IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANK STILE, M.D., an individual; and FRANK STILE M.D., P.C., a Nevada professional corporation, Appellants, vs. EVA KORB, an individual, Respondents.	Case No. 82189 Appeal from the Eighth Judicial District Court, the Honorable Joe Hardy Presiding

APPELLANTS' OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons or entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

1. Dr. Frank Stile, M.D., is an individual.

2. Dr. Frank Stile M.D., P.C., is a Nevada professional corporation and has no parent company or publicly held company that owns ten percent or more of its stock.

3. Howard & Howard Attorneys PLLC represented Dr. Frank Stile, M.D. and Dr. Frank Stile M.D., P.C. before the district court.

4. Claggett & Sykes Law Firm represent Dr. Frank Stile, M.D. and Dr. Frank Stile M.D., P.C. before this court.

DATED this 30th day of September, 2021.

CLAGGETT & SYKES LAW FIRM

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JURISDICTIONAL STATEMENT

This court has jurisdiction over this appeal because it challenges a final judgment entered in the underlying action. *See* NRAP 3A(b)(1). Specifically, appellants Dr. Frank Stile, M.D., and Dr. Frank Stile M.D., P.C., (Dr. Stile), appeal from the district court order: granting respondent Eva Korb's anti-SLAPP special motion to dismiss under NRS 41.660, 2 JA 256-63; denying Dr. Stile's motion to dismiss or alternatively for summary judgment, 3 JA 372-74; and granting Korb's motion for attorney fees and costs, pursuant to stipulation by the parties, under NRS 41.670 (providing for an award of reasonable attorney fees and costs to a prevailing anti-SLAPP special motion to dismiss movant). *Id*. at 396-98. Dr. Stile timely appealed, which the district court noticed on May 12, 2021. *Id*. at 388-89. While this court was initially concerned about jurisdictional defects, *Stile v. Korb*, Docket No. 82189 (Order to Show Cause, Apr. 13, 2021), the district court has since resolved all remaining claims and this court reinstated briefing, *Stile v. Korb*, Docket No. 82189 (Order Reinstating Briefing, June 2, 2021).

ROUTING STATEMENT

This court should retain review of this appeal as it involves issues of first impression involving constitutional rights or of statewide public importance. NRAP 17(a)(11)-(12). Anti-SLAPP cases generally concern matters involving public interest and public significance. *See Shapiro v. Welt*, 133 Nev. 35, 39, 389 P.3d 262, 267-68 (2017). This is because anti-SLAPP statutes involve fundamental First Amendment rights, as the Legislature designed them to "dismiss meritless lawsuit[s] that a party initiates primarily to chill a defendant's exercise of his or her First Amendment free speech rights." *Coker v. Sassone*, 135 Nev., Adv. Op. 2, 432 P.3d 746, 748 (2019). In retaining this case, this court should develop Nevada caselaw concerning what constitutes a good faith statement in a consumer review and provide guidance to district courts regarding mixed statements of fact and opinion present in the same. Accordingly, this court should retain review of this appeal and address the legal issues it presents.

ISSUE ON APPEAL

Whether the district court erred in granting Korb's anti-SLAPP special motion to dismiss under NRS 41.660.

STATEMENT OF THE CASE

This is a defamation and anti-SLAPP case. Dr. Stile performed a series of cosmetic surgeries on Korb. Years later, Korb authored an online Yelp review, making demonstrably false statements regarding her experiences with Dr. Stile. 1 JA 40-45; 2 JA 128-39. Dr. Stile filed a defamation cause of action, and Korb filed an anti-SLAPP special motion to dismiss. 1 JA 75-96. The district court concluded that Korb satisfied the two elements under NRS 41.660(3)(a)-(b) and granted her special motion to dismiss. 2 JA 254-64.

STATEMENT OF RELEVANT FACTS

On September 14, 2010, Korb consulted Dr. Stile for a breast implant exchange and augmentation procedure. 2 JA 141. After signing the necessary release forms, Korb chose to undergo the procedure on October 11, 2010. *Id.* at 143-45. The surgery was uneventful, and there were no post-operation complications. *Id.* Thereafter, Korb visited Dr. Stile for three routine post-operation appointments. *Id.* at 147-49. All these appointments were uneventful, and Dr. Stile believed she was recovering. *Id.* Additionally, Korb was "without complaints," "pleased with her results," and "very happy with her results." *Id.* At the third

post-operation appointment, Dr. Stile instructed Korb to only engage in "[a]ctivity as tolerated" and return for a fourth appointment in two months or sooner, if needed. *Id.* at 149.

