IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KATHY GILLESPIE, AN INDIVIDUAL,
Appellant,
vs.
RONNI COUNCIL, AN INDIVIDUAL; ORGANIZED KARMA, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND ALCHEMY, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Respondents.

No. 67421

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from an order awarding a preliminary injunction in favor of respondents. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

Appellant Kathy Gillespie and respondent Ronni Council have known each other for approximately 10 years. Gillespie is a co-owner at A&B Printing, which prints for political campaigns. Council, a political consultant, previously utilized A&B for her clients' printing needs. In 2013, Council was hired as a consultant to oversee a sheriff candidate's campaign. Gillespie learned Council was utilizing another printing company for the campaign.

Thereafter, an anonymous mailer was sent to approximately 115 recipients, mostly potential candidates for judicial and political office. The front side of the mailer featured a photograph of a woman making an "L" sign with her hand held against her forehead, and in large print the words "Ronnie Council is the Biggest Loser," "She has lost 80% of her races," and "Why Hire a Loser?" Small print indicated the 80 percent loss

number was based on the "[b]est compiled listing of represented races & estimated percent." The back side of the mailer featured the same photograph, along with the words "Ronnie Council is the Biggest Loser" and "80%," as well as a list of 18 campaigns in which Council had allegedly been involved in, most of which were labeled as "lost." The mailer did not list a sender.

Council suspected Gillespie was responsible for the mailer, but Gillespie forcefully denied involvement until Council confirmed, by the mailing barcode, that A&B was the sender. Council filed the instant lawsuit, requesting damages for defamation and an injunction to prevent further mailers.[1] Only then did Gillespie admit that A&B actually printed the mailer, but claimed her company did so for a confidential client. Council's consulting businesses suffered a significant decline in revenue during 2014, an election year, because of the mailer.

When Council sought a preliminary injunction, Gillespie urged the district court to conduct an evidentiary hearing following expedited discovery. The district court held a seven-day evidentiary hearing spread over four months. Prior to the evidentiary hearing, both parties presented bench memoranda to the district court. During the evidentiary hearing, each side presented opening and closing statements, argument, testimony, and other evidence. Gillespie disclosed the confidential client's name,

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[1]Although A&B was a party to that lawsuit and this appeal, the Nevada Supreme Court dismissed A&B from this appeal after it filed bankruptcy without prejudice to its right to seek reinstatement within 60 days of the lifting of the bankruptcy stay or the conclusion of the bankruptcy proceeding. *Gillespie v. Council*, No. 67421 (Nev. May 3, 2016) (order partially dismissing appeal). To date, no motion to reinstate this appeal as to A&B has been filed in this case.

(another Nevada political consultant) alleging that he was the actual client behind the mailer. Gillespie also claimed that she was the only person at A&B to interact with this consultant, that this individual never spoke to her face to face while the mailer was created or printed, and that she had no receipts or documentation for the transaction because she received cash. But, Gillespie's named client vehemently denied any involvement.

At the conclusion of the evidentiary hearing, the district court made findings that: a significant portion of A&B's printing business came from political consultants and A&B did direct mailings for these political campaigns; Gillespie previously made various threats to Council, including threats to ruin her business, when Council had sent business to another printer; more recently, Gillespie believed Council would use A&B printing for the sheriff's campaign; Gillespie discovered in January 2014 that Council was using another printer for the sheriff's race; and within approximately two weeks of this discovery, the anonymous mailer was sent out. Based on these findings, the district court found that Gillespie was the sole individual responsible for the mailer, that the statements on the mailer were false, that the mailer was defamatory, that Council and her businesses suffered and continued suffering irreparable harm from the defamation, and that Gillespie would suffer only minor inconvenience from an injunction. The district court further determined that unless restrained, Gillespie would continue to defame Council. The court awarded a preliminary injunction enjoining Gillespie, A&B Printing, and their officers, agents, servants, employees, and attorneys and any person in "active concert or participation with them" from creating or sending out

another mailer or any material "substantially similar" to the statements made on the previously-sent mailer. Gillespie now appeals this decision.

