Case No. 81859

IN THE SUPREME COURT OF THE STATE OF NEVADA

SARAH JANEEN ROSE,

Appellant,

vs.

DAVID JOHN ROSE,

Respondent.

District Court Case No. A-20-815750-C, Department XI

APPELLANT SARAH JANEEN ROSE'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

Pursuant to Nevada Rule of Appellate Procedure 26.1, Appellant Sarah Janeen Rose submits this Disclosure Statement:

The undersigned counsel of record certifies that the following are persons and entities as described in Nevada Rule of Appellate Procedure 26.1(a) and must be disclosed. These representations are made so that the justices of this Court may evaluate possible disqualification or recusal.

1. Appellant is an individual party. Therefore, she has no parent corporations or corporations owning 10 percent or more stock to disclose pursuant to Nevada Rule of Appellate Procedure 26.1(a).

2. Appellant is represented by Bailey❖Kennedy in this appeal and in the district court proceedings.

3. Appellant is not using a pseudonym for the purposes of this appeal.

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TABLE OF CONTENTS

BAILEY ❖ KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

BAILEY ❖ KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

TABLE OF AUTHORITIES

Federal Cases

State Cases

BAILEY ❖ KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

BAILEY ❖ KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

State Statutes

Other

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I. JURISDICTIONAL STATEMENT

The Nevada Supreme Court has jurisdiction over this matter pursuant to NRS 41.665(4). On August 27, 2020, the Eighth Judicial District Court, Clark County, Nevada, entered an Order Granting in Part, and Denying in Part, Defendant Sarah Janeen Rose's Special Motion to Dismiss Pursuant to NRS 41.660 (anti-SLAPP). (2 JA 15.)[1] Notice of Entry of this Order was filed and served on August 27, 2020. (2 JA 16.) Appellant filed a Notice of Appeal on September 25, 2020. (2 JA 19.)

II. ROUTING STATEMENT

Nevada's anti-SLAPP statute creates an interlocutory appeal to the Supreme Court where a district court denies a special motion to dismiss. NRS 41.660(4) ("If the court denies the special motion to dismiss filed pursuant to NRS 41.660, an interlocutory appeal lies to the ***Supreme Court***.") (emphasis added). Additionally, pursuant to NRAP 17(a)(12), this matter should be heard by the Nevada Supreme Court as it raises issues of statewide public importance; specifically, to confirm that Nevada's anti-SLAPP statute

[1] For citations to the Joint Appendix, the number preceding "JA" refers to the applicable Volume and the number succeeding "JA" refers to the applicable Tab, which is then followed by a pin-cite to the appendix page number(s) (if applicable).

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may apply to breach of contract claims. Neither the Nevada Supreme Court nor the Court of Appeals have issued a published opinion explaining that the anti-SLAPP statute may apply to breach of contract claims. Accordingly, the Nevada Supreme Court should hear this matter to provide guidance for jurists, parties, and lawyers as to whether the anti-SLAPP statute may apply to breach of contract claims.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court err when it determined that Nevada's anti-SLAPP statute did not apply to a breach of contract claim premised on the drafting of a stipulated divorce decree in a divorce action and the submission of the stipulated divorce decree to the family court?

2. Did the district court err in failing to determine that the plaintiff had failed to demonstrate a probability of prevailing on a breach of contract claim premised on a memorandum of understanding that was superseded by a stipulated divorce decree that did not provide for the survival of the memorandum of understanding?

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IV. STATEMENT OF THE CASE

On May 29, 2020, Respondent David John Rose ("David") initiated this lawsuit against Appellant Sarah Janeen Rose ("Sarah") and others. (1 JA 1.)

On July 6, 2020, Sarah filed a Special Motion to Dismiss Pursuant to NRS 41.660 (Anti-SLAPP), or, in the Alternative, Motion to Dismiss Pursuant to NRCP 12(b)(1) and NRCP 12(b)(5) (the "Special Motion to Dismiss"). (1 JA 6.) On August 27, 2020, the Eighth Judicial District Court, Clark County, Nevada, entered an Order Granting in Part, and Denying in Part, Defendant Sarah Janeen Rose's Special Motion to Dismiss Pursuant to NRS 41.660 (anti-SLAPP) (the "Order"). (2 JA 15.) Notice of Entry of the Order was filed and served on August 27, 2020. (2 JA 16.) Sarah filed a Notice of Appeal of the Order on September 25, 2020. (2 JA 19.)

V. STATEMENT OF THE FACTS

A. The Divorce Action.

1. Sarah and David are Married; David Files for Divorce.

Sarah and David were married on June 17, 2006. (1 JA 1, at 17; 1 JA 6, at 127.) On February 22, 2017, David filed a Complaint for Divorce (the "Divorce Action") against Sarah in the Eighth Judicial District Court, Family Division (the "Family Court"). (1 JA 1, at 17; 1 JA 6, at 127.)

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2. Sarah and David Attend Mediation.

On March 23, 2018, Sarah and David, along with their respective counsel, participated in a mediation in an effort to resolve the Divorce Action. (1 JA 6, at 127.) At that time, David was represented by Regina McConnell ("McConnell") of McConnell Law Ltd. ("McConnell Law") (jointly, the "McConnell Parties"), and Sarah was represented by Shelly Booth Cooley, Esq. ("Cooley") of The Cooley Law Firm ("Cooley Law") (the "Cooley Parties"). (*Id.*; *see also* 1 JA 1, at 2-3.)

