IN THE SUPREME COURT OF THE STATE OF NEVADA

TIPPING POINT GAMING, LLC, A NEVADA LIMITED LIABILITY COMPANY, Appellant, vs. CAESARS ENTERPRISE SERVICES, LLC, A DELAWARE LIMITED LIABILITY COMPANY; AND CAESARS ENTERTAINMENT CORPORATION, Respondents.	No. 85603
TIPPING POINT GAMING, LLC, A NEVADA LIMITED LIABILITY COMPANY, Appellant, vs. CAESARS ENTERPRISE SERVICES, LLC, A DELAWARE LIMITED LIABILITY COMPANY; AND CAESARS ENTERTAINMENT CORPORATION, Respondents.	No. 85822

ORDER OF REVERSAL AND REMAND

These are consolidated appeals from district court orders granting a motion for judgment as a matter of law, denying a motion for a new trial, and granting a motion for attorney fee and costs. Eighth Judicial District Court, Clark County; Nancy L. Allf, Judge.

In 2014, Caesars Entertainment Services, LLC (CES) and Tipping Point Gaming, LLC (TPG) entered into an agreement (the "Agreement"), which provided that TPG would supply CES with gaming technologies. In connection with the Agreement, CES represented that it would share in the efforts to deploy TPG's new technologies. In 2017, TPG

informed CES that it was entering into a Letter of Intent with a prospective buyer for all of TPG's assets.

After TPG allegedly failed to meet its contractual obligations, CES filed a complaint against TPG. In response, TPG filed counterclaims for, *inter alia*, breach of contract, breach of the implied duty of good faith and fair dealing, intentional interference with prospective contract, and fraud.

Before trial, the district court denied each party's motions for summary judgment. At trial, the district court admitted emails demonstrating that CES delayed TPG technologies from receiving necessary Gaming Labs Industries (GLI) certification. The district court also admitted internal CES emails in which CES executives stated that CES may need to intervene in TPG's potential sale or resort to a "nuclear option."

As part of its case, TPG's damages expert opined that TPG suffered over $10 million in direct damages. In connection with CES's alleged breach of contract, the expert further testified that TPG's consequential damages were between $2.6 million and $66.8 million.

After TPG presented its case, CES filed a motion for judgment as a matter of law on TPG's claims. The district court granted the motion as to all claims except for breach of contract. The jury found for CES on TPG's remaining breach of contract claim and found for TPG on CES's claims for breach of contract and the implied covenant of good faith and fair dealing. The jury awarded no damages to either party. The district court concluded that CES was the prevailing party and awarded CES attorney fees and costs of approximately $2.6 million. TPG moved for a new trial, which the district court denied. TPG now appeals.

Orders granting judgment as a matter of law pursuant to NRCP 50(a) are reviewed de novo. *Nelson v. Heer*, 123 Nev. 217, 223, 163 P.3d 420, 425 (2007). When reviewing such an order, this court considers "the evidence and all inferences therefrom in a light most favorable to the non-moving party." *Banks ex rel. Banks v. Sunrise Hosp.*, 120 Nev. 822, 839, 102 P.3d 52, 64 (2004) (internal quotation marks omitted). "To overcome a motion brought pursuant to NRCP 50(a), the nonmoving party must have presented sufficient evidence such that the jury could grant relief to that party." *Bielar v. Washoe Health Sys., Inc.*, 129 Nev. 459, 471, 306 P.3d 360, 368 (2013) (internal quotation marks omitted).

Beginning with TPG's claim for intentional interference with prospective contract, TPG had to show the following:

> 1) a prospective contractual relationship between the plaintiff and a third party; 2) the defendant's knowledge of this prospective relationship; 3) the intent to harm the plaintiff by preventing the relationship; 4) the absence of privilege or justification by the defendant; and, 5) actual harm to the plaintiff as a result of the defendant's conduct.

