IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case Nos.: 82338 (Lead Case)/82880

FORE STARS, LTD., A NEVADA LIMITED LIABILITY COMPANY; 180 LAND CO., LLC, A NEVADA LIMITED LIABILITY COMPANY; SEVENTY ACRES, LLC, A NEVADA LIMITED LIABILITY COMPANY,

Appellants,

v.

DANIEL OMERZA, DARREN BRESEE, and STEVE CARIA,

Respondents.

Appeal From the Eighth Judicial District Court,
In and for the County of Clark
The Honorable Richard F. Scotti & The Honorable Crystal Eller, Presiding
District Court Case No.: A-18-771224-C

RESPONDENTS' CONSOLIDATED ANSWERING BRIEF

Mitchell J. Langberg, Nevada Bar No. 10118
BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, Nevada 89106
702.382.2101
mlangberg@bhfs.com

Attorneys for Respondents
DANIEL OMERZA, DARREN BRESEE, and STEVE CARIA

NRAP 26.1 DISCLOSURE

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

Respondents Daniel Omerza, Darren Bresee and Steve Caria are individuals, so there is no parent corporation or any publicly held company that owns 10% of the party's stock.

DATED this 24th day of November, 2021.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: /s/MITCHELL J. LANGBERG
Mitchell J. Langberg, Esq. Bar No. 10118
100 North City Parkway, Suite 1600
Las Vegas, Nevada 89106

Attorneys for Respondents Daniel Omerza, Darren Bresee, and Steve Caria

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I. ROUTING STATEMENT

These consolidated appeals are the second time this anti-SLAPP case comes before this Court. In Supreme Court Case No. 76273, this Court considered the prior denial of the underlying defendants anti-SLAPP motion. This Court reversed and remanded for further proceedings below. The district court has now granted the anti-SLAPP motion and awarded attorneys' fees. These consolidated appeals, in part, involve disputes over the interpretation of this Court's prior decision and remand order. Therefore, Respondents (Defendants below) believe this case remains appropriate for decision by this Court.

II. STATEMENT OF THE CASE

This is an appeal of the district court's **granting** of a special motion to dismiss under the anti-SLAPP statute, NRS § 41.635 *et seq.*, (the "anti-SLAPP motion") filed by Defendants/Appellants Daniel Omerza, Darren Bresee and Steve Caria ("Residents").

The Residents were part of a grass roots effort to gather written statements to present to the Las Vegas City Council in advance of its consideration of a requested modification to a master plan and the City's general plan by Plaintiffs Fore Stars, Ltd., 180 Land Co., LLC, and Seventy Acres, LLC (collectively, "Landowners"). Landowners filed their complaint asserting a host of claims for relief based upon their allegation that Residents' efforts were improper and not in

good faith. Residents submitted their special motion to dismiss under the anti-SLAPP statute.

The district court initially denied the anti-SLAPP motion finding that the first prong of anti-SLAPP analysis did not apply to the tort claims asserted by Landowners. On appeal, this Court reversed, holding that the Residents had met their burden of showing the claims in the complaint arose from the Residents' good faith communications in furtherance of relevant First Amendment rights. Further, this Court found that the Landowners had failed to meet their burden to demonstrate their claims had merit by offering admissible evidence to support those claims. But, because the district court had not considered the Landowners' request for discovery under the anti-SLAPP statute, the Court remanded with instructions that the district court consider whether discovery pursuant to the anti-SLAPP statute was appropriate.

After further briefing on remand, the district court allowed limited discovery pursuant to the anti-SLAPP statute. Thereafter, the parties submitted supplemental briefing on the anti-SLAPP statute. The district court then granted the Residents' anti-SLAPP motion, dismissed Landowners' claims, and awarded mandatory attorneys' fees.

III. OBJECTION TO APPELLANT'S STATEMENT OF FACTS

NRAP 28(e)(1) requires that: "every assertion in briefs regarding matters in

the record shall 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."

This Court reviews the grant of an anti-SLAPP motion *de novo*. *Smith v. Zilverberg*, 137 Nev. Adv. Op. 7, 481 P.3d 1222, 1226 (2021). As this Court explained in its prior decision in this case, when opposing an anti-SLAPP motion, "the plaintiff cannot rely on the allegations of the complaint, but must produce evidence that would be admissible at trial." *Omerza v. Fore Stars, Ltd*, 455 P.3d 841, *3 (Nev. 2020) (quoting *HMS Capital, Inc. v. Lawyers Title Co.*, 12 Cal. Rptr. 3d 786, 791 (Ct. App. 2004)).

Nonetheless, all of the "facts" set out in the first six pages of the Landowner's "Statement of Facts" are either unsupported by any citation to the record or merely make reference to the Landowner's complaint (APP 1:0001-0095). Of course, the claims for relief set out in a complaint frame the scope of an anti-SLAPP motion. But, what Landowners attempt do in their appeal brief for this *de novo* review repeats the same error this Court recognized on the prior appeal—citation to "facts" alleged in the complaint is not sufficient to meet the evidentiary burden a plaintiff has in opposing an anti-SLAPP motion.

Therefore, the Residents request that this Court strike and/or disregard the "facts" set out in pages 1 through 6 of the Landowners' Opening Brief because the facts alleged in their complaint are not properly considered when determining

whether the Landowners met their evidentiary burden under the anti-SLAPP statute.

IV. COUNTER-STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

A. The Residents and Their Opposition to The Landowners' Development

As set out in this Court's prior decision in this case:

> [Residents] live in the Queensridge community and oppose residential development of adjacent land that is the site of the now-closed Badlands Golf Course. They circulated a form declaration to other Queensridge residents to sign, representing to the City of Las Vegas that the signatory purchased a residence/lot in Queensridge with the understanding that land designated as open space/natural drainage system in the Peccole Ranch Master Plan would remain as such and could not be developed.

