IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ERNEST DEL CASAL, AN INDIVIDUAL; AND MICHAEL FRANKLIN, JR., AN INDIVIDUAL, Appellants, vs. KURT K. HARRIS, ESQ., P.C., A NEVADA CORPORATION; AND KURT HARRIS, AN INDIVIDUAL, Respondents.	No. 85660-COA
ERNEST DEL CASAL, AN INDIVIDUAL; AND MICHAEL FRANKLIN, JR., AN INDIVIDUAL, Appellants, vs. KURT K. HARRIS, ESQ., P.C., A NEVADA CORPORATION; AND KURT HARRIS, AN INDIVIDUAL, Respondents.	No. 86644-COA

FILED

JUL 31 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART AND REVERSING IN PART (DOCKET NO. 85660-COA) AND REVERSING AND REMANDING (DOCKET NO. 86644-COA)

Ernest Del Casal and Michael Franklin, Jr., bring these consolidated appeals from a final judgment on a jury verdict and a post-judgment order awarding attorney fees in a contract and tort action. Eighth Judicial District Court, Clark County; David M. Jones, Judge; James M. Bixler, Senior Judge.[1]

[1]Judge Jones entered the final judgment that is the subject of the appeal in Docket No. 85660-COA while Senior Judge Bixler entered the

Respondent Kurt Harris, who is an attorney, and his law firm, respondent Kurt K. Harris, Esq., P.C. (generally referred to collectively herein as Harris), commenced the underlying proceeding against Del Casal and Franklin. In the operative complaint, Harris alleged that he purchased a business known as Equal Rights for Divorced Fathers (ERDF) from Del Casal, who initially stayed on with the business, but later left. Harris further alleged that Del Casal subsequently began posting defamatory content about Harris online to harm ERDF. Harris essentially alleged that Del Casal posted such content on a website he created with the domain name equalrightsfordivorcedfathers.com (referred to herein as the rogue website) and that he caused the rogue website to be associated with the "Google listing" for ERDF to misdirect customers and harm Harris. Lastly, Harris alleged that Franklin was an internet technician who assisted Del Casal in the foregoing actions.

Based on his allegations concerning the defamatory statements, Harris asserted claims against Del Casal and Franklin for business disparagement and defamation per se.[2] In connection with his allegations concerning the rogue website, Harris asserted a claim for conversion[3]

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post-judgment order awarding attorney fees that is the subject of the appeal in Docket No. 86644-COA.

[2]In his complaint, Harris styled this claim as one for "slander/defamation/defamation per se." However, the verdict forms that were submitted to the jury included an interrogatory that condensed the claim down to "Defamation Per Se/Reputational Harm," and we therefore focus on the defamation per se component of the claim.

[3]Harris's complaint included two separate claims styled as "theft" and "business theft." However, at trial, these claims were addressed in a single jury instruction on "theft/conversion" and "corporate theft/conversion,"

against Del Casal and Franklin as well as a claim for breach of contract against Del Casal. To establish that Del Casal and Franklin were subject to secondary liability, Harris asserted a claim against them for civil conspiracy.

Following a five-day jury trial, the jury returned a verdict in favor of Harris on all claims. The jury awarded Harris a total of $13,600 in damages against Del Casal, itemizing the damages as follows: (1) $1,000 for defamation per se, (2) $4,500 for lost business opportunities, (3) $8,100 for lost profits, (4) $0 for breach of contract, and (5) $0 for conversion. The jury also awarded Harris a total of $7,250 in damages against Franklin, itemizing the damages as follows: (1) $500 for defamation per se, (2) $2,250 for conversion, (3) $2,250 for lost profits, and (4) $2,250 for lost business opportunities. After the district court entered judgment on the jury's verdict, Del Casal and Franklin filed the appeal in Docket No. 85660-COA to challenge the judgment.

Harris then filed a post-judgment motion for attorney fees, citing to NRCP 68 and NRS 18.010(2)(a) and (b) as the bases for the award, which Del Casal and Franklin opposed. At the hearing that followed, the district court orally ruled that Harris could not recover attorney fees pursuant to NRCP 68 because his conditional offer of judgment required Del Casal and Franklin to agree to a permanent injunction against them. However, the district court further reasoned that Harris could recover attorney fees as the prevailing party in the underlying proceeding and directed the parties to provide supplemental briefing on the reasonableness of only those attorney fees that were attributable to a third-party attorney

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which set forth the elements of a claim for conversion. Consequently, we discuss these claims herein as a single claim for conversion.

