks as statements of existing fact rather than
6 expression of opinions... Defendants, and each of them, in making
7 public posts on Facebook, made *and/or condoned the publication of
such false and defamatory statements* of and concerning Plaintiff...
8 Defendants, and each of them, knew that the inflammatory false
9 information they were posting was malicious, false, and accusatory of
10 criminal conduct and had the purpose of harming, threatening,
11 intimidating and/or harassing Plaintiff and his livelihood.”

12 [Emphasis Added]. Vol. I, JA 0018 at ¶17-21. Despite this general and conclusory
13 allegation, the FAC fails to allege any statement at all- defamatory or otherwise-
14 that was made by SMITH. Vol. I, JA 0014:2-JA 0017:28; See also, *Id.* at JA
15 0032:10-11, (“Noticeably absent from the FAC are any allegations that SMITH
16 published any comments whatsoever...”). However, the Court then went on to find
17 that because LACKEY “generally alleges the elements of defamation, and
18 specifically states that SMITH and LAKE TAHOE WALL OF SHAME published
19 and encouraged the statements, the Court finds LACKEY has stated a claim for
20 defamation.” [Emphasis Added]. *Id.* at JA 0236:2-5.

21 Civil Conspiracy

22 With respect to LACKEY’s conspiracy claim, LACKEY failed to allege any
23 specific conduct at all by Defendants SMITH, BRYANT or STARK. Vol. I, JA
0014:2-JA 0017:28. Instead, LACKEY seeks to attribute comments allegedly
made by the BEAR LEAGUE and several other unrelated, non-parties, to SMITH.

1 *Id.* LACKEY failed to in any way allege how SMITH purportedly “acted in
2 concert with [the other defendants] to accomplish the goals of harassing and
3 threatening Plaintiff and causing him fear, anxiety, embarrassment and damaging
4 [sic] to his reputation.” Vol. I, JA 0020 at ¶35.

5 While SMITH has “never worked in concert with any of the other
6 defendants in this lawsuit with the goal to harass or threaten LACKEY” and, “ha[s]
7 also never worked in concert with any of the other defendants in this lawsuit with
8 the goal of causing LACKEY fear, anxiety, embarrassment or damage to his
9 reputation” (Vol. I, JA 0082 at ¶6); the District Court somehow still found
10 LACKEY properly alleged a claim for civil conspiracy against SMITH. Vol. IV,
11 JA 0236:17-18.
12

13
14 **Intentional Infliction of Emotional Distress**

15 Again, despite LACKEY’s failure to allege even one single shred of specific
16 conduct, statements or actions on the part of SMITH, the District Court found
17 LACKEY properly plead his claim of Intentional Infliction of Emotional Distress
18 against SMITH based on the allegation, which was disputed with admissible
19 evidence, that SMITH and the LAKE TAHOE WALL OF SHAME are one in the
20 same. Vol. IV, JA 0237:10-15.
21

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IX.
SUMMARY OF ARGUMENT

In direct violation of the statutory principals derived by way of the First Amendment's freedom of speech and freedom of association, LACKEY is attempting to use this lawsuit to silence wildlife advocates by apparently suing anyone associated with such advocacy. Here, even though LACKEY has failed to allege any specific conduct on the part of SMITH, it is clear that LACKEY has asserted claims against SMITH based on one specific statement made by a third-party, in a clear effort to silence SMITH and stop him from continuing his wildlife advocacy and conservation efforts "to change the way the Nevada Department of Wildlife ("NDOW") deals with problem bears in the Lake Tahoe area." Vol. I, JA 0086:3-5.

While LACKEY attempts to hold SMITH liable for a statement made by someone else (regarding the public issue of NDOW and its handling of bears) on the LAKE TAHOE WALL OF SHAME's public Facebook page (Vol. I, JA 0229:12-15), which SMITH did not create and is not an administrator of (Vol. I, JA 0082, ¶2-3), it is clear that the causes of actions asserted against SMITH herein all apparently derive from SMITH's association with similar wildlife advocacy and concerns and any such association/petitioning activity is protected by the Anti-SLAPP statutes. Vol. I, JA 0086:3-5; See also, Vol. IV, JA 0230:3-4. Thus, the

1 District Court abused its discretion is failing to grant SMITH's Anti-SLAPP
2 Motion.

3
4 **X.**
ARGUMENT

5 **A. Standard of Review**

6 On a special motion to dismiss pursuant to the anti-SLAPP statute, the
7 plaintiff's burden is clear and convincing evidence, and the Supreme Court reviews
8 for an abuse of discretion. NRS §41.660(3)(b). *Shapiro v. Welt*, 133 Nev. Adv. Op.
9 6, 389 P.3d 262, 266 (2017).
10

11 **B. Understanding Nevada's Anti-SLAPP Statutes**

12 Nevada's anti-SLAPP statute provides for early dismissal of meritless First
13 Amendment cases aimed at chilling expression through costly, time-consuming
14 litigation. *Id.*; *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1109 (9th Cir., 2003).
15 NRS 41.650 provides as follows:
16

17 Limitation of liability. A person who engages in good faith
18 communication in furtherance of the right to petition or the right to
19 free speech in direct connection with an issue of public concern is
immune from any civil action for claims based upon the
communication.