Omerza, 455 P.3d 841, *1.

While Badlands is not subject to the Queensridge Master Declaration or Amended Master Declaration (*id.* at *3), just before the time the Residents circulated the declarations, Judge Crockett (in another matter related to the Landowners' development of Badlands) had "observed during a hearing that purchasers of property subject to the Peccole Ranch Master Plan relied on that master plan in purchasing their homes." *Id.* The declaration the Residents offered to other residents simply invited those other residents to affirm that, when purchasing property in Queensridge, they relied on the open space/natural draining

system designation and that such land could not be developed under the Peccole Ranch Master Plan or the city's General Plan.[1] *Id.*

With their anti-SLAPP motion, the Residents' provided declarations supporting their understanding and intent. Their understanding was that Badlands was not subject to the Queensridge CC&R's but was part of Peccole Ranch and subject to the Peccole Ranch Master Plan. APP 2:0186, 0191, 0195. They were aware that the City had approved plans for the Landowners to build residential units on the Badland site, but that those plans had been challenged in separate litigation. APP 2:0186, 0191, 0195. They knew that Judge Crockett determined that some people relied on the master plan. APP 2:0186, 0191, 0195. They were aware that the Landowners had applied for a change to the General Plan to allow for development of Badlands. App 2:187, 192, 196.

The Residents opposed the changes. Two of the Residents hoped that others who shared their view would voice their opposition to the City. App 2:187, 196. To that end, they handed out the forms of declarations to other residents. App 2:187, 196. Among other things, based on Judge Crockett's ruling and conversations with other residents, the Residents believed that some other residents had relied on the terms of the Peccole Ranch Master Plan when purchasing their

[1] Notably, there is no evidence in the record that the Residents attempted to persuade any resident to sign the declaration if the resident did not believe it to be true.

properties. App 2:187, 192, 196.

B. The Landowners File a Complaint

The Landowners sued the Residents claiming that the form declaration and efforts to have other residents sign them supported six separate claims for relief. *Omerza*, 455 P.3d 841, *1. The claims were for "equitable and injunctive relief," intentional interference with prospective economic advantage, negligent interference with prospective economic advantage, conspiracy, intentional misrepresentation, and negligent misrepresentation.

C. The anti-SLAPP Motion and the First Appeal

The Residents filed an anti-SLAPP motion. The district court denied the motion, finding that the Residents could not meet the first prong of the anti-SLAPP analysis because the complaint asserted tort claims and because there were factual issues that needed to be resolved.

1. <u>This Court's decision on the first prong of anti-SLAPP</u>

On appeal, this Court explained that the anti-SLAPP statute can apply to any claim for relief if the alleged wrongful activity arises from covered protected activity. *Id.* The Court went on to find that the Residents' activities with respect to the declarations was protected activity. Critically, the Court expressly held that the Residents had met their burden under the first prong of the anti-SLAPP analysis. *Id.* at *2. More specifically, this Court held that the Residents "met their burden of showing that the communications were truthful or made without

knowledge of their falsehood." *Id.*

2. This Court's decision on the second prong of anti-SLAPP

As to the second prong of the anti-SLAPP analysis, the Court held that the Landowners "failed to meet their burden by demonstrating with *prima facie* evidence a probability of prevailing on the claims." *Id.* at *3. The Court explained that the Landowners were require to "point to competent, admissible evidence" to make their *prima facie* showing. *Id.* However, the Court noted that the Landowners did to present such evidence, instead relying on their challenge to the first prong of the analysis. *Id.* The Court expressly found that the exhibits submitted with Landowners' supplemental briefing on the anti-SLAPP motion did not provide the requisite evidentiary showing. *Id.* at *4.

3. This Court's ruling on Landowners' request for discovery

Though the Court found that the Residents had met their burden on the first prong of the anti-SLAPP analysis and the Landowners did not meet their burden on the second prong of the analysis, the Court also determined that the district court failed to address Landowners' request for limited discovery under NRS 41.660(3). *Id.* The Court ruled that the district court was required to address that issue in the first instance. *Id.*

4. This Court's limited remand order

In light of the discovery issue, the Court reversed and issued a very limited order remanding to the district court "for it to determine whether respondents are

entitled to discovery under NRS 41.660(4)."[2] *Id.*

D. The anti-SLAPP Motion on Remand

On remand, the Landowners attempted to defy this Court's remand order, seeking excessive discovery and attempting to relitigate the first prong of the anti-SLAPP analysis. But the district court was faithful to this Court's direction.

1. Discovery on remand

At a status hearing shortly after remand, the parties debated whether any discovery was appropriate. The Landowners' counsel asked for additional briefing, acknowledging that "there was an initial request made by Plaintiffs…for discovery, but 100 thing have happened since that time." App 11:1737. Therefore, counsel argued in order to "allow the Court to make an educated decision, an informed decision, based on everything that's happened since that initial request for discovery," "***[l]et me do some additional briefing just on what discovery is requested, why it's relevant, and how it comports with the Nevada Supreme Court's ruling."*** APP 11:1737 (emphasis added).

The district court allowed additional briefing. After promising the district court that the brief would identify "what discovery is requested," the Landowners expressly described the topics on which they sought discovery. The Landowners

[2] Importantly, NRS 41.660(4) only allows limited discovery (after a requisite showing) to address ***the second prong*** of the anti-SLAPP analysis. No discovery is permitted in relation to the first prong.

requested depositions, requests for production of documents, and request for admission whereby they would "be able to ask the Defendants what documents they are relying on, what information they are relying on, or if that information was provided to them by third persons." APP 6:735.

The district court permitted some limited discovery. As explained in a protective order the district court ultimately issued, the district court first issued a minute order authorizing discovery and then clarified that order. APP 6:0826. However the Residents sought a protective order because the Landowners propounded discovery that was beyond the scope authorized by the district court and NRS 41.660(4). APP 6:0826-0827.