On appeal, Gillespie argues that the injunction constitutes an impermissible prior restraint, Council failed to meet the prerequisites for a preliminary injunction, and that the injunction is vague and overbroad. We disagree in part. Nevada law allows district courts to issue a preliminary injunction in defamation actions and the facts of this case establish that the district court did not abuse its discretion in determining injunctive relief is warranted. However, we agree with Gillespie that the injunction issued here is overbroad.[2]

In reviewing the grant of a preliminary injunction we review questions of law de novo and consider whether the district court "abused its discretion or based its decision on an erroneous legal standard." *S. Highlands Cmty. Ass'n v. San Florentine Ave. Tr.*, 132 Nev. ___, ___, 365 P.3d 503, 504 (2016) (internal quotation marks omitted); *Excellence Cmty. Mgmt. v. Gilmore*, 131 Nev. ___, ___, 351 P.3d 720, 722 (2015). We limit our review to the record, and we will uphold the district court's findings of fact where they are supported by substantial evidence. *Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004).

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[2]We also agree with Gillespie that the district court erroneously determined the mailer was commercial speech. Commercial speech, at its core, proposes a commercial transaction. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983). The purpose of this mailer was not to obtain business; it was a retaliatory act used to destroy Council's business. But, because we conclude the mailer is unprotected defamatory speech and the injunction is overbroad, we need not consider this issue further.

Gillespie argues that injunctions are never permissible remedies for defamation, and alternatively, that a district court may enjoin defamation only following a final determination on the merits. On the outset we note Gillespie did not raise her second argument until her appeal.[3] As to her contention that injunctions are never permissible remedies for defamation, we recognize that jurisdictions differ widely on this question. For example, *Balboa Island Village Inn, Inc. v. Lemen*, 156 P.3d 339 (Cal. 2007), the California Supreme Court considered the constitutionality of injunctions against speech and concluded,

> preventing a person from speaking or publishing something that, allegedly, would constitute a libel if spoken or published is far different from issuing a posttrial injunction *after* a statement that already has been uttered has been found to constitute defamation. Prohibiting a person from making a statement or publishing a writing *before* that statement is spoken or the writing is published is far different from prohibiting a defendant from *repeating* a statement or *republishing* a writing that has been determined

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[3]Generally we do not address points not raised before the district court, *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981), but we may address issues of a constitutional nature, *Levingston v. Washoe Cty. By and Through Sheriff of Washoe Cty*, 112 Nev. 479, 482, 916 P.2d 163, 166 (1996). We note that before the district court, Gillespie, not Council, actually requested the evidentiary hearing and expedited discovery. We further note the evidentiary hearing took seven days, before which the parties submitted bench memoranda and during which the parties made their arguments and presented testimony from multiple witnesses and other evidence. *See Balboa Island Village Inn, Inc. v. Lemen*, 156 P.3d 349 (Cal. 2007) (holding that a permanent injunction is not an impermissible prior restraint where the speech has been found defamatory at trial). Under these facts the injunction was issued after a determination on the merits that the speech was defamatory.

> at trial to be defamatory and, thus, unlawful. This distinction is hardly novel.

Id. at 344-45. But, the California Supreme Court warned that injunctions should be specifically tailored and limited to prohibiting only those statements that were found to be defamatory at trial. *Id.* at 349, 351.

In contrast, in *Kinney v. Barnes*, 443 S.W.3d 87 (Tex. 2014), the Texas Supreme Court concluded injunctions are not permissible remedies for defamation because they cannot effectively remedy the harm. Specifically, the court stated,

> The narrowest of injunctions in a defamation case would enjoin the defamer from repeating the exact statement adjudicated defamatory. Such an order would only invite the defamer to engage in wordplay, tampering with the statement just enough to deliver the offensive message while nonetheless adhering to the letter of the injunction. . . . But expanding the reach of an injunction [by enjoining similar language] triggers the problem of overbreadth. Overbroad restrictions on speech are unconstitutional because of their potential to chill protected speech.

Id. at 97. The court therefore concluded that damages are the appropriate remedy for defamation. *Id.* at 99.

