Docket Number 66528

In the

SUPREME COURT

For the

STATE OF NEVADA

GARY SCHMIDT

Appellant,

v.

BEN KIECKHEFER

Respondent

Appeal from a Decision of the Second Judicial District of the State of Nevada,
Washoe County, Court Case No. CV14-01227

APPELLANT'S OPENING BRIEF

Charles R. Kozak, Esq.
Nevada State Bar #11179
3100 Mill Street, Suite 115
Reno, Nevada 89502
(775) 322-1239
chuck@kozaklawfirm.com
Attorney for the Appellant

CORPORATE DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, Appellant GARY SCHMIDT ("Schmidt") hereby certifies that he is an individual person and therefore no corporate disclosure statement is necessary.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

NEVADA CASES

FEDERAL AND OUT OF STATE CASES

NEVADA STATUTES AND RULES

I. STATEMENT OF JURISDICTION

Schmidt submits the following NRAP 28(A)(4) statement of jurisdiction. The Second Judicial District of the State of Nevada Court, Washoe County, (the "District Court") had personal jurisdiction over the parties pursuant to NRS 14.065. Both Schmidt and the appellee, BEN KIECKHEFER ("Kieckhefer"), are Nevada residents who were Republican opponents in the June 10, 2014 primary election. As this matter raises constitutional issues, the District Court had subject matter jurisdiction over the action under Article 6, Section 6 of the Nevada Constitution.

Schmidt seeks review of the District Court's order denying Schmidt's NRS 41.660 Special Motion to Dismiss. NRS 41.670(4) provides for interlocutory appeal from the order, which entered on September 5, 2014. This appeal is timely because Schmidt filed his Notice of Appeal on September 12, 2014, which was within 30 days of service of notice of entry of the order. NRAP 4(a)(1).

II. STATEMENT OF THE ISSUES

Did the District Court err in granting Kieckhefer's temporary restraining order ("TRO")?

Specifically, did the lower court err in finding Kieckhefer likely to suffer irreparable injury to his career and reputation from statements in television advertisements that he "endorsed and supported Harry Reid in 2010"?

Did the lower court fail to apply strict scrutiny to the Constitutional issue of the TRO's function as a prior restraint on free speech?

Did the District Court err in denying Schmidt's NRS 41.660 Special Motion to Dismiss?

Specifically, did the lower court err in finding there was clear and convincing evidence that Kieckhefer had a "probability of showing" that the statement regarding his endorsement and support of Harry Reid was false?

Did the lower court err in finding that Kieckhefer had a "probability of showing" the statement was defamatory because it "could be harmful to the reputation of a Republican politician"?

Did the lower court err in finding that Kieckhefer had a "probability of establishing damages and/or prevailing on the defamation per se claim"?

Did the lower court err in finding Kieckhefer had a "probability of showing that Schmidt's statements were made with knowledge of or reckless disregard for their falsity"?

III. REVIEWABILITY AND STANDARD OF REVIEW

Special motions to dismiss, like motions for summary judgment, are reviewed *de novo. John v. Douglas County Sch. Dist.*, 125 Nev. 746, 753-754, 219 P.3d 1276, 1281-1282 (2009). "Pursuant to NRS 41.660(3)-(4), the district court shall treat the special motion to dismiss as a motion for summary judgment, and its

granting the motion is an adjudication upon the merits." *Id.* The appellate court reviews the issues "without deference to the findings of the lower court." *Wood v. Safeway, Inc.*, 121 Nev. 724, 121 P.3d 1026, 1029 (2005).

