

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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*Supreme Court Case No. 80957*

Electronically Filed  
Nov 04 2021 03:07 p.m.

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Clerk of Supreme Court

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.*

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**APPELLANTS' REPLY 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. Appellants have 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 4th day of November, 2021.

PISANELLI BICE PLLC

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## **I. SUMMARY OF THE APPEAL**

Appellants Christopher Khorsandi, M.D. ("Dr. Khorsandi"), Dr. Christopher Khorsandi, PLLC (the "Practice"), and Catherine Le Khorsandi ("Ms. Le") (collectively the "Khorsandi Parties") have been targeted with this meritless lawsuit by business competitors. Respondents Smith Plastic Surgery, Inc. and Lane F. Smith, M.D. (collectively "Respondents") have a long history of using the legal system to artificially bolster their business reputation and to quiet their critics and competitors. After Dr. Khorsandi received a positive review<sup>1</sup> – on his own Google page – Respondents began their harassing campaign. Respondents admit that they received a series of negative reviews that, after threats, were promptly removed by Yelp.<sup>2</sup>

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<sup>1</sup> For the first time in their Answering Brief, and without citation to the record, Respondents claim that "[u]pon investigation, the Smith Parties found no evidence that anyone with the name 'Gabby Debruno' ever treated with Dr. Smith, nor at the Smith Plastic Surgery." (Answering Br. at 3.) This assertion is directly contradicted by Respondents' complaint, which does not state that the reviewer was not a patient and instead refers to Respondents' protocols. (See APP004, ¶¶ 15-17; APP008-9, ¶¶ 39-42.) Additionally, Respondents brought a claim for slander for this review, as opposed to libel for the purportedly false reviews. Why Respondents would make this unsupported statement is unclear, except for the prohibition on defamation claims for medical advice that Respondents have failed to address. (See Opening Br. at 29-31.) Dr. Khorsandi maintains that he never made any comments regarding the quality of Respondents' medical care. (APP0080.)

<sup>2</sup> These, of course, were hardly the only negative reviews Respondents have received. In fact, they have been so frustrated by another former patient that they filed suit against her. (APP044-075.) The Khorsandi Parties also attached numerous

On November 4, 2019, Respondents filed suit against the Khorsandi Parties. Based only on conclusory statements that each of the Khorsandi Parties were involved in making each of the posts that form the basis of Respondents' complaint, Respondents alleged a litany of supposed horrors they incurred based on the posts that were up for mere hours. Each of Respondents' fourteen causes of action are based on the reviews that purportedly were made by the Khorsandi Parties.

The Khorsandi Parties moved to dismiss Respondents' complaint. First, Respondents' complaint is a meritless lawsuit that is prohibited under Nevada's anti-SLAPP statutory scheme. Second, Respondents' complaint failed to adequately plead claims for relief, even under Nevada's liberal pleading standard.<sup>3</sup> On March 4, 2020, the district court entered its order, finding that the Khorsandi Parties could not meet their burden under NRS 41.660(3)(a) because they deny making the statements at issue.

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examples of other negative reviews Respondents have received on their Yelp page. (APP088-102.)

<sup>3</sup> The district court's denial of the Khorsandi Parties' motion to dismiss under NRCP 12(b)(5) is not on appeal. However, the deficiency of Respondents' complaint does go to whether they can demonstrate with prima facie evidence a probability of prevailing on their claim under NRS 41.660(3)(b). The Khorsandi Parties' Opening Brief details the legal – and factual – deficiencies of Respondents' claims. (See Opening Br. at 25-38.) However, as Respondents' Answering Brief does not address these arguments with any specificity, the Khorsandi Parties will not repeat the arguments herein. See NRAP 28(c) (requiring the reply brief "be limited to answering any new matter set forth in the opposing brief.")