who represented Harris during the underlying proceedings based on the factors set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). Following supplemental briefing, the district court conducted a second hearing where it orally awarded Harris $2,500 in attorney fees in connection with the third-party attorney's representation. Thereafter, in February 2023, the district court entered a written order that summarily awarded Harris $2,500 in attorney fees. Del Casal and Franklin then moved to set aside the portion of the February 2023 order awarding Harris attorney fees pursuant to NRCP 60(b)(1), arguing that the district court failed to identify the legal basis for the attorney fees award. Harris opposed that request, which the district court denied insofar as it related to the attorney fees award, finding that the February 2023 order accurately conveyed the court's oral ruling at the second hearing on Harris's request for attorney fees.[4] Del Casal and Franklin filed the appeal in Docket No. 86644-COA to challenge the February 2023 order awarding Harris attorney fees.

Docket No. 85660-COA

As discussed above, in Docket No. 85660-COA, Del Casal and Franklin challenge the judgment on the jury verdict. They initially contend that their defamatory statements were not actionable in the context of a claim for defamation per se because the statements concerned the cost and quality of ERDF's services, and, therefore, needed to be addressed in the

[4]As mentioned above, Senior Judge James M. Bixler entered the February 2023 order, which memorialized the oral decision to award attorney fees by Senior Judge Michael A. Cherry who conducted the second hearing on Harris's motion for attorney fees. Judge Jacob A. Reynolds entered the written order resolving Del Casal and Franklin's motion for NRCP 60(b)(1) relief.

context of Harris's claim for business disparagement. We review questions of law de novo. *Ene v. Graham*, 140 Nev., Adv. Op. 26, 546 P.3d 1232, 1236 (2024).

Although claims for defamation per se and business disparagement are similar insofar as they impose liability for injuries sustained due to the publication of false statements to third parties, the two claims protect different interests. *See Clark Cnty. Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 385-86, 213 P.3d 496, 503-04 (2009) (setting forth the elements of defamation per se and business disparagement and comparing the interests protected by each). In particular, a claim for defamation per se generally protects the plaintiff's personal reputation while a claim for business disparagement protects the plaintiff's economic interests against injurious falsehoods that concern its goods and services and interfere with business. *Id.* at 385, 213 P.3d at 504. "Thus, if a statement accuses an individual of personal misconduct in his or her business or attacks the individual's personal reputation, the claim may be one for defamation per se; however, if the statement is directed towards the quality of the individual's products or services, the claim is one for business disparagement." *Id.* at 385-86, 213 P.3d at 504.

Here, Harris presented evidence of many false statements concerning the cost and quality of ERDF's services, which were portrayed as expensive, predatory, and unlawful as well as inconsistent with those it once provided. As a result, the statements supported an actionable claim for business disparagement. *See id.* However, those statements also supported an actionable claim for defamation per se because they implied that Harris was operating ERDF in a manner that amounted to misconduct or even a fraud upon the public. *See* Restatement (Second) of Torts § 623A

cmt. g (Am. Law Inst. 1977) (stating that claims for defamation and business disparagement may overlap and explaining that statements about a business or its services may support a claim for defamation where the statements fairly imply an imputation that the "plaintiff is dishonest or lacking in integrity or that he is perpetrating a fraud upon the public by selling something that he knows to be defective"); *see also see Clark Cnty. Sch. Dist.*, 125 Nev. at 385, 213 P.3d at 504. Moreover, additional defamatory statements were made that accused Harris of being dishonest and untrustworthy, which were likewise actionable in the context of his claim for defamation per se given that they impugned his reputation. *See Clark Cnty. Sch. Dist.*, 125 Nev. at 385, 213 P.3d at 504. Consequently, Del Casal and Franklin have not presented a basis for relief in this respect. *See Ene,* 140 Nev., Adv. Op. 26, 546 P.3d at 1236.

Del Casal and Franklin further assert that the district court should have found that Harris was a limited-purpose public figure, an argument they advance in an effort to show that Harris was required to establish actual malice to satisfy the intent element of his claim for defamation per se. *See Pegasus v. Reno Newspapers*, 118 Nev. 706, 718-20, 57 P.3d 82, 90-91 (2002) (explaining that, to prevail on a claim for defamation against a limited-purpose public figure, the plaintiff must establish actual malice by showing that the defendant's defamatory statement was made with "knowledge that it was false or with reckless disregard of whether it was false or not" (alteration omitted)); *see also Tesla, Inc. v. Tripp*, 487 F. Supp. 3d 953, 970 (D. Nev. 2020) (stating that whether a plaintiff is a limited-purpose public figure is a question of law for the court to decide).

