IN THE SUPREME COURT OF THE STATE OF NEVADA

COLLEEN DALEY, AN INDIVIDUAL, Appellant, vs. DESI SHIELDS, AN INDIVIDUAL; AND FOURWAY BAR CAFE AND CASINO, INC., A NEVADA DOMESTIC CORPORATION, Respondents.	No. 85144
COLLEEN DALEY, AN INDIVIDUAL, Appellant, vs. DESI SHIELDS, AN INDIVIDUAL; AND FOURWAY BAR CAFE AND CASINO, INC., A NEVADA DOMESTIC CORPORATION, Respondents.	No. 85451
COLLEEN DALEY, AN INDIVIDUAL, Appellant, vs. DESI SHIELDS, AN INDIVIDUAL; AND FOURWAY BAR CAFE AND CASINO, INC., A NEVADA DOMESTIC CORPORATION, Respondents.	No. 85667

ORDER OF AFFIRMANCE

These are consolidated appeals from a final judgment, an order denying a motion to retax costs, and an order granting a motion for attorney fees. Third Judicial District Court, Lyon County; Leon Aberasturi, Judge.

Appellant Colleen Daley managed Fourway Bar Café and Casino in Fernley when respondent Desi Shields, the district manager for Fourway and Daley's boss, accused her of embezzling funds from the casino. Shields reported Daley to the Nevada Gaming Control Board ("Board"), and

after the Board completed its investigation, the local district attorney charged Daley with embezzlement. After a jury acquitted her of all charges, Daley filed a complaint against Fourway and Shields asserting eleven claims for relief. Shields and Fourway filed first a motion to dismiss under NRCP 12(b)(5), and then a special motion to dismiss under Nevada's anti-SLAPP statute. The district court dismissed two claims for relief under NRCP 12(b)(5) and dismissed the remaining claims under the anti-SLAPP statute. Daley appeals. We affirm.

The district court did not err in finding that NRS 41.660 applied

Daley argues that the district court erred in finding that Shields' communications were privileged.

We review a district court's decision on 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, the district court must use a two-prong analysis to determine whether to grant a special motion to dismiss. *Coker*, 135 Nev. at 12, 432 P.3d at 749. First, the district court must determine whether the moving party has established 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). If the first prong is satisfied, the district court must then determine whether the plaintiff has demonstrated "a probability of prevailing on the claim." NRS 41.660(3)(b).

First, the district court did not err in finding that the claim was based upon a protected good faith communication

Daley argues that Shields' statements that Daley embezzled are not protected communications because the statements were neither made to a government entity nor a direct communication on an issue under consideration by a legislative, executive, or judicial body.

Under NRS 41.637, the four prongs of protected communications include (1) communication aimed at procuring a government action or outcome; (2) communication to a legislator, officer, or employee of the federal or state government and that it concerned that government entity; (3) communication about a governmental issue or proceeding; or (4) "[c]ommunication made in direct connection with an issue of public interest in a place open to the public or in a public forum." To determine whether an issue is a matter of public or private interest, we have adopted California's guiding principles, referred to as the *Shapiro* factors:

> (1) "public interest" does not equate with mere curiosity;
>
> (2) a matter of public interest should be something of concern to a substantial number of people; a matter of concern to a speaker and a relatively small specific audience is not a matter of public interest;
>
> (3) there should be some degree of closeness between the challenged statements and the asserted public interest—the assertion of a broad and amorphous public interest is not sufficient;
>
> (4) the focus of the speaker's conduct should be the public interest rather than a mere effort to gather ammunition for another round of private controversy; and
>
> (5) a person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people.

Shapiro, 133 Nev. at 39, 389 P.3d at 268 (internal quotation marks omitted).

We affirm the district court's findings that Shields' statements to the Board fall under NRS 41.637(1). Using the *Shapiro* factors, Shields' comments to both Judy Rodriguez, one of Fourway's directors, and the Board are a matter of public concern. First, Shields' comments were more

than a "mere curiosity" because they were part of an audit of the casino. Shields did not gossip to third parties that Daley embezzled the money, but instead she reported the alleged embezzlement in her duty as an employee during an audit. Second, as a crime, an alleged embezzlement at a workplace, especially a casino, is of concern to a substantial number of people. *See Spirtos v. Yemenidjian*, 137 Nev. 711, 717, 499 P.3d 611, 618 (2021) (recognizing that alleged corruption "is of concern to a substantial number of people"). Although Fourway is not a public workplace, Daley's alleged actions would likely concern, and possibly affect, the clientele of the casino and people within the community.

