IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

CBHG MANAGEMENT, S.A. DE C.V., A FOREIGN CORPORATION; CHOLLA BAY HOTEL GROUP, AN ARIZONA CORPORATION; DESERT SPRINGS EQUESTRIAN CENTER, LLC, AN ARIZONA LIMITED LIABILITY COMPANY; AND LORILEI PETERS, IN HER INDIVIDUAL CAPACITY,
Plaintiffs/Appellants,

v.

FARM BUREAU FINANCIAL SERVICES, A FOREIGN CORPORATION, AND PAUL CULLY,
Defendants/Appellees.

No. 2 CA-CV 2020-0111
Filed August 6, 2021

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20161278
The Honorable Brenden J. Griffin, Judge

AFFIRMED

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MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Eppich and Chief Judge Vásquez concurred.

B R E A R C L I F F E, Judge:

¶1 Appellants Cholla Bay Hotel Group LLC; CBHG Management S.A. DE C.V.; Desert Springs Equestrian Center LLC ("DSEC"); and Lorilei Peters (collectively "CBHG") appeal from the trial court's grant of summary judgment in favor of appellees, Farm Bureau Financial Services, its "affiliate," Western Agricultural Insurance Company, and Paul Cully (collectively "Farm Bureau"), and the ultimate dismissal of its claims. We affirm.

Factual and Procedural Background

¶2 On review of the grant of summary judgment, "[w]e view the facts and all reasonable inferences therefrom in the light most favorable to the party opposing summary judgment." *Martin v. Schroeder*, 209 Ariz. 531, ¶ 2 (App. 2005). CBHG sued Farm Bureau and Cully for tortious interference in business expectancy and contract, and defamation.

¶3 In its complaint, CBHG alleged that a Mexican government agency had approved it to hold and use a gaming license within Mexico. It further alleged that it had received approval for a fifteen-million-dollar loan to construct a hotel and casino in Puerto Peñasco, a coastal town in the state of Sonora. That development loan was, according to the complaint, guaranteed by the Mexican government and funded by a group of commercial banks, Grupo Financiero IMBURSA ("GFI"), each of which had hired private investigators to conduct background investigations of CBHG.

¶4 CBHG claimed that the investigators contacted Farm Bureau and its agent Cully regarding an insurance claim made by DSEC, through its principal, Peters, who was also a principal of CBHG. CBHG's complaint asserted that once contacted, Farm Bureau and Cully provided a letter to

the investigators that "recklessly made false allegations of criminal conduct on behalf of Ms. Peters in connection with an allegedly fraudulent theft claim" made on behalf of DSEC. CBHG alleged that Farm Bureau and Cully filed a criminal referral with the National Insurance Crime Bureau ("NICB") and the Arizona Department of Insurance ("DOI"), allegedly "making false criminal allegations against Lorilei Peters and DSEC among others" amounting to defamation. CBHG claimed the development loan was denied due to negative information provided by Farm Bureau. At the close of discovery, Farm Bureau filed a motion for summary judgment seeking dismissal of CBHG's claims.

¶5 Regarding the tortious interference claim, Farm Bureau asserted that CBHG had failed to produce admissible evidence supporting the existence of the loan, hotel franchise, or gaming license, and that the documents that were produced could not be authenticated and some bore "several hallmarks of being a forgery." This, it claimed, defeated CBHG's claim of a business expectancy. It also asserted that, in light of the forged documents, summary judgment was appropriate as a sanction.

¶6 As to the defamation claim, Farm Bureau asserted that Cully had not published the purportedly defamatory documents as required for such a claim, and that the criminal referral of DSEC's insurance claim to the DOI was privileged. It also asserted that CBHG's defamation claims were time-barred and the allegations that the criminal referral was in bad faith were precluded by res judicata.

