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6 IN THE SECOND JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE

8 CARL LACKEY,

9 Plaintiff,

10 v.

11 BEAR LEAGUE, a California corporation,
12 ANNE BRYANT, an individual, MARK E.
13 SMITH, an individual dba LAKE TAHOE
14 WALL OF SHAME, CAROLYN STARK, an
individual dba NDOW WATCH KEEPING
THEM TRANSPARENT, and DOES 1-20,
inclusive,

15 Defendants.

Case No. CV17-00434

Department No.: 4

16
17 **ORDER ADDRESSING DEFENDANTS CAROLYN STARK AND MARK SMITH'S
MOTION FOR ATTORNEY'S FEES, COSTS AND STATUTORY DAMAGES**

18 The Nevada Supreme Court issued its opinion 136 Nev. Advance Opinion 4, concerning the
19 matter of Carolyn Stark, an individual, dba NDOW Watch Keeping Them Transparent, v. Carl
20 Lackey, wherein the Nevada Supreme Court reversed this Court's order denying STARK's special
21 motion to dismiss and remanded the matter with instructions to address prong two of the anti-SLAPP
22 analysis, and specifically instructing this Court to consider the applicability of the Communications
23 Decency Act, 47 U.S.C. § 230 (2012) in determining whether LACKEY can demonstrate "a
24 probability of prevailing on the claim." Subsequently, the Remittitur issued by the Nevada Supreme
25 Court was filed into this matter.

26 On October 11, 2022, the Court entered its *Order Granting Stark's April 19, 2017, Special*
27 *Motion to Dismiss* wherein the Court found that because 47 U.S.C. §230 immunizes CAROLYN
28 STARK (hereinafter "STARK") from liability, CARL LACKEY (hereinafter "LACKEY") was

1 unable to provide prima facie evidence, inter alia, that STARK's conduct was unlawful; therefore,
2 STARK's special motion to dismiss was granted in regard to LACKEY's claim for civil conspiracy.
3 Also, on October 11, 2022, the Court entered its *Order Granting Smith's June 5, 2017, Special Motion*
4 *to Dismiss* wherein the Court found that because 47 U.S.C. §230 immunizes MARK SMITH
5 (hereinafter "SMITH") from liability, LACKEY is unable to provide prima facia evidence, inter alia,
6 that SMITH's conduct was unlawful; therefore, SMITH's special motion to dismiss was granted in
7 regard to LACKEY's claim for civil conspiracy.

8 On October 17, 2022, SMITH, by and through his attorney, Luke Busby, Esq., filed *Mark*
9 *Smith's Verified Memorandum of Costs* and STARK, by and through her attorney Daniel Bravo, Esq.
10 and Bradley S. Schragger, Esq. of Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP, filed *Defendant*
11 *Carolyn Stark's Verified Memorandum of Costs*. On November 1, 2022, SMITH submitted the matter
12 for the Court's consideration.

13 On November 1, 2022, *Defendant Mark E. Smith's Motion for Statutory Damages Against*
14 *Plaintiff Carl Lackey and Defendant Carolyn Stark's Motion for Attorneys' Fees, Costs, and Statutory*
15 *Damages* were filed.

16 On November 4, 2022, STARK submitted her *October 17, 2022 Verified Memorandum of*
17 *Costs* for the Court's consideration.

18 On November 14, 2022, LACKEY filed his *Omnibus Opposition to Defendants' Motions for*
19 *Attorney's Fees, Costs, and Statutory Damages*.

20 On November 21, 2022, *Defendant Mark E. Smith's Reply to Opposition to Motion for*
21 *Attorney's Fees and Costs* was filed, and submitted the matter for the Court's consideration. Also,
22 filed on November 21, 2022, was *Defendant Mark E. Smith's Reply to Opposition to Motion for*
23 *Statutory Damages*, and the matter was submitted for the Court's consideration. Additionally, on
24 November 21, 2022, *Defendant Carolyn Stark's Reply in Support of her Motion for Attorneys' Fees,*
25 *Costs, and Statutory Damages* was filed, and submitted for the Court's consideration.