"Since the special motion to dismiss is procedurally treated as a summary judgment, the following standards apply. First, the district court can only grant the special motion to dismiss if there is no genuine issue of material fact and 'the moving party is entitled to a judgment as a matter of law'...Second, the nonmoving party cannot overcome the special motion to dismiss 'on the gossamer threads of whimsy, speculation and conjecture.'" *John v. Douglas County Sch. Dist.*, 125 Nev. 746, 753-754, 219 P.3d 1276, 1281-1282 (2009) (internal quotations omitted). The "nonmoving party must provide more than general allegations and conclusions; it must submit specific factual evidence" that demonstrates a genuine issue of fact. *Id.*

IV. STATEMENT OF THE CASE

Schmidt and Kieckhefer were political opponents running for State Senate in the 2014 primary election. On June 6, 2014, Kieckhefer initiated a SLAPP suit by filing a Complaint and Ex Parte application for a TRO. The Complaint alleged Defamation and sought a TRO based on a statement Schmidt made in a political television advertisement that Kieckhefer "endorsed and supported Harry Reid in 2010." (Appellant's Appendix, Ex. 2 at p. 000005.)

The District Court entered its order granting the TRO, finding that Kieckhefer was "likely to suffer irreparable injury to his career and reputation from [the] television advertisements," and ordered that the ads be withdrawn. (Appellant's Appendix, Ex. 14 at p. 000042.)

Schmidt subsequently filed a Special Motion to Dismiss Kieckhefer's Complaint on grounds that it was a meritless SLAPP suit and that Kieckhefer's TRO was unconstitutional. The District Court denied the motion, finding the following:

(1) There was clear and convincing evidence that Kieckhefer had a "probability of showing" that the statement regarding his endorsement and support of Harry Reid was false. (Appellant's Appendix, Ex. 13 at p. 000232.)

(2) Kieckhefer had a "probability of showing" the statement was defamatory because it "could be harmful to the reputation of a Republican politician." (Appellant's Appendix, Ex. 13 at p. 000232.)

(3) Kieckhefer had a "probability of establishing damages and/or prevailing on the defamation per se claim." (Appellant's Appendix, Ex. 13 at p. 000232.)

(4) Kieckhefer had a "probability of showing that Schmidt's statements were made with knowledge of or reckless disregard for their falsity." (Appellant's Appendix, Ex. 13 at p. 000232.)

Schmidt appeals these findings on grounds that: (1) Kieckhefer filed his action to "silence" Schmidt's free speech and electoral activities in the 2014 campaign for Nevada State Senate; and (2) the statements upon which he was sued were believed to be true by Schmidt at the time of publication and were based on an October 31, 2010 article appearing in the *Las Vegas Sun* as well as other research and related information.

V. STATEMENT OF RELEVANT FACTS

A. Kieckhefer's Lawsuit and TRO

In the 2014 primary election for Nevada State Senate District 16, Schmidt was a Republican candidate who ran against incumbent Kieckhefer. (Appellant's Appendix, Ex. 2 at p. 000005.) On June 4, 2014, Schmidt began airing a television advertisement, stating in part that Kieckhefer "endorsed and supported Harry Reid for Senate in 2010." (Appellant's Appendix, Ex. 2 at p. 000005, Ex. 9 at p. 000122.)

On June 6, 2014, four days before the election, Kieckhefer filed a Complaint and Ex Parte application for a TRO against Schmidt. (Appellant's Appendix, Ex. 2; Trial Court Docket.) The Complaint is essentially a SLAPP suit, which along with the TRO, alleged defamation and sought to "restrain and enjoin Mr. Schmidt and any person or entity acting in concert with Mr. Schmidt from publishing any

statement expressing or implying that Senator Kieckhefer has endorsed or supported Harry Reid." (Appellant's Appendix, Ex. 2, Ex. 3 at p. 000017.)

Due to little more than an hour's notice from the District Court, Schmidt attended the hearing on the TRO without adequate time to prepare or obtain counsel. (Appellant's Appendix, Ex. 9 at p. 000123.) The District Court granted the TRO, finding Kieckhefer "likely to suffer irreparable injury to his career and reputation from Defendant's television advertisement in the absence of injunctive relief." (Appellant's Appendix, Ex. 14 at p. 000042.)[1]

B. Background and Basis for the Television Ad

While working as a volunteer on Schmidt's campaign, Peter Hennessey, Ph.D. discovered an October 31, 2010 article published in the *Las Vegas Sun* by staff writer David Schwartz. (Appellant's Appendix, Ex. 9 at p. 000125.) According to the article, Nevada Republican Senator Bill Raggio endorsed Democratic U.S. Senate Majority Leader Harry Reid in the 2010 U.S. Senate race against Republican Sharron Angle. The article went on to relate that in fact a number of GOP members joined in on the endorsement of Harry Reid. (Appellant's Appendix, Ex. 4 at pp. 000001, 000002.)

