In the
Supreme Court of the State of Nevada

Electronically Filed
Aug 26 2020 05:54 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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

APPELLANT'S REPLY BRIEF

Marc J. Randazza (NV Bar No. 12265)
Alex J. Shepard (NV Bar No. 13582)
RANDAZZA LEGAL GROUP, PLLC
2764 Lake Sahara Drive, Suite 109
Las Vegas, Nevada 89117
Telephone: 702-420-2001
Facsimile: 702-297-6584
ecf@randazza.com

Attorneys for Appellant

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and 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.

1. Appellant Daphne Williams is an individual, and thus there is no parent corporation or publicly held company that owns 10% or more of her stock.

2. The following law firm represented Appellant in the district court proceedings leading to this appeal and represents Appellant in this appeal:

RANDAZZA LEGAL GROUP, PLLC
2764 Lake Sahara Drive, Suite 109
Las Vegas, NV 89117

No other law firm is expected to appear on Appellant's behalf in this appeal.

RANDAZZA LEGAL GROUP, PLLC

/s/ Marc J. Randazza
Marc J. Randazza (NV Bar No. 12265)
Alex J. Shepard (NV Bar No. 13582)
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

ARGUMENT

1.0 Introduction

Ms. Williams filed a complaint with a government agency about a licensed professional. She felt that his conduct was demeaning to her on the basis of her gender and her race. Respondent, Charles Lazer, filed a defamation complaint to retaliate against her for filing this complaint.

Mr. Lazer's lawsuit is a classic SLAPP suit, as it is designed to retaliate against Ms. William for engaging in constitutionally protected petitioning activity based on her heartfelt opinions. Ms. Williams has exhaustively shown that her statements in her complaint to the Nevada Real Estate Division ("NRED") are either true or were made without knowledge of falsity. And because her statements were made as part of a quasi-judicial proceeding before the NRED, they are absolutely privileged. The Court should reverse the District Court's order denying Ms. Williams's Anti-SLAPP Motion and remand with instructions to grant it.

2.0 Legal Standard

First, an Anti-SLAPP defendant must show that the plaintiff's claim is "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).

Second, once the defendant meets her burden on the first prong, the plaintiff must show that he has a probability of prevailing on his claims. *See* NRS 41.660(3)(b); *see also John v. Douglas County Sch. Dist.*, 125 Nev. 746, 754 (Nev. 2009).

3.0 Ms. Williams Satisfies the First Prong of the Anti-SLAPP Analysis

3.1 First Prong Standards

The Anti-SLAPP statute protects a variety of statements so long as they are made in "good faith," *i.e.*, they are "truthful or [are] made without knowledge of [their] falsehood." NRS 41.637. "Good faith" has nothing to do with being "nice," or being "statements the plaintiff agrees with," nor any other contorted meaning that SLAPP plaintiffs try and twist it to mean. The legislature defined it. If the statements are truthful or the defendant has no knowledge of their being false, they are made in "good faith."

The moving party must make only a *threshold* showing as to the first prong of the analysis; questions going to the merits of the plaintiff's claims are reserved for the second prong. *See John v. Douglas County Sch. Dist.*, 125 Nev. 746, 750 (2009).

Nevada courts may weigh competing evidence in determining good faith. *Rosen v. Tarkanian,* 453 P.3d 1200, 1223-25 (Nev. 2019) (finding it appropriate to weigh competing evidence submitted by the parties and draw reasonable inferences in favor of moving party in deciding whether plaintiff had shown "good faith").

Subsequent decisions of this Court reinforce the conclusion that the moving party's burden under prong one is easy to meet. *See Stark v. Lackey*, 458 P.3d 342, 347 (Nev. 2020) (finding that declaration attesting to good faith belief in accuracy of statements, even though it did not attest to the truth of any individual speaker or statement, was sufficient to satisfy the defendant's burden under prong one in the absence of contravening evidence).[1]

[1] Mr. Lazer argues that *Lackey* is distinguishable because there is evidence that controverts Ms. Williams's declaration. This is a lie, as none of Mr. Lazer's evidence shows or even suggests that Ms. Williams made her statements with knowledge of their falsity.

That is all that is required. Contrary evidence must complete the difficult task of showing that the defendant was lying about her own mental state at the time she made the statements. This is not impossible. A defendant could make statements against interest, or a plaintiff could have other evidence that shows that the defendant *knew* her statements were false.[2] But, as in this case, it is impossible to defeat a prong one showing with a mere declaration provided by a plaintiff as to what the defendant was actually thinking or what she actually *knew*. Evidence in opposition to an Anti-SLAPP motion must be admissible, and the subjective opinion of a plaintiff as to a defendant's state of mind is not.

The Court in *Abrams v. Sanson* approved of the conclusions in *Tarkanian* as to the prong one analysis, and made it clear that **statements of opinion can never be made *with knowledge of***

[2] Without discovery, it can be difficult to provide evidence of knowing falsity. But the Anti-SLAPP statute allows for targeted discovery necessary to oppose an Anti-SLAPP motion. NRS 41.660(4). Mr. Lazer cannot complain of the difficulty of providing evidence of knowing falsity when he refused to avail himself of the very mechanism designed to obtain such evidence.