26 On December 30, 2022, the Court entered an *Order to File Unredacted Attorney Billing*
27 *Statements Under Seal and Order Holding Decision on Memorandum of Costs and Motion for*
28 *Statutory Damages in Abeyance*.

1 On January 3, 2023, STARK filed a document entitled “*Sealed Filing Pursuant to Court’s*
2 *December 30, 2022 Order*” wherein STARK provided un-redacted attorney billings statements in
3 support of her motion for attorney’s fees. On January 4, 2023, *Defendant Mark E. Smith’s Submission*
4 *of Unredacted Time Logs (Filed Under Seal – SRCR 3(4)(a), (6)* was filed.

5 NRS 41.670(1)(a) states in pertinent part:

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

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

13 (b) The court may award, in addition to reasonable costs and attorney’s fees
14 awarded pursuant to paragraph (a), an amount of up to \$10,000 to the person against
15 whom the action was brought.

16 (c) The person against whom the action is brought may bring a separate action
17 to recover:

- 18 (1) Compensatory damages;
- 19 (2) Punitive damages; and
- 20 (3) Attorney’s fees and costs of bringing the separate action.

21 ...

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

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

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

27 Under NRS 41.670(1)(a), the Court, “shall award reasonable costs and attorney’s fees to the
28 person against whom the action was brought.” The award of attorney’s fees is available when
authorized by a “rule, statute, or contract.” See, e.g. Lubritz v. Circus Circus Hotels, 101 Nev. 109,
112 (1985). The decision to award reasonable attorneys’ fees is left to the sound discretion of the
Court. Barmettler v. Reno Air, Inc., 114 Nev. 441, 452 (1998); County of Clark v. Blanchard Contr.
Co., 98 Nev. 488, 492 (1982). The determination of the award and amount of fees is based upon the
pleadings, declarations and exhibits the parties submit to the Court. See Sandy Valley Assocs. v. Sky
Ranch Estates Owners Ass’n, 117 Nev. 948, 956 (2001), abrogated in part on other grounds. In order
to determine the reasonable value of attorney’s fees the court should consider the following factors:
“(1) the qualities of the advocate: his ability, training, education, experience, professional standing
and skill; (2) the character of the work to be done: its difficulty, intricacy, importance, the time and

1 skill required, the responsibility imposed and the prominence and character of the parties when they
2 affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time
3 and attention given to the work; (4) the result: whether the attorney was successful and what benefits
4 were derived.” Brunzell v. Golden Gate Nat’l Bank, 85 Nev. 345, 349 (1969); See also, Schouweiler
5 v. Yancey Co., 101 Nev. 827, 833-34 (1985).

6 In the instant matter, counsel for both SMITH and STARK have filed declarations and
7 supporting documentation in support of the Brunzell factors. Additionally, SMITH argues that when
8 an Anti-SLAPP motion disposes of every cause of action, it is appropriate to award all attorneys’ fees
9 incurred in connection with the entire case, even if some work is not directly related to the Anti-
10 SLAPP motion, because expenses are incurred in responding to a lawsuit the district court found
11 baseless. Graham-Sult v. Clainos, 738 F.3d 1131, 1159 (9th Cir. 2013)(affirmed in Graham-Sult v.
12 Clainos, 756 F.3d 724, 752 (9th Cir. 2014).

13 Absent controlling Nevada precedent, Nevada courts look to California law for guidance in
14 interpreting Nevada anti-SLAPP statute when relevant provisions are similar. Shapiro v. Welt, 133
15 Nev. 35, 39 (2017). After the Ninth Circuit Court Appeals issued its opinion in the Graham-Sult
16 case, the California Court of Appeal clarified that “a fee award under the anti-SLAPP statute may not
17 include matters unrelated to the anti-SLAPP motion, such as ... summary judgment research,”
18 because such matters are not “incurred in connection with the anti-SLAPP motion.” 569 E.Ct. Blvd.,
19 LLC v. Backcountry Against The Dump, Inc., 6 Cal.App.5th, 212 Cal.Rptr. 3d 304, 310-11 (2016).
20 As such, the Court finds that SMITH’s argument that all attorney’s fees incurred in connection with
21 the entire case should be awarded unpersuasive.

