

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

\* \* \* \* \*

HOWARD SHAPIRO and )  
JENNA SHAPIRO )

Appellants, )

VS. \_\_\_\_\_)

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SUP. CRT. CASE NO.: 67363

GLEN WELT, RHODA WELT, )  
LYNN WELT, MICHELLE WELT, )  
Individuals; DOES I through X, and )  
ROE CORPORATIONS I through X, )  
Inclusive, )

Respondents. )

**APPELLANTS' OPENING BRIEF**

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## **Federal Cases**

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NRS 41.637(4).....17, 18, 19

1                   **IN THE SUPREME COURT OF THE STATE OF NEVADA**

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3           HOWARD SHAPIRO and           )  
4           JENNA SHAPIRO                )

5                               Appellants,       )  
6           vs.                                )

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7           GLEN WELT, RHODA WELT,       )  
8           LYNN WELT, MICHELLE WELT, )  
9           Individuals; DOES I through X, and )  
10          ROE CORPORATIONS I through X,) )  
11          Inclusive,                        )

12                               Respondents.       )  
13    )

14                               **STATEMENT OF JURISDICTION**

15           This Court has appellate jurisdiction over the instant matter pursuant to  
16           Nevada Rules of Appellate Procedure § 3(A)(b)(1). On September 4, 2014, a  
17           complaint was filed, alleging defamation along with related claims. Subsequently,  
18           a special motion to dismiss based on Nevada's Anti-SLAPP statute was filed by  
19           Defendants. On January 2, 2015 a decision was filed which dismissed Plaintiff's  
20           claim. Appellant's counsel subsequently filed the instant appeal alleging the  
21           unconstitutionally vague nature of the statute challenged and clear legal error made  
22           by Judge Nancy Alff.  
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1                    **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

- 2                    1. Is NRS 41.637(4) unconstitutionally vague on its face such that it must be
- 3                    struck down?
- 4                    2. Does NRS 41.637(4) protect opinion, whether made with knowledge of
- 5                    falsehood or ignorance, contrary to established defamation case law to the
- 6                    contrary?
- 7                    3. Is this a matter of public concern as required under NRS41.637(4)?
- 8                    4. Does NRS 41.637(4) impermissibly protects opinion that is malicious and
- 9                    without truth?
- 10                  5. Did Judge Nancy Alff commit legal error in her decision by relying on
- 11                  incorrect facts and a misunderstanding of *Jacobs v. Adelson*, 130 Nev. Adv.
- 12                  Op. 44 (2014)?
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## Statement of the Case and Facts

On or about April of 2011, Plaintiff Howard Shapiro was given power of attorney over Walter Shapiro, his father, who is now 81 years of age, to handle Walter's estate and health care. On April 24, 2014, Walter was diagnosed with Lewy Dementia. At that time, Howard exercised his power of attorney over his father and arranged for his father to live in a nursing home/assisted care facility, upon doctor's recommendations. Howard disposed of his father's property to pay for Walter's care.

It was then that Defendants Rhoda Welt and Lynn Welt went to New Jersey, where Walter lives and where the nursing home/assisted care facility was located, where they commenced a campaign of harassment of Howard and undue influence upon Walter. Defendants, in concert, reported to Adult Protective Services that Howard was abusing/neglecting his father. Upon investigation, Adult Protective Services determined that Defendants withdrew \$7,500.00 from Walter's account and forced them to return that money immediately or they would be charged with abusing an elderly person.

Despite that, Defendants, all of them, continued their campaign of harassment and undue influence, calling Howard repeatedly, almost daily, and telling Walter that Howard was taking his money. As a result, Walter called

1 Howard every day to demand to know where his money was, despite the fact that  
2 Walter is incapable of making his own decisions.

3 On July 3, 2014, Howard's brother, Walter's son, drove Walter to Roseland,  
4 New Jersey, to reside at Solana at Roseland. At that time, Defendants Rhonda and  
5 Lynn Welt went back to their residence in Georgia.

