

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER KHORSANDI, M.D.;
CHRISTOPHER KHORSANDI, M.D.,
PLLC; CATHERINE LE
KHORSANDI,

Appellants/Cross-
Respondents,

v.

SMITH PLASTIC SURGERY, INC.
and LANE F. SMITH, M.D.,

Respondents/Cross-
Appellants.

Case No.: 80957

District Court

Case No. A-19-804819-C

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Dec 09 2020 02:16 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

**REPLY TO ORDER TO SHOW
CAUSE**

I. INTRODUCTION

In its Order to Show Cause, the Court correctly identified the two significant jurisdictional deficiencies with the Respondents Smith Plastic Surgery, Inc. and Lane F. Smith, M.D.'s (hereinafter "Respondents") cross-appeal. First, the cross-appeal was filed outside of the time allowed under NRAP 4(a). Second, Respondents are not an aggrieved party by the District Court's March 4, 2020 Order (hereinafter "Order") and therefore they do not have standing to appeal the Order. The Respondent's Response failed to demonstrate that the Court has jurisdiction. Accordingly, the Court should dismiss Respondents' cross-appeal for lack of jurisdiction.

II. RELEVANT FACTS

On November 4, 2019, Respondents filed their Complaint, bringing a litany of claims against Dr. Christopher Khorsandi ("Dr. Khorsandi"), Catherine Le ("Ms. Le"), and Christopher Khorsandi, M.D., PLLC (the "Practice") (collectively the "Khorsandi Parties" or "Appellants"). All of these claims relate to negative reviews of Respondents' plastic surgery practice that were posted by an anonymous user, "Cecily S.," who Respondents allege is connected to Appellants.

On January 10, 2020, Appellants filed their Special Motion to Dismiss Pursuant to NRS 41.660, or in the Alternative, Motion to Dismiss Pursuant to NRCp 12(b)(5) ("Special Motion"). The Special Motion attached declarations from Dr. Khorsandi and Ms. Le stating that they did not make the statements at issue in the complaint. The Respondents' opposition provided no evidence connecting the Cecily S. posts to Dr. Khorsandi or Ms. Le. For the first time at the hearing on the Special Motion, Respondents suggested that some of the Cecily S. posts were made at times and locations where Dr. Khorsandi or Ms. Le were traveling. However, nothing was authenticated or provided to the District Court.

After taking the Special Motion under advisement, the District Court issued its Order on March 4, 2020. Based on the District Court's interpretation of the anti-SLAPP statutes, it denied the Special Motion based on Dr. Khorsandi and

Ms. Le's denials that they made the statements.¹ "But since Defendants deny making the statements, the Court finds there cannot be an analysis whether the statements were made in 'good faith,' which is the first consideration of the NRS anti-SLAPP statutes: NRS 41.637(4), NRS 41.650, NRS 41.660." (Ex. 1, Order at 4-5.)

In that same Order, the District Court noted the anemic evidence (if any) that Respondents had presented in support of their position to the deny the Special Motion and stated that it was "concerned with allowing litigation in this matter to go forward based on the minimal evidence Plaintiff has to establish Defendants made the statements at issue." (*Id.* at 5.) Despite acknowledging the deficiencies with Respondents' complaint, the District Court denied the Special Motion. The District Court treated the Special Motion as a motion for summary judgment² under NRCP 12(d) and considered matters outside of the pleadings. The District Court would allow Respondents to take limited discovery under NRCP 56(d) in order "to demonstrate a factual issue for the jury as to

¹ Since the District Court issued its Order in March 2020, this Court has addressed a similar issue in *Taylor v. Colon*, 136 Nev. Adv. Op. 50 (July 30, 2020). There, the Court found that a declaration denying that a defendant made that statement constituted a showing of good faith under the anti-SLAPP statutes. "Holding otherwise would make it nearly impossible for a defendant to make a showing of good faith when the parties dispute what was actually said." *Id.*

² Appellants are appealing from the denial of the Special Motion.

defendants making the relevant statements." (*Id.* at 6.) The District Court's decision to allow for Respondents to take discovery was not based on the anti-SLAPP statutes.

