IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
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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' PETITION FOR REHEARING

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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 10th day of February, 2020.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

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I. INTRODUCTION

As this Court has explained, the anti-SLAPP statute is designed "to provide a mechanism for the expeditious resolution of meritless SLAPPs . . . ."[1] For that very reason, Appellants respectfully submit that this case (which has been pending for nearly two years) ***should not*** be remanded to the District Court to consider whether discovery should be permitted.

As a matter of law, the absolute litigation privilege is a complete bar to Respondents' claims. It prohibits claims based on communications made preliminary to, or during the course of, judicial and quasi-judicial proceedings, regardless of whether those communications were true or false or made with good or evil motive. Thus, no matter what discovery could theoretically reveal, the anti-SLAPP motion should have been granted in full.

In light of this Court's determination that Appellants' communications were made in good faith in direct connection with an issue under consideration by a legislative body ***and*** because those proceedings were quasi-judicial in nature,[2] the absolute litigation privilege bars any claims that arise from those communications. Therefore, remanding for consideration of whether discovery should be allowed

[1] January 23, 2020, Order Vacating and Remanding (the "Order"), p. 4, fn. 4.
[2] Respondents' counsel in the City Council proceedings correctly admitted that much. *See*, APP Vol. II, 293-294.

merely ensures that the matter will return to this Court for determination of an issue that requires no further factual record, is fully briefed, and will ultimately be determined as a matter of law. As a result, the Legislature's goal of expeditious resolution to protect Appellants' First Amendment rights will be frustrated.

Appellants respectfully submit that this Court overlooked the connection between its conclusion on the first prong of the anti-SLAPP analysis and, ***in the specific context of this case***, the applicability of the absolute litigation privilege. Because the District Court had not addressed Respondents' request for discovery, that issue would normally be a natural consideration after this Court concluded Respondents' had not met their second prong burden of making out a *prima facie* case. However, the applicability of the litigation privilege in this case makes any discovery superfluous.

This Court did not expressly address the extensive arguments on the litigation privilege and the quasi-judicial proceedings to which the communications at issue related. By not addressing how those issues relate, but stating that all issues have been considered, this Court's order suggests that it has considered and rejected the applicability of the litigation privilege. This leaves Respondents' room to suggest that this Court has rejected the applicability of the litigation privilege

and that it stands as "law of the case" when, in fact, the litigation privilege applies as a matter of law.

Therefore, the denial of the anti-SLAPP motion should be reversed and the District Court should be ordered to issue an order granting that motion.

II. ARGUMENT

A. Standards On Petition For Rehearing

This Court may grant rehearing when "the court has overlooked or misapprehended a material fact in the record or a material question of law in the case." NRAP 40(c)(2)(A); *see also City of N. Las Vegas v. 5th & Centennial*, 130 Nev. 619, 622, 331 P.3d 896, 898 (2014). While a petition for rehearing is not an opportunity to rehash arguments or points that were already considered and decided in the underlying disposition, when the Court has "failed to consider legal authority directly controlling a dispositive issue in the appeal," a petition for rehearing is proper so that the court may consider the overlooked legal authority. *Bahena v. Goodyear Tire & Rubber Co*., 126 Nev. 606, 608, 245 P.3d 1182, 1184 (2010).

B. Rehearing Is Appropriate Because The Absolute Litigation Privilege Eliminates The Need For The District Court To Consider Discovery Before The Anti-SLAPP Motion Is Granted

On appeal, this Court determined that Appellants had met their first prong burden under NRS 41.637 and 41.660 to demonstrate, by a preponderance of the evidence, that the claims asserted against them arise from their good faith communications in furtherance of the right to petition and their right of free speech. In part, this Court found that all of the challenged communications were "made in direct connection with an issue under consideration . . . by a legislative body . . . ." Order, p. 5-6. This Court also found that Respondents had not met their second prong burden to demonstrate with *prima facie* evidence a probability of prevailing on their claims. Order, p. 9. But, the Court noted that Respondents requested discovery and the District Court did not rule on the merits of that request. Order, p. 12. In light of that, this Court remanded to allow the District Court to consider the issue of discovery.

However, this Court's conclusion that the relevant communications were made in connect with issues under consideration by a legislative body—here, the Las Vegas City Council—implicates the absolute litigation privilege. Because it applies, Respondents' claims are barred as a matter of law. Therefore, as a matter of law, no discovery should be allowed and the motion should be granted.