20 Because this court has recognized that California's and Nevada's anti-
21 SLAPP "statutes are similar in purpose and language," *John v. Douglas Cty. Sch.*
22 *Dist.*, 125 Nev. 746, 752, 219 P.3d 1276, 1281 (2009); NRS 41.637(4); CCP
23 §425.16(e), we look to California law for guidance on this issue.

1 The California Anti-SLAPP statute provides that a cause of action “arising
2 from any act of [the defendant] in furtherance of the person's right of petition or
3 free speech... in connection with a public issue shall be subject to a special motion
4 to strike, unless the court determines that the plaintiff has established that there is a
5 probability that the plaintiff will prevail on the claim.” CCP §425.16(b)(1).
6 Similarly, Nevada's anti-SLAPP statute is premised on the requirement that a
7 defendant carries the initial burden to show that statements in question involve a
8 “communication made in direct connection with an issue of public interest in a
9 place open to the public or in a public forum...which is truthful or is made without
10 knowledge of its falsehood.” NRS 41.637(4).
11

12 In determining what type of specific conduct was protected by the Anti-
13 SLAPP statutes, in *City of Montebello v. Vasquez*, 1 Cal.5th 409, 205 Cal.Rptr.3d
14 499, 376 P.3d 624, 632 (2016), the California Supreme Court recently held “[t]he
15 Legislature did not limit the scope of the anti-SLAPP statute to activity protected
16 by the constitutional rights of speech and petition.” *Id.* See also, *Delucchi v.*
17 *Songer*, 396 P.3d 826, 832–33 (Nev. 2017).
18

19 **C. The conduct alleged in the FAC constitutes protected conduct and**
20 **falls squarely within the Nevada Anti-SLAPP statutes.**

21 Where a defendant shows by merely a preponderance of the evidence that
22 the claims against him arise out of a “good faith communication in furtherance of
23 the right to petition or the right to free speech in direct connection with an issue of

1 public concern,” said defendant has grounds to file a special motion to dismiss
2 under Nevada’s Anti-SLAPP statutes. *Shapiro v. Welt*, 133 Nev. Adv. Op. 6, 389
3 P.3d 262, 267 (2017); NRS 41.637. A “good faith communication” is defined as
4 any “[c]ommunication made in direct connection with an issue of public interest in
5 a place open to the public or in a public forum, which is truthful or is made without
6 knowledge of its falsehood.” NRS 41.637(4).

8 Further, a special motion to strike a “ ‘**cause of action against a person**
9 **arising from any act of that person in furtherance of the person's right of**
10 **petition or free speech’ may be used to strike allegations of protected activity,**
11 even if the motion does not defeat the entire purported ‘cause of action’ as it is
12 pleaded in the complaint, and even if the motion does not defeat the plaintiff’s
13 claim of a breach of a primary right.” [Emphasis Added]. *Baral v. Schnitt*, 1 Cal.
14 5th 376, 376 P.3d 604 (2016).

16 “A claim arises from protected activity when that activity **underlies or**
17 **forms the basis for the claim**.” [Emphasis Added]. *Park v. Bd. of Trustees of*
18 *California State Univ.*, 2 Cal. 5th 1057, 1062, 393 P.3d 905, 907 (2017);
19 accord, *City of Cotati v. Cashman*, 29 Cal. 4th 69, 78, 52 P.3d 695, 701 (2002).
20 “[T]he focus is on determining what ‘**the defendant’s activity [is] that gives rise**
21 **to his or her asserted liability**—and whether that activity constitutes protected
22 speech or petitioning.’” [Emphasis Added]. *Id.*
23