On November 27, 2010, Dr. Stile received a voice mail from Korb, stating that she was traveling in Asia and that she had just developed a swollen and painful right breast hematoma. *Id.* at 151. She had visited a doctor in Thailand who had recommended that she have an ultrasound and incision and drainage surgery. *Id.*

Dr. Stile and Korb exchanged several emails regarding this condition. *See id.* at 153-57. Korb initially thanked Dr. Stile for quickly responding to her message. *Id.* at 153. She acknowledged that she would likely need surgery to remove scar tissue due to the hematoma and she expressed concern about developing an infection if she had surgery in Thailand. *Id.* She conveyed her desire to avoid surgery, if possible. *Id.* She also stated that the Thai doctor "had to ask where [she] had [her breast implants] inserted [because] the scars [looked] amazing and pretty non existent [sic]." *Id.* Dr. Stile asked Korb to keep him "informed of what has transpired and what [her] present care plan [was]," and he gave Korb a direct phone number to contact him at should the need arise. *Id.*

The next day, Dr. Stile informed Korb that she could avoid surgery if her swelling resolved. *Id.* at 154. However, he also cautioned her that she would need to have her breast drained to avoid injury to her skin if her breast "[became] more swollen or tense." *Id.* He also informed Korb that she was at "increased risk for capsular contracture." *Id.* He recommended that she take Singulair 150mg per day to reduce any inflammation and that she take a Medrol Dosepak. *Id.* Lastly, Dr. Stile requested a photograph of her hematoma. *Id.* Later that day, Korb updated Dr. Stile about her second evaluation in Thailand. *Id.* She stated that her Thai doctor wished to operate right away, but that she declined since her breast swelling was not worse. *Id.* She asked Dr. Stile if she should massage her breast. *Id.* Dr. Stile instructed Korb not to massage her breast, requested a photograph of the hematoma again, and that she keep him informed. *Id.*

Two days later, Korb informed Dr. Stile that she still could not send pictures and that her breast was more tense and swollen and that she developed an ache. *Id.* at 155. However, she noted that her bruising was subsiding. *Id.* Three days later, Korb informed Dr. Stile that the bruise was gone but her breast was still tense. *Id.* at 156. She

also noted that her pain had mostly abated and that she was taking an anti-inflammatory. *Id.* Dr. Stile followed up and asked Korb about the condition of her breast. *Id.*

Three days later, Dr. Stile expressed "concern about not being able to see any photos." *Id.* at 157. He cautioned Korb that she was at risk of stretched skin or asymmetry if her breast was "much larger for an extended period of time." *Id.* He again requested photographs and recommend that Korb get her hematoma addressed immediately or return to the United States. *Id.*

Three days later, Korb informed Dr. Stile that she had departed Thailand and was "in remote areas of [C]ambodia." *Id.* She stated that she could not send Dr. Stile any photographs. *Id.* She conveyed that her breast had no bruise and was "not noticably [sic] swollen." *Id.* However, her breast was "rock hard and slightly ache[d]." *Id.* She expressed displeasure with the situation and stated she would return to the United States in a month. *Id.* She also "really appreciate[d]" Dr. Stile for "keeping in touch." *Id.*

Korb returned to Thailand and underwent the surgical procedure that the Thai doctor recommended, delaying her return to the

United States. *Id.* at 159. The Thai doctor incised and drained her right breast, removed her right breast implant, and inserted a new breast implant. *Id.* However, the new breast implant was the wrong "size, shape, and shell type." *Id.* at 163.

Korb eventually returned to the United States, and Dr. Stile, on February 23, 2011, performed a corrective procedure entailing the removal and replacement of the breast implant that the Thai doctor placed. *Id.* at 159. Dr. Stile noted that he advised Korb "to either seek expeditious treatment [in Thailand] or return to the [United States] and be treated by [him]." *Id.* He also noted that Korb had "an obvious size mismatch and hardened right breast." *Id.*

Korb missed her first post-operation visit due to a trip to California. *Id.* at 161. At her rescheduled appointment, Dr. Stile noted that Korb's breasts were symmetric, but "the right breast [was] slightly firmer than the left." *Id.* at 161. At her second post-operation visit, Korb was "without complaints and well pleased with her results." *Id.* at 162.

Korb then notified Dr. Stile by email that she was seeking a refund for the procedure she received in Thailand or alternatively that she was pursuing a medical malpractice cause of action against her Thai

doctor. *Id*. at 165. She requested a medical report from Dr. Stile to assist her in her pending lawsuit. *Id*. She also informed Dr. Stile that "[e]verything [was] still going great with the new implant" and that she was "super happy with the results." *Id*. Dr. Stile assisted Korb, giving her a copy of his operation notes and offering to explain it to her. *Id*. at 166. Korb thanked him for his assistance. *Id*.

