IN THE SUPREME COURT OF THE STATE OF NEVADA

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| STEPHEN P. GOTTLIEB,<br>Appellant,<br>vs.<br>JILL F. BRANDIN,<br>Respondent. | No. 45836 |
| STEPHEN P. GOTTLIEB,<br>Appellant,<br>vs.<br>JILL F. BRANDIN,<br>Respondent. | No. 46175 |

FILED

JUL 26 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

These are consolidated appeals from a district court summary judgment in a defamation action and a post-judgment order awarding attorney fees and costs. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition.

This court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court.[1]

Appellant Stephen B. Gottlieb argues that the district court erred in granting summary judgment to respondent Jill F. Brandin. He contends that the fair report privilege set forth in Sahara Gaming v.

[1]Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (citing Caughlin Homeowner's Ass'n v. Caughlin Club, 109 Nev. 264, 266, 849 P.2d 310, 311 (1993)).



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Culinary Workers[2] should not apply to self-reporters such as Brandin. Gottlieb asserts that this is an issue of first impression and that this court should adopt portions of the Restatement (Second) of Torts to conclude that Brandin's statements were defamatory.

Brandin responds that her communication to Gottlieb's ex-wife Shannon Such was absolutely privileged under existing Nevada law. She further contends that Gottlieb failed to present admissible evidence to show that she republished an allegedly defamatory statement. In particular, Brandin asserts that Gottlieb improperly relied on hearsay and double hearsay with the Bob Schorr memorandum as evidence to support his republication argument, and she asserts that the district court properly rejected that evidence. Brandin additionally argues that Gottlieb's portrayal of the Bob Schorr memorandum as a memorialization of the discussions between her and Such is a complete mischaracterization of Such's testimony because Such had prepared the Bob Schorr memorandum a few weeks after her conversations with Brandin and after her review of the Delaware record. We conclude that the district court properly determined that Gottlieb had failed to present sufficient admissible evidence to show that Brandin republished a defamatory statement to Such, and that Brandin was entitled to judgment as a matter of law.

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[2]115 Nev. 212, 215, 984 P.2d 164, 166 (1999) (holding that the fair report privilege applies absolutely to reports of official proceedings, so long as the reports are accurate and complete, or are a fair abridgement of the occurrence reported, regardless of the actual truth or falsity of the statements reported or the reporter's knowledge of whether the reported statements were true or false).

Contrary to Gottlieb's argument, the Bob Schorr memorandum cannot be considered as a party admission because it was prepared by Such and not Brandin, and thus, it cannot be considered as Brandin's own statement in her individual or representative capacity.[3] Additionally, the memorandum is not a record of regularly conducted activity under NRS 51.135[4] because Such did not draft this memorandum in her capacity as a lawyer in her regular course of duty. Finally, the Bob Schorr memorandum does not fall under the hearsay exception in NRS 51.075[5]

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[3]NRS 51.035 states that "'Hearsay' means a statement offered in evidence to prove the truth of the matter of the asserted, unless . . . [t]he statement is offered against a party and is . . . [her] own statement, in either [her] individual or a representative capacity." NRS 51.035(3)(a).

[4]NRS 51.135 reads:

> A memorandum, report, record or compilation of data, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony or affidavit of the custodian or other qualified person, is not inadmissible under the hearsay rule unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

[5]NRS 51.075 provides:

> 1. A statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness, even though he is available.

*continued on next page . . .*

because the nature and circumstances under which the memorandum was written offer no assurances of accuracy, even though Such was available as a witness. Thus, even though Gottlieb asserts that the Bob Schorr memorandum was evidence that Brandin made calls to Such and that these calls were embellished and defamatory, we conclude that the district court properly determined that the Bob Schorr memorandum was inadmissible as evidence of Brandin republishing a defamatory statement. Accordingly, we conclude that the district court did not err in granting summary judgment to Brandin.[6]

As to Brandin's argument relating to NRCP 41(e), we conclude that the district court did not violate the five-year rule.[7] By empanelling a jury and by having Gottlieb testify, we conclude that Gottlieb's case was timely brought to trial in accordance with NRCP 41(e).[8]

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> 2. The provisions of NRS 51.085 to 51.035, inclusive, are illustrative and not restrictive of the exception provided by this section.