1 While he has failed to allege any specific conduct on the part of SMITH, it is
2 clear that LACKEY has asserted claims against SMITH for Defamation,
3 Intentional Infliction of Emotional Distress and Civil Conspiracy based on one
4 specific statement made by a third-party (apparently finding none of SMITH's own
5 conduct to be actionable, otherwise presumably he would have raised it), in order
6 to silence SMITH and stop him from continuing his wildlife advocacy and
7 conservation efforts "to change the way the Nevada Department of Wildlife
8 ("NDOW") deals with problem bears in the Lake Tahoe area." Vol. I, JA 0086:3-5.
9 LACKEY explicitly admits this in his Opposition to SMITH's Anti-SLAPP
10 Special Motion to Dismiss. See, *Id.*, ("This action arises out of Defendants'
11 outrageous, harassing, intimidating and threatening conduct towards Plaintiff, an
12 innocent third party in Defendants' crusade to change the way the Nevada
13 Department of Wildlife ("NDOW") deals with problem bears in the Lake
14 Tahoe area."). [Emphasis Added]. This is text book protected petitioning activity.
15 As such, all claims asserted against SMITH arise out of SMITH's wildlife
16 advocacy and conservation efforts, which constitutes protected speech and
17 petitioning activity.
18
19
20

21 In any event, the third-party statement specified in the FAC alleged to be
22 attributable to SMITH by way of the incorrect assertion that SMITH and the
23 LAKE TAHOE WALL OF SHAME are one in the same, clearly constitutes

1 protected activity. The third-party author shared his opinion stating, “A department
2 with no real interest in wildlife other than to make it available to hunters and
3 trappers ... some might say they are criminals against nature ... they are certainly
4 ignorant about it.” Vol. IV, JA 0229:12-15. However, SMITH “had no role in
5 drafting or publishing the comment” and in fact, SMITH didn’t even know about it
6 until this lawsuit. Vol. I, JA 0082 at ¶5. Further, SMITH did not create the public
7 Facebook page, LAKE TAHOE WALL OF SHAME, and he is not an
8 administrator of the page. Vol. I, JA 0082 at ¶2-3. 5

10
11 *i. Issue of Public Interest*⁶

12 It is undisputed that Facebook constitutes a “public forum” for purposes of
13 Anti-SLAPP/Defamation cases. See, *Wong v. Tai Jing*, 189 Cal.App. 4th 1354,
14 1366 (2010) (listing cases). As such, we start by analyzing how the statement at

16 5 While this analysis is somewhat flawed, in that, it is difficult to properly analyze
17 this case in the way a traditional Anti-SLAPP case would be analyzed because it is
18 undisputed that SMITH did not author or publish the specific defamatory statement
19 alleged herein and did not create and doesn’t maintain the public Facebook page at
20 issue herein, because it is clear that the causes of action asserted against SMITH
21 herein all apparently derive from his association with similar wildlife advocacy and
22 concerns, any such association/petitioning activity is protected by the Anti-SLAPP
23 statutes. Vol. I, JA 0086:3-5; See also, Vol. IV, JA 0230:3-4.

21 6 Because SMITH did not author, create or publish any comments or statements
22 specifically alleged by LACKEY in his FAC, SMITH analyzes the statement made
23 by an unrelated third-party and posted on the LAKE TAHOE WALL OF SHAME
public Facebook page to demonstrate that the statement that forms the basis of the
allegation against SMITH clearly addresses a matter of public concern.

1 issue in this action was clearly and directly related to a matter of public interest and
2 concern.

3 Nevada has adopted California jurisprudence setting forth the following
4 guiding principles in determining what constitutes “an issue of public interest”:
5

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

19 *Shapiro v. Welt*, 133 Nev. Adv. Op. 6, 389 P.3d 262, 268 (2017). The one specific,
20 allegedly defamatory statement LACKEY attributes to the LAKE TAHOE WALL
21 OF SHAME’s public Facebook page shares the third-party author’s opinion
22 stating, “‘A department with no real interest in wildlife other than to make it
23 available to hunters and trappers ... some might say they are criminals against
nature ... they are certainly ignorant about it.’ Commenter Sean Stansfield on Lake
Tahoe Wall of Shame's Facebook Page.” Vol. IV, JA 0229:12-15. In evaluating
whether that one and only statement alleged by LACKEY to be attributable to the
LAKE TAHOE WALL OF SHAME’s public Facebook page was related to an

1 issue of public concern, the District Court erroneously held, “The Court questions
2 whether there is a sufficient degree of closeness between this statement and [the]
3 purported public interest of preserving wildlife or bribery of a public official.” Vol.
4 IV, JA 0230:9-11.

