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Case No. CV-1308115

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IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WHITE PINE

John Lampros,

Plaintiff,

vs.

Cheryl Noriega, James Adams, and Timothy McGowan, Ely Jet Center, Does I through 10, And Does Inc., 1 through 10,

Defendants.

DECISION RE ATTORNEY'S FEES, COSTS AND PENALTY

On October 30, 3013, this Court entered an order granting the defendants' special motion to dismiss pursuant to Nevada's anti-SLAPP[1] statutes, NRS 41.635 to NRS 41.670, inclusive. Defendants[2] now request an award of attorney fees, costs and the imposition of a $10,000 penalty for each defendant.

The complaint in this case was filed on August 2, 2013. At the time the complaint was filed, NRS 41.670 provided, *inter alia*:

> If the court grants a special motion to dismiss filed pursuant to NRS 41.660:
> 1. The court shall award reasonable costs and attorney's fees to the person against whom the action was brought, except that the court shall award reasonable costs and attorney's fees to this State or to the appropriate political subdivision of this State if the Attorney General, the chief legal officer or attorney of the political subdivision or special counsel provided the defense for the person pursuant to NRS 41.660.

[1] "SLAPP" is an acronym for strategic lawsuits against public participation.
[2] Defendant Ely Jet Center was previously dismissed pursuant to stipulation.

In determining attorney's fees, the court must evaluate the factors set forth in Brunzell v. Golden Gate National Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969), including the qualities of counsel, the nature and extent of the work performed, and the result obtained. See Miller v. Wilfong, 121 Nev. 619, 623–24, 119 P.3d 727, 730 (2005).

Plaintiff does not contest the qualities of the defense attorneys who advise this Court that they have over thirty years of civil legal practice experience between them. Ms. Cavanaugh-Bill claims to have been involved extensively in both State and Federal cases. Mr. Dickerson has devoted much of his thirty year legal career to civil rights and general civil litigation.

With regard to the nature and extent of the work that was done, This Court recognizes that the attorneys would have spent considerable time developing the facts from their clients and preparing the special motion to dismiss and the reply to plaintiff's opposition. The hourly rates of $225 and $250 which were charged were not out of line for this kind of work.

The result of the case was an adjudication on the merits of the action in favor of the defendants pursuant to Nevada's anti-SLAPP statutes which, frankly, this Court was not very familiar with. Since I had not decided an anti-SLAPP case previously, I had to do considerable research before deciding the motion. I assume counsel had similar obstacles to overcome. Therefore, I conclude the hours billed by counsel were not unreasonable.

The only problem this court has in determining the amount of fees and costs is that the statement presented as an attachment to the defendant's motion combines both costs and attorney fees. Rather than trying to separate out the attorney fees from the statement, I have decided to award $8,000 to the defendants as the attorney fee and require the defendants to file a memorandum of costs pursuant to NRS 18.110 for their costs.

The request for a penalty of up to $10,000 per defendant poses an interesting problem. SB 286 of the 77th Session of the Nevada Legislature provided that NRS 41.670 be amended, *inter alia,* to read as follows:

> 1. If the court grants a special motion to dismiss filed pursuant to NRS 41.660:
>   (a) The court shall award reasonable costs and attorney's fees to the person against whom the action was brought, except that the court shall award reasonable costs and attorney's fees to this State or to the appropriate political subdivision of this State if the Attorney General, the chief legal officer or attorney of the political subdivision or special counsel provided the defense for the person pursuant to NRS 41.660.
>   (b) The court may award, in addition to reasonable costs and attorney's fees awarded pursuant to paragraph (a), an amount of up to $10,000 to the person against whom the action was brought.
>   (c) The person against whom the action is brought may bring a separate action to recover:
>   (1) Compensatory damages;
>   (2) Punitive damages; and
>   (3) Attorney's fees and costs of bringing the separate action.

The complaint in this case was filed on August 2, 2013, and amended on August 29, 2013. The "special" motion to dismiss which I granted was filed on September 23, 2013. SB 286, the amended statute which permits a penalty of up to $10,000, took effect October 1, 2013. My order granting the motion was dated October 14, 2013, and filed on October 30, 2013, after the amended statute took effect.

The question is whether the amendment should be applied retroactively. Clearly, statutes that create causes of action should not be applied retroactively. An early case in Nevada wrestled with the problem inherent in the retrospective application of laws. In Milliken v. Sloat, 1 Nev. 573, 577 (1865), the Court stated "[r]etrospective laws have been regarded from remote antiquity as odious and tyrannical, and they have been almost uniformly discountenanced by the courts of Great Britain and the United States." The Court then quoted Lord Bacon: "[i]t is in general true that no statute is to have a retrospect beyond the time of its commencement." And finally the Court held: "We are of the opinion that when a statute is silent as to past time and events, courts are bound to apply it only prospectively."

The Nevada Supreme Court has continued this opinion today: "...statutes operate prospectively, unless the Legislature clearly manifests an intent to apply the statute retroactively, or 'it clearly, strongly, and imperatively appears from the act itself' that the Legislature's intent cannot be implemented in any other fashion." Pub. Employees' Benefits Program v. Las Vegas Metro. Police Dep't, 124 Nev. 138, 154, 179 P.3d 542, 553 (2008). See also In re Estate of

Thomas, 116 Nev. 492, 495-96, 998 P.2d 560, 562 (2000). No such retroactive intent appears in the amendments to NRS 41.660 or 41.670.

