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Electronically Filed
Nov 23 2015 03:00 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

7 **IN THE SUPREME COURT OF NEVADA**

8 HOWARD SHAPIRO and JENNA
9 SHAPIRO

10 Appellants/Cross-Respondents

11 v.

12 GLENN WELT, RHODA WELT,
13 LYNN WELT, and MICHELLE
14 WELT,

15 Respondents/Cross-Appellants

Supreme Ct. No. 67363
Dist. Ct. No. A-14-706566-C

**RESPONDENTS' ANSWERING
BRIEF (67363) AND OPENING
BRIEF (67596)**

16 HOWARD SHAPIRO and JENNA
17 SHAPIRO

18 Appellants

19 v.

20 GLENN WELT, RHODA WELT,
21 LYNN WELT, and MICHELLE
22 WELT,

23 Respondents

Supreme Ct. No. 67596
Dist. Ct. No. A-14-706566-C

24 **APPEAL**

25 From the Eighth Judicial District Court, Clark County

26 The Honorable Nancy L. Allf, District Judge

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1 **NRAP 26.1 Disclosure**

2 The undersigned counsel of record certifies that the following are persons
3 and entities, as described in NRAP 26.1(a), and must be disclosed. These
4 representations are made in order that the judges of this court may evaluate
5 possible disqualification or recusal.

6 1. Parent Corporation: None

7 2. Publicly held company that owns 10% or more of the party's stock:
8 None.

9 3. Law firms who have appeared or are expected to appear for Glenn
10 Welt, Rhoda Welt, Lynn Welt, and Michele Welt: Thorndal Armstrong Delk
11 Balkenbush & Eisinger.

12 DATED this 23rd day of November, 2015.

13 THORNDAL, ARMSTRONG,
14 DELK, BALKENBUSH & EISINGER

15 /s/ *Michael P. Lowry*

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1 **Attorney's Certificate of Compliance**

2 1. I certify that this brief complies with the formatting requirements of
3 NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style
4 requirements of NRAP 32(a)(6) because it has been prepared in a proportionally
5 spaced typeface using Microsoft Word 2007 in 14 point Times New Roman.

6 2. I further certify that this brief complies with the page- or type-volume
7 limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by
8 NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or
9 more, and contains 5,081 words.

10 3. Finally, I certify that I have read this petition, and to the best of my
11 knowledge, information, and belief, it is not frivolous or interposed for any
12 improper purpose. I further certify that this petition complies with all applicable
13 Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires
14 every assertion in the petition regarding matters in the record to be supported by a
15 reference to the page and volume number, if any, of the transcript or appendix
16 where the matter relied on is to be found. I understand that I may be subject to
17 sanctions in the event that the accompanying petition is not in conformity with the
18 requirements of the Nevada Rules of Appellate Procedure.

19 DATED this 23rd day of November, 2015.

20 THORNDAL, ARMSTRONG,
21 DELK, BALKENBUSH & EISINGER

22 */s/ Michael P. Lowry*

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27 Lynn Welt and Michele Welt
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1 **Certificate of Service**

2 Pursuant to NRAP 25, on November 23, 2015 **RESPONDENTS'**
3 **ANSWERING BRIEF (67363) AND OPENING BRIEF (67596)** was served
4 upon each of the parties to appeal 67363 via electronic service through the
5 Supreme Court of Nevada's electronic filing.

6
7 */s/ Michael P. Lowry*

8

An Employee of Thorndal, Armstrong,
9 Delk, Balkenbush & Eisinger

1 **Jurisdictional Statement**

2 The parties have filed cross-appeals. On January 2, 2015 notice of entry
3 occurred as to the district court’s order granting the Welts’ motion to dismiss.¹
4 The Shapiros filed their notice of appeal from that order on February 2, 2015.² The
5 Shapiros’ appeal is from a final judgment.³ The Welts filed a cross-appeal of this
6 final judgment on February 13, 2015.⁴

7 On January 5, 2015 the Welts filed the affidavit requested by the district
8 court concerning recoverable attorneys’ fees and costs authorized by NRS 41.670.⁵
9 On February 20, 2015 the district court entered its order granting certain attorneys’
10 fees and costs.⁶ Notice of entry of this order occurred on February 23, 2015.⁷ The
11 Welts’ then appealed this order on March 14, 2015.⁸ The Welts’ appeal is from an
12 order modifying a final judgment.⁹

13 **Statement of the Issues Presented for Review**

14 1. Was the district court correct to grant the Welts’ NRS 41.660 special
15 motion to dismiss?

16 2. Did the district court abuse its discretion by misinterpreting NRS
17 41.670(1)(a) to limit the attorney’s fees the Welts could recover to only those
18 incurred concerning their motion to dismiss? This is an issue of first impression.

19 3. Did the district court abuse its discretion by denying, without
20 explanation, the Welts’ request for relief per NRS 41.670(1)(b)?
21
22

23 ¹ Respondents’ Appendix at 161-165.

24 ² *Id.* at 188-189.

25 ³ NRAP 3A(b)(1).

26 ⁴ Respondents’ Appendix at 190-191.

27 ⁵ *Id.* at 166-184.

28 ⁶ *Id.* at 192-194.

⁷ *Id.* at 195-199.

⁸ *Id.* at 200-201.

⁹ NRAP 3A(b)(1).