***falsity* for purposes of the "good faith" analysis.**[3] *Abrams v. Sanson*, 458 P.3d 1062 (Nev. 2020).

Even more recently, this Court made it clear that showing "good faith" is easy in *Taylor v. Colon*, 2020 Nev. LEXIS 48 (Nev. July 30, 2020). *Colon* dealt with a presentation by a Nevada Gaming Control Board officer, the defendant, that allegedly implied a well-known gambler, the plaintiff, was a cheater. *Id.* at *2-3. The plaintiff also alleged the defendant claimed he was a criminal and had been arrested, but the defendant disputed saying this. *Id.* at *3. In evaluating the defendant's Anti-SLAPP motion, this Court found that a declaration from the defendant that the information in his presentation was true and accurate, and where he obtained this information, was sufficient to establish good faith. *Id.* at *13-14. Furthermore, the Court found that the defendant denying he said some of the statements alleged was sufficient to establish good faith, even though the plaintiff disputed this. *Id.* at *14-15. The Court reasoned that "[h]olding otherwise would

[3] Importantly, the Court in *Sanson* applied the same standards as in *Tarkanian* despite the case not dealing with a public figure plaintiff or the issue of actual malice.

make it nearly impossible for a defendant to make a showing of good faith when the parties dispute what was actually said." *Id*. at *14.

Though there is no dispute as to what Ms. Williams said in her NRED Complaint, Mr. Lazer disputes the contents of conversations Ms. Williams had with him and third parties that form the basis of her good faith belief. Under the reasoning in *Colon*, Mr. Lazer's differing account of this factual background cannot defeat Ms. Williams's declarations and evidence establishing that she believed her statements to be true when she made them.

3.2 Mr. Lazer's Claims are Based on Protected Conduct

Mr. Lazer's claims are based upon Ms. Williams's NRED Complaint. These statements fall under NRS 41.637(1)-(3). Mr. Lazer does not argue otherwise, conceding this issue.

3.3 Ms. Williams Has Shown She Made Her Statements in Good Faith

A statement must include a false assertion of fact to be defamatory. Even if there is doubt as to whether some of the statements in the NRED Complaint are completely, 100% true, this level of veracity is not required. The doctrine of substantial truth bars a court from imposing defamation liability based on a statement's

immaterial inaccuracies, so long as the gist of the statement is truthful or made without knowledge of falsity. *See PETA v. Bobby Berosini, Ltd.*, 11 Nev. 615, 627-28 (1995) (finding allegation that trainer beat orangutans with steel rods was not defamatory where trainer actually beat them with wooden rods) (overruled on unrelated grounds in *City of Las Vegas Downtown Redevelopment Agency v. Hecht*, 113 Nev. 644 (1997)). "[M]inor inaccuracies do not amount to falsity unless the inaccuracies 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'" *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 715 n.17 (2002). If the "gist" or "sting" of a story is true, it is not defamatory even if some details are incorrect. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991). This Court recently clarified that "[i]n determining whether the communications were made in good faith, the court must consider the 'gist or sting' of the communications as a whole, rather than parsing individual words in the communications." *Tarkanian*, 453 P.3d at 1222; *see Sanson*, 458 P.3d at 1068-69 (same). None of the nits in Mr. Lazer's suit rise to the level of actionability.

Another reason Ms. Williams has proven she made her statements in good faith is that the main statements at issue, that Mr. Lazer is racist, sexist, unprofessional, and unethical, are statements of opinion. A statement of opinion cannot be false or defamatory, as the First Amendment recognizes that there is no such thing as a "false" idea. *See Pegasus*, 118 Nev. at 714; *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974). An "evaluative opinion" cannot be false or defamatory, either. *See Bobby Berosini*, 11 Nev. at 624-25 (finding that claiming depictions of violence towards animals shown in video amounted to "abuse" was protected as opinion). Such an opinion is one that "convey[s] the publisher's judgment as to the quality of another's behavior, and as such, it is not a statement of fact." *Id.* at 624. To determine whether a statement is one of protected opinion or an actionable factual assertion, the court must ask "whether a reasonable person would be likely to understand the remark as an expression of the source's opinion or as a statement of existing fact." *Pegasus*, 118 Nev. at 715. This Court has recognized that a statement of opinion ***cannot be made with knowing falsity*** for purposes of the "good faith" inquiry. *Sanson*, 458 P.3d at 1068.

3.3.1 Statements of Opinion

Mr. Lazer's claims are premised on Ms. Williams's assertion in her NRED Complaint that he is racist, sexist, unprofessional, and unethical. In his Answering Brief, **Mr. Lazer admits that these statements are matters of opinion and does not argue to the contrary**. (*See* Answering Brief at 23 [admitting "… the terms racist or sexist may, in and of themselves, be statements of opinion …."], 24 [admitting "… these claims of racism and sexism are opinions"], and 61 [referring to the "flagrantly unreasonable opinions contained in Appellant's Statement of Fact …."].)

Even without this concession, it hardly requires explaining that "racist," "sexist," and "unprofessional" are terms that lack a precise meaning, and which readers could interpret in any different number of ways. Merely accusing someone of being racist or discriminatory "is no more than meaningless name calling" and is not defamatory. *See Overhill Farms, Inc. v. Lopez*, 190 Cal. App. 4th 1248, 1262 (2010) (citing *Stevens v. Tillman*, 855 F.2d 394, 402 (7th Cir. 1988)); *see also Cummings v. City of New York*, 2020 U.S. Dist. LEXIS 31572, *54-60 (S.D.N.Y. Feb. 24, 2020) (holding that media commentary calling

teacher "racist" for social studies lesson on slavery was protected as opinion).

