IN THE SUPREME COURT OF THE STATE OF NEVADA

ANA SHEPHARD, AN INDIVIDUAL,
Appellant,
vs.
SHAWN MEADOWS, AN INDIVIDUAL,
Respondent.

No. 85830

ORDER AFFIRMING IN PART AND REVERSING IN PART AND REMANDING

This is an appeal from a district court order denying a special motion to dismiss under NRS 41.660. Eighth Judicial District Court, Clark County; David M. Jones, Judge.

Appellant Ana Shephard and Respondent Shawn Meadows were in a romantic relationship. Upon their separation, Meadows sold the couple's residence. The parties could not agree on how to split the proceeds of this sale, and animated communications followed. Shephard sought a TPO, claiming Meadows threatened physical harm towards Shephard and her family if Shephard did not drop a lawsuit about the property dispute. A family court granted the TPO. Some time after the court granted the TPO, Shephard and a former neighbor made allegedly unfavorable statements about Meadows to a background-check investigator. The investigator was hired by a third-party company on behalf of the Department of Defense to conduct a background check of Meadows because he worked on a naval base.

Meadows brought the underlying suit against Shephard for several claims, including defamation and defamation per se. In response to the lawsuit, Shephard filed an anti-SLAPP special motion to dismiss under NRS 41.660. Shephard claimed two sets of statements—those made in the TPO proceedings and those made to the investigator—satisfied prong one

of the anti-SLAPP analysis as statements "made in direct connection with an issue under consideration by" an "executive or judicial body" under NRS 41.637(3). Shephard contended the statements made to the investigator also satisfied NRS 41.637(2) as statements made to an "officer or employee of the Federal Government . . . regarding a matter reasonably of concern to the respective governmental entity." Additionally, Shephard maintained Meadows could not establish a probability of prevailing on the claim under prong two of the anti-SLAPP analysis, and in any event, the litigation privilege applied. In particular, Shephard argued an absolute litigation privilege applied to the statements "because the communications uttered in the judicial proceedings are pertinent to the subject of controversy in this case" and the statements to the investigator "mirror the statements" Shephard made in applying for the TPO.

In a preliminary order, the district court held that Shephard satisfied her prong-one showing but that an evidentiary hearing was necessary to evaluate Meadows' prong-two showing. A different district court judge took over the case in the interim and vacated the hearing upon the parties' stipulation. After limited discovery and additional briefing, the district court entered a summary order denying the special motion to dismiss. The order contained no specific findings or conclusions about prong one or prong two. Shephard now appeals the order denying dismissal. NRS 41.670(4) (permitting an interlocutory appeal from an order denying an anti-SLAPP special motion to dismiss).

The court reviews a denial of an anti-SLAPP motion to dismiss de novo. *Rosen v. Tarkanian*, 135 Nev. 436, 438, 453 P.3d 1220, 1222 (2019). The anti-SLAPP analysis is split into two prongs. *See id.* at 438, 453 P.3d at 1223. Under the first prong, the movant must establish, "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)(a); *see also Rosen*, 135 Nev. at 438, 453 P.3d at 1223. Under the second prong, the district court "shall . . . determine whether the plaintiff has demonstrated with prima facie evidence a probability of prevailing on the claim." NRS 41.660(3)(b); *Williams v. Lazer*, 137 Nev. 437, 439-40, 495 P.3d 93, 97 (2021).

Shephard has made a prong-one showing

The party seeking dismissal under the anti-SLAPP statutes carries the burden at prong one to establish by a preponderance of the evidence that the statements qualify as a good faith communication. NRS 41.660(3)(a); *Rosen*, 135 Nev. at 438, 453 P.3d at 1223. A "preponderance of the evidence" is evidence indicating a "contested fact is more probable than its nonexistence." *In re Parental Rts. as to M.F.*, 132 Nev. 209, 217, 371 P.3d 995, 1001 (2016). NRS 41.637 outlines four categories of good-faith communications.

Shephard maintains that the statements in her TPO application and the statements to the investigator fall within NRS 41.637(2)-(3). Additionally, Shephard contends a preponderance of the evidence demonstrates she made these statements in good faith. In support, she points to her declaration and Meadows' own admissions that purportedly show Shephard genuinely believed the statements to be truthful or her opinion.

In answer, Meadows argues Shephard cannot satisfy the good-faith requirement. He argues that the record contains evidence indicating Shephard "acted in bad faith and made her statements in an attempt to

extort money from him." In a similar vein, Meadows contends that he "produced evidence that instead of furthering any issue of public concern, Shephard's statements were made to a 'small specific audience.'" Meadows, in the alternative, argues that anti-SLAPP protection cannot apply at all because the statements here qualify as defamation per se.