¶7 The trial court's grant of summary judgment was "[f]or all the reasons that [Farm Bureau's] Motion for Summary Judgment states." It further stated that CBHG's "business-expectancy claims are too attenuated, speculative." The court entered final judgment in favor of Farm Bureau as to all claims, pursuant to Rule 54(c), Ariz. R. Civ. P. CBHG then appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 12-2101(A)(1).

Analysis

¶8 We review the trial court's grant of summary judgment de novo, *Martin*, 209 Ariz. 531, ¶ 6, and summary judgment may be granted "if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law," Ariz. R. Civ. P. 56(a). However, we "deferentially review[] the evidentiary rulings of the trial court and affirm[] unless [we] find clear abuse of discretion or legal error, and prejudice." *Mohave Elec. Coop., Inc. v. Byers*, 189 Ariz. 292, 301 (App. 1997). On appeal, CBHG claims that the trial

court erred in rejecting admissible evidence and finding that CBHG's business-expectancy claim was too attenuated and speculative. CBHG further claims that the court erred in not addressing its defamation claim.

Dismissal of Intentional Interference Claims

¶9 To prove the tort of intentional interference with business expectancy and contract, CBHG principally must show "the existence of a valid contractual relationship or business expectancy." *See Wallace v. Casa Grande Union High Sch. Dist. No. 82 Bd. of Governors*, 184 Ariz. 419, 427 (App. 1995). "[A]n action for . . . interference with a business relationship requires a business relationship evidenced by an actual and identifiable understanding or agreement which in all probability would have been completed if the defendant had not interfered." *Dube v. Likins*, 216 Ariz. 406, ¶ 19 (App. 2007) (quoting *Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So. 2d 812, 815 (Fla. 1994)).

¶10 CBHG argues that the trial court abused its discretion in determining that the documents on which it relied for its interference claims were inadmissible for lack of authentication. The court specifically addressed, and the parties discussed, four specific exhibits identified by the parties as the Mexico Documents, the Villa Letter,[1] the License Transfer Agreement, and the FNS Loan Letter.

Authenticity standard

¶11 CBHG argues that the trial court applied an incorrect legal standard in determining the admissibility of documents when it stated that CBHG "must prove that the item is what the party claims it is." CBHG asserts that Rule 901, Ariz. R. Evid., does not require a party to prove that

[1] DSEC disclosed a letter dated September 11, 2013, written in Spanish, and addressed to Lastiri from Villa, which discusses a fifteen-million-dollar loan that had been denied due to unfavorable information about Peters contained in a letter from Farm Bureau. In its opening brief, CBHG does not make any argument regarding this letter, beyond stating that it was sent to Lastiri by Villa. The trial court determined that this letter was inadmissible, and, because CBHG does not argue in its opening brief, only in its reply brief, that it is admissible, we do not address or consider it. *See Dawson v. Withycombe*, 216 Ariz. 84, ¶ 91 (App. 2007) ("We will not consider arguments made for the first time in a reply brief.").

an item is what it contends it is. It asserts that, instead, it must only produce "some evidence" from which the trier of fact could reasonably conclude that the document is authentic.

¶12 In its ruling, the trial court stated, as quoted above, that the documents CBHG relied on "lack[ed] authenticity and foundation to be admitted into evidence so as to allow a reasonable jury to rely on them to decide in Plaintiffs' favor on their defamation and business-expectancy claims." It also stated that, even if the documents were "verbal acts"—that is, non-testimonial exhibits not offered for their truth—authentication and foundation were still required.

¶13 Under Rule 901(a) "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Such authentication and identification are conditions precedent to admissibility. *See Cavallo v. Phoenix Health Plans, Inc.*, 250 Ariz. 525, ¶ 36 (App. 2021). The trial judge must determine whether the record contains sufficient evidence to support a jury finding that the offered evidence is what the proponent claims it is. *See Taeger v. Catholic Family & Comty. Servs.*, 196 Ariz. 285, ¶ 40 (App. 1999). In doing so, "[t]he judge does not determine whether the evidence is authentic, but only whether evidence exists from which the jury could reasonably conclude that it is authentic." *State v. Lavers*, 168 Ariz. 376, 386 (1991). When considering whether evidence has been properly authenticated, the court may "consider the unique facts and circumstances in each case—and the purpose for which the evidence is being offered." *State v. King*, 226 Ariz. 253, ¶ 9 (App. 2011) (quoting *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 14 (App. 2008)).