[1]In its haste to grant the TRO, the District Court failed to require Kieckhefer to post the necessary bond before entering the Order granting the TRO or Motion to Dismiss SLAPP suit.

Schwartz reported: "Some Republicans who talked to the *Las Vegas Sun* said they support the longtime leader [Harry Reid]. Besides Raggio, the group includes Assemblyman Joe Hardy, R-Boulder City, who's running for State Senate; *Ben Kieckhefer*, a former spokesman for Gov. Jim Gibbons running for a seat in Reno; and Sen. Dean Rhodes, R-Tuscarora, who has publically backed Reid and is not up for re-election." (Appellant's Appendix, Ex. 4 at pp. 000001, 000002.)

Following his discovery, Hennessey presented the article to Schmidt. Both men believed the article to state that Kieckhefer endorsed and supported Harry Reid for Senate in 2010. (Appellant's Appendix, Ex. 9 at pp. 000122, 000125.) Consequently, David Ward, owner of E Media Ad Group, purchased a political campaign advertisement for Schmidt that included said statement. (Appellant's Appendix, Ex. 9 at p. 000127.) The advertisement began airing on various television stations Wednesday, June 4, 2014. (Appellant's Appendix, Ex. 9 at p. 000127.)

Members of Kieckhefer's campaign contacted the television stations, insisting Schmidt's statement was false and requesting that they stop airing the advertisement, but contrary to allegations and arguments made by Kieckhefer's counsel, they <u>never</u> contacted Schmidt or the Schmidt campaign. (Appellant's Appendix, Ex. 9 at pp. 000122, 000127; See Appellant's Appendix, Ex. 10 at p.

000061.) Once this came to his attention, Ward read the Sun's article and concluded the advertisement accurately reflected what was reported in the article. (Appellant's Appendix, Ex. 9 at p. 000127.) In defense of the advertisement, Ward emailed the Sun's article to the television stations. (Appellant's Appendix, Ex. 9 at p. 000127.) Each would continue to air Schmidt's advertisement despite Kieckhefer's objection. (Appellant's Appendix, Ex. 9 at p. 000128.)

VI. SUMMARY OF ARGUMENT

Kieckhefer and the District Court posit several "probabilities" that, they believe, refute Schmidt's Special Motion to Dismiss. First, that Kieckhefer could show the television ad stating he "endorsed and supported Harry Reid for Senate in 2010" was false. Second that the statement was defamatory because it could be harmful to Kieckhefer's reputation. Third that Kieckhefer could either establish damages and/or prevail on defamation per se. And fourth, that the statements were made with knowledge or reckless disregard for their falsity.

But the lower court failed to address the overarching theme of the Special Motion to Dismiss, which was also Schmidt's basis for contesting the TRO in the first place. The District Court did not apply strict scrutiny to the obvious Constitutional issue—that the TRO was a prior restraint that chilled free speech. Schmidt's statement was based on an opinion drawn from information found within a reliable source, a news article, and other research. Schmidt and his

campaign members believed the statement to be true. There was no knowledge of falsity and there was no malice. Kieckhefer has still presented no conclusive evidence that the statement was not true and failed twice to appear before the court to submit to examination. Judge Polaha stated "a denial by one candidate as to an accusation tossed by another candidate, I don't think carries that much weight because of the give and take of a political campaign". P. 20, lines 13-16 of Anti-SLAPP hearing. The parties were opposing candidates in a political campaign who had every right to exercise speech aimed toward the public interest. Yet, the District Court avoided the Constitutional issue in both of its orders. (Appellant's Appendix, Exs. 13, 14.)