22 When considering the Brunzell factors and applying them to the instant case, the Court finds
23 that counsel for SMITH and STARK demonstrated the requisite skill, experience, and professional
24 standing that warrants recognition in the form of a fee award. The Court has had the opportunity to
25 review filings by SMITH and STARK’s counsel in this instant action, and finds the litigation was
26 necessary and required additional advocacy as a result of complex issue present in this matter. The
27 Court also finds the hourly rates billed by SMITH’s counsel at an hourly rate between \$300 and \$415
28 per hour and paralegal time at \$195 per hour, and STARK’s counsel at an hourly rate between \$300

1 and \$400 per hour reasonable in light of their ability, training, education, experience, professional
2 standing and skill, as established by counsel's declarations in support of SMITH and STARK's
3 motion for attorney's fees. The Court finds that STARK and SMITH's attorneys were successful in
4 obtaining a dismissal of LACKEY's defamation complaint as a result of their special anti-SLAPP
5 motions to dismiss.

6 With regard to the third Brunzell factor, the work actually performed by the attorney, and
7 taking into consideration this Court's finding Graham-Sult v. Clainos, supra., unpersuasive, the
8 Court considers the reasonableness of the fees requested under Brunzell factor three as follows:

9 **SMITH'S ATTORNEY FEES**

10 During the pendency of this matter, SMITH was represented by Robin Shofner and
11 Cameron D. Bordner of MOBO Law, Stephanie Rice, Esq. of Midtown Law, and Luke Busby,
12 Esq. All counsel provided declarations in support of the attorney's fees requested, along with
13 detailed billing statements.

14 The Court will first turn its attention to MOBO Law's billing statements for the period of
15 March 1, 2017 to December 2, 2017. The billing statements provide evidence of attorney's fees
16 billed in the total amount of \$46,665.50 which were split between Ann Bryant and Bear League
17 for one-half, and SMITH for the other one-half. As such, SMITH'S one-half of the attorney's fees
18 billed would have been \$23,332.75. A review of the billing statements indicates that SMITH made
19 payments totaling \$22,715.76 for the period of March 1, 2017 and December, 2017.

20 However, pursuant to Robin Shofner, Esq.'s declaration in support of Mark Smith's Motion
21 for Attorney's Fees and Costs, Ms. Shofner, Esq. states that she reexamined the invoices sent to
22 Defendants, Mark Smith and Ann Bryant, Esq. and is "confident they correctly reflect the time
23 spent on this matter for the benefit of Mark." (Shofner Decl., pg. 2, ln. 6]. Ms. Shofner further
24 states that any work performed specific to either Ann Bryant or Bear League has been redacted
25 from the invoices and is not included in the below fee calculation. Finally, as part of her
26 declaration, Ms. Shofner provides a chart that she states reflects the timekeeper, the number of

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1 billable and unbillable hours worked, and the total cost of the tasks performed for SMITH benefit
2 as follows:

3 Timekeeper	Billable Hours	Total
4 Robin Shofner (RDS)	58.9	\$20,240.50
5 Cameron D. Bordner (CDB)	35.8	\$14,336.00
Paralegal (Melissa Paschal (IT))	25.85	\$5,041.62
Total	120.55	\$39,618.12

6 The Court does not dispute Ms. Shofner's declaration, and a review of the billing
7 statements time entries support a finding that MOBO law's fees meet the requirements of Brunzell
8 third factor as to the work actually performed; however, as a matter of equity, the Court finds that
9 SMITH should not be awarded attorney's fees in an amount greater than he paid to and MOBO
10 law accepted. As such, the Court finds that the reasonable amount of attorney's fees for MOBO
11 Law's representation of SMITH is \$22,715.76.

