IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Dec 26 2018 12:33 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court Case No. 76273

DANIEL OMERZA, DARREN BRESEE, and STEVE CARIA,

Appellants

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE RICHARD F. SCOTTI, DISTRICT JUDGE, DEPT. II, DISTRICT COURT CASE NUMBER A-18-771224-C,

Respondent,

and

FORE STARS, LTD.; 180 LAND CO., LLC; and SEVENTY ACRES, LLC,

Real Parties in Interest.

APPELLANTS' REPLY BRIEF

Mitchell J. Langberg, Esq., #10118
mlangberg@bhfs.com
BROWNSTEIN HYATT FARBER SCHRECK LLP
100 N. City Parkway, Suite 1600
Las Vegas, Nevada 89106
702.382.2101

Attorneys for Appellants

RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the foregoing are persons or entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Appellants Daniel Omerza, Darren Bresee and Steve Caria are individuals, so there is no parent corporation or any publicly held company that owns 10% of the party's stock.

DATED this 26th day of December, 2018.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: */s/ Mitchell J. Langberg*
Mitchell J. Langberg, Esq. Bar No. 10118
100 North City Parkway, Suite 1600
Las Vegas, Nevada 89106

Attorneys for Appellants Daniel Omerza, Darren Bresee, and Steve Caria

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SUMMARY OF THE ARGUMENT

In their opening briefs, the parties offer the Court two competing approaches to the anti-SLAPP statute. In the Residents' view, the anti-SLAPP statute protects persons exercising free speech by requiring a plaintiff bringing a lawsuit based on that speech to produce supporting evidence at the outset of the case, so plaintiffs cannot use the time and expense of litigation as a way to chill free speech. In Developers' view, the anti-SLAPP statute is just another way of ***adding*** to the defendants' burdens in such a lawsuit: defendants invoking the anti-SLAPP statute must begin by disproving the entire case against them; otherwise, they may not have spoken in good faith and the anti-SLAPP statute does not apply.

Fortunately for Residents and for the Constitution, there is no authority or logic to support Developers' approach. The first prong of the anti-SLAPP statute tests whether the case implicates First Amendment concerns. Developers' only argument that this case does not is that Residents have not proven all of their statements at issue were truthful or were made without knowledge that they were false. But Residents submitted declarations to the district court attesting to just that. This Court has twice found such declarations sufficient to meet the first prong of the anti-SLAPP statute. There is no requirement in the statute or in the case law that Residents go further and somehow disprove all of Developers'

assertions to the contrary. To create such a requirement would nullify the language and undermine the purpose of the anti-SLAPP statute.

Since (unlike many anti-SLAPP cases) this action squarely involves speech that would ordinarily be protected under the First Amendment, the burden shifts to Developers to establish through *prima facie* evidence a probability of succeeding on their claims notwithstanding Residents' constitutional rights. The only evidence to which Developers direct this Court's attention demonstrates nothing of the sort. In particular, Developers have entirely failed to come forward with evidence to show that Residents acted in bad faith.

Even if they had, Developers' action still fails based upon the litigation privilege. Their argument that the privilege is limited to actions that include a defamation claim is wrong as a matter of law. Similarly, their position that the privilege does not apply to Residents' statements made in anticipation of expected quasi-judicial proceedings is directly at odds with this Court's prior holdings.

ARGUMENT

The District Court should have dismissed this case under the anti-SLAPP statute for two reasons. First, Developers' claims against Residents lack the evidentiary support required to overcome an anti-SLAPP special motion to dismiss. Developers' contrary arguments ignore recent and controlling decisions of

this Court, California case law (which this Court has found to be instructive), and the language and purpose of the statute. Second, the communications at issue were protected by absolute or qualified litigation privilege. Developers' attempts to evade that fundamental privilege are again contrary to law.

I. THIS CASE SQUARELY IMPLICATES FREE SPEECH ISSUES, AND DEVELOPERS HAVE NOT PRESENTED *PRIMA FACIE* EVIDENCE TO SUPPORT THEIR CLAIMS.

Respondents' Answering Brief ("Ans. Brf.") fundamentally misapprehends the nature of the issue presented here. The anti-SLAPP statute was enacted to protect ***defendants***, creating a procedure for promptly testing the merits of a lawsuit brought against a person exercising his or her First Amendment rights, to prevent such a lawsuit from being used to discourage free speech. This case certainly arises out of Residents' First Amendment activities. That does not mean Residents are necessarily immune from suit, only that Developers were required to come forward at the outset with ***evidence*** to support their claims. Because they failed to do so, the district court should have dismissed this action.

A. Standard of Review: Proper Application of the Anti-SLAPP Statute Is a Question of Law for This Court to Review *De Novo*.

In their Opening Brief, Residents argued that the district court's is subject to *de novo* review for two reasons. First, the decision turns on construction of the anti-SLAPP statute itself. Second, the 2015 amendment of the anti-SLAPP statute

eliminated the "clear and convincing evidence" standard, removing the basis for applying an abuse of discretion standard, *see Shapiro v. Welt*, 133 Nev. Adv. Op. 6, 389 P.3d 262, 266 (2017), and returning new appeals to the *de novo* standard of *John v Douglas City Sch. Dist.*, 125 Nev. 746, 753, 219 P.3d 1276, 1281 (2009). Developers asserted to the contrary. Ans. Brf. at 15-17.