5
6 Contrary to the District Court’s finding, the conservation of natural
7 resources is widely understood to be a matter of public concern under the public
8 trust doctrine. See, *Davis v. Allen Parish Serv. Dist.*, 210 Fed. App’x 404, 409 (5th
9 Cir. 2006) (finding that comments concerning threats to destroy natural resources
10 addressed a matter of public concern); *Harthman v. Texaco (In Re Tutu Wells*
11 *Contamination Litig.)*, 846 F.Supp. 1243 (V.I. 1993) (“the protection of rapidly
12 diminishing and irreplaceable natural resources (the environment) . . . is of current
13 public concern”) (Citations Omitted); *State v. Thompson*, 136 P.3d 213, 215
14 (Idaho Ct. App. 2001) (“The State has a compelling interest in the management
15 and conservation of its natural resources, including wildlife.... Fish and game
16 violations are matters of grave public concern The wild game within our state
17 belongs to the people as a whole in their collective, sovereign capacity and is
18 treated as a common trust.”) (Citations Omitted).

19
20
21 The single comment posted by non-party Stansfield on LAKE TAHOE
22 WALL OF SHAME’s public Facebook page concerns the preservation of natural
23 resources (wildlife) in Nevada. Vol. IV, JA 0229 at ¶p. (“A department with no

1 real interest in wildlife other than to make it available for hunters and trappers . . .
2 some might say they are criminals against nature . . . they are certainly ignorant
3 about it.”). Because the preservation and treatment of bears and how agencies
4 handle such wildlife matters is clearly a matter of public concern and because the
5 lone comment posted on LAKE TAHOE WALL OF SHAME’s public Facebook
6 page specifically addresses the same, the District Court erred in finding such third-
7 party statement to be questionable as to whether a sufficient degree of closeness
8 between the statement and the public interest. Vol. IV, JA 0230:9-11.

10 SMITH’s relationship to this action is solely because he is a wildlife
11 advocate and conservationist of natural resources, “specifically the preservation
12 and treatment of bears.” Vol. IV, JA 0230:3-4. More specifically, in failing to
13 allege any specific actionable statements or conduct on the part of SMITH (again,
14 leading to the conclusion that SMITH himself has not made or engaged in any
15 specific actionable statements or conduct), in violation of both the First
16 Amendment and the anti-SLAPP statutes, LACKEY’s claims against SMITH
17 constitute a textbook SLAPP suit sought to chill and silence SMITH’s advocacy
18 efforts and stop his lawful protected petitioning activity “to change the way the
19 Nevada Department of Wildlife (“NDOW”) deals with problem bears in the Lake
20 Tahoe area.” Vol. I, JA 0086:3-5. The District Court erred in questioning whether
21 the specific statement at issue in this case addressed a direct matter of public
22
23

1 concern and, further erred by failing to find that the claims asserted against SMITH
2 herein all arise out of protected activity, mandating dismissal in its entirety
3 pursuant to NRS 41.660.

4 *ii. Truth or Falsity of the Subject Statement*

5
6 In denying SMITH's anti-SLAPP Special Motion to Dismiss, the District
7 Court concluded,

8 "Here, there is no evidence provided that shows the statement is
9 truthful or was made without knowledge of its falsehood. In fact,
10 Smith attests that he had no role in drafting or publishing the
11 comment of Sean S[tan]sfield on the Lake Tahoe Wall of Shame
12 Facebook's page. Therefore, the Court finds the first prong of NRS
13 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."

14 [Emphasis Added]. Vol. IV, JA 0230:16-21. In Nevada, a defamation claim
15 requires LACKEY to demonstrate "(1) **a false and defamatory statement of fact**
16 **by [SMITH]** concerning [LACKEY]; (2) an unprivileged publication to a third
17 person; (3) fault, amounting to at least negligence; and (4) actual or presumed
18 damages." [Emphasis Added]. *Pope v. Motel 6*, 121 Nev. 307, 114 P.3d 277
19 (2005). However, "Opinions are constitutionally protected and cannot form the
20 basis of a defamation-type claim." [Citations Omitted]. *Daniel v. Wayans*, 8 Cal.
21 App. 5th 367, 397, 213 Cal. Rptr. 3d 865, 891 (Ct. App. 2017).
22
23

1 “Use of ‘hyperbolic, informal,’ ‘crude, [or] ungrammatical’ language,
2 satirical tone, [or] vituperative, ‘juvenile name-calling’ ” provide support for the
3 conclusion that offensive comments were nonactionable opinion.” (Citations
4 Omitted). *ZL Techs., Inc. v. Does 1-7*, 13 Cal. App. 5th 603, 624, 220 Cal. Rptr. 3d
5 569, 589–90 (Ct. App. 2017). In addition, “overly vague statements and
6 ‘generalized’ comments ... ‘lack[ing] any specificity as to the time or place of
7 alleged conduct may be a ‘further signal to the reader there is no factual basis for
8 the accusations.’”⁷ (Citations Omitted). *Id.*

10 Here, the subject statement, “A department with no real interest in wildlife
11 other than to make it available for hunters and trappers . . . some might say they are
12 criminals against nature . . . they are certainly ignorant about it;” clearly
13 constitutes an opinion as opposed to a statement of fact. Vol. IV, JA 0229 at ¶p.

