IN THE SUPREME COURT OF

THE STATE OF NEVADA

*****

MICHAEL KOSOR JR., A NEVADA RESIDENT, Appellant, vs. OLYMPIA COMPANIES, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND GARRY V. GOETT, A NEVADA RESIDENT, Respondents.	**Supreme Court No. 75669** District Court Case No. A-17-765267-C

APPELLANT'S OPENING BRIEF

On Appeal from Order of the Eighth Judicial District Court, Clark County, Nevada

The Honorable Michelle Leavitt

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APPELLANT'S NRAP 26.1 DISCLOSURE

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

1. Michael Kosor, Jr.
2. Olympia Companies, LLC
3. Garry V. Goett
4. Barron & Pruitt, LLP

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5. Kemp, Jones & Coulthard, LLP

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NRAP 28.2 CERTIFICATE OF COMPLIANCE

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

> [X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 14-point; or
>
> [ ] This brief has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style].

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

> [X] Proportionately spaced, has a typeface of 14 points or more, and contains 12,546 words; or

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[ ] Does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that Appellant's Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 12th day of February, 2019.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Rules:

Secondary Sources:

JURISDICTIONAL STATEMENT

A. Basis for Supreme Court's Appellate Jurisdiction

NRS 41.670(4) confers jurisdiction on this Court, as this is an interlocutory appeal made from a District Court Order denying Appellant's Special Motion to Dismiss filed pursuant to NRS 41.660. NRS 41.670(4) states that in the event of such denial, "an interlocutory appeal lies to the Supreme Court." Additionally, NRAP 17(a)(10) and (11) retain with the Supreme Court matters raising as a principal issue a question of first impression involving the Nevada Constitution or common law, or raising as a principal issue a question of statewide public importance.

B. Filing Dates:

- November 29, 2017: Plaintiffs Olympia Companies, LLC, and Garry V. Goett's Complaint
- January 5, 2018: Defendant Michael Kosor's Answer
- January 29, 2018: Defendant Michael Kosor's Motion to dismiss Pursuant to NRS 41.660
- February 16, 2018: Plaintiffs' Opposition to Defendant's Motion to Dismiss pursuant to NRS 41.660
- February 26, 2018: Defendant's Reply to Plaintiffs' Opposition to Defendant's Motion to Dismiss Pursuant to NRS 41.660
- March 20, 2018: Order Denying Defendant's Motion to Dismiss Pursuant to NRS 41.660

- April 19, 2018: Defendant's Notice of Appeal

ROUTING STATEMENT

This is an interlocutory appeal from an order denying Defendant Kosor's Motion to Dismiss Pursuant to NRS 41.660 (anti-SLAPP Motion). It is not among those appeals presumptively referred to the Court of Appeals under NRAP 17(b), and the appeal invokes the Supreme Court's review of an appealable order under NRAP 3A(a) and NRS 41.670(4).

ISSUES ON APPEAL

A. Whether the District Court erred in denying Defendant's Motion to Dismiss Pursuant to NRS 41.660.

B. Whether Appellant has satisfied his burden of proof for protection under Nevada's anti-SLAPP laws.

C. Whether Respondents have failed to satisfy their burden of proof to demonstrate with prima facie evidence a probability they will prevail on their claims.

STATEMENT OF THE CASE

I. Nature of the Case

Appellant Michael Kosor, Jr. is a retired Air Force officer and homeowner in the Southern Highlands Community. As a homeowner, Appellant Kosor voiced concerns relating to the ongoing control exercised by the developer over the Southern Highland's Community, and sought election to the board of the Southern Highlands Community Association to better address such concerns. However, in a blatant display of intimidation aimed at silencing Appellant Kosor, the developer of the Southern Highlands Community, Olympia Companies, LLC, and its president, Garry Goett, (hereafter referred to as "Respondents"), asserted claims for defamation and defamation per se against Appellant Kosor.[1]

Appellant contends that Respondents have improperly filed the underlying lawsuit in violation of Nevada's anti-SLAPP laws for the purpose of chilling, silencing and intimidating Appellant Kosor from publically voicing concerns relating to the control exercised by the developer in the community and related issues. Appellant Kosor further contends that the alleged defamatory statements are protected by Nevada's anti-SLAPP statutes and that he is entitled to the dismissal of Respondents' lawsuit under Nevada law.

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[1] JA, Vol. I, 1-5.

Southern Highlands is a planned community in Las Vegas. From 2014 to 2017, Appellant was active in addressing various issues of public interest that affected the Southern Highlands Community, most particularly issues involving (1) the developer/Respondents' control of the Southern Highlands Community Association ("SHCA"), (2) the developer/Respondent's transfer to the SHCA of titles for community parks along with costly management obligations, and (3) the developer/Respondents' decade-long delay in completing a large community sports park, despite having received the benefit of an agreement with Clark County for special construction tax credits.[2]

Concerned that he and approximately 8,000 other community homeowners were being denied due control and access to the SHCA board and were bearing the costs for parks that should not have been transferred by the developer to the SHCA, Appellant Kosor and other homeowners endeavored to marshal greater public support regarding the foregoing issues. As part of such efforts, Appellant Kosor ran for election to the SHCA board.[3] However, after Appellant commenced his campaign and in a transparent attempt to silence and intimidate Appellant Kosor, Respondents improperly initiated a lawsuit against Appellant on November 29, 2017, alleging defamation and defamation per se arising out of some of

[2] *See, e.g.*, JA, Vol. I, 97-101.
[3] JA, Vol. I, 68.

Appellant's comments concerning issues of public concern within the community.

Respondents' action for defamation fails for several reasons, first and foremost because it is subject to dismissal under Nevada's anti-SLAPP statutes. The lawsuit commenced by Respondents is exactly the type of litigation the anti-SLAPP statutes were intended to eliminate, as it cannot be overstated the disparity of power that exists, with Respondents holding the greater portion of control, influence and resources in juxtaposition to the individual homeowner Appellant, whom they have attempted to improperly silence and intimidate.

In addition to being subject to dismissal pursuant to NRS 41.660, the statements alleged to be defamatory by Respondents are not defamatory on their face and were offered by Appellant as opinions. In fact, most of the statements were made during an election and, under Nevada law, are considered opinions. As opinions, such comments or statements do not rise to the level of defamation.[4]

Furthermore, several of the challenged statements were not even directed at Respondents and, consequently, are not actionable by Respondents. Moreover, many of the alleged defamatory statements, as claimed by Respondents, plainly display the disingenuous nature of their action, as Respondents only reference in

[4] Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 714, 57 P.3d 82, 87 (2002) ("statements of opinion as opposed to statements of fact are not actionable"); Nevada Indep. Broad. Corp. v. Allen, 99 Nev. 404, 410, 664 P.2d 337, 341 (1983) ("in cases involving political comment, there is a strong inclination to determine the remarks to be opinion rather than fact.")

their Complaint out-of-context sentence fragments as the bases for Appellant Kosor's alleged defamation. In referencing only sentence fragments to allege defamation, Respondents intentionally omitted the remainder of the statements that would have clearly demonstrated that Appellant's statements were opinions offered in support of matters of public interest.

In response to the chilling nature of Respondents' action, Appellant filed a *Motion to Dismiss Pursuant to NRS 41.660* on January 29, 2018 to terminate Respondent's strategic lawsuit against public participation ("SLAPP").[5] Thereafter, Respondents filed an Opposition on February 16, 2018.[6] After filing a Reply on February 26, 2018, Appellant's Motion came on for hearing on March 5, 2018.[7] Despite Respondents' violation of the Nevada's anti-SLAPP statutes, on March 20, 2018, the district court entered an Order denying Appellant Kosor's Motion.[8]

In denying Appellant's Motion, the district court simply ruled that Defendant/Appellant had failed to meet his burden to invoke NRS 41.660. Although Appellant Kosor had challenged each of the alleged defamatory statements as being subject to dismissal under Nevada's anti-SLAAP statutory framework and offered supporting case authorities, the district court made no findings of fact in support of

[5] JA, Vol. I, 21-50.
[6] JA, Vol. I, 139-167.
[7] JA, Vol. I, 206-227; Vol. II, 228-273.
[8] JA, Vol. II, 274-275.

its ruling. Accordingly, the Order of the district court is devoid of any analysis demonstrating how the court arrived at its decision.