1 4. If the district court did abuse its discretion as to NRS 41.670(1)(b),
2 what factors should a district court consider in deciding whether to issue an award
3 such as NRS 41.670(1)(b) provides? This is an issue of first impression.

4 **Statement of the Case**

5 The genesis of this litigation is a conservatorship petition being litigated in
6 New Jersey. Walter Shapiro is the father of plaintiff Howard Shapiro.¹⁰ On
7 August 5, 2014 Howard petitioned a New Jersey court to appoint him as Walter's
8 conservator.¹¹ The Welts are relatives of Walter and oppose Howard's petition.¹²
9 Although not listed in the petition, Glenn Welt is Walter's nephew. Glenn Welt
10 created a website that concerns the New Jersey petition,
11 www.howardshapirovictims.com.

12 After the website was created, the Shapiros filed their civil complaint in
13 Nevada on September 4, 2014.¹³ On December 15, 2014 the Welts filed their
14 motion to dismiss¹⁴ that the district court granted on January 2, 2015.¹⁵ The district
15 court then granted in part and denied in part the Welts' statutory request for
16 attorneys' fees on February 20, 2015.¹⁶

17 **Statement of the Facts**

18 The genesis of this litigation is a conservatorship petition being litigated in
19 New Jersey. Walter Shapiro is the father of plaintiff Howard Shapiro. On August
20 5, 2014 Howard petitioned a New Jersey court to appoint him as Walter's
21 conservator.¹⁷ The petition alleged Walter is allegedly no longer mentally fit to
22 care for himself. The Welts are relatives of Walter and oppose Howard's

23 ¹⁰ To avoid confusion arising from identical last names, the parties are referenced
24 by their first names.

25 ¹¹ Respondents' Appendix at 52-74.

26 ¹² *Id.* at 76-81.

27 ¹³ *Id.* at 1-24.

28 ¹⁴ *Id.* at 28-103.

¹⁵ *Id.* at 158-160.

¹⁶ *Id.* at 192-194.

¹⁷ *Id.* at 52-74.

1 petition.¹⁸ Allen Shapiro, Walter’s brother, also vehemently opposes Howard’s
2 petition.¹⁹ It appears even Walter opposes the petition based upon his statements to
3 his court appointed attorney requesting that Michele Welt be appointed as
4 conservator of his property.²⁰ Although not listed in the petition, Glenn Welt is
5 Walter’s nephew.

6 The Nevada complaint alleges defamation arising from a website that
7 concerns the New Jersey petition, www.howardshapirovictims.com. It notes Glenn
8 Welt is the webmaster for this website.²¹ The complaint attaches an email and
9 letter from Glenn Welt stating he will be post the website for public viewing.²²
10 Mr. Welt’s stated goal is to invite Howard Shapiro’s “known victims to appear in
11 court along with other caretakers, neighbors, acquaintances and relatives you’ve
12 threatened.”

13 Mr. Welt’s statements upon the website were based, in part, upon a
14 background check concerning Howard Shapiro.²³ It also relied upon publicly
15 available property records to accurately note the foreclosure status of Howard’s
16 home.²⁴

17 **Summary of the Argument**

18 **A. The Shapiros’ Appeal**

19 The Shapiros’ complaint arose from statements made in direct connection to
20 a New Jersey conservatorship proceeding involving the parties. The complaint’s
21 goal was to silence the Shapiros’ critics in the New Jersey case, a result explicitly
22 barred by Nevada’s anti-SLAPP statutes.

24 ¹⁸ *Id.* at 76-81.

25 ¹⁹ *Id.* at 83.

26 ²⁰ *Id.* at 85.

27 ²¹ *Id.* at 6, ¶ 20.

28 ²² *Id.* at 17, 23-24.

²³ *Id.* at 88-97.

²⁴ *Id.* at 99-103.

1 As the statute itself is silent, it is appropriate to consider its legislative
2 history. During the legislative process, the lead sponsors of Senate Bill 286, the
3 bill that eventually was enacted, twice testified in committee hearings that the bill
4 was derived from a substantively similar Washington statute.²⁸ By borrowing from
5 Washington, Nevada implicitly adopted Washington caselaw interpreting that
6 statute as it then existed in 2013.²⁹

7 In Washington, an anti-SLAPP motion was subject to de novo review
8 whether granted or denied.³⁰ Washington courts concluded “the procedure for
9 deciding anti-SLAPP motions is similar to that used in deciding a motion for
10 summary judgment.”³¹ Statutorily, the court “shall consider pleadings and
11 supporting and opposing affidavits stating the facts upon which the liability or
12 defense is based. However, the trial court may not find facts, but rather must view
13 the facts and all reasonable inferences therefrom in the light most favorable to the
14 plaintiff.”³²

15 Although the Nevada Legislature deleted specific language stating an anti-
16 SLAPP motion is to be reviewed like a motion for summary judgment, the
17 legislative history and reliance upon Washington caselaw indicates a similar
18 standard of review still applies.

19 ///

20 ///

21 ///

23 ²⁸ Minutes of the Senate Committee on Judiciary, March 28, 2013, at 16; Minutes
24 of the Assembly Committee on Judiciary, May 6, 2013, at 5-6.

25 ²⁹ *International Game Technology, Inc. v. Dist. Ct.*, 122 Nev. 132, 153, 127 P.3d
26 1088, 1103 (2006) (“When the Legislature adopts a statute substantially similar to
27 a federal statute, a presumption arises that the legislature knew and intended to
28 adopt the construction placed on the federal statute by federal courts.”).

