In the
Supreme Court of the State of Nevada

DAPHNE WILLIAMS,

Defendant/Appellant

vs.

CHARLES "RANDY" LAZER,

Plaintiff/Respondent

Supreme Court No. 80350

Appeal from the
Eighth Judicial District Court
for Clark County, Nevada

District Court Case No.
A-19-797156-C

BRIEF OF *AMICUS CURIAE*
FIRST AMEMENDMENT LAWYERS ASSOCIATION
SUPPORTING GRANTING REVIEW
AND REVERSAL

Clyde DeWitt
Nevada State Bar No. 117911
Law Offices of Clyde DeWitt, APC
2300 West Sahara Ave., Suite 800
Las Vegas Nevada 89102
(702) 386-1756
clydedewitt@earthlink.net

Counsel for Amici Curiae

The undersigned would like to acknowledge and thank the following for their substantial and invaluable assistance in preparing this brief:

Professor Jennifer M. Kinsley, Esq.
Northern Kentucky University Chase College of Law
Nunn Hall, Room 507
Highland Heights, KY 41099
kinsleyj1@nku.edu

W. Andrew McCullough, Esq.
W. Andrew McCullough, LLC
Attorney at Law
6885 S. State St. Suite 200
Midvale, UT 84047
wandrew48@ymail.com

Randall D.B. Tigue, J.D.
604 N. Lilac Drive
Golden Valley, MN 55422
tiguelaw@msn.com

CORPORATE DISCLOSURE

Amicus Curiae First Amendment Lawyers Association is an Illinois non-profit corporation. It has no parent corporation.

The names of all law firms whose partners or associates have appeared for the party or amicus in the case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court are the following:

In the District Court, the Court of Appeals and the Supreme Court on behalf of Defendant/Appellant Daphne Williams:

Randazza Legal Group
Marc J. Randazza
Alex J. Shepard

In the Supreme Court on behalf of Amicus Curiae First Amendment Lawyers Association:

Law Offices of Clyde DeWitt, APC
Clyde DeWitt (Nevada State Bar No. 97910)

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DISCLOSURE OF INTEREST OF AMICUS[1]

The First Amendment Lawyers Association ("FALA") is an Illinois-based, not-for-profit organization comprised of over 100 attorneys that routinely represent businesses and individuals engaged in constitutionally protected expression. FALA's members practice throughout the United States, Canada and Europe in defense of free speech.

FALA is concerned about all forms of governmentally imposed censorship. Use of the courts by private parties to suppress or deter the robust expression of opinions is just as detrimental to a free exchange of opinions and information as are censorial statutes and censorial executive actions. It is for that reason that FALA submits this brief.

FALA members, as far back as 1957, *Alberts v. California*, 354 U.S. 476 (1957),[2] have briefed and argued dozens of landmark free-speech cases before the United States Supreme Court and literally thousands of cases before lower federal courts and state appellate courts across the United States. Moreover, FALA members have testified untold numbers of times in the United States Congress and

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[1] This brief was authored by the listed counsel for *amicus curiae*, First Amendment Lawyers Association ("FALA") as listed herein. No other person or entity other than FALA has contributed to the preparation or costs of preparation of this brief.

[2] Briefed and argued by the late Stanley Fleishman, the first president and one of the founders of FALA.

state legislatures concerning proposed legislation impacting free expression. Additionally, FALA members regularly address audiences – lawyers, law students, the press and the public – about issues impacting free speech, as well as publishing many scholarly articles concerning free expression.

SUMMARY OF ARGUMENT

Contrary to the weight of decisions across the country, the Court of Appeals determined that accusing someone of being a racist is not an opinion. Correctly, such a statement is not provably false and therefore is a statement of opinion protected by the First and Fourteenth Amendments to the United States Constitution. In its decision, the Court of Appeals acted as a precedent-setting court, rather than its traditional function as an error-correcting court.

ARGUMENT

The Court of Appeals ruled that Defendant Williams' remarks directed at Plaintiff Lazer did not warrant dismissal of Lazer's defamation suit under Nevada's anti-SLAPP statute because, *inter alia*, the court held that Williams' statements were not opinions. *Williams v. Lazer*, 2020 WL 6955440 (Nev. App., November 25, 2020).

In making that ruling, the Court of Appeals assessed the framework required by NRS 41.660(3)(a)-(b) in determining if the anti-SLAPP statute applied to Williams' remarks and held under the first prong of that assessment that Williams' statements, calling Lazer racist, were not statements of her opinion, but that they were "factual claims" and that furthermore they were not true, thus making dismissal based on the anti-SLAPP statute unsupported.