Thereafter, on April 6, 2018, Appellant substituted his attorney of record.[9] Appellant Kosor then timely filed a Notice of Appeal on April 19, 2018 contending that the district court erred in its application of Nevada law to the facts of this case by denying Appellant Kosor's Motion to Dismiss for violation of Nevada's anti-SLAPP laws.[10]

After filing the Notice of Appeal, Appellant Kosor filed on April 23, 2018 a Motion for Reconsideration of the district court's Order denying his Motion to Dismiss pursuant to NRS 41.660.[11] An Opposition was filed by Plaintiffs on May 10, 2018, after which Appellant filed a Reply in Support of the Motion for Reconsideration.[12] Once again, the District Court summarily denied Appellant's Motion in an Order dated June 22, 2018, offering no findings of fact or analysis in support of its ruling.[13]

II. STATEMENT OF RELEVANT FACTS

Appellant adopts the foregoing Statement of the Case as a supplement to his Statement of Relevant Facts. Southern Highlands is a master-planned community

[9] JA, Vol. II, 280-282.
[10] JA, Vol. II, 283-289.
[11] JA, Vol. II, 294-344.
[12] JA, Vol. II, 345-367; 454-475.
[13] JA, Vol. III, 487-488.

in Clark County, Nevada. On or about January 6, 2000, Southern Highlands Development Corporation ("Declarant") caused to be recorded a Master Declaration of Covenants, Conditions and Restrictions and Reservation of Easements (CC&Rs) for Southern Highlands.[14]

Pursuant to section 2.32 of the CC&Rs, the maximum number of units approved for development in Southern Highlands was 9,000[15]. Under NRS 116.2122, a declarant may amend its declaration if the right to do so is preserved therein; however, "**the declarant may not in any event increase the number of units in the planned community beyond the number stated in the original declaration** ...." (emphasis added).

Despite such restriction on increasing the number of units in the planned community, Declarant attempted to amend section 2.32 of the CC&Rs on September 27, 2005, by increasing the maximum number of units approved for development in Southern Highlands from 9,000 to 10,400.[16] However, in Nevada, the amendment of a declaration is governed by NRS 116.2117.

The foregoing statute provides, in pertinent part, that "(1). ... the declaration, including any plats, may be amended only by vote or agreement of the units' owners of units to which at least a majority of the votes in the association are

[14] JA, Vol. I, 60, n.1.
[15] JA, Vol. I, 60, para. 2.
[16] JA, Vol. I, 64-65.

allocated, unless the declaration specifies a different percentage for all amendments .... If the declaration requires the approval of another person as a condition of its effectiveness, the amendment is not valid without that approval. (2) No action to challenge the validity of an amendment **adopted by the association pursuant to this section** may be brought more than 1 year after the amendment is recorded. (emphasis added).

Accordingly, Declarant's attempted amendment of the CC&Rs failed to satisfy the conditions of NRS 116.2117, as the proposed amendment was not voted upon or adopted by the Southern Highlands unit owners or the Southern Highlands Community Association. Because the proposed amendment was never voted upon or adopted, it is in violation NRS 116.2122 as set forth above.

Prior to October 1, 2015 and under the terms of the CC&Rs (section 2.19) and Nevada law (NRS 116.31032), Declarant control of the Southern Highlands Community Association was to have concluded or terminated within 60 days after the Declarant having conveyed 75 percent of the maximum number of units or, in other words, 75 percent of units created to unit's owners other than Declarant.

By 2014, Declarant control of the Southern Highlands Community Association should have concluded or terminated, as 8,240 units were created to unit's owners other than the Declarant.[17] NRS 116.093 defines a unit as "a

[17] JA, Vol. I, 60-63.

physical portion of the common-interest community designed for separate ownership or occupancy ...." Based on the forgoing number of units, 91.55 percent of the maximum number of units approved for development in Southern Highlands (9,000) were created to unit's owners other than Declarant by 2014.

Because the percentage of units created to unit's owners other than the Declarant (91.55 percent) exceeded the percentage required for transferring Declarant control of the Southern Highlands Community Association to the homeowners of said community (75 percent), Declarant was required to have terminated or relinquished control over the SHCA, but has failed to do so.

Appellant Kosor became a homeowner at Southern Highlands in Las Vegas, Nevada in 2012. From 2014 to 2017, Appellant Kosor was active on various issues of public interest that affected the Southern Highlands Community, most particularly issues involving the developer's ongoing control of the SHCA, the SCHA's assumption of the obligation to manage community parks and the developer's substantial delay of a long promised sports park for the community.[18]

In addressing such interests, Appellant Kosor made statements of opinion that expressed the following concerns: (1) that the developer's attempt in 2005 to amend the declarant control provisions of the CC&Rs for Southern Highlands was invalid under statutory law (NRS 116.2122); that by 2014, the sale of a sufficient

[18] *See, e.g.*, JA, Vol. I, 97-101; 115-116.

number of Southern Highlands units under the un-amended CC&Rs required transfer of board control from the Respondent Olympia Companies, LLC to the homeowners—which transfer never occurred; (3) that titles for "public parks," along with the costly performance obligations to maintain such parks and the rights to control them (and potentially their accessibility by the general public), were transferred by Respondent Olympia Companies, LLC (as developer) to the SHCA absent a majority approval by the SHCA members—potentially voiding said transfer under statutory law (NRS 116.3112); and (4) Respondent Olympia Companies, LLC delayed completion of a highly anticipated large public sports park in Southern Highlands for more than a decade, after receiving the benefit of a December 2005 agreement it entered into with Clark County to construct said sports park in exchange for special construction tax credits, and that such delay occurred with virtually no consequence to Respondents.[19]

Concerned that he and other homeowners (as well as other Clark County citizens) were being denied due control and access to the SHCA board, as a direct result of the invalid 2005 amendment; as well as control of the transfer of titles and performance obligations associated with the parks; and being subjected to the consequential construction delay, Appellant Kosor and other homeowners

[19] JA, Vol. I, 331-341; 343-344.

endeavored to marshal greater public support regarding these issues.[20] To that end, Appellant Kosor addressed the SCHA board in hearings wherein Appellant's concerns were listed as agenda items, and Appellant ran for election to the SHCA board in 2017.[21] In support of his election, Appellant Kosor sought to inform the Southern Highlands Community of his opinions relating to the developer's control of the SHCA board through election pamphlets and an election website.[22]

However, following the announcement of his campaign for membership on the SCHA board, Respondents improperly sought to chill, silence and intimidate Appellant Kosor by initiating on November 29, 2017 a lawsuit against him alleging defamation and defamation per se arising out of some of Appellant Kosor's communications made on behalf of the community, most of which occurred during Appellant's campaign.[23] Such claims were without merit and were instead initiated by Respondents as a strategic lawsuit against public participation directed at silencing Appellant Kosor.

In alleging defamation in their Complaint, Respondents conveniently omitted portions of the statements that would reflect or otherwise demonstrate the non-defamatory and opinion nature of the challenged statements. More specifically, Respondents contend in paragraph 6 of their Complaint that on

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[20] *See* JA, Vol. II, 331-341.
[21] JA, Vol. I, 79, 1:19:09-1:19:15; 1:20:54-1:21:01; Vol. I, 68.
[22] JA, Vol. II, 343-344; 331-341
[23] JA, Vol. I, 1-5.

December 12, 2015, Appellant Kosor "made comments that Olympia and Mr. Goett spoke with Clark County Commissioners in a 'dark room' and coerced them to act or vote in a certain manner; and that Olympia is 'lining its pockets' to the detriment of the Southern Highlands homeowners."[24]

However, what is omitted from the foregoing statement by Respondents is context and completeness. The statements were made by Appellant Kosor on December 12, 2015 in a hearing of the Christopher Community Association board meeting during which Appellant addressed various agenda items. At the meeting, Appellant Kosor stated "[H]e [Respondent Goett] is basically lining his own pockets, **in my opinion,** at the expense of the owners in Southern Highlands;" "[H]e was upset and angry **and probably** got the Commissioner aside in a dark room or someplace and read them the riot act[.]" (emphasis added).[25]

Clearly, Respondents omitted the language that demonstrates the true nature of the statements, as opinions of Appellant Kosor. As opinions, the statements of Mr. Kosor are not actionable. Furthermore, suggesting or opining that someone is lining his pockets at the expense of others or got upset and may have taken another aside and read them the riot act is hardly defamatory on its face.

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[24] JA, Vol. I, 2.
[25] JA, Vol. I, 124 at 1:19:09-1:19:15; 1:20:54-1:21:01.

Respondents then contended in paragraph 9 of their Complaint that Appellant Kosor posted a statement on social media "accusing Olympia of obtaining a 'lucrative agreement' with Clark County by cost-shifting expenses for the maintenance of public parks to the Southern Highlands owners."[26] The statement at issue was posted on September 11, 2017 to Appellant Kosor's social media account with Nextdoor.com and read as follows: "[T]o obtain a lucrative agreement with the County[,] the Developer committed to constructing [a] Sports Park using private money . . . [but] the County would in the fall of 2015 inexplicably reliev[e] the developer of its original commitment only to then approve spending $7M in public tax dollars for a similar complex in Mountain's Edge."[27]

As with the prior statements, there is nothing defamatory about the Appellant's social media statement. Furthermore, the statement does not even identify the developer by name and calls into question the actions of the County as opposed to the Respondents.

Thereafter, in paragraph 10 of their Complaint, Respondents contend that Appellant Kosor used his website to accuse "Olympia and its employees of, among other things, acting like a foreign government that deprives people of essential

[26] JA, Vol. I, 3.
[27] JA, Vol. II, 327.

rights. In other parts of his website, Mr. Kosor continues to reference sweetheart deals, statutory violations, breaches of fiduciary duty and improper shifting of 'millions of dollars'...."[28] Once again, Respondents have referenced portions of Appellant Kosor's statements that are incomplete and out of context in a deliberate and transparent attempt to manufacture the appearance of defamation to silence and intimidate Appellant.