³⁰ *Davis v. Cox*, 325 P.3d 255, 263 (Wash. App. 2014) (overruled on other grounds
by *Davis v. Cox*, 351 P.3d 862 (Wash. 2015)).

³¹ *Id.*

³² *Id.* at 263-64 (citations and quotations omitted).

1 **B. The Shapiros lack an adequate record to meet their appellate**
2 **burden.**

3 “[A]n appellant’s appendix must include any portion of the record that is
4 necessary for this court’s determination of the issues raised on appeal.³³ “[T]his
5 court has made it clear that appellants are responsible for making an adequate
6 appellate record.”³⁴ Appellate courts “generally cannot consider matters not
7 contained in the record on appeal.”³⁵ “When an appellant fails to include necessary
8 documentation in the record, we necessarily presume that the missing portion
9 supports the district court’s decision.”³⁶

10 For instance, the appendix in *Cuzze* was insufficient and the judgment was
11 summarily affirmed. The appendix contained, “among other things, their answers
12 to interrogatories, and a copy of a Las Vegas Review-Journal newspaper article,
13 but no opposition to the summary judgment motion. Without the opposition, these
14 documents have no context, and we are unable to discern, with any certainty, that
15 they were even submitted with the opposition.”³⁷

16 Here, the Shapiros’ appendix contains only two documents: 1) their
17 complaint; and 2) the district court’s order granting the Welts’ motion to dismiss.
18 The appendix contains none of the other documentation NRAP 30(b)(3) requires
19 and none of the “other portions of the record essential to determination of issues
20 raised in appellant’s appeal.” The Shapiros’ appendix lacks anything that would
21 permit an appellate court to determine what happened in the district court and
22 evaluate the parties’ arguments. As an example, the Shapiros’ brief repeatedly

23 ³³ *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135
24 (2007) (citing NRAP 30(b)(3)); “Traditionally, when evidence on which the lower
25 court’s judgment rests is not included in the record on appeal, it is assumed that the
record supports the district court’s findings.” *Schouweiler v. Yancey Co.*, 101 Nev.
827, 831, 712 P.2d 786, 789 (1985) (quotation and citation omitted).

26 ³⁴ *Id.*

27 ³⁵ *Id.*

28 ³⁶ *Id.*

³⁷ *Id.* at 603-04, 172 P.3d at 135.

1 asserts the statements on www.howardshapirovictims.com were false yet the
2 appendix contains no support for this argument. As a result, it must be presumed
3 that the missing sections of the appendix support the district court's decision.
4 Based upon the documents the Shapiros chose to include in their appendix, there is
5 no basis to conclude the district court erred granting the Welts' motion to dismiss.

6 The Shapiros may not now supplement or revise their opening brief or
7 appendix. Although *Cuzze* seemed to imply such supplementation is permissible,³⁸
8 the Supreme Court later noted it was not. In *Sanchez v. Wal-Mart Stores, Inc.* the
9 appellants filed a supplemental brief after briefing had concluded. "In that
10 supplemental brief, appellants provided additional authority, which was available
11 when their reply brief was filed, and appellants asserted a new argument that was
12 not previously raised in their opening or reply briefs."³⁹

13 Here, the documentation upon which the Shapiros' appeal presumably relies
14 has existed since January 2, 2015 when the district court entered its order granting
15 the Welts' motion to dismiss. If the Shapiros wished to include this documentation
16 in their brief and appendix, they had ample time to do so. Allowing the Shapiros
17 to include this documentation in their reply brief and appendix prejudices the
18 Welts because it denies them an opportunity to respond.⁴⁰ Courts cannot consider
19 new evidence provided in a reply when the other party does not have an
20 opportunity to respond.⁴¹

21 **C. The Welts' statements are statutorily protected.**

22 If the Court decides the Shapiros' appeal on its merits, it conducts a two step
23 analysis to evaluate an anti-SLAPP special motion to dismiss. It first determines

24 ³⁸ *Id.* at 604, 172 P.3d at 135 ("In their answering brief, respondents point out that
25 appellants failed to include necessary documents in their appendix. Despite this
26 notice, appellants failed to take any steps to supplement their appendix with the
missing documents.").

³⁹ 125 Nev. 818, 829 n.7, 221 P.3d 1276, 1284 (2009).

⁴⁰ *Tovar v. United States Postal Service*, 3 F.3d 1271, 1273 n.3 (9th Cir. 1993).

⁴¹ *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996).

1 “whether the moving party has established, by a preponderance of the evidence,
2 that the claim is based upon a good faith communication in furtherance of the right
3 to petition or the right to free speech in direct connection with an issue of public
4 concern.”⁴² If the moving party meets its burden, the court then determines
5 “whether the plaintiff has established by clear and convincing evidence a
6 probability of prevailing on the claim.”⁴³ The Shapiros’ appeal concerns only the
7 first step: did the Welts demonstrate, by a preponderance of the evidence, that the
8 Shapiros’ claim is based upon a good faith communication in furtherance of the
9 right to petition or the right to free speech in direct connection with an issue of
10 public concern? If the Welts met this burden, the Shapiros’ do not argue they
11 could establish by clear and convincing evidence a probability of prevailing on
12 their claim. Given this, the focus of the Shapiros appeal is exclusively upon the
13 first step.