Leavitt v. Leisure Sports Inc., 103 Nev. 81, 88, 734 P.2d 1221, 1225 (1987). Here, TPG presented evidence that it had a contractual relationship with a prospective buyer and that CES knew of the relationship. TPG also presented evidence in the form of emails that CES intended to prevent the acquisition. CES, without clear privilege or justification, intervened to delay TPG from receiving GLI certification. The buyer ultimately canceled its contract to purchase TPG.[1] Thus, because TPG presented sufficient

[1]TPG urges this court to adopt the federal sham exception to the litigation privilege. Pursuant to the litigation privilege, "communications

evidence from which a jury could return a verdict in its favor, the district court erred by granting judgment as a matter of law as to TPG's claim for intentional interference with prospective contract.

Next, for its fraud claim, TPG had to show:

> (1) A false representation made by the defendant; (2) defendant's knowledge or belief that its representation was false or that defendant has an insufficient basis of information for making the representation; (3) defendant intended to induce plaintiff to act or refrain from acting upon the misrepresentation; and (4) damage to the plaintiff as a result of relying on the misrepresentation.

Barmettler v. Reno Air, Inc., 114 Nev. 441, 447, 956 P.2d 1382, 1386 (1998). TPG presented evidence that CES represented it would assist TPG in deploying its new technologies and that TPG relied upon CES's representation. TPG also presented evidence that CES intentionally delayed TPG technologies from receiving necessary GLI certification, which potentially caused TPG to sustain damages. Therefore, TPG submitted sufficient evidence from which a jury could return a verdict in its favor, and

---

uttered or published in the course of judicial proceedings are absolutely privileged, rendering those who made the communications immune from civil liability." *Greenberg Traurig v. Frias Holding Co.*, 130 Nev. 627, 630, 331 P.3d 901, 903 (2014) (internal quotations omitted). Under the federal sham exception, when (1) a party files a suit that is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits" and (2) the suit was filed with the intent to interfere with a prospective business relationship, the litigation privilege will not shield the filing party from civil liability. *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 50 (1993). We decline TPG's invitation to adopt the federal sham exception to the litigation privilege at this time and note that here, even if we adopted the exception, it would not apply as the record demonstrates that CES's claims, while unsuccessful, were not baseless.

the district court erred by granting judgment as a matter of law on this claim.

Because the district court concluded that TPG's fraud claim was barred by the economic loss doctrine, we take this opportunity to provide clarifying guidance. "[U]nder the economic loss doctrine, a plaintiff generally cannot recover on an unintentional tort claim for purely economic losses." *Sadler v. PacifiCare of Nev.*, 130 Nev. 990, 996, 340 P.3d 1264, 1268 (2014) (internal quotation marks omitted). However, intentional torts are not barred by the economic loss doctrine. *Halcrow, Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. 394, 402, n.2, 302 P.3d 1148, 1154, n.2 (2013), as corrected (Aug. 14, 2013), (citing *Terracon Consultants W., Inc. v. Mandalay Resort Grp.*, 125 Nev. 66, 72-73, 206 P.3d 81, 84–85 (2009)). Thus, TPG's claim for fraud is not barred by the economic loss doctrine.

TPG also presented sufficient evidence for a jury to find in its favor on its claim that CES breached the implied covenant of good faith and fair dealing. "Where the terms of a contract are literally complied with but one party to the contract deliberately countervenes [sic] the intention and spirit of the contract, that party can incur liability for breach of the implied covenant of good faith and fair dealing." *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 107 Nev. 226, 232, 808 P.2d 919, 922–23 (1991). Here, TPG presented evidence that CES delayed TPG technologies from receiving GLI certification, which could be found to be a violation of the spirit of the Agreement. Therefore, the district court erred by granting judgment as a matter of law as to this claim.