David alleges that during the course of the mediation Sarah requested that David name her as the survivor beneficiary of David's PERS pension. (1 JA 1, at 3.) David alleges, and Sarah denies, that David specifically refused to grant survivor benefits to Sarah. (*Compare id. with* 1 JA 6, at 127-128.)

3. Sarah and David Execute a Memorandum of Understanding.

The mediation was successful. (1 JA 6, at 128.) The mediator drafted a three-page memorandum of understanding (the "MOU"), which memorialized the material terms of Sarah and David's agreement. (1 JA 1, at 3; *id.* at 12-14; 1 JA 6, at 128.) The MOU provided that its purpose was "to memorialize" the parties' agreement. (1 JA 1, at 12.) The MOU stated it included the "material terms" of their agreement and was intended to bind the parties to those material

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terms. (*Id.*) The MOU provided "that counsel for Sarah shall draft a final formal agreement incorporating the terms herein," and that final formal agreement (not the MOU) "shall be ratified by the Court, but shall not merge and shall retain its separate nature as a contract." (*Id.*) The MOU did not address survivor benefits. (*Id.* at 12-14.)

4. Sarah and David Enter into a Stipulated Divorce Decree.

After Sarah and David executed the MOU, Sarah (through her counsel) drafted a 39-page Stipulated Decree of Divorce (the Divorce Decree). (1 JA 1, at 16-54; 1 JA 6, at 128.) David and his counsel (McConnell) were given a copy of the Divorce Decree for their review. (1 JA 6, at 128.) David executed the Divorce Decree. (1 JA 1, at 4; *id.* at 54.)

The Divorce Decree unambiguously provided that David would name Sarah as the irrevocable survivor beneficiary of David's PERS pension. (*Id.* at 36, 39.) Further, the Divorce Decree contained many other terms necessary to resolve a divorce that were not addressed by the MOU, including: Certain details concerning child support (*id.* at 26-27); health insurance coverage for their minor children (*id.* at 27-28); unreimbursed medical expenses for their minor children (*id.* at 28-32); the allocation of the dependent child tax credit (*id.* at 32-33); the division of furniture and furnishings (*id.* at 37, 40); the division of personal property and jewelry (*id.* 37, 40); directions for the

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division of the PERS pension though a Qualified Domestic Relations Order (QDRO) (*id.* at 36-37, 39); the division of their community debts (*id.* at 40-41); the filing of tax returns (*id.* at 43-44); treatment of future-acquired property (*id.* at 45); waiver of inheritance rights (*id.* at 46); mutual release of obligations and liabilities (*id.* at 47); and handling of omitted community property and debts (*id.* at 51-52).

The Divorce Decree also contains an integration/merger clause, providing that the "Decree of Divorce contains the entire agreement of the parties on these matters, ***superseding any previous agreement between them***." (*Id.* at 53 (emphasis added).) Additionally, the parties agreed that "[n]o other agreement, statement, or promise made on or before the effective date of this Decree of Divorce by or to either party or his or her agent or representative will be binding on the parties unless (a) made in writing and signed by both parties, or (b) contained in an order of a Court of competent jurisdiction. (*Id.* at 53-54.) There is no other agreement, statement, or promise—either in a writing signed by both parties or in an order of a Court—addressing survivor benefits. (1 JA 6, at 128.)

Sarah (through her counsel) submitted the Divorce Decree to the judge assigned to the Divorce Action at that time. (1 JA 1, at 4; 1 JA 6, at 128.) The Divorce Decree was entered on April 11, 2018. (1 JA 1, at 16-54.)

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5. The Divorce Action Remains Pending.

On April 25, 2018, David filed a Motion to Set Aside the Paragraph Regarding Survivor Benefits in the Decree of Divorce Based Upon Mistake (the "Motion to Set Aside") in the Divorce Action. (1 JA 1, at 82-85.) In his Motion to Set Aside, David argued the same thing he alleges in this matter—that he did not agree to designate Sarah as the survivor beneficiary and the inclusion of such in the Divorce Decree was a mistake. (*Id.*) Notably, the Family Court initially granted David's Motion to Set Aside. (2 JA 15, at 337.)

However, on October 9, 2018, Sarah filed a Motion to Alter or Amend Judgment, or, in the Alternative, for New Trial Pursuant to NRCP 59(a)(7). (*Id.*) On January 16, 2019, the Family Court entered an order granting Sarah's motion and setting aside its prior order granting David's Motion to Set Aside. (*Id.*) The Family Court then set David's Motion to Set Aside (among other motions and issues) for an evidentiary hearing. (*Id.*) The Family Court began an evidentiary hearing on January 27, 2020. (*Id.*)

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As of the submission of this Opening Brief, the evidentiary hearing has not been completed.[2] (*See Rose v. Rose*, Case No. D-17-547250-D.)[3]

B. Procedural History.

1. David Initiates a Separate Civil Action (the Matter) Against Sarah.

On May 29, 2020, David initiated this lawsuit. (1 JA 1.) In addition to suing Sarah, David also sued his former counsel in the Divorce Action (the McConnell Parties) and Sarah's former counsel in the Divorce Action (the Cooley Parties). (*Id.*)

David contends that the McConnell Parties committed legal malpractice by "a. Failing to actively participate in drafting the Decree to ensure the agreed

[2] Sarah anticipates appealing (through either a direct appeal or a writ petition) a forthcoming order from the Family Court denying her Motion for Judgment Pursuant to NRCP 52(c) or in the Alternative Motion for Summary Judgment and Countermotion for Attorney's Fees and Costs, filed in the Divorce Action.