On March 31, 2020, Appellants appealed the District Court's Order denying the Special Motion pursuant to NRS 41.660(7). Under NRAP 4(a), the last day for Respondents to file a cross-appeal was April 14, 2020. However, Respondents did not file their cross-appeal until April 22, 2020. Appellants noted the untimely filing of the cross-appeal in their docketing statement. (*See* Docketing Statement, April 30, 2020, on file.) While Appellants are cognizant of the challenges that the COVID pandemic and remote work has caused, the deadline under NRAP 4(a) is mandatory and jurisdictional.

III. ARGUMENT

A. Respondents Concede That They Did Not Comply with the Mandatory Deadlines.

In their Response to the Order to Show Cause, Respondents concede that they did not comply with NRAP 4(a)'s deadline to file their cross-appeal. The deadline to file an appeal is mandatory. NRAP 4(a); *Winston Prods. Co. v. DeBoer*, 122 Nev. 517, 519, 134 P.3d 726, 728 (2006). "The filing of a timely notice of appeal is a fundamental jurisdictional requirement; without, this court never obtains jurisdiction over an appeal and has no power to consider the issues raised, no matter how much merit they might have." *Dickerson v. State*,

114 Nev. 1084, 1087, 967 P.2d 1132, 1134 (1998). Because Respondents' cross-appeal was untimely filed, this Court lacks jurisdiction to consider the merits.

Respondents generally argue that the Court should "find good cause to maintain jurisdiction over this matter" based on claims of excusable neglect or lack of prejudice to Appellants. (Response at 3.) These arguments are not well supported and fail to address the fundamental issue of whether the Court ever had jurisdiction over the cross-appeal such that it could maintain jurisdiction. This Court does not have discretion to excuse jurisdictional deadlines. To the extent that the impact on Appellants is to be considered, Appellants will be prejudiced if the untimely cross-appeal is allowed to proceed by having to respond to and defend against a baseless appeal that was not timely filed.³ The Court should dismiss the cross-appeal for lack of jurisdiction for failing to file a timely notice of appeal.

B. Respondents are Not Aggrieved Parties Under NRAP 3A(a).

Respondents do not have standing to file their cross-appeal because they are not aggrieved parties under NRAP 3A(a). "A party is 'aggrieved within the meaning of NRAP 3A(a) when either a personal right or right of property is

³ Appellants noted the untimely filing of their docketing statements. Respondents have not cited any support for their position that not filing a motion to dismiss appeal is a basis for creating jurisdiction over an untimely appeal, especially as briefing was stayed while the parties were involved in the settlement program and attempting to resolve the issues without the Court's involvement.

adversely and substantially affected by a district court's ruling." *Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 446, 874 P.2d 729, 734 (1994) (internal quotation marks omitted). The District Court's Order denying Appellants' Special Motion does not adversely or substantively affect any of Respondents' personal rights or property rights.

Respondents' Response misinterprets the holding of the District Court's Order when it states that "it is [Respondents] position that the trial court should have denied the motion to dismiss, outright." (Response at 4.) In fact, the District Court did just that. (*See* Ex. 1 at 4-5.) The limited discovery was ordered under NRCP 12(d) and 56(d), and will provide Respondents the opportunity to conduct discovery and prosecute their case. The Order did precisely what Respondents say they wanted it to do. As such, Respondents are not seeking to expand the scope of the Order and none of Respondents' rights have been adversely or substantially affected. Thus, Respondents are not aggrieved parties with standing to appeal under NRAP 3A(a). The cross-appeal should be dismissed.

