

1 Case No. CV 1307113

2 Dept. 1

3 IN THE SEVENTH JUDICIAL DISTRICT COURT
4 WHITE PINE COUNTY, STATE OF NEVADA

5 _____
6 Michael Lemich,

7 Plaintiff.

8 vs.

9 Cheryl Noriega, James Adams, Timothy
10 McGowan, Ely Jet Center, Does 1 through 10,
11 and Does Inc., 1 through 10, and Doe Trust, 1
12 through 10,

13 Defendants.
14 _____

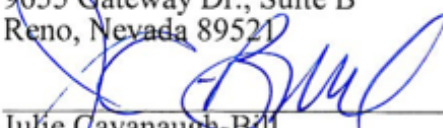
SPECIAL MOTION TO DISMISS
PURSUANT TO NRS 41.660 (Anti-
SLAPP); REQUEST FOR ATTORNEY
FEES (NRS 41.670)

15 Comes now DEFENDANTS, CHERYL NORIEGA, JAMES ADAMS, and TIMOTHY
16 MCGOWAN, by and through their counsel of record, CAVANAUGH-BILL LAW OFFICES and
17 JEFFREY A. DICKERSON, and hereby respectfully submit their Special Motion to Dismiss
18 pursuant to NRS 41.660. This case is a "SLAPP" lawsuit, or Strategic Lawsuit Against Public
19 Participation - a lawsuit that has been filed to interfere with, or retaliate for the Defendants'
20 Constitutionally protected activity. The entirety of Plaintiff's claims are based upon a legitimate
21 Recall Petition by Defendants and is clearly aimed at creating a chilling effect to hinder the recall
22 process. NRS 41.660 prohibits such suits, and NRS 41.670 places the costs of defending them on
23 the Plaintiff's shoulders. Defendants' Motion is made and based upon all the pleadings and papers
24 herein, as well as the attached Memorandum of Points & Authorities and attachments thereto and
25 any oral argument the Court should entertain.

26 Dated this 28th day of August, 2013.

27 CAVANAUGH-BILL LAW OFFICES, LLC
28 401 Railroad Street, Suite 307
Elko, Nevada 89801

LAW OFFICE OF JEFFREY A. DICKERSON
9655 Gateway Dr., Suite B
Reno, Nevada 89521



Julie Cavanaugh-Bill
Nevada Bar No. 11533

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NOTICE OF MOTION

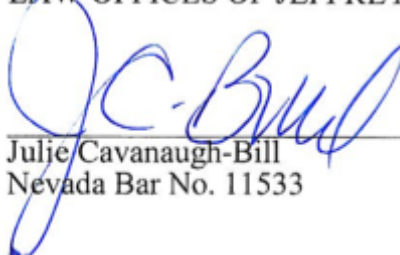
PLEASE TAKE NOTICE that the following SPECIAL MOTION TO DISMISS PURSUANT TO NRS 41.660 [ANTI-SLAPP]; and REQUEST FOR ATTORNEYS FEES AND COSTS (NRS 41.670); has been served upon you. If you oppose the Motion, you have ten (10) days plus three (3) days if this motion was received by mail (not counting weekends and holidays) from the day after this Motion was served on you, to serve on JULIE CAVANAUGH-BILL of the CAVANAUGH-BILL LAW OFFICES, LLC, 401 Railroad Street, Suite 307, Elko, Nevada, 89801, and file with the Court Clerk of the Seventh Judicial District Court, in and for the County of White Pine, State of Nevada, a written Response. If you fail to respond within ten days, the Court may enter an Order as requested by the Defendant without a hearing and without further notice to you, and without further chance to respond.

A hearing on this matter is requested and the Court is requested to set aside three (3) hours for the hearing.

Dated: August 28, 2013

CAVANAUGH-BILL LAW OFFICES, LLC
401 Railroad Street, Suite 307
Elko, Nevada 89801

LAW OFFICES OF JEFFREY A. DICKERSON



Julie Cavanaugh-Bill
Nevada Bar No. 11533

FILED IN CASE NO. 13-123456789

MEMORANDUM OF POINTS AND AUTHORITIES

I. Brief Statement of Facts

This case involves allegations by Plaintiff, a current White Pine County Commissioner, of defamation by Defendants for the filing of a Recall Petition against him. On or about July 8, 2013, Defendants filed a notice of intent to recall Plaintiff, County Commissioner Mike Lemich. See Exhibit ("Ex.") A to Affidavit of Timothy McGowan. In the Recall Petition the Defendants assert that:

Mike Lemich, along with the Chairman, has spearheaded the economic disaster in which the County now finds itself. Lemich has shown himself combative, pushing a personal vendetta against the private operator at the airport and members of the Airport Board. His accusations, intimidation, lies and threats against both the operator and their customers have disregarded all rules of ethics. He has continued his attacks even though both County and private attorneys have stated that there are no issues of legality

He is personally engaged in dismantling the County Fire and EMS services, subjecting the County to numerous NRS violations and placing outlying communities in grave risk by diminishing these services, while attempting to transfer management of these services to the City of Ely. Intimidation has been his major tool in this endeavour. As the County representative to the City of Ely, he has abused his office in personal negotiations involving his own private land transfers, while simultaneously negotiating land exchanges for the County.

The statements contained in the Petition are true and based upon good faith by the Defendants. See Affidavits of Timothy McGowan, Cheryl Noriega and James Adams attached hereto:

1. "Spearheading the economic disaster": The Defendants based this statement upon Plaintiff's role in such County actions as the Ely Times Building purchase and the Aquatic Center. The Ely Times Building purchase was approved on April 11, 2013. Deficiencies and problems with the building were not addressed before the approval, and the purchase was done without a proper estimate of re-engineering costs (estimated costs have now increased from \$135,000 to \$350,000). Ex. B. The Aquatic Center also encountered lack of planning issues including emergency vehicle access, sufficient parking to meet the County Code, ingress and egress to Highway 6 in conjunction with Nevada Department of Transportation, cost overruns and failure to properly assess operating costs (estimates have varied between \$385,000 to \$512,000). Ex. C. Annual County Budget shortfall was made known in May 2013, with an operating deficit in the General Fund of \$37,890,

1 equipment from Fund Balance in the amount of \$125,500, and engineering transfers that will reduce
2 the General Fund Balance by \$2,263,700, leaving a total planned reduction in the General Fund
3 balance of \$2,428,090. Ex. D. A reported \$ 1.3 million shortfall was in the General Fund as of April
4 2013.

5 2. "Pushing a personal vendetta against the private operator at the airport and engaging in
6 accusations, intimidation, lies and threat." Defendants have personal knowledge of these actions by
7 Plaintiff and the statements in the Petition are based on that first hand knowledge. See also Ex. E,
8 reflecting the public nature of this on going dispute.

9 3. " Commissioner Lemich is personally engaged in dismantling the County Fire and EMS
10 services, subjecting the County to numerous NRS violations and placing outlying communities in
11 grave risk." The Attorney General's Office in File No. 12-006 gave the County a "last warning" for
12 Commissioner Lemich's involvement in a meeting that was not duly noticed wherein this exact issue
13 was discussed and a decision made to consolidate the County Fire and Ely City Fire. Ex. F at
14 paragraph 7. The Attorney General's office stated "We will not hesitate to take further action in the
15 future should a similar violation occur."

16 4. "Use of Intimidation." Defendants have personal knowledge of Lemich behaving in an
17 intimidating manner. In addition, Commissioner Lemich committed an assault and battery on private
18 citizen George Chachas. See Ex. J.

19 5. "Engaging in personal negotiations involving his own private land transfers, while
20 simultaneously negotiating land exchanges for the County." Commissioner Lemich has used his
21 position to influence County Employees to publicly support the Midway Gold project with which
22 he has admitted to having a conflict of interest. Ex. G .Additionally, he failed to recuse himself from
23 the declared conflict of interest, disregarding advice from the District Attorney. Commissioner
24 Lemich also simultaneously engaged in real property negotiations with the City of Ely, both as a
25 County Commissioner and as a private businessman. Ex. H.

26 The first signatures were obtained by Defendants on or about July 25, 2013 - the lawsuit was
27 filed the same day, at 5:01 p.m., Mr. Lemrich filed his lawsuit claiming defamation, civil
28 conspiracy and emotional distress. His lawsuit rests entirely on the Recall Petition. These
statements are clearly protected under NRS 41.637 and - as is the case with the rest of Defendants

1 protected activity- Plaintiff's claims are explicitly based upon them, and those claims must fail. (Pl's
2 Compl., ¶¶ 14-20). (Plaintiff's complaint erroneously cites to an earlier draft Petition that was not
3 filed, therefore, Defendants shall focus this Motion on those statements actually placed in the public
4 Recall Petition).