But, Developers blatantly ignored recent controlling authority this Court set out in *Patin v. Lee*, 134 Nev. Adv. Op. 87, 429 P.3d 1248 (2018). This Court confirmed Residents' first point: "Because resolution of this appeal involves a single matter of statutory interpretation [under the anti-SLAPP statute], we review *de novo* the district court's denial of Patin's special motion to dismiss." *Patin*, 429 P.3d at 1250 (citing *Pawlik v. Deng*, 134 Nev. ___, 412 P.3d 68, 70 (2018)). In *Patin*, this Court also explicitly acknowledged that the 2015 amendments removed the "clear and convincing evidence" standard that was the basis for applying an abuse of discretion standard in *Shapiro*. *See* 429 P.3d at 1250 n.2.

Moreover, *Patin* confirmed that this Court looks to California law in applying the anti-SLAPP statute, 429 P.3d at 1250, and Developers do not dispute that California courts conduct *de novo* review of lower court rulings on anti-SLAPP special motions to dismiss. *See Mundy v. Lenc*, 203 Cal. App. 4th 1401, 1408, 138 Cal. Rptr. 3d 464, 470 (2012) ("An appellate court reviews an order

denying an anti-SLAPP motion from a clean slate.") (citation omitted) (cited in Residents' Opening Brief, ***ignored*** in Developers' Answering Brief); *Chodos v. Cole*, 210 Cal. App. 4th 692, 698, 148 Cal. Rptr. 3d 451, 454 (2012) (cited in Opening Brief, ***ignored*** in Answering Brief); *Sylmar Air Conditioning v. Pueblo Contracting Servs., Inc.*, 122 Cal. App. 4th 1049, 1056, 18 Cal. Rptr. 3d 882, 887 (2004) (cited in Opening Brief, ***ignored*** in Answering Brief); *HMS Capital, Inc. v. Lawyers Title Co.*, 118 Cal. App. 4th 204, 212, 12 Cal. Rptr. 3d 786, 792 (2004) (cited in Opening Brief, ***ignored*** in Answering Brief).[1]

This Court should similarly conduct *de novo* review of the lower court's denial of Residents' anti-SLAPP special motion to dismiss.

B. Developers Misunderstand the Nature of the Anti-SLAPP Statute.

In their Answering Brief, Developers misapprehend the issue before this Court. Residents do not contend that the anti-SLAPP statute creates some absolute bar against the various claims asserted in Developers Complaint. It is irrelevant whether the facts alleged by Developers might, in theory, support their claims for

[1] Developers helpfully note that the anti-SLAPP statute expressly references the burden of proof applicable under California law as of June 8, 2015. Ans. Brf. at 16 n.7 (citing NRS. 41.665(2)). This statutory provision does not address the standard of review on appeal, but to the extent it is relevant here, the body of California case law Residents have cited demonstrates that California applied a *de novo* standard of review on anti-SLAPP appeals as of June 8, 2015. Developers cite no California authority to the contrary.

relief. The issue is whether ***in this case*** Developers came forward with evidence to support their claims as required by the anti-SLAPP statute. In analyzing that issue, courts do ***not*** assume the allegations of the Complaint to be true, nor is there any exemption from the statute for tort claims.

In their Answering Brief, Developers again take up the theme that the anti-SLAPP statute "is not an absolute bar against substantive claims" and does not "immunize" intentional tortious misconduct. Ans. Brf. at 14, 18. This is a straw-man argument. Residents have never argued for some absolute bar against the particular claims for relief asserted here. Rather, under Nevada's anti-SLAPP statute, Developers' attack on Residents' protected activity requires Developers, at the outset of the case, to come forward with ***evidence*** supporting each and every element of their claims. The issue is whether the District Court properly applied NRS 41.660(3) to test whether (i) this case arises out of First Amendment activities, and (ii) Developers could demonstrate a probability of prevailing on their claims.

These questions cannot be resolved simply by reading the Complaint and assuming Developers' allegations to be true. *See* Appellants' Opening Brief, at 13-18. An anti-SLAPP motion is not governed by the same standards as a motion to dismiss under NRCP 12(b)(5). Yet, the District Court's findings of fact consist of

nothing but a summary of the allegations in Developers' Complaint. Order, ¶ 4 (APP, Vol. III, 569-572). Developers double down on the lower court's confusion, asserting they "are not trying to stifle the Residents' expression of public concern," based upon on the allegations of their own Complaint. Ans. Brf. at 20 (citing Complaint). They go on to argue that the anti-SLAPP statute does not apply because they "allege in the Complaint" that Residents made or circulated false statements and because "[t]he Complaint further alleges" that Residents acted with fraudulent intent. Ans. Brf. at 21. These bald, conclusory allegations mean nothing in the context of an anti-SLAPP special motion.