In addition to being in the public interest, Shields' communications to the Board constituted protected communications under NRS 41.637. Under NRS 41.637(1), Shields' comments were made to procure government action. Shields made statements to one of Fourway's directors and the Board, which triggered a Board investigation and a police complaint. Because the Legislature created the Board within the Nevada Tax Commission to govern the gaming industry, the Board is a governmental entity.[1] Therefore, Shields' communications to the Board can be considered a communication "aimed at procuring" governmental action. Accordingly, NRS 41.637(1) applies. NRS 41.637(2) also applies because Shields' complaint to the Board was a complaint to state government employees. Furthermore, Shields' statements about Daley's alleged embezzlement at a casino is a matter that would, and did, reasonably concern the Board, as evidenced by the fact that the Board reported Daley to the police.

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[1]Gaming Control Board, available at https://gaming.nv.gov/about/home/ (last visited Feb. 16, 2024).

Because Shields' comments are of public concern and fall under NRS 41.637(1) and NRS 41.637(2), we conclude that Shields satisfies the first component of prong one of the *Shapiro* factors.

Second, Shields' communication was truthful or made without knowledge of its falsehood

Daley argues that Shields' statements were untruthful because Shields allegedly had "clear motivation to disguise the truth" and shifted her story repeatedly. Shields argues that there is no credible evidence that she knew her statements were false.

The second component of prong one of an anti-SLAPP analysis is whether the alleged statements were truthful or made without knowledge of falsehood. *Stark v. Lackey*, 136 Nev. 38, 40, 458 P.3d 342, 345 (2020) (citing NRS 41.637). "A determination of good faith requires consideration of all of the evidence submitted by defendant in support of his or her anti-SLAPP motion." *Rosen v. Tarkanian*, 135 Nev. 436, 439, 453 P.3d 1220, 1223 (2019). Finally, "an affidavit stating that the defendant believed the communications to be truthful or made them without knowledge of their falsehood is sufficient to meet the defendant's burden absent contradictory evidence in the record." *Stark*, 136 Nev. at 43, 458 P.3d at 347.

In this case, the district court held that Fourway and Shields' declarations denying the falsity of their statements were "sufficient to shift the burden to require the Plaintiff to meet the second prong of the analysis." We agree. Shields submitted a declaration with her anti-SLAPP motion, stating that she "acted in good faith at all times" and "did not lie to anyone." She signed the declaration under penalty of perjury. However, the district court cannot rely solely on Shields' affidavit if there is contradictory evidence in the record, as here. In this case, manager Daley alleges that Shields authorized her to cash the check, and fellow manager Linda Estes

remembers that Daley told her that Shields wanted her to take out cash. There is also evidence that Shields rewrote the day sheets for the audit. If Shields told Daley to authorize the check, then Shields would have known that Daley was going to cash the check, and therefore knew about the cashed check before the audit. Furthermore, because Shields rewrote day sheets for the audit, it is possible that she erased Daley's recordation of the check. However, Daley's evidence does not demonstrate that Shields knowingly made a false statement with any amount of certainty. Instead, the record substantiates Shields' assertion that she did not falsely report Daley. First, both the Board's investigation and the justice court found that there was probable cause to charge Daley with embezzlement. Second, Daley does not allege that Shields made any of the statements before she reported Daley to Board, which supports Shields' argument that she did not know about the alleged embezzlement before the audit. Finally, Daley's acquittal alone does not prove that Shields made her statements with knowledge of their falsehood.

Because Daley does not show that Shields knowingly made false statements, we conclude that the district court did not err in finding the declarations satisfied the first prong and were statements made in good faith.

The district court did not err in finding that Daley failed to show a probability of prevailing on her claims in prong two

Daley argues that her claims have substantial merit. She further argues that Shields' report was not absolutely privileged because Shields made her statements to the Board outside of the scope of her employment. In contrast, Shields argues that absolute privilege requires dismissal of Daley's complaint.