¶14 The trial court, by examining whether sufficient evidence of the authenticity of multiple key documents had been brought forward such as to allow a reasonable jury to rely on those documents, applied the correct standard. As discussed more fully below as to the discrete documents in question, it simply determined that CBHG, as the proponent of the authenticity of the material, had failed to bring forward sufficient evidence.

The Mexico Documents

¶15 In 2010, DSEC claimed a theft of over $250,000 in personal property, which Farm Bureau denied. During that litigation, a sixty-five-page packet of documents, which included Farm Bureau's denial of DSEC's claim, was produced (the "Mexico Documents"). In the current litigation,

CBHG claims that Cully provided this sixty-five-page packet to the Mexican government investigators. The defamatory document within this packet, CBHG claims, caused its expected loan to be denied.

¶16 In its motion for summary judgment, Farm Bureau asserted that CBHG had failed to authenticate this document as what it claimed it was; namely, a document published to, and at one time in the possession of, the Mexican authorities. CBHG had asserted that two men, Victor Villa and Enrique Lastiri, were in the room during a conference call with Cully when Cully said that he would provide the Mexico Documents to the Mexican Federal Government and GFI. CBHG further claimed that a "runner for the Mexican consulate picked the documents up" from the Farm Bureau offices. But Farm Bureau argued that CBHG had "refused to identify the alleged 'runner,' or any witness at the 'Mexican consulate' who can testify about documents being picked up." Further, CBHG had "even refused to identify the source of their information for this highly specific allegation." In response, CBHG admitted that it had "not provided the identity" of the runner (because it did not know his identity), but that the source of the allegation was "documents received" by CBHG and Lastiri's notarized statement.

¶17 On appeal, and below, CBHG claims that the official Sonoran government stamp on the first page of the sixty-five-page packet was evidence that the entirety of the Mexico Documents, including the document bearing the purportedly defamatory statements, were received by a Sonoran government office. CBHG did not, however, identify any witness who was able to testify that either the entire packet or even its first page, as stamped, came from the Mexican government. It claims, nonetheless, that the "distinctive characteristics" of the stamp provide preliminary authenticity under Rule 901(b)(4), Ariz. R. Evid. Rule 901(b)(4) provides that the distinctive characteristics of an item, including the "appearance, contents, substance, internal patterns, or other distinctive characteristics . . . , taken together with all the circumstances," may provide sufficient authentication. In response, Farm Bureau argues that CBHG "waived" this argument because it does not identify the characteristics of the stamp that make it distinctive.

¶18 CBHG claims that its expert witness, Andres Garcia Montoya, "provided additional authentication when he confirmed the authenticity of that stamp and the document's receipt by the [Sonoran government]" when he spoke "directly with the in-house counsel for that Ministry." Montoya, however, had no personal knowledge of the stamp or of the receipt of the documents by the Sonoran government. He merely stated that he had

verified that the seal belonged to the ministry when he spoke with the attorney for that ministry. We agree that the Mexico Documents do not satisfy Rule 901, Ariz. R. Evid. Absent testimony from someone that has personal knowledge regarding the ministry stamp on the first page of the packet, its effect, and publication of the defamatory material to the ministry, CBHG could not authenticate the Mexico Documents as what it propounded them to be.