14 **i. The Welts’ statements arose from their right to petition in**
15 **direction connection with an issue of public concern.**

16 Nevada’s anti-SLAPP statutes are invoked when “an action is brought
17 against a person based upon a good faith communication in furtherance of ... the
18 right to free speech in direct connection with an issue of public concern”⁴⁴ NRS
19 41.637 defines the phrase “[g]ood faith communication in furtherance of the right
20 ... to free speech in direct connection with an issue of public concern.” This
21 phrase includes a “[w]ritten or oral statement made in direct connection with an
22 issue under consideration by a legislative, executive or judicial body, or any other
23 official proceeding authorized by law.”⁴⁵ It also includes “[c]ommunication made
24 in direct connection with an issue of public interest in a place open to the public or
25

26 ⁴² NRS 41.660(3)(a).

27 ⁴³ NRS 41.660(3)(b).

28 ⁴⁴ NRS 41.660(1).

⁴⁵ NRS 41.637(3).

1 in a public forum.”⁴⁶ These protections extend to any communication “which is
2 truthful or is made without knowledge of its falsehood.”⁴⁷ Neither of these
3 definitions has yet been interpreted by a Nevada appellate court.

4 The Supreme Court of Nevada has acknowledged California decisions
5 interpreting its anti-SLAPP statute are persuasive. “Nevada’s anti-SLAPP statute
6 was enacted in 1993, shortly after California adopted its statute, and both statutes
7 are similar in purpose and language.”⁴⁸ The language of both states’ anti-SLAPP
8 statutes remained similar after Nevada’s 2013 amendments. For instance,
9 California uses substantively identical language to define communications that
10 qualify for protection. Like Nevada, California’s protection is provided to

- 11 (1) any written or oral statement or writing made before a legislative,
12 executive, or judicial proceeding, or any other official proceeding
13 authorized by law,
14 (2) any written or oral statement or writing made in connection with
15 an issue under consideration or review by a legislative, executive, or
16 judicial body, or any other official proceeding authorized by law.⁴⁹

17 It is also appropriate to consider Washington law since Nevada
18 utilized as a source for its 2013 amendments. Washington protected

- 19 (b) Any oral statement made, or written statement or other document
20 submitted, in connection with an issue under consideration or review
21 by a legislative, executive, or judicial proceeding or other
22 governmental proceeding authorized by law;
23 (c) Any oral statement made, or written statement or other document
24 submitted, that is reasonably likely to encourage or to enlist public
25 participation in an effort to effect consideration or review of an issue
26 in a legislative, executive, or judicial proceeding or other
27 governmental proceeding authorized by law;
28 (d) Any oral statement made, or written statement or other document
submitted, in a place open to the public or a public forum in
connection with an issue of public concern; or

26 ⁴⁶ NRS 41.637(4).

27 ⁴⁷ NRS 41.637.

28 ⁴⁸ *John*, 125 Nev. at 752, 219 P.3d at 1281.

⁴⁹ Cal Code Civ Proc § 425.16(e)(1), (2) (2014).

1 (e) Any other lawful conduct in furtherance of the exercise of the
2 constitutional right of free speech in connection with an issue of
3 public concern, or in furtherance of the exercise of the constitutional
4 right of petition.⁵⁰

5 **ii. The statements concerned issues under consideration by a judicial
6 body.**

7 The Shaprios argue the statements on www.howardshapirovictims.com do
8 not qualify for NRS 41.660(1)'s protections because they are not "in direct
9 connection with an issue of public concern."⁵¹ This argument is not supported by a
10 single citation to authority, nor are statements concerning litigation required to
11 address an issue of public concern.

12 California has applied its anti-SLAPP definitions broadly to protect speech
13 similar to the Welts'. "Thus, statements, writings and pleadings in connection with
14 civil litigation are covered by the anti-SLAPP statute, and that statute does not
15 require any showing that the litigated matter concerns a matter of public interest."⁵²
16 "[A] statement is 'in connection with' litigation ... if it relates to the substantive
17 issues in the litigation and is directed to persons having some interest in the
18 litigation."⁵³

19 For example, a litigation update sent by a homeowner's association to
20 inform its members of pending litigation was a statement made in connection with
21 a judicial proceeding within the meaning of the anti-SLAPP statute.⁵⁴ Similarly, a
22 company's email to a small group of customers concerning court rulings and
23 favorable imposition of sanctions in litigation against the company's competitor

24 ⁵⁰ Rev. Code Wash. § 4.24.525(2)(b)-(e) (2014).

25 ⁵¹ NRS 41.660(1).

26 ⁵² *Neville v. Chudacoff*, 160 Cal. App. 4th 1255, 1261 (2008) (quoting *Rohde v. Wolf*, 154 Cal. App. 4th 28, 35 (2007)).

27 ⁵³ *Id.* at 1266.

28 ⁵⁴ *Healy v. Tuscany Hills Landscape & Recreation Corp.*, 137 Cal.App.4th 1, 5-6 (2006).

1 was protected activity because it was in connection with an issue under
2 consideration or review by a judicial body in connection with litigation.⁵⁵

3 Applied here, the statements on www.howardshapirovictims.com were made
4 in direct connection with an issue under consideration by a New Jersey judicial
5 body. The New Jersey court was evaluating a petition to appoint a conservator
6 over Walter and whether Howard should be that conservator. The statements on
7 www.howardshapirovictims.com directly concerned whether Howard was suitable
8 for that role. The website also requested information from others with information
9 that might reflect upon Howard's suitability to be Walter's conservator.