At her third post-operation visit, Korb was "happy with her overall results but . . . concerned about her [right] breast being slightly firmer." *Id*. at 163. Dr. Stile noted that Korb developed a capsular contracture. *Id*. He believed this was most likely because of Korb's "failure to return [to the United States] and have this treated expeditiously and with the appropriate setting with the appropriate implant may have contributed to the evolution of her capsular contracture." *Id*. at 163. He also noted that Korb was unable to afford the prescribed Singular and that she might discontinue her three-month course. *Id*. Dr. Stile gave Korb "a coupon for a free month supply to help deflate [the] expense." *Id*.

Sometime thereafter, Korb decided to pursue a personal injury action against Dr. Stile, serving a demand for arbitration on him

on April 27, 2012. *See id.* at 168. The matter never went forward. *Id.* at 170. Korb also filed a complaint against Dr. Stile with the Nevada State Board of Medical Examiners, which the board rejected as it determined that Dr. Stile "acted and performed appropriately under the circumstances." *Id.*

October 15, 2019, more than nine years after her initial surgical consultation and nearly eight years after she sent her demand for arbitration letter, Korb wrote the following online review against Dr. Stile on the Yelp website:

> DO NOT GO HERE!! Dr. Stile is a butcher and has horrific bedside manner. He botched a simple breast implant swap and has caused me YEARS of pain, money and issues with my implants.
>
> The procedure was to swap out my saline implants with silicone. Simple. I had had the saline implants for 6 years from a surgeon in Colorado with no issues at all I just wanted a softer less rippled implant. One month after surgery with Dr. Stile my right breast became rock hard literally over night [sic] due to internal bleeding. I woke up one morning with bruising and what felt like grade 4 capsular contracture but it happened within a few hours. This led to two other corrective surgeries, discounted but I still paid, only to have the exact same result. Dr Stile advised me for over a year to just massage the incredibly painful rock hard [sic] scar tissue. This was him stalling so the statute of limitations would run out for malpractice. Which it did. Shortly after that his

> office just stopped returning my calls all together. The office never offered a refund or further help of any kind.
>
> I returned to my original surgeon in Colorado, Dr. Wolfe, who fixed the issue perfectly but obviously at a much higher cost as I had to have two reconstructive surgeries to undo all of the damage Dr. Stile caused. What a nightmare!

Id. at 172-73. Dr. Stile responded to the review, *see id.* at 173-74, and filed a defamation complaint against Korb, 1 JA 1-5. In his complaint, Dr. Stile alleged that Korb intended to make defamatory statements to injure his professional reputation and that the defamatory statements caused him damage.[1] *Id.* at 3-4.

Korb filed an anti-SLAPP special motion to dismiss, arguing that her statements were either opinions or were made in good faith.[2] *Id.* at 75-86. Dr. Stile answered, arguing that Korb's comments were not made in good faith and that he was likely to prevail on the merits of his

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[1]Korb initially defaulted, 1 JA 8, but the district court granted her motion to set aside the default, *id.* at 125-26.

[2]Korb improperly asserted several counterclaims against Dr. Stile in her anti-SLAPP special motion to dismiss. 1 JA 86-95. The district court noted the impropriety of Korb's motion practice, reiterated that its order granting Korb's anti-SLAPP special motion to dismiss was a final judgment, and concluded that no other claims or counterclaims remained. 3 JA 372-74.

defamation claim. 2 JA 128-38. Korb replied, arguing that her statements were a matter of public interest, made in good faith in a public forum, were non-actionable opinions, and that Dr. Stile failed to show a likelihood of prevailing on the merits of his defamation claim. *Id.* 175-82.

After a hearing, *id.* at 186-208, the district court granted Korb's special motion to dismiss, concluding that Korb made her communications in good faith in connection with an issue of public concern and that Dr. Stile did not present a prima facie probability of success on his defamation claim. *Id.* at 256-63. The district court then entered an order, pursuant to stipulation between the parties, awarding Korb attorney fees and costs. 3 JA 396-98. Dr. Stile appeals. *Id.* at 358-60, 388-89.

SUMMARY OF THE ARGUMENT

The district court erred in granting Korb's anti-SLAPP special motion to dismiss under NRS 41.660. First, the district court erred in finding that Korb made her statements in good faith, as the record clearly demonstrates that Korb made knowingly false statements regarding the care that Dr. Stile provided. Second, the district court erred in

concluding that Dr. Stile failed to present prima facie evidence of a probability of prevailing on his defamation claim. Specifically, a reasonable person would interpret many of Korb's statements as statements of existing fact rather than an opinion. Thus, the district court's conclusion that Korb's statements were nonactionable opinions was erroneous. Accordingly, Dr. Stile requests that this court reverse the district court order granting Korb's anti-SLAPP special motion to dismiss, vacate the district court's award of attorney fees and costs, and remand the matter to the district court for further proceedings.

