

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES F. THOMSON, JR., D/B/A  
AMERICAN SOUTHWEST ELECTRIC,  
Appellant,

vs.

HELIX ELECTRIC OF NEVADA, LLC,  
A NEVADA LIMITED LIABILITY  
COMPANY; AND VICTOR FUCHS, AN  
INDIVIDUAL,

Respondents.

JAMES F. THOMSON, JR., D/B/A  
AMERICAN SOUTHWEST ELECTRIC,  
A SOLE PROPRIETORSHIP,  
Appellant,

vs.

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A NEVADA LIMITED LIABILITY  
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A NEVADA LIMITED LIABILITY

No. 80889

**FILED**

NOV 30 2023

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY *E. A. Brown*  
DEPUTY CLERK

No. 81159

No. 81892

No. 84216

COMPANY; AND VICTOR FUCHS, AN  
INDIVIDUAL,  
Respondents.

*ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING*

These are consolidated appeals from district court orders granting an anti-SLAPP special motion to dismiss and awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Nancy L. Alf, Judge.

Appellant James F. Thomson, Jr., is the proprietor of American Southwest Electric (collectively, ASE). Respondent Victor Fuchs is the president of respondent Helix Electric of Nevada, LLC (collectively, Helix). After obtaining copies of ASE's payroll reports in 2017, Fuchs suspected that ASE had incorrectly paid its electricians and notified the Nevada Labor Commission (NLC). Over the next few months, NLC investigated ASE's payroll practices. Helix was in frequent communication with NLC throughout the investigation and made concerted efforts to feed NLC inculpatory evidence regarding ASE. In March 2018, NLC issued an order (the Interim Order) suspending ASE from bidding on public works projects. Several weeks later, the district court enjoined that order, and ASE settled with NLC in October 2018.

After Helix renewed efforts to file wage complaints against ASE in 2019, ASE sued Helix for eleven tortious causes of action.<sup>1</sup> In response,

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<sup>1</sup>ASE brought causes of action for (1) abuse of process; (2) violation of the Nevada Unfair Trade Practices Act (UTPA); (3) civil conspiracy; (4) intentional interference with contractual relations as to ASE's electrical work at UNLV; (5) intentional interference with prospective UNLV contracts for electrical work; (6) intentional interference with prospective Clark County School District contracts for electrical work; (7) intentional

Helix filed an anti-SLAPP special motion to dismiss, which the district court granted in February 2020. In granting the motion, the district court concluded that Helix demonstrated, by a preponderance of the evidence, that ASE's eleven causes of action were "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," satisfying the first prong of Nevada's anti-SLAPP analysis. NRS 41.660(3)(a). The district court further determined that ASE had failed to demonstrate with prima facie evidence a probability of prevailing on any of its claims, in accordance with the second prong of Nevada's anti-SLAPP analysis. NRS 41.660(3)(b). ASE now appeals the district court's order granting Helix's anti-SLAPP motion (Docket Nos. 80889 & 81159),<sup>2</sup> as well as the district court's subsequent awards of attorney fees and costs to Helix (Docket Nos. 81892 & 84216).<sup>3</sup>

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interference with prospective economic advantage as to the UNLV Fertitta Football Complex (Fertitta Project); (8) intentional interference with contractual relations as to work for Martin-Harris Construction, LLC; (9) intentional interference with contractual relations as to work for APCO Construction; (10) intentional interference with contractual relations as to work for Rafael Construction, Inc.; and (11) intentional interference with contractual relations with Travelers, ASE's bond company.

<sup>2</sup>Due to confusion as to whether the district court's February 2020 order granting Helix's anti-SLAPP motion (Docket No. 80889) or April 2020 findings of fact and conclusions of law (Docket No. 81159) was the final judgment, ASE filed appeals from both entries. We find this issue only potentially relevant in regard to whether Helix timely moved for attorney fees.

<sup>3</sup>The same confusion regarding the final judgment resulted in Helix moving twice for attorney fees and costs. Docket No. 81892 is ASE's appeal from the district court's original award of attorney fees and is consolidated with Docket Nos. 80889 and 81159. Docket No. 84216 is ASE's appeal from

Reviewing the district court's decision to grant Helix's anti-SLAPP motion de novo, *Smith v. Zilverberg*, 137 Nev. 65, 67, 481 P.3d 1222, 1226 (2021), we affirm in part, reverse in part, and remand. The district court erred in concluding that *all* of the communications underlying ASE's complaint were "Good Faith Communications with the Labor Commissioner . . . and the NLC" protected under the anti-SLAPP statute's first prong. See NRS 41.637. Ten of ASE's eleven causes of action are supported by communications which were either not made in good faith, or not made to the Labor Commissioner or NLC. We reverse in part the district court's order granting the anti-SLAPP motion with respect to these ten causes of action and remand. We affirm in part the dismissal of ASE's civil conspiracy cause of action. In light of our reversal in part and remand, we vacate the district court's award of attorney fees and costs.