Calling someone "sexist" is likewise purely a statement of opinion. *See Hanson v. County of Kitsap*, 2014 U.S. Dist. LEXIS 89036, *15-16 (W.D. Wash. June 30, 2014) (finding statement that plaintiff made a "sexist response" was expression of non-actionable opinion). So too is the term "unprofessional." *See Moldea v. New York Times Co.*, 22 F.3d 310 (D.C. Cir. 1994) (finding that criticisms of a journalist's "sloppy journalism" and unprofessional techniques were not defamatory).

"Unethical" is arguably susceptible to a defamatory meaning if it implies false, undisclosed facts. But that is not what happened here. The NRED Complaint lays out precisely what conduct Ms. Williams alleged was unethical, and Mr. Lazer did not dispute he engaged in any such conduct. Mr. Lazer disagreed with the opinion that his conduct was unethical, but Ms. Williams's evaluative opinion of it is non-actionable; she disclosed the facts on which she based her opinion. *See Bobby Berosini*, 11 Nev. at 624-25. Even the NRED initially shared her opinion. To the extent "racist," "sexist," or "unprofessional" are not

statements of pure opinion, they are also expressions of evaluative opinion based on disclosed facts.

A wide variety of courts throughout the nation have found that such statements amount to expressions of opinion or rhetorical hyperbole that cannot support a claim for defamation. *See Stevens v. Tillman*, 855 F.2d 394, 402 (7th Cir. 1988) (noting that calling someone a racist "is not actionable unless it implies the existence of undisclosed[] defamatory facts"); *Meissner v. Bradford*, 156 So.3d 129, 133-34 (La. Ct. App. 2014) (holding statement that former president of youth football league "has a problem with people of color" was a statement of opinion in the nature of hyperbole rather than an actionable statement of fact); *Ward v. Zelikovsky*, 136 N.J. 516, 643 A.2d 972, 983 (N.J. 1994) (holding statement that plaintiff hated or did not like Jews was not actionable, as it "cannot be distinguished from characterizations that a person is a 'racist,' 'bigot,' 'Nazi,' or 'facists'"); *Silverman v. Daily News, L.P.*, 129 A.D.3d 1054, 1055-56, 11 N.Y.S.3d 674 (N.Y. App. Div. 2015) (holding defendant's publication that plaintiff authored "racist writings" is a statement of opinion, not fact); *Covino v. Hagemann*, 165 Misc. 2d 465, 627 N.Y.S.2d 894, 899-900 (N.Y. Sup. Ct. 1995) (holding statements

that characterized plaintiff's behavior as "racially insensitive" were protected expressions of opinion and that "[i]n daily life [the word] 'racist' is hurled about so indiscriminately that it is no more than a verbal slap in the face"); *Garrard v. Charleston Cty. Sch. Dist.*, 429 S.C. 170, 201, 838 S.E.2d 698, 714 (S.C. Ct. App. 2019) (findings the terms "racist" and "racist douchebag" in articles were not actionable because they were expressions of opinion and rhetorical hyperbole); *Forte v. Jones*, 2013 U.S. Dist. LEXIS 39113, *18-19 (E.D. Cal. Mar. 19, 2013) (in context of allegations that plaintiff was a member of the KKK, holding that defendant's statement that he was "lynched with words" may have "at worst" created implication that "Plaintiff and the others confronting Defendant are racists. As explained above, that sort of name-calling is not actionable, no matter how subjectively hurtful it may be, because the statement is not of the sort that can be verified as false); *Baca v. Moreno Valley Unified Sch. Dist.*, 936 F. Supp. 719, 728 n.6 (C.D. Cal. 1996) (finding that statement such as "'X is a racist'[] is legally an expression of opinion rather than a statement of fact and hence not actionable as slander").[4]

[4] Mr. Lazer argues Ms. Williams couldn't possibly have had a

Because these statements of opinion cannot be false, they were *per se* made in good faith under NRS 41.637. This leaves only a number of factual statements in the NRED Complaint, many of which Mr. Lazer admits are true, and for which Mr. Lazer has provided no evidence of knowing falsity.

3.3.2 Mr. Lazer's May 13, 2017 Statements

Mr. Lazer did not contest that he said to Ms. Williams on May 13, 2017, "Daphne, I think you are going to be successful. When you become successful and you want to buy a bigger house and if your brother is retired by then, I'd be glad to be your realtor." (II-AA 269, ¶5; I-AA 237, ¶24.)[5] Ms. Williams subjectively felt that this statement was sexist. (*See* II-AA 269, ¶6.) It is absurd that we are in a defamation case arguing about what Ms. Williams subjectively felt, and that we

---

negative opinion of him because she said nice things about him during the sale of the condo. This logic is faulty. One can be polite while having a legitimate grievance.