¶19 Simply stating that the documents have a government stamp on the first of sixty-five pages and having a third party with no personal knowledge of either the characteristics of the stamp or the ministry's receipt of the documents testify, is not sufficient. Montoya's testimony attesting to a hearsay statement of an unnamed government official is insufficient to authenticate the first page of the packet, let alone the other sixty-four pages. Although an expert witness may base his testimony on hearsay in certain circumstances, he may not base his opinion on "hearsay sources of information in acquiring factual knowledge of the specific subject on which he is to testify." *Ehman v. Rathbun*, 116 Ariz. 460, 463 (App. 1977); *see Hernandez v. Faker*, 137 Ariz. 449, 453 (App. 1983) (expert witness may testify to hearsay as basis for his opinion if the facts and data are of type reasonably relied on by experts in that field). Furthermore, a testifying expert may not "merely act[] as a conduit for another non-testifying expert's opinion." *State v. Lundstrom*, 161 Ariz. 141, 148 (1989). Montoya served as nothing other than a conduit for hearsay statements authenticating the stamp, and his entire "expertise" as to the authenticity of the government stamp was the hearsay itself. Absent competent evidence that the Mexican government had received the offered documents, the trial court did not abuse its discretion in deeming them inadmissible.

Casino License Transfer Agreement

¶20 In its motion for summary judgment, Farm Bureau asserted that CBHG had failed to produce any evidence of its expectancy of operating a casino in Mexico. In opposition, CBHG offered a document it referred to as a License Transfer Agreement, which it characterized as proof of its business expectancy. On its face, the translation of the document purports to transfer a federal gaming license from a named entity to CBHG. Farm Bureau asserted that CBHG had no witness to testify that the document was authentic. To authenticate the document, CBHG offered only the purported translation of the agreement.

¶21 On appeal, CBHG claims that the License Transfer Agreement is "a letter from the State of Sonora's Secretaria de Hacienda, bearing that

agency's official seal/stamp, [and]t . . . confirming a 'binding agreement' for CBHG to operate under a Mexican federal gaming license held by another named entity." It is signed by Peters, and, CBHG claims, a "Mexican government legal representative." CBHG appears to maintain on appeal that the License Transfer Agreement is self-authenticating. But such foreign public documents are not self-authenticating, and CBHG otherwise failed to authenticate this exhibit. *See* Ariz. R. Evid. 902(3).

¶22 CBHG also claims that the declaration of Mario Aranda authenticated the License Transfer Agreement. In this declaration, Aranda states that he is the CEO of "Impulsor—Sonora Government Strategic Project Operator" and, as such, he promotes and executes agreements for the State of Sonora including the transfer of gaming licenses. Further, he asserts that he had worked to ensure CBHG would be able to build their hotel and casino and that CBHG had the right to operate under another named entity's gaming license permit. This declaration, however, was filed *after* the trial court granted summary judgment. "On review, this court only considers the evidence presented to the trial court when the motion was heard and does not consider any evidence introduced later." *Nelson v. Nelson*, 164 Ariz. 135, 138 (App. 1990). And, although the court granted CBHG leave to supplement the record with the declaration, CBHG did not seek reconsideration of the court's grant of summary judgment in light of it, and the court did not revisit the issue.

¶23 Therefore, by offering the License Transfer Agreement without producing any other evidence that would support a finding that the document is what CBHG says it is, CBHG did not authenticate the document under Rule 901, Ariz. R. Evid. The trial court did not abuse its discretion in determining that the License Transfer Agreement lacked authenticity and foundation.

FNS Loan Letter

¶24 CBHG argues that the trial court erred in determining that a letter from FNS stating that CBHG's financing application was approved in the amount of fifteen million dollars, accepted by signature of Troy Pearce, Peters' business partner, is inadmissible. CBHG claims on appeal that this exhibit was authenticated under Rule 901 by the sworn testimony of Peters that she had "previous discussions with [FNS] committee members and their assistants." Both in its motion below and here, Farm Bureau asserts that CBHG is unable to authenticate the document.

¶25 Again, CBHG fails to acknowledge that Rule 901(b)(1) states that a witness "with knowledge" who testifies that an item is what it is claimed to be may be sufficient to support a finding of admissibility. Peters is not a member of FNS, and she merely testified that she had received this letter and it was consistent with conversations she previously had with FNS committee members. Peters does not have enough direct knowledge of this document to provide sufficient testimony to support a finding that it is what CBHG claims it is—namely, a document from FNS approving the loan.[2] The trial court did not abuse its discretion in determining that this unauthenticated FNS loan letter would be inadmissible.

