

Amendment No. 861

Assembly Amendment to Senate Bill No. 444 First Reprint	(BDR 3-1137)
Proposed by: Assembly Committee on Judiciary	
Amends: Summary: No Title: Yes Preamble: No Joint Sponsorship: No Digest: Yes	

ASSEMBLY ACTION		Initial and Date		SENATE ACTION		Initial and Date			
Adopted	<input type="checkbox"/>	Lost	<input type="checkbox"/>	_____	Adopted	<input type="checkbox"/>	Lost	<input type="checkbox"/>	_____
Concurred In	<input type="checkbox"/>	Not	<input type="checkbox"/>	_____	Concurred In	<input type="checkbox"/>	Not	<input type="checkbox"/>	_____
Receded	<input type="checkbox"/>	Not	<input type="checkbox"/>	_____	Receded	<input type="checkbox"/>	Not	<input type="checkbox"/>	_____

EXPLANATION: Matter in (1) *blue bold italics* is new language in the original bill; (2) variations of green bold underlining is language proposed to be added in this amendment; (3) ~~red strikethrough~~ is deleted language in the original bill; (4) ~~purple double strikethrough~~ is language proposed to be deleted in this amendment; (5) orange double underlining is deleted language in the original bill proposed to be retained in this amendment.

MKM/BJF



Date: 5/19/2015

S.B. No. 444—Revises provisions governing civil actions. (BDR 3-1137)



SENATE BILL NO. 444—COMMITTEE ON JUDICIARY

MARCH 23, 2015

Referred to Committee on Judiciary

SUMMARY—Revises provisions governing civil actions. (BDR 3-1137)

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; ~~revising provisions governing the dismissal of certain claims based on the right to petition and the right to free speech under certain circumstances;~~ revising provisions relating to special motions to dismiss ~~such claims; repealing provisions authorizing certain monetary awards in proceedings related to special motions to dismiss such~~ claims ~~;~~ **based upon the right to petition and the right to free speech under certain circumstances;** 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. Ferrel*, 693 F.3d 795, 796 n.1 (9th Cir. 2012))

Existing law provides that a person who engages in 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 civil liability for claims based upon that communication. (NRS 41.650) ~~Section 4 of this bill defines, for the purposes of statutory provisions concerning SLAPP lawsuits, an issue of public concern as any topic that concerns the general public beyond a mere curiosity or general interest. Section 12 of this bill provides that any cause of action arising from a communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern is subject to a special motion to dismiss.~~

~~Section 5 of this bill requires a special motion to dismiss to be filed within 20 days after service of the complaint, and to be limited to the issue of whether the claim arises from a communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern. If the court determines that such a claim does not arise from a communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern, section 6 of this bill requires the court to deny the special motion to dismiss. If the court determines that the claim does arise from a communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern, section 7 of this bill requires the plaintiff to~~

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27 establish prima facie evidence supporting each and every element of the claim other than
 28 elements requiring proof of the subjective intent or knowledge of the defendant. Section 7
 29 further requires the court to determine whether the plaintiff has established such prima facie
 30 evidence within 20 judicial days after the plaintiff's filing of briefs and supporting evidence.

31 ~~Section 8 of this bill provides that, if a court determines that the plaintiff established~~
 32 ~~prima facie evidence of each and every element of its claim other than elements requiring~~
 33 ~~proof of the subjective intent or knowledge of the defendant, the court must deny the special~~
 34 ~~motion to dismiss. If the court determines that the defendant filed the special motion to~~
 35 ~~dismiss in bad faith, section 8 requires the court to award the plaintiff reasonable attorney's~~
 36 ~~fees and costs. If a court determines that the plaintiff has not established the required prima~~
 37 ~~facie evidence, section 9 of this bill requires the court to dismiss the claim and award the~~
 38 ~~defendant reasonable attorney's fees and costs.~~