[5] In his Answering Brief, Mr. Lazer argues for the first time that he was misquoted in this exchange and actually said Ms. Williams was already successful. (Answering Brief at 24.) First, by not making this argument at the district court, Mr. Lazer has waived it on appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52 (1981). Second, whether Mr. Lazer said Ms. Williams was or was not successful is irrelevant. That statement on its own says noting negative about Mr. Lazer and cannot be defamatory.

have argument stating that she could not have felt that way. This is a statement of opinion based on admittedly true facts. It cannot be false, and thus Ms. Williams made it in good faith.

3.3.3 Mr. Lazer Shared Information Ms. Williams Thought Was Confidential

Mr. Lazer denied only that he told Ms. Williams that he and the Seller met on a dating website. (I-AA 144, ¶29.) He admitted that he told Ms. Williams the commission he was set to earn, and he was silent on Ms. Williams's claim that he told her further information on how he and the Seller met. (I-AA 144–145, ¶¶29–32.) Mr. Lazer admitted to the NRED in 2017 that he told Ms. Williams personal information about the Seller and the nature of their alleged "friendship," but claimed he was authorized to do so. Ms. Williams was not aware of any authorization either to tell her about the Seller's personal life or Mr. Lazer's commission, and Mr. Lazer did not allege Ms. Williams was aware of such authorization.[6] (*See* II-AA 269, ¶9.)

---

[6] Mr. Lazer claimed that Ms. Williams would have known about this alleged authorization if she asked the Seller about it. (*See* I-AA 237–238, ¶25.) But that is not an allegation of knowing falsity, and Ms. Williams was not required to perform a reasonable investigation to have made her statements in good faith.

This is a statement of opinion based on facts that are admittedly true. Minor disagreements as to whether Mr. Lazer told Ms. Williams that he and the Seller met on a dating website do not affect the "gist" or "sting" of this statement. It only matters that Ms. Williams subjectively believed this statement to be true. She thus made this statement in good faith as the statute defines that term.

3.3.4 Mr. Lazer's Contact with the Appraiser

Mr. Lazer admitted that he has a practice of communicating with appraisers prior to their appraisal of real estate in his deals. (*See* I-AA 238, ¶26.) He claimed there is nothing unethical about this practice, but that is irrelevant. Ms. Williams spoke with an NRED employee prior to filing the NRED Complaint, and the employee told her realtors are not supposed to do this. (*See* II-AA 270, ¶12.) Ms. Williams *subjectively believed* that Mr. Lazer's practice was unethical. (*See id*.) She made this statement in good faith as defined by the statute.

3.3.5 Ms. Williams Allowed Removal of Property from the Condo

Ms. Williams stated in the NRED Complaint that Mr. Lazer falsely claimed she "didn't let the seller's 'movers' get into the house to access her [the Seller's] property." (I-AA 55.) Mr. Lazer's claim to this

extent is a false statement of fact. Ms. Williams allowed people with the Seller's authorization into the condo to remove the Seller's property. Mr. Lazer admitted this in his response to the NRED and his Initial Complaint. (*See* II-AA 312, 318, & 323–324.) The only remaining items in the condo were wall-mounted shelves and a television bracket, which Ms. Williams believed are fixtures that were sold along with the condo. (*See* II-AA 270, ¶16; II-AA 278, ¶4; II-AA 312, 318, & 323–324.) At most, there is only a disagreement as to what constitutes "personal property" as opposed to "fixtures."

Even if there is some possible ambiguity in the meaning of the words in the NRED Complaint, Ms. Williams made this statement without knowing it to be false. She thus made this statement in good faith as defined by the statute.

3.3.6 Mr. Lazer Did Not Send Ms. Williams a Fully Executed Copy of the RPA[7]

Mr. Lazer claimed Ms. Williams lied when she told the NRED that Mr. Lazer did not provide her a signed copy of the RPA because he sent

[7] Relatedly, Ms. Williams stated in her NRED Complaint that Mr. Lazer did not provide her a receipt for earnest money paid. (I-AA 55.) Mr. Lazer admits he did not do so, proving the statement true. (Answering Brief at 18.)

her a version with the Seller's signature on May 18, 2017. (*See* I-AA 238, ¶28.) However, Ms. Williams's statement is provably true. The version Mr. Lazer sent was not the final version, as Ms. Williams made revisions to the terms of the RPA during a May 20, 2017 meeting at a Whole Foods.[8] Because the Seller needed to approve these additional terms, Ms. Williams asked Mr. Lazer to send her a fully executed copy once the Seller signed it. (*See* II-AA 271, ¶¶17–20.) He did not. Ms. Williams did not receive it until after escrow. (*See* II-AA 271, ¶¶20-21.)

Ms. Williams's statement is thus literally true. Even if there is some possible ambiguity in the meaning of the words in the NRED Complaint, she made this statement without knowing it to be false. She thus made this statement in good faith as defined by the statute.

---

[8] Mr. Lazer falsely claims Ms. Williams called him that day to request that he send a fully-executed copy of the RPA to Ms. Williams's loan officer, Bryan Jolly, which never happened. (III-AA 570, ¶¶ 5-6.) As explained in Ms. Williams's Opening Brief, this attempt at a factual dispute should not be credited. (Opening Brief at 12-13, 51-52.) Particularly in light of *Colon*, the Court should view this dispute as to what Ms. Williams said to Mr. Lazer as the kind of dispute that cannot defeat a showing of good faith. *Colon*, 2020 Nev. LEXIS 48 at *13-15.