Developers ask this Court to repeat the lower court's error of assuming their factual allegations to be true. But this would defeat the purpose of the statute of "filter[ing] unmeritorious claims in an effort to protect citizens from costly retaliatory lawsuit arising from their right to free speech under both the Nevada and Federal Constitutions." *John v. Douglas City Sch. Dist.*, 125 Nev. 746, 755, 219 P.3d 1276, 1282 (2009), *superseded by statute on other grounds*, as stated in *Shapiro v. Welt*, 133 Nev. Adv. Op. 6, 389 P.3d 262, 266 (2017).[2]

[2] The District Court disregarded this purpose by denying Residents' special motion without prejudice, in essence punting on a final determination until after discovery. But the whole point is to avoid such costly and time-consuming broad discovery if possible. The only discovery that should delay an anti-SLAPP ruling is when there is a request under NRS 41.660(4) for discovery of necessary information

Developers ignore the authority cited by Residents that, "[i]n opposing an anti-SLAPP motion, the plaintiff cannot rely on the allegations of the complaint, but must produce evidence that would be admissible at trial." *HMS Capital, Inc. v. Lawyers Title Co.*, 118 Cal. App. 4th 204, 212, 12 Cal. Rptr. 3d 786, 791 (2004) (cited in Opening Brief, ***ignored*** in Answering Brief); see also *De Havilland v. FX Networks, LLC*, 21 Cal. App. 5th 845, 855, 230 Cal. Rptr. 3d 625, 634 (2018) (cited in Opening Brief, ***ignored*** in Answering Brief); *Integrated Healthcare Holdings, Inc. v. Fitzgibbons*, 140 Cal. App. 4th 515, 527, 44 Cal. Rptr. 3d 517, 526 (2006) (cited in Opening Brief, ***ignored*** in Answering Brief).

Instead, Developers repeatedly and mistakenly invoke *Bikkina v. Mahadevan*, 241 Cal. App. 4th 70, 193 Cal. Rptr. 3d 499 (2015), for the notion that on an anti-SLAPP special motion, a "plaintiff's allegations and evidence must be accepted as true." Ans. Brf. at 38. There is no such holding to be found anywhere in that decision. To the contrary, the court in *Bikkina* held that a plaintiff "must demonstrate the complaint is both legally sufficient ***and supported by a sufficient prima facie showing of facts*** to sustain a favorable judgment. 241 Cal. App. 4th at 85, 193 Cal. Rptr. at 511 (emphasis added) (citations omitted). The court indicated

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exclusively in the possession of the opposing party. *See Goldentree Master Fund, Ltd. v. EB Holdings II, Inc.*, 2018 WL 1634189, *2 (Nev. Mar. 30, 2018) (unpublished). Developers have never identified any necessary information that is exclusively in Residents' control.

that it would accept the plaintiff's ***evidence*** as true so long as it was not defeated by the defendant's evidence, *id.*, but here, as discussed further below, Developers ***did not submit any evidence*** of fraudulent misconduct, and if they had it would have been defeated by Residents' declarations.[3] While courts review the pleadings to determine the nature of the case (particularly whether the allegations arise out of the exercise of protected First Amendment activity), *HMS Capital, supra*, no decision in Nevada or California holds that factual allegations of a complaint should be assumed true for purposes of an anti-SLAPP special motion to dismiss.

This fundamental misperception underlies the District Court's entire decision. In its Order, the lower court did not refer to any evidence whatsoever, only to facts alleged in the Complaint. The district court held that, "given the numerous ***allegations*** of fraud," Residents had not shown that this case arises out

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[3]3 Developers seize on language in the *Bikkina* opinion stating that "an anti-SLAPP motion is not a vehicle for testing the strength of a plaintiff's case." *Bikkina*, 241 Cal. App. 4th at 88 (quoting *Wilbanks v. Wolk*, 121 Cal App. 4th 883, 906, 17 Cal. Rptr. 497, 513 (2004)). But the court's holding in *Bikkina*, and in the *Wilbanks* decision it quotes, was only that a plaintiff need not produce evidence in support of every damage theory it advances, so long as the plaintiff "has stated ***and substantiated*** a legally sufficient claim." *Id.* (emphasis added). Neither decision can fairly be read to unwind the self-apparent purpose of the anti-SLAPP statute of "filter[ing] unmeritorious claims." *John, supra*, 125 Nev. at 755. In California, as in Nevada, "[t]he goal [of the anti-SLAPP statute] is to eliminate meritless or retaliatory litigation at an early stage of the proceedings." *Seelig v. Infinity Broadcasting Corp.*, 97 Cal. App. 4th 798, 806, 119 Cal. Rptr. 2d 108, 114 (2001) (citations omitted) (quoted in Opening Brief, ***ignored*** in Answering Brief).

of "good faith communications in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." Order, ¶ 5 (APP, Vol. III, 572) (emphasis added). But a plaintiff cannot overcome an anti-SLAPP motion with mere allegations.

