

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 89057

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

Appellants,

v.

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

Respondents.

APPELLANTS' OPENING BRIEF

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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.

Christopher Khorsandi, M.D. and Catherine Le (named as Catherine Le Khorsandi in the Complaint) are individuals. Christopher Khorsandi, M.D. PLLC is a professional limited liability company headquartered in Las Vegas, Nevada. Respondent has been represented by the following attorneys and law firms in the action below:

James J. Pisanelli and Emily A. Buchwald of Pisanelli Bice PLLC.

DATED this 22nd day of July, 2021.

PISANELLI BICE PLLC

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I. JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the district court's denial of the Khorsandi Parties'¹ special motion to dismiss pursuant to NRS 41.670(4). (*See also* Order Dismissing Cross-Appeal and Allowing Appeal to Proceed, Apr. 9, 2021 (finding that this Court had jurisdiction to hear the appeal).) The Notice of Entry of Order on Defendants' Special Motion to Dismiss was filed on March 10, 2020. (APP167.) The Khorsandi Parties timely filed their Notice of Appeal on March 31, 2020. (APP181.)

II. ROUTING STATEMENT

The Supreme Court should retain review of this appeal. NRS 41.670(4) provides that "[i]f the court denies the special motion to dismiss pursuant to NRS 41.660, an interlocutory appeal lies to the Supreme Court."

III. ISSUES PRESENTED FOR REVIEW

The Khorsandi Parties bring this appeal to determine the scope of Nevada's anti-SLAPP statutes, specifically whether defendants who deny making the allegedly defamatory statements are entitled to the protections of Nevada's

¹ The Khorsandi Parties refers collectively to Appellants/Defendants Christopher Khorsandi, M.D. ("Dr. Khorsandi"), Christopher Khorsandi, M.D., PLLC (the "Practice"), and Catherine Le Khorsandi ("Ms. Le").

anti-SLAPP statutes, including an expedited determination on the merits of the claims.

IV. STATEMENT OF THE CASE

Respondents Lane F. Smith, M.D. and Smith Plastic Surgery's ("Respondents") meritless action against the Khorsandi Parties is yet another example of their practice of lashing out when concerns about the quality of their care are raised. Respondents are so defensive about anything they perceive as publicly critical of their deficient medical services that they have filed suit against former patients about negative reviews, sent cease-and-desist letters, and have been flagged by Yelp as making "Questionable Legal Threats." (APP075-76.) Respondents became so incensed by a patient's positive review of Dr. Khorsandi that stated he was able to relieve her pain and fix her implant. Displeased by the review's implication that Respondents had provided inadequate care, Respondents sent Dr. Khorsandi a cease-and-desist letter asking him to remove the review even though Dr. Khorsandi had not authored the review. Respondents then received a series of anonymous negative reviews that they successfully had Yelp remove despite the statements being similar to other negative reviews that had been posted by other patients. Respondents filed a complaint against the Khorsandi Parties based on these negative reviews.

The Khorsandi Parties moved to dismiss these claims at the district court on two bases. First, Respondents' lawsuit was precisely the type of lawsuit that Nevada's anti-SLAPP statute was intended to prevent: A meritless lawsuit filed to obtain a financial advantage and intimidate others about an issue of public concern, *i.e.*, the quality of medical care provided by a medical doctor. Respondents' conduct in filing suit against the Khorsandi Parties was particularly egregious here, as both Dr. Khorsandi and Ms. Le submitted declarations that they had not made these statements. The Khorsandi Parties are therefore limited to establishing their good faith under the first prong of NRS 41.660(3) by establishing simply that they had nothing to do with the posts that form the basis for Respondents' complaint. All of Respondents' claims stem from protected speech, and therefore must be dismissed. Second, Respondents' complaint was plainly deficient under NRCP 12(b)(5) and failed to adequately state claims for relief, especially as they pled no facts that would implicate Dr. Khorsandi or the Practice in the posting of these negative reviews.

With the Khorsandi Parties satisfying their obligation to show, by a preponderance of the evidence, that the statements that form the basis of Respondents' complaint were good faith communications about an issue of public concern, the burden shifted to Respondents to present prima facie evidence to show a probability of prevailing on the merits under NRS 41.660(3)(b). Respondents failed to meet that burden. Instead of presenting *any* evidence to support their

claims, Respondents relied on the argument of counsel and references to "[p]reliminary research [that] shows that the defamatory statements were made at times and locations around the country where Dr. Khorsandi and [Ms. Le] were located." (APP105.) Counsel's argument at the hearing only highlighted the lack of evidence, vaguely referring to unrelated, non-defamatory posts that are not at issue in this litigation and not in the record. (APP156-58.) Respondents presented no evidence to show that the Khorsandi Parties were involved in these posts, let alone providing prima facie evidence that they would prevail on their claims against the Khorsandi Parties.

After taking the special motion to dismiss under advisement, the district court issued its 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"). The district court found that if the Khorsandi Parties "did not make the communications, the statute does not appear to apply to [Respondents'] Complaint." (APP171.) The district court recognized that California courts have found that preventing a defendant who denies making the statement from prosecuting a motion to dismiss under the anti-SLAPP statute "would create an irrational procedure in which a defendant is precluded from mounting an anti-SLAPP challenge to factually baseless claims." (APP173.) However, because

Nevada has a requirement that the protected statements be made in good faith and "since [the Khorsandi Parties] deny making the statement, 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-SLAP statutes: NRS 41.637(4), NRS 41.650, NRS 41.660." (APP173-74.) The district court also denied the motion to dismiss, stating that Respondents have "met the very low threshold for surviving a NRCP 12(b)(5) motion to dismiss because he and his practice have stated claims on which relief can be granted." (APP174.) Still, the district court recognized the absolute lack of evidence Respondents have provided, and expressed concern about allowing a case to go forward on the lack of evidence. (APP174-75.)

Dr. Khorsandi and Ms. Le will not admit making the statements or authoring the posts in order to receive the protections of the anti-SLAPP statutes, and the Practice is not alleged to have any involvement in any of the purportedly defamatory statements. Permitting Respondents' complaint to go forward after Appellants have shown that the statements were made in good faith the only way they could – by denying they made the statements – undermines the purposes of the anti-SLAPP statute. The district court erred when it found that the statute did not apply to circumstances where the defendant denies making the statement. The Court should reverse the district court's decision and grant the Khorsandi Parties' special motion

to dismiss as Respondents provided no evidence whatsoever that could show a probability of prevailing on the claim.