IV. CONCLUSION

Unfortunately, an oversight as a result of COVID does not excuse the jurisdictional deadline to file a notice of appeal under NRAP 4(a). Even if it did, the Court should still dismiss the cross-appeal. Respondents have not identified how they have standing as a party aggrieved by the Order. A review of Order

shows that the District Court did deny the Special Motion (as Respondents sought). Because Respondents did not comply with the requirements of NRAP 4(a) and are not aggrieved parties under NRAP 3A, the Court should dismiss the cross-appeal for lack of jurisdiction.

DATED this 9th day of December, 2020.

PISANELLI BICE PLLC

By: /s/ Emily A. Buchwald
James J. Pisanelli, Esq., #4027
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400 South 7th Street, Suite 300
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*Attorneys for Appellants
Christopher Khorsandi, M.D.,
Christopher Khorsandi, M.D., PLLC,
and Catherine Le Khorsandi*

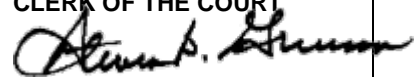
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Pisanelli Bice PLLC, and that on this 9th day of December, 2020, I caused to be served via the Court's e-filing/e-service system a true and correct copy of the above and foregoing **REPLY TO ORDER TO SHOW CAUSE** to the following:

Anthony P. Sgro, Esq.
Jennifer Willis Arledge, Esq.
SGRO & ROGER
720 South 7th Street, Third Floor
Las Vegas, NV 89101

/s/ Kimberly Peets
An employee of Pisanelli Bice PLLC

EXHIBIT 1



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*Attorneys for Defendants Christopher Khorsandi, M.D.,
Christopher Khorsandi, M.D., PLLC,
and Catherine Le Khorsandi*

**EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA**

SMITH PLASTIC SURGERY, INC., a Nevada
Corporation, and LANE F. SMITH, M.D., an
individual,

Plaintiffs,

v.

CHRISTOPHER KHORSANDI, M.D., an
individual, CHRISTOPHER
KHORSANDI, M.D., PLLC, a Nevada
Professional LLC, CATHERINE LE
KHORSANDI, an individual; CECILY S., a
pseudonym used by CATHERINE LE
KHORSANDI; Does I-X, and Roe
Corporations 1-X,

Defendants.

Case No.: A-19-804819-C
Dept. No.: XX

**NOTICE OF ENTRY OF ORDER ON
DEFENDANTS' SPECIAL MOTION TO
DISMISS**

Date of Hearing: February 19, 2020

Time of Hearing: 10:30 a.m.

1 PLEASE TAKE NOTICE that an "Order on Defendants Christopher Khorsandi, M.D.,
2 Christopher Khorsandi, M.D., PLLC, and Catherine Le Khorsandi's Special Motion to Dismiss
3 Pursuant to NRS 41.660, or in the Alternative, Motion to Dismiss Pursuant to NRCP 12(B)(5)"
4 was entered in the above-captioned matter on March 4, 2020, a true and correct copy of which is
5 attached hereto.

6 DATED this 10th day of March, 2020.

7 PISANELLI BICE PLLC

8
9 By: /s/ Emily A. Buchwald
10 James J. Pisanelli, Esq., #4027
11 Emily A. Buchwald, Esq., #13442
12 400 South 7th Street, Suite 300
13 Las Vegas, Nevada 89101

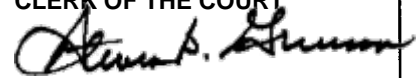
14 *Attorneys for Defendants Christopher Khorsandi,*
15 *M.D., Christopher Khorsandi, M.D., PLLC, and*
16 *Catherine Le Khorsandi*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Pisanelli Bice PLLC, and that on this 10th day of March, 2020, I caused to be served via the Court's e-filing/e-service system, true and correct copies of the above and foregoing **NOTICE OF ENTRY OF ORDER** to the following:

Anthony P. Sgro, Esq.
Jennifer Willis Arledge, Esq.
Justin W. Wilson, Esq.
SGRO & ROGER
720 South 7th Street, Third Floor
Las Vegas, NV 89101

/s/ Kimberly Peets
An employee of Pisanelli Bice PLLC



1 ORDR

2 EIGHTH JUDICIAL DISTRICT COURT

3 CLARK COUNTY, NEVADA

4 SMITH PLASTIC SURGERY, INC., a
5 Nevada Corporation, and LANE F. SMITH,
M.D., an individual,

Case No. A-19-804819-C

Dept. No. XX

6 Plaintiffs,

7 v.