The District Court further erred by holding that the anti-SLAPP statute does not apply to intentional torts such as fraud. Order, ¶¶ 17, 18 (APP, Vol. III, 574-575). Developers make no attempt to defend this holding, which is contrary to a significant body of case law, including this Court's recent decision in *Patin*. *Patin*, 429 P.3d at 1251 (policy of anti-SLAPP is to "protect the right of litigants to the utmost freedom of access to the courts without the fear of being harassed subsequently by derivative tort actions.") (quoting *Neville v. Chudacoff*, 160 Cal. App. 4th 1255, 1263, 73 Cal. Rptr. 3d 383, 389 (2008)); *see also*, *Graham-Sult v. Clainos*, 756 F.3d 724, 739 (9th Cir. 2014) (applying anti-SLAPP statute to claims for intentional and negligent misrepresentation) (cited in Opening Brief, ***ignored*** in Answering Brief); *Healthsmart Pacific, Inc. v. Kabateck*, 7 Cal. App. 5th 416, 426, 438, 212 Cal. Rptr. 3d 589 (2016) (affirming anti-SLAPP dismissal of claim for tortious interference) (cited in Opening Brief, ***ignored*** in Answering Brief); *Area 51 Productions, Inc. v. City of Alameda*, 20 Cal. App. 5th 581, 593, 229 Cal. Rptr. 3d 165, 175 (2018) (holding, as to anti-SLAPP motion to dismiss complaint

alleging misrepresentation and tortious interference, "plaintiff may not rely solely on its complaint, even if verified") (cited in Opening Brief, ***ignored*** in Answering Brief); *Haight Ashbury Free Clinics, Inc. v. Happening House Ventures*, 184 Cal. App. 4th 1539, 1548-49, 110 Cal. Rptr. 3d 129 (2010) (applying anti-SLAPP statute to claim for conspiracy) (cited in Opening Brief, ***ignored*** in Answering Brief).

Ironically, Developers now deny that the lower court actually held that the anti-SLAPP statute does not apply to intentional torts, Ans Brf. at 22, even though Developers argued exactly that below (see APP. Vol. I, 215-216 (section of Developer brief headed "Nevada's anti-SLAPP Statute Does Not Protect Against Intentional Torts")), and Developers' counsel drafted the lower court's Order, which squarely concludes that "Nevada's anti-SLAPP statute does not apply to fraudulent conduct, which Plaintiffs have alleged." Order, ¶ 28 (APP, Vol. III, 577). The Order on appeal reflects a general misunderstanding that unsubstantiated allegations of fraudulent misconduct are sufficient to defeat an anti-SLAPP special motion. That is wrong as a matter of law.

C. Developers' Claims Pertained to First Amendment Activity But Lacked the Required Evidentiary Support.

Because the lower court relied entirely upon the allegations of Developers' Complaint, its denial of Residents' special motion was improper, as a matter of

law. Residents met their initial burden of showing that this case arose from the exercise of their free speech rights—they were not required to disprove every allegation of the Complaint to meet that threshold. The burden thus shifted to Developers, who failed to produce any relevant admissible evidence, let alone evidence sufficient to support their claims.

1. **Residents Met Their Initial Burden of Demonstrating That the Claims Against Them Arose from the Exercise of Their First Amendment Rights.**

One inescapable conclusion from a review of the body of case law interpreting the anti-SLAPP statute in Nevada and California is that a court seldom sees a case arising so directly out of First Amendment activities as the case at bar. Developers cannot seriously dispute that this case involves speech and petitioning activity on an issue of public concern. But Developers insist that Residents' communications were false and made with knowledge of their falsity, simply because that's what Developers alleged. Residents submitted declarations under oath, however, that they did ***not*** know any of their statements at issue to be false. That is sufficient to satisfy the first prong of the anti-SLAPP statute, as this Court has held on two occasions. Moreover, the declarations are confirmed by Judge Crockett's decision in the Binion Litigation. Developers' position that Residents were required to go beyond their declarations and Judge Crockett's decision and

offer additional evidence to disprove all of Developers' factual allegations is wrong and would dramatically undermine the purposes of the anti-SLAPP statute.

Residents confess some difficulty in deciding which paragraph of NRS 41.637 to emphasize to this Court, because they all apply. Residents engaged in communications with neighbors for the purpose of procuring a desired governmental result, a favorable decision by the Las Vegas City Council on Developers' development plans. NRS 41.637(1). Their purpose was to convey the information they obtained to the City Council. NRS 41.637(2). These communications were directly in connection with the City Council's consideration of the Developers' plans. NRS 41.637(3); *see aso Patin v. Lee, supra*. This was an issue of public concern to be addressed in a public forum. NRS 41.637(4). While Developers are not forthright in conceding the point, there is no serious question that this case involves communications "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). They were certainly not "strictly a matter of private concern." *Shapiro, supra*, 389 P.3d at 268. The only real dispute is whether such communications were undertaken in good faith.[4]

[4] While Developers certainly dispute that Residents engaged in speech and petitioning activities permitted by the First Amendment, in every instance their dispute presumes that Residents did not act in good faith. They do not and cannot

To answer that question, Residents submitted sworn declarations to the court below, describing their communications at issue and attesting to their good faith. (APP, Vol. I, 137-150.) Each of the Residents acknowledged that the site of the Badlands Golf Course is not subject to the Queensridge CCR's,[5] but stated their understanding that it is subject to the Peccole Ranch Master Plan. The Residents explained a decision by Judge Crockett, holding that Developers' plans for the Badlands Golf Course required a major modification of the Peccole Ranch Master Plan, was the subject of substantial news reports and community discussion. Residents Omerza and Caria participated in handing out forms of declarations to neighbors who purchased their property in reliance on the open space/natural drainage designations of the Peccole Ranch Master Plan, and Resident Bresee signed one of the declarations. Crucially, all three Residents declared under

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argue that Residents' conduct was outside the ambit of NRS 41.637 *even if* all of their conduct was undertaken in good faith.