3.3.7 Mr. Lazer Falsely Claimed Ms. Williams was Responsible for Delays in Closing Escrow

Mr. Lazer claimed during the sale of the condo that the delays in closing escrow were due solely to Ms. Williams's negligence and failure to meet due diligence deadlines. (*See, generally*, II-AA 348-403.) Mr. Lazer's claims were false at the time he made them.

Ms. Williams's Opening Brief explains that there were several delays in the close of escrow outside of her control, including the appraisal being delayed, the condo questionnaire taking longer than usual to arrive, and staff shortages at Alterra Home Loans in July 2017. (*See* Opening Brief at 52-54.) Mr. Lazer does not dispute these facts or that third parties were either the cause of or contributed to delays.

Regardless of whether Mr. Lazer believed these delays were due to Ms. Williams's actions, he falsely claimed she was responsible for delays

in closing escrow.[9] Ms. Williams's complaint is thus true or made without knowledge of its falsity – good faith as defined by the statute.[10]

3.3.8 The June 2017 Call with the Seller

Ms. Williams had a phone call with the Seller on June 27, 2017 during which the Seller said, *inter alia*, that Mr. Lazer instructed her (his client) to tell Ms. Williams to apologize to Mr. Lazer, that Mr. Lazer was trying to sabotage the sale of the condo, and that Mr. Lazer had ulterior motives. (*See* II-AA 272–273, ¶¶29-30.) Ms. Williams contemporaneously told her mother about this conversation. (*See* II-AA 299, ¶7.) The Seller did not deny that this conversation took place or that Mr. Lazer instructed her to tell Ms. Williams to apologize. (*See* I-AA 149, ¶¶12-13.)

---

[9] Most of Mr. Lazer's argument on this point should be ignored, as he testifies as to how Alterra acted or would have acted (Answering Brief at 7-10), but has no personal knowledge of this, and his claims are contradicted by Mr. Jolly, who actually worked on processing the loan for purchasing the condo and had personal knowledge of it.

[10] Mr. Lazer simply ignores the other sources of delays in closing escrow. He also provides attorney argument as to what most lenders do upon receiving a condo questionnaire and the usual timeline for processing them (Answering Brief at 8-9), but there is no authority or record evidence cited for these purported facts. The Court should ignore them.

While Mr. Lazer disputed the contents of this conversation, he made no allegation and provided no evidence that Ms. Williams made her statements regarding this conversation with knowledge they were false. The Seller provided a declaration disputing some of Ms. Williams's claims about this conversation,[11] but there is no evidence suggesting that Ms. Williams's recollection of the conversation is not accurately reflected in her declarations.[12] Knowing falsity is particularly unlikely given that Ms. Williams contemporaneously relayed these statements to her mother. She met her burden of showing she made this statement in good faith as defined by the statute.

---

[11] *Colon* is again instructive here, as Mr. Lazer disputes who said what, but does not actually make a claim that Ms. Williams knew what she said was false. This is not the kind of dispute that can defeat a showing of good faith. *Colon*, 2020 Nev. LEXIS 48 at *13-15.

[12] It is important to reiterate that Ms. Williams's subjective recollection is the only thing important here. Mr. Lazer's argument as to knowing falsity is premised entirely on the proposition that if Ms. Williams's statements are false, she must have known they were false. This is not correct, as people's memories are imperfect and perceptions are debatable. This is particularly so in stressful or traumatic situations. *See* Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U.PA. L. REV. 399-461 (2019).

3.3.9 Ms. Williams's NRED Complaint is Protected if Any of the Statements in it Were Made in Good Faith

Even if Mr. Lazer could rebut Ms. Williams's showing of good faith as to some of her statements at issue, he has not done so as to all of them. Any possibly questionable statements are inextricably intertwined with statements that undeniably are either true or that Ms. Williams made without knowledge of falsity. This makes Mr. Lazer's claims "mixed" causes of action for Anti-SLAPP purposes. These "mixed cause[s] of action [are] subject to the Anti-SLAPP statute if **at least one of the underlying acts is protected conduct**, unless the allegations of protected conduct are merely incidental to the unprotected activity." *Lauter v. Anoufrieva*, 642 F. Supp. 2d 1060, 1109 (C.D. Cal. 2008) (emphasis added); *see also Salma v. Capon*, 161 Cal. App. 4th 1275, 1287 (2008) (holding that a cause of action based on both protected and unprotected activity under California's Anti-SLAPP statute is subject to an Anti-SLAPP motion); *Peregrine Funding, Inc. v. Sheppard Mullin*, 133 Cal. App. 4th 658, 675 (2005) (finding that because plaintiffs' claims "are based in significant part on [defendant's] protected petitioning activity," the first anti-SLAPP prong was

satisfied"). Several of Ms. Williams's statements were unquestionably expressions of opinion, true, or made without knowledge of falsity. None of the statements on which Mr. Lazer premises liability are merely incidental to these protected statements, and thus all of Ms. Williams's statements are protected.

