

BACK STORY

NEVADA'S ANTI-SLAPP LAW UPDATE

BY MARC J. RANDAZZA, ESQ.

A Strategic Lawsuit Against Public Participation, or SLAPP suit, is a meritless lawsuit against someone for exercising his or her First Amendment rights. The objective of these suits is not to win, but to silence or make examples of critics by imposing large legal bills upon them.¹

Last summer, the Nevada Legislature revisited the state's Anti-SLAPP law. The call for amendments to the law originally arose from efforts to cripple the statute. The Legislature did not ratify these amendments, but those who sought to kill the old law, ironically, allowed for a timely revision to the statute, making it more balanced and less vulnerable to constitutional challenge.

Nevada's Anti-SLAPP Framework

At the heart of the law is a two-step process. A defendant can file a Special Motion to Dismiss under NRS 41.660, which has a low burden requiring him or her to show that the suit 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." NRS 41.660(3)(a). If the defendant makes this showing, the plaintiff must then make an evidentiary showing demonstrating that he or she has a probability of prevailing on the claims. In the 2013 version of the statute, the plaintiff had to show by "clear and convincing evidence" a probability of prevailing.

Changing the Plaintiff's Burden

The Legislature passed revisions to the statute in May 2015, as part of Senate Bill 444 (SB 444). There was previously some ambiguity as to a plaintiff's evidentiary burden, so it was changed to prima facie evidence. The statute's definition of prima facie evidence is consistent with California case law. Thus, Nevada's statute is more in line with California's, so Nevada courts have a large body of interpretive case law upon which to rely.

This change to a plaintiff's evidentiary burden had the additional benefit of distancing itself from Washington's Anti-SLAPP statute, which the Washington Supreme Court struck down in *Davis v. Cox*, 183 Wn.2d 269 (2015) in May 2015. Washington's statute imposed a "clear and convincing evidence" burden on the plaintiff, with no possibility of discovery being taken by the plaintiff. The Washington Supreme Court found this burden unconstitutionally high, and the *Cox* decision would have made the 2013 version of Nevada's statute vulnerable to challenge.

Permitting Discovery in Anti-SLAPP Proceedings

The other substantial change introduced by SB 444 is the ability to take discovery to support or oppose an Anti-SLAPP motion. The 2013 statute imposed a stay on discovery while an Anti-SLAPP motion was pending. The current version, however, allows a party to take limited discovery "[u]pon a showing by a party that information necessary to meet or oppose the burden pursuant to paragraph (b) of subsection 3 is in the possession of another party or a third party and is not reasonably available without discovery." NRS 41.660(4).

This is not a free-wheeling fishing expedition license, however; a party must affirmatively file a motion for discovery, specify the discovery needed and why the party has, thus far, been unable to acquire it. In this way, Anti-SLAPP proceedings are even more like summary judgment proceedings, as parties are permitted to take summary judgment discovery under similar circumstances via NRCP 56(f).

Since the 2015 revisions, there have been quite a few Anti-SLAPP cases, handled with varying degrees of competence. One of the biggest mistakes I have witnessed is attorneys trying to litigate under the 2013 version of the statute. Other mistakes include plaintiffs' attorneys treating an Anti-SLAPP motion as a motion to dismiss under Rule 12(b)(5) or failing to request discovery by way of separate motion. On the defense side, some attorneys don't understand that the Anti-SLAPP motion is its own creature, not simply a statute to be invoked in a 12(b)(5) motion. Further, under the new statute, even the defense can take limited discovery, if requested by separate motion.

Nevada's Anti-SLAPP law remains the gold standard nationwide. However, it has undergone some significant changes since it was enacted. Whichever side of an anti-SLAPP case you are on, you should be aware of the various changes, and how to use the law's various components. **NL**

1. In 2013, I wrote an article discussing Nevada's Anti-SLAPP statute (NRS 41.635-670), after it was amended to become one of the strongest such laws in the country. See Marc J. Randazza, "Nevada's New Anti-SLAPP Law: The Silver State Sets the Gold Standard," Nevada Lawyer Vol. 21, Issue 10 (October 2013).

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