IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDERSON BUSINESS ADVISORS, LLC, A NEVADA LIMITED LIABILITY COMPANY, Appellant, vs. JENNIFER L. FOLEY, ESQ., AN INDIVIDUAL; AND HKM EMPLOYMENT ATTORNEYS LLP, A NEVADA LIMITED LIABILITY PARTNERSHIP, Respondents.	No. 82633
ANDERSON BUSINESS ADVISORS, LLC, A NEVADA LIMITED LIABILITY COMPANY, Appellant, vs. KATELYN WHITTEMORE, AN INDIVIDUAL; AND ELIZABETH CANNON, AN INDIVIDUAL, Respondents.	No. 82949
ANDERSON BUSINESS ADVISORS, LLC, A NEVADA LIMITED LIABILITY COMPANY, Appellant, vs. JENNIFER L. FOLEY, ESQ., AN INDIVIDUAL; AND HKM EMPLOYMENT ATTORNEYS LLP, A NEVADA LIMITED LIABILITY PARTNERSHIP, Respondents.	No. 83326

FILED

DEC 14 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
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DEPUTY CLERK

23-40544

ANDERSON BUSINESS ADVISORS, LLC, A NEVADA LIMITED LIABILITY COMPANY, Appellant, vs. JENNIFER L. FOLEY, ESQ., AN INDIVIDUAL; AND HKM EMPLOYMENT ATTORNEYS LLP, A NEVADA LIMITED LIABILITY PARTNERSHIP, Respondents.	No. 84499
ANDERSON BUSINESS ADVISORS, LLC, A NEVADA LIMITED LIABILITY PARTNERSHIP, Appellant, vs. ELIZABETH CANNON, AN INDIVIDUAL; AND KATELYN WHITTEMORE, AN INDIVIDUAL, Respondents.	No. 84975

CORRECTED ORDER AFFIRMING IN PART AND REVERSING IN PART

These are consolidated appeals from district court orders granting special motions to dismiss pursuant to NRS 41.660's anti-SLAPP provision and awarding attorney fees pursuant to NRS 41.670.[1] Eighth Judicial District Court, Clark County; Nancy L. Allf, Judge.

[1]We consolidate Docket No. 84975 with Docket Nos. 82633, 82949, 83326, and 84499, which were consolidated by order dated May 5, 2022. Although Whittemore states in her answering brief for Docket No. 84975 that she has settled with Anderson, no stipulation or joint motion to that effect has been filed, so she remains a party to these appeals.

Facts and Procedural Summary

This litigation arises out of the first amended complaint appellant Anderson Business Advisors, LLC (Anderson) filed against former employees and the attorneys and law firms who represented them in other litigation against Anderson. Anderson alleged a complex and ongoing conspiracy, but its first amended complaint, though verified, made many of those allegations on information and belief, and included allegations against nonparties and parties who were later dismissed. Respondents, as defendants below, filed anti-SLAPP special motions to dismiss, which the district court granted. They thereafter moved for attorney fees, which the district court granted.

On appeal, Anderson primarily contests the district court's construction and application of NRS 41.660 and its findings on the anti-SLAPP motions, arguing the district court erred in concluding (1) that respondents' communications were "good faith communications" under NRS 41.660(3)(a), particularly those communications made privately outside litigation; (2) that the absolute litigation privilege applied and Anderson failed to meet its burden under the second prong of the anti-SLAPP analysis; and (3) that Anderson failed to make the requisite showing for additional discovery under NRS 41.660(4). Anderson further argues that the district court erred by awarding fees and sanctions to respondents Foley and HKM pursuant to NRS 41.670(1)(a)-(b). Separately, Anderson appeals the award of attorney fees to respondents Cannon and Whittemore, arguing their motion for attorney fees was untimely. We agree with Anderson as to Cannon and Whittemore's late-filed attorney fees motion, but otherwise affirm.

Discussion

The district court correctly granted the motions to dismiss

NRS 41.660(1) provides that if a complaint 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," the defendant may file an anti-SLAPP special motion to dismiss. Evaluating an anti-SLAPP motion requires a two-pronged approach. First, the district court must "[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); *Stark v. Lackey*, 136 Nev. 38, 40, 458 P.3d 342, 345 (2020). This initial inquiry has two components: one, whether the defendants' comments fall into one of the four categories of good-faith communications enumerated in NRS 41.637, and two, whether the communication is truthful or was made without knowledge of the communication's falsity. *Stark*, 136 Nev. at 40, 458 P.3d at 345; *see* NRS 41.637.