ARGUMENT

I. *Standard of review*

This court reviews the grant or denial of an anti-SLAPP special motion to dismiss under NRS 41.660 de novo. *Rosen v. Tarkanian*, 135 Nev., Adv. Op. 59, 453 P.3d 1220, 1222-23 (2019).

Under the first prong of the burden-shifting framework, the moving party must establish, "by a preponderance of the evidence," NRS 41.660(3)(a), "that he or she made the protected communication in good faith," *Rosen*, 135 Nev., Adv. Op. 59, 453 P.3d at 1223. A person makes a communication in good faith when it "is truthful or is made without

knowledge of its falsehood." NRS 41.637; *Rosen*, 135 Nev., Adv. Op. 59, 453 P.3d at 1223. A determination of good faith requires this court to consider "all of the evidence" that the movant submitted in support of his or her anti-SLAPP special motion to dismiss. *Id.* at 1223. In making such a determination, this court determines "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." *Id.* at 1224 (alteration in original) (internal quotations omitted).

Under the second prong of the burden-shifting framework, this court must determine "whether the [nonmoving] party has demonstrated with prima facie evidence a probability of prevailing on the claim." NRS 41.660(3)(b). To meet this burden, the nonmoving party must present prima facie evidence of: "(1) a false and defamatory statement by [the moving party] concerning the [nonmoving party]; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages." *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 718, 57 P.3d 82, 90 (2002) (internal quotations omitted).

II. *Korb did not make her statements in good faith*

The district court erred in finding that Korb made her statements in good faith. First, Korb did not cite any relevant authority in her motion practice below that supports her contention that she made her statements in good faith. *See* 1 JA 79-80 (relevant portion of Korb's anti-SLAPP special motion to dismiss); 2 JA 178-79 (relevant portion of Korb's reply in support of the same). Thus, Korb failed to cogently argue in the district court that her statements were made in good faith. Regardless, the weight of authority supports his argument.

To prevail under the first prong of an anti-SLAPP special motion to dismiss, the moving party must prove, by a preponderance of the evidence, that he or she made the communication in good faith. NRS 41.660(3)(a). A communication is made in good faith when it "is truthful or is made without knowledge of its falsehood." NRS 41.637. In so doing, this court must review all the evidence the movant provided and must determine whether the gist or sting of the statement is true without parsing individual words. *Rosen*, 135 Nev., Adv. Op. 59, 453 P.3d at 1222-23.

First, Korb failed to proffer sufficient evidence demonstrating that she made her statement in good faith. This court recognizes that an affidavit or declaration stating that the movant "believed every statement [he or] she made was true as well as the basis for that belief . . . is sufficient to show that [the movant's] statements were truthful or made without knowledge of their falsehood." *Williams v. Lazer*, 137 Nev., Adv. Op. 44 at *10, ___ P.3d ___, ___ (2021); *see also Delucchi v. Songer*, 133 Nev. 290, 300, 396 P.3d 826, 833 (2017) (same).

Here, Korb's declaration contains no statement regarding the veracity of her statements. 1 JA 117-19. Rather, it merely states that she "wrote a [Yelp] review" that she "[b]ased on the procedure, the results of the procedure, and the customer service [Korb] received from Dr. Stile." *Id*. at 118. Korb provided no other evidence in support of her anti-SLAPP special motion to dismiss. *See id*. at 97-122 (Korb's exhibits in support of her anti-SLAPP special motion to dismiss). Accordingly, Korb failed to demonstrate by a preponderance of the evidence that she made her statements in good faith.[3]

[3]*Cf. Goldman v. Clark Cty. Sch. Dist.*, Docket Nos. 78822 & 78282, 2020 Nev. Unpub. LEXIS 879 (Order Affirming in Part, Reversing in Part & Remanding, Sept. 18, 2020) ("Respondents provided declarations

Even if this court were to liberally construe the language contained within Korb's declaration, Dr. Stile proffered sufficient evidence demonstrating that Korb did not make her statements in good faith. The weight of authority accords.