That ruling departs from the well-settled principle of First Amendment law that statements of opinion, like calling someone a racist, fascist, or other term reflecting their belief system, are constitutionally protected statements of opinion and cannot form the basis of civil liability.

"Among the fundamental protections preserved by the First Amendment, any person's right to speak freely on public issues, falls on the highest rung of the hierarchy of First Amendment values."

Connick v. Myers, 461 U.S. 138, 145 (1983) (internal quotations omitted).

Indeed, this Court has recognized, "statements of opinion as opposed to statements of fact are not actionable." *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 714 (Nev. 2003).

> "Statements of opinion cannot be defamatory because 'there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.'"

Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974).

The essential quality that separates a statement of opinion from a statement of fact is whether the statement can be proven false. *See, e.g., Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1966). As the Supreme Court explained in *Milkovich v. Lorrain Journal*, 497 U.S. 1, 2 (1990), that standard is heightened when the statement concerns a matter of public concern:

> "Foremost, we think *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1966), stands for the proposition that a statement on a matter of public concern must be provable as false before there can be liability under state defamation law, at least, like the present, where a media defendant is involved. Thus, unlike the statement, 'In my opinion, Mayor Jones is a liar,' the statement, 'In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin' would not be actionable. *Hepps* assures that a statement of opinion relating to matters of public concern, which does not contain a provably false factual connotation will receive full constitutional protection.'"

Following those principles, numerous courts across the country have explicitly recognized the non-actionable nature of statements regarding a person's racial or political attitudes. For example, the Seventh Circuit specifically observed

that the term "racist" is "hurled about so indiscriminately that it is no more than a verbal slap in the face" and "not actionable unless it implies the existence of undisclosed, defamatory facts." *Stevens v. Tillman*, 855 F.2d 394, 402 (7th Cir. 1988). Ohio state courts, for another example, have reached similar conclusions. In *Lennon v. Cuyahoga County Juv. Court*, 2006 Ohio 2587, 2006 WL 1428920 (8th Dist. 2006), the court observed that "appellant's being called a racist was a matter of one [person's] opinion and thus is constitutionally protected speech." *Id*. at ¶ 31. In addition, in *Condit v. Clermont County Review*, 110 Ohio App.3d 755, 760 (12th Dist. 1996), the court found that accusations of "fascist" and "anti-semite" were protected statements of opinion. As a result, under the high standard for the protection of expression of opinions, a discussion about whether particular conduct is racist could essentially never be the subject of an action for defamation or false light. *See, e.g., Steele v. Spokesman-Review*, 138 Idaho 249 (Idaho 2002) (Rejecting attorney's claim against newspaper who reported that he was a white supremacist in part based upon the fact that a person's belief system is not provable.). The burden is all the more insurmountable for a public official. *See Waterson v. Cleveland State Univ*., 93 Ohio App.3d 792, 797-98 (10th Dist. 1994) (Holding that explicit allegation of racism against police officer is not actionable.); *see also Buckley v. Littell*, 539 F.2d 882, 891-95 (6th Cir. 1977) (Noting that the word "fascist" is "loose[]" and "ambiguous and cannot be regarded as a statement of fact because of

the "tremendous imprecision" of meaning and usage of the term.); *Rambo v. Cohen*, 587 N.E.2d 140, 148-9 (Ind. App. 1992) ("[T]he phrase 'anti-Semitic'… is not defamatory *per se*."). For those reasons, to call a person a bigot or other appropriate name descriptive of his political, racial, religious economic or sociological philosophies gives no rise to an action for libel." *Raible v. Newsweek*, 341 F.Supp. 804, 807 (W.D. Pa. 1972).

Stated another way, claims of racism are always an opinion because no one can see into the heart of another person and determine if they are truly racist or if their actions are based on some other non-racist motivation.

The Court of Appeals acknowledged that "statements of opinion are treated as good faith communications under Nevada's anti-SLAPP statutes [and] an opinion cannot legally be a defamatory statement." 2020 WL 6955440, *6 (Internal quotations and citations omitted.). Therefore, the Court was fully aware that statements of opinion meet the good faith requirement of the anti-SLAPP statute and these statements are protected and defamation cases that are based on opinions should be dismissed in accordance with the anti-SLAPP statute.

Nonetheless, the Court came to the remarkable conclusion that claims of racism can be measured by the objective truthfulness of the statements and not as protected opinion.