V. STATEMENT OF THE FACTS

A. Respondents have a Pattern of Reactionary Tactics to Negative Reviews.

Dr. Smith is a plastic surgeon practicing in Las Vegas, Nevada with his own practice – Smith Plastic Surgery. (APP002, ¶¶ 1-2.) As with so many others, Respondents rely heavily on websites like Yelp to present an appearance of professionalism and reach out to potential clients. Respondents' Yelp page, however, shows a series of negative reviews about the quality of their care. (APP088-102.) In an effort to rehabilitate their image, Respondents maintain an active presence on their public review platforms. This includes responding to individuals who post negative reviews about the services Respondents have provided, sending cease and desist letters, and even filing suit in an effort to take down negative reviews. (APP044-73.) Respondents' playbook is so well known that their Yelp page includes a warning about their conduct and attempts to silence anyone who dares to raise concerns about the quality-of-care Respondents have provided.²

² "Consumer Alert: Questionable Legal Threats This business may have tried to abuse the legal system in an effort to stifle free speech, for example through legal threats or commercial gag clauses. As a reminder, reviewers who share their

Respondents appear to have fixated on Dr. Khorsandi after his patient posted a positive review of the care that Dr. Khorsandi provided. (APP004, ¶ 15.) In that review that was authored by a patient and left on Dr. Khorsandi's Google review page, the patient stated that she had previously received breast augmentation from Dr. Smith and was suffering some pain. (*Id.*) The patient stated that it was Dr. Khorsandi's conclusion that one of the implants was placed in backwards by Dr. Smith, but Dr. Khorsandi was able to alleviate her pain and fix her implant. (*Id.*) In his declaration, Dr. Khorsandi denies stating to the patient that her implant was placed in backwards, or attributing a mistake to Dr. Smith. (APP080.) Respondents were so incensed by the negative public review, they sent a cease-and-desist letter to Dr. Khorsandi asking him to remove the review on July 12, 2019, even though he was not the author of the review. (APP004, ¶ 16.)

Respondents' complaint details what it claims is an anonymous attack on the reputation of Respondents through a series of posts, authored by "Cecily S.," which contain negative comments and opinions about Respondents and their quality of work. (APP005, ¶ 22.) The complaint identifies multiple reviews posted by "Cecily S." on Respondents' Yelp page. These reviews were promptly taken down by Yelp, sometimes within hours, at Respondents' insistence. The August 7, 2019

experiences have a First Amendment right to express their opinions on Yelp." (APP075-76; APP078.)

review was removed by Yelp the same day. (APP006 ¶ 25.) So were the reviews on August 8, 9, and 14, 2019. (*Id.* ¶¶ 27, 29; APP007, ¶ 31; APP008, ¶ 34.) Respondents' complaint alleges that "Cecily S." is a pseudonym of Ms. Le, but the complaint provides no information or factual allegations to support this claim. (APP004, ¶ 18.) Respondents also allege that a review posted on Google Review was written by Ms. Le, but it is unclear from the complaint the basis for this conclusion. (APP008, ¶ 36.) Respondents' complaint also alleges that the statements were made with actual malice, but fails to allege any facts that support their malice allegation.

B. The Khorsandi Parties Seek the Protections of the Anti-SLAPP Statute Against Respondent's Meritless Claims.

Respondents filed their complaint on November 4, 2019, alleging a series of claims that all arise out of the negative reviews posted on Respondents' internet review sites.³ On January 10, 2020, within the 60 days allowed by statute, the

³ First Cause of Action: Slander Per Se – Google Review on Khorsandi Website; Second Cause of Action: Libel Per Se August 7, 2019 YELP Review by CECILY S.; Third Cause of Action: Libel Per Se – August 8, 2019 YELP Review; Fourth Cause of Action: Libel Per Se – August 9, 2019 YELP Review; Fifth Cause of Action: Libel Per Se – August 14, 2019 YELP Review; Sixth Cause of Action: Libel Per Se – August 14, 2019 Reply to Jessica on YELP Review; Seventh Cause of Action: Libel Per Se – August 14, 2019 Google Review as You Tuber; Eighth Cause of Action – Concert of Action, Aiding and Abetting, Civil Conspiracy; Ninth Cause of Action: Intentional Infliction of Emotional Distress; Tenth Cause of Action: False Light; Eleventh Cause of Action: Punitive Damages; Twelfth Cause of Action: Negligent Supervision and Training; Thirteenth Cause of Action:

Khorsandi Parties 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 to Dismiss"). The Special Motion to Dismiss attached the declarations of Dr. Khorsandi and Ms. Le, wherein they each deny making the statements alleged in the complaint. The Khorsandi Parties also argued that their denials satisfied the requirement in NRS 41.660(3)(a) to show, by a preponderance of the evidence, that the statements that form the basis for Respondents' complaint were made in good faith and that they could not and would not admit to making these statements in order to obtain relief under the anti-SLAPP statute. Further, California courts have held that communications such as public reviews about a medical professional's care constitute issues of public concern under the anti-SLAPP statute. The Khorsandi Parties' Special Motion to Dismiss also argued Respondents' complaint failed to state claims upon which relief can be granted under NRCP 12(b)(5). Therefore, even before there was any evaluation of evidence to support their claims, Respondents' complaint was so deficient that they could not show a probability of prevailing on the claims under NRS 41.660(3)(b).

Respondents' opposition was bereft of any evidence to support their allegations, or even an attempt to meet their burden under NRS 41.660(3)(b) to

Wrongful Interference with Prospective Economic Advantage; Fourteenth Cause of Action: Preliminary Injunction. (See APP001-24.)

present prima facie evidence of prevailing on the claims. Respondents attached nothing to support their central assertion that Cecily S. had any connection to the Khorsandi Parties. Instead, counsel's argument only served to highlight the lack of factual support for their claims when Respondents' filed suit. "Preliminary research shows that the defamatory statements were made at times and locations around the country where Dr. Khorsandi and [Ms. Le] were located." (APP105.) Respondents further claim that their "Complaint alleges facts that *suggest* [Ms. Le] posted the reviews under fake accounts with knowledge of the falsity of statements with the intent of harming Dr. Smith's business and reputation." (APP113.) However, Respondents fail to address their lack of factual allegations to support the claims against Dr. Khorsandi or the Practice instead relying on an information and belief statement that the Khorsandi Parties "conspired jointly to produce them." Respondents also state, repeatedly, that discovery would be necessary for them to muster support for their allegations and conflating the standards for a motion to dismiss and a motion for summary judgment. "As such, dismissal of the Complaint at this time would be premature as there are multiple issues of genuine material fact precluding the same." (APP114; *see also* APP118; APP119.) Nothing in the record supports these wide-sweeping claims, and they are countered by the declarations of Dr. Khorsandi and Ms. Le that deny making these statements.