12 The Court will next turn its attention to Midtown Law's billing statements for the period
13 of November 9, 2017 to March 31, 2022. The billing statements provide evidence of attorney's
14 fees billed to SMITH in the total amount of \$46,950.00. A review of the billing statements for this
15 time period supports a finding that Midtown Law fees meet the requirements of Brunzell factors
16 two and three as to the character of the work to be done: its difficulty, intricacy, importance, the
17 time and skill required, the responsibility imposed and the prominence and character of the parties
18 when they affect the importance of the litigation, and the work actually performed by the lawyer:
19 the skill, time and attention given to the work. As such, the Court finds that the reasonable amount
20 of attorney's fees for Midtown Law is \$46,950.00.

21 The Court will next turn its attention to Luke Busby's billing statement for the period of
22 June 3, 2022 to November 1, 2022. The billing statement provides evidence of attorney's fees
23 billed to SMITH in the total amount of \$4,320.00. A review of the billing statements for this time
24 period supports a finding that Luke Busby's fees meet the requirements of Brunzell factors two
25 and three as to the character of the work to be done and the work actually performed by the lawyer.
26 As such, the Court finds that the reasonable amount of attorney's fees for Luke Busby, Esq. is
27 \$4,320.00. With the Court's above findings, SMITH's total attorney's fee award is \$73,985.76.
28

1 **STARK’S ATTORNEY FEES**

2 During the pendency of this matter, STARK was represented by Del Hardy, Esq. and
3 Stephanie Rice, Esq. of Midtown Law, and Bradley S. Schragger, Esq. and Daniel Bravo, Esq. of
4 Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP. All counsel provided declarations in support of
5 the attorney’s fees requested, along with detailed billing statements.

6 The Court will first turn its attention to Midtown Law’s billing statements for the period of
7 April 14, 2016 to March 9, 2022.

8 As a result of the Court’s December 30, 2022, *Order to File Unredacted Attorney Billing*
9 *Statements Under Seal and Order Holding Decision on Memorandum of Costs and Motion for*
10 *Statutory Damages in Abeyance*, Midtown Law filed unredacted billing statements under seal. The
11 billing statements provide evidence of attorney’s fees billed in the total amount of \$76,619.92. The
12 Court considered the reasonableness of the fees requested by Midtown Law under Brunzell factors
13 two and three.

14 The Court previously found that a compelling privacy interest was present, i.e. attorney-client
15 privilege of STARK and SMITH, to order the un-redacted billing statements of counsel to be filed
16 under seal. SRCR 3(4)(a), (6). In order to preserve STARK’S attorney-client privilege, the Court
17 finds that it is appropriate to file the detail of the time entries in which the Court found unrecoverable
18 as “Sealed Exhibit 1.”

19 Taking all of the above into consideration, the Court reduces its award of fees incurred by
20 Midtown Law, i.e. Mr. Hardy and Ms. Rice, by a total of 63.4 hours, or \$20,350.00, reducing the total
21 award of attorney’s fees for Midtown Law down from the requested \$76,619.92 to the award of
22 \$56,269.92.

23 The Court will next turn its attention to Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP’s
24 billing statements for the period of August 15, 2022 to October 31, 2022. The billing statements
25 provide evidence of attorney’s fees billed in the total amount of \$20,257.02. A review of the
26 billing statements for this time period supports a finding that Wolf, Rifkin, Shapiro, Schulman &
27 Rabkin, LLP’s fees meet the requirements of Brunzell factors two and three as to the character of
28 the work to be done and the work actually performed by the lawyer. As such, the Court finds that

1 the reasonable amount of attorney’s fees for Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP is
2 \$20,257.02. With the Court’s above findings, STARK’S total attorney’s fee award is \$76,526.94.