To satisfy the first prong of the anti-SLAPP analysis, "the defendant must show that (1) the comments at issue fall into one of the four categories of protected communications enumerated in NRS 41.637 and (2) the communication is truthful or is made without knowledge of its falsehood." *Smith*, 137 Nev. at 67, 481 P.3d at 1227 (internal quotation marks omitted).

The four categories of protected communication are any:

1. Communication that is aimed at procuring any governmental or electoral action, result or outcome;
2. Communication of information or a complaint to a Legislator, officer or employee of the Federal Government, this state or a political subdivision of this state, regarding a matter reasonably of concern to the respective governmental entity;

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the district court's order granting Helix's renewed fee motions following a new notice of entry in 2021.

3. Written or oral statement made in direct connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law; or

4. Communication made in direct connection with an issue of public interest in a place open to the public or in a public forum.

NRS 41.637.

This case presents us with a difficult analysis because ASE's causes of action are not based upon any single "communication" on the part of Helix, but a long and diverse series of communications that took place over the course of several years. In its order, the district court summarily determined that these communications were "the Helix Parties' Good Faith Communications with the Labor Commissioner and the NLC." The communications satisfied the requirements under NRS 41.637, according to the district court, because they were truthful, directed to a state agency or employee, and concerned a matter of governmental or public interest. See NRS 41.637(2)-(4). Thus, the district court concluded that Helix had carried their first-prong burden under NRS 41.660(3)(a).

While it does appear that *many* of the communications underlying ASE's claims were indeed protected under NRS Chapter 41, we are not persuaded that *all* of the communications satisfy the first prong. Initially, *not all* of ASE's claims are based upon communications with the Labor Commissioner and/or NLC, as the district court concluded. ASE's seventh cause of action—intentional interference with prospective economic advantage with respect to the Fertitta Project—alleged that Helix attempted to prevent ASE from being awarded the electrical subcontract for the Fertitta Project by "wrongfully communicat[ing]" with Whiting-Turner Contracting Company (WT), the general contractor for the Fertitta Project to whom ASE and Helix had offered competing bids. The communication in



question was a phone call between Fuchs and Zachary Alan Crane, WT's Vice President, on March 1, 2018—the day before NLC issued the Interim Order—in which Fuchs told Crane that “there was a determination forthcoming” regarding ASE's eligibility to bid. When deposed, Fuchs implied that he made this statement to thwart ASE's bid for the Fertitta Project. This communication is central to ASE's seventh cause of action, and because it was made to a private third party, it is not immediately clear to us whether it falls within any of the protected categories in NRS 41.637. Likewise, ASE's eleventh cause of action is based upon an allegation that Helix demanded that Travelers cease writing project bonds for ASE, which we also struggle to classify as protected under NRS 41.637.<sup>4</sup>

More troubling is ASE's allegation that, in early 2018, Helix crafted a fake letter purporting to be from the wife of an allegedly underpaid ASE employee (the False Letter). The record contains an email sent from Art Geller, Helix's Senior Vice President, to Fuchs on February 8, 2018, with the subject line, “DRAFT/PLSE CALL ME TO DISCUSS.” The body of the email seems to impersonate a non-English speaker who claims he was underpaid.<sup>5</sup> The record contains follow-up correspondence between Geller

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<sup>4</sup>We note that while ASE has not produced clear evidence that this communication occurred, this would likely be irrelevant for purposes of the first prong analysis. *See Spirtos v. Yemenidjian*, 137 Nev. 711, 715-16, 499 P.3d 611, 616-17 (2021) (holding that, for purposes of prong one, a court must presume that the alleged “communication” actually occurred). However, failure to produce evidence of this communication would almost certainly prevent ASE from carrying its burden under the second prong.

<sup>5</sup>“My name is xxxxxx. I work for American Southwest Electric. My wife is writing this letter because my English not so good. I am not being paid the right amount, not getting my breaks or even time to eat lunch. One day I am a electrician. One day I am told I'm a engineer. Then I am a helper. When I ask what about my pay or breaks, they tell me they will fire me. I

and Helix employee, Julie Chavez, from February 22, 2018, in which Geller directs Chavez to mail the “letter” to the Labor Commissioner in Carson City, and Chavez replies that “[t]he deed is done!” Geller jokingly responds, “I will visit you in jail after they arrest you!” To which Chavez replies, “HaHa! You better come bail me out!!!!”