In response, the district court withdrew its prior orders. APP 6:0827. Instead, it issued the protective order. In that order, the district court explained that "the only discovery that might be permitted is discovery authorized by NRS 41.660(4)." APP 6:0827. The district court noted that section recognizes there is an automatic stay of discovery upon the filing of an anti-SLAPP motion. APP 6:0827. However, if a plaintiff makes a showing that discovery is necessary to meet its burden on the second prong of anti-SLAPP analysis, a court must allow discovery. APP 6:0827. Critically, the district court quoted the Landowners' brief in support of discovery and found:

> The Court finds that the only subjects on which Plaintiffs attempted to make a showing of such necessity were,

> with respect to the declarations to the City Council at issue in this case, "what documents [Defendants were] relying on, what information [Defendants were] relying on, or if that information was provided to [Defendants] by third persons."

APP 6:0827.

Therefore, the district court explained that the Landowners' "discovery should be limited to those topics." APP 6:0827. As a result, the district court ordered a limited quantity of discovery requests and depositions and restricted the scope "to the topics of what documents Defendants relied on, what information Defendants relied on, or whether the information was provided to Defendants by third persons, all with respect to the declarations to the City Council." APP 6:0827-0828.

The Landowners assert that the Residents did not properly respond to the discovery requests. However, the record does not reflect that the Landowners ever filed a motion to compel—because they never did so.

2. <u>Supplemental briefing on the anti-SLAPP motion</u>

After discovery was completed, the parties were allowed to submit supplemental briefs on the anti-SLAPP motion. APP 6:0828, APP 7:830-995, APP 8:996-1216, APP 9:1217-1257.

Remarkably, the Landowners spent almost the entirety of their brief rearguing what this Court had already decided and was not part of the remand

order—whether the Residents had met the burden under the first prong of the anti-SLAPP analysis. APP 7:0830-0849. Worse, even though this Court had determined that the Landowners prior briefing failed to make a *prima facie* showing with admissible evidence to support each of its claims (*Omerza*, 455 P.3d 841, *3-*4), and even though the Landowners had been permitted discovery to gather such evidence (if it existed), the Landowners dedicated ***only 23 lines*** of their brief to arguing that they had sufficient evidence to meet their burden under prong two of the anti-SLAPP analysis. APP 7:0845-0846. In those 23 lines of argument, ***the Landowners only addressed their claim for conspiracy, ignoring every one of the other 5 claims asserted in their complaint.*** APP 7:0845-0846.

3. <u>The district court's order granting the anti-SLAPP motion</u>

After hearing, the district court issued a minute order granting the anti-SLAPP motion. APP 9:1258-1259. On December 10, 2020, the district court entered its Findings of Fact and Conclusions of Law ("FFCL") granting the anti-SLAPP motion. APP 9:1260-1270.

Among other things, the district court discussed that the Landowners asserted they were entitled to discovery on both the first and second prong of the anti-SLAPP analysis and that this Court's prior decision in the case required the district court to reconsider both the first and second prong of the anti-SLAPP analysis on remand. APP 9:1262. However, the district court again explained that

Landowners had requested supplemental briefing on discovery and promised to identify the discovery to which they were entitled. APP 9:1262-1263. The district court repeated that NRS 41.660(4) required the Landowners to make a showing of necessity for limited discovery and that they had been allowed discovery on the only topics for which they "even attempted to make such a showing." APP 9:1263.

With respect to the supplemental briefing on the anti-SLAPP motion, the district court found that "[w]ith respect to Prong 2, the only one of the Claims that Plaintiffs addressed in their supplemental briefing was the claim for Conspiracy." APP 9:1263. "Moreover, with respect to the claim for Conspiracy, Plaintiffs did not offer any admissible evidence or make any argument regarding alleged damages resulting from the purported conspiracy." APP 9:1263.

In its conclusions of law, the district court found that this Court's prior decision constituted law of the case. APP 9:1264. After quoting this Court, the district court concluded that the only issue it was directed to consider on remand was whether discovery should be permitted under NRS 41.660(4). APP 9:1264. And, once discovery was allowed, the district court concluded it was required to determine whether the Landowners could now meet their burden under the second prong of the anti-SLAPP analysis. APP 9:1265.

The district court concluded that the Landowners failed to meet their burden

for two separate and independent reasons. First, the district court found that the litigation privilege applied to the Residents' solicit of statements from other residents to be considered in a City Council proceeding. APP 9:1266-1268.

"As a separate and additional basis for dismissing Plaintiffs' claims pursuant to the anti-SLAPP statute," the district court concluded that the Landowners failed to meet their burden under Prong 2 "even if the litigation privilege did not apply." APP 9:1268. Noting that this Court already determined that the Landowners had not met their burden in their prior briefing, the district court considered whether the Landowners "offered any new evidence or legal argument in an attempt to meet their burden on remand." APP 9:1268.

The district court noted that the "civil conspiracy claim is the only claim for which Plaintiffs have made any new argument." APP 9:1268. However, the district court concluded that the Landowners did not offer any admissible evidence of an agreement to do something unlawful as required by applicable authority. APP 9:1268-1269. Further, the district court concluded that the Landowners had not (and could not) provide any evidence of damages resulting from the form declarations because the relevant City Council proceedings did not take place and Landowners successfully appealed Judge Crockett's decision, meaning that the City Council's prior decisions to allow development without modification (the modification which the Residents opposed) of the master plan were affirmed. APP

9:1269.

The district court concluded, "Plaintiffs have failed to show an agreement to achieve an unlawful objective and failed to show any damage. Therefore, Plaintiffs have failed to meet their Prong 2 anti-SLAPP burden." 9 APP 1269.