3 **MEMORANDUM OF COSTS**

4 Next, the Court considers STARK and SMITH’s Memorandum of Costs (“MOC”).

5 Under NRS 41.670(1)(a), the Court, “shall award reasonable costs and attorney’s fees to
6 the person against whom the action was brought.” Pursuant to NRS 18.110(1), a prevailing party
7 seeking to recover costs must, within five days after the entry of judgment—or within a further
8 time granted by the court—file a sworn, itemized memorandum of costs with the clerk and serve
9 a copy upon the adverse party. NRS 18.110(1). The prevailing party is also entitled to clerk’s fees;
10 a prevailing party need not embody such fees in its memorandum as NRS 18.110(3) directs the
11 clerk to add them as fixed by statute. NRS 18.110(3). The non-prevailing party may move the court
12 to retax and settle costs within three days after service of the prevailing party’s memorandum.
13 NRS 18.110(4). Upon hearing of a properly filed motion to retax and settle costs, the court will
14 settle the costs. *Id.* It is within the court’s discretion to reach an untimely motion for costs. Village
15 Builders 96, L.P. v. U.S. Laboratories, Inc., 121 Nev. 261, 277 (2005). LACKEY concedes it did
16 not file any motion to retax; therefore, the Court will consider SMITH’s MOC as filed.

17 Costs pursuant to NRS 18.110 refer not to a “reasonable estimate or calculation” but rather
18 to “actual costs that are also reasonable.” *Id.* Through supporting documentation, the prevailing
19 party must “demonstrate” to the court that its costs are justified, meaning “reasonable, necessary,
20 and actually incurred.” Cadle Co. v. Woods & Erickson, LLP, 131 Nev 15 (2015).

21 “The determination of allowable costs is within the sound discretion of the trial court.
22 However, statutes permitting the recovery of costs are to be strictly construed because they are in
23 derogation of the common law.” Bobby Berosini Ltd., 114 Nev. at 1352. While costs sought by
24 a prevailing party are available as a matter of right, the trial court must determine whether they are
25 reasonable, necessary, and actually incurred. Cadle Co., 131 Nev. Adv. Op. 15, p. 10; Schwartz
26 v. Estate of Greenspun, 110 Nev. 1042, 1050-51 (1994). The party seeking costs must sufficiently
27 itemize the items for which it seeks to recover. Waddell v. L.V.R.V., Inc., 122 Nev. 15 (2006).
28 Additionally, the party seeking costs must show the reason for the cost; documentation reflecting

1 only dates and totals for the costs claimed is insufficient. Village Builders 96, L.P., 121 Nev. at
2 277-78 (itemization of costs insufficient where party failed to provide reason for them).

3 In his MOC, SMITH states his costs as follows:

4 Supreme Court Filing Fee	\$250.00
5 Mediation Bill	\$750.00
Sunshine Transcript Inv. 1501451	\$362.52
Sunshine Transcript Inv. 1504308	\$1078.91
6 Mandalay Bay Room	\$172.57
7 Southwest Flight	\$265.95
Avis Rental	\$164.33
TOTAL	\$3049.28

9 A review of the documentation provide for SMITH and STARK indicates that the charges for
10 the Sunshine Transcript Invoices, Mandalay Bay Room, Southwest Flight and Avis rental charges are
11 the full amounts of the charges incurred by Midtown Law (Stephanie Rice); however, a review of
12 STARK's Memorandum of Costs and the billing statements provided with her motion for attorney's
13 fees indicates that these charges were split (50/50) between SMITH and STARK. Therefore, SMITH
14 is not entitled to the full amount of the charges listed above for the Sunshine Transcripts, Mandalay
15 Bay Room, Southwest Flight and Avis Rental. The corrected amount of costs incurred by SMITH
16 are listed as follows:

17 Supreme Court Filing Fee	\$250.00
18 Mediation Bill	\$750.00
Sunshine Transcript Inv. 1501451	\$181.26 ($\$362.52 \div 2$)
Sunshine Transcript Inv. 1504308	\$539.46 ($\$1078.91 \div 2$)
19 Mandalay Bay Room	\$86.29 ($\$172.57 \div 2$)
20 Southwest Flight	\$132.98 ($\$265.95 \div 2$)
Avis Rental	\$82.17 ($\$164.33 \div 2$)
TOTAL	\$2022.16