Second, if the moving party meets the requirements of the first prong under NRS 41.660(3)(a), the burden shifts to the plaintiff to demonstrate, with prima facie evidence, a probability of prevailing on its claims. NRS 41.660(3)(b); *Coker v. Sassone*, 135 Nev. 8, 12, 432 P.3d 746, 749 (2019). An earlier version of NRS 41.660 expressly treated anti-SLAPP motions as motions for summary judgment, and previously a plaintiff was only required to demonstrate the existence of a genuine issue of material fact to meet its burden on this prong. *Delucchi v. Songer*, 133 Nev. 290, 294-96, 396 P.3d 826, 830-31 (2017); *see also* 1997 Nev. Stat., ch. 387 § 6 at 1365 (providing that an anti-SLAPP motion should be treated as a motion for summary judgment). But in 2013 and again in 2015, the Legislature

amended the statute as to plaintiff's burden, first increasing it to require "clear and convincing evidence [of] a probability of prevailing on the claim," 2013 Nev. Stat., Ch. 176 §3, and then decreasing it to "prima facie evidence [of] a probability of prevailing on the claim" 2015 Nev. Stat., ch. 428 § 13 at 2455-56; *Delucchi*, 133 Nev. at 295-96, 396 P.3d at 831; *see also Coker*, 135 Nev. at 10, 432 P.3d at 748 (noting the change in burden of proof). Under the current standard, the plaintiff's probability of prevailing will be determined by measuring the evidence against the elements of the claims. *Smith v. Zilverberg*, 137 Nev. 65, 70-71, 481 P.3d 1222, 1229 (2021). If the plaintiff fails to present prima facie evidence showing that its "claims have minimal merit," dismissal will be warranted. *Id.* at 70-71, 481 P.3d at 1229 (concluding the defendants' statements were not actionable where plaintiff relied on his subjective belief and "failed to provide evidence of actual malice" to counter the defendants' evidence that their statements were opinions or they believed them to be true). The absolute litigation privilege—which protects defamatory statements made during judicial and quasi-judicial proceedings, *see Shapiro v. Welt*, 133 Nev. 35, 40, 389 P.3d 262, 268 (2017)—will, if it applies to the statements at issue, prevent the plaintiff from meeting its burden of proof at this second prong of the analysis, *Williams v. Lazer*, 137 Nev. 437, 443, 495 P.3d 93, 99 (2021).

Decisions of the California courts interpreting California Code of Civil Procedure § 425.16 provide insight as to the plaintiff's burden. NRS 41.665(2) ("the plaintiff must meet the same burden of proof that a plaintiff has been required to meet pursuant to California's [anti-SLAPP] law"). Similar to NRS 41.660(3)(b), California requires the plaintiff opposing an anti-SLAPP motion to "establish[ ] that there is a probability that the plaintiff will prevail on the claim." Cal. Civ. Proc. § 425.16(b). California

courts addressing this provision have explained that "the plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Wilson v. Parker, Covert & Chidester*, 123 Cal. Rptr. 2d 19, 26 (2002) (internal quotations omitted). Because the plaintiff must support its claim with evidence, it "cannot rely [only] on its own pleading, even if verified." *Newport Harbor Offices & Marina, LLC v. Morris Cerullo World Evangelism*, 232 Cal. Rptr. 3d 540, 556 (Ct. App. 2018). The plaintiff fails its burden if it does not analyze the evidence or "tie the evidence to any element of any cause of action alleged in their complaint." *MMM Holdings, Inc. v. Reich*, 230 Cal. Rptr. 3d 198, 212-13 (Ct. App. 2018); *see also Newport*, 232 Cal. Rptr. 3d at 557 (noting that the plaintiff cannot satisfy its burden "merely by establishing the existence of a controversy" or by presenting a "jumble of documents" with "no declaration or argument to tie the materials together and explain how they support the claims arising out of the allegations of protected conduct").