In *Rosen*, this court held that "the 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." 135 Nev., Adv. Op. 59, 453 P.3d at 1224. There, Jacky Rosen ran a YouTube campaign

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stating that these statements were truthful, and Goldman did not demonstrate nor does he contend on appeal that they were false."); *Nielsen v. Wynn*, Docket No. 77361, 2020 Nev. Unpub. LEXIS 821 (Order of Reversal & Remand, Sept. 1, 2020) (concluding that an affidavit declaring that the movant believed that the allegedly defamatory statements were truthful and corroboration by a sexual assault victim's declaration were sufficient to meet the movant's burden under prong one of the anti-SLAPP framework); *Brown-Osborne v. Jackson*, Docket No. 79272, 2020 Nev. Unpub. LEXIS 386 (Order of Affirmance, Apr. 16, 2020) (concluding that a movant met his burden under prong one of the anti-SLAPP framework where he provided a declaration that "his statements to the police were based on his observations and discussions"); *Omerza v. Fore Stars*, Docket No. 76273, 2020 Nev. Unpub. LEXIS 96 (Order Vacating & Remanding, Jan. 23, 2020) (concluding that sworn declarations that the statements were truthful or made without knowledge of their falsehood along with testimony from a hearing were sufficient to meet the burden under prong one of the anti-SLAPP framework).

advertisement against her opponent, Danny Tarkanian, claiming: "that Danny Tarkanian set up 13 fake charities that preyed on vulnerable seniors," that "seniors lost millions from the scams Danny Tarkanian helped set up," and "that the charities Tarkanian set up were fronts for telemarketing schemes." *Id.* at 1222 (internal quotations omitted). Rosen's advertisement attributed these statements to articles published in two newspapers. *Id.* Tarkanian then brought a defamation suit against Rosen, which she moved to dismiss under NRS 41.660. *Id.*

The district court denied Rosen's anti-SLAPP special motion to dismiss, which this court reversed. *Id.* This court rejected Tarkanian's focus on the individual words that Rosen's advertisement contained and instead analyzed whether a preponderance of the evidence demonstrated that the gist of the statement was true. *Id.* at 1223-24. This court's review of the record demonstrated that Tarkanian "served as a resident agent, filed incorporation paperwork, and provided routine legal work for companies that ended up operating telemarketing scams." *Id.* (internal quotations omitted). The record also demonstrated that "Tarkanian's involvement with companies found to be fraudulent telemarketing schemes [was] present throughout the public discourse, as shown by the

expansive number of articles Rosen submitted as evidence." *Id.* at 1224. Accordingly, this court held that "[t]he gist of Rosen's statements, . . . that Tarkanian was involved or associated with companies later found to be telemarketing scams that targeted the elderly . . . [was] substantively true." *Id.*

This court similarly reversed a district court's denial of an anti-SLAPP special motion to dismiss in *Taylor v. Colon*, 136 Nev., Adv. Op. 50, ___ P.3d ___, ___ (2020). There, a Nevada Gaming Control Board deputy chief "gave a presentation entitled *Scams, Cheats, and Blacklists* to approximately 300 attendees" at a gaming exposition. *Id.* at *2. The presentation included "a nine-second video clip depicting [the respondent] playing blackjack while holding a standard tally counter device under the table." *Id.* The respondent "claim[ed] that many attendees were able to identify [him]" and later filed a defamation claim. *Id.* The appellants filed an anti-SLAPP special motion to dismiss, which the district court denied. *Id.* at *3-*4.

Upon review, this court held that the deputy chief made his statements in good faith. *Id.* at *15. In so doing, this court reviewed the appellants' proffered evidence to determine what the "gist or sting" of the

allegedly defamatory statement was. *Id.* at *13-*15. Given the title of the presentation and the video the deputy chief showed, this court concluded that the "gist or sting of [the] presentation was undeniably that a player had been caught using a cheating device in violation of [the law]." *Id.* at *14. However, because the appellants demonstrated by a preponderance of the evidence that the deputy chief's statements were "either truthful or made without knowledge of its falsehood," this court held that the appellants met their burden under step-one of the anti-SLAPP burden-shifting framework.[4] *Id.* at *14-*15.

Under *Rosen* and *Taylor*, the gist or sting of Korb's statement was that Dr. Stile "botched a simple breast implant swap." 2 JA 172. However, Dr. Stile proffered evidence that clearly demonstrates that the gist or sting of Korb's statement was demonstrably false. *See id.* at 147-70 (Dr. Stile's operative reports, follow-up notes, progress note, communications with Korb, and declaration). Specifically, the record

[4]Appellants included a declaration from the deputy chief in support of their motion, stating that the deputy chief "acquired all of the information, videos, and photographs used in his presentation through [Gaming Control Board] investigations, and that the information contained in his presentation was true and accurate." *Taylor*, 136 Nev., Adv. Op. 50 at *14.