22 Thus, the Court awards SMITH his costs in the amount of \$2,022.16.

23 In her MOC, STARK states her costs as follows:

24 Messenger Service	\$111.02
Filing Fee	\$997.00
25 Transcript Costs	\$913.54
Mediation Costs	\$250.00
26 Travel Costs	\$884.04
Postage	\$4.58
TOTAL	\$3,160.18

1 A review of the documentation provide in support of STARK MOC indicates charges for
2 audio copies of proceedings before Reno Justice Court in the total amount of \$105.00 incurred by
3 Midtown Law (Stephanie Rice); however, these charges are not related to the above-entitled matter.
4 Therefore, STARK is not entitled to the full amount of the charges listed above for Transcripts. The
5 corrected amount of costs incurred by STARK are listed as follows:

Messenger Service	\$111.02
Filing Fee	\$808.54
Transcript Costs	\$913.54
Mediation Costs	\$250.00
Travel Costs	\$884.04
Postage	\$4.58
TOTAL	\$3,055.18

10 Thus, the Court awards STARK her costs in the amount of \$3,055.18

11 **STATUTORY DAMAGES**

12 In addition to SMITH and STARK’s request for attorney’s fees and costs, they have each
13 requested the Court award damages to them in the amount of \$10,000 each pursuant to NRS
14 41.670(1)(b). NRS 41.670(1)(b) states that “[t]he court may award, in addition to reasonable costs
15 and attorney’s fees awarded pursuant to paragraph (a), an amount of up to \$10,000 to the person
16 against whom the action was brought.” In Smith v. Zilverberg, the Court found that NRS
17 41.670(1)(b) gives district courts the discretion to award up to an additional \$10,000 to each
18 individual defendant. 137 Nev.65, 75 (2021). Where the District Court does not properly exercise
19 its discretion or denies a discretionary request for an arbitrary or capricious reason without
20 explanation, it is abuse of discretion and can be overturned by a higher court. Pandelis Constr. Co.
21 v. Jones-Viking Assocs., 103 Nev. 129, 132 (1987)(finding it “constitutes an abuse of discretion
22 for a court to give no reason for its refusal to award fees.”); Bergmann v. Boyce, 109 Nev. 670
23 (1993)(“where a trial court exercises its discretion in clear disregard of the guiding legal principles,
24 this action may constitute an abuse of discretion.”).

25 In his motion for damages, SMITH argues that he was immune from suit for exercising his
26 rights under and within the scope of the First Amendment, and pursuant to the plain language of
27 NRS 41.670(1), the entitlement to the award in this case was established when the Court granted
28 SMITH’s Anti-SLAPP motion to dismiss. SMITH contends that LACKEY’s suit was frivolous

1 and was intended to silence those critical of his conduct as a public official. Additionally, SMITH
2 contends that Lackey’s lawsuit caused substantial emotional and financial harm, including causing
3 him difficulties and delays in obtaining financing for a housing development in California and
4 high blood pressure related to stress. Finally, SMITH argues that the Court should assess the full
5 \$10,000 statutory penalty to deter LACKEY and similarly situated persons from bringing suits that
6 lack minimal merit in order to censor and silence public criticism of public officials.

7 In her motion for damages, STARK argues that the Court should award her \$10,000 in
8 statutory damages given the lengthy history of the litigation, the unnecessary and costly discovery
9 engaged by LACKEY, and to compensate STARK in defending a meritless lawsuit. Additionally,
10 STARK argues that this matter caused her emotional stress that caused her to seek psychological
11 counseling because of panic attacks and the inability to sleep, and financial stress that forced her
12 to go back to work to cover her legal fees. As such, STARK argues that the statutory damages
13 award will compensate STARK in defending this “frivolous” lawsuit.