6  
7 Thereafter, Howard filed a petition for guardianship of Walter and a hearing  
8 for was scheduled for September 22, 2014. All of the Defendants were parties to  
9 the Guardianship matter except Glenn Welt. Since then, Glen Welt posted a  
10 website online, www.howardshaprovictims.com, which was copyrighted, in which  
11 he alleged that:  
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- 15 1. *Howard has stolen over \$780,000.00 in cash and assets, and the same*  
16 *was awarded in liens and judgments. (See Exhibit 1).*
- 17 2. *That Howard has filed several bankruptcies, that he has a criminal*  
18 *record, and 20 judgments made against him in the amount of*  
19 *\$361,871.00. That that money is owed to a public defender and a drug*  
20 *and rehabilitation center, in addition to multiple credit cards and other*  
21 *debts. (See Exhibit 1).*
- 22 3. *That Walter Shapiro's life is in danger because he gave Howard power*  
23 *of attorney over him. That that decision cost Walter \$430,000.00,*  
24 *including a \$100,000.00 loan that Walter allegedly gave to Howard.*
- 25 4. *That Howard committed the following "heinous acts":*
- 26 5. *That Howard abducted his father from his home and held him against*  
27 *his will;*
- 28 6. *That Howard sold his father's home for \$230,000.00 and kept the*  
*proceeds for himself;*
7. *That Howard stole tangible and intangible goods, including large sums*  
*of cash and furniture, from his father;*
8. *That Howard diverted all of Walter's retirement payments to himself.*
9. *That Howard blocked Walter from any contact with his relatives;*

10. That Howard left his father with no money;  
11. That Howard prevented others from purchasing food for his father;  
12. That Howard has threatened his father's life;  
13. That Howard stole his father's money and bragged about traveling with it;  
14. Howard may be carrying concealed weapons; and  
15. That Howard is lying about his home and business, listing a specific address belonging to Howard.  
16. Defendants further provide a photograph of Howard's vehicle and license plate number and encouraged the public to attend the adult guardianship proceedings indicated above.  
17. That the website was "recorded by two (2) witnesses", believed to a combination of the other named Defendants.  
18. That the webmaster is Defendant Glenn Welt, who informed Howard by email that he was posting the website. (See Exhibit 2).  
19. That various iterations of the website were previously posted. (See Exhibit 3).  
20. That Defendant Glenn Welt, in concert with other named Defendants, attempted to extort Howard in a letter dated August 11, 2014, by threatening public humiliation, civil action, and criminal charges if his demands are not met, which include returning cash and property allegedly stolen by Howard, presumably to Defendant Glenn Welt. (See Exhibit 4).  
21. That Defendants conduct is ongoing and persistent, requiring the instant legal action.<sup>1</sup>

None one of these allegations is true. Based on these statements, Howard and his wife filed a complaint alleging: 1) Defamation per se, 2) Defamation, 3) Extortion, 4) Civil conspiracy, 5) Fraud, and 6) Punitive damages. Defendants filed a special motion to dismiss citing NRS 41.637, Nevada's Anti-SLAAP statute. That motion was granted. This appeal followed.

### Legal Analysis

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<sup>1</sup> See AA 2-5 and all exhibits attached to Plaintiffs' complaint.

1       **I.       NRS 41.637(4) is unconstitutional on its face because it is in direct**  
2       **contravention of established defamation law**

3               **a. Standard of Review**  
4

5               The United States Supreme Court (SCOTUS) has determined that "in cases  
6 raising First Amendment issues . . . an appellate court has an obligation to 'make an  
7 independent examination of the whole record' in order to make sure that 'the  
8 judgment does not constitute a forbidden intrusion on the field of free  
9 expression.'" *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485,  
10 499, 80 L. Ed. 2d 502, 104 S. Ct. 1949 (1984) (quoting *New York Times*, 376 U.S.  
11 at 284-286)."The question whether the evidence in the record in a defamation case  
12 is sufficient to support a finding of actual malice is a question of law." *Harte-*  
13 *Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 685, 105 L. Ed. 2d  
14 562, 109 S. Ct. 2678 (1989).  
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19               **b. Brief History of the Law of Defamation in the United States**  
20

21                   **1. Public figures and officials**

22               In 1964, SCOTUS held in *New York Times Co. v. Sullivan*, 376 U.S. 254, 11  
23 L. Ed. 2d 686, 84 S. Ct. 710, that the First Amendment to the United States  
24 Constitution placed limits on the application of the state law of defamation. There  
25 the Court recognized the need for:  
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1 a federal rule that prohibits a public official from recovering damages  
2 for a defamatory falsehood relating to his official conduct unless he  
3 proves that the statement was made with 'actual malice' -- that is, with  
4 knowledge that it was false or with reckless disregard of whether it  
was false or not. *Id.*, at 279-280.