1. The City Council proceedings are quasi-judicial

This Court determined that the statements underlying each of Respondents' claims were made in connection with issues under consideration by a legislative body. In this case, that was the Las Vegas Council's consideration of "amendment to the Master Plan/General Plan affecting Peccole Ranch." Order, p. 6.

Those City Council proceedings are quasi-judicial. As set forth more fully in Appellants' Opening Brief, the Unified Development Code (UDC) section 19.16.030, *et. seq.* addresses amendments to the General Plan. It provides an extensive set of standards establishing how the City Council must exercise judgment and discretion, hear and determine facts, and render a reasoned written decision. In the course of those proceedings, the Council has the power to order the attendance of witnesses and the production of documents. Las Vegas City Charter §2.080(1)(d),(2)(a). The entire process meets the judicial function test which this Court established as a "means of determining whether an administrative proceeding is quasi-judicial." *State ex rel. Bd. of Parole Comm'rs v. Morrow*, 127 Nev. 265, 273, 255 P.3d 224, 229 (2011).

2. The absolute litigation privilege applies to statements preliminary to quasi-judicial proceedings

Nevada recognizes "the long-standing common law rule that communications uttered or published in the course of judicial proceedings are

absolutely privileged so long as they are in some way pertinent to the subject of controversy." *Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 60, 657 P.2d 101, 104 (1983) (citation omitted). This rule includes "statements made in the course of quasi-judicial proceedings." *Knox v. Dick*, 99 Nev. 514, 518, 665 P.2d 267, 270 (1983) (citation omitted); *see also Circus Circus*, 99 Nev. at 61 ("the absolute privilege attached to judicial proceedings has been extended to quasi-judicial proceedings before executive officers, boards, and commissions") (citations omitted).

Critically, the statement at issue does not have to be made ***during*** any actual proceedings. *See Fink v. Oshins*, 118 Nev. 428, 433, 49 P.3d 640, 644 (2002) (emphasis added) ("the privilege applies not only to communications made during actual judicial proceedings, but also to communications preliminary to a proposed judicial proceeding") (footnote omitted). To the extent that any doubts regarding privilege exist, they should be resolved in favor of application. *See Clark County Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 382, 213 P.3d 496, 502 (2009) (citation omitted) (noting 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") (citing *Fink, supra*).

Because this Court already determined that the statements were made in connection with the City Council proceedings, and because they were quite obviously an attempt to solicit witnesses testimony to submit in the form of declarations, Appellants' statements are all protected by the absolute litigation privilege.

3. Because no discovery would overcome the absolute privilege, there is not discovery issue for the District Court to consider

NRS 41.660(4) provides that only when "information necessary to meet or oppose the burden pursuant to paragraph (b) of subsection 3 is in the possession of another party or a third party and is not reasonably available without discovery, the court shall allow limited discovery for the purpose of ascertaining such information."

Here, because Respondents' claims are barred by the absolute litigation privilege, no discovery is "necessary" to meet Respondents' burden. Nothing they could discovery can overcome the privilege, so no discovery should be allowed. *See Blanchard v. DIRECTV, Inc.*, 20 Cal.Rptr.3d 385, 399, 123 Cal.App.4th 903, 922 (Cal.App. 2 Dist.,2004) (denying discovery because "the litigation privilege renders any such evidence irrelevant" and discovery would not "negate the privilege.").

III. CONCLUSION

Because the statements that underlie Respondents' claims were made in connection with a quasi-judicial proceeding, they were absolutely privileged. Because they were privileged, no amount of discovery could result in Respondents making out a *prima facie* case on any of their claims. As such, discovery should be denied, as a matter of law. This matter ***should not*** be remanded for the District Court to consider discovery. Rather, the order denying the anti-SLAPP motion should be reversed and the matter should be remanded so that the District Court can enter a new order granting the motion and awarding attorneys' fees.

DATED this 10th day of February, 2020.

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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 1 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. 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 10th day of February, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Brownstein Hyatt Farber Schreck, LLP, and that on this 10th day of February, 2020, I electronically filed and served by electronic mail a true and correct copies of the above and foregoing **APPELLANTS' PETITION FOR REHEARING** properly addressed to the following:

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