The alleged defamatory statements were posted by Appellant to his campaign website on November 16, 2017. The statements read as follows: "[1] I lived in foreign countries where citizens did not have [the right to vote] . . . I do not like the idea **the community** I now look to spend my retirement has denied me this central and important right."[29]..."[2] [O]ur **SHCA Board** has repeatedly failed to oppose and in many cases failed to even inform owners of damaging **efforts by the County and State**—for example: a massive sweetheart deal for our Developer that has significantly changed and reduced our long overdue 'Sports Park'..."[30]..."[3] **Clark County**'s 'cost shifting' of park maintenance expenses to our HOA"[31]... "[4] County and Developer coordinated [an] agreement that would permanently and wrongly obligate the HOA to maintain the 'public parks' in our

[28] JA, Vol. I, 3.
[29] JA, Vol. II, 448.
[30] JA, Vol. II, 444.
[31] JA, Vol. II, 444.

community."[32]... "[5] If elected I will keep owners informed and insist our Association engages to advance and defend owner interests **on both the County and State level.**" (emphasis added).[33]

The foregoing statements were offered by Appellant as opinions within the context of an election campaign for the SCHA board. The opinions addressed matters of public interest and concern and, for the most part, are not even directed at Respondents. The first statement refers to Appellant's disappointment with the SCHA in failing to conduct a vote of community owners on issues affecting declarant control of the SHCA and the ownership and maintenance of community parks. This statement is not directed at Respondents and is not defamatory on its face.

The second statement is again directed at the SCHA board, the County and State, which are not parties to this matter. Additionally, the expressed opinion of a sweetheart deal for the "Developer" is not defamatory on its face and is not actionable. The third statement offered by Appellant in his election campaign website is directed at the County and the HOA, who are not parties to the litigation and is not defamatory on its face. Accordingly, the statement is not actionable.

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[32] JA, Vol. II, 444.
[33] JA, Vol. II, 444.

The fourth statement is again offered as opinion within the context of an election campaign and is not defamatory on its face. Contrary to Respondents' claim, the statement does not allege criminal conduct on the part of Respondents. In the fifth statement, Appellant merely addressed his intent to hold the SCHA accountable to the homeowners. The statement is a matter of opinion expressed within an election and is not directed at Respondents. Accordingly, it is not defamatory nor actionable.

Finally, in paragraph 11 of their Complaint, Respondents allege that homeowners throughout the Southern Highlands Community received a pamphlet from Appellant which stated that "Olympia/Developer breached its fiduciary duties to the Southern Highland community and Developer's actions have 'already cost the homeowners millions.' In addition, he grossly overstates the Southern Highlands Community Association's 2016 legal expenses."[34] Once again, Respondents have referenced portions of Appellant Kosor's statements that are incomplete and out of context in a deliberate and transparent attempt to manufacture the appearance defamation to silence and intimidate Appellant.

The alleged defamatory statements were contained in Appellant's November 2017 campaign pamphlet and November 2016 campaign website, and read as follows:

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[34] JA, Vol. I, 3.

"[1] [If elected] I will work to end the Developer's control of our HOA Board. . . . With Olympia Management owned by the Developer, **the potential for** [our Board to experience] conflicts of interest, loss of board autonomy, and failed fiduciary oversights are clear." ... "[2] **I believe** this has cost our community millions of dollars." . . . "[3] **our Board** has repeatedly failed to act in the best interests of homeowners with government agencies." (emphasis added).[35]

Similar to the other statements, the foregoing were offered by Appellant as opinions within the context of an election campaign for the SCHA board. The opinions address matters of public interest and concern and, for the most part, are not even directed at Respondents.

In the first statement, Appellant clearly expresses an opinion of the potential or possibility for conflicts of interest and failed fiduciary oversight by the SCHA board in the absence of change through the election process. Once again, such opinions are directed at the board as opposed to Respondents, address matters of public interest, and are not defamatory on their face.

The second statement is again expressed as an opinion based on Appellant's belief that the transfer of ownership and maintenance responsibility to the SHCA for community parks has cost homeowners millions of dollars. The statement of opinion is not directed at Respondents, is not defamatory on its face, and addresses

[35] JA, Vol. II, 344; 340 (inserting "our management company").

matters of public interest.

The third statement of opinion is directed at the SHCA board and was intended to express the perceived need for change to the board membership. The opinion is not directed at Respondents, addresses a matter of public interest, and is not defamatory on its face.

Because the defamation claims were without merit and violated Nevada's anti-SLAPP laws, Appellant Kosor filed a Motion to Dismiss Pursuant to NRS 41.660 on January 29, 2018 in an effort to terminate Plaintiff's unlawful and improper strategic lawsuit against public participation ("SLAPP"). In response, Respondents opposed Appellant's Motion to Dismiss.

After a hearing before the lower court, an Order was filed on March 20, 2018 that denied Appellant's Motion. However, in denying said Motion, the district court failed to issue any findings in support of its ruling that Appellant Kosor had failed to meet his burden of proof for invoking the protection of NRS 41.660. Because the district court erred in finding that Appellant Kosor had failed to meet his burden of proof for protection under NRS 41.660, Appellant Kosor has filed the pending appeal seeking relief from district court's erroneous Order denying his Motion to Dismiss.

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III. SUMMARY OF THE ARGUMENTS

In a blatant display of intimidation aimed at silencing Appellant Kosor, Respondents have asserted claims for defamation and defamation per se following the announcement of Appellant's election candidacy for the board of the SHCA. In reliance upon the free speech protections provided under Nevada's anti-SLAPP laws, Appellant filed a Special Motion to Dismiss with the district court; however his motion was denied.

On appeal, Appellant Kosor argues that the district court erred in finding that Appellant had failed to satisfy his burden of proof for invoking the free speech protections provided under NRS 41.660. Therefore, Appellant Kosor argues that this Court, upon conducting a *de novo* review of the evidence, will determine that Appellant is entitled to the protections provided under NRS 41.660, as Respondents' defamation action was intended to chill, silence and intimidate Appellant from exercising his free speech rights.

Appellant Kosor is entitled to such protections because Respondents' action is based upon Appellant's good faith communications made in furtherance of the right to free speech in direct connection with issues of public concern. The evidence on appeal clearly demonstrates that the communications of Appellant Kosor were aimed at procuring an election outcome or result and/or were in direct connection with issues of public interest (governance of the SCHA, respondents'

control over the SCHA board, maintenance obligations for parks, substantial delay of sports park, etc.) in places open to the public or in public forums, and were truthful or made without knowledge of their falsity.

The fact that the subject communications were in direct connection with issues of public concern is demonstrated by application of the guiding principles adopted by this Court. Because the evidence and relevant legal authorities clearly demonstrate Appellant's satisfaction of his burden of proof, the communications of Appellant are entitled to protection under NRS 41.660. Furthermore, Respondents cannot demonstrate by *prima facie* evidence a probability that they will prevail at trial, as the communications at issue were not defamatory on their face, were truthful, were not the result of negligence on the part of Appellant and, in many instances, did not even mention Respondents. Accordingly, Appellant Kosor is entitled to an order directing the district court to vacate its denial of Appellant's Special Motion for Dismissal and to enter an order granting said Motion.

IV. LEGAL ARGUMENTS

A. The Standard of Review on Appeal Is *De Novo* for an Order Denying a Motion to Dismiss pursuant to NRS 41.660.

A district court's denial of a motion to dismiss pursuant to NRS 41.660 is subject to interlocutory appellate review.[36] The Supreme Court reviews *de novo* a

[36] Coker v. Sassone, 432 P.3d 746, 748-9 (Nev. 2019).

district court's order denying a motion to dismiss pursuant to NRS 41.660.[37] Indeed, a special motion to dismiss functions like a motion for summary judgment procedurally.[38]

Accordingly, the Supreme Court exercises its independent judgment in determining whether the challenged claim arises from protected activity based on its own review of the record. Thus, the Supreme Court gives no deference to the district court's ruling in determining whether the lower court erred in denying Appellant's Special Motion to Dismiss.

In conducting its review of the record, the Supreme Court does not weigh the evidence.[39] Rather, the Court accepts a plaintiff's submissions as true and then considers whether any contrary evidence from the defendant establishes the entitlement of defendant to prevail as a matter of law.[40]

In this case, Appellant Kosor has demonstrated by a preponderance of the evidence his entitlement to dismissal pursuant to NRS 41.440. Because Respondents have failed to demonstrate with *prima facie* evidence a probability of prevailing on any of their claims, the Order of the district court should be reversed, with instruction that the district court enter an order granting Appellant Kosor's Special Motion to

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[37] Id.
[38] Id.
[39] Coker, 432 P. 3d at 749; citing with approval Park v. Board of Trusties of California State University, 2 Cal. 5th 1057, 217 Cal. Rptr. 3d 130, 393 P. 3d 905, 911 (2017).
[40] Id.