5 At the time, the concern was that, with respect to the criticism of public officials in  
6 their conduct of governmental affairs, a state-law "rule compelling the critic of  
7 official conduct to guarantee the truth of all his factual assertions' would deter  
8 protected speech." *Gertz v. Robert Welch, Inc.*, 323 Nev. 334 (1974) (quoting *New*  
9 *York Times*, *supra*, at 279).

10  
11  
12 Three years later, in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 18 L. Ed.  
13 2d 1094, 87 S. Ct. 1975 (1967), a majority of the Court determined:

14  
15 the *New York Times* test should apply to criticism of 'public figures' as  
16 well as 'public officials.' The Court extended the constitutional  
17 privilege announced in that case to protect defamatory criticism of  
18 nonpublic persons 'who are nevertheless intimately involved in the  
19 resolution of important public questions or, by reason of their fame,  
20 shape events in areas of concern to society at large.'" *Gertz*, 418 U.S.  
21 at 336-337 (quoting *Butts*, 388 U.S. at 164 (Warren, C. J., concurring  
in result)).

22 in concurrence, Chief Justice Warren noted:

23 our citizenry has a legitimate and substantial interest in the conduct of  
24 such persons, and freedom of the press to engage in uninhibited  
25 debate about their involvement in public issues and events is as  
26 crucial as it is in the case of 'public officials. *Butts*, *supra*, at 164.

1 The Court has also determined that both for public officials and public  
2 figures, a showing of *New York Times* malice is subject to a clear and convincing  
3 standard of proof. *Gertz*, 418 U.S. at 342.

## 4 **2. Private individuals**

5  
6 The next step in this constitutional evolution was the Court's consideration  
7 of a private individual's defamation actions involving statements of public concern.  
8 There, the Court ultimately concluded that the *New York Times* malice standard  
9 was inappropriate for a private person attempting to prove he was defamed on  
10 matters of public interest. *Gertz v. Robert Welch, Inc., supra*. As the Court  
11 explained:  
12  
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14  
15 Public officials and public figures usually enjoy significantly greater  
16 access to the channels of effective communication and hence have a  
17 more realistic opportunity to counteract false statements than private  
18 individuals normally enjoy

19 . . . .  
20 [More important,] public officials and public figures have voluntarily  
21 exposed themselves to increased risk of injury from defamatory  
22 falsehood concerning them. No such assumption is justified with  
23 respect to a private individual." 418 U.S. at 344-345 (footnote  
24 omitted).

25 Nonetheless, the Court believed that certain significant constitutional  
26 protections were warranted in this area. First, the Court held that the States could  
27 not impose liability without requiring some showing of fault. See *id.*, at 347-  
28 348 ("This approach . . . recognizes the strength of the legitimate state interest in

1 compensating private individuals for wrongful injury to reputation, yet shields the  
2 press and broadcast media from the rigors of strict liability for defamation").

3         Second, the Court held that the States could not permit recovery of presumed  
4 or punitive damages on less than a showing of *New York Times* malice. See 418  
5 U.S. at 350 ("Like the doctrine of presumed damages, jury discretion to award  
6 punitive damages unnecessarily exacerbates the danger of media self-censorship . .  
7 .").  
8

9  
10         Still later, in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 89 L.  
11 Ed. 2d 783, 106 S. Ct. 1558 (1986), the Court held that "the common-law  
12 presumption that defamatory speech is false cannot stand when a plaintiff seeks  
13 damages against a media defendant for speech of public concern." *Id.*, at 777.  
14