Importantly, Meadows does not meaningfully dispute the applicability of NRS 41.637, beyond generally arguing that the statements were not made in good faith, were not of public concern, or do not come within the scope of anti-SLAPP. Absent such argument, we agree with the district court that the statements in the TPO and the statements to the investigator satisfy NRS 41.637 so long as there is a preponderance of evidence indicating Shephard made the statements in good faith. *See* NRS 41.660(3)(a).

Statements made in good faith are either "true or made without knowledge of any falsehood." *Rosen*, 135 Nev. at 437, 453 P.3d at 1222. The focus is on the "'gist or sting' of the communications as a whole," rather than "pars[ed] individual words in the communications." *Taylor v. Colon*, 136 Nev. 434, 440, 482 P.3d 1212, 1217 (2020) (quoting *Rosen*, 135 Nev. at 437, 453 P.3d at 1222). A preponderance of the evidence must show that the statements were made in good faith. *Id.* A sworn affidavit claiming that the statements were true or an opinion is sufficient under this standard to establish good faith "absent contradictory evidence in the record." *Stark v. Lackey*, 136 Nev. 38, 43, 458 P.3d 342, 347 (2020). In accord, the court will consider "all of the evidence submitted by the defendant in support of his or her anti-SLAPP motion." *Taylor*, 136 Nev. at 440, 482 P.3d at 1217. This necessitates an independent review of the record. *Spirtos v. Yemenidjian*, 137 Nev. 711, 714, 499 P.3d 611, 616 (2021).

We conclude that a preponderance of the evidence indicates Shephard's statements were made in good faith. The preponderance-of-the-evidence measure asks whether a "contested fact is more probable than its nonexistence," *In re Parental Rts. As to M.F.*, 132 Nev. at 217, 371 P.3d at 1001. Here, Shephard attached a sworn declaration to her special motion to dismiss averring that the statements she made in her TPO application and made to the investigator were true. Our review of the record reveals additional evidence of good faith. Shephard attached a declaration from a neighbor stating that the statements to the investigator were true or believed to be true. The motion was also supported by the TPO application, the TPO itself, Shephard and Meadows' cohabitation agreement, and several screenshots of text messages between the two. Despite Meadows' competing declaration, the weight of the evidence establishes that Shephard's statements were "true or made without knowledge of any falsehood" under a preponderance-of-the-evidence standard. *Rosen*, 135 Nev. at 437, 453 P.3d at 1222.

Relatedly, Meadows' argument that the statements were not made in good faith because evidence shows Shepherd made the statements "in an attempt to extort money from him" fails because it misconstrues the meaning of good faith here. Good faith in the anti-SLAPP context only asks whether a preponderance of the evidence supports that the statements were true or made without knowledge that the statements were untrue. *See Rosen*, 135 Nev. at 437, 453 P.3d at 1222 (defining good faith in the anti-SLAPP context as meaning that the statements "were true or made without knowledge of any falsehood"); NRS 41.637. Because the record supports the probable truth of the statements by a preponderance of the evidence, we conclude Meadows' contentions fail.

To be sure, Meadows' remaining arguments are similarly unavailing. Although Meadows contends that anti-SLAPP statutes do not protect defamation per se, the cases Meadows relies on for this proposition are factually distinguishable or do not discuss a defamation-per-se exception under the anti-SLAPP scheme whatsoever. *See Weinberg v. Feisel*, 2 Cal. Rptr. 3d 385, 388 (Ct. App. 2003) (concluding that statements accusing the plaintiff of theft were not of public interest when the defendant "did not report his suspicions to law enforcement, and there is no evidence that he intended to pursue civil charges against plaintiff"); *Bongiovi v. Sullivan*, 122 Nev. 556, 572, 138 P.3d 433, 445 (2006) (addressing the types of defamatory speech a plaintiff must show the defendant made with actual malice as opposed to negligence, depending on the degree of public concern at issue). Meadows also fails to present a cogent argument in claiming that the at-issue statements are not of public concern because they were made to a "small specific audience." On appeal, Meadows cites only to arguments in his briefing below as opposed to providing binding or persuasive authority. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (outlining litigants' duty to "present relevant authority"); *see also* NRAP 28(a).

Analysis under prong two establishes that reversal and remand is warranted only as to the statements made to the investigator

Given our determination that Shephard satified prong one, the analysis shifts to prong two, where the district court "shall . . . determine whether the plaintiff has demonstrated with prima facie evidence a probability of prevailing on the claim." NRS 41.660(3)(b); *Williams*, 137 Nev. at 439-40, 495 P.3d at 97. A plaintiff cannot make out a prima facie showing at this stage if a privilege applies to the statements. *See Williams*, 137 Nev. at 443, 495 P.3d at 99; *see also Stark*, 136 Nev. at 441, 458 P.3d at

345 (explaining that the applicability of a privilege—and thus "whether the defendant may be held liable"—"only becomes a consideration in the second prong of the anti-SLAPP analysis"). Both inquiries—whether the plaintiff has made a prima facie showing and whether a privilege applies—are reviewed de novo. *See Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 62, 657 P.2d 101, 105 (1983).

