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IN THE SUPREME COURT OF NEVADA

HOWARD SHAPIRO and JENNA SHAPIRO, Appellants/Cross-Respondents, v. GLENN WELT, RHODA WELT, LYNN WELT, and MICHLLE WELT, Respondents/Cross-Appellants	Supreme Ct. No. 67363 Dist. Ct. No. A-14-706566-C **APPELLANT'S ANSWERING BRIEF (67596) AND REPLY BRIEF (67363)**
GLENN WELT, RHODA WELT, LYNN WELT, and, MICHELLE WELT, Cross-Appellants/Respondents, v. HOWARD SHAPIRO and JENNA SHAPIRO, Cross-Respondents/Appellants.	Supreme Ct. No. 67363 Dist. Ct. No. A-14-706566-C

APPEAL

From the Eighth Judicial District Court, Clark County

The Honorable Nancy L. Allf, District Court Judge

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NRAP 26.1 Disclosure

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

1. Parent Corporation: None.
2. Publicly held company that owns 10% or more of the party's stock: None.
3. Law firms who have appeared or are expected appear for Howard Shapiro and Jenna Shapiro: Noggle Law PLLC.

Dated this 10th day of February, 2016.

NOGGLE LAW PLLC

/s/ Alex Ghibaudo

_____

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Attorney's Certificate of Compliance

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14 point Times New Roman.
2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 5,081 words.
3. Finally, I certify that I have read this petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the petition regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

4. I understand that I may be subject to sanctions in the event that the accompanying petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 10th day of February, 2016.

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/s/ Alex Ghibaudo

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Certificate of Service

Pursuant to NRAP 25, on November 23, 2015 APPELLANT'S ANSWERING BRIEF (67596) AND REPLY BRIEF (67363) was served upon each of the parties to appeal 67363 via electronic service through the Supreme Court of Nevada's electronic filing.

/s/ Alex Ghibaudo

An Employee of Noggle Law PLLC

JURISDICTIONAL STATEMENT

The parties have filed cross-appeals. On January 2, 2015 notice of entry occurred as to the district court's order granting the Welts' motion to dismiss. The Shapiros filed their notice of appeal from that order on February 2, 2015. The Shapiros' appeal is from a final judgment. The Welts filed a cross-appeal of this final judgment on February 13, 2015. On January 5, 2015 the Welts filed the affidavit requested by the district court concerning recoverable attorneys' fees and costs authorized by NRS 41.670. On February 20, 2015 the district court entered its order granting certain attorneys' fees and costs. Notice of entry of this order occurred on February 23, 2015. The Welts' then appealed this order on March 14, 2015. The Welts' appeal is from an order modifying a final judgment.

ISSUES PRESENTED FOR REVIEW

1. Is NRS 41.637(3) and (4) unconstitutionally vague?
2. Did the district court abuse its discretion in granting Respondents' special motion to dismiss?
3. Was the district court correct to grant the Welts' NRS 41.660 special motion to dismiss?
4. Did the district court abuse its discretion by misinterpreting NRS 41.670(1)(a) to limit the attorney's fees the Welts could recover to only those incurred concerning their motion to dismiss? This is an issue of first impression.

5. Did the district court abuse its discretion by denying, without explanation, the Welts' request for relief per NRS 41.670(1)(b)?

Statement of the Case

This litigation arose from a conservatorship petition that was being litigated in New Jersey and due to bad conduct by the Welts prior to that litigation that placed their motives and Walter Shapiro's well-being in doubt. Walter Shapiro is the father of plaintiff Howard Shapiro. On August 5, 2014 Howard petitioned a New Jersey court to appoint him as Walter's conservator. Howard was ultimately awarded conservatorship with a third party (Howard is charged with Walter's medical and financial affairs). The Welts are relatives of Walter and oppose Howard's petition. Glenn Welt is Walter's nephew. Glenn Welt created a website that concerns what he sees as Howard's bad character, www.howardshapirovictims.com, and is based alsmost entirely upon blatant and outlandish lies. Prior to the website, Glenn Welt repeatedly threatened to extort Howard by way of the website at issue. After the website was created, the Shapiros filed their civil complaint in Nevada on September 4, 2014.13 On December 15, 2014 the Welts filed their motion to dismiss that the district court granted on January 2, 2015.15 The district court then granted in part and denied in part the Welts' statutory request for attorneys' fees on February 20, 2015.16

Statement of Facts

For the sake of brevity, Appellant's will stand on the facts as described in their opening brief.