Dismiss pursuant to NRS 41.660.

B. Nevada's Anti-SLAPP Laws Are Designed to Protect First Amendment Rights by Providing a Procedural Mechanism to Dismiss Meritless Lawsuits Initiated Primarily to Chill Defendants' Exercise of Their First Amendment Free Speech Rights.

It is well settled in Nevada that "SLAPP lawsuits abuse the judicial process by chilling, intimidating, and punishing individuals for their involvement in public affairs."[41] To curb these abusive lawsuits, Nevada adopted anti-SLAPP laws that immunize protected speakers from suit.

A moving party may file a special motion to dismiss under Nevada's anti-SLAPP statutes "if an action is filed in retaliation to the exercise of free speech."[42] In considering a special motion to dismiss, a district court must undertake a two-prong analysis. First, the court must determine whether the moving party has, by a preponderance of the evidence, established that the action is based upon a good faith communication in furtherance of the right to free speech in direct connection with an issue of public concern.[43]

If the moving party is successful, then the district court proceeds to the second prong of the analysis. Under the second prong, the burden shifts to the plaintiff to demonstrate with *prima facie* evidence a probability that plaintiff will

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[41] John v. Douglas Cty. Sch. Dist., 125 Nev. 746, 752, 219 P.3d 1276, 1281 (2009), superseded by statute on other grounds as stated in Shapiro v. Welt, 133 Nev. Adv. Op. 6, 389 P.3d 262, 266 (2017).
[42] Coker, 432 P. 3d at 749.
[43] Id.; NRS 41.660(3)(a).

prevail on the claim.[44] If plaintiff fails to satisfy the second prong of the analysis and the district court grants the special motion to dismiss, "the dismissal operates as an adjudication upon the merits."[45]

Accordingly, in applying the first prong of the analysis, the question then becomes what constitutes a "good-faith communication in furtherance of the right … to free speech in direct connection with an issue of public concern."[46] "Good faith communications" are defined by NRS 41.637 as those communications made "in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern" which are "truthful or…made without knowledge of…falsehood."

Under Nevada's anti-SLAPP laws, four categories of "good faith communications" are protected, including: communication "aimed at procuring any governmental or electoral action, result or outcome…" *see* NRS 41.637(1); and communication made "in direct connection with an issue of public interest in a place open to the public or in a public forum … which is truthful or made without knowledge of its falsehood." *see* NRS 41.637(4). However, a moving party seeking protection under NRS 41.660 "need only demonstrate that his or her conduct falls within one of the four statutorily defined categories of speech, rather

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[44] Id.
[45] NRS 41.660(5).
[46] NRS 41.660(3)(a).

than address difficult questions of First Amendment law."[47]

In this case, the challenged statements of Appellant Kosor are entitled to protection under two of the categories of good faith communications.

C. Appellant Kosor Statements Fall within Two Categories of Protected Communications under NRS 41.660.

In pursuing a retaliatory action against Appellant to silence his free speech, Respondents have ignored the fact that the alleged defamatory statements are protected under NRS 41.660, as they qualify under two separate categories of good faith communications. More specifically, Appellant Kosor satisfies his burden of proof, as the subject communications were "aimed at procuring ... [an] electoral action, result or outcome..." *see* NRS 41.637(1); and were made "in direct connection with an issue of public interest in a place open to the public or in a public forum ..." and were truthful or made without knowledge of their falsehood. *see* NRS 41.637(4).

i. The Communications Contained within Appellant Kosor's Election Website and Pamphlet Are Protected, as They Were Aimed at Procuring an Electoral Action, Result, or Outcome.

Under Nevada law, the application of the anti-SLAPP statutory framework is not limited to communication addressed to a governmental agency, but also includes

[47] Coker, 432 P.3d at 749.

speech aimed at procuring an election action, result or outcome.[48] Accordingly, it is well recognized that communications aimed at procuring non-governmental election results or outcomes qualify for protection under NRS 41.660.[49]

Despite the application of the anti-SLAPP statutory framework to communications aimed at procuring a non-governmental election action, result or outcome, Respondents are likely to take the position that an HOA board election is not what was contemplated by the anti-SLAPP statutes in protecting election-related communications. However, should Respondents take such position, they would ignore the plain language of the anti-SLAPP statues and the overwhelming case authorities applying such protections to non-governmental elections.

Clearly, the plain meaning of the statute is to provide protection for communications "aimed at procuring … [an] electoral action, result or outcome…." *see* NRS 41.637(1). Had the Nevada Legislature intended to restrict such protection to only governmental elections, it would have done so.

Furthermore, even if governmental elections only were contemplated by Nevada's anti-SLAPP statues (which they do not), California jurisprudence is instructive on the issue of whether a homeowner's association election is akin to a

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[48] *See* Adelson v. Harris, 133 Nev. Adv. Op. 67, 402 P.3d 665, 666, 670 (Nev. 2017) (*citing* Delucchi v. Songer, 133 Nev.----, 396 P.3d 826, 830 (2017).

[49] *Cf.* Macias v. Hartwell, 64 Cal. Rptr. 2d 222, 224 (1997) (holding that California's anti-SLAPP statutes "applies to suits involving statements made during a political campaign" and specifically finding that "campaign statements made in a union election" fit within the California anti-SLAPP statute and fell squarely within constitutional protections of the right of free speech).

governmental election. This Court has repeatedly acknowledged the similarities between California's and Nevada's anti-SLAPP statutes and routinely looks to California for guidance on issues relating to such statues.[50] California courts have repeatedly held in the context of anti-SLAPP litigation that board meetings of a homeowners association "serve[] a function similar to that of a governmental body. As [the California] Supreme Court has recognized, owners of planned development units '"comprise a little democratic subsociety."'...A homeowners' association board is in effect 'a quasi-government entity paralleling in almost every case the powers, duties, and responsibilities of a municipal government.'"[51]

Based on the foregoing authorities, Appellant's communications made in the context of a campaign for a homeowner's association election is entitled to protection as communications "aimed at procuring any . . . electoral action, result or outcome" as provided by Nevada law.[52] Moreover, this Court determined that "in 2013 the Legislature amended portions of Nevada's anti-SLAPP statutes in order to clarify that, under NRS 41.637, the scope of the anti-SLAPP protections is *not limited to a communication made directly to a governmental agency.*"[53] Thus, "communications with either the government or the public that are intended to

[50] Coker, 432 P.3d at 749.
[51] *See* Lee v. Silveira, 211 Cal. Rptr. 3d 705, 714-15 (Cal. Ct. App. 2016).
[52] NRS 41.637(1).
[53] Adelson v. Harris, 133 Nev. Adv. Op. 67, 402 P.3d 665, 670 (2017) (citing prior holding that discussed the legislative history of NRS 41.637(1)) (emphasis added).

influence an electoral result potentially fall under NRS 41.637(1)."[54]

Accordingly, no leap of faith is necessary to conclude that NRS 41.637(1) was intended to protect political speech from being chilled or silenced—and in this case, an election for the SHCA board of directors (the governing body for that community) fits the aim of such an intent and is consistent with the protection of Appellant Kosor's First Amendment rights. In this case, the majority of the statements deemed defamatory by Respondents were made in support of Appellant Kosor's campaign for election to the SCHA board of directors through postings on his November 16, 2017 campaign website and a his November 17, 2017 mailed campaign pamphlet.[55]

Specifically, Appellant Kosor's campaign website (www.mikekosor.com) conspicuously reads: "A Uniquely Qualified Candidate for Southern Highlands Community Association (SHCA) Board of Directors."[56] Similarly, the front cover of his campaign pamphlet conspicuously reads: "Vote Mike Kosor," "Southern Highlands HOA," and "The Homeowner's Candidate," and directed readers to his campaign website (www.mikekosor.com).[57] Both communications included nearly identical letters from Appellant addressed to "Dear Southern Highlands Neighbor" and state that "As your board representative, not beholden to the Developer, I will

[54] Id. at 671.
[55] *See* JA, Vol. I, 1-5.
[56] JA, Vol. II, 331.
[57] JA, Vol. II, 343.

work to reverse the above [list of concerns] and ensure that something like this never happens again."[58]

There can be no dispute that the alleged defamatory statements contained in Appellant's November 16 and November 17 campaign website and campaign pamphlet were communications aimed at procuring an "electoral action, result or outcome."[59] Appellant sought a seat on the SHCA board in furtherance of his aim to address matters of public concern. Accordingly, such communications are protected under the anti-SLAPP statutes. Because Appellant Kosor has satisfied his burden with respect to such statements, the burden shifts to Respondents to demonstrate with *prima facie* evidence a probability that Respondents will prevail on their claims.

ii. The Use of Guiding Principles in Determining Whether an Issue is of Public Interest.