before this court clearly demonstrates that Korb: was initially satisfied with her surgery, *id.* at 147-49; missed her fourth follow-up appointment, *see id.* at 149, 151, 161; disregarded Dr. Stile's medical advice to only engage in "[a]ctivity as tolerated" by embarking on a nearly two-month vacation to Thailand and remote parts of Cambodia, *see id.*; disregarded Dr. Stile's medical advice while in Thailand and Cambodia, *see id.* at 153-57; underwent a surgical procedure in Thailand in which the Thai doctor inserted "the wrong implant of both size, shape and shell type," *id.* at 163, missed her first follow-up visit after Dr. Stile's corrective procedure due to a trip to California, *id.* at 161; was initially satisfied with Dr. Stile's corrective procedure, *id.* at 161-63; received assistance from Dr. Stile regarding her prospective cause of action against her Thai doctor, *id.* at 165-66; and received a free month's supply of Singular from Dr. Stile when she stated that she could not afford the prescription and would discontinue her recommended dosage, *id.* at 163. The record before this court also demonstrates that Korb filed a complaint with the Nevada State Board of Medical Examiners, which the board rejected, concluding that Dr. Stile "acted and performed appropriately under the circumstances." *Id.* at 170.

Based on the foregoing, the district court's finding that Korb made her statements in good faith strains the bounds of credulity and was clearly erroneous. Accordingly, this court should reverse the district court order granting Korb's anti-SLAPP special motion to dismiss, vacate the district court's award of attorney fees and costs, and remand the matter for further proceedings.

III. *Dr. Stile demonstrated a probability of prevailing with prima facie evidence*

Even if this court were to conclude that Korb made her statement in good faith, Dr. Stile demonstrated a probability of prevailing with prima facie evidence on his defamation cause of action. Thus, Dr. Stile met his burden under the second prong of the anti-SLAPP burden-shifting framework and was entitled to proceed on the merits of his claim.

If the moving party satisfies his or her burden under the first prong of the anti-SLAPP burden-shifting framework, the nonmoving party must "demonstrate with prima facie evidence a probability of prevailing on the claim." NRS 41.660(3)(b). The nonmoving party makes such a showing by demonstrating that his or her "claims have minimal merit." *Smith v. Zilverberg*, 137 Nev., Adv. Op. 7, 481 P.3d 1222, 1229

(2021). "To prevail on a defamation claim, the plaintiff must show (1) a false and defamatory statement; (2) unprivileged publication to a third person; (3) fault; [and] (4) damages." This court presumes damages where a "defamatory communication imputes a person's lack of fitness for trade, business, or profession, or tends to injure the plaintiff in his or her business." *Clark Cty. Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 385, 213 P.3d 496, 503 (2009) (internal quotations omitted).

A. *Korb made a false and defamatory statement*

As argued above, *see supra* Argument § II, Korb's Yelp post contained false statements. The "gist or sting" of her statements was that Dr. Stile "botched a simple breast implant swap." 2 JA 172. However, the record before this court clearly demonstrates that Korb's own disregard for Dr. Stile's medical advice and Korb's superseding surgery in Thailand caused her damages. *Id*. at 147-70. Thus, under *Rosen* and *Taylor*, Korb's statements were demonstrably false.

Korb argued, and the district court agreed, that Korb's statements were non-actionable opinions, hyperbole, or evaluative opinions. 2 JA 260-62. However, the district court's conclusion was contrary to Nevada caselaw concerning statements that are "neither pure

fact nor pure opinion." *Nev. Indep. Broad. Corp. v. Allen*, 99 Nev. 404, 411, 664 P.2d 337, 342 (1983). Statements of this nature, which this court termed "mixed type[s]," are "opinions which gives rise to the inference that the source has based the opinion on underlying, undisclosed defamatory facts." *Id.* at 411, 664 P.2d at 342. Thus, an opinion that a person is a thief is actionable "if the statement is made in such a way as to imply the existence of information which would prove" the person is a thief. *Id.* (citing *Restatement (Second) of Torts* § 566 (Am. Law. Inst. 1977)).

This court has long recognized that "separating factual statements from opinions . . . in defamation cases . . . is more easily stated than applied." *Allen*, 99 Nev. at 410, 664 P.2d at 342. In Nevada, the determinative question is "whether a reasonable person would be likely to understand the remark as an expression of the source's opinion or as a statement of existing fact." *Id.* "[W]here the statement is ambiguous, the issue must be left to the jury's determination." *Id.* (citing *Good Gov't Grp., Inc. v. Hogard*, 586 P.2d 572, 576 (Cal. 1978). Otherwise, "any statement of fact could be considered simply the opinion

of its maker," and thus be unactionable. *Allen*, 99 Nev. at 411, 664 P.2d at 342.