8 CHRISTOPHER KHORSANDI, M.D., an
individual, CHRISTOPHER KHORSANDI,
M.D., PLLC, a Nevada Professional LLC,
9 CATHERINE LE KHORSANDI, an individual;
CECILY S., a pseudonym used by CATHERINE
LE KHORSANDI; Does I-X, and Roe
10 Corporations I-X,

**ORDER ON DEFENDANTS
CHRISTOPHER KHORSANDI, M.D.,
CHRISTOPHER KHORSANDI, M.D.,
PLLC, AND CATHERINE LE
KHORSANDI'S SPECIAL MOTION TO
DISMISS PURSUANT TO NRS 41.660,
OR IN THE ALTERNATIVE, MOTION
TO DISMISS PURSUANT TO NRCP
12(B)(5)**

11 Defendants.

12 **INTRODUCTION**

13 THIS MATTER came on for hearing before Department XX of the Eighth Judicial District
14 Court, the Honorable Eric Johnson presiding, on February 19, 2020. Plaintiff was represented by
15 Jennifer Willis Arledge, ESQ. Defendants were represented by James Pisanelli, Esq. and Emily
16 Buchwald, Esq. At that time, the Court took the matter UNDER ADVISEMENT. After reviewing
17 the pleadings and papers on file herein, the Court finds the following:

18 **DISCUSSION**

19 Defendant argues that Nevada's Anti-SLAPP statute should apply to Plaintiff's complaint.
20 While Defendants deny making the statements which are the subject of the complaint, they note the
21 purported statements were made in direct connection with an issue of public interest in a public
22 forum. The Court agrees the quality of a doctor's patient care is most certainly an interest of public
23 interest and review sites like Yelp are public forums. Defendants argue that because the subject
24 matter of the purported statements falls within the ambient of communications the statute is intended

1 to protect, the burden should shift to the Plaintiffs to demonstrate they have “stated a legally
2 sufficient claim and made a prima facie showing sufficient to sustain a favorable judgment.” *Baral*
3 *v. Schnitt*, 376 P.3d 604, 608 (Cal. 2016).¹

4 The problem with the application of the Anti-SLAPP statute in this matter is that the
5 Defendants deny making the statements at issue. NRS 41.660(1) provides: “If an action is brought
6 against a person based upon a good faith communication in furtherance of the right to petition or the
7 right to free speech in direct connection with an issue of public concern: (a) The person against
8 whom the action is brought may file a special motion to dismiss.” NRS 41.637(4) in turn defines
9 “[g]ood faith communication in furtherance of the right to petition or the right to free speech in
10 direct connection with an issue of public concern” as any “[c]ommunication made in direct
11 connection with an issue of public interest in a place open to the public or in a public forum, which
12 is truthful or is made without knowledge of its falsehood.” Consequently, if Defendants did not
13 make the communications, the statute does not appear to apply to Plaintiff’s complaint.

14 Defendant’s argue the statements Plaintiff charge are the very type intended to be protected
15 under the under Nevada’s Anti-SLAPP statutes, and Plaintiffs unsupported allegations that
16 Defendants made the statements highlights that this is a strategic litigation against public
17 participation, or SLAPP, lawsuit. Plaintiffs largely admit that they currently have minimal evidence
18 supporting Defendants made the statements, relying on Yelp’s location feature for posts and travel
19 information concerning Defendants to suggest Defendants made the posts.