Summary of the Argument

A. The Shapiros' Appeal

Howard Shapiro had power of attorney over his father who was suffering from dementia. In the course of placing him in a full time nursing home, the Welts attempted to gain control of Mr. Walter Shapiro, Howard's father. In the midst of this dispute, Glenn Welt, a Respondent in the instant matter, established and posted a website maligning Howard and lying about his reputation and moral turpitude. The parties, minus Glenn Welt, fought over Mr. Walter Shapiro in what amounts to Adult Guardianship Court in New Jersey.

Eventually, Walter was given financial and medical control of Walter's well-being with a third-party conservator. In the meantime, Mr. Glenn Welt, the webmaster and author of the website at issue, was sued for Defamation and a number of related claims. The remainder of the Welts were included in the lawsuit as civil conspirators. The case was dismissed when the district court granted the Welts special motion to dismiss.

Appellants' contend that the complaint should not have been dismissed because the statute is unconstitutionally vague, Glenn Welt had no direct connection with the judicial proceedings in New Jersey, and this case is of no public concern or interest.

B. The Welts' Appeal

The Welts contend the district court abused its discretion by limiting the reasonable costs and attorney's fees the Welts' could recover per NRS 41.670(1)(a). The Welts further argue that the district court improperly added limiting language to an unambiguous statute. The district court also abused its discretion by denying, without explanation, the Welts' request for an award per NRS 41.670(1)(b).

Argument

A. Standard of Review for determining the district court's decision.

Appellants' agree that the standard of review in this case is de novo or as if the motion was for a summary judgment. Having said that, words have meanings that must be defined to understand what is meant when the legislature speaks. Here, the operative words are vague such that it is impossible to determine what speech is protected and open to attack by way of a special motion to dismiss through Nevada's Anti-Slapp statute, NRS 41.637 et seq.

B. The statements made in the website at issue were not good faith communications entitled to protection under NRS 41.637 et seq.

Respondents claim that www.howardshapiro.com was designed to seek other victims of Howards' in an effort to fabricate a connection with the litigation in New Jersey. Respondents contend that:

> the website attached to the Shapiros' complaint can be fairly read to construe these facts as forming the basis for an opinion that Howard Shapiro was not qualified or suitable to serve as Walter Shapiro's conservator.

Nowhere in the website at issue does Glenn Welt make any factual claims. They are fabricated with no basis in fact, no support in the form of actual documentary evidence, or any other indicia that what is being alleged is true. Rather, it is a litany of wrongs that the Welts, and Glenn Welt in particular, believe, or opine, with no basis in fact, such as official records, affidavits, etc., that they believe Howard has committed. This does not constitute good faith. Black's Law Dictionary, 5 ed., defines "good faith" as follows:

> Good faith is an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage, and an individual's personal good faith is concept of his own mind and inner spirit and, therefore, may not conclusively be determined by his protestations alone.[1] …Honesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry…An honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with absence of all information, notice, or benefit or belief

[1] *Doyle v. Gordon*, 158 N.Y.S.2d 248, 259, 260.

> of facts which render transaction unconscientious…In common usage this term is ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and generally speaking, means being faithful to one's duty or obligation.[2]

Respondents' conduct can hardly be construed as good faith, particularly Respondent Glenn Welt. Attached to the complaint, which is part of the appendix in this matter, is a letter from Mr. Welt in which he threatens public humiliation, civil action, and criminal charges if his demands are not met, which include returning cash and property he alleges was stolen from Walter Shapiro.[3] Had Mr. Welt stopped at making a demand upon threat of civil or criminal action, he would be in on the razors edge of good faith.

However, he explicitly threatens public humiliation in an attempt to essentially extort Mr. Shapiro. This does not evince an "absence of malice", "honesty of intention", or an "honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law". Quite the contrary, it clearly shows bad faith, malice, and opportunism. As such, Respondents', in particular Mr. Welt, but in conspiracy with all the named Defendants, have failed the very first requirement contained in NRS 41.637, that of good faith.