For example, this court held that the following were "mixed type" statements such that the jury had to determine whether they were opinion or fact: (1) "[O]ne of your checks for political advertising for $697.00 was returned to, to this television station, 'Refer to Maker' and we called the bank and we found that check wouldn't clear today;" (2) "[I]f the candidate doesn't pay his bills, what is he going to do with State money;" and (3) "But getting back to an honorable candidate, Senator Schofield . . . ." *Id.* at 411-12, 664 P.2d at 342-43. This court held that the first statement was statement of fact rather than a statement of opinion that the respondent bounced a check. *Id.* at 411, 664 P.2d at 342. This court held that the first clause of the second statement was a statement "susceptible of being interpreted as a statement of defamatory fact." *Id.* Regarding the third statement, which inferred that the respondent was not honorable, this court held that a jury could interpret it as factual rather than an opinion. *Id.* at 412, 664 P.3d at 343.

Thus, under *Allen*, Korb's statement was a "mixed type" statement, as it gave "rise to the inference that [she] based [her] opinion

on underlying, undisclosed defamatory facts." *Id.* at 411, 664 P.2d at 342. Furthermore, a reasonable juror could interpret many parts of Korb's statement as factual rather than an opinion. *See* 2 JA 172-73 (stating that Dr. Stile "botched a simple breast implant swap" and has "ruined so many women's bodies"). Thus, the district court's conclusion that Korb's statements were opinions or hyperbole was erroneous.

The district court's conclusion that Korb's statements constituted an evaluative opinion was also erroneous. To qualify as an evaluative opinion, the publisher must base his or her opinion "on true and public information," *Lubin v. Kunin*, 117 Nev. 107, 112, 17 P.3d 422, 426 (2001), to convey "the publisher's judgment as to the quality of another's behavior," *People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 111 Nev. 615, 624, 895 P.2d 1269, 1275 (1995), *overruled on other grounds by City of Las Vegas Downtown Redevelopment Agency v. Hecht*, 113 Nev. 644, 650, 940 P.2d 134, 138 (1997). Here, the record before this court demonstrates that Korb did not base her statements on true information, and it was demonstrably false. *Compare* 2 JA 172-73 *with id.* at 147-70. The record before this court further demonstrates that Korb did not base her opinion on public information, as she did not

disclose many of the material facts regarding her recovery from her initial surgery. *Id*. at 172-73. Accordingly, the district court's conclusion that Korb's statements constituted an evaluative opinion was erroneous.

Based on the foregoing, the district court erred in concluding that Korb's statements were not actionable opinions, hyperbole, or evaluative opinions. Rather, Nevada caselaw demonstrates that Korb's statements constituted a "mixed type" statement under *Allen*. Thus, Dr. presented prima facie evidence that Korb's statements were false and defamatory.

B. *Korb's publication was not privileged*

This court recognized that "privileges are defenses to a defamation claim and, therefore, the defendant has the initial burden of properly alleging the privilege." *Lubin*, 117 Nev. at 114, 17 P.3d at 427. Here, Korb failed to assert any privilege in the district court. *See* 1 JA 75-85; 2 JA 175-82. Thus, Korb waived any argument regarding the application of privileges to defamation. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

Even if this court were to overlook her waiver, Korb cannot demonstrate that a privilege applied to her statements. *See Williams,*

137 Nev., Adv. Op. 44 at *14 (noting that the absolute litigation privilege only applies to statements "made in the context of a quasi-judicial proceeding"); *Spencer v. Klementi*, 136 Nev., Adv. Op. 35, 466 P.3d 1241, 1247 (2020) (noting that the judicial proceedings privilege only applies "statements made in the course of a judicial proceeding" that are related to the underlying controversy); *Wynn v. Associated Press*, 136 Nev., Adv. Op. 70, 475 P.3d 44, 48 (2020) (noting that the fair report privilege only applies to fair, full, and true reports of official actions, official proceedings, or open meetings concerning matters of public concern); *Lubin*, 117 Nev. at 115, 17 P.3d at 428 (noting that the common interest privilege only applies to good faith statements about a subject matter that the publisher has an interest, right, or duty). Accordingly, Korb cannot avail herself of any privilege against defamation under these facts and Nevada caselaw. Thus, Dr. Stile met his burden of demonstrating that his defamation claim has minimal merit regarding whether a privilege applied to Korb's statements.