15 Further, the above holding by the District Court addressing the lack of
16 evidence of truth or falsity of the subject statement perfectly articulates the

18 ⁷ Further, in determining statements are nonactionable opinions, a number of
19 recent cases have relied heavily on the fact that statements were made in Internet
20 forums. *Chaker v. Mateo*, 209 Cal. App. 4th 1138, 1148, 147 Cal. Rptr. 3d 496,
21 503 (2012); See also, *Summit Bank v. Rogers*, 206 Cal.App.4th 669, 696–
22 701, 142 Cal.Rptr.3d 40 (2012); *Krinsky v. Doe 6*, 159 Cal.App.4th 1154, 1162, 72
23 Cal.Rptr.3d 231 (2008); Lidsky, *Silencing John Doe: Defamation & Discourse in
Cyberspace*, 49 Duke L.J. 855, 936–937; Comment, *Cybersmear or Cyber-
SLAPP: Analyzing Defamation Suits Against Online John Does as Strategic
Lawsuits Against Public Participation*, 25 Seattle U. L.Rev. 213, 217 (2001)
([“Posters on Yahoo! message boards often make outrageous claims” and “[m]ost
visitors are completely aware of the unreliable nature of these posts”].).

1 overwhelming problem with LACKEY's claims against SMITH- SMITH did not
2 author or publish the subject statement and he did not create and does not
3 administer the online public forum where it was posted. Vol. I, JA 0082 at ¶2-3;
4 Vol. I, JA 0082 at ¶5. In fact, SMITH didn't even know about the statement until
5 the filing of the lawsuit. *Id.* How can SMITH be forced to stand trial for an
6 allegedly defamatory statement that he did not author, publish or even know about
7 at the time because he cannot prove the truth or falsity of the statement at the time
8 it was made? The answer is: He can't.

10 Again and by definition, SMITH simply CANNOT be liable for Defamation,
11 Intentional Infliction of Emotional Distress, or Civil Conspiracy, when all
12 allegations set forth in the FAC arise out of SMITH's advocacy efforts brought
13 solely to stop SMITH's lawful protected petitioning activity "to change the way
14 the Nevada Department of Wildlife ("NDOW") deals with problem bears in the
15 Lake Tahoe area." Vol. I, JA 0086:3-5.

17 **D. The District Court further erred in failing to find SMITH immune**
18 **from liability under the Communications Decency Act.**

19 Facebook is an Internet-based social networking website that allows its users
20 worldwide to share information, opinions, and other content of the users' own
21 choosing for free. See, *Klayman v. Zuckerberg*, 753 F.3d 1354, 1356 (D.C. Cir.
22 2014). Facebook allows users to create pages for groups relating to common
23 associations or interests. See, *Rembrandt Soc. Media, LP v. Facebook, Inc.*, 22 F.

1 Supp. 3d 585, 590 (E.D. Va. 2013). Users can then post content using their
2 individual Facebook profile within the group or association Facebook page.

3 “Under the Communication Decency Act (“CDA”), ‘[n]o provider or user
4 of an interactive computer service shall be treated as the publisher or speaker of
5 any information provided by another information content provider.’ ”

6 [Emphasis Added]. 11 U.S.C. § 230(c)(1).
7

8 Here, SMITH did not create the LAKE TAHOE WALL OF SHAME public
9 Facebook page, nor is he an administrator for the page. Vol. I, JA 0082 at ¶2 and 3.
10 The FAC does not even allege SMITH to be a “user” of the LAKE TAHOE
11 WALL OF SHAME’s public Facebook page. See, Vol. I, JA 0011-JA 0021.
12 Further, the FAC alleges only one specific, allegedly defamatory, statement posted
13 that was posted to the LAKE TAHOE WALL OF SHAME’s public Facebook
14 page, made by an unrelated, non-party. Vol. IV, JA 0229:12-15. SMITH had
15 absolutely no role in the drafting or publishing of that statement and didn’t even
16 know about it until he learned of it by way of this lawsuit. Vol. I, JA 0082 at ¶5. In
17

18 In *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 474–75 (E.D.N.Y.
19 2011), the Court held that the website “PissedConsumer is not an ‘information
20 content provider’ under Section 230 with respect to the negative postings
21 concerning plaintiffs at issue in this case.” Even under the most generous
22 application of taking the allegations in the FAC as true that SMITH does business
23

1 as the LAKE TAHOE WALL OF SHAME public Facebook page (which has been
2 proven by admissible evidence to be incorrect), there is nothing in the FAC that
3 alleges SMITH developed or authored the specific statement in question.