4.0 Mr. Lazer Has Not Shown a Probability of Prevailing on His Claims

A plaintiff's burden of proof on prong two is "the same burden of proof that a plaintiff has been required to meet pursuant to California's anti-Strategic Lawsuit Against Public Participation law as of the effective date of this act." NRS 41.665(2). Mr. Lazer allegations in his complaint are not sufficient; he must present "substantial evidence that would support a judgment of relief made in the plaintiff's favor." *S. Sutter, LLC v. LJ Sutter Partners, L.P.*, 193 Cal. App. 4th 634, 670 (2011). Mr. Lazer has not done so.

Mr. Lazer makes the bizarre argument in his Answering Brief that the Court cannot consider any affirmative defenses, such as absolute privilege, in deciding an Anti-SLAPP motion. (Answering Brief at 44-47.) This is his first time making the argument, meaning he has waived it. *Brown*, 97 Nev. at 52. But, just for fun, let us presume

that he raised this ludicrous position before – it has no basis in law or reason. If this were true, then no SLAPP defendant could raise the affirmative defense of *truth* in an Anti-SLAPP case. Lawsuits against the Supreme Court Justices, themselves, for statements in their judicial opinions would never be dismissed under the Anti-SLAPP law if the Court were to adopt this novel theory. Finally, this Court has explicitly stated the obvious – that the issue of privilege may be considered in Anti-SLAPP proceedings. *See Shapiro v. Welt*, 2018 Nev. Unpub. LEXIS 1202, *11-12 (Nev. Dec. 27, 2018). California has also expressly found that affirmative defenses such as privilege may be considered in deciding an Anti-SLAPP motion. *See, e.g., Feldman v. 1100 Park Lane Associates*, 160 Cal. App. 1467, 1485 (2008) (holding that "[t]he litigation privilege is 'relevant to the second step in the anti-SLAPP analysis in that it may present a substantive defense a plaintiff must overcome to demonstrate a probability of prevailing'") (quoting *Flatley v. Mauro*, 39 Cal. 4th 299, 323 (2006)). Nevada's Anti-SLAPP statute explicitly uses the same burden of proof on prong two as California's statute, meaning Mr. Lazer is required to defeat Ms. Williams's showing that the litigation privilege applies here. *See* NRS 41.665(2).

4.1 Ms. Williams's Statements are Absolutely Privileged

Ms. Williams's statements to the NRED are absolutely protected under the litigation privilege. Statements made in quasi-judicial proceedings, such as those before administrative bodies, are absolutely privileged. *See Sahara Gaming Corp. v. Culinary Workers Union Local 226*, 115 Nev. 212, 217 (1999); *see also Lewis v. Benson*, 101 Nev. 300, 301 (1985) (applying absolute privilege to citizen complaint to internal affairs bureau against police officer). This privilege bars any liability for statements made in the course of these proceedings, **even if they are made maliciously and with knowledge of their falsity**. *See Sahara Gaming*, 115 Nev. at 219. It is not "limited to the courtroom, but encompasses actions by administrative bodies and quasi-judicial proceedings. The privilege extends beyond statements made in the proceedings, and includes statements **made to initiate official action**." *Wise v. Thrifty Payless, Inc.*, 83 Cal. App. 4th 1296, 1303 (2000) (emphasis added) (holding absolute privilege applied to husband's report to the Department of Motor Vehicles regarding wife's drug use and its possible impact on her ability to drive); *see also Fink v. Oshins*, 118 Nev. 428, 433-34 (2002) (holding that "the privilege applies

not only to communications made during actual judicial proceedings, but also to '**communications preliminary to a proposed judicial proceeding**'") (emphasis added).

"[The] absolute privilege exists to protect citizens from the threat of litigation for communications to government agencies whose function it is to investigate and remedy wrongdoing." *Wise*, 83 Cal. App. 4th at 1303. "[C]ourts should apply the absolute privilege liberally, resolving any doubt 'in favor of its relevancy or pertinency,'" and district courts should "resolve[] any doubt in favor of a broad application of the absolute privilege." *Oshins*, 118 Nev. at 434. Finally, the privilege applies to all claims based on the same set of facts: "[i]f a statement is protected, either because it is true or because it is privileged, that 'protection does not depend on the label given the cause of action.'" *Francis v. Dun & Bradstreet, Inc.*, 3 Cal. App. 4th 535, 540 (1992) (quoting *Reader's Digest Assn. v. Superior Court*, 37 Cal. 3d 244, 265 (1984)). "Though the privilege originally formed as a defense to defamation, it has been expanded to cover a variety of torts.'" *Allstate Ins. Co. v. Belsky*, 2018 U.S. Dist. LEXIS 162318, *8 (D. Nev. Sept. 21, 2018); *Lebbos v. State Bar*, 165 Cal. App. 3d 656, 667 (1985) (noting that

litigation privilege applies to claims including, *inter alia*, intentional infliction of emotional distress and negligence).

Though the Nevada Supreme Court has not yet dealt with a case applying the privilege to a complaint to the NRED, a Clark County trial court did come to this obvious conclusion. *See Real Estate Central, LLC v. Ekus*, 2011 WL 13156946, *1 (Nev. Dist. Ct. Oct. 3, 2011). The trial court found that "the statements made by Defendant Ekus to the Real Estate Division are quasi-judicial in nature, not unlike the filing of a complaint with a police department's internal affairs office," and that the absolute privilege "extends to complaints filed with the Real Estate Division, or else complainants would be dissuaded from filing such legitimate complaints." *Id.* Furthermore, there are statutory procedural requirements for disciplinary proceedings before the NRED. These provide that a respondent is entitled to an opportunity to provide a written answer (NRS 645.685); a respondent is entitled to a hearing (NRS 645.680, 645.690); the NRED may subpoena and depose witnesses (NRS 645.700, 645.730); a respondent may provide their own witnesses (NRS 645.730(3)); and a respondent may seek judicial review of an adverse licensing decision (NRS 645.760). By his own admission, Mr.