ASE proffers the False Letter as evidence for all but its third cause of action. We find it entirely implausible that this communication was “truthful or . . . made without knowledge of its falsehood,” pursuant to NRS 41.637 such that it is protected under the first prong. Rather, the contents of the email chain strongly suggest that Helix employees drafted and submitted the letter to NLC as falsified evidence of ASE’s payment practices.<sup>6</sup> Thus, we cannot affirm the district court’s conclusion that *all* of the communications underlying ASE’s causes of action were “good faith communication[s] 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).

“A complaint should not be dismissed in its entirety where it contains claims arising from both protected and unprotected communications.” *Abrams v. Sanson*, 136 Nev. 83, 91, 458 P.3d 1062, 1069 (2020) (citing *Baral v. Schnitt*, 376 P.3d 604, 613-14 (Cal. 2016)). “This

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need this work. I am very scared they will fire me, so please do not mention my name.”

<sup>6</sup>Helix insists that the letter was not sent, and the Labor Commissioner attests that she never received nor considered the letter. Regardless, we must assume that the letter *was* sent for purposes of the first prong. *Sirtos*, 137 Nev. at 715-16, 499 P.3d at 616-17. Moreover, Chavez’s statement that “[t]he deed [was] done” suggests that Helix did send the letter to NLC, regardless of whether the Commissioner ultimately received or examined the document.

analysis serves to ensure that the anti-SLAPP statutes protect against frivolous lawsuits designed to impede protected public activities without striking legally sufficient claims.” *Id.* Because ASE’s complaint rested on both protected and unprotected communications, we conclude that the district court erred in granting Helix’s anti-SLAPP motion and dismissing ASE’s complaint in its entirety.

California law provides some direction as to how we may address “a ‘mixed cause of action’—that is, a cause of action that rests on allegations of multiple acts, some of which constitute protected activity and some of which do not.”<sup>7</sup> *Bonni v. St. Joseph Health Sys.*, 491 P.3d 1058, 1066 (Cal. 2021) (quoting *Baral*, 376 P.3d at 607). Rather than “evaluating whether an *entire cause of action*, as pleaded by the plaintiff, arises from protected activity or has merit,” a court

should analyze *each claim for relief*—each *act or set of acts* supplying a basis for relief, of which there may be several in a single pleaded cause of action—to determine whether the acts are protected and, if so, whether the claim they give rise to has the requisite degree of merit to survive the motion.

*Id.* (emphases added).<sup>8</sup> For purposes of the first prong, “the moving defendant must identify the [communications] alleged in the complaint that

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<sup>7</sup>“This court has repeatedly recognized the similarities between California’s and Nevada’s anti-SLAPP statutes, routinely looking to California courts for guidance in this area.” *Coker v. Sassone*, 135 Nev. 8, 11, 432 P.3d 746, 749 (2019).

<sup>8</sup>We note several semantic differences between California and Nevada anti-SLAPP statutes. For instance, California permits a movant to bring “a special motion to *strike*” a “*cause of action . . . arising from any act . . . in furtherance of [the movant’s] right of petition or free speech.*” Cal. Civ. Proc. Code § 425.16(b)(1) (West 2023) (emphases added). Whereas NRS 41.660(1)(a) allows a movant to “file a special motion to *dismiss*” an “*action . . . based upon a good faith communication in furtherance of the*



it asserts are protected and what claims for relief are predicated on them.” *Id.* “In turn, a court should examine whether those [communications] are protected and supply the basis for any claims.” *Id.* If “unprotected [communications]” are “alleged within what has been labeled a single cause of action,” then “these are disregarded at this stage.” *Id.* (internal quotation marks omitted). “So long as a court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached with respect to these claims.” *Id.* (internal quotation marks omitted). But “[i]f a cause of action contains multiple claims and a moving party fails to identify how the speech or conduct underlying some of those claims is protected activity, it will not carry its first-step burden as to those claims.” *Id.* at 1067.

Here, ASE brought eleven causes of action, each of which alleged several “claims” (i.e., communications) that were likely protected, but others (e.g., the False Letter) that were clearly unprotected. Helix’s anti-SLAPP motion identified the foreseeably protected communications alleged in ASE’s complaint and catalogued which causes of action were predicated on them. *Id.* at 1066. While the “claims” identified by Helix included ASE’s communications with third parties, the identified “claims” did not include the False Letter. Although the False Letter did not emerge until the discovery process, ASE’s opposition to the anti-SLAPP motion relied on the False Letter as support for ten of its eleven causes of action. Helix’s reply merely dismissed the letter as a “red herring” that was never sent nor seen by NLC. Thus, Helix failed to explain whether the False Letter was a protected communication.

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right to petition or the right to free speech.” (Emphases added.) In light of these differences, we have substituted relevant language of NRS 41.660(1)(a) into our discussion of California caselaw.