4 Directly on point with the instant case, in *Ascentive*, one of the plaintiffs,
5 Classic Brands, did not claim that the defendant created or authored negative
6 comments on its website, “rather it claims that “PissedConsumer encourages
7 consumers to create negative postings on the PissedConsumer website.”
8 [Emphasis Added]. *Id.* The *Ascentive* Court held, “While it is true that ‘Section
9 230(c) immunity is not so broad as to extend to an interactive computer service
10 that ... takes an active role in creating or developing the content at issue,’ *plaintiffs*
11 *have provided no such evidence, nor even sufficiently alleged that PissedConsumer*
12 *played such a role. Asserting or implying the mere possibility that*
13 *PissedConsumer did so is insufficient to overcome the immunity granted by*
14 *the CDA.*” [Emphasis Added]. *Id.*

15 Here and despite the evidence to the contrary, the District Court held,
16

17 “Here, the FAC alleges that Smith is doing business as Lake Tahoe
18 Wall of Shame. The FAC alleges a specific comment of a person (not
19 Smith) on Lake Tahoe Wall of Shame's Facebook page as well as
20 generally states that members of Lake Tahoe Wall of Shame, and
21 Lake Tahoe Wall of Shame (itself) has made and continues to make
22 false statements regarding Lackey and initiates public comment
23 threads on Facebook slandering Lackey including accusing him of
criminal conduct (accepting bribes and conspiracy). It further alleges
that Smith and Lake Tahoe Wall of Shame published and encouraged
statements. . . . [T]he Court cannot conclude for the purposes of a

1 motion to dismiss, that Smith did not encourage the third party user's
2 statement. Therefore, at this time, *the Court cannot find Smith is*
3 *immunized from liability for the third party comments* under the
CDA.”

4 (Citations Omitted). [Emphasis Added]. Vol. IV, JA 0042:14-JA 0043:8. However,
5 SMITH declared under penalty of perjury that he “had no role in drafting or
6 publishing the comment of Sean S[tan]sfield on the LAKE TAHOE WALL OF
7 SHAME Facebook page ... [and] ... was not even aware of the comment until ...
8 this lawsuit.” [Emphasis Added]. Vol. I, JA 0082 at ¶5. If SMITH had “no role” in
9 drafting or publishing the subject statement and didn’t even know about it, SMITH
10 could not have possibly encouraged the statement. Therefore, the District Court’s
11 finding that it could not conclude that “SMITH did not encourage the third-party
12 user’s statement,” is an unequivocal mistake of fact.

14 In any event, assuming arguendo only, that the District Court was in some
15 roundabout way able to arrive at a finding that SMITH somehow encouraged the
16 third-parties statement, the Court in *Ascentive* makes it clear that merely
17 encouraging public comment or even specifically encouraging negative comments,
18 is clearly protected under the CDA. *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp.
19 2d 450, 474–75 (E.D.N.Y. 2011). As such, even under the most generous
20 interpretations of the allegations set forth in the FAC, SMITH is further immune
21 from liability under the CDA.
22
23

1 **E. The District Court Abused its Discretion in Failing to Dismiss the**
2 **other causes of action asserted against SMITH arising out of the**
3 **protected activities.**

4 A special motion to strike may be used to strike any “cause of action against
5 a person arising from any act of that person in furtherance of the person's right of
6 petition or free speech . . .” (Citations Omitted). [Emphasis Added]. See, *Baral v.*
7 *Schnitt*, 1 Cal. 5th 376, 376 P.3d 604 (2016). The District Court abused its
8 discretion in failing to dismiss the remaining two claims for Intentional Infliction
9 of Emotional Distress and Civil Conspiracy, as both claims arise directly out of
10 SMITH’s protected activities as described more fully herein.

