

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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Elizabeth A. Brown
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**APPELLANTS' RESPONSE TO
ORDER TO SHOW CAUSE**

I. INTRODUCTION

The district court's 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) (hereinafter "Order") is a denial of the Appellants' Special Motion to Dismiss, thereby vesting this Court with jurisdiction to hear the present appeal. Following a review of Respondents/Cross-Appellants' response to this Court's previous Order to Show Cause related to jurisdiction on their cross-appeal, this Court entered a subsequent Order to Show Cause related to

Appellants' jurisdiction.¹ Although the district court also considered Appellants' alternative request for relief, its determination that Appellants could not satisfy the first prong of the statutory two-part test set forth under NRS 41.660(3)(a) constitutes a denial of the motion to dismiss. Therefore, this Court has jurisdiction to hear the appeal of this Order under NRS 41.670(4).

II. ARGUMENT

NRS 41. 635 *et seq.* sets forth the limitations of liability in civil actions "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 sets forth the process by which defendants who believe a complaint brought against them constitutes a prohibited civil action can bring a special motion to dismiss within 60 days of service of the complaint. NRS 41.660(2). Recognizing the importance of resolving a special motion to dismiss promptly, the statute provides that the special motion to dismiss must be ruled upon within 20 days of filing. NRS 41.660(3)(f).

A defendant moving to dismiss under NRS 41.660 bears the initial burden of "establish[ing], by a preponderance of the evidence, that the claim is based upon

¹ Due to the narrow issue raised in the Court's Order to Show Cause entered December 15, 2020, Appellants incorporate the relevant facts as discussed in their Reply to Order to Show Cause, filed December 9, 2020, rather than reciting them again here.

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). Only if the district court determines that the defendant has met this burden does it go on to consider the second prong under NRS 41.660(3)(b). Otherwise, the special motion to dismiss is denied.

Here, following a discussion of what it considered the applicable case law, the district court stated: "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 in each of the NRS anti-SLAPP statutes: NRS 41.637(4), NRS 41.650, NRS 41.660."² (Ex. 1, Order at 4:24-5:2.) Although the district court did not explicitly state that it had denied Appellants' Special Motion to Dismiss, it did determine that Appellants had not met their burden under the first prong of the test set forth in NRS 41.660(3)(a). That the district court did not go on to examine whether the Respondents had met their burden under NRS 41.660(3)(b) shows that it did not intend to grant the special motion to dismiss. The Order constitutes a denial of Appellants'

² The issue on appeal is whether the district court correctly determined that Appellants could not, and did not, meet their burden under NRS 41.660(3)(a) based upon the declarations of Christopher Khorsandi, M.D. and Catherine Le Khorsandi stating that they did not make the statements at issue in the litigation.

Special Motion to Dismiss sufficient to vest this Court with jurisdiction under NRS 41.670(4).

The district court's subsequent ruling on Appellants' request for alternative relief under NRCP 12 further supports its denial of Appellant's Special Motion to Dismiss. After considering, and denying, the Special Motion to Dismiss under NRS 41.660, the district court moved on to an attempt to adjudicate the motion on alternative grounds. The district court would have not considered alternative relief if it considered the motion under NRS 41.660 to be outstanding or to have been granted.

Additionally, were this Court to determine that the district court's finding that Appellants did not meet their burden under the first prong of NRS 41.660(3) did not constitute a denial of the special motion to dismiss, the Special Motion to Dismiss would be pending for nearly a year. Considering the statute's timeframes for filing and granting the special motion to dismiss, it is unlikely that the district court would allow the motion to be pending for far longer than the 20 days contemplated by NRS 41.660(f).

III. CONCLUSION

The district court's determination that Appellants had not met their burden under NRS 41.600(3)(a) constitutes a denial of the special motion to dismiss sufficient to vest this Court with jurisdiction to hear the appeal. The Court should

dismiss Respondents' cross-appeal for lack of jurisdiction and reinstitute the briefing schedule on Appellants' appeal.

DATED this 14th day of January, 2021.

PISANELLI BICE PLLC

By: /s/ Emily A. Buchwald

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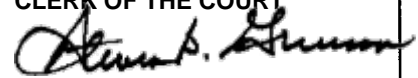
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Pisanelli Bice PLLC, and that on this 14th day of January, 2021, I caused to be served via the Court's e-filing/e-service system a true and correct copy of the above and foregoing **RESPONSE 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



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
10 LE KHORSANDI; Does I-X, and Roe
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 judgement 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