Under NRS 41.660(3)(a), the Khorsandi Parties bear the initial burden to show, by a preponderance of the evidence, that Respondents' claims are "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." The Khorsandi Parties are in the unfortunate situation of being targeted with a meritless lawsuit, while not having made the posts that form the basis for the Respondents' complaint. Therefore, the Khorsandi Parties met their burden under NRS 41.660(3)(a) the only way they could – both Dr. Khorsandi and Ms. Le submitted declarations denying their involvement in the posts. The undisputed evidence before the district court was that the Khorsandi Parties were not involved in the speech at issue.<sup>4</sup> Alternatively, and without admitting any involvement in making the posts, the Khorsandi Parties argue that the gist and sting of the posts were consistent with other negative reviews that are on Respondents' current Yelp page.

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<sup>4</sup> As discussed more fully *infra* at Section II.C and in the concurrently-filed motion to strike, Respondents offered no competent evidence in the record that the Khorsandi Parties were involved in the targeted speech at all. Instead, after the record was closed, Respondents offered unauthenticated attorney work product and illegible printouts that relate to other, non-defamatory posts outside of this lawsuit. This information was not before the district court at the time the appealed order was entered, and is therefore not properly before the Court. Additionally, Respondents' bold statements about the Khorsandi Parties' involvement are not supported by anything in the actual record. The Court should strike the irrelevant material from the record.



Although this Court has not addressed this precise situation, it should, as it so often does, look to California courts' handling of similar issues. In *Bel Air Internet, LLC v. Morales*, a California court set forth the process for analyzing whether a suit was entitled to anti-SLAPP protections without requiring the defendant to admit to making a statement they did not make. 230 Cal. Rptr. 3d 71 (2018). Considering the character of the speech alleged in the complaint – public reviews about the quality of medical care – these communications fall under NRS 41.637(4) as protected speech.

Therefore, this Court should find that the Khorsandi Parties have met their burden to show that the protected speech was not untruthful and, in fact, was not made by them at all. With that, the burden shifts to Respondents to present prima facie evidence of prevailing on their claim. NRS 41.660(3)(b). Respondents have failed to do so, instead relying on the unsupported allegations in their complaint and extra-record allegations. This Court should reverse the district court's order, dismiss Respondents' complaint, and stop Respondents' campaign of harassment.

## **II. ARGUMENT**

### **A. Nevada's Anti-SLAPP Statute is Intended to Prevent Harassing, Meritless Lawsuits.**

Nevada's anti-SLAPP law was enacted to ensure that plaintiffs could not bring meritless lawsuits against individuals who made protected communications, 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 suit is a meritless lawsuit that a party initiates primarily to chill a defendant's exercise of his or her First Amendment free speech rights." *Stubbs v. Strickland*, 129 Nev. 146, 150, 297 P.3d 326, 329 (2013). "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 with a meritless lawsuit the ability to assert immunity from claims based on protected communication by filing a special motion to dismiss. *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."<sup>5</sup>

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<sup>5</sup> Throughout their Answering Brief, Respondents argue that they are entitled to discovery to allow them to uncover the information to prevail. (*See* Answering Br. at 7, 12, 21, 23, 24, 27, 28, and 29.) This approach runs counter to the purpose of Nevada's anti-SLAPP statutory scheme that allows for early dismissal of meritless and harassing claims. Nevada's legislature recognized that the costs and

*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).

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." A defendant must provide "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; . . . ." "[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*, 136 Nev. Adv. Op. 50, 482 P.3d at 1216. The defendant'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

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burden of discovery are many times the point of strategic lawsuits like this one. Allowing that burden to pass to the target of the harassment would undermine the purpose of the statutory scheme. Plus, Respondents could have asked the district court for limited discovery under NRS 41.660(6) to oppose the Khorsandi Parties' anti-SLAPP motion to dismiss. Instead, they opposed the motion in its entirety and won. Now is not the time to request discovery.