[3] While this Court, as a general rule, "will not take judicial notice of records in another and different case, even though the cases are connected," the "rule is flexible in its application and, under some circumstances, [this Court] will invoke judicial notice to take cognizance of the record in another case." *Mack v. Estate of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009). In evaluating whether "a particular circumstance falls within the exception" to the general rule, this Court "examine[s] the closeness of the relationship between the two cases." *Id.* at 91-92, 206 P.3d at 106. Here, the relationship of this matter and the Divorce Action is extremely close—this matter is based on alleged actions that took place in the Divorce Action. Accordingly, this Court should elect to take judicial notice of the Divorce Action. *See id.*

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upon terms are properly reflected in the final draft; b. Failing to properly read, review, and object to the Decree that contained unfavorable terms that [David] did not agree to; and c. Advising [David] to sign the Decree that contained unfavorable terms that [David] did not agree to." (*Id.* at 5.)

David asserted two causes of action against Sarah and the Cooley Parties. First, David asserted a claim for civil conspiracy against Sarah and the Cooley Parties, alleging they "acted in concert to intentionally defraud [David] into signing the legally binding Decree of Divorce with terms that were not agreed to" and that they "had no intention of abiding to the agreed upon terms as outlined in the MOU." (*Id.* at 8.) Second, David asserted that Sarah and the Cooley Parties breached an agreement that Sarah would not receive survivor benefits (which he alleges is reflected in the MOU even though it does not address survivor benefits) by: "a. Drafting the Decree of Divorce, which contained terms that SARAH would be entitled to survivorship benefits under Plaintiff's PERS account; b. Submitting the Decree of Divorce so that its terms become legally enforceable; c. Seeking to enforce the survivorship benefit from the Decree, despite being contradictory to the agreed upon terms of the MOU." (*Id.* at 8-9.)

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2. Sarah Files a Special to Dismiss; the District Court Grants the Motion in Part, and Denies the Motion in Part.

On July 6, 2020, Sarah filed a Special Motion to Dismiss Pursuant to NRS 41.660 (Anti-SLAPP), or, in the Alternative, Motion to Dismiss Pursuant to NRCP 12(b)(1) and NRCP 12(b)(5) (the "Special Motion to Dismiss"). (1 JA 6.)

On August 27, 2020, the district court entered an Order Granting in Part, and Denying in Part, Defendant Sarah Janeen Rose's Special Motion to Dismiss Pursuant to NRS 41.660 (anti-SLAPP) (the "Order"). (2 JA 15.) The district court granted Sarah's Special Motion to Dismiss as to David's civil conspiracy claim, but denied it as to the breach of contract claim. (*Id.* at 341.)

As to the civil conspiracy claim, the Court found that "David's civil conspiracy claim against Sarah concerns conduct and statements at issue related to the ongoing Divorce Action and thus is based on '[w]ritten or oral statement[s] made in direct connection with an issue under consideration by a . . . judicial body.'" and that "Sarah's conduct and statements 'relate to the substantive issues in the litigation' and are 'directed to persons having some interest in the litigation,'—specifically, to David and the Family Court." (*Id.* at 339.) The Court further found that "Sarah's conduct and alleged statements are not false—even assuming Sarah and David had orally agreed that Sarah

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would not receive survivor benefits at the mediation, neither their alleged agreement nor the inclusion of the survivor benefits in the Divorce Decree are false statements." (*Id.*) As a result, the Court found that the civil conspiracy claim was "subject to a special motion to dismiss under Nevada's anti-SLAPP statute" and dismissed the claim because David had "failed to demonstrate, with prima facie evidence, that he ha[d] a probability of prevailing on his civil conspiracy claim." (*Id.* (internal quotation marks omitted).) Specifically, the Court found that "David cannot assert fraud based on an alleged term (the survivor benefits) that is contradicted by the unambiguous terms of a written agreement (the Divorce Decree)." (*Id.* at 340.)

However, as to the breach of contract claim, the Court found it was "not based on '[w]ritten or oral statement[s] made in direct connection with an issue under consideration by a . . . judicial body,'" and thus was "not subject to a special motion to dismiss under Nevada's anti-SLAPP statute." (2 JA 15, at 339-40.)[4]

[4] The district court denied Sarah's motions to dismiss under NRCP 12(b)(1) and NRCP 12(b)(5)—which she had sought in the alternative—without prejudice. (*Id.* at 341.)

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3. Sarah Files an NRCP 12(b) Motion to Dismiss; the District Court Stays the Action Pending Resolution of the Divorce Action.