And, in failing to consider good faith, Judge Alff made an arbitrary and capricious decision, even though she had the complaint, with the letter in which the communication threatening public humiliation, civil action, and criminal action was

[2] *Efron v. Kalmonovitz,* 249 Cal.App. 187, 57 Cal.Rptr. 248, 251.
[3] See Exhibit 4 to Shapiros' complaint.

before her at the time of the hearing. Therefore, Judge Alff's decision was an abuse of discretion that was not harmless but went to the heart of the matter: whether the communication was earnest or vengeful and malicious in nature and not designed to take advantage of judicial proceedings for self-serving motives.

C. This case is of no public interest and so does not warrant protection of the anti-slapp statute.

A matter is of "public interest" when the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean something so narrow as mere curiosity or as the interests of the particular localities, which may be affected by the matters in question….Interest shared by citizens generally in affairs of local, state or national government...[4]

Here, the public has no pecuniary interest whatever in the private struggle between the Welts and the Shapiros. That matter is entirely private. The simple fact that the public courts are utilized to resolve the private dispute do not imbue that dispute with a public interest, particularly not in the adult guardianship context where matters are private and deal with sensitive financial and medical information. At best, the matter is a mere curiosity and certainly of no national interest. Such curiosities are not meant for public consumption. Thus, in not considering closely the nature of the dispute, Judge Alff again issued an order that was arbitrary and capricious.

[4] Black's Law Dictionary, 5th Ed.

D. As with public interest, there is no public concern in this dispute that merits protection under Nevada's Anti-Slapp statute.

Whether an speech addresses a matter of public concern is determined by the "content, form, and context of a given statement, as revealed by the whole record."[5] "Public concern" is defined as speech that "'relate[s] to a matter of political, social, or other concern to the community.'"[6] Because "'an employee's speech will rarely be entirely private or entirely public,'" it is protected so long as the "main thrust" of the speech is on a matter of public concern.[7]

As discussed in the opening brief, in 2011, the United States Supreme Court took up the issue of "public concern" in *Snyder v. Phelps*. The case is revisited here because of the Respondents heavy reliance on that term and "good faith communication"; indeed, Respondents asserted that the argument made in the opening brief was lacking. A more detailed discussion follows.

> Speech deals with matters of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community," or when it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public," The arguably "inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern."[8]

The Court continues:

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[5] *Camp v. Corr. Med. Servs.*, 668 F. Supp. 2d 1338, 1355 (M.D. Ala. 2009); citing *Connick v. Myers*, 461 U.S. 138, 147-48, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983).
[6] *Id. at* 1355; citing *Akins*, 240 F.3d at 1304 (quoting *Watkins v. Bowden*, 105 F.3d 1344, 1352 (11th Cir. 1997)).
[7] *Id. at* 1355; citing *Id.* (quoting *Morgan v. Ford*, 6 F.3d 750, 755 (11th Cir. 1993)).
[8] *Snyder v. Phelps*, 562 U.S. 443, 453, 131 S. Ct. 1207, 1216 (2011); citations omitted.

> Deciding whether speech is of public or private concern requires us to examine the " 'content, form, and context' " of that speech, " 'as revealed by the whole record.' As in other First Amendment cases, the court is obligated "to 'make [an independent examination of the whole record'] in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.' In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.[9]

Here, again, the speech at issue, the statements made in the Welts' website, fails even the threshold test: Speech deals with matters of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community," or when it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public". This dispute does not involve a political controversy, social issue, or other concern to the community. It involves a private family matter. It is certainly not a legitimate news interest: indeed, if the story of Walter's admittance to a nursing home were covered, it is certain no one would watch or care. Therefore, again, Judge Alff, in failing to carefully consider this element, issued an arbitrary and capricious order, abusing her discretion.

E. There is no direct connection with a matter under consideration by a judicial body.

The term "direct connection" is vague and undefined. That issue will be dealt with in more detail below in discussing this Statutes constitutionality. In the

[9] *Snyder v. Phelps*, 562 U.S. 443, 453, 131 S. Ct. 1207, 1216 (2011); citations omitted.

meantime, it is instructive to consider how Washington, a State this State borrowed from heavily in drafting its anti-slapp statute considers the term.