10 The Welts' statements on the website were "made in direct connection with
11 an issue under consideration by a ... judicial body...."⁵⁶ This qualifies the
12 statements as "[g]ood faith communication in furtherance of the right ... to free
13 speech in direct connection with an issue of public concern."⁵⁷ The Shapiros'
14 complaint is premised exclusively upon these statements. Given these facts, the
15 Welts' statements are protected and they are immune from suit.⁵⁸ The district
16 court's conclusion was correct and should be affirmed.

17 **iii. The website concerned an issue of public interest.**

18 If the website's statements were not made in direct connection with an issue
19 under consideration by a judicial body, the statements still concerned an issue of
20 public interest. Howard sought to invoke the authority of the State of New Jersey
21 to take involuntary control of Walter's personal and financial matters. As *Young v.*
22 *CBS Broad., Inc.*⁵⁹ concluded, this is very much an issue of public concern within
23 the definition of anti-SLAPP statutes. There the plaintiff was a professional
24

25 ⁵⁵ *Contemporary Services Corp. v. Staff Pro Inc.*, 152 Cal.App.4th 1043, 1050-
1051, 1055-1056 (2007).

26 ⁵⁶ NRS 41.637(3).

27 ⁵⁷ NRS 41.637.

28 ⁵⁸ NRS 41.650 (2014).

⁵⁹ 212 Cal. App. 4th 551, 553 (2012).

1 conservator and was appointed by the court as a conservator for an elderly woman.
2 After the conservatorship terminated, a local television station aired a report
3 accusing the conservator of abusing her authority and mistreating Mann. The
4 conservator filed a defamation suit against the television station, who responded
5 with an anti-SLAPP motion. The television station’s statements, however,
6 concerned an issue of public concern. “A person holding these sovereign powers
7 over another unrelated person and using them for compensation is subject to the
8 public’s independent interest in her performance, and warrants public scrutiny
9 beyond that occasioned by the controversy with Mann.”⁶⁰

10 The public has an interest in those who invoke governmental authority to
11 take involuntary control of another’s life. This is precisely why judicial review
12 exists over conservators. Comments concerning Howard’s suitability to be
13 Walter’s conservator were made in connection with that issue and are protected.
14 Again, the district court’s conclusion was appropriate and should be affirmed.

15 **D. The district court appropriately applied *Jacobs v. Adelson*.**

16 The district court’s order granting the Welts’ motion to dismiss stated “[t]he
17 Nevada Supreme Court recently reconfirmed its commitment to an absolute
18 litigation privilege in” *Jacobs v. Adelson*, 130 Nev. Adv. Op. 44, 325 P.3d 1282,
19 1285 (2014).⁶¹ The Shapiros argue the district court erred by relying upon *Jacobs*
20 at all.

21 *Jacobs* was not the primary basis for the district court’s order, nor did
22 *Jacobs* itself concern Nevada’s anti-SLAPP statutes. Instead, *Jacobs* created
23 Nevada’s only, narrow exception to the otherwise absolute litigation privilege.
24 Specifically, *Jacobs* concluded “communications made to the media in an
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26
27 ⁶⁰ *Id.* at 562.

28 ⁶¹ Respondents’ Appendix at 192-194.

1 extrajudicial setting are not absolutely privileged, at least when the media holds no
2 more significant interest in the litigation than the general public.”⁶²

3 Applied here, the district court concluded the statements on
4 www.howardshapirovictims.com were not made to a media outlet in an
5 extrajudicial setting like in *Jacobs*. This meant the statements on the website are
6 protected by the absolute litigation privilege. The district court properly
7 considered *Jacobs* in reaching its decision.

8 **E. NRS 41.670 is unambiguous and requires an award of all**
9 **reasonable attorneys’ fees.**

10 When a district court grants a special motion to dismiss per NRS 41.660, it
11 “shall award reasonable costs and attorney’s fees to the person against whom the
12 action was brought....”⁶³ The Welts special motion to dismiss was filed per NRS
13 41.660 and was granted.⁶⁴ They then filed the affidavit on fees and costs that the
14 district court requested.⁶⁵ The affidavit requested \$14,775.00 of attorneys’ fees,
15 consisting of 59.1 hours at \$250.00 per hour.⁶⁶ In reviewing this affidavit and the
16 Shapiros’ response, the district court then applied the *Brunzell*⁶⁷ factors. It
17 accurately noted the Welts “affidavit requested attorneys’ fees that accrued
18 throughout the entirety of the case.” The district court refused to award this
19 amount. “In applying a reasonableness standard, it is appropriate to only allow the
20 work specifically relating to the successful Motion to Dismiss under NRS
21 41.660.”⁶⁸ It then awarded \$4,500 of attorneys’ fees that it concluded related to
22 that motion.⁶⁹ The district court erroneously construed NRS 41.670(1)(a).

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24 ⁶² *Jacobs*, 325 P.3d at 1284.

25 ⁶³ NRS 41.670(1)(a).

26 ⁶⁴ Respondents’ Appendix at 158-160.

27 ⁶⁵ *Id.* at 166-184.

28 ⁶⁶ *Id.*

⁶⁷ *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

⁶⁸ Respondents’ Appendix at 193.