We recognize the concerns addressed in these cases. But, we are constrained to follow *Guion v. Terra Marketing of Nevada, Inc.*, 90 Nev. 237, 523 P.2d 847 (1974), wherein our Nevada Supreme Court upheld a preliminary injunction in a defamation action. In that case, the court reasoned that there is a property right "to carry on a lawful business without obstruction," and that actions that interfere with the business "or destroy its custom, its credit or its profits, do an irreparable injury and thus authorize the issuance of an injunction." *Id.* at 240, 523 P.2d at 848. The court therefore held that equity will "restrain tortious acts where it is

essential to preserve a business or property interest and also restrain the publication of false and defamatory words where it is the means or an incident of such tortious conduct." *Id.* Accordingly, where defamation interferes with a plaintiff's lawful business, a Nevada court may enjoin the defamation and thus Gillespie's arguments that injunctive relief is an improper remedy for defamation claims fail. *See, e.g., Eulitt ex rel. Eulitt v. Maine, Dep't of Educ.*, 386 F.3d 344, 349 (1st Cir. 2004) (holding that a district court must follow binding precedent "unless it has unmistakably been cast into disrepute by supervening authority").

Gillespie further argues that, even if injunctions are permissible remedies for defamation, the district court abused its discretion in awarding this injunction because the statements on the mailer were hyperbole and substantially true, and did not constitute defamation. We disagree.

"A preliminary injunction is proper where the moving party can demonstrate that it has a reasonable likelihood of success on the merits and that, absent a preliminary injunction, it will suffer irreparable harm for which compensatory damages would not suffice." *Excellence Cmty. Mgmt.*, 131 Nev. at ___, 351 P.3d at 722. "Defamation is a publication of a false statement of fact." *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 714, 57 P.3d 82, 87 (2002). Neither truth nor substantial truth will constitute defamation, and defamation will not be found where a reasonable person could interpret the statements as hyperbole. *Id.* at 715, 57 P.3d at 88.

Here, the district court made findings that the assertions on the mailer were presented as fact: the mailer asserted an 80 percent loss rate and supported this assertion with both a 20-campaign list of losses

and wins and a reference to an outside source. A reasonable person would understand these as statements of fact. But, substantial evidence established that some information on the mailer was completely false and that the 80 percent loss ratio was incorrect by any calculation. *See Univ. & Cmty. Coll. Sys.*, 120 Nev. at 721, 100 P.3d at 187 ("[f]actual determinations will be set aside only when clearly erroneous or not supported by substantial evidence"). When taking Council's actual wins and losses into consideration her overall loss percentage is considerably lower. We therefore agree with the district court that the mailer constituted defamation and substantial evidence supports the district court's findings in this regard. *See id.*

The record further demonstrates that the district court made findings that Council's reputation and business were substantially harmed by the mailer, and that irreparable harm would result if the conduct was not enjoined. Likewise, Gillespie's testimony regarding the provenance of the mailer was not credible, nor did she proffer plausible support for her contention that compliance with an injunction would be unduly difficult and costly. Testimony supports the district court's findings that Gillespie was responsible for the mailer and would continue to defame Council unless enjoined. In fact, Gillespie herself admitted she would continue the conduct if not enjoined. Given the nature of Council's business as a political consultant in the community, calculating monetary damages would be difficult, and we recognize that monetary damages would not redress the irreparable harm to Council's professional reputation as a consultant. Thus, in light of the record and pursuant to *Guion*, we conclude the district court did not abuse its discretion in concluding a preliminary injunction in favor of Council was warranted in this case. *See*

Guion, 90 Nev. at 240, 523 P.2d at 848 (holding equity will restrain defamation where the statements cause irreparable harm to a business); *see also S. Highlands Cmty. Ass'n*, 132 Nev. at ___, 365 P.3d at 504 (we will not overturn the grant of an injunction unless that grant constitutes an abuse of discretion).

However, we agree with Gillespie that the district court abused its discretion by enjoining speech about Organized Karma, LLC, and Alchemy, LLC, Council's corporations. The district court expressly made findings that neither corporation enjoyed a likelihood of success on the merits at trial on its defamation claims. Therefore, the district court's later conclusion and order issuing an injunction in favor of Council's corporations was contrary to its own findings, and because these corporations did not meet the first requirement for a preliminary injunction, the preliminary injunction was improper. *See Excellence Cmty. Mgmt.*, 131 Nev. at ___, 351 P.3d at 722 (to obtain a preliminary injunction, a party must show both a likelihood of success on the merits and irreparable harm if the injunction is not issued).