In Washington, an absolute privilege protects the maker of an otherwise defamatory communication from all liability for libel or slander.[10] Defamatory communications made by a party or counsel in the course of a judicial proceeding are absolutely privileged if they are pertinent or material to the redress or relief sought.[11] This privilege encompasses extrajudicial "pertinent" statements.[12]

A statement is pertinent if it has some relation to the judicial proceedings in which it was used, and has any bearing upon the subject matter of the litigation.[13]

> The privilege ... is confined to statements made by an attorney while performing his function as such. Therefore it is available only when the defamatory matter has some reference to the subject matter of the proposed or pending litigation, although it need not be strictly relevant to any issue involved in it. Thus the fact that the defamatory publication is an unwarranted inference from the evidence is not enough to deprive the attorney of his privilege.... On the other hand, the privilege does not cover the attorney's publication of defamatory matter that has no connection whatever with the litigation.[14]

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[10] *Story v. Shelter Bay Co.*, 52 Wn. App. 334, 338, 760 P.2d 368 (1988).
[11] *McNeal v. Allen*, 95 Wn.2d 265, 267, 621 P.2d 1285 (1980); *accord*, Restatement (Second) of Torts §§ 586-587, § 586, comment *c* (1977).
[12] Restatement, *supra* § 586, comment *a*; Annot., *Libel and Slander: Attorneys' Statements, to Parties Other Than Alleged Defamed Party or its Agents, in Course of Extrajudicial Investigation or Preparation Relating to Pending or Anticipated Civil Litigation as Privileged*, 23 A.L.R.4th 932, 940-46 (1983); *cf. Story*, 52 Wn. App. at 340-41 (extending absolute privilege for statements made during the course of quasi-judicial administrative proceedings to statements made during the proceedings' investigatory phase).
[13] *Johnston v. Schlarb*, 7 Wn.2d 528, 540, 110 P.2d 190, 134 A.L.R. 474 (1941).
[14] Restatement, *supra* § 586, comment *c*.

The determination of pertinency is a question of law for the court,[15] and should be based upon an examination of the whole proceeding to which the defamatory statements are alleged to be pertinent.[16]

"The absolute privilege, while broad in scope, has been applied sparingly. `Absolute privilege is usually confined to cases in which the public service and administration of justice require complete immunity.'"[17] The privilege does not extend to statements made in situations for which there are no safeguards against abuse.[18] Thus, an absolute privilege is allowed only in "situations in which authorities have the power to discipline as well as strike from the record statements which exceed the bounds of permissible conduct."[19]

The Washington appellate court was convinced that it would not advance public service and the administration of justice to extend an absolute privilege to a party attorney's (Hermesen's) statement. An Arizona case is instructive:

> As an immunity which focuses on the status of the actor, the privilege immunizes an attorney for statements made "while performing his function as such."[20] We agree that "*special emphasis must be laid on the requirement that it [statement] be made in furtherance of the litigation*

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[15] *Cooperstein v. Van Natter,* 26 Wn. App. 91, 95 n. 2, 611 P.2d 1332, *review denied,* 94 Wn.2d 1013 (1980); Restatement, *supra* § 619(1)

[16] *Johnston,* 7 Wn.2d at 540; *accord,Green Acres Trust v. London,* 142 Ariz. 12, 688 P.2d 658, 671 (1983) (*Green Acres* I), *rev'd in part on other grounds,* 141 Ariz. 609, 688 P.2d 617 (1984) (*Green Acres* II); *McCarthy v. Yempuku,* 5 Hawaii App. 45, 678 P.2d 11, 15-16 (1984).

[17] *Herron v. Tribune Pub'g Co.,* 108 Wn.2d 162, 177, 736 P.2d 249 (1987) (quoting *Bender v. Seattle,* 99 Wn.2d 582, 600, 664 P.2d 492 (1983)).

[18] *Story,*52 Wn. App. at 338-39.

[19] *Twelker v. Shannon & Wilson, Inc.,* 88 Wn.2d 473, 476, 564 P.2d 1131 (1977).