5 While not explicitly referenced in Plaintiff's Complaint, it remains clear Plaintiff's animus
6 for Defendants engaging in the Recall process permeates his claims. In fact, there appears to be no
7 doubt that Plaintiff's intent is to "chill" the Recall process - a process to which the Defendants have
8 constitutionally protected rights both under the Nevada Constitution Article 1 (9) and the United
9 States Constituion.. In a media article following the lawsuit filing, Plaintiff's attorney is actually
10 quoted as saying, "I haven't really looked into it....It would be an interesting point if anyone who
11 signs the petitions could also be named in the defamation suit." See Ex. I at page 3. The article,
12 which ran in the local media was entitled "Sign the Lemich/Lampros Recall, Get Sued?" Because
13 Defendants statements are absolutely protected, those claims should be disallowed and Plaintiff
14 should be ordered to pay Defendants attorney fees and costs.

15 **II. Legal Argument**

16 "SLAPP" refers to Strategic Lawsuits Against Public Participation. SLAPP lawsuits, are
17 intended to censor, intimidate and silence critics by burdening them with the cost of a legal defense
18 until they abandon their criticism or opposition. They also function to intimidate others to prevent
19 them from participating in the debate. Intimidation will naturally exist any time a community
20 member is sued by an organization or entity, since most laypersons are uncomfortable with litigation,
21 cannot afford to pay attorneys fees, engage in the petition process in good faith, and do not want to
22 have to explain their status as a Defendant in a lawsuit. States began to realize that there was a
23 problem growing relative to the initiation of SLAPP litigation. In 1992 California responded to this
24 problem enacting an anti-SLAPP statute (California Code of Civil Procedure § 425.16) protecting
25 those attacked with SLAPP lawsuits by providing to them the remedy of a special Motion to Strike.
26 Nevada was close on California's heels, enacting legislation similar in purpose, codified in NRS
27 41.645 through NRS 41.670.

28 The legislative history of Assembly Bill 485 (Bill Summary) describes a classic SLAPP
lawsuit as:

1 “... when a citizen makes a statement intended to influence public policy and is then sued for
2 defamation, interference or similar common law tort.”

3 **A. Procedural authority and Motion standard.**

4 Pursuant to Nevada’s Anti-SLAPP statute, if a lawsuit arises as a result of a good faith
5 communication in furtherance of the right to petition, the person(s) against whom the lawsuit is
6 brought may file a Special Motion to Dismiss. *See*, NRS 41.660(1). Upon the filing of such a Motion
7 the Court “shall treat the motion as a motion for summary judgement.” *see*, NRS 41.635, *et seq.*
8 Should the Court grant the special motion, “the dismissal operates as an adjudication upon the merits.”
9 *See*, NRS 41.660 (4) attorney fees and costs shall be awarded, and the persons against whom the
10 action is brought may bring a separate action to recover compensatory damages, punitive damages and
11 attorney fees and costs of bringing the separate action. *See*, NRS 41.670.

12 From the face of the Complaint, there is no doubt Plaintiff’s claims are impermissibly
13 predicated upon alleged action in furtherance of these Defendants’ First Amendment Rights to Petition.
14 The available documentation set forth above confirms this conclusion.

15 **B. Nevada’s Anti-SLAPP statute mandates dismissal of Plaintiff’s State-law
16 claims, which are based on actions protected by Defendants’ First
17 Amendment rights of freedom of speech and petition.**

18 **1. Nevada’s Anti-SLAPP Statute**

19 In 1993, the Nevada Legislature enacted legislation under NRS Chapter 41 entitled
20 “Liability of Person who engages in Right to Petition.” The legislation was introduced in response to
21 the vast number of retaliatory SLAPP lawsuits being brought against citizens who petitioned
22 government. *See*, S.B. 405, NEV. S. JUD. COMM., 38 (1993). The Legislature’s effort provided
23 “immunity from civil liability for claims based upon a good faith communication to a legislator,
24 officer, or employee of the Federal Government.” *Id.* at 2.