VII. ARGUMENT

A. The TRO Was an Unconstitutional Prior Restraint on Speech Made in the Public Interest.

Prior restraints "on speech and publication are the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559, 96 S.Ct. 2791, 2803 (1976). This is because "[p]rior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgment." *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 181, 89 S.Ct. 347, 351 (1968). Due process requires that "the litigant is afforded 'reasonable notice of and an opportunity to oppose a

restrictive order's issuance.'" *Johanson v. Eighth Judicial District Court*, 124 Nev. 245, 253, 182 P.3d 94, 99 (2008).

Schmidt was afforded no such notice. Instead he was hauled to court after being given little more than an hour's warning about the Ex Parte hearing. (Appellant's Appendix, Ex. 9 at p. 000123.) This was not enough time to prepare or have counsel appear on his behalf, especially since this occurred during a critical period of his campaign.

A "system of prior restraints 'comes to this Court bearing a heavy presumption against its constitutional validity' . . . subjecting it to a degree of protection so broad that it avoids constitutional infirmity only if it fits within one of a handful of narrowly defined exceptions . . . immunity from prior restraint has been recognized only in exceptional cases, among them to protect the national security, to prevent the publication of obscenity, and to protect against incitement to acts of violence and the overthrow by force of orderly government." Under these circumstances, immunity is afforded only "if it has been accomplished 'under procedural safeguards designed to obviate the dangers of the censorship system.'" *Providence Journal Company v. Newton*, 723 F.Supp. 846, 853 (D.R.I. 1989) (citing *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558, 95 S.Ct. 1239, 1246 (1975); additional citations omitted).

A candidate for political office "has a protected right to speak in furtherance of his candidacy." *Spratt v. Toft*, 324 P.3d 707, 712 (Wa 2014) (finding interpreting Washington's anti-SLAPP statute). "Speech involves 'matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community." *Id.* at 713. The constitutional guarantee of free speech "has its fullest and most urgent application precisely to the conduct of campaigns for political office." Therefore, those engaged in political debate are entitled not only to speak responsibly but to "speak foolishly and without moderation." *Governor Gray Davis Committee v. American Taxpayers Alliance*, 102 Cal.App.4th 449, 458-459, 125 Cal.Rptr.2d 534, 541 (2002).

"Where . . . a candidate speaks out on the issues relevant to the office or the qualifications of the opponent, the speech activity is protected by the First Amendment . . . . 'The right to speak on political matters is the quintessential subject of our constitutional protections of the right of free speech. Public discussion about the qualifications of those who hold or wish to hold positions of public trust presents the strongest possible case for applications of the safeguards afforded by the First Amendment.'" Elections and qualifications of a candidate for office are public issues. *Macias v. Hartwell*, 55 Cal.App.4th 669, 673-674, 64 Cal.Rptr.2d 222, 225 (1997) (concluding that anti-SLAPP law applies to

defamation actions arising out of statements made in a union election). In the context of anti-SLAPP law, a "'public' forum is traditionally defined as a place that is open to the public where information is freely exchanged." *Cabrera v. Alam*, 197 Cal.App. 4th 1077, 1087, 129 Cal.Rptr.3d 74, 81 (2011).

Schmidt was running as a candidate in a political campaign. He had every right to exercise speech aimed toward the public interest, including published information that he and his campaign members learned about an opposing candidate. In an article printed in the *Reno Gazette Journal* on June 4th, Schmidt identified the October 31, 2010 *Sun* article which was the principle basis of his allegation. The public and Kieckhefer had notice and could read the October 31 *Las Vegas Sun* article for themselves and draw their own conclusions as did the TV stations airing the subject advertisement. Schmidt and his staff looked for any article or evidence that would refute their conclusions in regards to the *Sun* article and found none.

B. The Speech Was Based On a Reliable Source of Information, Not upon Malice.

"As a public figure in a political campaign, plaintiff cannot prevail in his defamation claims against defendants unless he can also demonstrate by clear and convincing evidence that the objectionable statements were made with 'actual malice.' . . . 'The clear and convincing standard requires that the evidence be such

as to command the unhesitating assent of every reasonable mind.'" *Rosenauer v. Scherer*, 88 Cal.App.4th 260, 273-274, 105 Cal.Rptr.2d 674, 683-684 (2001).