[20] *Demopolis v. Peoples Nat'l Bank of Washington,* 59 Wash. App. 105, 118, 796 P.2d 426 (1990); Restatement (Second) of Torts § 586, Comment c.

and to promote the interest of justice."[21] Without that nexus, the defamation only serves to injure reputation.

Hermsen argued that the defamatory accusation of perjury was pertinent to the estate litigation simply because the Appellant's credibility was at issue in that action. The court found that accepting Hermsen's argument might greatly extend the privilege's scope since credibility is frequently an issue in litigation.

The Washington court held that extrajudicial defamatory allegations relating to a party's honesty are not sufficiently "pertinent" to a judicial proceeding to clothe them with an absolute privilege, when the only basis alleged for finding the allegations pertinent is that the defamed party's credibility was at issue.

A qualified privilege protects the maker from liability for a defamatory statement unless it can be shown that the privilege was abused.[22] The burden of establishing an abuse of a qualified privilege rests on the defamed party, who must show that the speaker acted with actual malice; *i.e.*, that he or she knew the statement was false, or had a high degree of awareness of its probable falsity.[23]

This case sheds light on the term "direct connection". The simple rule is that if the statements are pertinent to the case then they fall under the protection of the absolute privilege or, in this case, the anti-slapp statute. Pertinent is easily defined

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[21] *Demopolis v. Peoples Nat'l Bank of Washington*, 59 Wash. App. 105, 118, 796 P.2d 426 (1990); citing *Bradley v. Hartford Accident & Indemnity Co.*, 30 Cal. App.3d 818, 826, 106 Cal. Rptr. 718, 723 (1973) (emphasis in original).

[22] *Id.*; citing *Bender v. Seattle*, 99 Wn.2d 582, 600, 664 P.2d 492 (1983).

[23] *Story*, 52 Wn. App. at 341-42.

while "direct connection" is not. Again, for all the reasons cited above, the statements are not pertinent to the case and so should not be protected.

F. NRS 41.637 is unconstitutionally vague and should be struck down.

In their supplemental brief, Respondents argue that NRS 41.637(4) provides notice sufficient to identify what conduct is prohibited. In evaluating the viability of a potential defamation complaint, the potential plaintiff can read NRS 41.637(4) to determine how the phrase "good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern" is defined in one context.

Respondents assert that, more broadly, NRS 41.637 provides four specific definitions of this phrase for citizens to consider. NRS 41.637(4) provides sufficient guidance as to what conduct is prohibited and the standards to be used in evaluating whether certain conduct falls within its definition for purposes of enforcement. Respondent concludes that vagueness does not permeate NRS 41.637(4): its definition is specific as to what conduct is prohibited, providing standards against which a district court may evaluate enforcement.

However, what is vague is not easily defined legally as it has been through a legal wringer of sorts. However, in the end, as will be revealed at the conclusion of the following discussion, the definition of what is constitutionally vague is clear and serves to abrogate the instant statute.

b. Standard of Review

The determination of whether a statute is constitutional is a question of law, which this court reviews de novo.[24] "Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional."[25] The court must interpret a statute in a reasonable manner, that is, "[t]he words of the statute should be construed in light of the policy and spirit of the law, and the interpretation made should avoid absurd results."[26] In reviewing a statute, it "should be given [its] plain meaning and must be construed as a whole and not be read in a way that would render words or phrases superfluous or make a provision nugatory."[27]

When analyzing whether a statute is unconstitutionally vague in violation of due process, courts generally apply a two-factor test.[28] Under this two-factor test, an act is unconstitutionally vague if it "(1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited and (2) lacks specific

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[24] *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 509, 217 P.3d 546, 551 (2009); citing *Silvar v. Dist. Ct.*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006).

[25] Id.; citing *Id.*

[26] Id., 125 Nev. 502, 509, 217 P.3d 546, 551 (2009); citing *Desert Valley Water Co. v. State Engineer*, 104 Nev. 718, 720, 766 P.2d 886, 886-87 (1988).