In supporting that holding, the Court of Appeals claimed that the title of the

form provided by the Nevada Real Estate Division (NRED), which is titled "Statement of Facts" somehow changed Williams' opinion statement regarding Lazer into a fact statement because it is written on a form that is titled as a "statement of fact."

The Court explained:

> "Lastly, Williams's claim that the statements in her NRED complaint were mere opinions is unpersuasive. Although Williams could possibly have perceived Lazer's alleged comment at the condominium as racist and sexist, her accusation as it is presented on appeal appears to be made as a statement of fact, not opinion. Indeed, the NRED complaint is titled as a "Statement of Fact," so there is no basis for opinion when filing such a complaint with the NRED. Filing a Statement of Fact with the NRED unsurprisingly necessitates making a communication as a statement of fact."

The form provided by the NRED – the "Statement of Facts" form is a standard form published by the NRED for lodging complaints against members of the Nevada Real Estate Division. The title of that document cannot somehow change Williams' opinion of Lazer into a statement of fact by its mere title.

Moreover, Williams has no alternative form or forum to lodge a complaint against a realtor who is member of NRED; thus, although her claims are indeed her opinion, in order to file a complaint she is compelled to do so with a form that is titled "Statement of Facts."

The title of that document should not be construed to change an opinion into a fact by its merely being titled "Statement of Facts." A rose by any other name is

still a rose.

Judged by the appropriate First Amendment standards, everything the Petitioner in this case said is entitled to full constitutional protection. No claim is made that her complaint to regulatory authorities implied any provably false factual implications; indeed, she does not dispute the alleged facts. Lazar does not dispute the fact that he offered to be Williams' realtor, should she ever become successful, and he does not dispute the assertion that he made *ex parte* contact with the appraiser. The only thing he disputes are the conclusory opinions that the admittedly true actions were racist or unethical. However, as the decisions identified above make clear, those statements of opinion are fully entitled to constitutional protection and cannot form the basis of civil liability.

The Court of Appeals was in error when it decided that Williams' statements were anything other than her opinion; and because her statements were her opinion, they meet the good faith requirement of the Nevada anti-SLAPP statute. The case against Williams should therefore have been dismissed.

In addition to its significance to Williams, this case also falls in line with a disturbing trend in which police officers and public officials are suing their critics, typically those associated with the Black Lives Matter movement, for outing political activities that could be construed as racist. *See, e.g., M.R. v. Niesen*, Ohio Sup. Ct. No. 2020-1131 (Describing complaint filed by Cincinnati police officer

against Black Lives Matter activists who complained online after he made a racist gesture at a public meeting.); Matt Mencarini, "Louisville Cop Injured in Breonna Taylor Shooting Threatens Lawsuits over Being Called a 'Murderer,'" USA Today (Sept. 25, 2020)[3].

In light of that trend, it is all the more important that this Court preserve the First Amendment right of individuals to express opinions about racial inequity without fear of being sued. Amicus Curiae FALA thus respectfully requests that the Court grant the Petition for Review.

Respectfully Submitted

CLYDE DEWITT
LAW OFFICES
OF CLYDE DEWITT, APC

By: */s/ Clyde DeWitt*
Clyde DeWitt

[3] Available at: https://www.usatoday.com/story/news/nation/2020/09/25/breonna-taylor-louisville-officer-jonathan-mattingly-attorney-lawsuit-murderer/3530246001/

CERTIFICATE OF COMPLIANCE

[NEV. R. APP. PROC. 28.2]

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point font, Times New Roman type style; or

[ ] This brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[X] Proportionately spaced, has a typeface of 14 points or more and contains less than 2,333 words;[4] or

[] Monospaced, has 10.5 or fewer characters per inch, and contains ___ words or ___ lines of text; or

[] Does not exceed five (5) pages.

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[4] The Petition that this *Amicus Curiae* supports is limited to 4,667 words. NEV. R. APP. PROC. 40B(d). The *Amicus Curiae* Brief is limited to one-half of that. NEV. R. APP. PROC. 29(e).

3. Finally, I hereby certify that I have read this appellate (*amicus curiae*) brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NEV. R. APP. PROC. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

/s/ Clyde DeWitt
Clyde DeWitt

CERTIFICATE OF SERVICE

Consistent with Rule 25 of the Nevada Rules of Appellate Procedure, I certify that the foregoing document was served on all counsel and parties of record through the electronic filing system of this court.

/s/ Clyde DeWitt
Clyde DeWitt