25 In 1997, the Legislature revised the provisions governing immunity for persons
26 engaging in communication in furtherance of the right to petition. *See*, A.B. 485, NEV. ASSEM. JUD.
27 COMM., 1 (1997). The bill implemented procedures for defendants to file a special motion to dismiss
28 if the action is brought against a person, business or organization who engaged in such good faith
communication based on exercising the First Amendment Right to Petition. *See id.*; *see also*, NRS
41.635, *et seq.* (Note). The Reviser’s Note further states “[s]uch lawsuits . . . are typically dismissed,

1 but often not before the defendant is put to great expense, harassment and interruption of their
2 productive activities . . .” NRS 41.635, *et. seq.* (note). In so doing, the Legislature explained “[i]t is
3 essential to our form of government that the constitutional rights of citizens to participate fully in the
4 process of government be protected and encouraged.” *Id.*

5 As it currently stands, the statute provides that “[a] person who engages in a good
6 faith communication in furtherance of the right to petition is immune from civil liability for
7 claims based upon the communication.” NRS 41.650 (emphasis added). Examples of such good-
8 faith communications under NRS 41.637 include the following:

- 9 1. Communication that is aimed at procuring any
governmental or electoral action, result or outcome;
- 10 2. Communication of information or a complaint to a
11 Legislator, officer or employee of the Federal
12 Government, this state or a political subdivision of this
state, regarding a matter reasonably of concern to the
respective governmental entity; or
- 13 3. Written or oral statement made in direct connection with
14 an issue under consideration by a legislative, executive or
15 judicial body, or any other official proceeding authorized
by law, which is truthful or is made without knowledge of
its falsehood.

16 NRS 41.637.

17 Therefore, where an action is brought against a person, business or organization
18 based upon good faith communications in furtherance of the right to petition, NRS 41.660 provides
19 the opportunity to file a special motion to dismiss - such as this one - at a very early stage in the
20 litigation. NRS 41.660(1)(a), (2).

21 **2. The Nevada Supreme Court recently recognized Anti-SLAPP’s
applicability in lawsuits such as this, which are brought for the purpose
22 of chilling the right to petition.**

23 In *John v. Douglas County Sch. Dist.*, 219 P.3d 1276 (Nev. 2009), the Nevada
24 Supreme Court for the first time rendered a decision applying Nevada’s Anti-SLAPP statute. Mr. John,
25 a security guard at Douglas County High School, was disciplined after an investigation. *Id.*, at 1278.
26 He was suspended and eventually terminated at the conclusion of the school district’s investigation.
27 *Id.*, at 1279. Mr. John filed a union grievance related to his discipline, and filed serial litigation against
28 those who testified at the grievances or participated in the investigation. *Id.*, at 1280. The school

1 district filed a Special Motion to Dismiss pursuant to NRS 41.635, *et seq.*, which was granted by the
2 District Court and upheld by the Nevada Supreme Court, *en banc. Id.*

3 In its decision, the Court recognized that “SLAPP lawsuits abuse the judicial process
4 by chilling, intimidating, and punishing individuals for their involvement in public affairs.” *Id.*, at
5 1281. The Court recognized that “representative democracy demands that citizens and public officials
6 have the ability to openly engage in discussions of public concern.” *Id.* That discussion of public
7 concern is precisely the conduct contemplated by Nevada’s Anti-SLAPP legislation. The Court looked
8 to comments made by a State Senator on S.B. 405, and recognized that “Nevada’s Anti-SLAPP statute
9 is predicated on protecting ‘well-meaning citizens who petition the government and them find
10 themselves hit with retaliatory suits known as SLAPP suits.” *Id.*

11 The allegations of Plaintiff’s Complaint concerning statements made by
12 Defendants are precisely the kind of petitioning activity protected by Nevada’s Anti-SLAPP statute.
13 Here, Plaintiff alleges that good faith statements contained in a Recall Petition are somehow
14 defamatory, part of a conspiracy and causing him emotional distress. This type of communication fits
15 squarely within the statute’s concerning for protecting well-meaning citizens who petition the
16 government.

17 **3. Plaintiff’s claim fails under Nevada’s Anti-SLAPP standard.**

18 A Special Motion to Dismiss under NRS 41.660 is treated as a motion for summary
19 judgement. *John*, at 1281. First, the district court can only grant the special motion to dismiss if there
20 is no genuine issue of material fact and the moving party is entitled to a judgement as a matter of law.
21 *Id.* Second, the nonmoving party cannot overcome the special motion to dismiss on the gossamer
22 threads of whimsy, speculation and conjecture. *Id.*

23 A party who moves for a special motion to dismiss bears the initial burden of
24 production and persuasion. *Id.* This means the moving party must first make a threshold showing that
25 the lawsuit is based on good faith communications made in furtherance of the right to petition the
26 government. *Id.*, at 1282. If the moving party satisfies this threshold showing, then the burden of
27 production shifts to the nonmoving party, who must demonstrate a genuine issue of material fact. *Id.*

28 As outlined above, all of Plaintiff’s claims against these Defendants are based upon
protected petitioning activity. Defendants have demonstrated their good faith.