On September 10, 2020, Sarah filed a Motion to Dismiss pursuant to NRCP 12(b)(1) and 12(b)(5). (2 JA 17.) The district court denied the Motion to Dismiss, without prejudice, but stayed the matter pending resolution of the Divorce Action. (2 JA 30.) As of the submission of this Opening Brief, the Divorce Action is still pending, and the Matter remains stayed. (2 JA 33.)

VI. SUMMARY OF THE ARGUMENT

Respectfully, the district court erred in denying Sarah's Special Motion to Dismiss as to David's breach of contract claim.

Initially, David's breach of contract claim is subject to Nevada's anti-SLAPP statute because it is based on "[w]ritten or oral statement[s] made in direct connection with an issue under consideration by a . . . judicial body . . ."[5] Specifically, David's breach of contract claim is premised, ***expressly***,[6] on Sarah's drafting and submission of the Divorce Decree to the Family Court. Notably, as explained below, the California Supreme Court has held that breach of contract claims arising from the negotiation and execution of

[5] NRS 41.637(3).

[6] 1 JA 1, 8-9.

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settlement documents are subject to California's anti-SLAPP statute (which is similar to Nevada's anti-SLAPP statute).

Because David's breach of contract claim is subject to a special motion to dismiss under the anti-SLAPP statute, the burden of proof shifted to David to demonstrate, with prima facie evidence, a probability of prevailing on his breach of contract claim. David failed to meet this burden. Even accepting David's allegations in his Complaint as true, his breach of contract claim fails as a matter of law.

First, the district court lacks subject-matter jurisdiction to address David's breach of contract claim. This Court has held that where a divorce decree does not directly provide for the survival of a pre-decree agreement merged into the decree (like the MOU), that pre-decree agreement is destroyed and the parties' remedies are limited to those available on the decree itself (e.g., a motion to set aside the decree). Stated differently, David cannot collaterally attack the Divorce Decree through a claim for breach of contract because the MOU and any alleged oral agreements were unequivocally merged into the Divorce Decree. Because David's remedies are limited to those available on the Divorce Decree itself and because the Family Court has exclusive jurisdiction over divorce matters, the district court lacks subject-matter jurisdiction over David's breach of contract claim.

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Second, David's breach of contract claim is barred by the parol evidence rule because the Divorce Decree is the final integrated agreement and supersedes any prior agreements (including the MOU and any other alleged oral agreements). As a result, David may not use parol evidence (such as the MOU) to vary or contradict the Divorce Decree, because the MOU and all prior agreements are deemed to have been merged into the Divorce Decree.

Finally, David's claims are unripe because they are contingent upon the outcome of the Divorce Matter, which remains pending as of the submission of this Opening Brief.

In sum, David's breach of contract claim is subject to Nevada's anti-SLAPP statute and he failed to meet his burden of establishing a probability of prevailing. As a result, Sarah respectfully requests that this Court vacate the portion of the district court's Order denying Sarah's Special Motion to Dismiss as to David's breach of contract claim and remand with instructions to the district court to grant the Special Motion to Dismiss in its entirety.

VII. STANDARD OF REVIEW

This Court reviews "a decision to grant or deny an anti-SLAPP special motion to dismiss de novo." *Smith v. Zilverberg*, 137 Nev. Adv. Op. 7, 481 P.3d 1222, 1226 (2021).

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VIII. ARGUMENT

A. Nevada's anti-SLAPP Statute.

"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). SLAPP cases "abuse the judicial process by chilling, intimidating, and punishing individuals for their involvement in public affairs." *Id.* Accordingly, Nevada's anti-SLAPP statutes provide defendants with a way to quickly and effectively dismiss "meritless lawsuit[s] 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).

Nevada's anti-SLAPP statute states that "[i]f an action is brought against a person 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 person against whom the action is brought may file a special motion to dismiss." NRS 41.660(1)(a); *see also* NRS 41.665(1). When deciding an anti-SLAPP motion, a district court applies a two-step framework. Under the first step, the district court determines whether the defendant has shown, "by a preponderance of the evidence, that the claim is based upon a

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good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." NRS 41.660(3)(a). If the defendant makes this initial showing, the district court moves to the second step of the analysis, and the burden shifts to the plaintiff to show "with prima facie evidence a probability of prevailing on the claim." NRS 41.660(3)(b).

Nevada's anti-SLAPP statute is modeled on California's anti-SLAPP statute. *John*, 125 Nev. at 752, 219 P.3d at 1281. Accordingly, this Court often relies upon California case law when interpreting Nevada's anti-SLAPP statute. *Id.* at 756, 219 P.3d at 1283 ("When determining whether Nevada's anti-SLAPP statute falls within this category, we consider California case law because California's anti-SLAPP statute is similar in purpose and language to Nevada's anti-SLAPP statute."); *Coker v. Sassone*, 135 Nev. 8, 11, 432 P.3d 746, 749 (2019) ("This court has repeatedly recognized the similarities between California's and Nevada's anti-SLAPP statutes, routinely looking to California courts for guidance in this area.").[7]

[7] Indeed, the Nevada legislature, when amending the anti-SLAPP statute in 2015, directly referenced its reliance upon California's interpretation of its anti-SLAPP statute. *See* NRS 41.665(2); *see also Coker*, 135 Nev. at 11 n.3, 432 P.3d at 749 n.3 (finding "reliance on California caselaw is warranted" given "the similarity in structure, language, and the legislative mandate to adopt California's standard for the requisite burden of proof . . . .").