Exhibits Not Addressed by Trial Court

¶26 CBHG argues that a number of documents that the trial court did not address in its order granting summary judgment create a genuine issue of material fact regarding the validity of their loan.[3] We do not agree.

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[2]CBHG also claims that "the residual exception to the Hearsay Rule[] would allow admissibility of the documents because, even if hearsay, they are supported by sufficient guarantees of trustworthiness after considering the totality of the circumstances under which those documents were authored." CBHG, however, makes mere generalized claims that this rule applies. By failing to make specific arguments, it has waived this argument on appeal. *See* Ariz. R. Civ. App. P. 13(a)(7) (requiring all arguments to contain supporting reasons for each contention); *Ritchie v. Krasner*, 221 Ariz. 288, ¶ 62 (App. 2009) (failure to comply with Rule 13(a)(6) may constitute abandonment and waiver of claim). It has also waived any argument that the exhibits are admissible under the "verbal act doctrine" because it makes this argument solely in its reply brief. *Dawson v. Withycombe*, 216 Ariz. 84, ¶ 91 (App. 2007) ("We will not consider arguments made for the first time in a reply brief.").

[3]In the statement of facts in its opening brief, CBHG cites to a number of emails and letters for the proposition that it was approved for a loan, and approved for and issued a franchise for a hotel by Intercontinental Hotel Group. However, it does not assert that these exhibits are included in the body of "sufficient evidence" it presented. We thus do not consider them. *See* Ariz. R. Civ. App. P. 13(a)(7); *Ritchie*, 221 Ariz. 288, ¶ 62. CBHG also claims that its business expectancy is best evidenced by a $50,000 payment "to the hotel group." However, it cites to no exhibits nor provides any specific argument in support of this proposition. Therefore, we do not consider it. *See* Ariz. R. Civ. App. P. 13(a)(7) (appellant must cite to legal

¶27 CBHG claims that a June 2011 letter from Antonio Proto "in his capacity as the State of Sonora's Director of Promotion of Tourism Development" establishes "fact issues about whether or not [CBHG] had a reasonable contractual expectancy of obtaining final financing to complete the intended hotel/casino project." This letter does not, however, identify CBHG as the loan recipient, but rather identifies "Luis Lugo" and "Alfonso Arroyo" as the loan recipients. Proto's declaration asserts that the letter states Peters and CBHG had been approved for funding. Neither CBHG nor Proto's declaration adequately explain, or even address, why the letter does not state that Peters or CBHG were approved for funding.

¶28 CBHG also argues that a "claim note" written by Timothy Lanser, an adjuster for Farm Bureau, shows that CBHG "had secured a multimillion-dollar loan in order to build a casino and hotel in Puerto Penasco." The note, which CBHG only produced part of, provided in one of its ten paragraphs that "Insured is a partner in building a 9 Million Dollar hotel casino in Rocky Point . . . . Funding just got approved by Javiar Tapia." Even assuming this document could be authenticated and admissible to prove the truth of the matter asserted, it does not prove the existence of the fifteen-million-dollar loan CBHG claims it secured. Such a document, especially given the absence of any other supporting evidence of such a substantial loan, is not sufficient to create an issue of fact regarding the existence of CBHG's funding.

¶29 The trial court's grant of summary judgment to Farm Bureau as to CBHG's claim of intentional interference with a business expectancy or contract was proper. CBHG was unable to produce admissible evidence below to create a genuine issue of material fact as to the existence of a valid contractual relationship or business expectancy.

