

IN THE COURT OF APPEALS 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,
Respondent.

No. 82189-COA

FILED

MAY 18 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Dr. Frank Stile and Frank Stile M.D., P.C. (collectively, Dr. Stile) appeal from a district court order granting respondent Eva Korb's anti-SLAPP special motion to dismiss and from a district court order awarding Korb fees and costs in a defamation action. Eighth Judicial District Court, Clark County; Joseph Hardy, Jr., Judge.

In October 2010, Dr. Stile performed a breast implant exchange and augmentation on Eva Korb.¹ After three routine post-operation appointments, Dr. Stile instructed Korb to engage only in "[a]ctivity as tolerated" and to return for a fourth follow-up appointment if needed. Korb then embarked on a trip to Asia.

In November 2010, Korb left Dr. Stile a voicemail indicating that she was in Thailand, that she had developed a swollen, painful right breast hematoma, and that a doctor in Thailand recommended drainage surgery. Korb and Dr. Stile corresponded for several days about her options. During their conversations, Dr. Stile cautioned Korb about her increased risk for capsular contracture, stretched skin, and asymmetry. He recommended

¹We recount the facts only as necessary for our disposition.

that she get the hematoma addressed immediately or return to the United States.

Korb had the drainage and implant replacement surgery in Thailand and returned to the United States. But in February 2011, Korb had Dr. Stile perform a corrective procedure because the implant she received in Thailand was the wrong size and shape. Post-operation, Korb told Dr. Stile that her right implant was relatively firmer, which Dr. Stile attributed to capsular contracture. Dr. Stile's notes indicated that the contracture was most likely caused by Korb's "failure to return and have this treated expeditiously and with the appropriate setting with the appropriate implant."

Sometime thereafter, Korb retained personal injury counsel, served Dr. Stile with a demand for arbitration, and filed a complaint against Dr. Stile with the Nevada State Board of Medical Examiners (the Board). Korb ultimately never filed a lawsuit and, according to Dr. Stile's sworn declaration, the Board rejected her complaint because it determined Dr. Stile acted appropriately under the circumstances.

Then in 2019, Korb placed a review on Dr. Stile's Yelp page strongly criticizing him and his medical practice. Dr. Stile responded, wherein he apparently revealed photographs of Korb's breasts, part of her social security number, date of birth, full name, and medical records. Korb had Yelp take down Dr. Stile's post, which he reposted three times and Yelp removed each time. Before his last repost was removed, Dr. Stile and his professional corporation (collectively, Dr. Stile) filed a defamation action against Korb.

Korb filed an anti-SLAPP special motion to dismiss Dr. Stile's defamation claim, arguing that Nevada's anti-SLAPP statute protected her Yelp review as a consumer complaint-based opinion. The court granted

Korb's motion finding that her review constituted a consumer complaint in a public forum and that Korb's statements were her opinions, which could not form the basis of Dr. Stile's defamation claim. The district court also awarded Korb attorney fees and costs as the prevailing party as provided by the anti-SLAPP statute, pursuant to a stipulation by the parties. Dr. Stile appealed.

We review a district court's decision to grant an anti-SLAPP special motion to dismiss de novo. *Coker v. Sassone*, 135 Nev. 8, 10, 432 P.3d 746, 748-49 (2019). "Under Nevada's anti-SLAPP statutes, a moving party may file a special motion to dismiss if an action is filed in retaliation to the exercise of free speech. A district court considering a special motion to dismiss must undertake a two-prong analysis." *Id.* at 11-12, 432 P.3d at 749; see NRS 41.660(1)(a).² First, the court shall "[d]etermine whether the moving party has established, by a preponderance of the evidence, that the claim is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." NRS 41.660(3)(a). Second, "[i]f the court determines that the moving party has met [her] burden[,] . . . [the court shall] determine whether the plaintiff has demonstrated with prima facie evidence a probability of prevailing on the claim." NRS 41.660(3)(b).

Korb's review taken as a whole was her opinion which cannot be false

On appeal, Dr. Stile argues that the district court erred by finding Korb met her burden under prong one of Nevada's anti-SLAPP statute because Korb did not make her Yelp review in good faith.

A good-faith communication in furtherance of
the right to free speech regarding a matter of public

²The current version of Nevada's anti-SLAPP statutes were in effect when Korb posted her Yelp review and filed her anti-SLAPP motion.

concern includes any communication that is (1) “made in direct connection with an issue of public interest,” (2) “in a place open to the public or in a public forum,” and (3) “which is truthful or is made without knowledge of its falsehood.”

Abrams v. Sanson, 136 Nev. 83, 86, 458 P.3d 1062, 1066 (2020) (quoting NRS 41.637(4)).