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1. Step One: Does the Claim Involve a Protected Communication?

Although "Nevada's anti-SLAPP statutes aim to protect First Amendment rights. . . courts determining whether conduct is protected under NRS 41.660 must look to statutory definitions, as opposed to general principles of First Amendment law." *Coker*, 135 Nev. at 14, 432 P.3d at 751.

Nevada's anti-SLAPP statutes define a "[g]ood faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern" to mean any of the following:

> 1. Communication that is aimed at procuring any governmental or electoral action, result or outcome;
>
> 2. Communication of information or a complaint to a Legislator, officer or employee of the Federal Government, this state or a political subdivision of this state, regarding a matter reasonably of concern to the respective governmental entity;
>
> 3. Written or oral statement made in direct connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law; or
>
> 4. Communication made in direct connection with an issue of public interest in a place open to the public or in a public forum,
>
> ➥ which is truthful or is made without knowledge of its falsehood.

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NRS 41.637. Thus, a defendant satisfies its burden under the first step of the anti-SLAPP analysis by demonstrating, by a preponderance of the evidence, that the communication at issue "falls within one of the four categories enumerated in NRS 41.637 and 'is truthful or is made without knowledge of its falsehood.'" *Delucchi v. Songer*, 133 Nev. 290, 299, 396 P.3d 826, 833 (2017) (quoting NRS 41.637). Absent contradictory evidence in the record, "an affidavit stating that the defendant believed the communications to be truthful or made them without knowledge of their falsehood is sufficient" to meet the last component of the statutory definition. *Stark v. Lackey*, 136 Nev. 38, 43, 458 P.3d 342, 347 (2020); *see also Taylor v. Colon*, 136 Nev. Adv. Op. 50, 482 P.3d 1212, 1217–18 (2020).

The anti-SLAPP statute applies not only to statements, but also to "communicative conduct." *See Rusheen v. Cohen*, 128 P.3d 713, 718 (Cal. 2006); *see also Allstate Ins. Co. v. Belsky*, No. 2:15-cv-02265-MMD-CWH, 2017 U.S. Dist. LEXIS 224167, at *10 (D. Nev. Mar. 31, 2017) (finding party's "petition[ing] a court for redress" was "an activity which California courts interpreting California's corresponding statute have found qualifies as a good faith communication in furtherance of the right to petition," and was thus subject to Nevada's anti-SLAPP statute) (internal quotation marks omitted); *accord John*, 125 Nev. at 761, 219 P.3d at 1286 (affirming district court's

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LAS VEGAS, NEVADA 89148-1302
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application of Nevada's Anti-SLAPP statute where it found defendants' "***actions*** were protected activity under the anti-SLAPP statute . . . .") (emphasis added).

Indeed, the "anti-SLAPP statute's definitional focus is not 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." *See Navellier v. Sletten*, 52 P.3d 703, 711 (Cal. 2002) (emphasis in original); *City of Cotati v. Cashman*, 52 P.3d 695, 701 (Cal. 2002) ("[T]he critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech.") (emphasis in original). As a result, courts have applied the anti-SLAPP statute in numerous causes of action, including claims for breach of contract. *See, e.g.*, *Navellier*, 52 P.3d at 711 (applying anti-SLAPP to breach of contract claim); *Midland Pac. Bldg. Corp.*, 68 Cal. Rptr. 3d 499, 505 (2007) (same).

Finally, when analyzing whether the alleged conduct is "truthful or is made without knowledge of its falsehood," absent contradictory evidence in the record, "an affidavit stating that the defendant believed the communications to be truthful or made them without knowledge of their falsehood is sufficient" to meet the requirements of the anti-SLAPP statute.

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Stark v. Lackey, 136 Nev. 38, 43, 458 P.3d 342, 347 (2020). Although "contradictory evidence in the record may undermine a defendant's sworn declaration establishing good faith," a plaintiff cannot rebut a declaration of good faith simply by arguing the alleged statements were false. *Taylor*, 136 Nev. Adv. Op. 50, 482 P.3d at 1218. The question is whether the defendant subjectively believes the statements were correct, "not whether he was [actually] correct." *Id.*

2. Step Two: Is the Plaintiff Likely to Prevail on the Claim?

If the defendant satisfies its burden of proof under the first step, then, under the second step, the burden shifts to the plaintiff to demonstrate, "with prima facie evidence[,] a probability of prevailing on the claim." *Id.* at 1216. In conducting this evaluation, the "court does not make any findings of fact;" instead, "prong two merely requires a court to decide whether a plaintiff's underlying claim is legally sufficient." *Id.*

The plaintiff *cannot* simply rely on allegations in the complaint. To defeat an anti-SLAPP motion, "[t]he plaintiff's showing of facts must consist of evidence that would be admissible at trial." *Stewart v. Rolling Stone LLC*, 105 Cal. Rptr. 3d 98, 110 (Cal. Ct. App. 2010), *as modified on denial of reh'g* (Feb. 24, 2010).

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B. David's Breach of Contract Claim is Subject to the anti-SLAPP Statute.

1. Step One: David's Breach of Contract Claim Arises from Statements Made in Direct Connection with an Issue Under Consideration by a Judicial Body.

