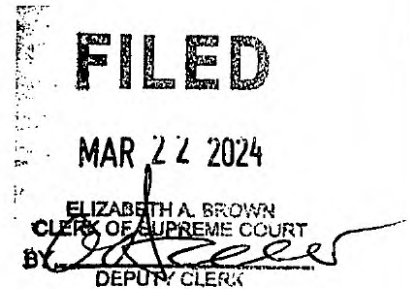


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SMITH PLASTIC SURGERY
INSTITUTE, P.C., A NEVADA
CORPORATION; AND LANE F. SMITH,
M.D., AN INDIVIDUAL,
Appellants,
vs.
CHRISTOPHER KHORSANDI, M.D.,
AN INDIVIDUAL; AND CHRISTOPHER
KHORSANDI, M.D., PLLC, A NEVADA
PROFESSIONAL LLC,
Respondents.

No. 86118-COA



ORDER OF AFFIRMANCE

Smith Plastic Surgery Institute, P.C., and Lane F. Smith, M.D., (collectively, Smith), appeal from a district court order granting in part and denying in part Smith's anti-SLAPP special motion to dismiss. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Smith and respondents Christopher Khorsandi, M.D., and Christopher Khorsandi, M.D., PLLC (collectively, Khorsandi), both operate licensed plastic surgery centers in the Las Vegas area.¹ In 2019, a patient posted a review on Khorsandi's Yelp page which referenced Smith by name and stated that Smith had "botched" that patient's procedure. Smith requested that Khorsandi remove that review. Shortly after Smith made this request, several highly critical and negative reviews of Smith appeared on Smith's Yelp page. Smith filed suit against Khorsandi, alleging that they had orchestrated the negative reviews. Khorsandi moved to dismiss pursuant to NRCP 12(b)(5) and Nevada's anti-SLAPP laws, NRS 41.635-

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

.670. The district court denied the motion, and Khorsandi appealed. The Nevada Supreme Court affirmed. *Khorsandi v. Smith Plastic Surgery, Inc.*, No. 80957, 2022 WL 2276295, at *1 (Nev. June 22, 2022) (Order of Affirmance).

Following remand, Khorsandi filed an answer and counterclaims against Smith for abuse of process and defamation per se. The defamation per se counterclaim identified three separate allegedly defamatory statements. The first was a comment made by Smith's attorney in November 2019 to the Las Vegas Review-Journal that stated, "[t]his [lawsuit against Khorsandi] is evidence of the improper weaponization of a social media vehicle like Yelp . . . [sic] You can't simply disseminate untruths and expect to be free of consequences."² The second statement was a November 2020 post on Smith's Yelp page that stated, in pertinent part, **"[u]nfortunately Dr. Smith has had to sue a competitor for posting multiple false reviews, and we have reported this as a false review as well for the following reason."** The third statement was another post to Smith's Yelp page in January 2021, in response to a negative review posted by user "Carly B.," in which Smith stated the following, in relevant part:

We are sorry that Dr. Smith refused to do a breast surgery on you Carly B and we are sorry that it has hurt your feelings enough to write TEN negative reviews. . . . **Carly B. went to Dr. Smith's competitor Dr. Khorsandi who Dr. Smith is successfully suing for writing many false reviews on Yelp against him.** All of [a] sudden Carly starts writing negative reviews against Dr.

²The allegedly defamatory statements, as quoted here, are taken from Khorsandi's answer and counterclaims, and Smith does not allege that Khorsandi's recitation of the statements is inaccurate.

Smith. . . It is our opinion that this review is motivated by Dr. Khorsandi. We ask you to simply Google Fox 5 Investigative Report on Dr. K and his many lawsuits (fox5vegas.com/news/las-v . . .) or the Review Journals [sic] report on the current lawsuit Dr. Smith has had to file against Dr. Khorsandi in regards to false reviews reviewjournal.com/local/. . . We understand that people often get upset when Dr. Smith chooses not to do surgery on them, but there is no need to continually make false statements.

Smith filed a special motion to dismiss Khorsandi's counterclaims pursuant to NRS 41.660(3)(a)-(b) and for failure to state a claim pursuant to NRCP 12(b)(5). After two hearings, the district court dismissed the abuse of process counterclaim and the defamation per se counterclaim as to the statement by Smith's attorney and the November 2020 Yelp post. However, the district court denied Smith's special motion to dismiss as to the January 2021 Yelp post, finding that there was ambiguity as to whether that post expressed an opinion or a fact, and that the question of whether the post was actionable as defamation per se should be determined by a jury. Smith appeals the district court's order partially denying their special motion to dismiss. See NRS 41.670(4) (allowing an interlocutory appeal from a district court order denying an anti-SLAPP special motion to dismiss).