As an initial matter, we do not consider the first two sub-issues under prong one—whether Korb’s review was connected to an issue of public interest and whether she made it in a public place or forum—because Dr. Stile failed to address them on appeal. See *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that issues not raised on appeal are waived); see also *Greenlaw v. United States*, 554 U.S. 237, 243 (2008) (noting that courts “follow the principle of party presentation” on appeal, which requires the litigants to frame the issues).

As to the remaining sub-issue, we conclude that Korb’s review was truthful or made without knowledge of its falsehood. “Because there is no such thing as a false idea, statements of opinion are statements made without knowledge of their falsehood under Nevada’s anti-SLAPP statutes.” *Abrams*, 136 Nev. at 89, 458 P.3d at 1068 (citation and internal quotations omitted). In assessing whether statements are opinion or factual assertions in this context, “the court must consider the gist or sting of the communications as a whole,” rather than “single out individual words in [the speaker’s] statements.” *Id.* at 90, 458 P.3d at 1068-69 (internal quotations omitted). So, when “a reasonable person would be likely to understand” most of the statements as the speaker’s “personal views” or “criticisms,” then the statements together constitute a good-faith communication under prong one of Nevada’s anti-SLAPP statute. *Lubin v. Kunin*, 117 Nev. 107, 112, 17 P.3d 422, 426 (2001) (internal quotations omitted); *Abrams*, 136 Nev. at 90, 458

P.3d at 1068;.

A reasonable person would be likely to understand most of Korb's statements as her personal views and criticisms of her surgical results and Dr. Stile's medical care. For example, Korb stated that Dr. Stile was "a butcher," "arrogant," "a terrible surgeon or more likely just extremely lazy [due] to his overly confident pompous ego," "acts like the victim," a "class act sociopath," "has no idea what he's doing," "ruined so many women's bodies," "has horrific bedside manner," and "should have his medical license revoked." Korb also commented that Dr. Stile "botched a simple breast implant swap," that her procedure was "simple," and that her experience was a "nightmare." These "hyperbolic and factually unprovable" statements in their essence signal to the reader that Korb was expressing her opinion rather than asserting fact. See *Spirtos v. Yemenidjian*, 137 Nev., Adv. Op. 73, 499 P.3d 611, 619 (2021).

We only consider whether "the gist of the story, or the portion of the story that carries the sting of the statement, is true, and not on the literal truth of each word or detail used in a statement." *Abrams*, 136 Nev. at 90, 458 P.3d at 1069 (alteration and internal quotations omitted). Based on Korb's review as a whole, we conclude that the "gist" of her statements is that she stated her view that Dr. Stile is a terrible doctor and surgeon. This is her opinion, which as an opinion, cannot be false. Therefore, Korb met her burden of showing a protected good-faith communication under prong one of the anti-SLAPP statute.

Dr. Stile did not prove with prima facie evidence a probability of prevailing on his defamation claim

Dr. Stile argues that, even if we conclude Korb made her review in good faith thereby shifting the burden to him, he met his burden by demonstrating a probability of prevailing on his claim with prima facie

evidence. “To prevail on a defamation claim, the plaintiff must show: (1) a false and defamatory statement by [a] defendant concerning the plaintiff; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages.” *Rosen v. Tarkanian*, 135 Nev. 436, 442, 453 P.3d 1220, 1225 (2019) (alteration in original) (internal quotations omitted).

On the first element of defamation, Dr. Stile argues that Korb’s review is a mixture of fact and opinion, which makes at least some of her statements actionable. Korb answers that the supporting authority for Dr. Stile’s argument is not controlling because it predates Nevada’s anti-SLAPP statute. Indeed, current authority requires that the court consider the “gist” of a statement, rather than evaluate individual statements out of context. *Id.* (applying the “gist” test to determine whether a nonmovant met his burden under prong two of the anti-SLAPP statute). And, as stated above, Korb’s review as a whole constitutes her nonactionable opinion.³ *See Miller v. Jones*, 114 Nev. 1291, 1296, 970 P.2d 571, 575 (1998) (“In order to prevail on his defamation claim, [plaintiff] must prove, *inter alia*, that the statement . . . was a false statement of fact, as opposed to a statement of opinion.”). Therefore, Dr. Stile did not show a probability of proving Korb made a false and defamatory statement about him. *See Rosen*, 135 Nev. at 443, 453 P.3d at 1225.

We need not analyze Dr. Stile’s probability of proving the

³The district court found that Korb’s review was a nonactionable “evaluative opinion,” which Dr. Stile disputes on appeal. But because we find Korb’s review to be an opinion, which cannot form the basis for a defamation action, we need not consider whether it specifically was evaluative. *See Miller v. Burk*, 124 Nev. 579, 588-89 & n.26, 188 P.3d 1112, 1118-19 & n.26 (2008) (explaining that this court need not address issues that are unnecessary to resolve the case at bar).