More troublesome is that the district court did not specifically analyze whether the communications at issue were protected under NRS 41.637. *Id.* As discussed above, the district court summarily concluded that the communications (1) “[w]ere truthful,” (2) “[w]ere made to the Labor Commissioner . . . and the NLC,” and (3) “[a]re a matter of reasonable public interest or concern to the NLC,” such that Helix satisfied its burden under NRS 41.660(3)(a) and NRS 41.637. But this analysis overlooks whether Helix’s communications with third parties were protected under NRS 41.637. It also ignores the False Letter—a communication that is clearly unprotected. The False Letter supplies a basis for ten of ASE’s eleven causes of action.<sup>9</sup> Helix’s communications with third parties supply an additional basis for two of ASE’s causes of action.<sup>10</sup> Ignoring these foreseeably *unprotected* communications “constrains [ASE’s] ability to seek relief without advancing the anti-SLAPP’s goals of shielding protected activity.” *Bonni*, 491 P.3d at 1067. We find this oversight to be reversible error on the part of the district court.<sup>11</sup>

On remand, we instruct the district court as follows. First, the district court must specifically examine each of the communications relevant to ten of ASE’s eleven causes of action, including the False Letter and communications made to third parties, and assess whether these

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<sup>9</sup>These include causes of action (1)-(2) and (4)-(11) referenced above, *supra* at note 1.

<sup>10</sup>These include causes of action (7) and (11) referenced above, *supra* at note 1.

<sup>11</sup>We find no such reversible error with respect to ASE’s third cause of action for civil conspiracy. We further conclude that ASE has not met its second-prong burden with respect to this cause of action. Thus, we affirm the district court’s dismissal of this cause of action pursuant to NRS 41.660.

communications are protected under NRS 41.637. Second, after doing so, the district court should “disregard[ ]” any communications it finds unprotected. *Bonni*, 491 P.3d at 1066. If, after “disregard[ing]” these unprotected communications, the district court finds that a cause of action is still sufficiently “based on allegations arising from activity protected by [NRS 41.637],” then it may proceed to the second prong analysis. *Id.* But if there are no further allegations supplying the basis for a cause of action besides unprotected communications, then Helix will not have met their first-prong burden with respect to that cause of action. *Id.* at 1066, 1068 (explaining that “to the extent any acts are unprotected, the claims based on those acts will survive”).<sup>12</sup> At the second prong, the district court must similarly “review each challenged claim independently and assess [ASE’s] probability of prevailing.” *Abrams*, 136 Nev. at 91, 458 P.3d at 1069 (citing *Baral*, 376 P.3d at 613-14).<sup>13</sup> Thus, we

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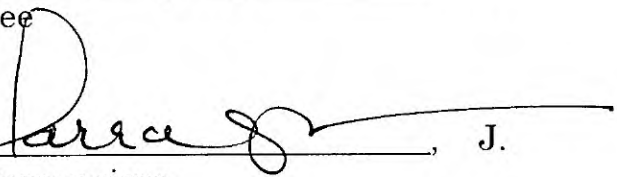
<sup>12</sup>To clarify this point, we note that in *Bonni*, respondent brought an anti-SLAPP motion seeking to strike appellant’s cause of action for retaliation in its entirety. 491 P.3d at 1066. But that cause of action alleged “a nonexhaustive list of at least 19 distinct acts or courses of conduct” that were allegedly retaliatory. *Id.* The *Bonni* court found that some of these acts were protected, but others were unprotected. *Id.* at 1078. The court allowed the retaliation cause of action to survive only to the extent it was based upon unprotected acts. *Id.* With respect to the protected acts, the court permitted respondent to seek dismissal (or, more accurately, to “strike” these allegations) under the second prong of anti-SLAPP. *Id.*

<sup>13</sup>For a detailed explanation of the second prong analysis with respect to mixed causes of action, see *Baral*, 376 P.3d at 613-14, 617.

ORDER the judgment of the district court AFFIRMED IN PART, AND REVERSED IN PART, AND REMAND this matter to the district court for proceedings consistent with this order.<sup>14</sup>

  
\_\_\_\_\_, J.  
Herndon

  
\_\_\_\_\_, J.  
Lee

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. Nancy L. Alf, District Judge  
Paul M. Haire, Settlement Judge  
Brownstein Hyatt Farber Schreck, LLP/Las Vegas  
Lewis Roca Rothgerber Christie LLP/Las Vegas  
Peel Brimley LLP/Henderson  
Parker, Nelson & Associates  
Eighth District Court Clerk

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<sup>14</sup>Our reversal in part and remand pertains to both appeals of the district court's decision to grant the anti-SLAPP motion (Docket Nos. 80889 & 81159), regardless of which entry was the final judgment. In light of our reversal in part, we vacate both district court orders awarding attorney fees and costs (Docket Nos. 81892 & 84216).