"A limited-purpose public figure is a person who voluntarily injects himself or is thrust into a particular public controversy or public concern, and thereby becomes a public figure for a limited range of issues." *Pegasus*, 118 Nev. at 720, 57 P.3d at 91. A plaintiff is a limited-purpose public figure if the following factors are satisfied: (1) "a public controversy existed when the statements were made," (2) "the alleged defamation is related to the plaintiff's participation in the controversy," and (3) "the plaintiff voluntarily injected itself into the controversy for the purpose of influencing the controversy's ultimate resolution." *Planet Aid, Inc. v. Reveal*, 44 F.4th 918, 925 (9th Cir. 2022); *see also Pegasus*, 118 Nev. at 720, 57 P.3d at 91 (stating that the test for evaluating whether a plaintiff is a limited-purpose public figure includes considering whether the plaintiff's "role in a matter of public concern is voluntary and prominent").

To establish that a public controversy existed when they made their defamatory statements, Del Casal and Franklin vaguely assert that, after Harris acquired ERDF, there was a public controversy on the internet concerning the cost and competency of ERDF's services.[5] However, aside from the evidence adduced at trial concerning Del Casal's and Franklin's defamatory statements, no evidence was presented to establish that there

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[5]Del Casal and Franklin also briefly refer to a newspaper article and television story concerning ERDF from before Harris acquired the business, but they do not present any cogent argument concerning how the newspaper article and television story were relevant for purposes of the limited-purpose public figure analysis. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 160 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that "[i]ssues not raised in an appellant's opening brief are deemed waived"); *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (declining to consider issues that are not supported by cogent argument).

was any form of public discussion surrounding ERDF after Harris acquired the business, much less one that rose to the level of a public controversy. *See Planet Aid*, 44 F.4th at 925 (explaining that a public controversy is "a real dispute, the outcome of which affects the general public or some segment of it"). Insofar as Del Casal and Franklin are attempting to establish the existence of a public controversy based on their own defamatory statements, their efforts are unavailing since the predicate public controversy needed to exist when the statements were made, *see Planet Aid*, 44 F.4th at 925, and "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure," *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979).

Because Del Casal and Franklin have failed to establish that a public controversy existed when they made their defamatory statements, they have not demonstrated that the district court should have found Harris was a limited-purpose public figure. *See Planet Aid*, 44 F.4th at 925; *see also Pegasus*, 118 Nev. at 720, 57 P.3d at 91; *see also Ene*, 140 Nev., Adv. Op. 26, 546 P.3d at 1236. Consequently, relief is unwarranted in this respect.[6]

The next argument is brought solely by Franklin in connection with the verdict on Harris's conversion claim. Franklin essentially asserts that Harris's theory of liability was that he exercised wrongful dominion and control over web traffic that would have ordinarily accessed ERDF's website by modifying the Google listing for ERDF to redirect said web traffic

[6]Given that Del Casal and Franklin failed to establish that Harris was a limited-purpose public figure, their follow-on arguments concerning instructions that they believe should have been submitted to the jury based on Harris's purported status as a limited-purpose public figure likewise fail.

to the rogue website. Franklin maintains that this theory of liability does not support an actionable conversion claim because web traffic is not personal property. *See M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 910-11, 193 P.3d 536, 542-43 (2008) (providing that conversion requires a wrongful exertion of dominion over the plaintiff's personal property in derogation of his or her rights and adopting the test set forth in *Kremen v. Cohen*, 337 F.3d 1024, 1030 (9th Cir. 2003), for determining whether a property right exists). Although Harris maintains that the jury properly found that Franklin was liable for conversion based on his exercise of wrongful dominion over web traffic, Harris does not acknowledge, much less attempt to address, Franklin's argument that web traffic does not constitute personal property. As a result, Harris waived any argument that Franklin could properly be held liable for conversion for exercising wrongful dominion over web traffic. *See SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 135 Nev. 346, 352 n.4, 449 P.3d 461, 466 n.4 (2019) (concluding that respondent waived an issue by failing to address it on appeal). And because he does not offer any other viable basis on which the jury could properly find against Franklin on the conversion claim, we reverse the judgment on the jury verdict on the conversion claim against Franklin.