The district court granted the anti-SLAPP motion and denied the Landowners' subsequent reconsideration motion. APP 11:1600-1601.

E. The District Court Grants the Resident's Motion for Attorneys' Fees

The Residents filed a motion for mandatory attorneys' fees pursuant to the anti-SLAPP statute. APP 9:1357-1420. The fee motion requested an award of hourly fees of just over $350,000 (based on a lodestar analysis) and an enhancement of an equal amount because the Residents' counsel handled the defense on a contingency basis.

1. The hours worked

Because the Residents were seeking fees for more than 650 attorney hours, in the motion they provided a timeline of all of the major events that occurred in the case (mostly necessitated by the Landowners' litigation tactics) between March 15, 2018 and December 24, 2020. APP 9:1360-1364. The Residents also included detailed billing entries for all tasks performed, along with coding that identified the billings by 13 major tasks. APP 9:1394-1420. In addition, the Residents provided a summary of the hours and fees for each of those 13 tasks. APP 9:1368-1369.

Notably, when considering the fee motion, the district court was aware that it reflected a total of roughly 650 hours worked by the Residents' counsel, which the Landowners' counsel compared to the 481.5 hours worked by the Landowners' counsel (Landowners' Opening Brief, 50:8-11). However, at the time of ruling on the motion, the district court was also aware that the Landowners' in-house counsel had substantively participated in the lawsuit, including by taking depositions. Yet, none of her hours were included by Landowners when comparing total hours worked. APP 11:1610.

2. <u>The quality of the advocates</u>

The Residents provided short biographical information about the three attorneys who performed 95% of the work on the case. APP 9:1366-1367.

3. <u>The billing rates</u>

When considering the fee motion the district court was aware that lead counsel charged between $655 and $690 per hour over the course of the 2 1/2 year litigation. APP 9:1366. That rate was compared to other attorneys in the market who had less specialized experience—specifically the ***Landowners'*** counsel who had attested to having a regular hourly rate of $600 per hour (App 9:1366, APP 11:1606) and their initial lead counsel who charged $595 per hour (APP 11:1610, APP 10:1509-1545). Likewise, in the fee motion and reply, the Residents showed that the Residents' lead counsel was supported by a class of 1990 attorney who

billed at $485 and a class of 2004 attorney who billed at $450, while the Landowners' initial lead counsel was supported by a class of 2012 attorney who billed at $400. APP 11:1610, APP 10:1509-1545.

4. The district court's ruling on the fee motion

At the hearing on the fee motion, the district court made clear that it considered all of the required factors for considering a fee award. The district court had read the papers and knew that the Landowners' counsel addressed the fees "line-by-line." APP 11:1810. The district court expressly stated that it "reviewed the billing" and made its award:

> [u]nder the circumstances with how long this case took, with how much work went into it, how much expertise went into it, noting the normal rates of attorneys with this type of experience and this type of law, I don't find it unreasonable the initial amount asked for prior to Lodestar calculations.

APP 11:1813.

In its order awarding fees, the district court denied the Residents any enhancement or additional penalty under the anti-SLAPP statute. Pursuant to NRCP 52(a)(3)[3], incorporating the reasons stated on the record, the district court awarded fees of $363,244.00.

[3] "The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion. The court should, however, state on the record the reasons for granting or denying a motion."

V. SUMMARY OF THE ARGUMENT

On the prior appeal, this Court found that the Residents had met their burden under the first prong of the anti-SLAPP analysis by demonstrating by a preponderance of the evidence that the Landowners claims arise from good faith communications in furtherance of the right of free speech and the right to petition on matters of public interest.

This Court also determined that the Landowners failed to meet their burden under prong two to demonstrate a likelihood of success on the merits of their claims with admissible *prima facie* evidence.

The only basis for remand (rather than full reversal) was this Court's determination that the district court should consider whether the Landowners should have been permitted limited discovery pursuant to NRS 41.660(4) in order to meet their burden under the second prong. Indeed, this Court's remand order ***only*** allowed for consideration of the discovery issue. Under the mandate rule, all the district court could do was consider whether discovery was appropriate and, if discovery was allowed, provide the Landowners with an opportunity to reargue their burden under the second prong. That is exactly what the district court did.

NRS 41.660(4) only allows discovery if the requesting party makes a "showing" that information necessary to meet its burden on the second prong of the anti-SLAPP analysis is in the possession of another party or third party and not

otherwise available without discovery. In such a case, the district court can only "allow limited discovery for the purpose of ascertaining such information." NRS 41.660(4).

In this case, after Landowners requested the opportunity to brief exactly what discovery they were requesting and the basis for it. The district court allowed the Landowners the discovery they requested. When they sought more, the district court properly issued a protective order. Any allegation by the Landowners that the Residents did not properly respond to the authorized discovery was abandoned when the Landowners chose not to file a motion to compel.

Once discovery was completed, the Landowners had the opportunity to supplement their argument on the second prong of the anti-SLAPP analysis. Instead, for the most part, they tried to relitigate the issue on Prong 1 which had already been decided by this Court.

As to the Landowners' efforts to make a *prima facie* showing with admissible evidence supporting their claims, this Court need not even reach the complex analysis of the litigation privilege and whether the City Council hearings ***would have*** been quasi-judicial proceedings. Mindful that this Court already ruled that the Landowners' initial anti-SLAPP opposition was devoid of evidence to support any of their claims, it was incumbent on the Landowners to address each of their claims in the supplemental opposition to the anti-SLAPP motion and

demonstrate *prima facie* evidence to support each of them. Yet the Landowners abandoned all but their claim for conspiracy.