Lazer was able to provide a written response to the NRED and appealed an initial finding that he had violated Nevada statutes and ethics codes. (Answering Brief at 26-27.) These procedural safeguards make an NRED disciplinary proceeding a quasi-judicial proceeding entitled to the absolute litigation privilege.

Other states have recognized that the absolute privilege applies to such circumstances, as well. *See King v. Borges*, 28 Cal. App. 3d 27, 34 (1972) (extending absolute privilege to complaint against real estate agent filed with state division of real estate); *see also Vultaggio v. Yasko*, 215 Wis. 2d 326, 334 (Wis. 1998) (noting Wisconsin extending absolute privilege to "statements made to a real estate broker's board"). Ms. Williams's complaint to the NRED is comparable to a complaint filed with a state bar against an attorney, which is considered an official proceeding. *See Lebbos*, 165 Cal. App. 3d at 667 (finding that "[i]nformal complaints to the State Bar are part of 'official proceedings' protected by" California's privilege); *see also Katz v. Rosen*, 48 Cal. App. 3d 1032, 1036-37 (1975)[13] (stating that "[i]nformal complaints received

[13] Mr. Lazer argues that the Court should disregard California cases applying its statutory litigation privilege (Answering Brief at 53-

by a bar association which is empowered by law to initiate disciplinary procedures are as privileged as statements made during the course of formal disciplinary proceedings").[14]

Nevada has found that establishing this absolute privilege requires two elements to be satisfied: "(1) a judicial [or quasi-judicial] proceeding must be contemplated in good faith and under serious consideration, and (2) the communication must be related to the litigation." *Jacobs v. Adelson*, 325 P.3d 1282, 1285 (Nev. 2014).[15] "Good faith" here is a low bar because the privilege applies "even when the motives behind [the statements] are malicious and they are made with

---

54), but provides no real argument as to why. Mr. Lazer provides nothing to suggest that Nevada's privilege is or should be categorically narrower than California's. The purpose of the privilege is to encourage citizens to petition the government without fear of retaliation, and recognizing that it applies to NRED complaints would, without question, further this purpose.

[14] Mr. Lazer argues the absolute privilege should not apply to complaints against professionals who do not have a union capable of paying expenses related to disciplinary proceedings. (Answering Brief at 49-50.) But lawyers are in the exact same position, and the undersigned can attest that responding to frivolous bar complaints can be an expensive and time-consuming process. That does not make the statements in such complaints any less privileged.

[15] This privilege applies equally to lawyers and non-lawyers alike. *See Clark Cty. Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 383 (2009) ("VESI").

knowledge of the communications' falsity." *Id*. This condition of the absolute privilege is satisfied if the speaker makes a statement while seriously considering litigation or a quasi-judicial proceeding, regardless of their motives.

Mr. Lazer's complaint show this to be the case. Ms. Williams told Mr. Lazer in June 2017 she planned to file a complaint against him, then did so two months later. To bolster the strength of her complaint, at least initially, **the NRED found cause to discipline Mr. Lazer** – though they later reversed on appeal. (*See* II-AA 417–421.) The NRED had the ability to initiate an investigation, which it did, and impose discipline, which it also initially did. The NRED investigation, including the NRED Complaint which initiated it, is thus an "official proceeding" for purposes of the litigation privilege.[16] The privilege

[16] Mr. Lazer suggests that the privilege does not apply because the NRED did not conduct a hearing on Ms. Williams's NRED Complaint. (Answering Brief at 49, 51-52.) But the privilege does not hinge on what action the government body eventually takes; it only hinges on whether the defendant's statements were made in anticipation of a judicial or quasi-judicial proceeding. Citizens would be less likely to file complaints against realtors if they knew the privilege depended on how seriously the NRED took the complaint.

applies even if every statement in the NRED Complaint was false and Ms. Williams knew every statement to be false.

The NRED Complaint is unquestionably absolutely privileged, even if Ms. Williams knew that every statement in it was false. All of Mr. Lazer's claims must fail and he cannot show a probability of prevailing on them.

4.2 Mr. Lazer's Defamation Claims Fail as a Matter of Law

To establish a cause of action for defamation, a plaintiff must show: (1) a false and defamatory statement by the defendant concerning the plaintiff; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages. *See Wynn v. Smith*, 117 Nev. 6, 10 (Nev. 2001); *see also Pegasus,* 118 Nev. at 718. A statement is only defamatory if it contains a factual assertion that can be proven false. *See Pope v. Motel 6*, 114 P.3d 277, 282 (Nev. 2005).

If a statement is true or substantially true, such that the "gist" or "sting" of a story is true, it is not defamatory even if some details are incorrect. *Masson*, 501 U.S. at 517. A statement cannot be defamatory if it is an expression of opinion. *See Pegasus*, 118 Nev. at 714.