[5] This fact reveals the "smoke and mirrors" game Developers use to advance their substantive story. The prior litigation they tout did not include a finding that they had an absolute right to develop. The finding was that the Queensridge CCR's did not prevent such development because the land to be developed was not within Queensridge. If there is any doubt that Developers' "absolute right to develop" has not been determined, this Court need only take judicial notice of the ongoing litigation on the subject, including Judge Crockett's determination that no such development can take place without a major modification to the Peccole Ranch Master Plan.

penalty of perjury that they did not have any knowledge or understanding that any of the statements in these declarations was false:

> I have no understanding that any of these statements [in the declaration forms] are false.… [T]he statements correctly summarize my beliefs.… Further, based on my conversations with other Queensridge residents, many other residents have similar beliefs. Finally, this is consistent with the conclusions of Judge Crockett.

(APP, Vol. I, 140, 145, 149.)

As demonstrated in Residents' Opening Brief, this Court found such a declaration sufficient to meet a defendant's initial burden of showing that the disputed communication was true or made without knowledge of its falsehood in *Delucchi v. Songer*, 396 P.3d 826, 833 (Nev. 2017). Developers make two attempts to avoid the import of *Delucchi*. First, they argue that in *Delucchi*, this Court analyzed California law, which they argue is distinguishable on this issue. But the Court did ***not*** rely on any California authority in reaching the conclusion that defendant's declaration, stating that "the information contained in his reports was truthful to the best of his knowledge, and he made no statements he knew to be false," was sufficient to make "an initial showing that the [report] was true or made without knowledge of its falsehood." *Id.*

Second, Developers argue that *Delucchi* is inapposite because it applied the pre-2013 version of NRS 41.660. But, as discussed in that opinion, the pertinent

change to the statute was to the ***second*** prong of the statute, which replaced the former summary judgment standard with a requirement that a plaintiff prove a probability of prevailing on its claims by clear and convincing evidence.[6] The Court's holding that is relevant here, that a declaration attesting to a defendant's good faith is sufficient to make an initial showing that his statements were truthful or made without knowledge of its falsity, is still controlling on that issue.

Moreover, in *Goldentree Master Fund , Ltd. v. EB Holdings II, Inc.*, *supra*, which Developers themselves cited on a different point, this Court removed any lingering doubt that the analysis of *Delucchi* remains in force. In *Goldentree*, the district court denied defendants' special motions to dismiss, determining that defendants had not established by a preponderance of the evidence that the statements at issue, contained in a judicial complaint, were good faith communications. In an unpublished but persuasive opinion applying the current version of the anti-SLAPP statute, this Court reversed that aspect of the lower court's decision. The Court held that "appellants' declarations constituted evidence that their complaint was a good faith communication in furtherance of the right to petition." 2018 WL at *1. The Court noted that "[w]hile respondent contends that

[6] Thus, Developers' attempt to take comfort in the fact that the plaintiff prevailed in *Delucchi*, Ans. Brf. at 43, is misplaced. The plaintiff in that case was not held to the standard Developers must meet, of showing a probability of succeeding on their claims.

the declarations are conclusory, it is unclear what else the declarants could have done to establish that they did not know the complaint's allegations were false." *Id.* at 1 n.4 (citing NRS 41.637). The same reasoning applies here. Residents' declarations were sufficient to meet their threshold burden of showing the claims against them are "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).

Developers offer the Court no decisions to the contrary holding that a comparable declaration was not sufficient to meet the first prong of the anti-SLAPP statute, and Residents can find no case in Nevada or California reaching such a conclusion.

Further, unlike the defendants in *Delucchi* and *Goldentree*, here Residents went beyond their own declarations and also presented Judge Crockett's ruling in the Binion Litigation. In that related case, Judge Crockett carefully examined the relevant evidence and determined that Developers' plans for the Badlands Golf Course, the same plans Residents oppose, require the Developers to seek, and the City to make, a major modification of the Peccole Ranch Master Development Plan. (APP, Vol. I, 159-164.) He reasoned that neighboring residents may have relied upon the existing master planning, which designated the golf course as an

open space/natural drainage system. (*Id.*) Developers repeatedly insist that a judge can be wrong—an observation with which Residents heartily agree—but that misses the point. The question here is not whether Judge Crockett was right. The question is whether the Residents acted in good faith, *i.e.*, whether they could possibly have believed that they or their neighbors had relied on the existing master planning as to the Badlands Golf Course when they purchased their property. Developers contend that Residents must have known otherwise, but that position cannot be reconciled with Judge Crockett's order. As stated in their declaration, Residents knew about Judge Crockett's ruling. It cannot be bad faith for Residents to have believed that Judge Crockett was right, no matter how insistently Developers disagree.