For the first time, at the hearing on February 19, 2020, counsel for Respondents provided information about the basis for their assertions that the statements were made at times and locations where Dr. Khorsandi or Ms. Le were located. The basis for these statements, however, is nowhere in the record as they were merely referenced during the hearing. (APP156-59.) It appears, however, that these were not the Yelp Reviews at issue in the litigation. Respondents attempt to assign significance to these posts that is not readily apparent, as the posts by Dr. Khorsandi and Cecily S. were often days apart in the large cities like Toronto and New York. (APP157-59.) And, again, these oral representations were made without any evidentiary support, leaving the Khorsandi Parties and the district court unable to assess them. The district court took the matter under advisement after expressing concerns about the application of the anti-SLAPP statute.

The district court issued its written order on March 4, 2020. In it, the district court denied the Khorsandi Parties Special Motion to Dismiss. The order attempted to distinguish the California statute from Nevada's statutory scheme, as well as the California cases that allow a court to dismiss a complaint wherein the defendant denies making the statement if it otherwise protected speech. "[S]ince 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 states: NRS 41.637(4), NRS 41.650, NRS 41.660."

(APP173-74.) While the district court found that Respondents' complaint states claims upon which relief can be granted, it expressed concerns about the absence of evidence to support those claims. "Consequently, the evidence [Respondents] currently possess is arguably insufficient in the Courts view to raise even a prima facie case against [the Khorsandi Parties]." (APP175.) The Khorsandi Parties filed their appeal of the district court's denial of their Special Motion to Dismiss on March 30, 2020.⁴

VI. SUMMARY OF THE ARGUMENT

Respondents have a history of weaponizing the legal system in an attempt to rehabilitate their public image. The anti-SLAPP statute was enacted to prevent meritless lawsuits intended to impose a burden on a plaintiff's adversary. Respondents have done just that, filing a lawsuit without evidence and based on the merest speculation. The Khorsandi Parties ask this Court to reverse the district court's decision that they are not entitled to the protections of the anti-SLAPP statute because they deny making the statements at issue.

Under NRS 41.660(3)(a), defendants bear the burden of showing with a preponderance of the evidence that plaintiffs' claims were "based upon a good faith

⁴ Respondents filed a cross-appeal on April 22, 2020, which was outside of the time period allowed by NRAP 14(a)(2). Following an order to show cause, this Court dismissed the cross-appeal as untimely, and because Respondents were not an aggrieved party by the district court's order. (*See* Order Dismissing Cross-Appeal and Allowing Appeal to Proceed, Apr. 9, 2021.)

communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern;" Here, the Khorsandi Parties will not admit to making statements they did not make in order to receive the safe harbor of the anti-SLAPP statute. Instead, they met their burden to show good faith the only way they could, submitting declarations denying that they made the statements. The Court should look to California law, which provides that a defendant who denies making the statement should be entitled to the protections of the anti-SLAPP statute, lest the absurd result of allowing meritless claims to proceed against defendants who would not admit to making the statements at issue. *Bel Air Internet, LLC v. Morales*, 230 Cal. Rptr. 3d 71, 75 (2018). There can be little doubt that reviews about the quality of a doctor's medical care posted on a public review site like Yelp go to issues of public concern. *See, e.g., Stark v. Lackey*, 136 Nev. 38, 43, 458 P.3d 342, 347 (2020); *Abrams v. Sanson*, 136 Nev. 83, 87, 458 P.3d 1062, 1066 (2020). With that, the Khorsandi Parties have met their burden under NRS 41.660(3)(a).

The burden shifts to Respondents to demonstrate "with prima facie evidence a probability of prevailing on the claim;" NRS 41.660(3)(b). Respondents did not, and cannot, meet that burden. Instead, their Opposition to the Special Motion to Dismiss only highlighted the lack of evidence to support their claims and provided nothing to rebut the Khorsandi Parties' declarations denying they made the

statements. In addition, Respondents' complaint is legally insufficient to support their claims for relief. Rather than pleading facts to support their allegations, Respondents' complaint simply recites legal conclusions. Even then, Respondents do not plead that Dr. Khorsandi or the Practice had any involvement in the Cecily S. posts. Nor can they show that negative reviews meet the standard for intentional infliction of emotional distress. Respondents' claims for negligent hiring, supervision, and training and intentional interference with prospective contractual relations similarly fail because they do not include the necessary factual allegations. Lacking all substance, Respondents have failed to meet their burden under NRS 41.660(3)(b) to show any evidence, let alone prima facie evidence, of prevailing on their claims. Accordingly, Respondents' claims against the Khorsandi Parties should be dismissed as a quintessential SLAPP lawsuit.

VII. ARGUMENT

A. Standard of Review.

The Court reviews a district court's denial of an anti-SLAPP motion de novo. *Coker v. Sassone*, 135 Nev. 8, 10-11, 432 P.3d 746, 748-49 (2019). "In making such a determination, we conduct an independent review of the record and consider affidavits concerning the facts upon which liability is based. We do not weigh the evidence, but instead accept the plaintiff's submissions as true and consider only 'whether any contrary evidence from the defendant establishes its entitlement to

prevail as a matter of law." *Taylor v. Colon*, 136 Nev. Adv. Op. 50, 482 P.3d 1212, 1217 (2020) (quoting *Coker*, 135 Nev. at 11, 432 P.3d at 749). "The defendant's evidence, especially a declaration regarding the defendant's state of mind, is likewise entitled to be believed at this stage, at least 'absent contradictory evidence in the record.'" *Taylor*, 482 P.3d at 127 (quoting *Stark*, 136 Nev. at 43, 458 P.3d at 347).

B. The Khorsandi Parties Have Shown the Communications at Issue are Protected Speech under NRS 41.660(3)(a).

1. The Khorsandi Parties have established the good faith requirement by submitting declarations denying they made the statements in the Complaint.

Nevada's anti-SLAPP law is intended to protect certain good faith communications that are truthful or made without knowledge of their falsehood, provided that they are "made in direct connection with an issue of public interest in a place open to the public or in a public forum," NRS 41.637(4). A SLAPP lawsuit is "a meritless lawsuit that a plaintiff initiates to chill a defendant's freedom of speech and right to petition under the First Amendment." *Pope v. Fellhauer*, 437 P.3d 171, 2019 WL 1313365, at *2 (Nev. March 21, 2019) (unpublished disposition) (citing NRS 41.637). "The hallmark of a SLAPP lawsuit is that it is filed to obtain a financial advantage over one's adversary by increasing litigation costs until the adversary's case is weakened or abandoned." *John v. Douglas Cty. Sch. Dist.*, 125 Nev. 746, 752, 219 P.3d 1276, 1280 (2009) (superseded by amended statute).