39 ~~Section 15 of this bill repeals provisions authorizing additional awards of compensation~~
 40 ~~when a court dismisses a claim arising from a communication in furtherance of the right to~~
 41 ~~petition or the right to free speech in direct connection with an issue of public concern.]~~
 42 Existing law also provides that if an action is brought against a person based upon such
 43 good faith communication, the person may file a special motion to dismiss the claim. If a
 44 special motion to dismiss is filed, the court must first determine whether the moving
 45 party has established, by a preponderance of the evidence, that the claim is based upon a
 46 good faith communication in furtherance of the right to petition or the right to free
 47 speech in direct connection with an issue of public concern. If the court determines that
 48 the moving party has met this burden, the court must then determine whether the
 49 person who brought the claim has established by clear and convincing evidence a
 50 probability of prevailing on the claim. While the court's ruling on the special motion to
 51 dismiss is pending and while the disposition of any appeal from that ruling is pending,
 52 the court must stay discovery. (NRS 41.660)

53 Section 13 of this bill revises provisions governing a special motion to dismiss a
 54 claim that is based upon a good faith communication in furtherance of the right to
 55 petition or the right to free speech in direct connection with an issue of public concern.
 56 Section 13 increases from 7 days to 20 judicial days the time within which a court must
 57 rule on a special motion to dismiss. Section 13 also authorizes limited discovery for the
 58 purposes of allowing a party to obtain certain information necessary to meet or oppose
 59 the burden of the party who brought the claim to establish by clear and convincing
 60 evidence a probability of prevailing on the claim. Finally, section 13 authorizes the court
 61 to modify certain deadlines upon a finding that such a modification would serve the
 62 interests of justice.

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

1 **Section 1.** ~~[Chapter 41 of NRS is hereby amended by adding thereto the~~
 2 ~~provisions set forth as sections 2 to 9.5, inclusive, of this act.]~~ (Deleted by
 3 amendment.)

4 **Sec. 2.** ~~1. The Legislature finds and declares that:~~

5 ~~(a) Meritless lawsuits that arise from the public's exercise of the right to~~
 6 ~~petition for the redress of grievances and the right of free speech as it relates to~~
 7 ~~matters of public concern are Strategic Lawsuits Against Public Participation,~~
 8 ~~commonly known as SLAPP suits; and~~

9 ~~(b) Such lawsuits have a chilling effect on the exercise of such rights.~~

10 ~~2. The Legislature reaffirms its support of the provisions of Section 9 of~~
 11 ~~Article 1 of the Nevada Constitution which provide for the rights of every citizen~~
 12 ~~of this State to freely speak, write and publish his or her thoughts on all subjects,~~
 13 ~~while being responsible for the abuse of such rights.~~

~~3. To avoid the chilling effect of meritless SLAPP suits while still providing a remedy when free speech rights have been abused, it is the Legislature's intent to provide for the early termination of SLAPP suits. (Deleted by amendment.)~~

~~Sec. 3. [NRS 41.635 to 41.660, inclusive, and sections 2 to 9.5, inclusive, of this act may be referred to as the Nevada anti SLAPP Law.] (Deleted by amendment.)~~

~~Sec. 3.5. ["Defendant" means any person against whom a claim is asserted, including, without limitation, a counterclaim or cross claim.] (Deleted by amendment.)~~

~~Sec. 4. ["Issue of public concern" means any topic that concerns not only the speaker and the speaker's audience, but the general public, and is not merely a subject of curiosity or general interest.] (Deleted by amendment.)~~

~~Sec. 4.5. ["Plaintiff" means any person asserting a claim, including, without limitation, a counterclaim or cross claim.] (Deleted by amendment.)~~

~~Sec. 5. [1. A special motion to dismiss filed pursuant to NRS 41.660 must be:~~

~~(a) Filed within 20 days after service of the complaint, unless the court provides an extension of time for good cause shown; and~~

~~(b) Limited to the issue of whether the claim arises from a communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern.~~

~~2. The plaintiff has 10 judicial days to file an opposition to a special motion to dismiss filed pursuant to subsection 1, and the defendant has 5 judicial days to reply to such an opposition.~~

~~3. Within 20 judicial days after service of a special motion filed pursuant to subsection 1, the court shall hear and determine whether the defendant has established, by a preponderance of the evidence, that the claim arises from a communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern. The court shall enter written findings of fact and conclusions of law on the record supporting the determination of the court.~~

~~4. Except as otherwise provided in this subsection, all discovery must be stayed pending a ruling by the court on a special motion to dismiss filed pursuant to subsection 1. Upon a showing by the plaintiff that information necessary to oppose the special motion to dismiss is in the possession of the defendant or a third party and is not reasonably available to the plaintiff without discovery, the court shall allow limited discovery for the purpose of ascertaining such information. The court may modify briefing and hearing schedules for the special motion to dismiss to accommodate limited discovery pursuant to this subsection.] (Deleted by amendment.)~~