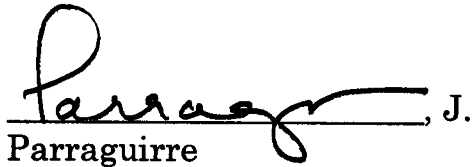
[6]In light of this conclusion, we decline to address whether the fair report privilege applied to insulate Brandin from liability for the allegedly defamatory statements.

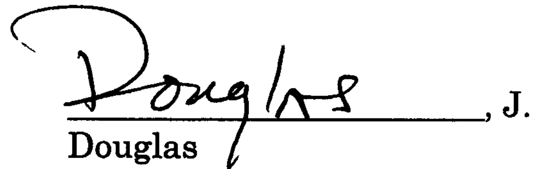
[7]See Monroe v. Columbia Sunrise Hosp., 123 Nev. ___, ___, ___ P.3d ___, ___ (2007) (holding that because the application of NRCP 41(e) is an issue of law, this court reviews issues related to NRCP 41(e)'s application de novo).

[8]See French Bouquet Flower Shoppe v. Hubert, 106 Nev. 324, 326, 793 P.2d 835, 836 (1990).

Further, as to the district court's award of attorney fees and costs, we conclude that the district court did not abuse its discretion[9] in making its findings pursuant to the factors set forth in Beattie v. Thomas.[10] Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_______________, J.
Parraguirre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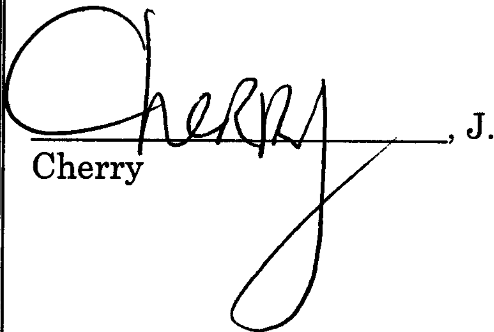
Douglas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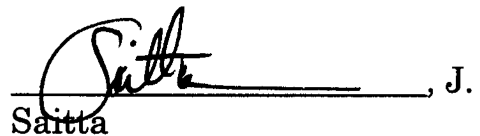
Cherry


_______________, J.
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cc: Hon. Brent T. Adams, District Judge
Nicholas F. Frey, Settlement Judge
Joshua P. Gang
Lemons Grundy & Eisenberg
Perry & Spann/Reno
Washoe District Court Clerk

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[9]Mack-Manley v. Manley, 122 Nev. ___, ___, 138 P.3d 525, 533 (2006) (citing Love v. Love, 114 Nev. 572, 581-82, 959 P.2d 523, 529 (1998)).

[10]99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983).

HARDESTY, J., with whom MAUPIN, C.J., and GIBBONS, J., agree, concurring in part and dissenting in part:

While I concur with the majority that the district court did not violate NRCP 41(e) when it impaneled the jury prior to the expiration of the five-year period for bringing a case to trial, I would reverse the district court's grant of summary judgment and its award of attorney fees and costs to Brandin.

We have previously adopted the first paragraph of Comment (c) to Section 611 of the Restatement (Second) of Torts (1997), in Sahara Gaming v. Culinary Workers.[1] I would adopt also the second paragraph of Comment (c), as well as the reasoning set forth in Kurczaba v. Pollock[2] and Republic Tobacco Co. v. North Atlantic Trading Co., Inc.[3] to preclude the use of the fair report privilege to self-reporters. Based on that preclusion, I would then reverse the district court's summary judgment and remand this matter for further proceedings on the defamation claim.

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[1]115 Nev. 212, 215, 984 P.2d 164, 166 (1999).

[2]742 N.E.2d 425, 442-43 (Ill. Ct. App. 2000).

[3]381 F.3d 717, 732 (7th Cir. 2004).

Consequently, I dissent from the majority's decision to affirm the summary judgment and the award of attorney fees and costs.

____________________, J.
Hardesty

We concur:

____________________, J.
Maupin

____________________, J.
Gibbons