Developers also argue that Judge Crockett's ruling does not apply to Residents, because they do not live in Peccole Ranch, but the only evidence submitted to the court below is to the contrary. Declaration, ¶ 4 (APP, Vol. I, 139, 144, 148). In any event, Judge Crockett's order left it to the Las Vegas City Council to determine whether neighbors of the Badlands Golf Course relied on the existing master planning. Residents' petitioning activities were designed to address that issue, for the benefit of the City Council and other residents. Thus, any

dispute Developers might have raised below as to the boundaries of Peccole Ranch would only have been a red herring.

Developers ask the Court to hold that the Residents' declarations and their reliance on Judge Crockett's ruling are not enough, that Residents were required to offer additional evidence to disprove all of Developers' blanket accusations of fraud and improper intent. Not only is their position contrary to *Delucchi* and *Goldentree*, it is directly at odds with the statutory language and purpose. The anti-SLAPP statute requires a defendant to make an initial showing that the case implicates First Amendment concerns, then the burden shifts to the plaintiff to present *prima facie* evidence to establish a probability of prevailing on its claims. The second prong, placing the burden on the ***plaintiff*** to show a probability of succeeding on its claims, would be rendered entirely meaningless if the ***defendant*** has the burden of first disproving all those same claims to satisfy the first prong.[7] This Court should not impose such a new burden on Residents.

[7] This is why California courts have held that "[a]rguments about the merits of the claims are irrelevant to the first step of the anti-SLAPP analysis." *Coretronic Corp. v. O'Connor*, 192 Cal. App. 4th 1381, 1388, 121 Cal. Rptr. 3d 254, 258 (2011) (cited in Opening Brief, ***ignored*** in Answering Brief); *see also People ex rel. Fire Ins. Exchange v. Anapol*, 211 Cal. App. 4th 809, 823, 150 Cal. Rptr. 3d 224, 235 (2012) (cited in Opening Brief, ***ignored*** in Answering Brief).

2. **Developers Failed to Produce *Prima Facie* Evidence to Support Their Claims.**

Since Residents sufficiently made their initial showing that the claims against them pertained to First Amendment activities, the burden shifted to Developers to present *prima facie* evidence to establish a probability that they will prevail on their claims.[8] Developers attempt to meet that burden by invoking the factual allegations of their own Complaint, Ans Brf. at 33-41. But, as demonstrated above, the Court should not assume their allegations to be true for purposes of the second prong of the anti-SLAPP statute, which expressly requires that Developers make a showing with "evidence." NRS 41.660(3)(b). Developers also make the argument in passing that a handful of exhibits, which they filed with the lower court after its hearing on Residents' special motion, were enough to meet their burden. *See, e.g.*, Ans. Brf. at 37 ("All six exhibits submitted by the Landowners … support their conspiracy claim."). The first problem with this is

[8] Developers repeatedly attempt to avoid the burden of showing a probability of prevailing, relying (again) on *Bikkina v. Mahadevan*, *supra*, in support of the assertion that a lesser showing of "minimal merit" to their claims is enough. But in the parlance of California courts, this is ***not*** a lesser standard. *See Navellier v. Sletten*, 29 Cal. 4th 82, 95, 52 P.3d 703 (2002) (holding that plaintiffs should show "the minimal merit required to survive an anti-SLAPP motion" on remand, "by establishing a probability of prevailing on their claim"). The standard is the same. Even if it were not, NRS 41.660(3)(b) expressly requires a plaintiff to demonstrate "a probability of prevailing on the claim" under the second prong, so no lower standard may be substituted.

that the lower court's order cites to none of these exhibits; indeed, it cites no evidence at all in support of Developers' claims. In any event, none of these exhibits comes close to satisfying Developers' burden of showing a probability of prevailing.

The first two exhibits are a video and transcript of a brief conversation between one of the Residents, Mr. Omerza, and a person named Yohan Lowie, who did not disclose himself to be a principal of the Developers. Ans. Brf. at 8 (*see* APP, Vol. II, 313-323). In the transcript, Mr. Lowie erroneously questioned the existence of a Peccole Ranch Master Plan. Mr. Omerza responded that the Master Plan had been discussed at city council meetings and was mentioned in the Queensridge CC&Rs. (APP, Vol II, 322-323.) Developers do not deny that the Plan was discussed in city council meetings, but assert that it is not mentioned in the CC&Rs. This is hardly the "Gotcha!" Developers seem to believe. They have no evidence to support their assertion that Mr. Omerza knew the Plan was not referenced in the CC&Rs, nor is this fact of any particular significance, since the Plan does exist and was presumably discussed in city council meetings as Mr. Omerza indicated. Certainly it does nothing to undermine Mr. Omerza's belief, as attested in his declaration, that some Queensridge residents relied on the open space designations in the Master Plan when purchasing their property.

Exhibit 3 is a note stating that many Queensridge residents relied upon the open space designation of the Master Plan. (APP, Vol. II, 325.) But the note is ***not*** signed by any of the Residents who have been sued. Even if it had been, it is entirely consistent with the Residents' declarations and with Judge Crockett's ruling in the Binion Litigation. It is apparently different from what Developers believe, but it does nothing to show that Residents knowingly made any false statements.