Smith argues that the district court erred in denying in part their special motion to dismiss because Khorsandi did not establish "a probability of prevailing on" their defamation per se counterclaim related to the January 2021 Yelp post. See NRS 41.660(3)(b). Initially, Smith claims that the post is merely an expression of opinion that cannot be defamatory. Next, Smith contends that the statements in the post "do not impute to Dr.

Khorsandi a lack of fitness for trade, business, or profession” as is required to establish defamation per se. Finally, Smith contends that Khorsandi did not provide “substantial evidence” in support of their counterclaim. We disagree and address each argument in turn.

A district court’s grant or denial of an anti-SLAPP motion to dismiss is reviewed de novo. *Coker v. Sassone*, 135 Nev. 8, 11, 432 P.3d 746, 749 (2019).

A court must grant an anti-SLAPP special motion to dismiss where (1) the defendant shows, by a preponderance of the evidence, that the claim is based on a good faith communication in furtherance of . . . the right to free speech in direct connection with an issue of public concern and (2) the plaintiff fails to show, with prima facie evidence, a probability of prevailing on the claim.

Smith v. Zilberberg, 137 Nev. 65, 67, 481 P.3d 1222, 1227 (2021) (internal quotation marks omitted). Both prongs must be established for dismissal; thus, even if the defendant demonstrates “a good faith communication” under the first prong, NRS 41.660(3)(a), the plaintiff may avoid dismissal under the second prong, NRS 41.660(3)(b), by demonstrating “a probability of prevailing on the claim.” We conclude that Khorsandi established a probability of prevailing on their defamation per se claim, and therefore, the district court properly denied Smith’s special motion to dismiss.³

The plaintiff’s burden under the second prong is to show that the claims have “at least minimal merit.” *Williams v. Lazer*, 137 Nev. 437,

³We decline Khorsandi’s invitation to address whether Smith carried their burden to show “a good faith communication” under NRS 41.660(3)(a). 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).

442, 495 P.3d 93, 98 (2021). “Minimal merit exists when the plaintiff makes a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.” *Wynn v. Assoc. Press*, 140 Nev., Adv. Op. 6, 542 P.3d 751, 757 (2024) (internal quotation marks omitted). Because the claim at issue here is defamation per se, we look to the elements of that claim to determine whether it has at least minimal merit.

“An action for defamation requires the plaintiff to prove four elements: (1) a false and defamatory statement . . . ; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages.” *Clark Cnty. Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 385, 213 P.3d 496, 503 (2009) (omission in original) (internal quotation marks omitted). “[I]f the defamatory communication imputes a person’s lack of fitness for trade, business, or profession, or tends to injure the plaintiff in his or her business, it is deemed defamation per se, and damages are presumed.” *Id.* (internal quotation marks omitted).

Generally, “only assertions of fact, not opinion, can be defamatory. However, expressions of opinion may suggest that the speaker knows certain facts to be true or may imply that facts exist which will be sufficient to render the message defamatory if false.” *Wynn v. Smith*, 117 Nev. 6, 17, 16 P.3d 424, 431 (2001) (internal quotation marks omitted). “The rule for distinguishing an opinion from an assertion of fact is whether a reasonable person would be likely to understand the remark as an expression of the source’s opinion or as a statement of existing fact.” *Id.* “Although ordinarily the fact-versus-opinion issue is a question of law for

the court, where the statement is ambiguous, the issue must be left to the jury's determination." *Id.* at 18, 16 P.3d at 431.

Initially, we disagree with Smith's contention that the Yelp post is an unambiguous expression of opinion. Although couched as a statement of "opinion," the post also suggests that Smith "knows certain facts to be true . . . which will be sufficient to render the message defamatory if false." *Id.* at 17, 16 P.3d at 431 (internal quotation marks omitted). For example, the post states that "**Dr. Khorsandi . . . [has] writ[ten] many false reviews on Yelp.**" Moreover, after stating the "opinion" that Carly B.'s negative review was "**motivated by Dr. Khorsandi,**" the post suggests that the reader can find support for this opinion online in a "**Fox 5 Investigative Report**" detailing the "**many lawsuits**" against Khorsandi and in a "**Review Journals [sic] report**" on Smith's current lawsuit against Khorsandi for "**false reviews.**" We agree with the district court that this statement is ambiguous, insofar as it intimates "that Dr. Khorsandi has engaged in other cases of false reviews and . . . that this is established by . . . looking at these reports that this is out there as a fact." Therefore, we agree with the district court that there is sufficient "ambigu[ity]" as to whether the statement is an expression of fact or opinion such that the question is properly one for the jury. *Id.* at 18, 16 P.3d at 431.⁴