⁶⁹ *Id.*

1 Statutory construction is a question of law that this court reviews de novo.⁷⁰
2 “When a statute is clear on its face, we will not look beyond the statute’s plain
3 language.”⁷¹ Where the statute is unambiguous, a court may not deviate from the
4 statute’s plain meaning or read additional language into the statute.⁷² Here, NRS
5 41.670(1)(a) states the “shall award reasonable costs and attorney’s fees to the
6 person against whom the action was brought....” The statute contains no language
7 limiting the award of attorney’s fees to those specifically relating to the motion to
8 dismiss. By ruling that NRS 41.670(1)(a) limited the attorney’s fees to those
9 specifically relating to the motion to dismiss, the district court impermissibly read
10 language into an unambiguous statute.

11 The district court’s ruling would have been correct had NRS 41.670(1)(a)
12 mirrored Guam’s anti-SLAPP statute. If a Guam court grants an anti-SLAPP
13 motion to dismiss, it shall award the “costs of litigation, including reasonable
14 attorney and expert witness fees, incurred in connection with the motion....”⁷³
15 NRS 41.670(1)(a) contains no similar restriction. Even had it, Guam’s limiting
16 language is broadly interpreted to include far more than merely drafting and
17 arguing the motion itself.⁷⁴

18 The district court appropriately noted NRS 41.670(1)(a) permits an award of
19 only “reasonable” attorney’s fees. It also then appropriately relied upon *Brunzell*
20 to determine which fees were reasonable. However, the district court erred by
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22 ⁷⁰ *Egan v. Chambers*, 129 Nev. Adv. Op. 25, 299 P.3d 364, 366 (2013).

23 ⁷¹ *Id.*

24 ⁷² *Williams v. United Parcel Servs.*, 129 Nev. Adv. Op. 41, 302 P.3d 1144, 1148
(2013).

25 ⁷³ 7 GC § 17106(g)(1) (2014).

26 ⁷⁴ *Enriquez v. Smith*, 2015 Guam 29, ¶ 34 (“Smith’s initial appeal arguing that the
27 trial court be compelled to address her anti-SLAPP motion on the merits, as well as
28 her defense of the appeal in the present case are certainly covered by the statutory
mandate. Additionally, because the award of attorney’s fees and sanctions are a
mandatory result of success on a CPGA motion, Smith’s counterclaims regarding
these issues are also sufficiently connected to her motion to warrant compensation
for preparation of these arguments.”).

1 using *Brunzell* to restrict the categories of attorney’s fees the Welts could recover.
2 When considering the reasonableness of attorneys’ fees to award, *Brunzell* requires
3 district courts to consider at least four factors.

- 4 (1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill;
- 5 (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the
- 6 prominence and character of the parties where they affect the importance of the litigation;
- 7 (3) the work actually performed by the lawyer: the skill, time and attention given to the work;
- 8 (4) the result: whether the attorney was successful and what benefits were derived.⁷⁵

9
10 The district court considered the qualities of the advocate and concluded
11 they were appropriate for the rate charged.⁷⁶ It considered the character of the
12 work, concluding it “was intricate, and required research into a developing area of
13 law.”⁷⁷ The district court did not expressly address the third factor, however it did
14 not conclude the work actually performed was inappropriate, insufficient or
15 overbilled. Finally, the fourth factor need not be expressly addressed as the Welts’
16 motion to dismiss was successful and benefited them.

17 *Brunzell* provides the district court with a method to evaluate whether the
18 attorney’s fees requested are appropriate for the facts and circumstances of the
19 individual case. They are designed to protect opposing parties from exorbitant
20 rates from less qualified lawyers, dubious billing activities and poor quality work.
21 The district court concluded none of this occurred. The costs and fees the Welts
22 incurred were appropriate and not unreasonable such as the more than \$200,000 in
23 fees that an Oregon court reduced to \$40,000.⁷⁸

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25 ⁷⁵ *Brunzell*, 85 Nev. at 349, 455 P.2d at 33.

26 ⁷⁶ Order at 2-3.

27 ⁷⁷ *Id.* at 3.

28 ⁷⁸ “It is beyond comprehension, let alone reasonableness, that litigating a case only as far as a special motion to strike costs over \$ 200,000 in legal fees, especially considering these motions must be filed within 60 days of serving the complaint

1 The Legislature decided all reasonable fees are recoverable. The courts are
2 to use *Brunzell* to determine if the fees requested are reasonable. The courts may
3 not use *Brunzell* to prevent a prevailing party from recovering reasonable fees for
4 certain categories of work. In doing so, the district court erroneously construed
5 NRS 41.670(1)(a) and improperly limited the Welts' award.

6 **i. On remand, the Welts may also recover their reasonable**
7 **attorney's fees and costs incurred with this appeal.**

8 Multiple courts construing anti-SLAPP fee shifting statutes have concluded
9 the prevailing defendants may also recover their reasonable attorney's fees and
10 costs incurred appealing a ruling on an anti-SLAPP motion. In Guam, "the trial
11 court erred in denying Smith's request for attorney's fees associated with the
12 appeal...."⁷⁹ Multiple state and federal courts interpreting California's anti-SLAPP
13 statute have reached the same conclusion.⁸⁰ Washington⁸¹ and Oregon⁸² have also
14 reached the same conclusion.

15 These conclusions are consistent with NRS 41.670(1)(a), as it contains no
16 language excluding reasonable costs and attorneys' fees on appeal from the award.
17 Any award of appellate costs and fees would still be subject to *Brunzell*'s
18 reasonableness analysis.