The anti-SLAPP statutory scheme provides defendants who have been targeted the opportunity file a special motion to dismiss, asserting immunity from claims related to protected communication.⁵ See NRS 41.660(3). Nevada's anti-SLAPP statutes provide 'defendants with a procedural mechanism to dismiss meritless lawsuit[s] . . . before incurring the costs of litigation.'" *Taylor v. Colon*, 136 Nev. Adv. Op. 50, 482 P.3d 1212, 1215 (2020) (quoting *Coker v. Sassone*, 135 Nev. 8, 10, 432 P.3d 746, 748 (2019)) (alteration in original). These early motions to dismiss "provide[] a procedure for weeding out, at an early stage, meritless claims arising from activity that is protected by the law." *Abir Coehn Treyzon Salo, LLP v. Lahiji*, 254 Cal. Rptr. 3d 1, 4-5 (2d Dist. 2019); see also *Kosor v. Olympia Cos., LLC*, 136 Nev. Adv. Op. 83, 478 P.3d 390, 393 (2020).

⁵ All of Respondents' claims are subject to dismissal, as they all arise out of the purportedly defamatory statements. The protections under the anti-SLAPP statutes are not limited to claims for defamation, slander, and libel. "The anti-SLAPP statute's definitional focus is not on the form of the plaintiff's cause of action, but rather, the defendant's *activity* that gives rise to his or her asserted liability – and whether that activity constitutes protected speech or petitioning." *Navellier v. Sletten*, 52 P.3d 703, 711 (Cal. 2002) (emphasis in original) (cited with approval by *Omerza v. Fore Stars, Ltd.*, 455 P.3d 841, 2020 WL 406783, at *1 (Nev. Jan. 30, 2020) (unpublished disposition)). "[I]f the specific elements of a party's claim cannot be established without relying on an opposing party's protected petitioning activity, the claim is 'based on' protected activity." *Goldentree Master Fund, Ltd. v. E.B. Holdings, II, Inc.*, 415 P.3d 14, 2018 WL 1634189, at *2 (quoting *Park v. Bd. of Trustees of Cal. State Univ.*, 393 P.3d 905, 910 (Cal. 2017)). Here, all of Respondents' claims rely on the alleged statements to impose liability on the Khorsandi Parties, and therefore should all be dismissed.

Under NRS 41.660(3)(a), the moving party first has the burden to show, "by a preponderance of the evidence, that the claim is based upon a good faith communication in furtherance of . . . the right to free speech in direct connection of public concern." "[T]he preponderance standard requires proof that it is more likely than not" that the statements were made in good faith. *Omerza v. Fore Stars, Ltd.* No. 7627, 2020 WL 406783, 455 P.3d 841, at *2 (Nev. Jan. 23, 2020) (unpublished). Once the moving party has made the necessary showing, the burden shifts to the plaintiff to "demonstrat[e] with prima facie evidence a probability of prevailing on the claim;" The movant's obligation to show by a preponderance of the evidence that the statement was made in good faith "is far lower than the burden of proof that the plaintiff must meet" under the second prong of the anti-SLAPP analysis. *Rosen v. Tarkanian*, 135 Nev. 436, 440, 453 P.3d 1220, 1224 (2019). If plaintiff cannot meet that burden with admissible evidence, the court must dismiss the claims that arise out of the protected communication.

The Khorsandi Parties are in an untenable situation: Respondents brought claims against them for speech that would have been protected had the Khorsandi Parties made those statements, but the Khorsandi Parties did not make these statements. Therefore, the Khorsandi Parties can only make their showing that the statements were truthful or made without knowledge of their falsehood by submitting declarations that they had nothing to do with these posts.

The Court has addressed how a defendant can show that the statement was made in good faith. A defendant's affidavit stating they "believed the communication was truthful or without knowledge of their falsehood is sufficient to meet the defendant's burden absent contradictory evidence in the record." *Stark v. Lackey*, 136 Nev. 38, 43, 458 P.3d 342, 347 (2020). A plaintiff can introduce contradictory evidence to the record to undermine the defendant's assertions, including that the statements were truthful or made without knowledge of a falsehood. *Stark*, 136 Nev. at 43, 458 P.3d at 347.

The Court has not specifically addressed the precise situation here, where a defendant explicitly denies making the protected statements that form the basis of the complaint brought against them. However, courts in California have granted a defendant's motion to dismiss under the anti-SLAPP statute, while allowing the defendant to maintain that they did not make the statements.⁶ *Bel Air Internet, LLC v. Morales*, 230 Cal. Rptr. 3d 71, 75 (2018). There, the court held that a defendant denying the allegations can rely on the plaintiff's allegations alone to determine whether the statements were protected speech and thus should be dismissed. *Id.*

⁶ As this Court knows, Nevada regularly looks to California for guidance on issues to anti-SLAPP statutes and motion practice because California and Nevada's statutes are similar in purpose and language. *Shapiro v. Welt*, 133 Nev. 35, 39, 389 P.3d 262, 268 (2017). When "no Nevada precedent is instructive on this issue, we look to California precedent for guidance." *Patin v. Ton Vinh Lee*, 134 Nev. 722, 724, 429 P.3d 1248, 1250 (2018).

"Otherwise, a defendant who disputes the plaintiff's allegations (as appellants do here) might be precluded from bringing an anti-SLAPP motion. That would have the perverse effect of making anti-SLAPP relief when a plaintiff alleges a baseless claim, which is precisely the kind of claim that [the anti-SLAPP statute] was intended to address." *Id.* (citing *Baral v. Schnitt*, 205 Cal. Rptr. 3d 475 (2006)).

If a defendant has not actually exercised such a right, how can a lawsuit chill it? However, the argument is ultimately irrelevant and wrong. It is irrelevant because our Supreme Court has explained that a party bringing an anti-SLAPP motion need not prove that a plaintiff's claim was intended to, or actually did, chill any protected activity. And it is wrong because a meritless lawsuit asserting a claim based on alleged protected activity can chill such activity even if it did not occur in a particular case. For example, a plaintiff might file a series of meritless claims against a public interest organization's free speech or petitioning activity with the goal of imposing burdensome litigation costs. The facts that the organization did not actually engage in the protected conduct alleged in a particular case would not diminish the cost of defending a lawsuit.

Id. at 81, n. 4. As the record here shows, Respondents have a long history of aggressively and maliciously attempting to silence those who raise concerns about the quality of their medical care. (See APP044-73; APP076-77.) Permitting a plaintiff to proceed with a lawsuit intended to burden protected activity on the ground that the lawsuit has no basis in fact would be a perverse outcome indeed. *Bel Air*, 230 Cal. Rptr. 3d at 81, n. 4.