If, after analyzing both prongs, the court grants an anti-SLAPP special motion, "the dismissal operates as an adjudication on the merits." NRS 41.660(5). On appeal, a plaintiff-appellant retains its burden to "demonstrat[e] each claim based on allegations of protected activity is legally sufficient and factually substantiated." *Newport Harbor*, 232 Cal. Rptr. 3d at 556; *Summit Bank v. Rogers*, 142 Cal. Rptr. 3d 40, 48 (Ct. App. 2012) ("[A]ppellate review is conducted in the same manner as the trial court in considering an anti-SLAPP motion.") (quoting *Paiva v. Nichols*, 885 Cal. Rptr. 3d 838, 847 (2008); *cf. Smith*, 137 Nev. at 71, 481 P.3d at 1229 (concluding the plaintiff failed to meet his burden on the second prong where he did not provide evidence to counter the defendants' evidence). In

doing so, the plaintiff-appellant should focus on the defendant's specific activity that gives rise to the alleged liability, and "whether that activity constitutes protected speech or petitioning." Martin D. Carr & Ann Taylor Schwing, 1 Cal. Affirmative Def. § 12:37 *SLAPP special motions to strike and the like* (2d ed. 2022); *see* NRS 41.637 (defining the four protected categories of "good faith communications"). We review de novo the district court's decisions here. *See Williams*, 137 Nev. at 439, 443, 495 P.3d at 96-97, 99.

By these measures, Anderson's appeal of the district court's dismissal orders falls short. First, Anderson largely omits record citations from its appellate briefing, and further omits many of the relevant district court findings from its discussion. *See* NRAP 28(a)(8) (requiring appropriate references to the record in the statement of facts); NRAP 28(a)(10)(A) (requiring citations to the record in the body of the argument); NRAP 28(e)(1) (requiring citations for "every assertion in briefs regarding matters in the record"); NRAP 28(e)(2) (forbidding parties from incorporating by reference briefs submitted to the district court). Our ability to address the merits is frustrated by these omissions as well as by Anderson's sweeping characterizations of the respondents' activities and its interwoven references to actions by and allegations against nonparties.

Second, to the extent that merits review is appropriate, Anderson's appeal does not demonstrate that the district court erred in reaching the conclusions it did on the evidence and argument presented. On the first prong, Anderson's opening brief misstates the definition of a good-faith communication by citing to Black's Law Dictionary and missing that this is a term of art defined by NRS 41.637, the controlling statute. *See Delucchi*, 133 Nev. at 298, 396 P.3d at 832 (explaining that NRS 41.637's

definition controls as to the first prong of the anti-SLAPP analysis). Pertinent to this case, NRS 41.637(3) provides that a "statement made in direct connection with an issue under consideration by a . . . judicial body[ ] or any other official proceeding authorized by law . . . which is truthful or is made without knowledge of its falsehood," is a good-faith communication protected by NRS 41.660.

As to Foley and HKM, the district court determined that the subject communications made by these defendants related to litigation and were made in good faith and without knowledge of falsehood. Given that NRS 41.660(3)(a) protects claims based on a good-faith communication in furtherance of the right to petition the court, and that NRS 41.637(3) classifies as good-faith communications statements made in connection with an issue under consideration by a court where the statements are truthful or made without knowledge of falsehood, we agree with the district court that the Foley and HKM respondents met the good faith communication requirement. Notably, Anderson ignores the record evidence showing that these respondents did not knowingly make any false statements. On the second prong, Anderson fails to demonstrate with prima facie evidence a probability of prevailing on its claims, as Anderson's briefing focuses on statements made in open court or the related pleadings and motions, all of which fall within the absolute litigation privilege. *See Shapiro*, 133 Nev. at 40, 389 P.3d at 268 (describing the privilege). It is incumbent on Anderson to overcome that privilege, and although Anderson argues it did, Anderson failed to submit evidence in support—instead relying on the allegations in its verified first amended complaint. But allegations made on information and belief are insufficient to meet the plaintiff's burden on the second prong. *See Newport Harbor*, 232 Cal. Rptr.

3d at 556. Here, once the allegations made on information and belief or related to nonparties are removed from the first amended complaint, there is nothing left to which Anderson can point that shows the complaint should not be dismissed as to Foley and HKM.

The allegations against Cannon and Whittemore are somewhat more difficult to parse because Anderson references activities outside the pleadings in the earlier litigation. However, we reiterate that Anderson failed its obligation under NRAP 28 to support its arguments with sufficient citation, and, further, Anderson again makes many of its critical allegations on information and belief, which do not count as evidence in the anti-SLAPP analysis. Complicating matters further, Anderson relies heavily on the actions of nonparties or parties since dismissed, and it is unclear what actions Cannon and Whittemore took here that could support Anderson's claims, or whether such actions are supported by evidence. In view of the deficient briefing and Anderson's failure to support its burden on appeal, we affirm the district court's decision to grant the motions to dismiss.

