

SENATE BILL NO. 286—SENATORS JONES,
SEGERBLOM, KIHUEN; AND FORD

MARCH 15, 2013

Referred to Committee on Judiciary

SUMMARY—Provides immunity from civil action under certain circumstances. (BDR 3-675)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: No.

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EXPLANATION – Matter in *bolded italics* is new; matter between brackets ~~omitted material~~ is material to be omitted.

AN ACT relating to civil actions; providing immunity from civil action for certain claims based on the right to petition and the right to free speech under certain circumstances; establishing the burden of proof for a special motion to dismiss; providing for the interlocutory appeal from an order denying a special motion to dismiss; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law establishes certain provisions to deter frivolous or vexatious lawsuits (Strategic Lawsuits Against Public Participation, commonly known as "SLAPP lawsuits"). (Chapter 387, Statutes of Nevada 1997, p. 1363; NRS 41.635-41.670) A SLAPP lawsuit is characterized as a meritless suit filed primarily to discourage the named defendant's exercise of First Amendment rights. "The hallmark of a SLAPP lawsuit is that it is filed to obtain a financial advantage over one's adversary by increasing litigation costs until the adversary's case is weakened or abandoned." (*Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795, 796 n.1 (9th Cir. 2012))

The Ninth Circuit Court of Appeals recently held that the provisions of NRS concerning such lawsuits only protect communications made directly to a governmental agency. The Ninth Circuit also held that, as written, these provisions of NRS provide protection from liability but not from trial. That distinction, when coupled with the lack of an express statutory right to an interlocutory appeal, led the court to conclude that these provisions of NRS do not provide for an immediate appeal of an order denying a special motion to dismiss a SLAPP lawsuit. (*Metabolic*, at 802)

Existing law provides that a person who engages in good faith communication in furtherance of the right to petition is immune from civil liability for claims based upon that communication. (NRS 41.650) **Section 2** of this bill expands the scope of



that immunity by providing that a person who exercises the right to free speech in direct connection with an issue of public concern is also immune from any civil action for claims based upon that communication.

Existing law defines certain communications, for purposes of statutory provisions concerning SLAPP lawsuits, as communications made by a person in connection with certain governmental actions, officers, employees or entities. (NRS 41.637) **Section 1** of this bill includes within the meaning of such communications those that are made in direct connection with an issue of public interest in a place open to the public or in a public forum. **Section 3** of this bill establishes the burden of proof for a dismissal by special motion of a SLAPP lawsuit. **Section 3** reduces from 30 days to 7 judicial days the time within which a court must rule on a special motion to dismiss.

Existing law requires, under certain circumstances, an award of reasonable costs and attorney's fees to the person against whom a SLAPP lawsuit was brought if a court grants a special motion to dismiss. (NRS 41.670) **Section 4** of this bill authorizes, in addition to an award of costs and attorney's fees, an award of up to \$10,000 if a special motion to dismiss is granted. **Section 4** also provides that if a court finds that a special motion to dismiss was frivolous or vexatious, the court shall award the prevailing party reasonable costs and attorney's fees and may award an amount of up to \$10,000 and any such additional relief as the court deems proper to punish and deter the filing of frivolous or vexatious motions.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 41.637 is hereby amended to read as follows:

41.637 "Good faith communication in furtherance of the right to petition ~~or~~ *or the right to free speech in direct connection with an issue of public concern*" means any:

1. Communication that is aimed at procuring any governmental or electoral action, result or outcome;

2. Communication of information or a complaint to a Legislator, officer or employee of the Federal Government, this state or a political subdivision of this state, regarding a matter reasonably of concern to the respective governmental entity; ~~or~~

3. Written or oral statement made in direct connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law ~~or~~; *or*

4. 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 is made without knowledge of its falsehood.

Sec. 2. NRS 41.650 is hereby amended to read as follows:

41.650 A person who engages in 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* is immune from any civil ~~liability~~ *action* for claims based upon the communication.



Sec. 3. NRS 41.660 is hereby amended to read as follows:

41.660 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) ~~Treat the motion as a motion for summary judgment;~~
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



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~~1~~ ~~(e)~~ *(f)* Rule on the motion within ~~30~~ *7 judicial* days after the
2 motion is ~~filed~~ *served upon the plaintiff.*

3 4. If the court dismisses the action pursuant to a special motion
4 to dismiss filed pursuant to subsection 2, the dismissal operates as
5 an adjudication upon the merits.

6 **Sec. 4.** NRS 41.670 is hereby amended to read as follows:

7 41.670 *1.* If the court grants a special motion to dismiss filed
8 pursuant to NRS 41.660:

9 ~~1-1~~ *(a)* The court shall award reasonable costs and attorney's
10 fees to the person against whom the action was brought, except that
11 the court shall award reasonable costs and attorney's fees to this
12 State or to the appropriate political subdivision of this State if the
13 Attorney General, the chief legal officer or attorney of the political
14 subdivision or special counsel provided the defense for the person
15 pursuant to NRS 41.660.

16 ~~1-2~~ *(b) The court may award, in addition to reasonable costs*
17 *and attorney's fees awarded pursuant to paragraph (a), an amount*
18 *of up to \$10,000 to the person against whom the action was*
19 *brought.*

20 *(c)* The person against whom the action is brought may bring a
21 separate action to recover:

22 ~~1(a)~~ *(1)* Compensatory damages;

23 ~~1(b)~~ *(2)* Punitive damages; and

24 ~~1(e)~~ *(3)* Attorney's fees and costs of bringing the separate
25 action.

26 *2. If the court denies a special motion to dismiss filed*
27 *pursuant to NRS 41.660 and finds that the motion was frivolous or*
28 *vexatious, the court shall award to the prevailing party reasonable*
29 *costs and attorney's fees incurred in responding to the motion.*

30 *3. In addition to reasonable costs and attorney's fees awarded*
31 *pursuant to subsection 2, the court may award:*

32 *(a) An amount of up to \$10,000; and*

33 *(b) Any such additional relief as the court deems proper to*
34 *punish and deter the filing of frivolous or vexatious motions.*

35 *4. If the court denies the special motion to dismiss filed*
36 *pursuant to NRS 41.660, an interlocutory appeal lies to the*
37 *Supreme Court.*