Even at that, Landowners failed to make the requisite evidentiary showing. They offered no evidence to support an explicit or tacit agreement to do something unlawful, as required under Nevada law. Moreover, by failing to make out any of their other substantive claims, the conspiracy claim failed, as a matter of law. Finally, the *sine qua non* of a conspiracy is resulting injury. However, because the Landowners successfully appealed the district court ruling (in another case) that would have required them to obtain a modification of the mater plan or General Plan, the City Council hearing for which the form declaration were being distributed never occurred and, therefore, there could have been no damages from those declarations.

Therefore, the anti-SLAPP motion was properly granted because the Landowners could not meet their burden under the second prong of the anti-SLAPP analysis.

As to the award of attorneys fees, the Landowners have not demonstrated that the district court abused its discretion. The record is clear that the district court applied the correct law and considered all of the necessary factors in making

the award. Therefore, because substantial evidence[4] supports the award, the district court's discretion awarding the fees should not be disturbed.

VI. LEGAL ARGUMENT

A. The Landowners Were Granted All the Discovery to Which They Were Entitled (if Not More)

The Landowners devote much of their discovery argument to discussing standard by which a party resisting an anti-SLAPP motion might be entitled to discovery. But the Landowners ignore that pursuant to NRS 41.660(4), it was their burden to make a "showing" that information "necessary" to meet their burden under the second prong of anti-SLAPP analysis was "not reasonably available without discovery." The Landowners also ignore that ***they*** told the district court they would provide a supplemental brief setting out what discovery they were requesting and why it was relevant.

The Landowners argue that there were many requests for discovery in the course of this case. But they are responsible for what they told the district court. Landowners' counsel asked for additional briefing. She told the district court that "there was an initial request made by Plaintiffs…for discovery, but 100 thing have happened since that time." App 11:1737. Therefore, in order to "allow the Court to make an educated decision, an informed decision, based on everything that's

[4] "[E]vidence that a reasonable mind might accept as adequate to support a conclusion. *Winchell v. Schiff*, 124 Nev. 938, 944, 193 P.3d 946, 950 (2008)

happened since that initial request for discovery," she argued for additional briefing in which she promised she would explain what discovery was being requested: "***[l]et me do some additional briefing just on what discovery is requested, why it's relevant, and how it comports with the Nevada Supreme Court's ruling."*** APP 11:1737 (emphasis added).

The district court allowed the additional briefing. The Landowners were quite specific about what discovery they were seeking. They expressly requested depositions, requests for production of documents, and requests for admission whereby they would "be able to ask the Defendants what documents they are relying on, what information they are relying on, or if that information was provided to them by third persons." APP 6:735.

The requirement for a "showing" under NRS 41.660(4) has meaning. The Landowners were only eligible to obtain discovery for which they were able to make a showing of necessity. And, even then, the district court could only allow "limited discovery for the purpose of ascertaining such information." Thus, the district court's grant of limited discovery to address Prong 2 was limited to that which was requested by the Landowners in their brief (the only thing on which the Landowners made any showing).

Moreover, as discussed above and below, because the Landowners could not satisfy the critical damages element of their claims, no amount of discovery on the

issues about which Landowners now argue would have been sufficient to make out their claims. Therefore, it was impossible to make a showing that any additional discovery was necessary or warranted.

The Landowners also suggest that more discovery should have been permitted because (they claim) the Residents did not properly respond to the discovery that was authorized. However, the Landowners never filed a motion to compel (for reasons that appear obvious). They had every right to seek relief from the discovery commissioner or, perhaps, directly from the district court. Having failed to do so, they have waived any objection to the discovery responses. *See, Valley Health Sys., LLC v. Eighth Jud. Dist. Ct. of State ex rel. Cty. of Clark*, 127 Nev. 167, 172, 252 P.3d 676, 679 (2011) (discussing waiver of discovery issues not raised with the discovery commissioner in the first instance).

B. The Landowners Were Not Entitled to Relitigate Whether the Residents Met Their Burden on the First Prong of the Anti-SLAPP Analysis

In the appeal of the prior ruling on the anti-SLAPP motion, this Court expressly held:

> [i]n sum, we conclude that the district court erred by finding that appellants had not met their burden under NRS 41.660(3)(a) to establish by a preponderance of the evidence that respondents' claims are grounded on appellants' good faith communications in furtherance of their petitioning rights on an issue of public concern.

The Court was also clear in its remand order to the district court:

> …we vacate the portion of the district court's order denying appellants' anti-SLAPP special motion to dismiss and remand to the district court for it to determine whether respondents are entitled to discovery under NRS 41.660(4).

Pursuant to the "mandate rule," a court must effectuate a higher court's ruling on remand. *Estate of Adams By & Through Adams v. Fallini*, 132 Nev. 814, 819, 386 P.3d 621, 624 (2016). The law-of-the-case doctrine directs a court not to "re-open questions decided (i.e., established as law of the case) by that court or a higher one in earlier phases." *Id*.

In considering the Prong 1 issues, this Court explained that the Landowners failed to present "evidence the clearly and directly overcomes" the declarations that were offered by the Residents. *Omerza*, 455 P.3d 841, *2. As a result, the Court explained that the Residents:

> …met their burden of showing by a preponderance of the evidence that their communications were truthful or made without knowledge of their falsehood (i.e., that they were "good faith" communications) through the sworn declarations attached to their special motion to dismiss, which is sufficient to satisfy the good-faith component of the step-one inquiry under NRS 41.660(3)(a).

Id. Thus, this Court found (and the law of the case is) that the Residents "met their burden of showing that the communications were truthful or made without knowledge of their falsehood." *Id*.

The Landowners were not entitled to relitigate Prong 1. Instead, in its clear

mandate, the Court simply instructed the district court to "determine whether respondents are entitled to discovery under NRS 41.660(4)." As discussed above, NRS 41.660(4) only allows discovery related to Prong 2 of the anti-SLAPP analysis. That is the portion of the analysis in which the Landowners were required to demonstrate that they had *prima facie* evidence to support their claims.