11 ***i. Intentional Infliction of Emotional Distress***

12 The elements of a claim for intentional infliction of emotional distress are:
13
14 1) that the defendant's conduct was extreme and outrageous; (2) that the defendant
15 either intended or recklessly disregarded the causing of emotional distress; (3) that
16 the plaintiff actually suffered severe or extreme emotional distress; and (4) that the
17 defendant's conduct actually or proximately caused the distress. *Nelson v. City of*
18 *Las Vegas*, 99 Nev. 548, 555, 665 P.2d 1141, 1145 (1983). “[E]xtreme and
19 outrageous conduct is that which is outside all possible bounds of decency and is
20 regarded as utterly intolerable in a civilized community.” *Maduikie v. Agency Rent-*
21 *A-Car*, 114 Nev. 1, 4, 953 P.2d 24, 26 (1998).
22
23

1 The District Court refused to dismiss LACKEY's claim for Intentional
2 Infliction of Emotional Distress stating,

3 "Taking the factual allegations set forth in the FAC as true, the Court
4 finds Lackey has properly stated a claim for intentional infliction of
5 emotional distress against Smith as the FAC alleges, among other
6 allegations, that Lake Tahoe Wall of Shame (who Smith does business
7 as) has initiated public comment to encourage the public to shame and
8 harass Lackey so he will lose his job and/or feel threatened enough to
9 leave the community, and that Smith and Lake Tahoe Wall of Shame
10 published and encouraged the statements. Here, the FAC alleges
11 Smith (in addition to Lake Tahoe Wall of Shame) engaged in
12 tortious conduct by publishing and encouraging statements."

13 [Emphasis Added]. Vol IV, JA 0237:10-17. This finding is wholly unsupported by
14 the record. First, SMITH is not doing business as LAKE TAHOE WALL OF
15 SHAME. Second, it is undisputed that LACKEY has failed to allege any specific
16 conduct on the part of SMITH at all- let alone intentional, extreme and outrageous
17 conduct required for a claim of Intentional Infliction of Emotional Distress. As
18 such, for the Court to find that SMITH has engaged in tortuous conduct by
19 publishing and encouraging statement is wholly unsupported. LACKEY has not
20 alleged one single statement in his FAC that SMITH either published or
21 encouraged. Vol. I, JA 0011- JA 0021.

22 Further, any sort of "guilt by association" which LACKEY somehow
23 attempts to impute to SMITH by way of his similar advocacy efforts as those of the
third-party comment at issue herein, directly arises out of SMITH's Constitutional

1 rights to speech, petition and associate. As such, even if such conduct had been
2 properly plead, it would be protected as it arises out of protected activities.
3 Accordingly, the District Court erred in failing to dismiss LACKEY's claim for
4 Intentional Infliction of Emotional Distress as to SMITH.

5
6 **ii. Civil Conspiracy**

7 Actionable civil conspiracy “consists of a combination of two or more
8 persons who, by some concerted action, intend to accomplish an unlawful
9 objective for the purpose of harming another, and damage results from the act or
10 acts.” *Consol. Generator-Nevada v. Cummins Engine Co.*, 114 Nev. 1304, 1311,
11 971 P.2d 1251, 1256 (1998). (Citations Omitted).

12
13 As to conspiracy, the District Court erroneously held,

14 The FAC sets forth that defendants continuously over the past several
15 years have acted in concert with one another to accomplish the goals
16 of harassing and threatening Lackey. The FAC alleges Lackey feels
17 the defendants and their supporters post a threat to his safety and as a
result he has suffered damages. The Court finds Lackey has properly
alleged a claim for civil conspiracy against Smith.

18 [Emphasis Added]. Vol IV, JA 0236:14-19. LACKEY has failed to in any way
19 specify how SMITH has “allegedly acted in concert with one another to
20 accomplish the goals of harassing and threatening LACKEY” or any unlawful
21 objective or damages, as required to sustain a civil conspiracy claim. *Id.*; Vol. I, JA
22 0011-JA 0021.

1 Specifically, in the anti-SLAPP context, in *Contreras v. Dowling*, the Court
2 found that “an anti-SLAPP motion is an evidentiary motion.” (Citations Omitted).
3 5 Cal. App. 5th 394, 416, 208 Cal. Rptr. 3d 707, 724 (Ct. App. 2016), *as modified*
4 *on denial of reh'g* (Nov. 18, 2016), *review denied* (Feb. 1, 2017). Just as is the case
5 here, the *Contreras* Court found plaintiff, Contreras, failed to provide any
6 evidentiary support for her allegations of conspiracy...” *Id.* The Court ultimately
7 held, “Because civil conspiracy is so easy to allege, plaintiffs have a weighty
8 burden to prove it;” the plaintiff failed to meet their burden by failing to produce
9 any evidence to support her allegations of conspiracy. *Id.*

11 Here, the District Court found general allegations that SMITH acted in
12 concert with the other Defendants to accomplish the goals of harassing and
13 threatening LACKEY; however, in addition to failing to identify any shred of
14 specific conduct SMITH did to engage in such alleged conduct, the general
15 allegations on their own fail as a matter of law because all of the conduct alleged
16 in the FAC is conduct which expressly arises out of protected activity and is thus,
17 protected by the anti-SLAPP statute. As such, the District Court’s failure to
18 dismiss this claim in its entirety as to SMITH, was an abuse of discretion.