C. *Korb made knowingly false statements or made her statements in reckless disregard of the truth, which amounts to fault*

To demonstrate the element of fault in a defamation cause of action involving a private citizen,[5] the plaintiff must demonstrate that the defendant was negligent in publishing the defamatory statement. *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 483, 851 P.2d 459, 462 (1993). This court follows the *Restatement (Second) of Torts* § 580B (Am. Law. Inst. 1977) rule for determining negligence, *see Chowdhry*, 109 Nev. at 483, 851 P.2d at 462 (citing the *Restatement (Second) of Torts* regarding the elements of a defamation cause of action), which requires the plaintiff

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[5]Korb made no argument in the district court that Dr. Stile was a public figure or a limited-purpose public figure. *See* 1 JA 75-85; 2 JA 175-82. Thus, Korb waived any argument regarding the same. *Brown*, 97 Nev. at 52, 623 P.2d at 983. Even if this court were to overlook Korb's waiver, the weight of authority demonstrates that Dr. Stile is not a public figure nor is he a limited-purpose public figure. *Bongiovi v. Sullivan*, 122 Nev. 556, 573-74, 138 P.3d 433, 445-46 (2006) (noting "that a doctor is not ordinarily considered a public figure" and is only a "limited-purpose public figure" if he or she "voluntarily comes to the forefront of a national or local debate concerning medical issues" or steps outside the realm of private practice "to attract public attention" (internal quotations omitted)). Thus, Dr. Stile does not need to show that Korb acted with malice to meet his burden of demonstrating fault. *See Rosen*, 135 Nev., Adv. Op. 59, 453 P.3d at 1225 (noting that the plaintiff must demonstrate actual malice when he or she is a public figure).

to demonstrate that the defendant: "(a) [knew] that the statement [was] false and that it defames the [plaintiff], (b) act[ed] in reckless disregard of [the truth], or (c) act[ed] negligently in failing to ascertain [the truth]." *Restatement (Second) of Torts* § 580B (Am. Law. Inst. 1977).

Here, Dr. Stile presented prima facie evidence that Korb either knowingly made false statements or made her statements in reckless disregard for the truth. *Compare* 2 JA 172-73 *with id.* at 147-70. Thus, Dr. Stile met his burden of demonstrating that his defamation claim has minimal merit regarding Korb's fault.

D. *Dr. Stile sustained presumed damages as a matter of law*

As argued above, this court presumes damages where a "defamatory communication imputes a person's lack of fitness for trade, business, or profession, or tends to injure the plaintiff in his or her business." *Virtual Educ. Software, Inc.*, 125 Nev. at 385, 213 P.3d at 503 (internal quotations omitted). The record before this court demonstrates that the gist or sting of Korb's statements was that Dr. Stile "botched a simple breast implant swap" and "should have his medical license revoked." 2 JA 172-73. Thus, Korb's communication unequivocally imputes Dr. Stile's lack of fitness for his profession and injures his

business. Accordingly, Dr. Stile met his burden of demonstrating his defamation claim has minimal merit regarding the damages that Korb's statement caused.

In summation, Dr. Stile presented prima facie evidence that his defamation claim against Korb had minimal merit. Accordingly, Dr. Stile met his burden under NRS 41.660(3)(b), rendering the district court order granting Korb's anti-SLAPP special motion to dismiss erroneous.

IV. *The district court's award of attorney fees and costs was erroneous*

Should this court agree with the foregoing analysis, Dr. Stile requests that this court vacate the district court's award of attorney fees and costs under NRS 41.670. *See Loomis v. Lange Fin. Corp.*, 109 Nev. 1121, 1129, 865 P.2d 1161, 1166 (1993) (reversing an award of attorney fees upon reversing the district court order giving rise to the same).

CONCLUSION

The record before this court and the weight of authority clearly demonstrate that Korb did not make her statements in good faith. Thus, she failed to meet her burden under NRS 41.660(3)(a). Even if this court were to assume that Korb met her burden, the record before this court and the weight of authority clearly show that Dr. Stile

demonstrated, with prima facie evidence, that his defamation claim has minimal merit. Accordingly, Dr. Stile respectfully requests that this court reverse the district court order granting Korb's anti-SLAPP special motion to dismiss, vacate the district court order awarding Korb attorney fees and costs, and remand the matter to the district court for further proceedings.

DATED this 30th day of September, 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 Microsoft Word 2010 in 14-point Century Schoolbook font.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of brief exempted by NRAP 32(a)(7)(C), it is either:

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Finally, I hereby certify that I have read this brief, and 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 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 transcript or appendix where the

matter relied on is to be found.

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 30th day of September, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Appellants' Opening Brief and Joint Appendix (volumes one through three) with the Supreme Court of Nevada on the 30th day of September, 2021. I will electronically serve the foregoing document in accordance with the Master Service List as follows:

Christopher S. Connell (Connell Law)

/s/ Anna Gresl
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