~~Sec. 6. [1. If the court determines that a claim does not arise from a communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern, the court shall deny the special motion to dismiss.~~

~~2. If the court determines that the defendant filed the special motion to dismiss without a reasonable basis to contend that the claim arose from a communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern, the court must award the plaintiff reasonable attorney's fees and costs incurred in opposing the special motion to dismiss.] (Deleted by amendment.)~~

~~Sec. 7. [1. If the court determines that the claim arises from a communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern, the plaintiff has 15 judicial~~

1 ~~days after the court enters an order making such a determination to file such~~
2 ~~briefs, declarations and evidence necessary to establish prima facie evidence~~
3 ~~supporting each and every element of the claim, except such elements that~~
4 ~~require proof of the subjective intent or knowledge of the defendant.~~

5 ~~2. The defendant has 10 judicial days to file an opposition to briefs,~~
6 ~~declarations and evidence filed pursuant to subsection 1, and the plaintiff has 5~~
7 ~~judicial days to reply to such an opposition.~~

8 ~~3. Within 20 judicial days after the plaintiff serving the briefs, declarations~~
9 ~~and evidence required pursuant to subsection 1, the court shall:~~

10 ~~(a) Determine whether the plaintiff has established prima facie evidence of~~
11 ~~each and every element of the claim, except such elements that require proof of~~
12 ~~the subjective intent or knowledge of the defendant; and~~

13 ~~(b) Enter written findings of fact and conclusions of law on the record~~
14 ~~supporting the determination of the court.~~

15 ~~4. Except as otherwise provided in this subsection, all discovery must be~~
16 ~~stayed pending a ruling by the court on whether the plaintiff has established~~
17 ~~prima facie evidence of each and every element of the claim, except such~~
18 ~~elements that require proof of the subjective intent or knowledge of the defendant~~
19 ~~pursuant to subsection 1. Upon a showing by the plaintiff that the information~~
20 ~~necessary to make such a prima facie showing is in the possession of the~~
21 ~~defendant or a third party and is not reasonably available to the plaintiff without~~
22 ~~discovery, the court shall allow limited discovery for the purpose of ascertaining~~
23 ~~such information. The court may modify briefing and hearing schedules for the~~
24 ~~special motion to dismiss to accommodate limited discovery pursuant to this~~
25 ~~subsection.] (Deleted by amendment.)~~

26 **Sec. 8.** ~~1. If the court determines that the plaintiff has established prima~~
27 ~~facie evidence of each and every element of its claim, except such elements that~~
28 ~~require proof of the subjective intent or knowledge of the defendant, the court~~
29 ~~shall deny the special motion to dismiss.~~

30 ~~2. If the court determines that the defendant filed the special motion to~~
31 ~~dismiss in bad faith, the court shall award the plaintiff reasonable attorney's fees~~
32 ~~and costs incurred in opposing the special motion to dismiss.~~

33 ~~3. The court shall ensure that a determination made pursuant to this~~
34 ~~section:~~

35 ~~(a) Will not be admitted as evidence at any later stage of the underlying~~
36 ~~action or subsequent proceedings; or~~

37 ~~(b) Will not affect the burden of proof required in the underlying action or~~
38 ~~subsequent proceeding.] (Deleted by amendment.)~~

39 **Sec. 9.** ~~1. If the court determines that the plaintiff has not established~~
40 ~~prima facie evidence of each and every element of the claim except such elements~~
41 ~~that require proof of the subjective intent or knowledge of the defendant, the~~
42 ~~court shall dismiss the claim and award the defendant reasonable attorney's fees~~
43 ~~and costs incurred in bringing the special motion to dismiss.~~

44 ~~2. If the court dismisses the action pursuant to subsection 1, the dismissal~~
45 ~~operates as an adjudication upon the merits.] (Deleted by amendment.)~~

46 **Sec. 9.5.** ~~[If the court denies a special motion to dismiss filed pursuant to~~
47 ~~NRS 41.660, an interlocutory appeal lies to the appellate court of competent~~
48 ~~jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section~~
49 ~~4 of Article 6 of the Nevada Constitution.] (Deleted by amendment.)~~