In determining whether an issue is in the public interest under NRS 41.637(4), this Court has relied upon and adopted guiding principles from California jurisprudence.[60] Those guiding principles are specifically:

> (1) "public interest" does not equate with mere curiosity;
> (2) a matter of public interest should be something of concern to a substantial number of people; a matter of concern to a speaker and a relatively small specific audience is not a matter of public interest;
> (3) there should be some degree of closeness between the challenged statements and the asserted public interest—the assertion of a broad and amorphous public interest is not sufficient;

[58] JA, Vol. II, 340; 344.
[59] JA, Vol. II, 331-341; 343-344.
[60] *See* Shapiro v. Welt, 133 Nev. Adv. Op. 6, 389 P.3d 262, 268 (2017).

(4) the focus of the speaker's conduct should be the public interest rather than a mere effort to gather ammunition for another round of private controversy; and
(5) a person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people.[61]

Under California anti-SLAPP jurisprudence, the meaning of "public interest" has been repeatedly and "broadly defined" to include, in addition to government matters both, "private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity."[62] California courts have routinely found that speech offered within the context of a homeowners' association dispute is protected as a matter of public interest.[63] Like California courts, Nevada courts also define an issue of public interest broadly.[64]

iii. **Governance of the SHCA is an Issue of Public Concern.**

California courts have repeatedly found that issues concerning the manner in which an HOA group is governed are inherently political questions and issues of public interest. In the seminal case Damon v. Ocean Hills Journalism Club, 102

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[61] Id. (*citing* Piping Rock Partners, Inc. v. David Lerner Assocs., Inc., 946 F.Supp.2d 957, 968 (N.D. Cal. 2013)).
[62] *E.g.*, Colyear v. Rolling Hills Cmty. Ass'n of Rancho Palos Verdes, 214 Cal. Rptr. 3d 767, 776 (Cal. Ct. App. 2017) (internal citations omitted) (emphasis added), *as modified on denial of reh'g* (Mar. 23, 2017), *review denied* (June 14, 2017); *see* Shapiro, 389 P.3d at 268 ("Because this court has recognized that California's and Nevada's anti-SLAPP statutes are similar in purpose and language, we look to California law for guidance [in determining what constitutes an issue of public interest].")
[63] Colyear, 214 Cal. Rptr. 3d at 776-77.
[64] Coker, 432 P.3d at 751.

Cal. Rptr. 2d 205, 212-13 (Cal. Ct. App. 2000), an appellate court affirmed a lower court's ruling that statements concerning the decision of whether to continue to be self-governed as a homeowners' association were protected by anti-SLAPP law as they "pertained to issues of public interest within the [HOA community]."[65] In its determination, the court noted that the statements "concerned the very manner in which this group of [occupants of approximately 1,633 homes] would be governed—an inherently political question of vital importance to each individual and to the community as a whole."[66]

Similarly, in Ruiz v. Harbor View Community Assn., 37 Cal. Rptr. 3d 133, 133 (Cal. Ct. App. 2005), a homeowner sued his homeowners' association alleging letters written by the association's counsel defamed him. The appellate court concluded that the letters fell within Cal. Civ. Proc. Code. § 425.16(e)(4) (compare to NRS 41.637(4)), noting that the dispute was of interest to a definable portion of the public, i.e., residents of 523 lots, because they "would be affected by the outcome of these disputes and would have a stake in [association] governance."[67]

Also instructive is Lee v. Silveira, 211 Cal. Rptr. 3d 705, 715-20 (Cal. Ct. App. 2016), wherein a lower court's denial of an anti-SLAPP motion was reversed and the appellate court determined that alleged wrongful voting by certain board

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[65] Damon, 102 Cal. Rptr. 2d at 212.
[66] Id. at 212-13 (*citing* Chantiles v. Lake Forest II Master Homeowners Assn., 45 Cal. Rptr. 2d 1, 4-5 (Cal. Ct. App. 1995)) (bolding added).
[67] Ruiz, 37 Cal. Rptr. 3d at 133 (emphasis added).

members of a homeowners' association (sued by other board members) concerned a matter of public interest subject to anti-SLAPP protection. That court held that the director defendants' "decision making process and debate in approving the roofing project, which affected multiple buildings in [a 440 unit community], and the . . . management contract, which management entity was responsible for the day-to-day operations of [the homeowners' association and its community], impacted a broad segment, if not all, of [the homeowners' association] members" and thus concerned a matter of public interest protected by anti-SLAPP law.[68] The appellate court made its determination over the plaintiffs/respondents' argument that the holding in *Talega Maintenance Corp. v. Standard Pacific Corp.*[69] preempted any application of the anti-SLAPP statute pursuant to Cal. Civ. Proc. Code. § 425.16(e)(3).

In each of these case authorities, issues concerning governance of an HOA were found to be matters of public interest. In this case, each of the alleged defamatory statements of Appellant concern the governance of the SCHA and its board and, as such, addressed matters of public interest and are entitled to protection.

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[68] Lee, 211 Cal. Rptr. 3d at 716.
[69] 170 Cal. Rptr. 3d 453 (Cal. Ct. App. 2014) (denying defendants' anti-SLAPP motion on grounds the subject acts were not "written or oral statements" covered by § 425.16(e)(3) and that the remaining fraud claim was not based on a statement in connection with an issue of public interest).

iv. The Statements Made by Appellant Kosor in the December 17, 2015 Christopher Communities Association ("CCA") Board Meeting Were Directly Connected to Issues of Public Interest.

Respondents have challenged two statements made by Appellant on December 17, 2015 at a board meeting of the CCA, and each regarded Mr. Goett. Both statements were clearly opinions—one expressly qualified itself as "my opinion" and the other was made using the limiting qualifier "probably."[70] Of course, statements of opinion cannot be defamatory, nor are they actionable, and "in cases involving political comment, there is a strong inclination to determine the remarks to be opinion rather than fact."[71]

In addressing agenda items at the board meeting, Appellant stated, "[Mr. Goett, President of Olympia Companies, LLC,] is basically lining his own pockets, in my opinion, at the expense of the owners in Southern Highlands."[72] Thereafter, Appellant stated, "The audit report was quickly glossed over and the Country Commission was worried about, they [the Country Commission] were apologizing to the Developer, Goett, who was there, about the conduct of the audit committee and all the audit committee did was do their job. But they were, he was upset and angry and probably got the Commissioner aside in a dark room or someplace and

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[70] JA, Vol. I, 79, 1:19:09-1:19:15; 1:20:54-1:21:01.
[71] Nevada Indep. Broad. Corp. v. Allen, 99 Nev. 404, 410, 664 P.2d 337, 341 (1983).
[72] JA, Vol. I, 79, 1:19:09-1:19:15.

read them the riot act."[73] Not only does this isolated latter statement use the limited qualifier "probably," but it also uses the colloquialism "read them the riot act," which is not defamatory on its face.

In addition to the statements not being defamatory, the statements satisfy the guidelines and case authorities set forth above for establishing an issue of public interest, as both statements do not reflect a mere curiosity and concerned a substantial number of people—namely the nearly eight thousand homeowners of Southern Highlands and all of the Clark County citizens who may use or benefit from access to "public parks" located within Southern Highlands. Indeed, in 2016 alone, SHCA spent $675,643.00 to maintain "public parks."[74]

Such financial burden might instead have been shouldered by the Southern Highlands developer, Clark County or some other third party, as previously contemplated, had control of the SHCA board involved homeowners more directly—which is precisely the cause for which Appellant sought to marshal support.[75]

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[73] JA, Vol. I, 79, 1:20:38-1:21:01.
[74] *See* JA, Vol. II, 423 ("A 2011 county audit determined that without the contracts, the other six parks could be privatized after the development agreement expires…Southern Highlands Development granted ownership of the parks to the community's homeowner's association years ago. The move has shifted the annual burden of more than $1 million to maintain the parks onto homeowners but has also given them control of the parks."); *see also* JA, Vol. I, 120-122.
[75] *Cf.* Damon v. Ocean Hills Journalism Club, 102 Cal. Rptr. 2d 205 (2000) (affirming application of California's anti-SLAPP statute where the statements at issue concerned the manner in which more than three thousand homeowners would be governed).

A high degree of closeness also exists between the challenged statements and the public interest at issue in Appellant's statements. Specifically, the statements opine that Respondent Goett basically benefited at the expense of the owners in Southern Highlands by negotiating a deal with the Clark County Commission. Said deal benefited the developer by furthering efforts to shift costly maintenance obligations onto the SHCA and relieving the developer of substantial infrastructure obligations.[76] More specifically, such deal resulted in the SCHA taking on maintenance obligations for public parks, which were originally planned as a future transfer to Clark County for maintenance obligations under the Southern Highland Development Agreement.[77]

To this day, Clark County and Respondents have left the Southern Highlands owners to be assessed so that the SHCA can maintain public parks. Nothing in the record would make this issue a private controversy. And, there is also no question that the speech at issue was not otherwise private information that was turned public simply by communicating it to a large number of people. Thus, Appellant's statements fit squarely under each of the guiding principles for a matter of public interest as adopted by the Nevada Supreme Court for purposes of invoking the protection of NRS 41.660.