⁴We are not persuaded by Smith's argument that the post is immune from legal action because it utilized hyperlinks to "underlying source documents." The cases relied on by Smith, *Nicosia v. De Rooy*, 72 F. Supp. 2d 1093 (N.D. Cal. 1999), and *Franklin v. Dynamic Details, Inc.*, 10 Cal. Rptr. 3d 429 (Ct. App. 2004), do not stand for any such proposition. In *Nicosia*, the court did not conclude that the use of hyperlinks rendered a party immune from defamation; instead, it determined that an "accusation[] of criminal activity" was not actionable as defamation because it "disclosed" the "underlying facts" behind the accusation. 72 F. Supp. 2d at 1103. In

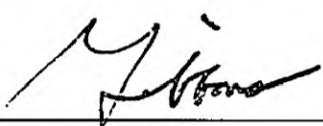


Next, Smith contends that Khorsandi did not properly allege the elements of defamation because he did not allege damages, nor did the Yelp post impugn Dr. Khorsandi's professional fitness such that damages could be presumed as defamation per se. As noted above, damages are presumed where "the defamatory communication imputes a person's lack of fitness for trade, business, or profession, or tends to injure the plaintiff in his or her business." *Clark Cnty.*, 125 Nev. at 385, 213 P.3d at 503 (internal quotation marks omitted). Here, the Yelp post stated that Dr. Khorsandi had made "many false reviews" on Smith's page and that Carly B.'s "review is motivated by Dr. Khorsandi." These statements impugn Dr. Khorsandi's professional fitness by suggesting that he had engaged in unethical conduct to malign a competitor. In addition, Dr. Khorsandi provided a sworn declaration to the district court that Smith's post harmed his business prospects. Thus, the district court did not err in finding that the alleged defamatory statement could "injure" Dr. Khorsandi's business, thereby satisfying the element of damages for the defamation per se claim. *Id.*

Franklin, the California Court of Appeal determined that several emails were not actionable as libel because the "totality of the circumstances" demonstrated that the emails did not "communicate[] or impl[y] a provably false statement of fact." 10 Cal. Rptr. 3d at 437. The *Franklin* court did not, as Smith seems to suggest, lay out a bright-line rule that the use of a hyperlink automatically renders a statement non-actionable; indeed, the court even stated that, "simply couching such statements in terms of opinion does not dispel these false, defamatory implications because a speaker may still imply a knowledge of facts which lead to the defamatory conclusion." *Id.* at 436 (alterations and citation omitted) (quoting *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 18-19 (1990)). Thus, "[e]ven if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact." *Milkovich*, 497 U.S. at 18-19.

Finally, we are not persuaded by Smith's argument, based on California law, that Khorsandi failed to present "substantial evidence" to satisfy their burden under Nevada's anti-SLAPP statute. Rather, we conclude that Khorsandi met their burden under Nevada law to show that their claim "had at least minimal merit." *Williams*, 137 Nev. at 442, 495 P.3d at 98. Khorsandi provided multiple exhibits supporting their contention that the January 2021 Yelp post was per se defamatory, including a sworn declaration from Dr. Khorsandi stating that he did not post any false Yelp reviews regarding Smith nor had knowledge of any other person doing so. In conjunction with Dr. Khorsandi's sworn declaration that Smith's post harmed his business prospects, Khorsandi's evidence, if credited, established "a sufficient prima facie showing of facts to sustain a favorable judgment" on his defamation per se claim. *Wynn*, 140 Nev., Adv. Op. 6, 542 P.3d at 757 (internal quotation marks omitted).⁵

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

	 _____, C.J. Gibbons	
 _____, J. Bulla		 _____, J. Westbrook

⁵We decline to address Smith's argument, raised for the first time in their reply brief, that the Yelp post is privileged under the common law doctrine of reply. *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) ("Issues not raised in an appellant's opening brief are deemed waived."). To the extent Smith raises additional arguments not specifically addressed herein, we have considered the same and conclude they do not provide a basis for relief.

cc: Hon. Eric Johnson, District Judge
Stephen Haberfeld, Settlement Judge
Sgro & Roger
Garman Turner Gordon LLP
Eighth District Court Clerk