In evaluating the second prong, we assess the plaintiff's probability of prevailing on each claim. *Smith v. Zilverberg*, 137 Nev. 65, 70-71, 481 P.3d 1222, 1229 (2021). "The probability of prevailing is determined by comparing the evidence presented with the elements of the claim." *Id.* at 71, 481 P.3d at 1229. If the evidence provided is insufficient to establish that the communications are actionable, then the court should dismiss the case. *Id.*

The Legislature created a statutory absolute privilege that expressly protects "communication[s] made by a licensee or applicant to assist the Gaming Control Board . . . in the performance of their respective duties." *Hampe v. Foote*, 118 Nev. 405, 408, 47 P.3d 438, 440 (2002), *abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008). NRS 463.0171 defines a licensee as a person to whom a valid gaming license, among other specific licenses, has been issued. NRS 463.0133 defines an affiliate as a person who, directly or indirectly, controls or is controlled by a specified person. "Any communication or document of an applicant, licensee[,] . . . ." or an affiliate of an applicant" that is made to the Board or Commission that can assist the Board or Commission in the performance of their duties is absolutely privileged and cannot be the ground for a civil action. NRS 463.3407(1)(c).

In this case, the district court found that Shields and Fourway had absolute immunity. It found that the statements were only made during the initiation of the investigation and to parties connected to the investigation, including the Board who then relayed them to the district attorney. We agree. Shields, who is under the control of Fourway's licensees, is an affiliate. Because she made the statements to the Board to assist the Board in its audit of Fourway, Shields' statements to the Board

cannot form the basis of civil liability and are protected by absolute privilege. Furthermore, because Daley cannot show prima facie evidence of a probability of prevailing on her claims, we conclude that she cannot succeed on prong two of an anti-SLAPP analysis.

The district court did not abuse its discretion in denying Daley's discovery request

Daley argues that the district court erred in denying her discovery request because she needed discovery to demonstrate that she could prevail on her claims. Shields argues that Daley did not articulate a justified reason for discovery and no justified reason exists because absolute privilege precluded Daley from succeeding on her claims.

We review a court's determination regarding discovery for an abuse of discretion. *Toll v. Wilson*, 135 Nev. 430, 435, 453 P.3d 1215, 1219 (2019). NRS 41.660(4) provides that when a party shows that another party has information "to meet or oppose the burden" that the moving party cannot access "without discovery, the court shall allow limited discovery for the purpose of ascertaining such information." We will "determine whether the plaintiff has demonstrated with prima facie evidence a probability of prevailing on the claim" if the party has met the burden of the first prong. NRS 41.660(3)(b).

The district court here dismissed the case without ruling on Daley's request for limited discovery. However, because the court determined that the anti-SLAPP statute applied, Daley does not show that she would prevail on her claims or that discovery would have helped her challenge the anti-SLAPP claims.

We hold that the district court did not abuse its discretion in awarding fees, costs, and statutory damages

Daley argues that the district court erred in awarding Shields costs and attorney fees because it incorrectly determined that the

communications were made in good faith. She also argues that Fourway and Shields' attorney fees were unreasonable because they included "block billing." She finally argues that the district court abused its discretion in awarding Fourway costs and statutory damages.

"We generally review a district court's decision to grant attorney fees and costs for an abuse of discretion." *Smith*, 137 Nev. at 72, 481 P.3d at 1230. A defendant can bring an action for damages and attorney fees under NRS 41.670 when the district court grants a special anti-SLAPP motion to dismiss. *Stubbs v. Strickland*, 129 Nev. 146, 151, 297 P.3d 326, 329 (2013). A prevailing party in an anti-SLAPP suit may receive all reasonable costs and attorney fees for the entire action, not just those incurred during the anti-SLAPP litigation. *Smith*, 137 Nev. at 73, 481 P.3d at 1231. If the court grants an anti-SLAPP motion to dismiss, "[t]he court shall award reasonable costs and attorney's fees to the person against whom the action was brought." NRS 41.670(1)(a). The court may award attorney fees "of up to $10,000 to the person against whom the action was brought." NRS 41.670(1)(b). Finally, the person against whom the action is brought may bring a new action to recover compensatory damages, punitive damages, and attorney fees and costs for the new action. NRS 41.670(1)(c). To determine whether attorney fees are reasonable, the district court must use the *Brunzell* factors. *Smith*, 137 Nev. at 73-74, 481 P.3d at 1231.