Defamation

¶30 Lastly, CBHG argues that the trial court cited no basis to dismiss its defamation claim, which was based on its allegation that Farm Bureau filed a criminal fraud charge about Peters with the NICB. "A private person suing for defamation must prove a defendant (1) published a false and defamatory statement concerning the person, (2) knew the statement was false and defamed the other, and (3) acted in reckless

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authorities and references to portions of record on which appellant relies); *Ritchie*, 221 Ariz. 288, ¶ 62.

disregard of these matters or negligently failed to ascertain them." *Rogers v. Mroz*, 250 Ariz. 319, ¶ 24 (App. 2020).

¶31 Again, the trial court granted summary judgment "[f]or all the reasons that [Farm Bureau's] Motion for Summary Judgment states." Farm Bureau's motion claimed that its referral to the Insurance Fraud Unit of the DOI was privileged pursuant to A.R.S. § 20-466(G). CBHG argues that Farm Bureau's affirmative defense of privileged publication is a question of fact.

¶32 Insurance companies have a statutory duty to refer claims they believe to be fraudulent. *See* § 20-466(G). Section 20-466(G) provides that "[a]n insurer that believes a fraudulent claim has been or is being made shall send to the director, on a form prescribed by the director, information relative to the claim." *See also* A.R.S. § 20-102(1) ("'Director' . . . means the director of the department of insurance and financial institutions."). It further provides that any person acting within the scope of employment that, in good faith, files a report pursuant to this section shall not be subject to civil liability for reporting that information. § 20-466(K).

¶33 CBHG claims that the statutory privilege is not applicable because Farm Bureau's initial report was to the NICB, not the DOI. We find no merit to this argument. Cully explained that the NICB's portal is where Farm Bureau enters information that is then sent to the DOI. Further, as Farm Bureau argues, the purpose of filling out the NICB form is to refer this information to the DOI. Indeed, in CBHG's controverting statement of facts in support of its response to Farm Bureau's motion for summary judgment, it states Farm Bureau "entered the [NICB] portal again for the purposes of making a criminal referral to the Department of Insurance."

¶34 "If the moving party on a motion [for summary judgment] has made a prima facie showing that no genuine issue of material fact exists, the opponent of the motion has the burden to produce sufficient evidence that there is indeed an issue." *W.J. Kroeger Co. v. Travelers Indem. Co.*, 112 Ariz. 285, 286 (1975). The facts set forth in the motion are presumed to be true when they are uncontroverted by the opposing party. *Id.* Because Farm Bureau asserted a statutory privilege predicated on its good-faith reporting, CBHG could not simply remain silent as to any evidence of bad faith. CBHG does not cite to any evidence in the record that raises a factual question as to whether Farm Bureau, and Cully, acted in good faith. Nor did it seek, under Rule 56(d), Ariz. R. Civ. P., additional time to pursue such evidence. Accordingly, the trial court did not err by (implicitly) concluding

that Farm Bureau was statutorily privileged in reporting insurance fraud, and thus dismissing CBHG's defamation claim on this basis.[4]

Attorney Fees

¶35 Farm Bureau requests attorney fees and costs on appeal pursuant to Rule 21, Ariz. R. Civ. App. P. It, however, fails to state the statutory basis for an award of attorney fees. *See Roubos v. Miller*, 214 Ariz. 416, ¶ 21 (2007) (party requesting fees must state statutory or contractual basis for award). We therefore decline Farm Bureau's request for attorney fees. However, as the prevailing party, Farm Bureau is entitled to its costs upon compliance with Rule 21, Ariz. R. Civ. App. P. *See Bell-Kilbourn v. Bell-Kilbourn*, 216 Ariz. 521, ¶ 13 (App. 2007) (prevailing party entitled to costs upon compliance with Rule 21).

Disposition

¶36 For the foregoing reasons, we affirm the trial court's judgment.

[4]Because we affirm the trial court's judgment on these grounds, it is unnecessary to address CBHG's arguments regarding expert testimony and statute of limitations. *See In re Indenture of Trust Dated Jan. 13, 1964*, 235 Ariz. 40, n.6 (App. 2014).