1 Under NRS 41.635, *et seq.*, the definition of “protected activity” consists of “good
2 faith communication in furtherance of the right to petition.” In describing this standard, the Statute’s
3 Reviser’s Note states as follows:

4 The communications, information, opinions, reports, testimony,
5 claims and argument provided by citizens to their government
6 are essential to wise governmental decisions and public policy,
7 the public health, safety and welfare, effective law enforcement,
8 and trust afforded government and the continuation of our
9 representative form of government

10 NRS 41.635 (2007) (note).

11 The Nevada Supreme Court recognized that there are three classes of petitions
12 protected by the statute. *John*, at 1286. The first two classes are communications that are truthful or
13 made without knowledge of falsehood made for the following reasons: (1) to procure government or
14 electoral action, or (2) to address a matter that reasonably concerns the petitioned governmental entity.
15 *Id.*; NRS. 41.637(1)-(2). The third protected class is any written or oral statement made in direct
16 connection with an issue under consideration by an legislative, executive or judicial body, or any other
17 proceeding authorized by law which is truthful or is made without knowledge of its falsehood. *John*,
18 at 1286; NRS 41.637(3). Here, Plaintiff’s Complaint is based on clearly protected conduct that extends
19 across all three of these categories, and should not be allowed to continue.

20 Since NRS 41.660(3)(a) indicates this Special Motion to Dismiss should be
21 considered “as a motion for summary judgement,” Plaintiff has a burden to produce affirmative,
22 admissible evidence on this point - as well as upon all the other elements of his claims. *See, Wood v.*
23 *Safeway, Inc.*, 121 Nev. 724 121 P.3d 1026(2005)(adopting federal summary judgement standard).
24 Plaintiff must present affirmative, admissible evidence supporting each of the elements of its claims
25 or face dismissal. Because the Complaint is based upon protected activity, Plaintiff cannot satisfy the
26 elements of these claims against these Defendants and the Complaint should be dismissed in its
27 entirety.

28 **C. Defendants are Entitled, By Statute, to an Award of Attorney Fees and Costs.**

In enacting anti-SLAPP Legislation, the Legislature has provided for an award of attorney’s
fees and costs to those who have had their rights violated. In this regard, NRS 41.670 provides as
follows:

1 If the court grants a special motion to dismiss filed pursuant to NRS 41.660:

- 2 1. The court **shall** award reasonable costs and attorney's fees to the person against whom
3 the action was brought..." (emphasis added)

4 Defendants retained the services of attorneys Julie Cavanaugh-Bill and Jeffrey A. Dickerson
5 to defend their interests and otherwise protect their constitutional rights. NRS 41.670 is a mandatory
6 fee and cost statute. Consequently, Defendant is entitled to an award of attorney fees and costs
7 incurred, as will be proven by affidavit.

8 CONCLUSION

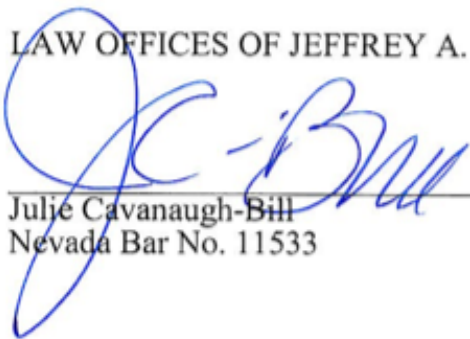
9 WHEREFORE, Defendants pray for the following relief:

- 10 1. That Plaintiff's Complaint be dismissed in its entirety be with prejudice;
11 2. That the time for obtaining signatures for the Recall Petition be extended by sixty
12 (60)days to remedy the chilling effect caused by this lawsuit and the media statements, and
13 3. That Defendants be awarded their attorney fees and costs.
14 4. And for such other remedies as the court finds equitable and just.

15 Dated this 28th day of August, 2013.

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