Exhibit 4 is an email from Resident Bresee stating that, as of July of 2016, he supported redevelopment of the Badlands Golf Course, if accompanied by a $5 million package of related improvements. Residents are at a loss as to what support Developers perceive in this email. It is not contrary to any communications now at issue.

Exhibit 5 is a chain of contentious emails between two attorneys and Queensridge residents, neither of whom is a party to this case. The attorneys apparently disagreed as to the prospects of litigation with the Developers, who attempt to infer an improper motive from the statement, "we have done a pretty good job of prolonging the developer's agony." But the very same email indicates the author fully agrees with Residents' understanding that Developers' plans are contrary to the existing Master Plan, as Judge Crockett later ruled. (APP, Vol. II, 333) ("the approvals from the City since 1990 all required conformance with the

original plan approved in 1990"). It also does nothing to establish that Residents knowingly made any false statements.

Exhibit 6 consists of two unsigned declarations that could be filled in by neighbors of the Residents. (APP, Vol. II, 335.) This is the same form of declaration that the Residents all attested under oath was consistent with their understanding of the facts and with Judge Crockett's decision. Developers observe that the return envelope is to Mr. Omerza, not to any member of the City Council, but this is perfectly consistent with an effort to gather such declarations in order to provide them together to the City Council; indeed, the greeting in each of the declarations is to the City and the declarations would serve no other purpose.

None of these exhibits in any way disproves Residents' declarations to the District Court, nor do they come close to establishing factual support for claims for intentional or negligent interference, for conspiracy, or for intentional misrepresentation. Residents submit that the flimsy nature of this so-called evidence only further demonstrates that this case is indeed a SLAPP suit, meant to punish Residents for their participation in the democratic process.[9]

[9] As anticipated in Residents' Opening Brief, Developers make the belated request for additional discovery in hopes of finding actual evidence of misconduct. Ans. Brf. at 44-46. Even setting aside the eleventh-hour nature of the request, Developers offer no support to satisfy the requirement that information necessary to respond to the anti-SLAPP special motion is exclusively within Residents'

II. RESIDENTS' COMMUNICATIONS WERE SUBJECT TO ABSOLUTE OR QUALIFIED LITIGATION PRIVILEGE.

Finally, the court below should have granted Residents' special motion for the independent reason that Residents' efforts in gathering declarations from their neighbors is absolutely privileged or, at a minimum, subject to an applicable qualified privilege. Developers' cursory argument otherwise, Ans. Brf. at 46-54, fails to overcome this fundamental privilege. There is no basis for their assertion that the privilege is limited to actions that include a defamation claim. Their contention that the privilege does not apply because the anticipated quasi-judicial proceedings had not yet commenced is wrong under the law. Nor can they avoid the privilege by again asserting bad faith by Residents.

Developers' first attempt to avoid litigation privilege is to argue again that the privilege only applies to claims for defamation. Developers proposed below a conclusion of law that absolute litigation privilege only applies to defamation action. The lower court rejected this finding (APP, Vol. III, 576) for very good reason—the case law in Nevada imposes no such restriction on the doctrine. See Opening Brief, at 42-43. Developers contend that even though many judicial

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control. NRS 41.660(4). They simply would like to conduct discovery in hopes of finding something useful (and running up Residents' fees), which cannot be a sufficient basis to forestall operation of the anti-SLAPP statute, or the statute would serve almost no useful purpose. Moreover, because the Residents' conduct is absolutely privileged under the litigation privilege, no additional facts could ever save Developers' claims.

decisions apply litigation privilege to claims other than defamation, they do so only when the plaintiff has *also* pled a defamation claim. Ans Brf. at 47-49. But their only support for this novel concept is no support at all. They cite *Shapiro v. Welt, supra*, for the proposition that litigation privilege acts as a bar to defamation claims, *Shapiro*, 389 P.3d at 266, but the decision does not state or in any way imply that the doctrine ***only*** applies to defamation claims.

To the contrary, this court flatly stated in *Hampe v. Foote* that an "absolute privilege bars any civil litigation based on the underlying communication." *Hampe v. Foote*, 118 Nev. 405, 409, 47 P.3d 438, 440 (2002), *overruled in part on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228 n. 6, 181 P.3d 670, 672 n. 6 (2008). In their Answering Brief, Developers called this an inaccurate summary of the Court's holding, Ans. Brf. at 49 n.15, apparently missing the fact that it is a ***direct quotation*** from the Court's opinion. Similarly, there is nothing in the Court's opinion in *Bank of America Nevada v. Bourdeau*, 115 Nev. 263, 267, 982 P.2d 474, 476 (1999) (privilege can bar a claim for interference with prospective business relation), that limits the Court's holding to actions in which a defamation claim is also asserted. There is no support in the

case law, or any logical reasoning, for Developers' view that the privilege turns on the artfulness of a plaintiff's pleading.[10]

Developers' second attempt to avoid the privilege is to emphasize that the quasi-judicial proceedings at issue had not yet commenced at the time of the disputed communications. Ans Brf. at 49-52. But Developers cannot avoid the black letter rule of law that "the privilege applies not only to communications made during actual judicial proceedings, but also to communications preliminary to a proposed judicial proceeding." *Fink v. Oshins*, 118 Nev. 428, 433, 49 P.3d 640 (2002) (citation omitted). They attempt to question whether Residents were actually gathering declarations for the purpose of providing them to the City Council in connection with quasi-judicial proceedings concerning Developers' plans, but they do not hazard a guess as to what other purpose draft declarations beginning "TO: City of Las Vegas" might conceivably serve.