19 ///

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21
22 and are essentially the first thing the defendant does in the case." *Northon v. Rule*,
23 494 F. Supp. 2d 1183, 1185 (D. Or. 2007).

⁷⁹ *Enriquez*, 2015 Guam at ¶ 35.

⁸⁰ *Manufactured Home Communities, Inc. v. Cnty. of San Diego*, 655 F.3d 1171,
1181 (9th Cir. 2011); *Metabolife Int'l, Inc. v. Wornick*, 213 F. Supp. 2d 1220, 1222
25 (S.D. Cal. 2002); *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, 54 Cal. Rptr. 2d
830, 835 (App. 1996).

⁸¹ "[W]here a prevailing party is entitled to attorney fees below, they are entitled to
attorney fees if they prevail on appeal." *Davis*, 325 P.3d at 275.

⁸² *Northon v. Rule*, 637 F.3d 937 (9th Cir. 2011) (applying ORS § 31.152(3) and
permitting attorneys' fees for appeal).

1 **F. If NRS 41.670 is ambiguous, Legislative intent requires an award**
2 **of all reasonable attorneys' fees.**

3 “If the statutory language fails to address the issue, this court construes the
4 statute according to that which reason and public policy would indicate the
5 legislature intended.”⁸³ “The Legislature’s intent is the primary consideration
6 when interpreting an ambiguous statute.”⁸⁴ “When construing an ambiguous
7 statutory provision, this court determines the meaning of the words used in a
8 statute by examining the context and the spirit of the law or the causes which
9 induced the legislature to enact it.”⁸⁵

10 The Supreme Court has previously discussed the Legislature’s intent in
11 enacting Nevada’s anti-SLAPP statutes. The Court concluded “[a] SLAPP suit is a
12 meritless lawsuit that a party initiates primarily to chill a defendant’s exercise of
13 his or her First Amendment free speech rights.”⁸⁶ “The hallmark of a SLAPP
14 lawsuit is that it is filed to obtain a financial advantage over one’s adversary by
15 increasing litigation costs until the adversary’s case is weakened or abandoned.”⁸⁷
16 “When amending Nevada’s anti-SLAPP statute in 1997, the Legislature explained
17 that SLAPP lawsuits abuse the judicial process by chilling, intimidating, and
18 punishing individuals for their involvement in public affairs.”⁸⁸ “The Legislature
19 further reasoned that the number of SLAPP lawsuits in Nevada had increased, and
20 therefore, implementation of an anti-SLAPP statute was essential to protect
21 citizens’ constitutional rights.”⁸⁹

22
23 ⁸³ *Hardy Cos. v. SNMARK, LLC*, 126 Nev. Adv. Op. 49, 245 P.3d 1149, 1153
24 (2010) (quotation and citation omitted).

25 ⁸⁴ *Id.*
⁸⁵ *Id.* (quotation and citation omitted).

26 ⁸⁶ *Stubbs v. Strickland*, 129 Nev. Adv. Op. 15, 297 P.3d 326, 329 (2013) (citations
omitted).

27 ⁸⁷ *John*, 125 Nev. at 752, 219 P.3d at 1280.

28 ⁸⁸ *Id.*, 219 P.3d at 1281 (citing 1997 Nev. Stat., ch. 387, preamble, at 1364).

⁸⁹ *Id.*

1 Here, the district court concluded the Shapiros' lawsuit qualified as a
2 SLAPP lawsuit and granted the Welts special motion to dismiss. Again, "[t]he
3 hallmark of a SLAPP lawsuit is that it is filed to obtain a financial advantage over
4 one's adversary by increasing litigation costs until the adversary's case is
5 weakened or abandoned."⁹⁰ By interpreting NRS 41.670(1)(a) to restrict a
6 successful defendant to recovering only those attorney's fees specifically incurred
7 relating to the preparation and filing of a special motion to dismiss, the district
8 court permitted the Shapiros to gain an impermissible financial advantage from
9 filing a SLAPP lawsuit. This is contrary to the Legislature's stated intent of
10 protecting its citizens' ability to participate in public affairs.

11 If NRS 41.670(1)(a) permits a successful defendant to recover only those
12 attorney's fees specifically incurred relating to the preparation and filing of a
13 special motion to dismiss, then a financial motivation still exists that allows a
14 litigant to gain an advantage from filing a SLAPP lawsuit. The defendants, who
15 should never have been sued, would still be forced to spend money on attorney's
16 fees defending themselves from a non-meritorious lawsuit but only a fraction of
17 those fees are recoverable. This is precisely what occurred here and it conflicts
18 with the Legislature's stated intent.

19 NRS 41.670(1)(a) required the district court to award the Welts all the
20 reasonable attorney's fees. The district court concluded all the fees incurred were
21 reasonable, but impermissibly limited the Welts' recovery to only a certain
22 category of fees. The Court should reverse and remand to award the Welts' award
23 to reflect the full amount of attorneys' fees incurred in this action, including
24 appeal.

25 ///

27 ⁹⁰ *Id.*, 219 P.3d at 1280.

1 **G. The district court abused its discretion by denying the Welts’**
2 **request for an award per NRS 41.670(1)(b).**

3 NRS 41.670(1)(a) permits a successful SLAPP defendant to recover
4 reasonable costs and attorneys’ fees. Additionally, when a special motion to
5 dismiss is granted, NRS 41.670(1)(b) states “[t]he court may award ... an amount
6 of up to \$10,000 to the person against whom the action was brought.” The Welts
7 specifically requested such an award.⁹¹ The district court acknowledged NRS
8 41.670(1)(b) allows such an award.⁹² Neither of the district court’s orders granted
9 NRS 41.670(1)(b) relief or stated why this relief was denied.