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 the plaintiff cannot meet that burden with admissible evidence, the court must dismiss the claims that arise out of the protected communication.<sup>6</sup>

**B. The Speech that Forms the Basis of Respondents' Complaint is Protected Speech Under NRS 41.660(3)(a).**

**1. *The undisputed evidence presented to the district court was that the Khorsandi Parties did not make the statements, thereby meeting the good faith requirement under NRS 41.660(3)(a).***

This Court has addressed how a defendant can meet its burden to show, by a preponderance of the evidence, that the statement was made in good faith under NRS 41.660(3)(a). 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

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<sup>6</sup> As noted in the Opening Brief, all of Respondents' claims rely on the alleged statements to impose liability on the Khorsandi Parties, and therefore should all be dismissed. "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)). Respondents failed to address, let alone rebut, that all of their claims arise out of protected communication and therefore would be prohibited by the anti-SLAPP statute.

evidence to the record to undermine the defendants' assertions, including that the statements were truthful or made without knowledge of a falsehood. *Id.*

Here, the Khorsandi Parties cannot follow the traditional path and simply submit a declaration that the statements were made in good faith, thereby entitling them to protection under the anti-SLAPP statute. Dr. Khorsandi and Ms. Le, instead, submitted declarations stating that they did not make the statements as alleged in Respondents' complaint. (See APP080 & APP086.) Doing so satisfies the burden under NRS 41.660(3)(a); that is, because the Khorsandi Parties did not make the statements, those statements necessarily could not have been untruthful or made with the Khorsandi Parties' knowledge of their falsehood. Indisputably, because Respondents failed to submit any evidence contradicting the declarations, the undisputed evidence before the district court (and this Court) is that the Khorsandi Parties did not make the statements that form the basis for Respondents' complaint.<sup>7</sup>

Although this Court has not addressed the applicability of the anti-SLAPP statute when a defendant denies making the statements that form the basis for the

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<sup>7</sup> As discussed in the Khorsandi Parties' concurrently-filed motion to strike and *supra* at Section II.C, Respondents attempt to rely on unverified assertions and attorney work product, outside the record on appeal, related to the authorship of other posts not at issue in their complaint. Because this information was not before the district court at the time of the special motion to dismiss, it is not properly before this Court, and should not be considered by this Court as part of the appeal.

complaint, California has. Because of the similarity in purpose and language, Nevada regularly looks to California for guidance on issues related to anti-SLAPP statutes and motion practice. *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).

In *Bel Air Internet, LLC v. Morales*, the court granted an anti-SLAPP motion to dismiss while allowing the defendant to maintain that they did not make the statement at issue. 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 under the anti-SLAPP statute and thus should be dismissed. *Id.*<sup>8</sup>

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.

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<sup>8</sup> The court specifically identified situations where, like here, a plaintiff filed a meritless claim to harass a defendant and increase litigation costs: " 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.

*Id.* (citing *Baral v. Schnitt*, 205 Cal. Rptr. 3d 475 (2006)). As the court in *Bel Air* recognized, requiring discovery into whether the Khorsandi Parties authored the statements was improper when, based on the complaint, the court can determine that the lawsuit is a prohibited SLAPP lawsuit. *Bel Air*, 230 Cal. Rptr. 3d at 81, n. 4.

Here, the uncontested evidence – Appellants' declarations – show that neither Dr. Khorsandi nor Ms. Le made the defamatory statements as alleged by Respondents. Respondents failed to submit any evidence in response to the Special Motion to Dismiss that rebutted the Khorsandi Parties' declarations. As such, 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, by 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 the Khorsandi Parties' declarations stating they were not involved in the protected speech are sufficient to meet their burden under NRS 41.660(3)(a).