Here, the uncontested evidence shows that neither Dr. Khorsandi nor Ms. Le made the defamatory statements, as alleged by Respondents. Respondents failed to

submit any evidence that rebutted the Khorsandi Parties' declarations. Instead, counsel's arguments only highlighted Respondents' deficient evidence, resorting to arguing that "preliminary research shows that the defamatory statements were made at times and locations around the Country where Dr. Khorsandi and [Ms. Le] were located."⁷ (APP105.) This, plainly, is insufficient. The Khorsandi Parties have met their burden to show that the statements were made in good faith, truthfully and without knowledge of their falsehood the only way they could, submitting the declarations that confirmed they were not involved in the posting. Consistent with courts in California and the purpose of the anti-SLAPP statute to limit meritless cases intended to chill speech, this Court should determine that a declaration stating they were not involved in the protected speech is sufficient under NRS 41.660(3)(a).

Alternatively, and without admitting the Khorsandi Parties involvement, the reviews posted on Yelp has the gist and sting of truth, as shown by the plethora of other reviews highlighting the deficiencies in Respondents' medical care. "[T]he relevant inquiry in prong one of the anti-SLAPP analysis is whether a preponderance

⁷ At the hearing, the district court recognized his authority under NRS 41.660(4) to allow limited discovery so that a party can ascertain necessary information meet their burden under the motion to dismiss. Respondents never requested that relief. Moreover, "[w]hile Plaintiff must be afforded a fair and reasonable opportunity to muster evidence to defeat the motion to dismiss, the Court also has a duty to ensure that the discovery process is not abused to achieve the goals that the anti-SLAPP statute is intended to prevent." *Wynn v. Bloom*, 218CV00609JCMGWF, 2019 WL 1983044, at *6 (D. Nev. May 2, 2019).

of the evidence demonstrates that 'the gist of the story, or the portion of the story that carries the sting of the [statement], is true.'" *Rosen*, 135 Nev. at 441, 453 P.3d at 1224 (quoting *Pegasus v. Reno Newspapers, Inc.* 118 Nev. 706, 715 n.17, 57 P.3d 82, 88 n.17(2002)). There, the Court found that defendant had met her burden to show that the statements were made without knowledge of their falsity because the "gist" of the statements was substantively true based upon the evidence in the record. *Id.* The Court recently addressed a similar situation in *Taylor v. Colon*, 136 Nev. Adv. Op. 50, 482 P.3d 1212 (2020). There, the defendant also denied making the allegedly defamatory statement that formed the basis for plaintiff's complaint. *Id.* at 1218. Rather than parse the individual words of the allegedly defamatory statement, the Court instead looked to determine whether the gist "was either truthful or made without knowledge of its falsehood." *Id.* (citing *Delucci v. Songer*, 133 Nev. 290, 300, 396 P.3d 826, 833 (2017)). This is particularly applicable where a plaintiff has failed to establish any "contradictory evidence in the record" to "undermine a defendant's sworn declaration establishing good faith," *Id.* (citing *Stark*, 136 Nev. at 43, 458 P.3d at 347).

Here, the evidence the Khorsandi Parties presented shows that the defamatory statements that form the basis for Respondents' complaint carry the same gist and sting of other reviews. In other words, nothing new was presented in these reviews about the sub-standard care offered by Respondents' practice that was not already in

the public. Dr. Smith has a long history of unprofessional conduct and unsuccessful surgeries which have resulted in critical reviews on Yelp and other review platforms. (APP088-102.) While Respondents regularly resort to legal threats in an attempt to create an air of professionalism on these public sites, the reviews remain. (*Id.*) And, importantly, all of this evidence is in the record. (*Id.*) Respondents failed to present any evidence to rebut the Khorsandi Parties' declarations that they did not make the otherwise truthful statements that form the basis for the complaint. In sum, the reviews at issue in the complaint carry the gist and sting of other patients' experiences and reviews of Respondents. Respondents have not submitted any evidence to support the assertions that the Khorsandi Parties were involved in making the purportedly defamatory reviews, or that the statements are false. Therefore, under the policy and logic of the *Taylor* decision, the Khorsandi Parties have satisfied their good faith obligation under NRS 41.660(3)(a).

2. *The posts were in a public forum that relates to issues of public concern as required by NRS 41.660(3)(a).*

The posts that form the basis of Respondents' complaint are communications "made in direct connection with an issue of public interest in a place open to the public or in a public forum" and are therefore communications protected by the anti-SLAPP statute. NRS 41.637(4). In its Order, the district court "agrees the quality of a doctor's patient care is most certainly an interest of public interest and review sites like Yelp are public forums." (APP170.) Respondents barely addressed

this aspect of the statute, instead focusing on the good faith requirement. (APP111-12.) There can be little dispute that posts on websites like Yelp about the quality of a doctor's care are protected speech under the anti-SLAPP statute.

This Court defines an issue of public concern broadly. *Smith v. Zilverberg*, 137 Nev. Adv. Op. 7, 481 P.3d 1222, 1227 (2021); *see also Shapiro v. Welt*, 133 Nev. 35, 37, 389 P.3d 262,267 (2017) (setting forth the guiding principles for determining whether an issue is of public interest). The quality of a doctors' care is most certainly an issue of public concern under NRS 41.637(4). This Court recently held that "[t]he public has an interest in an attorney's courtroom conduct that is not mere curiosity, as it serves as a warning to both potential and current clients looking to hire and retain the lawyer." *Abrams v. Sanson*, 136 Nev. 83, 87, 458 P.3d 1062, 1066 (2020). The public has an identical – if not greater – interest in ensuring that the doctor they choose to perform their surgery provides quality medical care. Other courts have held that a doctor's quality of patient care is an issue of public interest. *See, e.g., Carver v. Bonds*, 135 Cal. Rptr. 3d 480, 493 (2005); *Nagel v. Twin Labs., Inc.*, 134 Cal. Rptr. 2d 420, 425 (2003). The purported statements in Respondents' complaint relate to the quality of care that Dr. Smith provides, and therefore were in direct connection with an issue of public interest.

These statements were also made "in a place open to the public or a public forum, . . ." under NRS 41.637(4). "[U]nder its plain meaning, a public forum is not

limited to a physical setting, but also includes other forms of public communication.'" *Kosor*, 136 Nev. Adv. Op. 83, 478 P.3d at 395 (quoting *Damon v. Ocean Hills Journalism Club*, 102 Cal. Rptr. 2d 209, 210 (2000)). Although not all websites should be considered public forums under NRS 41.637, courts look to "whether the limited page, or as appropriate, post at issue creates a forum for citizen involvement." *Id.* (citing *City of Madison Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 175, 97 S.Ct. 421 (1976)).