Thus, all of the Landowners' direct and indirect arguments that the Residents failed to meet their burden on the first prong of the anti-SLAPP analysis should be disregarded as inconsistent with this Court's prior decision.

C. The Landowners Failed to Meet Their Burden on Prong 2 to Demonstrate a Probability of Success by Providing Admissible Evidence to Make a *Prima Facie* Showing on Their Claims

In order to meet the burden on Prong 2, "in addition to stating a legally sufficient claim, the plaintiff must demonstrate that the claim is supported by a prima facie showing of facts that, if true, would support a favorable judgment." *Omerza*, 455 P.3d 841, *3.

In its prior decision, this Court expressly held that the Landowners' pre-appeal anti-SLAPP briefing "did not present 'prima facie evidence,' as required by NRS 41.660(3)(b), to demonstrate a probability of prevailing on their claim." *Id.* Therefore, on remand, if discovery was allowed (as it was), the Landowners were obligated to present ***new*** arguments with admissible evidentiary support to make out a *prima facie* showing on each of their claims.

The Landowners failed to do so.

1. The Landowners abandoned all claims other than the conspiracy claim

Even though this Court's prior decision expressly informed the Landowners that they had failed to make ***any*** evidentiary showing on any of their claims and explained what was required to meet their burden (*see, id* at *4), the Landowners did not offer any new evidence or argument in their supplemental opposition for any of their claims ***other than*** conspiracy. APP 7:0845-0846.

Not once did the Landowners present any evidence or offer any argument to support their interference, misrepresentation, or injunctive relief claims. As a result, any opposition to the anti-SLAPP motion on those claims has been abandoned and the Landowners' arguments on those claims in their Opening Brief should be disregard.

Perhaps the Landowners believe the *de novo* standard of review that applies to anti-SLAPP motions allows them to offer new evidence and raise new arguments for the first time on appeal. But that would be incorrect, as a matter of law. "[A] *de novo* standard of review does not trump the general rule that a point not urged in the trial court, unless it goes to jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Schuck v. Signature Flight Support of Nevada, Inc.*, 126 Nev. 434, 436, 245 P.3d 542, 544 (2010).

Because the ***only*** arguments on these five claims were contained in the

Landowners' initial anti-SLAPP opposition and because this Court already determined that those arguments did not meet the Landowners' Prong 2 burden, the failure to offer new argument as to those claims on remand was a waiver of any further argument and those claims have been abandoned. They cannot be raised for the first time on this appeal.

2. The Landowners failed to meet their Prong 2 burden on the conspiracy claim

The district court correctly found that the Landowners did not offer *prima facie* evidence to support their conspiracy claim.

This Court explained that the Landowners were required to "demonstrate that the claim is supported by a prima facie showing of facts" that is supported by "competent, admissible evidence." *Omerza*, 455 P.3d 841, *3. This is the same standard as a court applies in a summary judgment motion. *Id.*

The Landowners hardly tried to meet this burden, devoting only one page to the entire factual and legal argument. Neither the "evidence" offered nor the legal argument met the burden set out by this Court.

An actionable civil conspiracy "consists of a combination of two or more persons who, by some concerted action, intend to accomplish an unlawful objective for the purpose of harming another, and damage results from the act or acts." *Consol. Generator-Nevada, Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1311 (1998) (affirming summary judgment for defendant on the plaintiff's

conspiracy claim because there was no evidence that the two defendants had agreed and intended to harm the plaintiff). The evidence must be "of an explicit or tacit agreement between the alleged conspirators." *Guilfoyle v. Olde Monmouth Stock Transfer Co.*, 130 Nev. 801, 813, 335 P.3d 190, 198 (2014) (upholding district court's grant of summary judgment where plaintiff "has presented no circumstantial evidence from which to infer an agreement between [defendants] to harm" plaintiff). Here, the Landowners did not offer any evidence of an agreement to do something unlawful.

The lack of evidence of damages is also fatal to the Landowners' conspiracy claim. Such a claim fails where the plaintiff cannot show that he suffered any actual harm. *Sutherland v. Gross*, 105 Nev. 192, 197 (1989); see also *Aldabe v. Adams*, 81 Nev. 280, 286 (1965), *overruled on other grounds by Siragusa v. Brown*, 114 Nev. 1384 (1998) ("The damage for which recovery may be had in a civil action is not the conspiracy itself but the injury to the plaintiff produced by specific overt acts."). "The gist of a civil conspiracy is not the unlawful agreement but the damage resulting from that agreement or its execution. The cause of action is not created by the conspiracy ***but by the wrongful acts done by the defendants to the injury of the plaintiff***." *Eikelberger v. Tolotti*, 96 Nev. 525, 528 (1980) (emphasis added).

The Landowners' entire set of claims is based on the Residents signing

and/or circulating the form declarations to community members to oppose the Landowners' efforts to change the land use restrictions on the Badlands. The Landowners offered no evidence they were damaged. Why? Perhaps because the City Council proceedings never took place. Instead, the Landowners appealed (successfully) Judge Crockett's decision and the City Council's prior decisions to allow development without a modification to the Peccole Ranch Master Plan were affirmed.

The fact that the Landowners offered no evidence to support any of their other claims also demonstrates the invalidity of the conspiracy claim. Where a plaintiff cannot demonstrate an unlawful act because it cannot prevail on the other claims it has alleged form the basis for the underlying wrong, dismissal of the civil conspiracy claim is appropriate. *Goldman v. Clark Cty. Sch. Dist.*, 471 P.3d 753 (Nev. 2020) (unpublished) (*citing Consol. Generator-Nevada, Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1311, 971 P.2d 1251, 1256 (1998)).

In sum, the Landowners failed to provide admissible evidence to support each of the elements of its conspiracy claim. Therefore, they failed to meet their Prong 2 anti-SLAPP burden.