14 In response, LACKEY argues he didn’t bring his complaint to silence political speech, but
15 rather to try to stop personal harassment, and did so in a largely untested legal landscape in Nevada
16 where online defamation was concerned. LACKEY states that despite his adherence to prescribed
17 policies and procedures during the defamation, he had to bring this action personally to protect his
18 interests when his agency took no action to do so. Additionally, LACKEY argues that he didn’t
19 set out to bring a suit in bad faith; rather, he set out to seek the Court’s assistance in ending the
20 harm he was suffering. In support of this argument, LACKEY states that prior to the Nevada
21 Supreme Court’s reversal, this Court agreed that the acts described in the complaint were not
22 plausibly good faith statements. In response to STARK and SMITH’s contentions that this lawsuit
23 caused them emotional and financial harm as a result of the length of the litigation, LACKEY
24 argues that the length or toll of the litigation is explicitly not an appropriate consideration wherein
25 statutory damages are concerned. Instead, LACKEY argues that the Court should consider
26 whether LACKEY’s conduct, given the unique and unusual facts of this case, is the kind that
27 should be deterred at all. In support of this argument, LACKEY states that he sued for defamation
28 those who orchestrated his defamation; however, during the case, the legal grounds for this claim

1 shifted under LACKEY’s feet. LACKEY argues it is not appropriate for the Court to deter future
2 litigants with legitimate complaints of defamation from coming forward and having their case
3 heard.

4 In his reply, SMITH argues that LACKEY’s omnibus opposition fails to address the issue
5 as to whether SMITH is entitled to statutory damages, or what the standard of review is when a
6 Court is tasked to determine how much of an award to impose; rather, SMITH states that LACKEY
7 argues he is the one who suffered, his claim was meritorious, and he was the victim. However,
8 SMITH argues that these arguments have little to do with the issue of what statutory award would
9 be sufficient to deter the targeted conduct. Further, SMITH argues that LACKEY had alternatives
10 to bringing his defamation claim, i.e., he could have ignored the Lake Tahoe Wall of Shame, or
11 publicly correct the record where he thought someone was wrong on the internet. SMITH states
12 that the remedy for factually incorrect criticism is not a lawsuit, its competing speech. Rosen v.
13 Tarkanian, 135 Nev. 436, 447 (2019).

14 In her reply, STARK argues that the statutory damages award is meant to further
15 disincentivize vexatious litigants from filing baseless SLAPPs, such as the Complaint in this
16 matter, and awarding STARK an additional \$10,000 is necessary to deter future SLAPP litigation.
17 Finally, STARK argues that the statutory award is not a windfall as LACKEY suggests, it is
18 reasonable under the circumstances – given the public policy considerations of Nevada’s anti-
19 SLAPP statute.

20 The anti-SLAPP statute allows the Court to consider an award of up to \$10,000 to each
21 individual defendant. The purpose of such an award is to further the anti-SLAPP statutes’ goal of
22 deterring litigants from filing meritless SLAPP suits in the future. See, Smith, 137 Nev. Adv. Op.
23 7 (observing that the purpose of NRS 41.670’s fee and cost award provision was to “limit[] the
24 chilling effect of civil actions filed against valid exercises of” a citizen’s First Amendment free
25 speech rights). Statutory damages are intended to deter the conduct at issue and are calculated
26 based on the statute and not the degree of harm to the victim.

27 In its original orders denying STARK and SMITH’s special motions to dismiss, the Court
28 found that STARK and SMITH failed to meet their burden that the statements made on Facebook

1 were communication made in direct connection with an issue of public interest in a place open to the
2 public or in a public forum because not all of the comments on the NDOW Watch Facebook posts
3 were sufficiently related to the stated public interest and because defendants' affidavits failed to
4 establish the third-party posts were true or otherwise made without knowledge of their falsehood.
5 The Nevada Supreme Court disagreed, and further instructed the Court to address prong two of the
6 anti-SLAPP analysis with specific consideration of the applicability of the Communications Decency
7 Act, 47 U.S.C. §230.¹

8 Thereafter, the Court entered its orders granting STARK and SMITH'S special motions to
9 dismiss wherein the Court found that Communications Decency Act provided STARK and SMITH
10 with immunity from civil actions for the content posted by third parties onto the NDOW Watch
11 Keeping Them Transparent Facebook page and the Lake Tahoe Wall of Shame page, provided
12 STARK and SMITH with immunity for choosing to either monitor or not postings, to delete or not
13 postings based on whether or not STARK or SMITH found them offensive. As a result, the Court
14 found the Communications Decency Act provides that STARK and SMITH cannot be treated as the
15 publisher or speaker of third-party posts. As such, LACKEY was unable to provide prima facie
16 evidence that STARK and/or SMITH made false or defamatory statements concerning LACKEY,
17 and was unable to show his probability of succeeding on his claims.