20 Defendants argue the Court should find the instant complaint falls within the Anti-SLAPP
21 statute under *Bel Air Internet LLC v. Morales*, 230 Cal.Rptr.3d 71 (2018), where the court applied
22 the California Anti-SLAPP statue in a case where defendants denied making the statements. The
23

24 ¹ As Defendants note, “Nevada courts regularly look to California law for guidance on issues related to
anti-SLAPP [statutes] because California’s and Nevada’s statutes are similar in purpose and language.”

1 court stated “[the California] Supreme Court has explained that, ‘[i]n deciding whether the initial
2 ‘arising from’ requirement is met, a court considers ‘the pleadings, and supporting and opposing
3 affidavits stating the facts upon which the liability or defense is based.’” *Id.* at 80. “[I]f the
4 complaint itself shows that a claim arises from protected conduct (supplemented, if appropriate, with
5 the plaintiff’s description of the factual basis for its claim in its declarations), a moving party may
6 rely on the plaintiff’s allegations alone in making the showing necessary under prong one without
7 submitting supporting evidence.” *Id.* The court goes on to explain “a defendant may deny acts
8 alleged in the plaintiff’s complaint yet also recognize that those allegations describe protected
9 conduct. If the defendant is required to support an anti-SLAPP motion with evidence about the
10 nature of his or her conduct rather than relying on the complaint itself, the defendant might not be
11 able to do so without contradicting his or her own understanding of the relevant events. As
12 mentioned above, this would create an irrational procedure in which a defendant is precluded from
13 mounting an anti-SLAPP challenge to factually baseless claims.” *Id.* at 81.

14 However, the California Anti-SLAPP statute is arguably broader than the Nevada statute.
15 California: CA CIV PRO § 425.16(b)(1), provides:

16 A cause of action against a person arising from any act of that person in furtherance
17 of the person's right of petition or free speech under the United States Constitution or
18 the California Constitution in connection with a public issue shall be subject to a
special motion to strike, unless the court determines that the plaintiff has established
that there is a probability that the plaintiff will prevail on the claim.

19 The statute goes on to define an “act in furtherance of a person's right of petition or free
20 speech under the United States or California Constitution in connection with a public issue” to
21 include: “(3) any written or oral statement or writing made in a place open to the public or a public
22 forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the
23 exercise of the constitutional right of petition or the constitutional right of free speech in
24 connection with a public issue or an issue of public interest.” California: CA CIV PRO §

1 425.16(e)(3) and (4). Consequently, California protects "any act of [the person against whom
2 litigation is brought] in furtherance of the person's right of petition or free speech," where Nevada
3 provides such protection only to "good faith communication in furtherance of the right to petition or
4 the right to free speech."

5 In the context of the court's decision in *Morales* to apply the Anti-SLAPP statute despite
6 defendants' denials to making the alleged statements this distinction in statutes is important. The
7 *Morales* court concluded even if a fact finder had determined that defendants in that case had done
8 the acts alleged by plaintiffs, that is: encouraged other employees to quit their jobs and sue the
9 company, their actions would have been protected under the idea that such "petition-speech" is
10 protected under California state law. Consequently, defendants did not need to admit making the
11 statements for the Court to conclude the Anti-SLAPP statute was applicable to them.

12 Here, there is a fine line between saying that evaluation of a doctor's care is protected speech
13 and saying that potentially false statements are protected just because the subject matter of the false
14 statements regard a doctor's care. If this case was a case involving a former patient who denied
15 making the statements, then the *Morales* analysis would be more appropriate. But the issue here is
16 that, taking the Plaintiffs' allegations as true, the Defendants made the instant statements evaluating
17 Plaintiff without ever having been patients of Plaintiff. Accordingly, if Plaintiff's allegations are
18 true, Defendants cannot demonstrate a "good faith communication" required under the Nevada
19 statute as Defendants' statements under such an assumption would not constitute a communication
20 "which is truthful or is made without knowledge of its falsehood." NRS 41.637(4).