15         In other words, the Court fashioned "a constitutional requirement that the  
16 plaintiff bear the burden of showing falsity, as well as fault, before recovering  
17 damages." *Id.*, at 776. Although recognizing that "requiring the plaintiff to show  
18 falsity will insulate from liability some speech that is false, but unprovably so," the  
19 Court believed that this result was justified on the grounds that "placement by state  
20 law of the burden of proving truth upon media defendants who publish speech of  
21 public concern deters such speech because of the fear that liability will  
22 unjustifiably result." *Id.*, at 777-778.  
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### 3. Specific Types of Protected Speech

The SCOTUS also recognized constitutional limits on the *type* of speech which may be the subject of state defamation actions. Next, the *Bresler-Letter Carriers-Falwell* line of cases provides protection for statements that cannot "reasonably [be] interpreted as stating actual facts" about an individual. *Falwell*, 485 U.S. at 50. This provides assurance that public debate will not suffer for lack of "imaginative expression" or the "rhetorical hyperbole" which has traditionally added much to the discourse of our Nation. See *id.*, at 53-55.

The *New York Times-Butts-Gertz* culpability requirements further ensure that debate on public issues remains "uninhibited, robust, and wide-open." *New York Times*, 376 U.S. at 270. Thus, where a statement of "opinion" on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth. Similarly, where such a statement involves a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault as required by *Gertz*. Finally, the enhanced appellate review required by *Bose Corp.* provides assurance that the foregoing determinations will be made in a manner so as not to "constitute a forbidden intrusion of the field of free expression." *Bose Corp.*, 466 U.S. at 499 (quotation omitted).



1 The numerous decisions discussed above establishing First Amendment  
2 protection for defendants in defamation actions demonstrate the Court's recognition  
3 of the Amendment's vital guarantee of free and uninhibited discussion of public  
4 issues.  
5

#### 6 **4. Limits on Free Speech**

7  
8 But there is also another side to the equation; the SCOTUS have regularly  
9 acknowledged the "important social values which underlie the law of defamation,"  
10 and recognized that "society has a pervasive and strong interest in preventing  
11 and redressing attacks upon reputation." *Rosenblatt v. Baer*, 383 U.S. 75, 86, 15  
12 L. Ed. 2d 597, 86 S. Ct. 669 (1966). Justice Stewart in that case put it with his  
13 customary clarity:  
14  
15

16 "The right of a man to the protection of his own reputation from  
17 unjustified invasion and wrongful hurt reflects no more than our basic  
18 concept of the essential dignity and worth of every human being -- a  
19 concept at the root of any decent system of ordered liberty.  
20 . . . .

21 Furthermore, in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 14-23 (1990),  
22 the SCOTUS noted that:  
23

24 "The destruction that defamatory falsehood can bring is, to be sure,  
25 often beyond the capacity of the law to redeem. Yet, imperfect though  
26 it is, an action for damages is the only hope for vindication or redress  
27 the law gives to a man whose reputation has been falsely  
28 dishonored." 383 U.S. at 92-93 (concurring opinion).

1 Expressions of opinion are generally accorded absolute immunity from  
2 liability under the First Amendment. *Trump v. Chicago Tribune Co.* (D. N.Y.  
3 1985), 616 F. Supp. 1434, 1435; *Gertz v. Robert Welch, Inc., supra*, at  
4 339; *Chaves v. Johnson* (Va. 1985), 335 S.E. 2d 97, 102. The determination of  
5 whether an averred defamatory statement constitutes opinion or fact is a question  
6 of law, properly within the Nevada Supreme Court's purview. *Scott v. News-*  
7 *Herald*, 25 Ohio St. 3d 243, 250, 496 N.E.2d 699, 705 (1986); *Ollman v.*  
8 *Evans* (C.A. D.C. 1984), 750 F.2d 970, 978; *Rinsley v. Brandt* (C.A. 10, 1983),  
9 700 F.2d 1304, 1309; *Lewis v. Time, Inc.* (C.A. 9, 1983), 710 F.2d 549,  
10 553; *Slawik v. News-Journal Co.* (Del. 1981), 428 A.2d 15, 17.