18 While STARK and SMITH prevailed on obtaining dismissal of LACKEY'S complaint under
19 Nevada's anti-SLAPP statute, LACKEY'S claims were not brought in bad faith or for a frivolous
20 purpose. However, LACKEY did have the opportunity to settle this matter after the entry of the
21 Nevada Supreme Court's opinion, but chose to extend the litigation in this matter in his pursuit of
22 additional discovery that in the end proved fruitless, including numerous requests to extend the

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¹ Stark v. Lackey, 136 Nev. Adv. Op. 4 (2020).

1 discovery period. As such, the Court finds that an award of statutory damages pursuant to NRS
2 41.670(1)(b) in the amount of \$1,000.00, to STARK and SMITH, individually, is appropriate.

3 Based on the foregoing and good cause appearing,

4 IT IS HEREBY ORDERED that Defendant CAROLYN STARK's Motion for Attorney's
5 Fees, Costs and Statutory Damages is GRANTED in part, and DENIED in part. As such the Court
6 awards attorney's fees in the amount of \$76,526.94, costs in the amount of \$3,055.18, and statutory
7 damages in the amount of \$1,000.00.

8 IT IS HEREBY FURTHER ORDERED that Defendant MARK SMITH's Motion for
9 Attorney's Fees and Costs and Motion for Statutory Damages are GRANTED in part, and DENIED
10 in part. As such, the Court awards attorney's fees in the amount of \$73,985.76, costs in the amount
11 of \$2,022.16, and statutory damages in the amount of \$1,000.00.

12 DATED this 10 day of April, 2023.

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16 DISTRICT JUDGE
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1 **CERTIFICATE OF SERVICE**

2 CASE NO. CV17-00434

3 I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the
4 STATE OF NEVADA, COUNTY OF WASHOE; that on the 10 day of April, 2023, I filed the
5 **ORDER ADDRESSING DEFENDANTS CAROLYN STARK AND MARK SMITH'S**
6 **MOTIONS FOR ATTORNEY'S FEES, COSTS AND STATUTORY DAMAGES** with the
7 Clerk of the Court.

8 I further certify that I transmitted a true and correct copy of the foregoing document by the
9 method(s) noted below:

10 **Personal delivery to the following: [NONE]**

11 **xx I electronically filed with the Clerk of the Court, using the ECF which sends an**
12 **immediate notice of the electronic filing to the following registered e-filers for their review**
13 **of the document in the ECF system:**

14 LUKE BUSBY, ESQ. for CARL LACKEY

15 REW GOODENOW, ESQ. for CARL LACKEY

16 BRADLEY SCHRAGER, ESQ. for CAROLYN STARK DBA NDOWL WATCH KEEPING
17 THEM TRANSPARENT

18 MICHAEL SHANNON, ESQ. for MARK SMITH

19 MICHAEL HALL, ESQ. for MARK SMITH

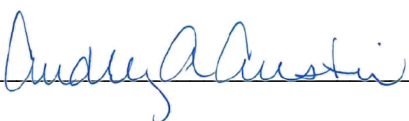
20 **Deposited in the Washoe County mailing system in a sealed envelope for postage and**
21 **mailing with the United States Postal Service in Reno, Nevada:**

22 **Placing a true copy thereof in a sealed envelope for service via:**

23 Reno/Carson Messenger Service – [NONE]

24 Federal Express or other overnight delivery service [NONE]

25 DATED this 10 day of April, 2023.

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27 _____
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