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### Smith v. Zilverberg, 137 Nev. Adv. Op. 7 (Mar. 4, 2021)

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## ANTI-SLAPP: SPECIAL MOTION TO DISMISS AND RECOVERING FEES

### **Summary**

The Nevada Supreme Court considered whether the district court properly applied Nevada's anti-SLAPP statutes. The Court held that the district court appropriately granted the motion to dismiss because, under Nevada's anti-SLAPP statute, the defendants satisfied the statute's first and second prongs. The Court also held that under Nevada's anti-SLAPP statute, the defendants were properly awarded attorney fees and costs, and an additional \$10,000 for prevailing on an anti-SLAPP special motion to dismiss.

### **Background**

The plaintiff, Jason Smith, filed a complaint alleging that Katy Zilverberg and Victoria Eagan, the defendants, made false and defamatory statements about him. This stems from the defendants' online criticism of Smith for bullying and allegations of wrongful behavior. The defendants filed an anti-SLAPP special motion to dismiss. The district court granted the motion and awarded the defendants attorney fees and costs, and a discretionary statutory award of \$10,000 each. Smith appealed both the motion to dismiss and the awarding of fees, costs, and statutory damages.

### **Discussion**

*The district court correctly granted the anti-SLAPP special motion to dismiss*

The Court reviews the district court's decision to grant an anti-SLAPP special motion to dismiss de novo.<sup>2</sup>

*Zilverberg's and Eagan's statements were made in good faith and in direct connection with a matter of public interest*

Smith argued that the defendants' statements were not made in good faith, the district court did not apply the *Shapiro* factors correctly, and that defendants' statements were not entitled to anti-SLAPP protections in Nevada. The Court disagreed with Smith because the defendants satisfied the two prongs of Nevada's anti-SLAPP statute's special motion to dismiss requirements. In the first prong, the defendant must show that the claim was made in good faith and in direct connection with an issue of public concern.<sup>3</sup> In the second prong of the statute, the plaintiff must fail to show a probability of prevailing on their claim.<sup>4</sup>

The defendants argued that because Smith was a public figure, the statements about him were statements related to an issue of public concern. The Court rejected this argument and stated the need for going through the *Shapiro* factors to determine whether the statements relate

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<sup>1</sup> By Brady Bathke.

<sup>2</sup> *Rosen v. Tarkanian*, 135 Nev. 436, 438, 453 P.3d 1220, 1222 (2019).

<sup>3</sup> NEV. REV. STAT. § 41.660(3)(a)–(b) (2020).

<sup>4</sup> *Id.*

to a public interest. The Court held that the statements did relate to a public interest because the interest in Smith's behavior alleged in the statements is more than just curiosity and many people are concerned by it.<sup>5</sup> The Court noted how people around the world are involved in the thrifting community and would be concerned by Smith's behavior for deciding whether or not to do business with him. The Court also noted that the defendant's statements were not personal, but rather about Smith's public persona and reputation in the thrifting community.

*Zilverberg's and Eagan's statements were truthful or made without knowledge of falsehood, or were opinions incapable of being false*

Smith next argued that the defendants knew their statements were false when they publicly criticized Smith. If a statement is truthful or made without knowledge of being false, then the statement was made in good faith.<sup>6</sup> The Court stated that the record shows Zilverberg's statements were either truthful or made without knowledge of being false. Zilverberg provided evidence such as a declaration to support her statements about Smith. The evidence included screenshots and videos of Smith publishing and exposing the identities and personal information of his critics. Also, Zilverberg's statements describing Smith as a bully is an opinion that is unable to be false.<sup>7</sup> The Court also noted that Eagan's statements were also opinions like Zilverberg's statements. The other parts of Eagan's statements were truthful or made without knowledge of being false because the statements were based on her personal knowledge. The Court concluded that the defendants met their burden under the first prong of Nevada's anti-SLAPP statute.

*Smith failed to show with prima facie evidence a probability of prevailing on his claims*

Under the second prong, Smith must provide prima facie evidence that the claims in his filed complaint have minimal merit.<sup>8</sup> The Court compared the evidence that Smith presented with the elements of the claims to determine the probability of Smith prevailing under the second prong.<sup>9</sup> If the plaintiff in a defamation claim is a public figure, then actual malice must be proved.<sup>10</sup> The Court concluded that Smith did not show evidence of actual malice and the statements made were opinions or defendants' statements were factually based. It was not enough that Smith alleged his belief that the defendants made the statements because of their personal animosity towards Smith. The Court concluded that the district court appropriately granted the defendants' special motion to dismiss.

*The district court acted within its sound discretion by awarding respondents attorney fees and costs*

Smith argued that the defendants should only have collected attorney fees and costs related to their anti-SLAPP motion, and not the entire amount of costs from the start of litigation. Smith also argued that the amount awarded was unreasonable. The Court noted that the statute is ambiguous because it does not state whether the costs and fees awarded should be from the entire

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<sup>5</sup> See *Shapiro v. Welt*, 133 Nev. 35, 39, 389 P.3d 262, 268 (2017).

<sup>6</sup> NEV. REV. STAT. § 41.637(4) (2020).

<sup>7</sup> See *Lubin v. Kunin*, 117 Nev. 107, 112, 17 P.3d 422, 426 (2001).

<sup>8</sup> NEV. REV. STAT. § 41.660(3)(b) (2020); *Abrams v. Sanson*, 136 Nev. 83, 91, 458 P.3d 1062, 1069 (2020).

<sup>9</sup> See *Abrams*, 136 Nev. at 91–92, 458 P.3d at 1069–70.

<sup>10</sup> *Rosen*, 135 Nev. at 442, 453 P.3d at 1225.

litigation or only from the anti-SLAPP motion. The Court looks to the rules of statutory construction to determine the Legislature's intent.

The Court compared the statute at issue here, NRS 41.670(1)(a), with another similar statute regarding a special motion to dismiss because it can be inferred that an omission is intentional.<sup>11</sup> A similar statute, NRS 41.670(2), provides that a prevailing plaintiff can recover costs and fees related to responding to the particular motion. The statute here does not contain qualifying language that would limit what can be recovered. The Court concluded that the Legislature intended for prevailing defendants to recover all reasonable fees and costs from the start of litigation, rather than just from the anti-SLAPP motion. The Court further noted how the Legislature intended this to protect free speech and prevent the worrying effects of SLAPP suits.

The Court also held that the district court followed the *Brunzell* factors in determining a reasonable amount of attorney fees and costs. Because of that, and the district court's finding that the attorney fees and time spent were reasonable, the Court concludes that the district court properly awarded attorney fees and costs.

*The district court acted within its sound discretion by awarding Zilverberg and Eagan each statutory damages*

Smith argued that the two defendants could only collect \$10,000 total instead of each collecting that much. The Court disagreed because the plain language of the statute does not limit the award per lawsuit, but rather per individual.

## **Conclusion**

The defendants' statements are protected by Nevada's anti-SLAPP statutes and Smith did not provide prima facie evidence of a probability of prevailing on his claims, including defamation. The statute at issue here, NRS 41.670(1)(a), allows a prevailing defendant to recover reasonable attorney fees and costs from the entire litigation, not just litigating the motion to dismiss. The district court also appropriately awarded an additional \$10,000 to each defendant under Nevada's anti-SLAPP statute.

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<sup>11</sup> See *In re Christensen*, 122 Nev. 1309, 1323, 149 P.3d 40, 49 (2006).