The district court denied Sarah's Special Motion to Dismiss as David's breach of contract claim, finding that it was "not based on '[w]ritten or oral statement[s] made in direct connection with an issue under consideration by a . . . judicial body,'" and thus was "not subject to a special motion to dismiss under Nevada's anti-SLAPP statute." (2 JA 15, at 339-340.) Respectfully, the district court erred.

As noted above, the anti-SLAPP statute defines a "[g]ood faith communication in furtherance of the right to free speech in direct connection with an issue of public concern" by four defined categories and the third defined category protects "[w]ritten or oral statement[s] made in direct connection with an issue under consideration by a . . . judicial body . . . ." NRS 41.637(3); *see also* Cal. Civ. Proc. Code § 425.16(e)(2). To qualify for this category, "the statement must (1) relate to the substantive issues in the litigation and (2) be directed to persons having some interest in the litigation." *Patin v. Ton Vinh Lee*, 134 Nev. 722, 726, 429 P.3d 1248, 1251 (2018).

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Notably, the California Supreme Court has ruled—in an opinion that has been cited by this Court with approval[8]—that breach of contract claims arising from the negotiation and execution of settlement documents are subject to anti-SLAPP under the third category (statements or writings relating to an issue before a judicial body). *See Navellier v. Sletten*, 52 P.3d 703, 709 (Cal. 2002) ("A claim for relief filed in federal district court indisputably is a 'statement or writing made before a … judicial proceeding'") (quoting Cal. Civ. Proc. Code § 425.16(e)(2)); *accord Navarro v. IHOP Props.*, Inc., 36 Cal. Rptr. 3d 385, 391-92 (Cal. Ct. App. 2005) (finding claim that defendant defrauded plaintiff into signing stipulated judgment was subject to anti-SLAPP); *Dowling v. Zimmerman*, 103 Cal. Rptr. 2d 174, 190 (Cal. Ct. App. 2001) (finding anti-SLAPP applied where "complaint arose from [defendant's] acts of negotiating a stipulated settlement . . . .").

Here, David's claims against Sarah are based on her "[w]ritten or oral statement[s] made in direct connection with an issue under consideration by a . . . judicial body," and are thus subject to Nevada's anti-SLAPP statute. NRS 41.637(3). Specifically, the gravamen of David's claims against Sarah is that she breached an alleged agreement and defrauded him by "drafting the Decree

[8] *See Abrams v. Sanson*, 136 Nev. 83, 91, 458 P.3d 1062, 1069 (2020).

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of a Divorce" with a term entitling her to survivor benefits and "[s]ubmitted the Decree of Divorce [to the court] so that its terms become legally enforceable." (1 JA 1, at 9.) Sarah's negotiations with David, her drafting of the Divorce Decree (through her counsel), and her submission of the Divorce Decree to the Family Court (through her counsel) are all written and alleged oral statements made in direct connection with an issue (the Divorce Action) under consideration by a judicial body (the Family Court). Further, the statements contained in the Divorce Decree and the alleged oral statements "relate to the substantive issues in the litigation" and are "directed to persons having some interest in the litigation,"—specifically, to David and the Family Court. *See Patin*, 134 Nev. 722, 726, 429 P.3d 1248, 1251 (2018).

Finally, the Sarah's statements and actions are "truthful or ... made without knowledge of its falsehood." NRS 41.637. Even assuming Sarah and David had orally agreed that Sarah would not receive survivor benefits at the mediation (they did not), neither their alleged agreement nor the inclusion of the survivor benefits in the Divorce Decree are false statements. (*See* 2 JA 15, at 339.) Sarah and David had the right to propose and alter terms until the execution of their final integrated agreement (the Divorce Decree). Moreover, as detailed below, because the Divorce Decree is the final integrated

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agreement, David cannot use parol evidence (such as the alleged oral agreement) to contradict the Divorce Decree's express terms. (1 JA 1, at 53.)

Accordingly, because Sarah met her initial burden of demonstrating, by a preponderance of the evidence, that the claims at issue are subject to the anti-SLAPP statute, the burden of proof shifted to David to demonstrate, with "prima facie evidence," that he has a "probability of prevailing on" his claims. *See* NRS 41.660(3)(a), (3)(c). As explained below, David failed to demonstrate a probability of prevailing on his claims because they all fail as matter of law, and therefore this matter must be dismissed. *See* NRS 41.4660(5).

2. Step Two: David Cannot Demonstrate the Legal Sufficiency of His Breach of Contract Claim.

For the second step of the anti-SLAPP analysis, David bears the burden of proof. He must present sufficient admissible evidence to establish "a probability of prevailing on [his] claim." *Taylor*, 136 Nev. Adv. Op. 50, 482 P.3d at 1215. As set forth below, David failed to meet his burden as to his breach of contract claim because it fails as a matter of law.

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a. The District Court Lacked Subject Matter Jurisdiction Over David's Breach of Contract Claim.