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[76] *See, e.g.*, JA, Vol. I, 52-56; Vol. II, 423.
[77] Id.: JA, Vol. I, 73; Vol. II, 423.

v. The December 17, 2015 Christopher Communities Association ("CCA") Board Meeting Was a Public Forum

Board meetings, such as the meetings of the CCA board, are public forums for purposes of Nevada's anti-SLAPP statute.[78] Although a California case held that a homeowner's association meeting does not fit within the scope of "other official proceeding[s]" for purposes of Cal.C.C.P. 425.16(e)(1),[79] the subsequent California case of *Lee v. Silveira*, 211 Cal. Rptr. 3d 705, 715 (Cal. Ct. App. 2016) expressly found that a meeting of the board of directors of a homeowner's association "constituted a public forum within the meaning of [Cal.C.C.P. 425.16(e)(3)]." Accordingly, there is no Nevada or California case law indicating that homeowners' association board meetings are anything other than public forums consistent with the language of NRS 41.637(4). Accordingly, Appellant's December 17, 2015 statements at the CCA board meeting are entitled to protection under NRS 41.660.

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[78] *See* Chocolate Magic Las Vegas LLC v. Ford, No. 217CV00690APGNJK, 2018 WL 475418, at *3 (D. Nev. Jan. 17, 2018) (citing to Damon v. Ocean Hills Journalism Club, 102 Cal. Rptr. 2d 205 (2000) (holding that televised and open board meetings of a homeowner's association constituted a public forum for purposes of California's anti-SLAPP statute)); *see also* Lee v. Silveira, 211 Cal. Rptr. 3d 705, 715 (Ct. App. 2016) (explaining that homeowners elect a board and delegate it powers, creating "a quasi-government entity paralleling in almost every case the powers, duties, and responsibilities of municipal government.")

[79] *See* Talega Maintenance Corp. v. Standard Pacific Corp., 170 Cal.Rptr.3d 453, 461 (2014).

vi. Appellant's September 11, 2017 Social Media Statement Was Directly Connected to Issues of Public Interest.

On September 11, 2017, Appellant posted to social media site Nextdoor (https://nextdoor.com) a statement expressing frustration regarding the Southern Highlands' obligation to maintain public parks in the community and the lack of accountability. His statement specifically referred to a sports park that Respondent Olympia Companies had agreed with Clark County in January 2006 to build within two years—but was delayed for more than a decade, virtually without consequence, until Clark County altered the obligation in 2015.[80]

Appellant's statement read in part, "[t]o obtain a lucrative agreement with the County the [D]eveloper committed to constructing the above Sports Park using private money...[but] the County would in the fall of 2015 inexplicably relieving [sic] the developer of its original commitment only to then approve spending $7M in public tax dollars for a similar complex in Mountain's Edge."[81] Instead of a mere curiosity, Appellant's statement was directed at an issue of significant public interest involving the County, the Respondent developer and the Southern Highlands Community. The statement was detailed in its content and the tone of the statement reflects the community's frustration with the lack of accountability

[80] *See* JA, Vol. II, 420-427 (describing impact of subject planned sports park on Clark County at large—but also specifically to the Southern Highlands homeowners, locals anticipating public access to the park, contractors whose dealings with Olympia Companies, LLC might be impacted if Clark County freezes permit issuances, etc.)
[81] JA, Vol. I, 169.

for and accessibility to the highly anticipated sports park. Indeed, the sports park was highly-anticipated and affected the community, not merely a handful of residents and was the focus of Appellant's posting.

During a multiplicity of town hall meetings conducted by Clark County Commissioner Susan Brager, the topic of the sports park was repeatedly raised.[82] In fact, the sports park was of such interest that the Clark County Commission received recurring public progress updates.

Furthermore, local news coverage of the issue expressly referred to "Clark County" as "still waiting" for the aforementioned public sports park.[83] Moreover, the multi-million dollar commitment(s) of Respondent Olympia Companies to Clark County (and the nearly 8,000 residents of Southern Highlands) by its very nature constituted a matter of public interest and concern to a substantial number of people.

Once again, the closeness between Appellant's statement and the asserted public interest is of a high degree, since Appellant Kosor offered the statement to

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[82] *See, e.g.*, JA, Vol. II, 463:6-12 (http://clark.granicus.com/MediaPlayer.php?view_id=17&clip_id=5166) Statement by Comm'r Sisolak opening public comment on Agenda Item #50 (periodic review of Southern Highlands sports park) on Feb. 8, 2017 ("I have got a bunch of cards, like I said comments will be limited to three minutes."), at 1:59:00; *see also* Statements by Comm'r Brager during Agenda Item #50-51 ("We have had many conversations with the homeowners and we have had neighborhood meetings . . . and it has been a very big challenge.. This has been really answering tons of questions, going to meetings…to figure out, everything that we can and/or should have done [to resolve the delayed construction and reduce size]."), at 2:14:072:14:55, 2:31:14-2:31:33.

[83] *See also* JA, Vol. II, 420-427.

draw attention to the public issue in direct furtherance of his right to free speech on the matter. Clearly, the communication at issue is not reflective of a private controversy—nor is it merely in furtherance of a private controversy. Instead, the communication is reflective of an effort to marshal accountability of the Clark County Commission and the SHCA board to their voters and residents. To that end, the statement included the following invitation, "Then join us at Wednesday's Clark County Commission meeting . . . If we do not stand up and demand accountability for what I believe are inexplicable actions, your County, the Commissions, and your HOA Board have made it clear that they will continue to ignore these questions while continuing to make [Southern Highlands] home owners bear more than their fair share."[84] (underlining added.)

Accordingly, this was not some errant effort to flyer the town with information about a private dispute between two parties in an effort to qualify as a "public interest." Based on the foregoing, Appellant's September 11, 2017 statement should be recognized for what it was, a statement made in direct connection to a public concern, sufficient to invoke NRS 41.660.

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[84] JA, Vol. I, 169.

vii. The September 11, 2017 Social Medial Statement Was Made Via a Public Forum

The social media posting at issue was a communication made in a place open to the public or a public forum. Websites accessible to the public are public forums for purposes of anti-SLAPP litigation.[85]

Here, the social media site used by Appellant to post on September 11, 2017 is accessible to any Southern Highlands resident—except for any registered sex offenders and members of their households.[86] Nextdoor brands itself as a private social networking service because it requires users to verify their address and use their real name; however, broad account eligibility guidelines render it highly accessible by the local public. In fact, the Nextdoor Member Agreement makes clear accessibility is intended, "we hope that neighbors everywhere will use the Nextdoor platform to build stronger and safer neighborhoods around the world."[87] Additionally, Nextdoor offers "personal accounts to individual residential members," and "special, restricted-functionality accounts to government agencies . . . and to businesses, nonprofits, news media, and other organizations."[88] Much

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[85] *See* Kronemyer v. Internet Movie Data Base, Inc., 59 Cal. Rptr. 3d 48, 55 (2007) (recognizing that websites accessible to the public are "public forums" for the purposes of the California anti-SLAPP statute and finding that statements on a website "accessible to anyone who chooses to visit the site . . . 'hardly could be more public.'"); *see also* Daniel v. Wayans, 213 Cal.Rptr.3d 865, 882 (Ct. App. 2017) (*citing* Nygard, Inc. v. Usui-Kerttula, 72 Cal.Rptr.3d 210 (2008) and finding postings to social media site Twitter to be a public forum).
[86] *See* JA, Vol. II, 305:25 (https://nextdoor.com/member_agreement/).
[87] Id. (underlining added)
[88] Id.

like Twitter and other social media sites, the ability of the public to simply create an account and gain access to postings renders Netdoor a public forum precisely because it is so publically accessible.

viii. Appellant's November 16, 2017 Website Statements Were Directly Connected to Issues of Public Interest.

On November 16, 2017, Appellant launched a website (http://www.mikekosor.com) using the free website builder Wix (www.wix.com), as part of his campaign seeking election to the SHCA board. The website outlined his platform, concerns and recommendations for improving the Southern Highlands Community. His website contained a statement regarding "the community" and the manner in which SHCA board members were determined, which read as follows: "I lived in foreign countries where citizens did not have this right [the right to vote] and saw firsthand [sic] the negative implications. I do not like the idea the community I now look to spend my retirement has denied me this central and important right."[89] (underlining added).

Appellant's statement referred to the power retained by Respondent to unilaterally appoint a majority of the SHCA board seats and to use Respondent Olympia's wholly owned management company (Olympia Management). It is Appellant's position that Respondent Olympia should have turned over board

[89] JA, Vol. II, 448.

control as early as 2014.