**2. *The reviews contain the gist and sting of other criticisms of Respondents' medical care.***

This Court has also determined that a defendant can meet their burden to show that a statement was made in good faith based on it containing the gist and sting of truth. "[T]he relevant inquiry in prong one of the anti-SLAPP analysis is

whether a preponderance 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.*

While the Khorsandi Parties deny making the statements at issue, this Court can still determine whether the allegedly defamatory statements contained the gist and sting of the truth. The Court recently addressed a similar situation in *Taylor v. Colon*, 136 Nev. Adv. Op. 50, 482 P.3d 1212 (2020). There, a defendant also denied making the allegedly defamatory statement that formed the basis for plaintiff's complaint. *Id.* at 1214 ("[Plaintiff] alleges that [defendant] also stated that the person depicted in the video clip was arrested for his behavior and was a cheater and criminal, although appellants dispute Taylor saying such statements.").

Still, separate and apart from the defendant's denial, the Court looked to see whether the gist "was either truthful or made without knowledge of its falsehood." *Id.* at 1218 (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).

Numerous negative reviews posted by other patients – including ones that form the basis for other lawsuits filed by Respondents – show that the gist and sting of the reviews are true. (*See* APP044-76; APP088-102.) In other words, while the Khorsandi Parties' declarations show that they had no involvement in the posts, 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 allegations 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.*; APP044-76.) 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. Based on the policy and logic of the *Taylor* decision, the Khorsandi Parties have satisfied their good faith obligation under NRS 41.660(3)(a) because the statements that form the basis for Respondents' complaint carry the gist and sting of truth.

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

In addition to the requirement discussed above, that the statement be "truthful or made without knowledge of its falsehood," NRS 41.637 sets forth four types of communications that are protected under the anti-SLAPP statutory scheme. Here, 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, the type of 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.) In their opposition before the district court, Respondents barely addressed this aspect of the statute, instead focusing on the good faith requirement. (APP111-12.) Respondents' Answering Brief again focuses on the need for discovery to determine who authored the posts, rather than whether the posts constituted protected communications under NRS 41.637. (Answering Br. at 19-21.) Rather than focusing on the authorship of the posts, the Court should look to the substance of the allegations in the complaint to determine whether the alleged communications constituted protected conduct. *See Bel Air*, 230 Cal. Rptr. 3d at 80-81.

The quality of a doctor's care is most certainly an issue of public concern under NRS 41.637(4). 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). 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). In *Abrams v. Sanson*, this Court recognized that an attorney's conduct is an issue of public concern. 136 Nev. 83, 87, 458 P.3d 1062, 1066 (2020). The quality of a doctor's care is surely an issue of public concern as well. The reviews 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 v. Olympia Cos., Inc.*, 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)); *see also, Kosor*, 478 P.3d at 397 (determining posts on Nextdoor.com qualified as a public forum); *Stark*, 136 Nev. at 41 n.2, 458 P.3d at 345 n.2 (determining posts on Facebook constituted a public forum). Respondents' Yelp page and Dr. Khorsandi's Google Review pages are similarly public forums, inviting reviews from patients and the public about the quality of a plastic surgeon's care.

As alleged in Respondents' complaint, the comments that form the basis for the claims for relief were reviews of medical care posted in a public forum. Therefore, the statements 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). The uncontroverted evidence shows that the Khorsandi Parties did not make the statements at issue in the complaint. Therefore, the Khorsandi Parties have met their burden to show, by a preponderance of the evidence, that Respondents' complaint is based on protected communication. The district court erred when it determined that the Khorsandi Parties had not met their burden and denied their Special Motion to Dismiss. The Court should reverse the district court's order, and dismiss Respondents' complaint.

**C. Respondents Have Not Provided Prima Facie Evidence of Prevailing on Their Claim.**

Respondents claim that they have met their burden under NRS 41.660(3)(b) to "demonstrate[] with prima facie evidence a probability of prevailing on the

claim[s]; . . . ." (*See* Answering Br. at 27.) The claims must have minimal merit, and the Court must "review each challenged claim independently and assess [plaintiff's] probability of prevailing." *Abrams v. Sanson*, 136 Nev. at 91, 458 P.3d at 1069 (citing *Baral*, 205 Cal. Rptr.3d 475). "[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 Assos., Inc.*, 946 F.Supp. 2d 957, 967 (N.D. Cal. 2013) (emphasis added).