"Subject matter jurisdiction is the court's authority to render a judgment in a particular category of case." *Landreth v. Malik*, 127 Nev. 175, 183, 251 P.3d 163, 168 (2011). "[W]hether a court lacks subject matter jurisdiction "can be raised by the parties at any time, or sua sponte by a court of review, and cannot be conferred by the parties." *Id.* at 179, 251 P.3d at 166. Where a district court lacks subject matter over a claim, the plaintiff has failed to establish a probability of prevailing on the claim under the anti-SLAPP statute. *Barry v. State Bar of Cal.*, 386 P.3d 788, 792 (Cal. 2017) ("The pertinent question under the [anti-SLAPP] statute is simply whether the plaintiff has established a probability of prevailing on a claim . . . alleged to justify a remedy.... While lack of substantive merit is one reason a plaintiff might fail to make the requisite showing, ***lack of subject matter jurisdiction is another***. A plaintiff cannot prevail on her claim unless the court has the power to grant the remedy she seeks.") (emphasis added).

In Nevada, the "family court division has ***original and exclusive jurisdiction*** over matters affecting the familial unit including ***divorce*** . . . ." *Landreth*, 127 Nev. at 184, 251 P.3d at 169 (emphasis added); NRS 3.223(1)(a) (stating that, in judicial districts where established, family courts

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have original and exclusive jurisdiction over all proceedings brought pursuant to NRS Chapter 125).

This Court has held that a divorce decree destroys the independent contractual nature of a merged pre-decree agreement unless the agreement ***and*** the divorce decree ***both*** direct that the agreement is to survive. *See Day v. Day*, 80 Nev. 386, 389-90, 395 P.2d 321, 322-23 (1964) (holding the "survival provision of a [pre-decree] agreement is ineffective unless the court decree specifically directs survival."); *Vaile v. Porsboll*, 128 Nev. 27, 33 n.7, 268 P.3d 1272, 1276 n.7 (2012) ("[W]hen a support agreement is merged into a divorce decree, the agreement loses its character as an independent agreement, unless both the agreement and the decree direct the agreement's survival"). Under such circumstances, a party may not seek to modify, rescind, or enforce the merged agreement under contract principles. *See Vaile*, 128 Nev. at 33 n.7, 268 P.3d at 1276 n.7 ("Because the parties' agreement was merged into the divorce decree, to the extent that the district court purported to apply contract principles, specifically, rescission, reformation, and partial performance . . . to support its decision . . . any application of contract principles to resolve the issue [addressed] . . . was improper."). Instead, the parties' remedies are limited to those available to address the divorce decree itself—e.g., the Nevada

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Rules of Civil Procedure and NRS Chapter 125. *See Day*, 80 Nev. at 390, 395 P.2d at 323.

For example, in *Day*, this Court held that a divorce decree destroyed a pre-decree agreement concerning alimony even though the pre-decree agreement "expressly stated that the agreement was not to be merged into any decree of divorce entered later." *Id.* 387, 395 P.2d at 321. There, a wife and husband executed a written agreement concerning the husband's payment of alimony to the wife and expressly provided that it would not merge into any subsequent divorce decree. *Id.* Later, the court entered a divorce decree that adopted the written agreement, but "did not itself state that the agreement was not merged, nor did it expressly provide that the agreement survive the decree." *Id.*

The wife subsequently sought a judgment for the husband's non-payment of alimony under NRS 125.180, and the husband argued that the wife's sole remedy was a breach of contract action on the pre-decree agreement. *Id.* at 387-88, 395 P.2d at 322. This Court rejected the husband's argument, finding that the pre-decree agreement's survival provision was ineffective because the divorce decree itself did not direct survival. *Id.* at 389, 395 P.2d at 322-23. The Court explained that absent "a clear and direct expression [of survival] in the decree we shall presume that the court

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rejected the contract provision for survival by using words of merger in its decree . . . ." *Id.* at 389-90, 395 P.2d at 323. As such, this Court held that the wife's remedy was through enforcement of the divorce decree via NRS 125.180. *Id.* at 390, 395 P.2d at 323.

Here, any prior agreements between Sarah and David (including the MOU and the alleged oral agreement) were merged into and destroyed by the Divorce Decree. The Divorce Decree contains an integration/merger clause, providing that David and Sarah "expressly agree that this Decree of Divorce contains the entire agreement of the parties on these matters, superseding any previous agreement between them." (1 JA 1, at 53.) Moreover, the Divorce Decree expressly references the MOU (which is attached to the Divorce Decree) but does not specifically direct the survival of the MOU or any other agreements. (*See generally id.*)[9] Thus, the MOU and any other agreements were merged into the Divorce Decree and did not survive. *Day*, 80 Nev. at 389-90, 395 P.2d at 323.

[9] In fact, the MOU itself does not state that it (the MOU) would survive the entry of a divorce decree. Instead, the MOU contemplated that the parties would draft a "final formal agreement" that would "not merge" and "retain its separate nature as a contract." (1 JA 1, at 70-72.) The Parties never drafted a "final formal agreement," apart from the Divorce Decree. (1 JA 6, at 128.) Regardless, the Divorce Decree does not direct the survival of the MOU or any other agreement and that ends the inquiry. *See Day*, 80 Nev. at 389-90, 395 P.2d at 323.