Once again, the statement at issue is directly connected to a matter of public interest concerning the ability of homeowners to vote for their board representatives to the SCHA. This matter was not a mere curiosity, rather it involved the process for selecting the SHCA board, which governs the rights of nearly eight thousand homeowners within the Southern Highlands.[90]

Respondents have also alleged defamation through Appellant Kosor's use of the phrase "massive sweetheart deal" within the context of an election campaign. A closer reading of the statement reveals that the phrase was used in specifically criticizing three non-parties: the SHCA Board, the County and the State.[91] Indeed, only one of Appellant's statements indirectly criticizes Respondent Olympia. More specifically, Appellant stated that "County *and Developer* coordinated [an] agreement that would permanently and wrongly obligate the HOA to maintain the 'public parks' in our community."[92] Nothing in this statement alleges that anyone violated the law—only that the County and Developer "wrongly obligate[d] the HOA to maintain the 'public parks.'"

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[90] *Cf.* Damon v. Ocean Hills Journalism Club, 102 Cal. Rptr. 2d 205 (2000) (affirming application of California's anti-SLAPP statute where the statements concerned the manner in which more than three thousand homeowners would be governed).
[91] JA, Vol. II, 443-44.
[92] JA, Vol. II, 444.

Instead of a mere curiosity, Defendant's statement was made in furtherance of the right to free speech on an issue directly affecting homeowner assessments, the SCHA budget, expenses, financial responsibility for parks and the highly anticipated sports park. As such, the statement is directly connected to matters of public interests that affect nearly eight thousand homeowners in the Southern Highlands, as well as citizens of Clark County, anticipating use of the public parks.

There also exists a high degree of closeness between the challenged statements and the asserted public interest, as Appellant was seeking to marshal voters and support to facilitate a shifting of the burden for the parks and end the delay for the highly anticipated sports park. Nothing about this matter could be considered private—as it was raised in a public campaign to champion a public cause, affecting a large portion of the Clark County community.

Appellant's website also featured a letter addressed "Dear Southern Highland Neighbor," which stated his objectives if elected and campaigned that "As your board representative, not beholden to the Developer, I will work to reverse [a list of campaign issues, including]":

My objectives if elected are: First and foremost, I will work to end the Developer's control of our HOA Board. Currently, three of our 5-person SHCA Board of Directors are appointed and employed by the Developer. With Olympia Management owned by the Developer, the potential for our Board to experience

conflicts of interest, loss of board autonomy, and failed fiduciary oversight are clear. As I note below, I believe this has cost our community millions of dollars. … Fourth, our board has repeatedly failed to act in the best interests of homeowners with government agencies. This must change.[93] [underlining added].

As the statement suggests, Appellant merely opines that the potential exists for conflicts of interest, loss of board autonomy, and failed fiduciary oversight because the majority of the SHCA Board of Directors are appointed and employed by Respondent Developer. Such a statement is not defamatory on its face and concerns a matter of public interest. Specifically, the statement concerned the election to and governance of a homeowner's association with nearly eight thousand homeowner members, which satisfies the public interest guidelines for protected speech.

The foregoing statements were also based on concern that the 2005 amendment to the Southern Highlands CC&Rs was invalid and that Respondent Developer had failed to timely transfer control of the SCHA board to the homeowners. Appellant's statement also opines that Respondent Developer had cost the community millions of dollars—because it transferred ownership of "public parks" along with a costly annual obligation to maintain said parks, without first obtaining the majority consent of the SHCA homeowners.

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[93] JA, Vol. II, 340.

Appellant's statements fit well within the protected speech category of public concerns. Nothing about these statements indicate that they were made simply to gather ammunition for another round of private controversy. In fact, Appellant's statements were offered specifically as part of an election campaign focused on the interests of the Southern Highlands' homeowners. Appellant was not simply turning something from private to public by communicating it to a large number of people—it was of public concern because it dealt with the governance of a homeowner's association.

ix. Appellant Kosor's Campaign Website Was a Public Forum

The statements at issue were made in a place open to the public or a public forum. Websites accessible to the public are public forums for purposes of anti-SLAPP litigation.[94] Accordingly, Appellant's statements are entitled to protection under NRS 41.660.

x. Appellant's Statements, as contained in his November 17, 2017 Election Pamphlet, Are Protected Speech under NRS 41.660.

On November 17, 2017, Appellant Kosor issued a campaign pamphlet, one side of which contained a slightly edited copy of his website letter addressed "Dear

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[94] *See* Kronemyer v. Internet Movie Data Base, Inc., 59 Cal. Rptr. 3d 48, 55 (2007) (recognizing that websites accessible to the public are "public forums" for the purposes of the California anti-SLAPP statute and finding that statements on a website "accessible to anyone who chooses to visit the site . . . 'hardly could be more public.'"); *see also* Daniel v. Wayans, 213 Cal.Rptr.3d 865, 882 (Ct. App. 2017) (*citing* Nygard, Inc. v. Usui-Kerttula, 72 Cal.Rptr.3d 210 (2008) and finding postings to social media site Twitter to be a public forum).

Southern Highland Neighbor." Using nearly identical language to the website letter, the campaign pamphlet letter reads:

> First and foremost, I will work to end the Developer's control of our HOA Board. Currently, three of our 5-person SHCA Board of Directors are appointed and employed by the Developer. With Olympia Management owned by the Developer, the potential for conflicts of interest, loss of board autonomy, and failed fiduciary oversight are clear. As I note below, I believe this has cost our community millions of dollars. ....
>
> Fourth, our Board has repeatedly failed to act in the best interest of homeowners with government agencies, defaulting to the interest of the Developer.[95]

For the same reasons as stated above in addressing statements on the campaign website, Appellant's statements, as contained in his written election pamphlet, are directly connected to issues of public interest and are entitled to protection under NRS 41.660. Appellant's statements set forth his campaign goals as a candidate and point to "the potential" for conflicts of interest, loss of board autonomy, and failed fiduciary oversight if changes are not made to the manner in which the board is elected and the SCHA is governed. Such opinion statements were made in furtherance of public concerns and are entitled to protection under NRS 41.660.

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[95] JA, Vol. II., 344.

xi. Appellant's November 17, 2017 Written Pamphlet Was a Public Forum

Communication or "[s]peech by mail, i.e., the mailing of a campaign flyer, is a recognized public forum under California's SLAPP statute."[96]

Based on the foregoing authorities, Appellant's November 17, 2017 campaign pamphlet qualifies as a public forum. Said pamphlet contained statements sent to Southern Highlands homeowners addressing an upcoming election for the SHCA board. The campaign flyer expressly read, in part, in large bold text: "Vote Mike Kosor," "Southern Highlands HOA," "The Homeowner's Candidate." As such, the statements of Appellant as contained therein are entitled to free speech protection under NRS 41.660.

xii. Appellant Kosor's Statements Were Either Truthful or Were Not Made with Knowledge of Their Falsity.

Appellant Kosor's statements were layman's opinions and were believed to have been truthful when offered. Nevertheless, to the extent any such statement was false, it was made without knowledge of its falsity.

Not until January 8, 2018, long after Appellant Kosor's statements were

[96] Macias v. Hartwell, 64 Cal. Rptr. 2d 222, 225 (1997) (holding campaign flyer mailed to union members in connection with an election for the office of union president to be a public forum for purposes of SLAPP litigation); *cf.* Damon v. Ocean Hills Journalism Club, 102 Cal. Rptr. 2d 205, 210-12 (2000) (holding that a newsletter intended to "communicate information of interest and/or concern to the residents" of a homeowners association was a public forum for purposes of California's anti-SLAPP statute over argument that "it was essentially a mouthpiece for a small group of homeowners.")

made and Respondents had filed their Complaint, did Appellant receive correspondence from the Nevada Department of Business and Industry Real Estate Division and an accompanying memorandum from the Office of the Attorney General, explaining the existence of a statute of limitations and its potential effect on the validity of the 2005 amendment to the CC&Rs for Southern Highlands.[97] Said correspondence suggested that a statute of limitations had lapsed, making the 2005 amendment "legally sufficient and binding." Moreover, the correspondence was made in response to a complaint filed earlier by Appellant Kosor, under the belief that the 2005 amendment (to increase the number of units in the planned community beyond the number stated in the original declaration) was invalid as a matter of law pursuant to NRS 116.2122.[98] There has been no judicial determination to date of the accuracy of the positions reflected in the correspondence from the Real Estate Division or the Memorandum form the Office of the Attorney General.

If the 2005 amendment to the Southern Highlands CC&Rs was invalid (as Appellant reasonably believed), then in October 2014, under the CC&Rs, Respondent should have transfered its remaining control of the SHCA to the homeowners.[99] Most of Appellant Kosor's statements focused on this issue.

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[97] JA, Vol. I, 104-106.
[98] JA, Vol. I, 111.
[99] JA, Vol. I, 103-108.

Defendant Kosor also correctly asserted that the homeowners of Southern Highlands were not given the opportunity to vote on whether the SCHA should acquire any title and accompanying maintenance obligation in any of the "public parks" located within Southern Highlands. Defendant Kosor has also relied upon his understanding (as a layman) of certain statutes (*e.g.*, NRS 116.087 and NRS 116.3112), which indicated to him that the transfer of title to the SHCA was not valid.