The district court also erred when it concluded that TPG's consequential damages were speculative and barred by the Agreement. While damages need not be mathematically certain, they cannot be

speculative. *Clark Cnty. Sch. Dist. v. Richardson Constr., Inc.*, 123 Nev. 382, 397, 168 P.3d 87, 97 (2007). However, "[d]amages are, of necessity, tinged with a certain degree of speculation." *Freeman v. Davidson*, 105 Nev. 13, 16, 768 P.2d 885, 887 (1989). The issue of speculation arises when the asserted claim for consequential damages is not supported by proof or not based on facts. *See Richardson*, 123 Nev. at 397, 168 P.3d at 97; *Frantz v. Johnson*, 116 Nev. 455, 469, 999 P.2d 351, 360 (2000). In other words, consequential damages are speculative when they are not supported by admissible and credible evidence.

Here, TPG's damages expert testified that TPG suffered consequential damages between $2.6 million and $66.8 million in connection with CES's alleged breach of contract. Though this range is indisputably broad, because it was based on credible evidence, including financially relevant documents and financial forecasts, and was reached by using industry-appropriate calculations, it was not speculative.

Furthermore, we are not persuaded by the court's conclusion that TPG could not recover concurrently under theories of fraud and breach of contract. "A plaintiff may assert several claims for relief and be awarded damages on different theories." *Topaz Mut. Co. v. Marsh*, 108 Nev. 845, 852, 839 P.2d 606, 610 (1992). Further, a plaintiff who simultaneously maintains claims for fraud and breach of contract need not present separate damages calculations for each claim because "[t]he measure of damages on claims of fraud and contract are often the same." *Id.* at 852, 839 P.2d at 610. Rather the district court can determine "after trial" if a jury award results in double recovery that would violate the equitable prohibition on double recovery. *J.A. Jones Constr. Co. v. Lehrer McGovern Bovis, Inc.*, 120 Nev. 277, 289, 89 P.3d 1009, 1017 (2004).

Moreover, the Agreement did not entirely bar consequential damages. We review the interpretation of contracts de novo. *Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 739, 359 P.3d 105, 106 (2015). The Agreement reads in pertinent part: "[e]xcept for . . . a Party's *intentional misconduct* or gross negligence . . . [i]n no event shall either Party be liable for any indirect, special, incidental, consequential or punitive damages, even if such Party has been advised of the likelihood of the occurrence of such damages or such damages are foreseeable." (Emphasis added.) Here, TPG asserts two intentional tort claims: intentional interference with prospective contract and fraud. Accordingly, the district court erred when it granted CES's motion for judgment as a matter of law as to TPG's claim for consequential damages, to the extent that it was predicated on the language of the contract.

The district court further erred when it denied TPG's motion for a new trial. Under NRCP 59 a "court may, on motion, grant a new trial" if an error "materially affect[s] the substantial rights of the moving party." When a district court erroneously grants a motion for judgment as a matter of law, a new trial should be ordered. *See Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co.*, 127 Nev. 331, 348, 255 P.3d 268, 280 (2011). Because TPG's substantial rights were materially impacted when the district court erroneously granted CES's motion as a judgment of law, a new trial must be granted. Accordingly, we conclude that the district court erred when it denied TPG's motion.

Because we reverse the district court's order granting judgment as a matter of law as to TPG's claims for intentional interference with prospective contract, fraud, breach of the implied duty of good faith and fair

dealing, and consequential damages, we necessarily vacate the order awarding attorney fees and costs to CES.[2] We accordingly,

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

_____, J.
Herndon

_____, J.
Lee

_____, J.
Bell

cc: Chief Judge, Eighth Judicial District Court
Dana Jonathon Nitz, Settlement Judge
Garman Turner Gordon LLP
Weide & Miller, Ltd.
Greenberg Traurig, LLC/Chicago
Leonard Law, PC
Fennemore Craig, P.C./Phoenix
Fennemore Craig, P.C./Las Vegas
Eighth District Court Clerk

---

[2]We note that, generally, where two parties maintain claims against one another, and both parties merely succeed in defending against the claims brought against them, neither party may be deemed the prevailing party as both have succeeded on "significant issue[s] in litigation." *Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005). Thus, neither CES nor TPG can be declared the prevailing party in this instance.