21 XI. 22 CONCLUSION

23 SLAPP lawsuits are intended to censor, intimidate and silence critics by
burdening them with the cost of a legal defense until they abandon their criticism


1 or opposition. They also function to intimidate others to prevent them from
2 participating in the debate.

3 As explained by then Senator Dina Titus, Nevada's Anti-SLAPP legislation
4 was designed to protect well-meaning individuals who petition for some cause
5 from being hit by retaliatory "SLAPPS," and includes all forms of
6 communication. See, Minutes of the Senate Committee on Judiciary, Sixty-seventh
7 Session May 26, 1993, p. 7-8.

9 Here, while LACKEY has not asserted any claims with respect to specific
10 statements by SMITH, he brings this action against SMITH based on one specific
11 statement made by a third-party with similar wildlife interests and concerns, to
12 silence SMITH and stop him from continuing his wildlife advocacy and
13 conservation efforts directed at how NDOW deals with bears in Nevada. There is
14 no dispute that SMITH is a wildlife advocate and expresses his concerns about
15 how bears in Nevada are handled. This is no secret. If SMITH had crossed the line
16 and engaged in some sort of actionable conduct, surely LACKEY would have
17 asserted it herein. But LACKEY asserted no such misconduct on the part of
18 SMITH. Failing to find such actionable conduct, LACKEY instead uses a
19 statement from an individual with similar wildlife advocacy interests and
20 apparently seeks to use such statement to silence all similarly situated or associated
21 critics with which LACKEY disagrees with.
22
23

1 This not only fails to rise to meet the elements of any of the causes of action
2 set forth herein, it is also explicitly immunized by Nevada's anti-SLAPP statute.
3 As such, it is respectfully requested that this Court reverse the District Court's
4 Order, dismissing LACKEY's FAC as to SMITH and the LAKE TAHOE WALL
5 OF SHAME in its entirety and remand with instructions to award reasonable costs
6 and attorney's fees and additional damages up to \$10,000 per party as mandated by
7 NRS 41.670.
8

9 Dated this 16th day of April, 2018.

10 
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14 Attorney for Appellant
15 MARK E. SMITH
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XII.
ATTORNEY'S CERTIFICATE

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3 1. I hereby certify that this brief complies with the formatting
4 requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and
5 the type style requirements of NRAP 32(a)(6) because:

6 [X] This brief has been prepared in a proportionally spaced typeface
7 using Microsoft Word in Times New Roman, size 14 font; or

8 [] This brief has been prepared in a monospaced typeface using *[state name*
9 *and version of word processing program]* with *[state number of characters per*
10 *inch and name of type style]*.

11
12 2. I further certify that this brief complies with the page-or type-volume
13 limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by
14 NRCP 32(a)(7)(C), it is either:

15 [X] Proportionately spaced, has a typeface of 14 points or more and contains
16 7,950 total words; or,

17
18 [] Monospaced, has 10.5 or fewer characters per inch, and contains ____
19 words or ____ lines of text; or

20 [] Does not exceed ____ pages.

21 3. Finally, I hereby certify that I have read this appellate brief, and to the
22 best of my knowledge, information, and belief, it is not frivolous or interposed for
23 any improper purpose. I further certify that this brief complies with all applicable

1 Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires
2 every assertion in the brief regarding matters in the record to be supported by a
3 reference to the page and volume number, if any, of the transcript or appendix
4 where the matter relied on is to be found.
5

6 I understand that I may be subject to sanctions in the event that the
7 accompanying brief is not in conformity with the requirements of the Nevada
8 Rules of Appellate Procedure.

9 Dated this 16th day of April, 2018.

10
11 
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XIII.
PROOF OF SERVICE

I hereby certify pursuant to NRAP 25(c), that on the 11th day of April, 2018, I caused service of a true and correct copy of the above and foregoing **APPELLANT'S OPENING BRIEF** on all parties to this action by the method(s) indicated below:

X by using the Supreme Court Electronic Filing System:

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DATED this 11th day of April, 2018.



AN EMPLOYEE OF WINTER STREET LAW GROUP