10 NRS 41.670(1)(b) is relief is discretionary, however the district court gave
11 no explanation why it denied this specifically requested relief. This prevents
12 meaningful appellate review of the district court’s decision. “Without an
13 explanation of the reasons or bases for a district court’s decision, meaningful
14 appellate review, even a deferential one, is hampered because we are left to mere
15 speculation.”⁹³ At a minimum, reversal and remand are required so the district
16 court can provide its reasoning for denying NRS 41.670(1)(b) relief.

17 **i. What factors should a district court consider in evaluating**
18 **whether to provide NRS 41.670(1)(b) relief?**

19 On remand, it would benefit both the parties and the district court to have
20 guidance as to what factors should be considered in deciding if NRS 41.670(1)(b)
21 discretionary relief is appropriate. The text of the statute provides no guidance.
22 The statute’s legislative history debates whether the award should have been
23 mandatory or discretionary,⁹⁴ but ultimately did not discuss what factors may merit
24 a discretionary award. The legislative history did indicate NRS 41.670(1)(b)’s

25 _____
⁹¹ Respondents’ Appendix at 49-50.

26 ⁹² *Id.* at 160.

27 ⁹³ *Boonsang Jitnan v. Oliver*, 127 Nev. Adv. Op. 35, 254 P.3d 623, 629 (2011)
(collecting cases).

28 ⁹⁴ Minutes of the Senate Committee on Judiciary, March 28, 2013, at 10-12.

1 proposed relief was based upon a Washington statute, however imposed a
2 mandatory award.⁹⁵

3 Although not discussed in Nevada’s legislative history, a similar Texas
4 statute provides some guidance. In Texas, if an anti-SLAPP motion to dismiss is
5 granted, the court shall award “sanctions against the party who brought the legal
6 action as the court determines sufficient to deter the party who brought the legal
7 action from bringing similar actions described in this chapter.”⁹⁶ The statute
8 guides the court by stating the Texas Legislature’s ultimate goal of deterring
9 SLAPP lawsuits but does not discuss what factors the district court should consider
10 in determining how much of a sanction to award.

11 *Am. Heritage Capital, LP v. Gonzalez*⁹⁷ construed this statute where the
12 district court awarded \$15,616 in attorney’s fees and then awarded a discretionary
13 \$15,000 sanction. AHC, the sanctioned party, argued the sanction was not
14 supported by evidence but the prevailing party described evidence in the record on
15 this point. “Given this evidence, we conclude that a reasonable trial judge could
16 have determined that a \$15,000 sanction was appropriate and necessary to deter
17 future lawsuits by AHC in the future, given AHC’s track record of profitability and
18 Prasla’s aggressive email to Dinah.”⁹⁸ “It was the trial judge’s prerogative to
19 weigh this evidence along with all the other evidence in determining, as a matter of
20 discretion, how large the sanction needed to be to accomplish its statutory
21 purpose.”⁹⁹

22 Guam’s anti-SLAPP statute also obligated the district court granting an anti-
23 SLAPP motion to dismiss to award “such additional sanctions upon the responding
24

25 ⁹⁵ *Id.* at 16; Minutes of the Assembly Committee on Judiciary, May 6, 2013, at 5-6;
Rev. Code Wash. (ARCW) § 4.24.525(6)(a)(ii) (2014).

26 ⁹⁶ Texas Civil Practice and Remedies Code § 27.009(a)(2) (2014).

27 ⁹⁷ 436 S.W.3d 865, 880 (Tex. App. 2014).

28 ⁹⁸ *Id.* at 881.

⁹⁹ *Id.*

1 party, its attorneys or law firms as it determines will be sufficient to deter
2 repetition of such conduct and comparable conduct by others similarly
3 situated....”¹⁰⁰ *Enriquez v. Smith* applied this statute where the district court
4 granted the motion to dismiss, awarded attorney’s fees and imposed a \$20,000
5 sanction.¹⁰¹ The sanction was affirmed. “While the amount is not insignificant, it
6 is within the realm of reasonableness compared to anti-SLAPP sanctions in other
7 jurisdictions.”¹⁰²

8 Given that the goal of a SLAPP lawsuit is for the plaintiff to exert financial
9 pressure on a less well funded opponent, a district court evaluating whether to
10 issue a discretionary award per 41.670(1)(b) should consider factors that evaluate
11 if a sanction is needed to deter repetition of such conduct and comparable conduct
12 by others similarly situated.

13 **Conclusion**

14 The district court’s order granting the Welts’ special motion to dismiss per
15 NRS 41.660 was proper and should be affirmed. The district court’s orders the full
16 amount of attorneys’ fees reasonably incurred per NRS 41.670(1)(a) and denying
17 the Welts a recovery per NRS 41.670(1)(b) should be reversed.

18 DATED this 23rd day of November, 2015.

19 THORNDAL, ARMSTRONG,
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26 ¹⁰⁰ 7 G.C. § 17106(g)(2) (2014).

27 ¹⁰¹ 2015 Guam 29, ¶ 1.

28 ¹⁰² *Id.* at ¶ 31.