This understanding is plainly evident in the 5-page letter sent by Appellant Kosor to the SHCA Board of Directors on September 18, 2017 detailing his beliefs and encouraging the board to take specific actions.[100] After the Board did not undertake the requested actions, Appellant Kosor ran for election to the Board, in an effort to correct the perceived errors. Only after Appellant ran for the board did Respondents attempt to silence his free speech and to intimidate him by suing him for defamation.

Appellant Kosor's statements regarding the decade delayed sports park are also accurate, as evidenced by the investigative journalism of the Review Journal.[101]

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[100] JA, Vol. I, 97-101.
[101] *See* JA, Vol. II, 420-427.

Furthermore, Respondents cannot demonstrate that Appellant's statements were made with knowledge of their falsehood. Nor can Respondents demonstrate that such statements were, in fact, false. Accordingly, Appellant Kosor has satisfied his burden of proof and is entitled to an Order reversing the Order of the district court.

D. Because Respondents Cannot Satisfy Their Burden of Proof, Appellant Kosor Is entitled to Dismissal Pursuant to NRS 41.660.

Based on Appellant's satisfaction of his burden, the burden of proof shifts to Respondents to demonstrate by *prima facie* evidence a probability that Respondents will prevail on their claims.[102] Because Respondents cannot satisfy their burden of proof, Appellant Kosor is entitled to dismissal.

In Nevada, "[a]n action for defamation requires the plaintiff to prove four elements: (1) a false and defamatory statement ...; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages."[103] "In reviewing an allegedly defamatory statement, the words must be viewed in their entirety and in context to determine whether they are susceptible of a defamatory meaning."[104]

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[102] Coker, 432 P. 3d at 749.
[103] Clark County Sch. Dist. v. Virtual Educ. Software, Inc., 125 Nev. 374, 385, 213 P.3d 496, 503 (2009).
[104] Lubin v. Kunin, 117 Nev. 107, 111, 17 P.3d 422, 425 (2001) (internal quotations omitted); *see also* Pacquiao v. Mayweather, 803 F. Supp. 2d 1208, 1211 (D. Nev. 2011).

As a general rule, "statements of opinion as opposed to statements of fact are not actionable . . . there is no such thing as a false idea, and the societal value of robust debate militates against a restriction of the expression of ideas and opinions."[105] "The rule for making the determination [between factual statement and opinion] is . . . whether a reasonable person would be likely to understand the remark as an expression of the source's opinion or as a statement of existing fact."[106]

"In cases involving political comment, there is a strong inclination to determine the remarks to be opinion rather than fact."[107] "Although ordinarily the fact/opinion issue is a question of law for the court, where the statement is ambiguous, the issue must be left to the jury's determination."[108] This Court has also embraced the fact/opinion analysis set forth in Restatement (Second) of Torts § 566 (1977).[109]

Because the statements of Appellant are truthful and not defamatory on their face, and because they are statements of opinion and were made without negligence, Respondents cannot satisfy their burden of proof.[110]

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[105] Nevada Indep. Broad. Corp. v. Allen, 99 Nev. 404, 410, 664 P.2d 337, 341-42 (1983); Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 714, 57 P.3d 82, 87 (2002).
[106] Id.
[107] Id.
[108] Id.
[109] Id. at 411, 664 P.2d at 342.
[110] 118 Nev. at 714, 57 P.3d at 87.

i. CCA Board Meeting Statements (Dec. 17, 2015)

As noted above, the two statements at issue were both clearly opinions—one expressly qualified itself as "my opinion" and the other was made using the opinion implying qualifier "probably." Statements of opinion cannot be defamatory, nor are they actionable.[111] And, "in cases involving political comment, there is a strong inclination to determine the remarks to be opinion rather than fact"[112] (underlining added).

First, Appellant stated "He is basically lining his own pockets, in my opinion, at the expense of the owners in Southern Highlands. . . I want to know what political shenanigans were going on when they approved that park. I've got a whole list of things that I'm going to talk to [Commissioner Brager] about...This has been going on for about eight years."[113] This discussion uses just the kind of rhetorical hyperbole and figurative statements that are nonactionable (underlining added).

Second, Appellant stated, "The audit report was quickly glossed over and the Country Commission was worried about, they [the Country Commission] were apologizing to the Developer, Goett, who was there, about the conduct of the audit

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[111] Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 714, 57 P.3d 82, 87 (2002).
[112] Indep. Broad. Corp. v. Allen, 99 Nev. 404, 410, 664 P.2d 337, 341 (1983).
[113] JA, Vol. I, 124 at 1:19:08-1:19:33.

committee and all the audit committee did was do their job. But they were, he was upset and angry and he probably got the Commissioners aside in a dark room or someplace and read them the riot act . . . that's why I'm going to go at 3 o'clock, I've gotta ask—what's going on here because I'm really upset with what's going on here . . . I want the board run by owners"[114] (underlining added).

Such statements on their face are not defamatory, as the colloquialism "read them the riot act" hardly conveys a defamatory meaning or context. And, while making these statements, Appellant Kosor repeatedly indicated and emphasized that he was seeking more information. Accordingly, the statements from the board meeting are opinion, are not defamatory on their face and are not actionable.

ii. Social Media Platform Nextdoor.com Post (Sept. 11, 2017)

In his September 11, 2017 social media statements, Appellant Kosor expressed frustration over the Southern Highlands' obligation to maintain public parks in the community and the lack of accountability. Defendant's statement read in part, "to obtain a lucrative agreement with the County the Developer committed to constructing the above Sports Park using private money...[but] the County would in the fall of 2015 inexplicably relieving [sic] the developer of its original

[114] JA, Vol. I, 124 at 1:20:39-1:21:24.

commitment only to then approve spending $7M in public tax dollars for a similar complex in Mountain's Edge."

The statements reflected the opinions of Defendant Kosor and are not defamatory on their face, nor are most of the statements even directed at either Respondent. Furthermore, there is no evidence the challenged statements are false or were known to be false by Appellant. As such, the statements are not actionable.

Although Respondents contend that the statements were defamatory on grounds that they implied Respondents acted wrongly financially—including the "lucrative agreement" statement, "to charge a breach of ethics [or much less, to charge that a person entered a profitable agreement] is not to charge a breach of the law."[115] Accordingly, such statements are not actionable.

iii. Appellant Kosor's Campaign Website and Pamphlet

The campaign website and pamphlet outlined his platform, concerns and recommendations for improving the Southern Highlands community. Despite its use in an election campaign, Respondents have claimed defamation over Candidate Kosor's website statement wherein he opines that he does not like "the idea" of the

[115] Beilenson v. Superior Court, 52 Cal. Rptr. 2d 357, 363 (Cal. Ct. App. 1996) (finding that motion to dismiss should have been granted where political campaign flyer accused opponent of committing a "rip-off).

community in which he now lives denying him the right to vote on issues that will affect the community. In addition to having been offered as an opinion and political commentary within an election, the statement is not defamatory on its face, nor was it directed at either Plaintiff. The statement never mentioned either Plaintiff, only "the community." And, as the U.S. Supreme Court has determined, "Under the First Amendment there is no such thing as a false idea"[116] (underlining added). Accordingly, Respondents cannot satisfy their burden.

Plaintiffs also challenge Appellant Kosor's use of a website statement referencing a "massive sweetheart deal" and that the Country and Developer coordinated an agreement that would permanently and wrongly obligate the SHCA to maintain the public parks in our community. The foregoing statements were offered within the context of a campaign and pending election. As political commentary, the statements at issue are opinion, as opposed to fact, and are not defamatory on their face. Furthermore, the statements do not name either Plaintiff (instead naming three non-parties: "SHCA Board," "County and State") and are not actionable.

Respondents also challenge Appellant Kosor's references on his campaign website and pamphlet—to the "potential for our Board to experience conflicts of interest . . . and failed fiduciary oversight" and his belief that such failures have

[116] Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

cost the community millions of dollars. Once again, the foregoing statements were made in an electoral campaign and, as political commentary, constitute the opinions of then Candidate Kosor. This is further evidenced by Appellant's use of qualifying language such as "potential and belief." As opinions, the challenged statements are not actionable, nor are they even defamatory on their face.

Also, statements like the foregoing are among the type of political rhetoric, figurative statements, and hyperbole that are common to political campaigns.[117] As such, the statements at issue are not actionable and Appellant is entitled dismissal pursuant to NRS 41.660.

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[117] *E.g.*, Rosenaur v. Scherer, 105 Cal. Rptr. 2d 74 (2001) (calling opponent "thief" and "liar" during political campaign was hyperbole).

CONCLUSION

Based on the foregoing, Appellant respectfully requests that the Court issue an order vacating the district court's Order denying Appellant's Special Motion to Dismiss and to further instruct the district court to enter an order granting the Appellant's Special Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of February, 2019, I served the foregoing **APPELLANT'S OPENING BRIEF** upon all counsel of record:

☒ By electronically filing and serving the document(s) listed above with the Nevada Supreme Court: or

☐ By personally serving it upon him/her: or

☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es).

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