Kieckhefer had absolutely no evidence of actual malice when seeking the TRO. At no time prior to filing suit did Kieckhefer contact Schmidt or his campaign to inform them that the statement in the television ads were false and ask that he voluntarily retract them and there was no evidence presented to support such an allegation. Schmidt testified under oath that he was never contacted by Kieckhefer or any of his agents in regard to the protective order until notified by the application no more than an hour before the hearing. (See Appellant's Appendix, Ex. 10 at p. 000061.) The court action was a last minute effort to publicize Schmidt as an unsavory character to Republican voters. Kieckhefer filed the suit to "silence" Schmidt's communications aimed at procuring electoral action and a violation of NRS 41.637(1). Whereas, the communication that Kieckhefer "endorsed and supported Harry Reid for Senate in 2010" was made in direct connection with an issue of public interest in a place open to the public or in a public forum. NRS 41.637(4).

More importantly, Schmidt and members of his campaign believed the communication to be truthful. Under NRS 41.660(3)(b), Kieckhefer must establish that Schmidt's campaign statement was both false and made with "knowledge of its falsehood." NRS 41.637. Schmidt's television campaign ad

was based substantially on the *Las Vegas Sun's* article which was believed to state that Kieckhefer endorsed and supported Harry Reid for Senate in 2010 as well as other supportive research.[2] Kieckhefer could have issued a statement to the *Sun* clarifying his position on Reid, but did not. Kieckhefer could have contacted Schmidt or a member of his campaign to explain that the statement was not true, which he also did not pursue.

Kieckhefer could have offered some evidence or statement of third party witnesses other than his denial first made in an affidavit before the court late Friday afternoon at the TRO hearing, but he did not. Neither did he do so at the TRO hearing or the hearing before Judge Polaha on the Special Motion to Dismiss brought by Schmidt. Kieckhefer also conveniently failed to appear in person and submit to examination by Schmidt or the court at either hearing.

Statements made during political campaigns about individuals running for public office naturally invite public criticism. *Conroy v. Spitzer*, 70 Cal.App.4th 1446, 1451, 1454, 83 Cal.Rptr.2d 443, 446, 448 (1999). Such statements may be based on reliable sources of information such as newspapers, which is exactly what

---

[2]Schmidt's campaign reviewed newspaper articles and other publications including the Nevada Secretary of State website in search of Kieckhefer's support of Sharron Angle and records of his donations to the Angle campaign and found none. Although evidence at the anti-SLAPP motion to dismiss hearing demonstrated he publically supported other Republican candidates and donated to their campaigns. Conspicuously absent was any criticism by Kieckhefer of Reid or prominent Republicans supporting Reid, Raggio, and Cashell. (See Appellant's Appendix, Ex. 10 at p. 000057, lines 11-24 and p. 000058, lines 1-3).

Schmidt and his campaign members did. *See id.*at 1453, 448. "[T]he contents of public records are generally thought to be reliable, and statements based thereon cannot be deemed to have been made with actual malice." *Rosenauer v. Scherer*, 88 Cal.App.4th 260, 275-276, 105 Cal.Rptr.2d 674, 684-685 (2001). Similarly, Schmidt's statement was based on his and his colleague's interpretation of a news publication. Notably Judge Flanagan at the TRO hearing initially had the same interpretation as did Schmidt and his colleagues, and Judge Polaha also stated that the article was "confusing". (See Appellant's Appendix, Ex. 10 at p. 000064, lines 13 and 22.) Judge Polaha further acknowledged this at the Special Motion to Dismiss hearing.

C. The Statement in the Television Ad Did Not Amount to Defamation.

1. Kieckhefer's Defamation Claim Fails Because Schmidt Is Not at Fault for Making a False Assertion of Fact.

The elements for establishing a defamation claim are "(1) a false and defamatory statement of fact by the defendant concerning the plaintiff; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages." *Pope v. Motel 6*, 121 Nev. 307, 315, 114 P.3d 277, 282 (2005).