With that standard in mind, this Court has recently held that certain websites are public forums for purposes of the anti-SLAPP analysis. In *Kosor*, the Court held that defendant's posts on Nextdoor.com qualified as a public forum because it provided others the opportunity to comment and respond to defendant's questions. 478 P.3d at 397. Similarly, in *Stark*, the Court that posts on a Facebook page about government actions constituted a public forum. 136 Nev. at 41 n.2, 458 P.3d at 345 n.2. Other courts have specifically held that review pages, like Yelp, are public forums and that posts on those pages constitute protected communications under the anti-SLAPP statute. *See Wong v. Jing*, 117 Cal. Rptr. 3d 747, 760 (2010) (finding that patient's critical comments about a dentist's practice on Yelp were "part of a public discussion and dissemination of information on issues of public concern."); *Davis v. Avvo, Inc.*, No. C11-1571RSM, 2012 WL 1067640, at *3 (W.D. Wash Mar. 28, 2012) (cited with approval in *Abrams v. Sanson*, 136 Nev. at 87,

458 P.3d at 1066) (holding that a website that includes reviews of professionals is a public forum "in that it provides information to the general public which may be helpful to them in choosing a doctor, dentist, or lawyer.") Respondents' Yelp page and Dr. Khorsandi's Google Review pages are similarly public forums, inviting reviews of from patients and the public about the quality of plastic surgeon's care.

The purportedly defamatory statements that constitute the foundation of Respondents' Complaint were "made in direct connection with an issue of public interest in a place open to the public or in a public forum" under NRS 41.637(4). When coupled with the Khorsandi Parties' declarations that they did not make the statements at issue, they have met their burden to show, by a preponderance of the evidence, that Respondents' Complaint is based on protected communication. As a result, the burden then shifts to Respondents to show with prima facie evidence a probability of prevailing on their claims.

C. Respondents Presented No Evidence to Support their Baseless Claims.

Respondents' history of using the legal system to intimidate, harass, and bully those who raise concern about the quality of their medical care is well documented. From lawsuits against former patients, to cease and desist letters, to warnings on Yelp, Respondents routinely attempt to chill free speech through bully tactics, including baseless litigations like the present. After becoming frustrated, a former patient told the world that Dr. Khorsandi had provided her some relief. After that

patient posted Yelp comments that are virtually indistinguishable from other negative reviews, Respondents took the dramatic step of filing suit against the Khorsandi Parties.⁸ When faced with the burden to present prima facie evidence to support their claims, Respondents' true colors shone through. They had no evidence. In fact, they barely had speculation.

Respondents have failed to present any evidence to support their claims, let alone prima facie evidence showing a probability of prevailing on the claim. Under NRS 41.660(3), plaintiffs face a higher burden than defendants seeking to show that the statements are protected. *See Rosen v. Tarkanian*, 135 Nev. 436, 440, 453 P.3d 1220, 1224 (2019). "[T]he prima facie evidence standard requires the court to decide whether the plaintiff met his or her burden of production to show that a reasonable trier of fact could find that he or she would prevail." *Taylor*, 482 P.3d at 1216. "A defendant's anti-SLAPP motion should be granted when a plaintiff presents an insufficient legal basis for the claims or when no evidence of a sufficient substantiality exists to support a judgment for the plaintiff." *Piping Rock Partners, Inc. v David Lerner Assocs., Inc.*, 946 F. Supp. 2d 957, 967 (N.D. Cal. 2013), *aff'd* 609 Fed. Appx. 497 (9th Cir. 2015). Not only have Respondents not provided any

⁸ Dr. Khorsandi believes that Dr. Smith also sent him a threatening note, scrawled on an article about the lawsuit. (APP080; APP082-83.) Although Dr. Khorsandi raised the issue in the motion, Respondents did not address it in their opposition or oral argument.

evidence, relying instead on argument of counsel, they have not stated claims upon which relief can be granted and cannot meet their burden under the second prong of the anti-SLAPP motion to dismiss statute. Accordingly, the Court should find that they failed to meet their burden under the second prong of the anti-SLAPP motion to dismiss standard.⁹

1. Respondents cannot support their defamation claims against the Khorsandi Parties.

Setting aside the absolute absence of evidence to support their specious allegations, Respondents' complaint on its face fails to show a probability of prevailing on their claims for slander and libel. Respondents bring a claim for slander per se based on a patients' Google review of Dr. Khorsandi, and another six claims for libel per se based on posts made by anonymous reviews that Respondents' claim were made by Ms. Le. To state a claim for slander or libel, the complaint must allege: (1) a false and defamatory statement of fact by a defendant about the plaintiff; (2) the unprivileged publication of this statement to a third person; (3) the defendant was at least negligent in making the statement; and (4) the plaintiff

⁹ Because the district court determined that it could not complete the analysis under the first prong of the anti-SLAPP motion to dismiss standard, it never reached whether Appellants had met their burden under NRS 41.660(3)(b). It did, however, express significant concerns about the absence of evidence to support their claims. (APP174.) "[T]he evidence Plaintiff currently possesses is arguably insufficient in the Court's view to raise even a prima facie case against Defendants." (APP175.)

sustained damages as a result of the statement. *Pegasus*, 118 Nev. at 718, 57 P.3d at 90.

"[A]ctual malice is proven when a statement is published with knowledge that it was false or with reckless disregard for its veracity." *Id.* at 722, 57 P.3d at 92. Where Respondents have held themselves out as a leader in the plastic surgery field in Las Vegas, as here, they are limited purpose public figures and therefore must show that the purported statements were made with actual malice. "A limited-purpose public figure is a person who voluntarily injects himself or is thrust into a public controversy or public concern, and thereby becomes a public figure for a limited range of issues. The test for determining whether someone is a limited public figure includes examining whether a person's role in a matter of public concern is voluntary and prominent." *Id.* at 720, 57 P.3d at 91 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351-52, 94 S. Ct. 2997 (1974)). As this Court held in *Pegasus*, a restaurant that "voluntarily entered the public spectrum by providing public accommodation and seeking public patrons" was a limited public figure for purposes of restaurant reviews. *Id.* at 721, 57 P.3d at 92. Respondents have similarly entered the public spectrum. Moreover, Respondents' business strategy appears heavily focused on their Yelp reviews, actively responding to critical reviews and going so far as to file suit against former patients who spoke out about their deficient care. (APP044-73.) Respondents also claim that they have a prospective business

relationship with everyone who reviews their Yelp page, going so far as to bring a generalized claim for wrongful interference with prospective economic advantage based on the negative reviews. (APP022.) Respondents must therefore show that any statement was made with actual malice to prevail on their claims. Respondents' complaint fails to meet that standard.

Respondents' first claim for slander per se, based on a Google Review on the Practice's website, is also privileged and cannot form the basis of a claim for relief. According to Respondents' complaint, Dr. Khorsandi made a statement to a patient that in his professional medical opinion, her breast implant was placed in backwards by her prior surgeon, Dr. Smith. (APP004, ¶ 15.) The patient then posted a review of Dr. Khorsandi on the Practice's Google Review page. (*Id.*) Respondents then took the remarkable step of sending the Khorsandi Parties a cease and desist letter before filing suit. In addition to Dr. Khorsandi's declaration denying that he told his patient that the implant had been placed in backwards or attributing the issues to Dr. Smith, a doctor's statement to his patient is privileged, and therefore cannot be the basis for a claim of slander as a matter of law.