Here, Respondents *neither* show that they have a legally sufficient claim *nor* provide evidence to support their claims. Rather than rely on admissible evidence, Respondents claim that because the complaint alleges the necessary allegations, they have met their burden under the second prong of NRS 41.660(3).<sup>9</sup> (Answering Br. at 27.) As the Court determined in *Abrams v. Sanson*, the

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<sup>9</sup> Respondents have also failed to even attempt to address the substantial legal issues raised in the Khorsandi Parties' Opening Brief regarding the insufficiency of Respondents' complaint. (*See* Opening Br. at 25-38.) Respondents' failure to address the substantive argument raised by the Khorsandi Parties constitutes a waiver or confession of error under NRAP 31(d), and Respondents cannot attempt to remedy this error at oral argument (if the Court believes oral argument is necessary). *See also Polk v. State*, 126 Nev. 180, 184, 233 P.3d 357, 359-60 (2010).

allegations made in the complaint are insufficient to meet the burden. "[T]he review should focus on the particular allegations, their basis in protected communications, and their probability of prevailing, rather than on the form of the complaint." 136 Nev. at 91 n.4, 458 P.3d at 1069 n.4 (citing *Baral*, 476 P.3d at 616). Respondents' attempts to rely on the complaint are particularly concerning when, as here, the district court expressed concern about the factual sufficiency of the complaint. "Consequently, the evidence [Respondents] currently possess is arguably insufficient in the Court's view to raise even a prima facie case against [the Khorsandi Parties]." (APP175.)

Respondents also attempt to bolster their deficiency by relying on information that was not presented to the district court during briefing on the Khorsandi Parties' Special Motion to Dismiss.<sup>10</sup> (Answering Br. at 27.) Respondents cite to unauthenticated and illegible printouts to support the broad proposition that "[p]reliminary research substantiates the notion that the Khorsandi Parties were responsible for these posts." (*Id.*; see also Answering Br. at 9-11 (including a lawyer-prepared chart that does not include specific references to any supporting documentation.)) These printouts were attached to Respondents' reply in support of their motion for case terminating sanctions, filed more than a year after Respondents

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<sup>10</sup> The Khorsandi Parties are concurrently filing a motion to strike the irrelevant and improper inclusion of Respondents' post-hoc attempts to support their harassing complaint.

were obligated to provide prima facie evidence in their opposition to the Khorsandi Parties' Special Motion to Dismiss. (*Compare* RA044-96 and APP103-122.) Moreover, Respondents fail to explain how these posts relate to the authorship of the defamatory posts that form the basis for their complaint.

The reliance on this information is, at best, an admission that the Respondents did not meet their burden to present prima facie evidence establishing a probability of prevailing on the claim. At the time of their opposition to the Special Motion to Dismiss, the most Respondents could muster was a claim that the defamatory posts "were made at times and locations around the country where Dr. Khorsandi and [Ms. Le] were located." (APP105.) At the hearing on February 19, 2020, Respondents referenced non-defamatory Yelp reviews that they claimed showed a connection between Dr. Khorsandi and Cecily S., but these were not entered into evidence or provided to the Khorsandi Parties. (APP156-59.) Respondents failed to meet their burden under NRS 41.660(3)(b) before the district court to show with prima facie evidence of prevailing on their claim; they cannot rely on evidence outside of the record to remedy their deficient opposition.

### **III. 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 cannot 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.

DATED this 4th day of November, 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 4,763 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 4th day of November, 2021.

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## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of Pisanelli Bice PLLC, and that on this 4th day of November, 2021, I caused to be e-filed/e-served through the Court's website true and correct copies of the above and foregoing **APPELLANTS' REPLY BRIEF** to the following:

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