3. <u>The conspiracy claim is barred by the litigation privilege</u>

Because the Landowners failed to present *prima facie* evidence that supports each element of its conspiracy claim, the Court can end its Prong 2 analysis.

However, even if the Landowners had set out evidence to support the conspiracy claim, it would still be barred by the litigation privilege.

Nevada recognizes "the long-standing common law rule that communications uttered or published in the course of judicial proceedings are absolutely privileged so long as they are in some way pertinent to the subject of controversy." *Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 60, 657 P.2d 101, 104 (1983) (citation omitted). This rule includes "statements made in the course of quasi-judicial proceedings." *Knox v. Dick*, 99 Nev. 514, 518, 665 P.2d 267, 270 (1983) (citation omitted); *see also Circus Circus*, 99 Nev. at 61, 657 P.2d at 105 ("the absolute privilege attached to judicial proceedings has been extended to quasi-judicial proceedings before executive officers, boards, and commissions") (citations omitted).

Critically, the statement at issue does not have to be made during any actual proceedings. *See Fink v. Oshins*, 118 Nev. 428, 433, 49 P.3d 640, 644 (2002) ("the privilege applies not only to communications made during actual judicial proceedings, but also to communications preliminary to a proposed judicial proceeding") (footnote omitted). "[B]ecause the scope of the absolute privilege is broad, a court determining whether the privilege applies should resolve any doubt in favor of a broad application." *Clark Cty. Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 382, 213 P.3d 496, 502 (2009) (citation omitted) (citing *Fink*,

supra).

This Court already determined the statements underlying each of Landowners' claims were made in good faith in connection with issues under consideration by a legislative body. That was the City Council's consideration of "amendment to the Master Plan/General Plan affecting Peccole Ranch." *Omerza,* 455 P.3d 841, *2.

Those City Council proceedings are quasi-judicial. Unified Development Code (UDC) section 19.16.030, et. seq. addresses amendments to the General Plan. It provides an extensive set of standards establishing how the City Council must exercise judgment and discretion, hear and determine facts, and render a reasoned written decision. In the course of those proceedings, the Council has the power to order the attendance of witnesses and the production of documents. Las Vegas City Charter §2.080(1)(d),(2)(a). This entire process meets the judicial function test for "determining whether an administrative proceeding is quasi-judicial." *State, ex rel. Bd. of Parole Comm'rs v. Morrow*, 127 Nev. 265, 273, 255 P.3d 224, 229 (2011). Moreover, the Landowners admitted it was a quasi-judicial proceeding. APP 0282 (p. 16, lines 415-420 with Mr. Hutchison as counsel for these Landowners explaining that the proceedings are quasi-judicial).

Critically, the absolute litigation privilege applies without regard to how the Landowners styles their claims. "An absolute privilege bars any civil litigation

based on the underlying communication." *Hampe v. Foote*, 118 Nev. 405, 409, 47 P.3d 438, 440 (2002), overruled in part on other grounds by *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228 n. 6, 181 P.3d 670, 672 n.6 (2008).

The Landowners attempt to escape application of the litigation privilege by relying on *Spencer v. Klementi*, 136 Nev. 325, 466 P.3d 1241, 1247 (2020). As Landowners' argue it, *Spencer* establishes that no proceeding is quasi-judicial unless the proceeding requires evidence to be taken under oath, allows for cross-examination, and provides other due process protections that are the hallmark of traditional judicial proceedings. However, the Landowners ignore that this Court expressly stated that these were the standards for "a quasi-judicial proceeding in the ***context of defamations suits***." *Id.* at ____, 1247 (emphasis added).

While the distinction as to whether the case is one for defamation or not may seem meaningless at first blush, it is quite significant because this Court has created rules that treat particular proceedings as quasi-judicial based on one standard in some contexts (*id* the judicial function test) and not in other contexts (*ie* the requirement that particular due-process protections to be available). This incongruent treatment can be harmonized. In a defamation case, the plaintiff is attempting to hold the person asserting the privilege liable for what was said in a proceeding. There is good policy reason for this because "[s]tatements made during proceedings that lack basic due-process protections generally do not

engender fair or reliable outcomes." *Id.* at ___, 1248. However, the Landowners' claims are not for defamation. In truth, they are attempting to hold the Residents liable (for conspiracy, interference, and misrepresentation) for encouraging others to participate in a City Council proceeding (albeit offered by way of a form declaration). The circumstance is different than in a defamation case and the judicial function test should be applied to determine if the proceedings are quasi-judicial.

No fact-intensive inquiry was required. Because this Court already determined that the Residents' activities were made in connection with the City Council proceedings, and because those activities were quite obviously an attempt to solicit witnesses to submit testimony in the form of declarations, the Residents' statements were all made in connection with, and preliminary to, a quasi-judicial proceeding and, therefore, were protected by the absolute litigation privilege.

D. The District Court Properly Awarded Attorneys' Fees

An award of attorneys' fees is reviewed for an abuse of discretion. *Smith*, 137 Nev. Adv. Op. 7, 481 P.3d at 1231. Landowners do not prevail simply because they disagree with the district court's decision or because this Court might have decided the motion differently. "So long as the district court considers the *Brunzell* factors, ***its award of attorney fees will be upheld if it is supported by substantial evidence.*** *Id.* (emphasis added)(internal citations and quotations

omitted). Substantial evidence is a bit of a misnomer. It does not require a large amount of evidence. Rather, it is "evidence that a reasonable mind might accept as adequate to support a conclusion." *Winchell*, 124 Nev. at 944, 193 P.3d at 950. In the context of a fee award, it is enough that the district court considered billing logs for the work performed, as well as declarations supporting the reasonableness of the rates and the work performed. *Smith*, 481 P.3d at 1231, fn. 9.