15 Where a statement of "opinion" on a matter of public concern reasonably  
16 implies false and defamatory facts regarding public figures or officials, those  
17 individuals must show that such statements were made with knowledge of their  
18 false implications or with reckless disregard of their truth. *Milkovich v. Lorain*  
19 *Journal Co.*, 497 U.S. 1, 20-21, 110 S.Ct. 2695, 2706-07 (1990). Similarly, where  
20 such a statement involves a private figure on a matter of public concern, a plaintiff  
21 must show that the false connotations were made with some level of fault as  
22 required by *Gertz*. The Federal Ninth Circuit has promulgated a three-part test  
23 which holds those statements which " \* \* \* convey pertinent information to the  
24 public about a matter of public interest, \* \* \* are made in the course of a public  
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1 debate or similar circumstances, and \* \* \* are phrased in cautionary language" are  
2 opinion. *Scott v. News-Herald*, 25 Ohio St. 3d 243, 250, 496 N.E.2d 699, 705-06  
3 (1986); *Murray v. Bailey* (N.D. Cal. 1985), 613 F.Supp. 1276, 1282; *Information*  
4 *Control Corp. v. Genesis One Computer Corp.* (C.A. 9, 1980) 611 F.2d 781.

6 **II. NRS 41.637(4) protects opinion, whether made with knowledge of**  
7 **falsehood or ignorance, contrary to established defamation case law**  
8 **to the contrary demonstrated supra.**

9 **a. NRS 41.637(4) impermissibly protects opinion that is malicious**  
10 **and without truth.**

11 NRS 41.637(4) provides that if an action is brought against a person based  
12 upon good faith communication, the person may file a special motion to dismiss  
13 the claim. If a special motion to dismiss is filed, the court must first determine  
14 whether the moving party has established, by a preponderance of the evidence, that  
15 the claim is based upon a good faith communication in furtherance of the right to  
16 petition or the right to free speech in direct connection with an issue of public  
17 concern. If the court determines that the moving party has met this burden, the  
18 court must then determine whether the person who brought the claim has  
19 established by clear and convincing evidence a probability of prevailing on the  
20 claim. While the court's ruling on the special motion to dismiss is pending and  
21 while the disposition of any appeal from that ruling is pending, the court must stay  
22 discovery.  
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1 The precise language is: "Communication made in direct connection with an  
2 issue of public interest in a place open to the public or in a public forum, which is  
3 truthful or is made without knowledge of its falsehood." An opinion is defined as  
4 "a view or judgment formed about something, not necessarily based on fact or  
5 knowledge." That definition fits the language above perfectly. Thus, what NRS  
6 41.637(4) is designed to protect is opinion. However, Defendants' website  
7 contained no opinion as that is defined in *Scott v. News-Herald*, supra.

10 First, it conveys *no* pertinent information to the public about a matter of  
11 public interest. Rather, the matter is a private family matter concerning the  
12 guardianship of an elderly family member. Nothing about such information  
13 renders it of public concern. Second, there is no public debate about this private  
14 family matter. The case is not notorious, newsworthy, or otherwise interesting to  
15 the public at large. Thus, it has no public value. Third, there is nothing close to be  
16 cautious about what is written or posted on the complained of website. Rather the  
17 information is inflammatory and aimed at doing damage and, perhaps even,  
18 persuade Appellants from pursuing guardianship of Appellant Howard Shapiro.  
19 Therefore, what is being dealt with is facts that are blatantly false and made  
20 maliciously.

26 The statements made, contained in the complaint, are certainly false  
27 connotations made with a high level of fault. Allegations of kidnapping, theft,  
28

1 elder abuse and the like cannot be confused with anything but connotations made  
2 with a high level of fault. Therefore, NRS 41.637(4) is in contravention of ancient  
3 common-law claims for defamation and are thus unconstitutionally vague as they  
4 create confusion concerning when a defamation case can be made and under what  
5 circumstances.  
6

7  
8 **b. This is not a matter of public concern as required under NRS**  
9 **41.637(4).**