An essential element of any slander or libel claim is the *unprivileged* publication of a statement to a third person. However, even accepting Dr. Khorsandi's purported statements as true, his statements are absolutely privileged because he made these statements in the context of fulfilling his duties as

a doctor to his patient and therefore cannot be the basis for a claim for relief. "The class of absolutely privileged communications recognized by this court remains narrow and is limited to those communications made in judicial or quasi-judicial proceedings and communications made in the discharge of a duty under express authority of law." *Cucinotta v. Deloitte & Touche, LLP*, 129 Nev. 322, 326, 302 P.3d 1099, 1102 (2013). Under Nevada law, medical doctors must be permitted to have full and frank discussions with his or her patient to provide advice and analysis as to the patient's medical condition and treatment. This is consistent with Nevada's recognition of the doctor-patient privilege in the first instance: "The doctor-patient privilege is 'intended to inspire confidence in the patient' and encourage candor in making a full disclosure so the best possible medical care can be given." *Rogers v. State*, 127 Nev. 323, 327, 255 P.3d 1264, 1266 (2011) (quoting *Hetter v. Dist. Ct.*, 110 Nev. 513, 516, 874 P.2d 762, 763 (1994)).

Dr. Khorsandi has denied making the statements alleged in the complaint. Additionally, had it been Dr. Khorsandi's medical opinion that one of his patient's implants was placed in backwards, he was obligated to provide his patient with that medical diagnosis. That information was required to be communicated so as to obtain the patient's informed consent for the manipulation procedure referred to in

the review, and therefore privileged. It cannot, therefore, form the basis for the slander claim, and must be dismissed as to Dr. Khorsandi.¹⁰

Respondents' remaining libel per se claims against Dr. Khorsandi and the Practice are also deficient because they fail to allege that Dr. Khorsandi or the Practice made any of the statements that form the basis for Respondents' complaint. The most fundamental element a plaintiff must allege to support a claim for libel is that the defendant made a defamatory statement about the plaintiff. *Pegasus*, 118 Nev. at 718, 57 P.3d at 90. Therefore, the complaint must specifically include an allegation that a defendant "actually made a defamatory statement." *Flowers v. Carville*, 266 F. Supp. 2d 1245, 1252 (D. Nev. 2003) (applying *Pegasus*, 118 Nev. at 718, 57 P.3d at 90.) In *Flowers*, the court applying Nevada law determined that a complaint's allegations that defendant had directed others to make defamatory statements were insufficient to state an actionable claim. *Id.* Here, Respondents repeatedly state that Ms. Le "either on her own volition or at the direction of one of both of the other Defendants and posing as 'Cecily S.'" posted the reviews." (APP009-10, ¶ 46; APP011, ¶ 52; APP012, ¶ 58; APP013, ¶ 64; APP014-15, ¶ 70;

¹⁰ Respondents' complaint is also deficient because it alleges that Ms. Le, as opposed to Dr. Khorsandi, made the slanderous comment to the client. Based on the text of the review, it was Dr. Khorsandi who provided his client with medical advice. (See APP004, ¶ 15; APP008-09, ¶ 39.) As neither Ms. Le nor the Practice is alleged to have made any statements that form the basis for the slander claim, the first claim for relief must be dismissed to both.

APP016, ¶ 76.) Ms. Le, once again, denies authoring the statements attributed to her, (APP086, ¶¶ 3 & 4) but even if she had, the allegations in the complaint are insufficient to support the libel per se claims against Dr. Khorsandi or the Practice. There is no allegation that Dr. Khorsandi or the Practice actually made defamatory statements. Respondents would not be able to provide the prima facie evidence to support their Second through Seventh Claims for Relief against Dr. Khorsandi and the Practice.

Similarly, Appellant's eighth cause of action for "Concert of Action, Aiding and Abetting, Civil Conspiracy" is nothing more than a repackaging of their libel claims, still with the same flaws. To state a claim for civil conspiracy, a plaintiff must plead facts alleging the defendants acted in concert with the intention of accomplishing an unlawful objective for the purpose of harming the plaintiff, and the plaintiff sustained damages as a result of defendants' actions. *Guilfoyle v. Olde Monmouth Stock Transfer Co., Inc.*, 130 Nev. 801, 813, 335 P.3d 190, 198 (2014). Respondents' claim fails, just as the others, because there are no factual allegations alleging any actions by the Khorsandi Parties in furtherance of the conspiracy. Instead, the complaint simply states the legal conclusion that the Khorsandi Parties worked together to libel Respondents, failing to identify any actions any defendant took to further the conspiracy to defame Respondents. (APP017, ¶¶ 83-85; APP018, ¶ 87.) The mere recitation of the elements of a claim

is insufficient to even support a claim for relief, let alone meet the standard under NRS 41.660(3)(b) to show with prima facie evidence a probability of prevailing on the claim. Respondents have not alleged facts to support their claim for civil conspiracy, and it therefore must be dismissed.

Respondents' complaint also fails to identify any actions by Dr. Khorsandi or the Practice that would place them in a false light, as alleged in the claim for false light.

[A]n action for false light arises when one who gives publicity to a matter concerning another that places the other before the public in a false light . . . if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Franchise Tax Bd. of Cal. v. Hyatt, 130 Nev. 662, 685, 335 P.3d 125, 141 (2014), *vacated and remanded on other grounds by Franchise Tax Bd. of Cal. v. Hyatt*, 136 S. Ct. 1277 (2016) (citing Restatement (Second) of Torts § 652E (1977)). The complaint alleges that all of the Khorsandi Parties "engaged in a systematic pattern of publishing information" regarding Respondents. (APP019, ¶ 103.) As with the claims for libel, the complaint is bereft of instances where Dr. Khorsandi or the Practice were accused of actually publishing information. Without this essential element, Respondents cannot success on their Tenth Claim for Relief of False Light.