Defamation requires an assertion of fact. *State v. Eighth Judicial Dist. Court*, 118 Nev. 140, 150-151, 42 P.3d 233, 240 (2002). A statement of opinion is

not defamation. *Id.* Opinions are protected speech under the First Amendment. *Nevada Indep. Broad. Corp. v. Allen*, 99 Nev. 404, 410, 664 P.2d 337, 341-342 (1983); See *also* Section VII. A. above with re Schmidt's constitutionality argument. And, truth of the statement is an affirmative defense. *Interstate Commer. Bldg. Servs. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 23 F. Supp. 2d 1166, 1176 at fn. 4 (D. Nev. 1998). As outlined above, Schmidt's statement was based on an opinion drawn from information found within a reliable source; and the absence of any contrary evidence that Kieckhefer supported Sharron Angle which should have existed had he done so. Schmidt and his campaign members believed the statement to be true.

"A statement is defamatory when it would tend to lower the subject in the estimation of the community, excite derogatory opinions about the subject, and hold the subject up to contempt." *K-Mart v. Washington*, 109 Nev. 1180, 1191, 866 P.2d 274, 281-282 (1993). Kieckhefer seemingly believes that a statement that he supported Harry Reid rises to this level of contempt because it means that Kieckhefer is not conservative enough. Kieckhefer's witness (David Buell) was not deemed to be an expert witness and failed to appear at either hearing for examination or cross examination. Kieckeher in essence offered no viable evidence that the statement would harm Kieckhefer's reputation, only pure unfounded speculation. After all, Harry Reid has numerous times been elected to

high public office in the State of Nevada and many Republicans who supported Harry Reid in 2012 were subsequently elected or re-elected to public office. One could just as easily speculate that having supported Harry Reid and not Sharron Angle in 2010 would enhance Kieckhefer's reputation. Does this really rise to the level of holding the subject up to contempt? Is this really the type of speech that need be unconstitutionally stifled and kept hidden from the public at large? If so, then there will undeniably be serious public policy implications for future elections in the State of Nevada and throughout the nation. The statement by Judge Polaha, that "the unrefuted evidence in the record indicates that the statement in question could be harmful to the reputation of a Republican politician" is based on "street curb" opinion offered by Kieckhefer and Buell. Neither Kieckhefer nor Buell remotely qualify as expert witnesses. Neither of them had any scientific polling results to validate their gratuitous and widely speculative Affidavits on this subject. Schmidt who "speculated" just the opposite could either be determined to be more of an expert witness in that he had participated in five times more campaigns personally than Kieckhefer and Buell combined. (Appellant's Appendix, Ex. 10 at p. 3, lines 8-9.)

Moreover, Schmidt contests the District Court's finding that Kieckhefer could establish damages. First of all, he hasn't incurred any. Schmidt removed the Reid statement from the television ads as soon as practicable after the District

Court issued the TRO.[3] Kieckhefer won the election and is currently sitting as a Senator for the State of Nevada. The claim that Kieckhefer could or would ever incur damages a result of the statement is beyond speculative, such that Schmidt is surprised that the District Court decided the way it did.

2. A Claim for Defamation Per Se Fails in the Absence of Actual Malice.

A statement is considered defamation per se, i.e., actionable without actual damage, when it falls into the category of "imputations that would injury plaintiff's trade, business or office." *Branda v. Stanford*, 97 Nev. 643, 646, 637 P.2d 1223, 1225 (1981). Statements made about a candidate for political office can constitute defamation per se. *Nevada Independent Broadcasting v. Allen*, 99 Nev. 404, 418, 664 P.2d 337, 346 (1983). Here, though, where the individual who is the subject of the defamatory statement is a public official, the claimant must establish that the statement was made with actual malice. "Actual malice is defined as knowledge of the falsity of a statement or a reckless disregard for its truth." Reckless disregard for the truth has been "defined as a high degree of awareness of the probable falsity

---

[3]There was no evidence presented that Kieckhefer or his campaign ever notified Schmidt or his campaign that the subject statement were false. Schmidt testified consistently on more than one occasion that neither he nor his campaign were ever notified by Kieckhefer or his campaign in said regards "except in court at the TRO hearing on June 6th. Judge Polaha erred in his statement in the order dated September 5th when he stated "Sen. Kieckhefer's campaign notified Schmidt that these statements were false, but Schmidt did not pull the advertisements. (Appellant's Appendix, Ex. 13 at p. 000231, lines 4-6.)