[27] Id., 125 Nev. 502, 509, 217 P.3d 546, 551 (2009); citing *Mangarella v. State*, 117 Nev. 130, 133, 17 P.3d 989, 991 (2001) (internal quotation omitted). Plain meaning is what an ordinary reasonable lay person would interpret the meaning to be. *Aetna Cas. & Sur. Co. v. Pintlar Corp.*, 948 F.2d 1507, 1512 (9th Cir. 1991)

[28] *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 510, 217 P.3d 546, 551-52 (2009); citing *Silvar*, 122 Nev. at 293, 129 P.3d at 685; *see also Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983).

standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement."[29]

G. Challenges for facial vagueness

Beginning in 1982, the United States Supreme Court stated that a facial vagueness challenge would fail unless the complainant could "demonstrate that the law is impermissibly vague in all of its applications."[30] However, the *Hoffman Estates* opinion went on to note that "[t]he degree of vagueness that the Constitution tolerates . . . depends in part on the nature of the enactment" and that the Court has "greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe."[31]

One year later, the Court, in a footnote, questioned whether a facial challenger must establish that a statute is vague in all its applications, at least when a statute involves a constitutionally protected right or criminal penalties.[32] Relying in part on the additional language in *Hoffman Estates,* the Court observed that there was a varying tolerance of vagueness, depending on the nature of the statute. The *Kolender* Court recognized that a higher standard applied to statutes

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[29] *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 510, 217 P.3d 546, 551-52 (2009); citing *Silvar,* 122 Nev. at 293, 129 P.3d at 685.
[30] *Id.*; citing *Hoffman Estates v. Flipside, Hoffman Estates,* 455 U.S. 489, 497 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982)
[31] *Id*; citing *Id.* at 498-99.
[32] *Id.*, at 510; citing *Kolender v. Lawson,* 461 U.S. 352, 358, n.8, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)

involving constitutional rights or criminal penalties, however, the Court did not articulate what constituted the higher standard.

In a 1999 plurality opinion, the Supreme Court again called into question the requirement that a statute be void in all its applications for a successful facial challenge. In *Morales*, the Court enunciated a higher standard test, at least in cases in which the statute involved criminal penalties with no mens rea requirement and that dealt with constitutional rights, holding that such statutes would be unconstitutional if "vagueness permeates the text of such a law."[33]

Thus, the Supreme Court has announced differing rules for facial challenges. On the one hand, the Court in *Hoffman Estates, Salerno,* and *Washington State Grange,* stated the requirement that a statute must be void in all its applications.[34] On the other hand, in *Kolender* and *Morales*, the Court questioned this standard, at least in cases with statutes involving constitutional rights or criminal penalties.[35]

As the Supreme Court precedent fails to explain with specificity the higher standard applicable to criminal statutes, several courts have expressed concerns as to when this higher standard applies and how the standard is measured. Some courts have

[33] *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 510, 217 P.3d 546, 552 (2009); citing *Chicago v. Morales,* 527 U.S. 41, 55 n.22, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999) (plurality opinion).
[34] *Id. at* 511.
[35] *Id.* at 510.

concluded that the higher standard only applies when a ***First Amendment right*** is at issue.[36]

Other courts have held that the higher standard applies when ***any*** constitutional right is at issue but not simply because criminal penalties not involving a constitutional right are present, again distinguishing *Morales* and *Kolender* because those cases involved constitutional rights.[37]

H. Nevada Law and facial challenges for vagueness

After considering the history of this tortured standard, the Nevada Supreme Court held that when the statute involves criminal penalties or constitutionally protected rights, the second approach involves a higher standard of whether "vagueness permeates the text."[38] Vagueness permeates a text by failing to define terms included in the statute that do not have a plain meaning.[39] The standard, as above, is whether the statute: "(1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited and (2) lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement."[40]

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[36] *Flamingo Paradise Gaming, LLC v. Chanos,* 125 Nev. 502, 511, 217 P.3d 546, 552 (2009).
[37] *Id.*
[38] *Id*. at 512-13 (Vagueness permeates a text by failing to define terms included in the statute that do not have a plain meaning.)
[39] *Id.*
[40] *Id. at* 512-13.