"Block billing is the time-keeping method by which each lawyer and legal assistant enters the total daily time spent working on a case, rather than itemizing the time expended on specific tasks." *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 945 n.2 (9th Cir. 2007) (internal quotation marks omitted). Courts have determined that block billing makes it more difficult to determine how much time was spent on certain activities, but

nevertheless, block-billed entries are generally amenable to consideration under the *Brunzell* factors. *Mendez v. County of San Bernardino*, 540 F.3d 1109, 1129 (9th Cir. 2008), *overruled on other grounds by Arizona v. ASARCO LLC*, 773 F.3d 1050 (9th Cir. 2014).

NRS 18.005 defines recoverable costs. Costs may include expenses for clerks' fees or compensation for the official reporter or reporter pro tempore. NRS 18.005(1), (8). It can also include telecopies, photocopies, and postage, NRS 18.005(11), (12), (14), as well as "[a]ny other reasonable and necessary expense incurred in connection with the action, including reasonable and necessary expenses for computerized services for legal research," NRS 18.005(17). A court may also award courier fees "to the extent that the court determines that the expenses incurred were reasonable and necessary." *Bergmann v. Boyce*, 109 Nev. 670, 682, 856 P.2d 560, 568 (1993), *superseded by statute on other grounds as recognized in In re DISH Network Derivative Litig.*, 133 Nev. 438, 451 n.6, 401 P.3d 1081, 1093 n.6 (2017).

The district court here did not find any difficulty analyzing the block billing. The time entries provide detailed descriptions of each attorney, their position at the time, their rate, and the total hours billed. As a result, Daley has not shown that the fees were unreasonable on the basis of block billing. Furthermore, the district court's analysis of the *Brunzell* factors supports that its award of attorney fees was reasonable. *See Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349-50, 455 P.2d 31, 33 (1969) (holding that the district court must analyze the qualities of the advocate, the character of the work, the work actually performed, and the result). The district court found that the lawyers involved had extensive experience and reduced the costs of litigation when possible, including by

using the anti-SLAPP motion to dismiss, which limited costs and fees of the parties. The district court also noted that the work actually performed by the lawyers required a high level of skill, time and attention, all of which warranted the fee award. Finally, the court found that they were successful, and that standard practice allows them to recover fees from the beginning of litigation.

Next, the costs were reasonable. First, the costs relate to the pleadings and transcripts from Daley's criminal case and associated courier fees. Fourway and Shields stated that the pleadings were court fees under NRS 18.005(1) and the transcript was compensation for an official reporter under NRS 18.005(8). Fourway says that the pleadings were part of fees incurred to obtain criminal case records. Furthermore, Fourway stated that the costs for the criminal trial transcript were incurred from "official court reporter fees." Because these fees arose from the official court report and include "civil county court fees" and "district court filing fees," the fees fall under NRS 18.005(8). The pleadings and transcripts were also necessary to understand the evidence from the criminal trial to use in the anti-SLAPP motion as to whether there was contradictory evidence in the record. Finally, the courier fees were reimbursable under NRS 18.005(17) as other reasonable and necessary expenses. Using a courier service just four times, with costs ranging from $65 to $300, for a total of $715 was not excessive. *But see In re Chrysler Motors Corp. Overnight Evaluation Program Litig. Tag-Along Cases*, 137 F.R.D. 665, 673 (E.D. Mo. 1991) (holding that spending $2,639.50 on overnight courier services for timely filings was excessive).

Finally, we conclude the district court properly awarded statutory damages. The district court awarded Fourway and Shields an

award of $1,000 each "for any harm suffered in addition to fees and costs." NRS 41.670(1) applies because the district court granted the special motion to dismiss. Therefore, Fourway and Shields were eligible to recover up to $10,000 in statutory damages. Daley brought the litigation in good faith and raised fair arguments, which both weigh toward a lower award. Given the low award in relation to the statutory cap, Daley failed to demonstrate that the court abused its discretion in awarding $2,000 in statutory damages.[2]

Accordingly, we ORDER the judgments of the district court AFFIRMED.

Stiglich, J.
Stiglich

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

[2]We decline to reach the issue of whether NRS 463.3407 is unconstitutionally overbroad because it was raised for the first time on appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (holding that any issue not argued in the trial court is waived and not considered on appeal).

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