The district court did not abuse its discretion in denying discovery

Anderson further argues that the district court improperly denied its request for limited discovery to gather evidence in opposition of the anti-SLAPP motions. NRS 41.660(4) provides,

> upon a showing by a party that information necessary to meet or oppose the burden pursuant to paragraph (b) of subsection 3 is in the possession of another party or a third party and is not reasonably available without discovery, the court shall allow limited discovery for the purpose of ascertaining such information.

That showing should include, at the minimum, a description of the facts the plaintiff expects to uncover, and how those facts will enable the plaintiff to

demonstrate a prima facie case on any of its claims. *See Sipple v. Found. for Nat'l Progress*, 83 Cal. Rptr. 2d 677, 690 (Ct. App. 1999).

Anderson argued in district court that it was entitled to limited discovery to prove the intent that drove the defendants' actions and communications. Anderson further claimed the information was under the defendants' control and that there had been insufficient depositions and no written discovery. But Anderson did not make a showing of what *specific* information it expected to uncover as to these respondents, how that information would help it demonstrate a prima facie case against these respondents, or why discovery in the other litigation did not afford it sufficient information. Nor did Anderson show that the information was in another party's possession. Instead, Anderson relied on general arguments that did not satisfy NRS 41.660(4)'s requirements. More fatally still, Anderson did not fill those gaps on appeal. On this record, we will not overturn the district court's decision to deny Anderson's request for limited discovery, making it unnecessary to reach respondents' arguments pertaining to NRCP 56(d) and its affidavit requirement. And in view of the foregoing, we likewise affirm the district court's order awarding Foley and HKM attorney fees and sanctions under NRS 41.670(1), because Anderson does not raise an independent argument against that award.

The district court erred in granting Cannon's and Whittemore's untimely motion for attorney fees.

Finally, Anderson contends that the district court improperly awarded attorney fees to Cannon and Whittemore because their motion was filed after NRCP 54(d)(2)(B)(i)'s 21-day deadline. "[U]nless a statute or a court order provides otherwise," a motion for attorney fees must be "filed no later than 21 days after written notice of entry of judgment is served." A statute "provides otherwise" if it sets forth an alternative deadline for the

motion. *See Cont'l Cas. Co. v. Assicurazioni Generali, S.P.A.*, 903 F. Supp. 990, 991 (S.D. W. Va. 1995) (concluding the nearly identical exception in FRCP 54(d)(2)(B) "appl[ies] only when an alternative time is not otherwise provided by statute") (internal quotation marks omitted); *Barbara Ann Hollier Tr. v. Shack*, 131 Nev. 582, 589, 356 P.3d 1085, 1089 (2015) (noting that this court considers the FRCP when interpreting the NRCP's cognate provisions).

Because NRS 41.670(1)(a), the statute providing for an award of attorney fees in an anti-SLAPP case, does not provide an alternative deadline, and because NRCP 6(b)(2) explicitly bars extensions of the Rule 54 deadline after the deadline has passed, respondents Cannon and Whittemore were subject to Rule 54's 21-day deadline. Nor were they exempt from the deadline under NRCP 54(d)(2)(D). NRS 41.670 allows as "additional relief" attorney fees awarded as sanctions for "frivolous or vexatious motions," NRS 41.670(3)(b), but the "sanctions" language is confined to subsection (3)(b) and does not stretch to the mandatory fees awarded under subsection (1)(a). Notice of entry of the district court order granting Cannon and Whittemore's anti-SLAPP motion to dismiss was served on April 19, 2021, but they did not file their motion for attorney fees until June 21, 2021. Because this date fell well after the 21-day Rule 54 deadline and respondents did not request an extension before the deadline expired, the motion was untimely. We therefore reverse the order granting attorney fees to Cannon and Whittemore.

Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART.

_____, J.
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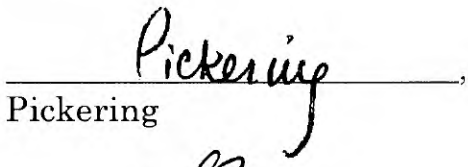

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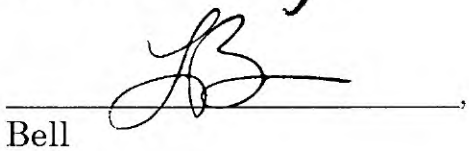
Pickering



_____, J.
Bell

cc: Hon. Nancy L. Allf, District Judge
Thomas J. Tanksley, Settlement Judge
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