The next argument concerning the judgment on the jury verdict is brought by both Del Casal and Franklin. In particular, they maintain that Harris, who represented himself during most of the trial in this matter, committed misconduct by making an improper golden rule argument. *See Lioce v. Cohen*, 124 Nev. 1, 22, 174 P.3d 970, 984 (2008) (defining a golden rule argument as "an argument asking jurors to place themselves in the position of one of the parties"). Del Casal and Franklin are correct. *See*

Evans-Waiau v. Tate, 138 Nev. 423, 429, 511 P.3d 1022, 1028 (2022) ("We review whether an attorney's comments constitute misconduct de novo."). However, the district court followed the appropriate procedure for addressing attorney misconduct, as the court sustained their objection, admonished Harris, and instructed the jury to disregard his argument in this respect. *See Lioce*, 124 Nev at 17, 174 P.3d at 980 (requiring the district court to take the foregoing actions in addressing objected-to attorney misconduct).

Under these circumstances, Del Casal and Franklin bear the burden of demonstrating that Harris's misconduct was "so extreme that the objection and admonishment could not remove the misconduct's effects." *See id.* at 17, 174 P.3d at 981 (stating the foregoing as the burden that must be met when a party moves for a new trial based on objected-to and admonished misconduct). However, Del Casal and Franklin fail to cogently argue why reversal is warranted in this case. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

Del Casal and Franklin further argue that the damages awards for lost profits and lost business opportunities were not supported by substantial evidence. But in so doing, they fail to meaningfully address the evidence presented at trial. Instead, Del Casal and Franklin contend that Harris improperly relied on testimony from his son, Cam Harris, to establish these categories of damages rather than documentary evidence. However, testimony is evidence. *In re Dish Network Derivative Litig.*, 133 Nev. 438, 445 n.3, 401 P.3d 1081, 1089 n.3 (2017) ("[T]estimony is evidence whether it is given in court or a deposition."). Thus, this argument is without merit.

Del Casal and Franklin additionally suggest that damages for lost profits and lost business opportunities could not properly be awarded in this case because the jury did not award any damages in connection with Harris's breach of contract claim and there was no evidence to show that they usurped a business opportunity. However, the specific types of damages that Harris sought to recover as lost profits and lost business opportunities were available in connection with Harris's business disparagement claim. *See Clark Cnty. Sch. Dist.*, 125 Nev. at 386-87, 213 P.3d at 504-05 (stating that, to establish special damages for purposes of a business disparagement claim, the plaintiff may present evidence showing a general decline of business that solely resulted from the disparaging statements); Restatement (Second) of Torts § 633 (Am. Law Inst. 1977) (listing "the expense of measures reasonably necessary to counteract" a disparaging statement as additional damages that may be recovered in the context of a business disparagement claim). And Del Casal and Franklin do not address the propriety of a damages award for lost profits and lost business opportunities in the context of a claim for business disparagement. Thus, they have waived any such argument. *See Powell*, 127 Nev. at 160 n.3, 252 P.3d at 672 n.3.

Turning to Del Casal's and Franklin's remaining arguments concerning the judgment on the jury verdict, they contend that the district court improperly did the following: (1) admitted testimony from Cam concerning certain special damages even though he did not submit a corresponding computation of damages in accordance with NRCP 16.1(a)(1)(A)(iv); (2) failed to instruct the jury that the author of a defamatory statement is not liable for a third party's subsequent publication of the statement; (3) failed to instruct the jury concerning the

definitions of special damages, lost business opportunities, and lost profits and when each is available; and (4) submitted verdict forms to the jury that allowed it to make combined damages awards to both Harris and his law firm.

However, Del Casal and Franklin failed to preserve these remaining arguments for appellate review because they did not raise contemporaneous objections during the underlying proceeding. *See* NRS 47.040 (requiring a party who objects to the admission of testimony to make a timely objection or motion to strike); NRCP 51(c)(1) (requiring objections to jury instructions to be raised on the record before the instructions are submitted to the jury); *Bldg. Trades Counsel v. Thompson*, 68 Nev. 384, 409, 234 P.2d 581, 593 (1951) (providing that "objections to the form of verdict are deemed waived if no objection is made at the time"). Insofar as Del Casal and Franklin assert that we may review the purported deficiencies in the underlying proceeding for plain error, they waived the issues by waiting to raise them until their reply brief. *See Powell*, 127 Nev. at 160 n.3, 252 P.3d at 672 n.3. Regardless, Del Casal and Franklin have either failed to identify defects in the underlying proceeding that were so unmistakable from a casual inspection of the record as to amount to plain error, *see Williams v. Zellhoefer*, 89 Nev. 579, 580, 517 P.2d 789, 789 (1973), (observing that an error is plain if it "is so unmistakable that it reveals itself by a casual inspection of the record"), or have not otherwise demonstrated that any defects affected their substantial rights, *see, e.g.*, NRCP 51(e)(2) (authorizing consideration of unpreserved challenges to jury instructions based on plain error affecting a party's substantial rights).

