

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVE WYNN,  
Appellant,  
vs.  
JORGEN NIELSEN,  
Respondent.

No. 85394  
**FILED**  
DEC 22 2023

ORDER OF REVERSAL AND REMAND

ELI BROWN  
CLERK OF THE SUPREME COURT  
DEPUTY CLERK  
*Eli Brown*

This is an appeal from a district court order granting a special motion to dismiss a defamation claim following remand. Eighth Judicial District Court, Clark County; Adriana Escobar, Judge.

Appellant Steve Wynn sued respondent Jorgen Nielsen for defamation after Nielsen went on record with national media outlets about Wynn's alleged misconduct against employees of Wynn Resorts, Ltd. Nielsen moved to dismiss under Nevada's anti-SLAPP statutes. The district court denied the motion, concluding that Nielsen failed to show that Wynn's defamation claim was "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" under the first prong of the anti-SLAPP analysis. NRS 41.660(3)(a). Nielsen appealed, and we reversed and remanded, concluding, in relevant part, that: (1) "Nielsen demonstrated that the gist of his communication was truthful or made without knowledge of its falsehood"; and (2) Nielsen met his burden under the first prong of the anti-SLAPP analysis. *Nielsen v. Wynn*, No. 77361, 2020 WL 5230591, at \*1-2 (Nev. Sept. 1, 2020). We remanded to the district court with specific instructions to "proceed to the second prong of the anti-SLAPP analysis, decide whether limited discovery [was] appropriate, and make further findings consistent with [that] order." *Id.* at \*2.

Upon remand, the district court denied limited discovery concluding that “none of the statements Steve Wynn complain[ ]s of are actionable defamatory statements, rather, they are all either truthful statements of fact, nonactionable statements of opinion, or some combination of the two,” such that Wynn had not and could not “show that any discovery would aid in meeting his burden under the second prong of the anti-SLAPP analysis.” In reaching this conclusion, the district court noted it was “bound by the Supreme Court of Nevada’s findings on the first step of the anti-SLAPP analysis.” Further, it noted that its adoption of our conclusion “that Mr. Nielsen’s communication[s] were all truthful or made without knowledge of their falsehood . . . eliminate[d] the need for any discovery on whether Mr. Wynn has a probability of prevailing on his defamation claim.” It explained that Mr. Wynn had not and could not demonstrate that discovery would aid him in meeting his burden “as a result of the Nevada Supreme Court’s findings on Mr. Nielsen’s comments being truthful or made without knowledge of their falsity.”

As to the second prong of the anti-SLAPP analysis, the district court concluded that Wynn failed to make a prima facie showing of actual malice, and again noted that it had adopted this court’s determination under prong one that Nielsen’s “communication[s] were all truthful or made without knowledge of their (alleged) falsehood.” It also referenced its own conclusion that the statements Wynn complained of were not actionable defamatory statements. Further, it found in an “independent analysis of prong two” Wynn had not provided prima facie evidence that Nielsen had a high degree of awareness of probable falsity or serious doubts as to the truth of his published statements. Thus, it concluded Wynn had not made a showing of minimal merit on his defamation claim. Accordingly, the district

court granted Nielsen's special motion to dismiss under the second prong of the anti-SLAPP analysis. NRS 41.660(3)(b). Wynn appeals.

We conclude the district court abused its discretion in denying Wynn's motion for limited discovery and consequently granting the motion to dismiss because it misapplied the relevant law and misinterpreted this court's decision regarding the first prong of the anti-SLAPP analysis.<sup>1</sup> *Toll v. Wilson*, 135 Nev. 430, 435, 453 P.3d 1215, 1219 (2015) ("We review the district court's determination whether . . . discovery [under NRS 41.660(4)] is necessary for an abuse of discretion."). While the first and second prongs of the anti-SLAPP analysis are similar, the burdens on the parties are different. Thus, a conclusion that a defendant has satisfied their burden under the first prong is not determinative of the outcome of the second prong nor does it preclude the plaintiff from satisfying their burden under the second prong. NRS 41.660(3)(a) (providing that under prong one, the court "[d]etermine[s] 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)(b) (providing that if the court determines the defendant has satisfied their burden under prong one, it must next "determine whether the plaintiff has demonstrated with prima facie evidence a probability of prevailing on the claim.").

---

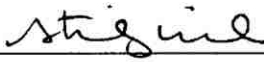
<sup>1</sup>Because we reverse and remand for the district court to determine whether limited discovery is appropriate and whether Wynn thereafter satisfies prong two, we need not address the merits of Wynn's other arguments on appeal.

Our previous determination that Nielsen met his prong-one burden of showing by a preponderance that the “gist of [Nielsen’s] communication was truthful or made without knowledge of its falsehood” did not, as the district court held, conclusively preclude Wynn from meeting his burden under the second prong by demonstrating with prima facie evidence that Nielsen made the statements with a reckless disregard as to their veracity. *Nielsen v. Wynn*, No. 77361, 2020 WL 5230591, at \*1 (Nev. Sept. 1, 2020); *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 722, 57 P.3d 82, 92 (2002) (holding the actual malice element of a defamation claim required when the plaintiff is a public figure is proven “when a statement is published with knowledge that it was false or with reckless disregard for its veracity.”). Specifically, even if Nielsen did not *know* his statements were false, it is possible that he acted with reckless disregard thereto. The district court improperly relied on our conclusion with regard to Nielsen meeting his prong-one burden as precluding the possibility that Wynn could present evidence to meet his prong-two burden of showing his defamation claim had minimal merit.


As a result, we conclude the district court failed to properly analyze both whether limited discovery was appropriate under NRS 41.660(4) and whether Wynn satisfied his burden under the second prong of the anti-SLAPP analysis based on its misunderstanding that our conclusion regarding prong one was determinative of both questions. Therefore, we reverse the district court’s decision and remand for the district court to determine whether Wynn met his burden to show limited discovery is appropriate under NRS 41.660(4). Once that determination is made, and any permitted limited discovery is completed, the district court should proceed to the second prong of the anti-SLAPP analysis to determine


whether Wynn has met his burden to make a prima facie showing as to all the elements of defamation under prong two consistent with this order.


It is so ORDERED.


  
\_\_\_\_\_, C.J.  
Stiglich

  
\_\_\_\_\_, J.  
Cadish

  
\_\_\_\_\_, J.  
Pickering

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

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

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

  
\_\_\_\_\_, J.  
Bell

cc: Hon. Adriana Escobar, District Judge  
Pisanelli Bice, PLLC  
Peterson Baker, PLLC  
Maier Gutierrez & Associates  
Franny A. Forsman  
Henriod Law, PLLC  
Gilbert & England Law Office  
Eighth District Court Clerk