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Because the MOU and any other agreements were merged into the Divorce Decree, David's remedies are limited to those available to address the Divorce Decree itself—such as his Motion to Set Aside currently pending in the Divorce Action—and David may not seek to modify, rescind, or enforce the merged agreement under contract principles. *See id.* at 390, 395 P.2d at 323; *see also Vaile*, 128 Nev. at 33 n.7, 268 P.3d at 1276 n.7. The Family Court has ***exclusive jurisdiction*** to address the Divorce Decree. *See* NRS 3.223(1)(a); *Landreth*, 127 Nev. at 184, 251 P.3d at 169. Accordingly, the district court lacked subject-matter jurisdiction to address David's attempt to collaterally attack the Divorce Decree through his breach of contract action.

Because the district court lacked subject matter jurisdiction, David failed to meet his burden to demonstrate a "probability of prevailing" on his breach of contract claim and the district court should have granted Sarah's Special Motion to Dismiss as a result. *See* NRS 41.660(3)(c); *see also Barry*, 386 P.3d at 792.

b. <u>David's Breach of Contract Claim is Barred by the Parol Evidence Rule.</u>

David alleges that he and Sarah (and Cooley) "entered into a contract wherein [Sarah] agreed that SARAH would NOT receive survivorship benefits under Plaintiff's PERS account, as outlined in the MOU." (1 JA 1, at 8.)

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David alleges Sarah breached this alleged contract by drafting the Divorce Decree to include providing survivor benefits to Sarah, submitting the Divorce Decree to the Family Court "so that its terms became legally enforceable," and by seeking to enforce the Divorce Decree. (*Id.* at 9.) Even assuming contract principles applied (they do not), David's claim is nevertheless barred by the parol evidence rule.

"The parol evidence rule forbids the reception of evidence which would vary or contradict [an integrated agreement], since all prior negotiations and agreements are deemed to have been merged therein." *Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 281, 21 P.3d 16, 21 (2001) (internal quotation marks omitted). "An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement." Restatement (Second) of Contracts § 209(1) (1981). Where an agreement "which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression." *Id.* § 209(3).

Here, any prior agreement of David and Sarah (including the MOU and any alleged oral agreements) was merged into the Divorce Decree. As detailed above, the Divorce Decree contains an integration/merger clause, providing that David and Sarah "expressly agree that this Decree of Divorce contains the

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entire agreement of the parties on these matters, superseding any previous agreement between them." (1 JA 1, at 53.) Even if one were to disregard the integration/merger clause, it is evident that the 39-page Divorce Decree, "in view of its completeness and specificity reasonably appears to be a complete agreement," and thus should be presumed to be an integrated agreement—especially considering that the three-page MOU failed to address numerous terms that were necessary to resolve the Divorce Matter. *See* Restatement (Second) of Contracts § 209(3). Indeed, the MOU itself contemplates that it does not represent the "final formal agreement" of the parties. (1 JA 1, at 12.)

Because the Divorce Decree is an integrated agreement, David cannot use parol evidence (such as the alleged oral agreement or the MOU) to "vary or contradict [the Divorce Decree], since all prior negotiations and agreements are deemed to have been merged therein." *See Kaldi*, 117 Nev. at 281, 21 P.3d at 21 (internal quotation marks omitted). Accordingly, since the Divorce Decree unambiguously provides that Sarah is to receive survivor benefits, David may not assert a breach of contract action based on an alleged prior agreement that is directly contradicted by an express term of the Divorce Decree. *See id.*; *accord* Restatement (Second) of Contracts § 213(1) (1981) ("A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them.").

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In sum, even if contract principles applied (they do not), such principles dictate that David's breach of contract claim is not viable because David cannot use parol evidence to contradict the express terms of the parties' integrated agreement (the Divorce Decree). *See Kaldi*, 117 Nev. at 281, 21 P.3d at 21.

c. David's Breach of Contract Claim is Unripe.

In order for a claim to be justiciable, it must be ripe for review. *See Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986). A dispute is not ripe "if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998).

Here, David's breach of contract claim is unripe. Specifically, David's breach of contract claim is contingent on the outcome of the Divorce Matter. David's Motion to Set Aside the Divorce Decree remains pending in the Divorce Matter and, if he prevails on it, then the claims asserted in this matter will be moot—he will have suffered no damages.

Because David's breach of contract claim is contingent upon the final outcome in the Divorce Matter, it is unripe and thus David cannot demonstrate a probability of prevailing. *See Texas*, 523 U.S. at 300; *Doe*, 102 Nev. at 525, 728 P.2d at 444.

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IX. CONCLUSION

David's breach of contract claim is subject to Nevada's anti-SLAPP statute and he failed to meet his burden of establishing a probability of prevailing. Accordingly, this Court should vacate the portion of the district court's Order denying Sarah's Special Motion to Dismiss as to David's breach of contract claim and remand with instructions to the district court to grant the Special Motion to Dismiss in its entirety.

DATED this 7th day of June, 2021.

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NRAP 32(a)(9) CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Opening 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 Opening Brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in Times New Roman font 14.

2. I further certify that this Opening Brief complies with the type-volume limitations of NRAP 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 6,839 words.

3. I further hereby certify that I have read this Opening Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. I further certify that this Opening Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the Brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found.

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I understand that I may be subject to sanctions in the event that the accompanying Opening Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 7th day of June, 2021.

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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 7th day of June, 2021, service of the foregoing was made by electronic service through Nevada Supreme Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

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