50 **Sec. 10.** ~~[NRS 41.625 is hereby amended to read as follows:~~

51 ~~41.625 As used in NRS 41.625 to [41.670.] 41.660, inclusive, and sections 2~~
52 ~~to 9.5, inclusive, of this act, unless the context otherwise requires, the words and~~

1 terms defined in NRS 41.637 and 41.640 ~~and sections 3.5, 4 and 4.5 of this act~~
2 ~~have the meanings ascribed to them in those sections.~~ **(Deleted by amendment.)**

3 **Sec. 11.** [NRS 41.627 is hereby amended to read as follows:

4 ~~41.637~~ ~~["Good faith communication"]~~ ~~"Communication in furtherance of the~~
5 ~~right to petition or the right to free speech in direct connection with an issue of~~
6 ~~public concern" means any:~~

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

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

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

16 ~~4. Communication made in direct connection with an issue of public [interest]~~
17 ~~concern in a place open to the public or in a public forum . . .~~

18 ~~which is truthful or is made without knowledge of its falsehood.]~~ **(Deleted by**
19 **amendment.)**

20 **Sec. 12.** [NRS 41.650 is hereby amended to read as follows:

21 ~~41.650~~ ~~A *cause of action against a person* [who engages in a good faith]~~
22 ~~*arising from a* communication in furtherance of the right to petition or the right to~~
23 ~~free speech in direct connection with an issue of public concern [is immune from~~
24 ~~any civil action for claims based upon the communication.] *is subject to a special*~~
25 ~~*motion to dismiss, and that motion must be granted by the court unless the*~~
26 ~~*plaintiff establishes that the claim is not meritless pursuant to section 8 of this*~~
27 ~~*act.*~~ **(Deleted by amendment.)**

28 **Sec. 13.** NRS 41.660 is hereby amended to read as follows:

29 41.660 1. If an action is brought against a person based upon ~~arising from~~
30 a good faith communication in furtherance of the right to petition or the right to free
31 speech in direct connection with an issue of public concern:

32 (a) ~~1.1~~ The person against whom the action is brought may file a special
33 motion to dismiss; and

34 (b) ~~1.2~~ The Attorney General or the chief legal officer or attorney of a
35 political subdivision of this State may defend or otherwise support the person
36 against whom the action is brought. If the Attorney General or the chief legal
37 officer or attorney of a political subdivision has a conflict of interest in, or is
38 otherwise disqualified from, defending or otherwise supporting the person, the
39 Attorney General or the chief legal officer or attorney of a political subdivision may
40 employ special counsel to defend or otherwise support the person.

41 2. A special motion to dismiss must be filed within 60 days after service of
42 the complaint, which period may be extended by the court for good cause shown.

43 3. If a special motion to dismiss is filed pursuant to subsection 2, the court
44 shall:

45 (a) Determine whether the moving party has established, by a preponderance of
46 the evidence, that the claim is based upon a good faith communication in
47 furtherance of the right to petition or the right to free speech in direct connection
48 with an issue of public concern;

49 (b) If the court determines that the moving party has met the burden pursuant
50 to paragraph (a), determine whether the plaintiff has established by clear and
51 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~~ **Except as otherwise provided in subsection 4, 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 ~~77~~ **20** judicial days after the motion is served upon the plaintiff.

4. Upon 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 and is not reasonably available without discovery, the court shall allow limited discovery for the purpose of ascertaining such information.

5. 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.

6. The court may modify any briefing or hearing deadlines pursuant to this section or any other deadlines relating to a complaint filed pursuant to this section upon a finding that such modification would serve the interests of justice.

7. As used in this section:

(a) "Complaint" means any action 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, including, without limitation, a counterclaim or cross-claim.

(b) "Plaintiff" means any person asserting a claim, including, without limitation, a counterclaim or cross-claim.

Sec. 14. The amendatory provisions of this act apply to an action commenced on or after October 1, 2015.

Sec. 15. ~~NRS 41.670 is hereby repealed.~~ **(Deleted by amendment.)**

†

TEXT OF REPEALED SECTION

~~41.670 Award of reasonable costs, attorney's fees and monetary relief under certain circumstances; separate action for damages; sanctions for frivolous or vexatious special motion to dismiss; interlocutory appeal.~~

~~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.~~

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

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

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

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

~~4. If the court denies the special motion to dismiss filed pursuant to NRS 41.660, an interlocutory appeal lies to the Supreme Court.]~~