10 Speech deals with matters of public concern when it can “be fairly  
11 considered as relating to any matter of political, social, or other concern to the  
12 community,” or when it “is a subject of legitimate news interest; that is, a subject  
13 of general interest and of value and concern to the public,” *Snyder v. Phelps*, 131  
14 S. Ct. 1207, 1216, 179 L. Ed. 2d 172, 181, 2011 U.S. LEXIS 1903, 17, 562 U.S.  
15 443, 79 U.S.L.W. 4135, 39 Media L. Rep. 1353, 22 Fla. L. Weekly Fed. S 836  
16 (U.S. 2011).or when it “is a subject of general interest and of value and concern to  
17 the public,” *Id. at* 1211; See also *San Diego v. Roe*, 543 U.S. 77, 83-84, 125 S. Ct.  
18 521, 160 L. Ed. 2d 410. To determine whether speech is of public or private  
19 concern, The United States Supreme Court has held that it must independently  
20 examine the “ ‘content, form, and context’ ” of the speech “ ‘as revealed by the  
21 whole record.’ ”  
22

23  
24 *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761, 105  
25 S. Ct. 2939, 86 L. Ed. 2d 593.In considering content, form, and context, no factor  
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1 is dispositive, and it is necessary to evaluate all aspects of the speech. *Snyder v.*  
2 *Phelps*, 131 S. Ct. 1207, 1211, 179 L. Ed. 2d 172, 176, 2011 U.S. LEXIS 1903, 3-  
3 4, 562 U.S. 443, 79 U.S.L.W. 4135, 39 Media L. Rep. 1353, 22 Fla. L. Weekly  
4  
5 Fed. S 836 (U.S. 2011).

6 In *Snyder*, the Court found the content to be of public concern, stating:

7  
8 Westboro's signs plainly relates to public, rather than private, matters.  
9 The placards highlighted issues of public import--the political and  
10 moral conduct of the United States and its citizens, the fate of the  
11 Nation, homosexuality in the military, and scandals involving the  
12 Catholic clergy--and Westboro conveyed its views on those issues in a  
13 manner designed to reach as broad a public audience as possible. Even  
14 if a few of the signs were viewed as containing messages related to a  
15 particular individual, that would not change the fact that the dominant  
16 theme of Westboro's demonstration spoke to broader public issues.<sup>2</sup>

17 The Court explained that the context of the speech was its connection with  
18 Matthew Snyder's funeral. *Id.* However, a person's choice of where and when to  
19 conduct his/her speech is not beyond the Government's regulatory reach--it is  
20 "subject to reasonable time, place, or manner restrictions." *Id.* at 1211-1212; citing  
21 *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct.  
22 3065, 82 L. Ed. 2d 221. After consideration, however, the Court found the context  
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26 <sup>2</sup> *Snyder v. Phelps*, 131 S. Ct. 1207, 1211, 179 L. Ed. 2d 172, 176, 2011 U.S.  
27 LEXIS 1903, 4, 562 U.S. 443, 79 U.S.L.W. 4135, 39 Media L. Rep. 1353, 22 Fla.  
28 L. Weekly Fed. S 836 (U.S. 2011).

1 tenuous at best. In Snyder, the Court found that the speech was of public concern,  
2 due primarily to its content.

3 ***Example of matter not of public concern***  
4

5 The Court's opinion in *Dun & Bradstreet*, on the other hand, provides an  
6 example of speech of only private concern. In that case the Court held, as a  
7 general matter, that information about a particular individual's credit report  
8 "concerns no public issue." The content of the report, "was speech solely in the  
9 individual interest of the speaker and its specific business audience."<sup>3</sup>  
10  
11

12 Finally, in *Johnson v. Ryan*, citing *Alaska Structures, Inc. v. Hedlund*, 180  
13 Wn. App. 591, 599, 323 P.3d 1082 (2014), the Johnson court described a matter of  
14 public concern, referencing federal case law, including United States Supreme  
15 Court law, as follows:  
16