As explained above, the majority of the statements in the NRED Complaint which contain factual assertions are true or substantially true, and are not defamatory. This only leaves the statements that Mr. Lazer's conduct described in the NRED Complaint was racist, sexist, unprofessional, and unethical. As explained above, these are statements of opinion which cannot support a defamation claim.

Aside from this defect, Mr. Lazer provided absolutely no evidence that he suffered any damages whatsoever. He simply claimed he had to spend time responding to the NRED, which is not reputational harm recoverable in a defamation claim. "It was inconvenient for me to exercise my due process rights" is not the same as "my reputation was damaged." Mr. Lazer cannot show a probability of prevailing on his defamation claims.

4.3 Mr. Lazer's Business Disparagement Claim Fails

A defamation action concerns statements that injure a plaintiff's personal reputation, while a business disparagement claim concerns statements regarding the quality of the plaintiff's goods or services. *VESI*, 125 Nev. at 385-86. Ms. Williams's statements are not of the character with which a claim for business disparagement is concerned,

and Mr. Lazer does not respond to this argument, conceding it. This claim also fails because it requires falsity, lack of privilege, actual malice, and proof of special damages, all of which are absent on the record. *See id*. at 386. This claim thus fails for the same reasons the defamation claims fail.

4.4 Mr. Lazer's Intentional Infliction of Emotional Distress Claim Fails

To establish a cause of action for intentional infliction of emotional distress, Mr. Lazer must affirmatively prove: "(1) extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress, (2) the plaintiff's having suffered severe or extreme emotional distress, and (3) actual or proximate causation." *Olivero v. Lowe*, 116 Nev. 395, 398-99 (2000) (citing *Star v. Rabello*, 97 Nev. 125, 126 (1981)) (citations omitted). "Extreme and outrageous conduct is that which is outside all possible bounds of decency and is regarded as utterly intolerable in a civilized community." *Maduike v. Agency Rent-A-Car*, 114 Nev. 1, 4 (1998). The bar for establishing extreme and outrageous conduct is high, and not every statement that one finds personally upsetting may provide the basis for liability. *See Chehade Refai v. Lazaro*, 614 F. Supp. 2d 1103, 1121-22 (D. Nev. 2009).

Harm is only recognized for this tort if "the stress [is] so severe and of such intensity that no reasonable person could be expected to endure it." *Alam v. Reno Hilton Corp.*, 819 F. Supp. 905, 911 (D. Nev. 1993).

First, Mr. Lazer's claim fails because the majority of the statements at issue are undeniably true, and an IIED claim cannot be premised on a true statement. *See Dun & Bradstreet*, 3 Cal. App. 4th at 540. Second, Mr. Lazer cannot prove the elements of an IIED claim. There is nothing extreme or outrageous about Ms. Williams's conduct. She followed the NRED's procedures for submitting a complaint against a licensed realtor, and the NRED felt the allegations were sufficient initially to impose discipline on him. And as explained above, Ms. Williams's statements were either true or statements of opinion. There is nothing extreme about telling an executive body tasked with overseeing realtors about the actual or perceived misconduct of a realtor. Even if Ms. Williams's statements were false, they amount to nothing more than minor insults which cannot make out an IIED claim. Furthermore, there is nothing particularly severe or extreme about the stress Mr. Lazer alleges. Having to spend time responding to the

NRED is not stress so severe and of such intensity that "no reasonable person could be expected to endure it." *Alam*, 819 F. Supp. at 911.

And as with his other claims, the IIED claim fails for lack of evidence of damages. There are no documents and no declarations even claiming, much less specifying or quantifying, any kind of emotional distress caused by the NRED Complaint. There is likewise no evidence that Ms. Williams intended to inflict any kind of emotional distress when she filed the NRED Complaint. This claim thus fails.

4.5 Mr. Lazer's Negligence Claim Fails

Mr. Lazer provides no argument as to this claim, conceding that it is meritless. With no analysis necessary at all, this claim should be dismissed and fees assessed.

CONCLUSION

For the foregoing reasons, the Court should reverse the District Court's order denying Ms. Williams's Anti-SLAPP Motion with instructions to grant it.

Dated: August 26, 2020.

RANDAZZA LEGAL GROUP, PLLC

/s/ Marc J. Randazza

Marc J. Randazza (NV Bar No. 12265)
Alex J. Shepard (NV Bar No. 13582)
Attorneys for Appellant

CERTIFICATION OF ATTORNEY

1. The undersigned has read the following reply brief of Defendant/Appellant Daphne Williams;

2. To the best of the undersigned's knowledge, information and belief, the brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

3. The following brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e) that every assertion in the brief regarding matters in the record be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found; and

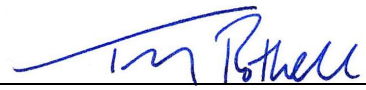
4. The brief complies with the formatting requirements of Rule 32(a)(4)-(6) and the type-volume limitations stated in Rule 32(a)(7). Specifically, the brief was written in 14-Point Century Schoolbook font, and the brief is 6,994 words as counted by Microsoft Word.

Dated: August 26, 2020. /s/ Marc J. Randazza
Marc J. Randazza

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August, 2020, a true and correct copy of the foregoing Appellant's Reply Brief was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system.

Respectfully Submitted,



Employee,
Randazza Legal Group, PLLC