But these statutes do not create a cause of action. Nevada's anti-SLAPP statutes create a statutory defense to certain claims for defamation filed by a government or a public official.[3] Should a statute which creates a statutory defense be applied retroactively? Neither party has addressed this issue squarely or presented any cases. I have been unable to locate any Nevada case directly on point.

In Lahti v. Fosterling, 357 Mich. 578, 99 N.W.2d 490 (1959) the court held that an amendment of the Workmen's Compensation Law eliminating restriction limiting medical benefits to four six-month periods was retrospective, and the Legislature intended the amendment to be applicable to an existing award entered prior to effective date of amendment and intended to allow, on proper application and proofs, additional medical benefits even though all previous

[3] NRS 41.660 as amended effective October 1, 2013 reads as follows:
1. If an action is brought against a person based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern:
   (a) The person against whom the action is brought may file a special motion to dismiss; and
   (b) The Attorney General or the chief legal officer or attorney of a political subdivision of this State may defend or otherwise support the person against whom the action is brought. If the Attorney General or the chief legal officer or attorney of a political subdivision has a conflict of interest in, or is otherwise disqualified from, defending or otherwise supporting the person, the Attorney General or the chief legal officer or attorney of a political subdivision may employ special counsel to defend or otherwise support the person.
2. A special motion to dismiss must be filed within 60 days after service of the complaint, which period may be extended by the court for good cause shown.
3. If a special motion to dismiss is filed pursuant to subsection 2, the court shall:
   (a) Determine whether the moving party has established, by a preponderance of the evidence, that the claim is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern;
   (b) If the court determines that the moving party has met the burden pursuant to paragraph (a), determine whether the plaintiff has established by clear and convincing evidence a probability of prevailing on the claim;
   (c) If the court determines that the plaintiff has established a probability of prevailing on the claim pursuant to paragraph (b), ensure that such determination will not:
      (1) Be admitted into evidence at any later stage of the underlying action or subsequent proceeding; or
      (2) Affect the burden of proof that is applied in the underlying action or subsequent proceeding;
   (d) Consider such evidence, written or oral, by witnesses or affidavits, as may be material in making a determination pursuant to paragraphs (a) and (b);
   (e) Stay discovery pending:
      (1) A ruling by the court on the motion; and
      (2) The disposition of any appeal from the ruling on the motion; and
   (f) Rule on the motion within 7 judicial days after the motion is served upon the plaintiff.
4. If the court dismisses the action pursuant to a special motion to dismiss filed pursuant to subsection 2, the dismissal operates as an adjudication upon the merits.

benefit periods had been exhausted. However, in Hess v. Chase Manhattan Bank, USA, N.A., 220 S.W.3d 758, 769 (Mo. 2007), the court stated "[l]aws that provide for penalties where none existed before, however, are substantive and 'are always given only prospective application.' *See Yellow Freight Sys., Inc. v. Mayor's Comm'n on Human Rts.,* 791 S.W.2d 382, 387 (Mo. banc 1990). And, absent legislative intent to the contrary, '[w]hen a statute is ... remedial in one part while penal in another, it should be considered a remedial statute when enforcement of the remedy is sought' and applied retrospectively, but considered 'penal when enforcement of the penalty is sought' and applied prospectively. *City of St. Louis v. Carpenter,* 341 S.W.2d 786, 788 (Mo.1961)."

I am convinced that the $10,000 penalty in the amendment should not apply because, while I entered the order after it was enacted, I was ruling on a motion filed pursuant to the statutes as they existed before the motion. For example, the statute before amendment said I was to treat the "special" motion to dismiss as a motion for summary judgment. That is exactly what I did.[4] However, the amendment repealed the requirement that the motion be treated as a motion for summary judgment. The amendment even increased the burden of proof for the plaintiff to show a probability of prevailing by "clear and convincing evidence". I never considered that to be the plaintiff's burden. Since I was deciding the motion under the statute as it existed before amendment, I should not use the amendment to award a penalty.

Accordingly, I decline to give the statute retrospective effect and I deny any request for a penalty.

Counsel for the defendants shall prepare an appropriate order for $8,000 in attorney fees, costs pursuant to a memorandum of costs and submit the same to this Court.

[4] In my decision I stated that a "special motion to dismiss under the anti-SLAPP statute is treated as a motion for summary judgment. NRS 41.660(3)(a). Thus, this court may only grant the special motion to dismiss if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *John* (setting forth the summary judgment standard and explaining that "the nonmoving party cannot overcome the special motion to dismiss 'on the gossamer threads of whimsy, speculation and conjecture' ") (quoting *Wood v. Safeway, Inc.,* 121 Nev. 724, 731, 121 P.3d 1026, 1030 (2005)). To avoid summary judgment once the movant has properly supported the motion, the nonmoving party may not rest upon general allegations and conclusions, but must instead set forth by affidavit or otherwise specific facts demonstrating the existence of a genuine issue of material fact for trial. NRCP 56(e); *Wood,* 121 Nev. at 731, 121 P.3d at 1030–31."

Dated this 15 day of January, 2014.

J. Charles Thompson

J. CHARLES THOMPSON
SENIOR DISTRICT JUDGE