17 First, "public interest" does not equate with mere curiosity. (*Time, Inc.*  
18 *v. Firestone*, [424 U.S. 448, 454-55, 96 S. Ct. 958, 47 L. Ed. 2d 154  
19 (1976)]; *Briscoe v. Reader's Digest Association Inc.*, (1971) 4 Cal.3d  
20 529, 537 [93 Cal.Rptr. 866, 483 P.2d 34].) Second, a matter of public  
21 interest should be something of concern to a substantial number of  
22 people. (*Dun & Bradstreet v. Greenmoss Builders*, [472 U.S. 749,  
23 762, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985)].) Thus, a matter of  
24 concern to the speaker and a relatively small, specific audience is not  
25 a matter of public interest. (*Ibid.*; *Hutchinson v. Proxmire* (1979) 443  
26 U.S. 111, 135 [61 L.Ed.2d 411, 431, 99 S.Ct. 2675].) Third, there  
27 should be some degree of closeness between the challenged  
28 statements and the asserted public interest. (*Connick v. Myers* (1983)  
461 U.S. 138, 148-149 [75 L.Ed.2d 708, 720-721, 103 S.Ct. 1684]);

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<sup>3</sup> *Id.* at 1216.

1 the assertion of a broad and amorphous public interest is not  
2 sufficient. (*Hutchinson v. Proxmire, supra*, 443 U.S. at p. 135 [61  
3 L.Ed.2d at p. 431]). Fourth, the focus of the speaker's conduct should  
4 be the public interest rather than a mere effort "to gather ammunition  
5 for another round of [private] controversy ... ." (*Connick v. Myers,*  
6 *supra*, 461 U.S. at p. 148 [75 L.Ed.2d at p. 721].) Finally, "those  
7 charged with defamation cannot, by their own conduct, create their  
8 own defense by making the claimant a public figure." (*Hutchinson v.*  
9 *Proxmire, supra*, 443 U.S. at p. 135 [61 L.Ed.2d at p. 431].)<sup>4</sup>

10 First, the content of the speech at issue must be considered. Here, the  
11 content considered are clear lies about Howard and only Howard and his alleged  
12 conduct toward his father. The information was disseminated in the course of a  
13 guardianship matter pending in New Jersey through a national website. That  
14 matter was sealed and not made available to the public. Furthermore, guardianship  
15 rules limit those interested parties by law to family members of a certain degree of  
16 consanguinity.

17 Thus, as in *Dun & Bradstreet*, the speech was solely in the individual  
18 interest of the speaker and its specific audience, certain other family members or  
19 fictive kin in a certain degree of consanguinity. In essence, this is a matter of  
20 concern to the speaker and a relatively small, specific audience, not a matter of  
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26 <sup>4</sup> *Johnson v. Ryan*, 2015 Wash. App. LEXIS 564, 15 (Wash. Ct. App. Mar. 19,  
27 2015).  
28



1 public interest: rather, in this case, the interest is limited to a small number of  
2 family members. Thus, the content is not of public concern.

3       The next element to consider is the context, or the speech's connection to the  
4 event, in this case the guardianship matter and struggle over the guardianship of  
5 Walter. Here, "the focus of the speaker's conduct should be the public interest  
6 rather than a mere effort "to gather ammunition for another round of [private]  
7 controversy ...." *Connick v. Myers, supra*, 461 U.S. at p. 148 [75 L.Ed.2d at p.  
8 721].  
9

10  
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12       Furthermore, the assertion of a broad and amorphous public interest is not  
13 sufficient. *Hutchinson v. Proxmire, supra*, 443 U.S. at p. 135 [61 L.Ed.2d at p.  
14 431]. Finally, there should be some degree of closeness between the challenged  
15 statements and the asserted public interest. *Connick v. Myers* (1983) 461 U.S. 138,  
16 148-149 [75 L.Ed.2d 708, 720-721, 103 S.Ct. 1684]. Here, Defendant Glen Welt's  
17 website contains nothing but invective aimed at a broad public and an amorphous  
18 interest: the public's safety from Howard and his tendency to be an arch-criminal.  
19 Mr. Welt calls on all citizens to: 1) come to his aid in his personal vendetta with  
20 Howard, and 2) beware of Howard. None of this has anything to do with the  
21 guardianship matter. The guardianship matter is a pretext for defaming Howard  
22 and destroying his good name.  
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1 As such, the content of the website and of the guardianship matter is of no  
2 public concern and the context has nothing to do with the guardianship matter as it  
3 is a call to arms and general "beware" aimed at an amorphous public about the  
4 dangers of Howard Shapiro.  
5