21 Had the Defendants received the allegedly "bad" plastic surgery services from Plaintiff, and
22 consequently posted negative Yelp reviews, then maybe there would be an issue of chilling free
23 speech—since the purpose of anti-SLAPP litigation is to protect statements that a party actually
24 makes. But since Defendants deny making the statements, the Court finds there cannot be an

1 analysis whether the statements were made in “good faith,” which is the first consideration in each
2 of the NRS anti-SLAPP statutes: NRS 41.637(4), NRS 41.650, NRS 41.660.

3 The Court in *Morales* also recognized this distinction between protected conduct which is
4 denied and unprotected conduct which is denied. The court noted “[a]n anti-SLAPP motion is a
5 preliminary procedure designed to weed out meritless claims arising from protected conduct. It is
6 not a device to decide the ultimate merits of a claim by resolving factual disputes.” *Morales* at 83.
7 The court explained that is for purposes of the motion it “accept[s] plaintiff’s evidence as true” for
8 purposes of analyzing whether the plaintiff’s claim arose from protected activity. *Id.* “A defendant’s
9 declaration denying that he or she engaged in the conduct alleged in the complaint does not foreclose
10 the possibility that a fact-finder could later find that he or she did in fact engage in that conduct.
11 Foreclosing an anti-SLAPP motion based upon one version of the facts would irrationally and
12 unfairly disregard this possibility.” *Id.* Whether defendants made the statements is a question of fact
13 and if defendants did make the statements they would not be protected under the Nevada Anti-
14 SLAPP statute.

15 In the Court’s view, the issue at this time is not that Plaintiff has failed to state claims on
16 which relief can be granted, but that Plaintiff has virtually no evidence to support his
17 claims. Plaintiff has met the very low threshold for surviving a NRCP 12(b)(5) motion to dismiss
18 because he and his practice have stated claims on which relief can be granted. The Nevada Supreme
19 Court has held that a Plaintiff’s Complaint “should be dismissed only if it appears beyond a doubt
20 that it could prove no set of facts, which, if true, would entitle it to relief.” *Buzz Stew, Ltd. Liability*
21 *Co. v. City of N. Las Vegas*, 124 Nev. 224, 228 (2008).


22 The Court, however, is concerned with allowing litigation in this matter to go forward based
23 on the minimal evidence Plaintiff has to establish Defendants made the statements at issue. At the
24 hearing on Defendants’ motion, Plaintiff only presented evidence suggesting some posts made by

1 Cecily S. on Yelp were made at times and in locations where Defendants were
2 traveling. Consequently, the evidence Plaintiff currently possesses is arguably insufficient in the
3 Court's view to raise even a prima facie case against Defendants. NRCP 12 (d) provides that if on a
4 motion to dismiss for failure to state a claim upon which relief can be granted, the Court considers
5 matters outside the pleadings, the Court may treat the motion as one for summary judgment. *See*
6 *also Thompson v. City of North Las Vegas*, 108 Nev. 435, 438, 833 P.2d 1132 (1992). Here the
7 entire crux of this litigation is based on Plaintiff's assertion Defendants made the statements in
8 question. If Defendants did not make the statements, Plaintiff's case is at an end. Consequently, the
9 Court in view of the limited evidence Plaintiff presented at the hearing in support of his key
10 allegations, treats Defendant's motion to dismiss as one for summary judgment and provides for
11 additional time under NRCP 56(d) for limited discovery to allow Plaintiff to demonstrate a factual
12 issue for the jury as to defendants making the relevant statements.

13 **ORDER**

14 The Court HEREBY ORDERS a hearing on March 11, 2020 at 8:30am at which time
15 Plaintiff shall present a plan as to expedited discovery on the question of whether Defendants made
16 the statements in question to allow the Court to determine whether summary judgment should be
17 granted on that basis. The Court encourages the parties to meet and confer prior to the hearing to
18 attempt to reach a joint recommendation as to an expedited discovery plan.

19 DATED this 4th day of March, 2020.

20 
21 _____
22 ERIC JOHNSON
23 DISTRICT COURT JUDGE
24