We note at the outset that review of this issue has been significantly complicated by the lack of any specific findings by the district court with regard to whether Shephard satisfied prong two, both with regard to the TPO application and with respect to the statements to the investigator. Despite the lack of findings, the record contains sufficient information for a de novo review of the issues presented.

Shephard contends that the litigation privilege applies to both the statements made in the TPO application and the statements made to the investigator as statements made in a judicial proceeding. As to the statements made to the investigator, Shephard contends that they qualify as "having been made to relay the contents of" a judicial or "quasi-judicial" proceeding. She also argues that the statements to the investigator could qualify for the fair-reporting privilege or a "conditional privilege" as "statements made to initiate official proceedings." Finally, because the other tort claims beyond the defamation and defamation per se claims share the "same set of facts" as those underlying the defamation per-se claim, Shephard asserts that the district court should have dismissed all the claims in this case.

Among other arguments, Meadows points out that Shephard has waived some of her privilege arguments for failing to raise them below. Moreover, Meadows argues that the litigation privilege cannot apply to the

statements made to the investigator because there was no review, notice, or opportunity to be heard.

We agree that Shephard has waived argument about the applicability of some of these privileges. Before the district court, Shephard failed to preserve argument concerning a fair-report privilege or a conditional privilege for official proceedings. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). We therefore only address whether the litigation privilege applies. *Id.*

The litigation privilege applies to statements made during the course of judicial or quasi-judicial proceedings. *Jacobs v. Adelson*, 130 Nev. 408, 412, 325 P.3d 1282, 1285 (2014). The litigation privilege can also apply to statements made "preliminary to a proposed judicial proceeding." *Fink v. Oshins*, 118 Nev. 428, 433, 49 P.3d 640, 644 (2002). In either case, the privilege applies only where the judicial proceeding is (1) "contemplated in good faith and under serious consideration" and (2) the communication is "related to the litigation." *Jacobs*, 130 Nev. at 413, 325 P.3d at 1285. If applicable, the litigation privilege serves as a "complete bar to defamation claims based on privileged statements." *Id.*

Here, the litigation privilege applies to the statements Shephard made in applying for the TPO and the ensuing TPO proceedings. *See Jacobs*, 130 Nev. at 412, 325 P.3d at 1285; *Fink*, 118 Nev. at 433, 49 P.3d at 644. The TPO application itself was a legal prerequisite to the TPO, and the TPO proceeding took place before the family court. *See* NRS 33.020(1)-(2). Shephard's statements in the application and proceedings were necessarily in "serious consideration" of a judicial proceeding and to an audience "related to the litigation." *Jacobs*, 130 Nev. at 413, 325 P.3d at 1285.

We are not persuaded, however, that the same privilege extends to statements made in the context of the background-check investigation. Namely, the interview with the investigator does not qualify as either a judicial proceeding or a quasi-judicial proceeding. Even quasi-judicial proceedings, "at a minimum," must "(1) provide the opportunity to present and rebut evidence and witness testimony, (2) require that such evidence and testimony be presented upon oath or affirmation, and (3) allow opposing parties to cross-examine, impeach, or otherwise confront a witness." *Spencer v. Klementi*, 136 Nev. 325, 332, 466 P.3d 1241, 1247 (2020). The facts here do not satisfy all three requirements.

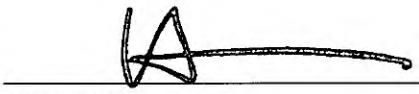
Given that no privilege applies to statements made to the investigator, we turn to the remaining question: whether Meadows has set forth prima facie evidence indicating that his claims can stand on the statements made in the background-check investigation. *See Abrams v. Sanson*, 136 Nev. 83, 91, 458 P.3d 1062, 1069 (2020). That prima facie showing is one only of "minimal merit," and the court makes no fact findings in making this determination. *Id.*; *Taylor*, 136 Nev. at 437, 482 P.3d at 1216. We believe "minimal merit" exists for the claims premised on statements made to the investigator. *Abrams*, 136 Nev. at 91, 458 P.3d at 1069.

Accordingly, we affirm the district court's order to the extent that Meadows has set forth prima facie evidence of his claims that depend on the statements made to the background-check investigator. We reverse and remand, however, for the district court to dismiss claims solely based on Shephard's statements made in applying for and maintaining the TPO because such claims are subject to the litigation privilege. We urge the district court to make more specific findings on prong one and prong two in

future anti-SLAPP proceedings. Insofar as the parties raise other arguments that are not addressed in this order, we decline to address them because they lack merit and do not change our determination.

Therefore, we

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



_____, J.
Herndon

_____, J.
Lee

_____, J.
Bell

cc: Hon. David M. Jones, District Judge
Patrick N. Chapin, Settlement Judge
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