Nearly all of Developers' arguments are refuted by the *Neville* case, which has been cited by this Court with approval on other anti-SLAPP matters in the *Patin* case. In *Neville*, Neville's employer believed he had breached his contract

[10] The implication of Developers' position is that all of their claims would be barred by litigation privilege if they had chosen also to include a claim for defamation; but because they did not, none of the other claims is barred. Developers make no attempt to justify such an anomalous outcome, where application of the privilege to a given claim depends on what *other* claims are asserted. There are, of course, no decisions reaching such a result.

and misappropriated trade secrets. ***Before*** initiating any lawsuit, the employer sent a letter to its current and former customers who were ***potential*** witnesses or unwitting participants in Neville's alleged wrongful conduct. Although the letter was sent ***before*** any claim was filed, and although it was sent to people who were not going to be parties to any lawsuit, the court determined the litigation privilege applied (and, also, that the employer demonstrated the conduct was in connection with a matter under consideration by an official body under the first prong of the anti-SLAPP analysis). As a result, the court dismissed ***all six*** of Neville's claims based on the employer's letter. *See generally*, *Neville*, 160 Cal. App. 4th 1255, 73 Cal. Rptr. 3d 383 (2008).

Finally, Developers again contend that there is a dispute as to Residents' good faith. Ans. Brf. at 53-54. But they advance this argument only as to the qualified privilege, implicitly conceding that absolute privilege does ***not*** require a finding of good faith. *See Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 60, 657 P.2d 101, 104 (1983) ("absolute privilege precludes liability even where the defamatory statements are published with knowledge of their falsity and personal ill will toward the plaintiff") (citations omitted). Thus, Developers cannot defend the lower court's ruling, which denied the special motion as to litigation

privilege entirely on the erroneous basis that there is a factual dispute as to whether Residents acted in good faith. Order, ¶ 26 (APP, Vol. III, 577).

Developers limit their good faith argument to the qualified litigation privilege, but even in that context they would have to prove the "stringent standard" of "actual malice" by a "preponderance of the evidence." *Pope v. Motel 6*, 121 Nev. 307, 317, 114 P.3d 277 (2005). The flimsy factual support for their assertions of bad faith are not sufficient to raise a legitimate dispute on this issue.

This Court has instructed that "because the scope of the absolute privilege is broad, a court determining whether the privilege applies should resolve any doubt in favor of a broad application." *Clark County Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 382, 213 P.3d 496, 502 (2009) (citation omitted). As a matter of law, Developers' novel legal theories and unsupported insistence that Residents acted in bad faith cannot overcome the litigation privilege. Critically, where the challenged statements are privileged under the litigation privilege, an anti-SLAPP motion must be granted because such "a plaintiff could not show a likelihood of success on the merits, the second step in the anti-SLAPP inquiry." *Neville* 160 Cal. App. 4th at 1263, 73 Cal. Rptr. 3d at 389.

CONCLUSION

For the foregoing reasons and the reasons stated in Residents' Opening Brief, the Court should reverse the district court's ruling and remand with instructions to dismiss this action in its entirety pursuant to the anti-SLAPP statute.

DATED this 26th day of December, 2018.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: */s/ Mitchell J. Langberg*
Mitchell J. Langberg, Esq. Bar No. 10118
100 North City Parkway, Suite 1600
Las Vegas, Nevada 89106

Attorneys for Daniel Omerza, Darren Bresee, and Steve Caria

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), the type style requirements of NRAP 32(a)(6), and the length requirements of NRAP 32(a)(7), because this brief has been prepared in a proportionally spaced typeface using Office Word 2013 in size 14 font in double-spaced Times New Roman, and is 6,850 words in length. I further certify that I have read this brief and that it complies with NRAP 21(d).

Finally, I hereby certify that 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 NRAP 28(e)(1), which requires that every assertion in this brief regarding matters in the record to be supported by appropriate references to the record on appeal.

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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.

DATED this 26th day of December, 2018.

BROWNSTEIN HYATT FARBER
SCHRECK, LLP

By: */s/ Mitchell J. Langberg*
Mitchell J. Langberg, Esq. Bar No. 10118
100 North City Parkway, Suite 1600
Las Vegas, Nevada 89106

Attorneys for Daniel Omerza, Darren Bresee, and Steve Caria

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Brownstein Hyatt Farber Schreck, LLP, and that on this 26th day of December, 2018, I electronically filed and served a true and correct copies of the above and foregoing Reply Brief properly addressed to the to the following:

James J. Jimmerson, Esq.
The Jimmerson Law Firm, P.C.
415 South Sixth Street, Suite 100
Las Vegas, Nevada 89101
Email: ks@jimmersonlawfirm.com

Attorneys for Developers
FORE STARS, LTD., 180 LAND CO., LLC;
and SEVENTY ACRES, LLC

/s/ Paula Kay
An employee of Brownstein Hyatt Farber Schreck, LLP