Finally, we turn to whether the injunction in this case runs afoul of the First Amendment to the United States Constitution. The First Amendment states: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. This generally "forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."[4] *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). Importantly, the First Amendment requires

[4]The First Amendment applies to our state through the Fourteenth Amendment. *Erwin v. State*, 111 Nev. 1535, 1539, 908 P.2d 1367, 1370 (1995); *see also Gitlow v. New York*, 268 U.S. 652, 666 (1925).

content-based restrictions to be precise[5] and narrowly-tailored. David S. Ardia, *Freedom of Speech, Defamation, and Injunctions*, 55 Wm. & Mary L. Rev. 1, 66 (2013).

Balboa Island Village Inn, Inc. v. Lemen, 156 P.3d 339 (Cal. 2007) is instructive on this point. There, the Balboa Village Inn, a restaurant and bar, sought an injunction against Anne Lemen. *Id.* at 341. Lemen lived across an alley from the Village Inn and harassed its customers and employees and sought to turn neighbors against the Inn by making false claims regarding activities conducted at the Inn. *Id.* at 341-42. The Inn's sales dropped more than 20 percent due to Lemen's conduct. *Id.* at 342. The district court granted an injunction in favor of the Inn, enjoining Lemen and "'her agents, all persons acting on her behalf or purporting to act on her behalf and all other persons in active concert and participation with her'" from making the complained-of statements. *Id.* at 342.

The California Supreme Court disapproved of the injunction's application to Lemen's agents and all others acting on her behalf or in concert with her. *Id.* at 352. Enjoining more persons than the named party and failing to limit time, place, and manner of the injunction "sweeps more broadly than necessary." *Id.* (internal quotation marks omitted). Likewise, other courts have declined to uphold injunctions that

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[5]Council argues paragraph 49 of the order clearly defines which future speech is prohibited by defining "substantially similar" statements as "anonymous items falsely disparaging Plaintiffs." We are not persuaded that this language is clear. Critically, the order fails to differentiate between fact and opinion, and truth and falsity. Thus, the injunction would encompass statements, including opinions, that are not defamation.

reach past the defamatory statements to future speech that might be similar to the statements at issue. *See Kinney v. Barnes*, 443 S.W.3d 87, 98 (Tex. 2014); *Oakley, Inc. v. McWilliams*, 879 F. Supp. 2d 1087, 1091 (C.D. Cal. 2012). *See also* Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 Syracuse L. Rev. 157, 172 (2007) (concluding that injunctions which extend past the words already held to be defamatory are overbroad because they necessarily reach communication that may be non-defamatory).

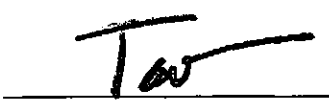
We agree with this reasoning and hold that the injunction issued by the district court in this case is overbroad. Although a court may enjoin speech found to be defamatory, *see Guion*, 90 Nev. at 240, 523 P.2d at 848; *Balboa Island*, 156 P.3d at 349, enjoining the act of printing language "substantially similar" to that on the mailer necessarily extends the injunction to speech which may be protected. *See Kinney*, 443 S.W.3d at 98; *Oakley, Inc. v. McWilliams*, 879 F.Supp.2d 1087, 1091 (C.D. Cal. 2012). For example, the injunction would enjoin opinions protected by the First Amendment regarding Council or her corporations if that speech were "substantially similar" to the language on the mailer. *See Pegasus*, 118 Nev. at 714, 57 P.3d at 87. Of further concern, the injunction enjoins more parties than just Gillespie even though there is no evidence presented that anyone besides Gillespie herself was responsible for the mailer at issue in this case. *See Balboa Island*, 156 P.3d at 352 (disapproving an injunction that enjoined parties beyond the defendant). Accordingly, the wording of the preliminary injunction prohibiting "substantially similar" language, and the fact that it applies to more than just Gillespie herself, runs contrary to the First Amendment. We therefore instruct the district court to limit the preliminary injunction to

enjoining Gillespie from publishing the false statements of fact made in the mailer.

In conclusion, we agree with the district court that the mailer in this case constitutes defamation and that preliminary injunctive relief was a proper remedy in this case under current Nevada law. But, because the preliminary injunction is overbroad both in what speech it prohibits and who it affects, we reverse the district court's grant of this preliminary injunction.[6] Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

_____, C.J.
Gibbons



_____, J.
Tao

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cc: Hon. Mark R. Denton, District Judge
Dana Jonathon Nitz, Settlement Judge
Holland & Hart LLP/Las Vegas
Flangas Dalacas Law Group, Inc.
Eighth District Court Clerk

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[6]In light of our disposition, we decline to address the parties' remaining arguments.