of a statement." Reckless disregard "may be found where the defendant entertained serious doubts as to the truth of the statement, but published it anyway." "As such, it is a subjective test, focusing on what the defendant believed and intended to convey… Evidence of negligence, motive, and intent may cumulatively establish necessary recklessness to prove actual malice in a defamation action." *Posadas v. City of Reno*, 109 Nev. 448, 454-455, 851 P.2d 438, 442-443 (1993).

Here, once again, the statement in the television ad was based on an opinion drawn from information found in an article published by the *Las Vegas Sun* . . . not only Schmidt's opinion, but Peter Hennessey, Dave Ward, and the TV stations and Judge Flanagan upon his initial reading. (See Appellant's Appendix, Ex. 10 at p. 000068, lines 7-17.) Piecing together what they learned about Kieckhefer, his behavior and his associations with others, Schmidt and his campaign members believed the statement to be true. At the hearing on the Special Motion to Dismiss, Schmidt gave the following testimony during cross examination:

> Q: But you offered to pull that ad if anything turned up?
>
> A: Yeah. Well, I would in any event. If anything came up that would put into question the article, I would naturally discontinue running the ad.

(Appellant's Appendix, Ex. 13 at p. 000233.)

In its Order on the Special Motion to Dismiss, the District Court conflated this testimony and "other evidence that Schmidt entertained serious doubts as to

the truth of his statements and that the advertisements 'should have been pulled'" to a "probability of showing" of actual malice. (Appellant's Appendix, Ex. 13 at p. 000233.) The District Court cited the hearing transcript, but didn't state what this "other evidence" was or how it showed Schmidt doubted the truth of his statements. (Appellant's Appendix, Ex. 13 at p. 000233.) This testimony does not show serious doubt about the statement on Schmidt's part. To the contrary, it shows that had someone— the news stations, Kieckhefer or his campaign members, for instance—brought it to Schmidt's attention that the statement was incredible or untrue, or brought to Schmidt's attention found anywhere in the published record that Kieckhefer supported Sharron Angle in her race against Harry Reid, Schmidt would have pulled the ad. None was forthcoming. The trier of fact could just as easily infer that this demonstrated a lack of malice and not a reckless disregard for it. An honest mistake or misinterpretation does not rise to the level of defamation per se, especially here where the individual making the statement was ready and willing to retract it even without the TRO that limited his free speech.

VIII. CONCLUSION AND SUMMARY OF REQUESTED RELIEF

Schmidt respectfully requests that this Court vacate the District Court's denial of his NRS 41.660 Special Motion to Dismiss and make a determination as to the unconstitutionality of the TRO.

IX. CERTIFICATE OF COMPLIANCE

I certify that I have read this opening brief, and that to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, including NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), the type style requirements of NRAP 32(a)(6) and the type-volume limitation set forth in NRAP 32(a)(7). This brief uses a proportional typeface and 14-point font, contains 5486 words and does not exceed 30 pages.

Pursuant to NRS 239B.030 the undersigned certifies no Social Security numbers are contained in this document.

DATED: January 19, 2015.

Respectfully Submitted
By: */s/ Charles R. Kozak*
Charles R. Kozak, Esq.
Attorney for Appellant
GARY SCHMIDT

CERTIFICATE OF SERVICE

I, Nan Adams, hereby certify that on the 19th day of January 2015, I electronically filed the foregoing with the Clerk of the Court by using the ECF System that will send a Notice of Electronic filing to the following partie(s):

Michael Pagni, Esq.
Adam Hosmer-Henner, Esq.
McDonald Carano Wilson LLP
100 West Liberty Street, 10th Floor
Reno, Nevada 89501
Attorneys for Respondent

Dated this 19th day of January 2015.

*/s/ Nan Adams*_____
Nan Adams
Employee of Kozak Law Firm
3100 Mill Street, Suite 115
Reno, Nevada 89502