The Landowners complain that the district court's fee order does not indicate that it considered the *Brunzell* factors. But there is no requirement for a district court to lay out its analysis in the form of findings of fact and conclusion of law when deciding a motion. NRCP 52(a)(3) ("The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion. The court should, however, state on the record the reasons for granting or denying a motion."). The district court did what NRCP 52(a)(3) suggests. The district court expressly stated on the record that it had considered "how long this case took, with how much work went into it, how much expertise went into it, noting the normal rates of attorneys with this type of experience and this type of law." APP 11:1813. The district court had all the billing records, the analysis of how much time was spent on each category of task, the declaration of counsel regarding the experience of the team members including the division of labor, and the comparison of the similarity of rates

between the Residents' counsel and the Landowners' counsel. APP 9:1357-1420, APP 11:1608-1614.

Still, the Landowners want to second guess the district court's analysis. They claim that the amount of fees awarded is disproportionate to fees awarded in other anti-SLAPP cases. But they provide no real analysis. For example, in *Smith*, the court awarded $66,615 in attorneys fees in a case where there is no indication that, as here, there was also an entire appeal, discovery, discovery motions, and supplemental briefing. *Id.* Nor do the Landowners cite to a case that was addressed during the fee hearing: *Gunn v. Drage*, No. 219CV2102JCMEJY, 2021 WL 848640, at *5 (D. Nev. Mar. 5, 2021) (applying 1.5 times multiplier in awarding $257,286.75 in attorney's fees related to anti-SLAPP motion, and an additional $77,206.50 in fees related to post-judgment motions), amended by No. 219CV02102JCMEJY, 2021 WL 1160943, at *1 (D. Nev. Mar. 17, 2021) (amended to include additional fees incurred in connection with fee motion, for total fees and costs amounting to $387,653.75).

The Landowners also challenge the rates charged even though there is little difference in regular rates for lead counsel (Landowners' counsel normally bills at $600 and the Residents' lead counsel billed at between $655 and $690 over 2 1/2 years). They also ignore the district court's statements on the record indicated familiarity with rates for similar work.

Then the Landowners attempt to compare the total number of hours spent by the attorneys for the respective parties. However, as discussed in the facts (above), the Landowners' litigation team was supplemented by an in-house counsel who participated substantively in the case, including by taking depositions. There is no telling how many hours she spent on the case that would be relevant to a comparative analysis. Nor do the Landowners consider that on the anti-SLAPP motion, the Residents had to file an opening brief ***and*** reply. So too on the motion to dismiss under NRCP 12(b)(5). And the discovery motion for protective order. And on the successful initial appeal to this Court. In other words, the Residents simply had more work to do. Candidly, in many cases, the quality of the work was different, too. Thus, when briefing the initial anti-SLAPP motion, the Residents addressed both prongs of the anti-SLAPP analysis. On the other hand, as this Court noted in its prior decision, the Landowners did not even brief the second prong of the analysis in their initial opposition.

This analysis could continue. But the detailed process of parsing these facts and analyzing these issues is exactly why this Court only reverses a fee award for abuse of discretion, deferring to the district court if there was substantial evidence to support its decision which, in this context, merely requires consideration of the information addressing each of the *Brunzell* factors, just as the district court did.

Simply, the district court did not abuse its discretion. The fee award was

proper.

VII. CONCLUSION

After years of litigation, a prior appeal, discovery, and substantial briefing, the district court properly found that the Landowners failed to meet their burden under the second prong of the anti-SLAPP analysis and granted the Residents' anti-SLAPP motion. The district court did not abuse its discretion when deciding the scope of discovery the Landowners would be permitted or the award of attorneys' fees.

Therefore, the district courts order granting the anti-SLAPP motion and awarding fees should be affirmed in full. Further, the Residents should be award their fees and costs on appeal.

DATED this 24th day of November, 2021.

BROWNSTEIN HYATT FARBER
SCHRECK, LLP

By: /s/MITCHELL J. LANGBERG
Mitchell J. Langberg, Esq. Bar No. 10118
100 North City Parkway, Suite 1600
Las Vegas, Nevada 89106

Attorneys for Respondent, Daniel Omerza, Darren Bresee, and Steve Caria

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), the type style requirements of NRAP 32(a)(6), and the length requirements of NRAP 32(a)(7), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in size 14 font in double-spaced Times New Roman, and is 8,136 words in length. I further certify that I have read this brief and that it complies with NRAP 21(d).

Finally, I hereby certify that to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in this brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure

DATED this 24th day of November, 2021.

BROWNSTEIN HYATT FARBER
SCHRECK, LLP

By: ___/s/MITCHELL J. LANGBERG_____
Mitchell J. Langberg, Esq. Bar No. 10118
100 North City Parkway, Suite 1600
Las Vegas, Nevada 89106

Attorneys for Respondent, Daniel Omerza, Darren Bresee, and Steve Caria

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Brownstein Hyatt Farber Schreck, LLP, and that on this 24th day of November, 2021, I electronically filed and served by electronic mail a true and correct copies of the above and foregoing **RESPONDENTS' CONSOLIDATED ANSWERING BRIEF** properly addressed to the following:

Lisa A. Rasmussen, Esq.
The Law Offices of Kristina Wildeveld & Associates
550 East Charleston Boulevard, Suite A
Las Vegas, Nevada 89104
Email: Lisa@Veldlaw.com

Elizabeth Ham, Esq.
EHB Companies
1215 Ft. Apache, Suite 120
Las Vegas, Nevada 89117
Email: EHam@ehbcompanies.com

Attorneys for Appellants
FORE STARS, LTD., 180 LAND CO., LLC;
and SEVENTY ACRES, LLC

/s/ DeEtra Crudup
An employee of Brownstein Hyatt Farber Schreck, LLP