6 **III. Judge Nancy Alff committed legal error in her in her decision by**  
7 **relying on incorrect facts and a misunderstanding of *Jacobs v.***  
8 ***Adelson*, 130 Nev. Adv. Op. 44 (2014).**

9 In her decision, Judge Alff characterized the *Jacobs* case as standing for the  
10 proposition that there is an absolute litigation privilege. See AA Page 2, Lines 25-  
11 26. This is incorrect. In *Jacobs*, the Nevada Supreme Court held that:

13 Although statements made during the course of judicial proceedings  
14 are generally considered absolutely privileged and cannot form the  
15 basis of a defamation claim, we have yet to consider whether  
16 statements made to the media regarding ongoing or contemplated  
17 litigation are covered by this absolute privilege. We adopt the  
18 majority view that communications made to the media in an  
19 extrajudicial setting are not absolutely privileged, at least when the  
20 media holds no more significant interest in the litigation than the  
21 general public. Thus, we reverse the order of dismissal and remand  
22 this matter to the district court for further proceedings.<sup>5</sup>

23 Thus, a privilege does exist and Judge Alff's analysis was incorrect. *Jacobs*  
24 v. *Adelson*, 325 P.3d 1282, 1284 (Nev. 2014).  
25  
26  
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28 <sup>5</sup> *Jacobs v. Adelson*, 325 P.3d 1282, 1284 (Nev. 2014).

1 Additionally, and most importantly, the Nevada Supreme Court held in

2 *Jacobs*:

3 we have previously determined that the absolute privilege only covers  
4 statements made to those without direct involvement in the judicial  
5 proceeding if the recipients of the communication are "significantly  
6 interested in the proceeding." *Fink v. Oshins*, 118 Nev. 428, 436, 49  
7 P.3d 640, 645-46 (2002) (internal quotations omitted). While we have  
8 yet to examine what constitutes a "significant interest" in judicial  
9 proceedings, drawing from our analysis in *Fink*, the policy underlying  
10 the absolute privilege, and other relevant caselaw, **we conclude that**  
11 **assessing the significant interest of the recipient requires review of**  
12 **the recipient's legal relationship to the litigation, not their interest as**  
13 **an observer.** See *id.* at 436, 49 P.3d at 645-46; *cf. Hall v. Smith*, 214  
14 Ariz. 309, 152 P.3d 1192, 1197 (Ariz. Ct. App. 2007) (stating that  
15 resolution of the judicial privilege issue pivots on relationship of  
16 recipient to the legal proceedings). (Emphasis added).<sup>6</sup>

17 Here, as stated above, the public has no relationship to the litigation at  
18 issue. Thus, under *Jacobs v. Adelson*, 41.637(4) does not protect the  
19 Defendants, particularly not Glen Welt as he was not a party to the litigation.  
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28 <sup>6</sup> *Jacobs v. Adelson*, 325 P.3d 1282, 1287 (Nev. 2014).

1 **Conclusion**

2 For the foregoing reasons, Appellants request this Court reverse the  
3 order dismissing the complaint and remand for a new trial.  
4

5 DATED this 1<sup>st</sup> day of October, 2015.  
6

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## **CERTIFICATE OF COMPLIANCE**

1  
2 1. I hereby certify that this brief complies with the formatting requirements  
3 of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style  
4 requirements of NRAP 32(a)(6) because: This brief has been prepared in a  
5 proportionally spaced typeface using Office Word, 14 point font, times new roman  
6 in.  
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9 2. I further certify that this brief complies with the page- or type volume  
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12 points, contains 3284 words, and does not exceed 30 pages.  
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15 3. Finally, I hereby certify that I have read this appellate brief, and to the  
16 best of my knowledge, information, and belief, it is not frivolous or interposed for  
17 any improper purpose. I further certify that this brief complies with all applicable  
18 Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires  
19 every assertion in the brief regarding matters in the record to be supported by a  
20 reference to the page and volume number, if any, of the transcript or appendix  
21 where the matter relied on is to be found.  
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1 I understand that I may be subject to sanctions in the event that the  
2 accompanying brief is not in conformity with the requirements of the Nevada  
3 Rules of Appellate Procedure.  
4

5 Dated this 1<sup>st</sup> day of October, 2015.

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