Based on the foregoing analysis, in Docket No. 85660-COA, we reverse the judgment on the jury verdict against Franklin on the conversion claim and we affirm all other aspects of the decision.[7]

Docket No. 86644-COA

In Docket No. 86644-COA, Del Casal and Franklin challenge the portion of the February 2023 order awarding Harris attorney fees, arguing that the district court improperly failed to identify the legal basis for the award. The district court may not award attorney fees unless authorized by statute, rule, or contract. *Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 417, 132 P.3d 1022, 1028 (2006). "The failure of a district court to state a basis for the award of attorney fees is an arbitrary and capricious action and, thus, is an abuse of discretion." *See Henry Prods. Inc. v. Tarmu*, 114 Nev. 1017, 1020, 967 P.2d 444, 446 (1998).

As discussed above, Harris moved for attorney fees pursuant to NRCP 68 and NRS 18.010(2)(a) and (b). At the second hearing on that motion, the district court orally ruled that Harris could not recover attorney fees pursuant to NRCP 68 because his offer of judgment was invalid for purposes of that rule since it was conditioned on Del Casal and Franklin agreeing to an injunction against them. *See Pombo v. Nev. Apartment Ass'n*, 113 Nev. 559, 562, 938 P.2d 725, 727 (1997) ("An offer of judgment must be unconditional and for a definite amount in order to be valid for purposes of NRCP 68"). The district court nevertheless reasoned that Harris could recover attorney fees because he was the prevailing party in the underlying

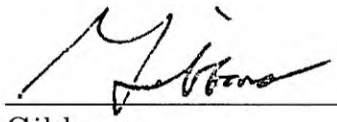
[7]We need not consider appellants' cumulative error argument as there are not multiple errors to cumulate. *See Burnside v. Slate*, 131 Nev. 371, 407, 352 P.3d 627, 651 (2015) (explaining that cumulative error requires multiple errors to cumulate).

proceeding, which is one of the prerequisites for an award of attorney fees pursuant to NRS 18.010(2). However, the prevailing party may only recover attorney fees pursuant to NRS 18.010(2) if he or she also meets the requirements set forth in subsections (a) or (b) of that statute, which respectively authorized the district court to award Harris attorney fees if he recovered less than $20,000 or if the district court found that Del Casal and/or Franklin brought or maintained their defenses "without reasonable ground or to harass" Harris.

Although the district court did not provide any indication of whether its decision to award Harris attorney fees was based on NRS 18.010(2)(a) or (b), attorney fees were not available to Harris under NRS 18.010(2)(a) since the total judgment against Del Casal and Franklin exceeded $20,000. *See, e.g., Parodi v. Budetti*, 115 Nev. 236, 241-42, 984 P.2d 172, 175-76 (1999) (providing that the total value of a judgment determines the applicability of NRS 18.010(2)(a), and calculating that figure by subtracting the sum of the damages in favor of defendants on their counterclaims from the sum of the damages in favor of plaintiff on his claims); *Peterson v. Freeman*, 86 Nev. 850, 880, 477 P.2d 876, 855-56 (1970) (reasoning that NRS 18.010(2)(a) was inapplicable because the plaintiffs' joint recovery on their claim exceeded the statutory amount). The foregoing arguably suggests that the district court awarded Harris attorney fees pursuant to NRS 18.010(2)(b). But even if the district court relied on that authority as the basis for the attorney fees award, it failed to make any findings that Del Casal and Franklin brought or maintained their defenses without reasonable ground or to harass Harris, which was an abuse of discretion. *See* NRS 18.010(2)(b); *see also Henry Prod. Inc.*, 114 Nev. at 1020, 967 P.2d at 446. Therefore, we reverse the award of attorney fees and

remand to the district court for further findings to support such an award in light of our disposition. Accordingly, we

ORDER the district court's judgment on the jury verdict, which is challenged in Docket No. 85660-COA, AFFIRMED IN PART AND REVERSED IN PART, and in Docket No. 86644-COA, we REVERSE the district court's post-judgment order awarding attorney fees and REMAND for proceedings consistent with this order.[8]



_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. James M. Bixler, Senior Judge
Hon. David M. Jones, District Judge
Hon. Jacob A. Reynolds, District Judge
Ernest Del Casal
Michael Franklin, Jr.
Kurt K. Harris, Esq., P.C.
Eighth District Court Clerk

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[8]Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.