2. *The purportedly defamatory statement did not result in intentional infliction of emotional distress.*

Respondents' complaint fails to present any evidence that Ms. Le made the statements at issue but, even if true, purported conduct does not rise to the level of intentional infliction of emotional distress. Respondents must show "(1) extreme and outrageous conduct on the part of the defendant; (2) the intent to cause emotional distress or reckless disregard for causing emotional distress; (3) that the plaintiff actually suffered extreme or severe emotional distress; and (4) causation." *Miller v. Jones*, 114 Nev. 1291, 1299-1300, 970 P.2d 571, 577 (1998). Extreme or outrageous conduct is more than just being critical; a person "must necessarily be expected and required to be hardened . . . to occasional acts that are definitely inconsiderate and unkind." *Maduik v. Agency Rent-A-Car*, 114 Nev. 1, 4, 953 P.2d 24, 26 (1998) (internal citations omitted). Instead, "extreme and outrageous conduct is that which is outside all possible bounds of decency and is regarded as utterly intolerable in a civilized community." *Id.* The publication of a defamatory statement, without more, does not constitute extreme and outrageous conduct. *Soto-Lebron v. Fed. Express Corp.*, 538 F.3d 45, 58-59 (1st Cir. 2008). "Nothing short of extraordinary transgressions of the bounds of civility will give rise to liability for intentional infliction of emotional distress." *Zeran v. Diamond Broad.*, 19 F. Supp. 2d 1249, 1254 (W.D. Okla. 1997), *aff'd* 203 F. 3d 714 (10th Cir. 2000) (finding that a hoax accusing an individual of attempting to profit off of the Oklahoma City Federal

Building bombing did not rise to the level of intentional infliction of emotional distress).

Here, even accepting all of Respondents' allegations as true, negative reviews of Dr. Smith's patient care are not nearly egregious as falsely accusing someone of attempting to profit from a national tragedy. Critical comments about the quality of Dr. Smith's care must be expected on a public review site like Yelp, as evidenced by numerous other reviews. While Respondents' may consider Cecily S.'s comments inconsiderate or unkind, they are hardly outside all possible bounds of decency. And, as with the rest of Respondents' complaint, their claim for intentional infliction of emotion distress does not allege any conduct by Dr. Khorsandi or the Practice that could form the basis for that claim, a fatal omission for this claim. Respondents cannot show a probability of prevailing on the claim for intentional infliction of emotional distress based on the deficient allegations in the Complaint.

3. Dr. Khorsandi and the Practice were not negligent in their hiring, training, or supervision.

Respondents also cannot show a probability of prevailing on their claim for negligent hiring supervision and training against Dr. Khorsandi and the Practice. In fact, the complaint fails to allege any facts indicating how Dr. Khorsandi or the Practice failed to use reasonable care in the hiring, training, or supervision of Ms. Le. The tort of negligent hiring imposes "a duty on an employer to conduct a reasonable background check on a potential employee to ensure that the employee is fit for the

position." *Hall v. SSF, Inc.*, 112 Nev. 1384, 1392, 930 P.2d 94, 98 (1996). This duty is breached when the employer "hires an employee even the employer knew, or should have known, of that employee's dangerous propensities." *Id.* Respondents' complaint is devoid of any references to the Khorsandi Parties' purported hiring practices or how Dr. Khorsandi or the Practice's hiring process fell below the standard of care, instead simply stating the legal conclusion that they were negligent in hiring Ms. Le.

Similarly, Respondents simply allege the legal conclusion that Dr. Khorsandi and the Practice failed to use reasonable care in the training and supervision of Ms. Le. The complaint does not include facts to support the elements of the related tort of negligent supervision and training. Although an employer has a general duty to use reasonable care in the training and supervision of his or her employees, a plaintiff must allege facts specifically identifying how the employer violated this duty. *Burnett v. C.B.A. Sec. Serv., Inc.*, 107 Nev. 787, 789, 820 P.2d 750, 752 (1991); *Colquhoun v. BHC Montevista Hosp., Inc.*, No. 2:10-CV-00144-RLH-PAL, 2010 WL 2346607, at *3 (D. Nev. June 9, 2010). Respondents' theory appears to be that Dr. Khorsandi and the Practice are liable for any wrongful acts of their employee. Yet, the law refutes such an inference, requiring that the complaint pleads facts indicating how the employer violated the duty. *Colquhoun*, 2010 WL 2346607, at *3 (citing *Burnett*, 107 Nev. 787, 820 P.2d 750). The mere "fact that an employee

acts wrongfully does not in and of itself give rise to a claim for negligent hiring, training or supervision." *Id.* Respondents recognize that their complaint does not include facts to support this allegation. (APP118, Opp'n at 16.) As such, Respondents cannot support their claim with prima facie evidence as required by NRS 41.660(3)(b).

4. *Respondents' fail to allege interference with any prospective contractual relationship.*

To state a claim for interference with prospective advantage, a plaintiff must plead: "(1) a prospective contractual relationship between the plaintiff and a third party; (2) the defendant's knowledge of this prospective relationship; (3) the intent to harm the plaintiff preventing the relationship; (4) the absence of privilege or justification by the defendant; and (5) actual harm to the plaintiff as a result of defendants' conduct." *Leavitt v. Leisure Sports Inc.*, 103 Nev. 81, 88. 734 P.2d 1221, 1225 (1987). Respondents' complaint is plainly deficient, and they failed to present prima facie evidence to support this claim. Instead, as enumerated in their opposition, Respondents' claim that they "had prospective economic or contractual relationships with customers who viewed Plaintiffs' Yelp page at the time the false, defamatory reviews were displayed." (APP119, Opp'n 17.) Therefore, their Thirteenth Cause of Action for Wrongful Interference with Prospective Economic Advantage is intended to impose liability on the Khorsandi Parties for interfering with all of those prospective relationships. Setting aside the other negative reviews

that were posted on the Respondents' Yelp page and the near impossibility of proving damages, the mere possibility of entering into a contractual relationship is not enough to support a claim for interference with prospective economic advantage. "The tort requires a reasonable expectation of entering into a valid business relationship, and not speculation or mere wishful thinking." 86 C.J.S. Torts § 37. Respondents' overly-optimistic certainty that individuals who viewed their Yelp page would have entered into a contractual relationship with them but for these specific negative comments that were online for mere hours is insufficient to form a basis for a claim for interference with prospective economic advantage.

VIII. CONCLUSION

This Court should reverse the district court's order and find that the Khorsandi Parties can – and have – met their burden under NRS 41.660(3)(a) to show that the statements that form the basis for Respondents' complaint were made in good faith by submitting a declaration that they did not make the statements at issue. Additionally, Respondents have failed to present any evidence to support their claims for relief, claims that, as pled, are legally insufficient. With that, Respondents' have not met their burden under NRS 41.660(3)(b). Respondents'

claims must be dismissed, and their attempts to harass others under the guise of defending their reputation stopped.

DATED this 22nd day of July, 2021.

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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) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2007 in size 14 font in Times New Roman.

I further certify that I have read this brief and it complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains approximately 9,585 words.

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 22nd day of July, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Pisanelli Bice PLLC, and that on this 22nd day of July, 2021, I caused to be e-filed/e-served through the Court's website true and correct copies of the above and foregoing **OPENING BRIEF** to the following:

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