Thus:

> when a statute is reviewed under the lower standard of vague in all its applications, if the statute provides sufficient guidance as to at least some conduct that is prohibited and standards for enforcement of that conduct, it will survive a facial challenge because it is not void in all its applications.[41] Under the higher standard, the question becomes whether vagueness so permeates the text that the statute cannot meet these requirements in most applications; and thus, this standard provides for the possibility that some applications of the law would not be void, but the statute would still be invalid if void in most circumstances.[42]

I. Analysis reveals NRS 41.637 is unconstitutional for vagueness.

Here, a constitutionally protected right is at issue: the right Appellants have to petition the courts for redress of their grievances, a right protected under the First Amendment to the United States Constitution. That right is abrogated under the following circumstances as prescribed by statute:

> **NRS 41.637 "Good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern" defined.** "Good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern" means any:
>
> 1. Communication that is aimed at procuring any governmental or electoral action, result or outcome;
>
> 2. Communication of information or a complaint to a Legislator, officer or employee of the Federal Government, this state or a political subdivision of this state, regarding a matter reasonably of concern to the respective governmental entity;
>
> 3. Written or oral statement made in direct connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law; or

[41] *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 513, 217 P.3d 546, 554 (2009); citing *Hoffman Estates*, 455 U.S. at 497.
[42] *Id*.

4. Communication made in direct connection with an issue of public interest in a place open to the public or in a public forum,
Ê which is truthful or is made without knowledge of its falsehood.

The first issue in the analysis is whether the statute fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited. Here, any communication must be made "in good faith". It is important to note that the canon of imputed common law meaning applies. That canon holds that a statute that uses a common law term, without defining it, adopts its common law meaning. Here, the term "good faith" is at the center of the statute but is not defined.

The term good faith has the meaning in the common law ascribed to it above, such as: an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage. In common usage this term is ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and generally speaking, means being faithful to one's duty or obligation.[43] However, in the statute, it is not defined: rather, it is taken for granted that it is understood. That term, however, is inherently vague and ambiguous. Indeed, such a lack of definition in such a term of art is the epitome of vagueness.

Secondly, Respondents also rely on the term "without knowledge of its falsehood" to hide behind the many falsehoods made in their website. There is an inherent contradiction in the statute in that a good faith communication is defined as a

[43] *Efron v. Kalmonovitz*, 249 Cal.App. 187, 57 Cal.Rptr. 248, 251.

statement made without knowledge of its falsehood without defining what it means to make an honest statement without knowledge of its falsehood, which would fall in line with the requirement that the communication be made in good faith, that is, honestly and without malice. This is the definition of vague, which means "not clearly stated or expressed".

As written under the statute, a statement can be malicious and made in ignorance without any bounds placed on it. That is, as here, Respondents' complaint states, among other things, that Appellant Howard Shapiro may be carrying a concealed weapon and that he owes, in one claim $780,000.00 and in another allegation $361,871.00, two highly divergent amounts that suggest ignorance at best, malicious intent at worse. However, under the statute, since Respondents do not know of the truth of the matter for certain, it is protected speech. Anyone reading the allegations in the complaint, along with the other documents attached to the complaint, would be hard pressed to find them made in good faith. In the average defamation case, proof of actual malice is required to prove a Plaintiff's case.[44] Again, here it is unclear if such a requirement would defeat the provision stating "without actual knowledge of falsehood". This is yet again vague and the answer would clarify much.

Third, the statute fails to define what is an issue of public interest or public concern? Under the case law cited above, the two are not the of the same nature. This

[44] *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283, 84 S. Ct. 710, 727 (1964).

renders the statute vague and ambiguous. Nor is it clear what it means to have a "direct connection" with a matter under judicial consideration. Does that mean the party is a litigant, is not a litigant but stands to gain from the litigation, is a member of the general public but the matter is of such pressing concern that its resolution would substantially affect that persons rights and obligations? It is unclear in the extreme.

In the Washington case cited above, some guidance is given by stating that extrajudicial statements that are "pertinent" to a matter under consideration are sufficient. The case goes on to cite an example, a non-party's view of a litigants honesty, which is a matter that is not pertinent and protected. Such a rule is concrete. Nevada's rule is, again, vague in that it does not define what it means to have a direct connection to a matter under consideration. Indeed, a plain reading of direct connection would suggest standing or a substantial stake in the matter such that the party's rights and obligations would be affected.

Fourth, the statute "lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement". Though the statute at issue appears to contain standards, those standards are rife with vague and undefined terms, as discussed more fully above, inviting arbitrary and capricious decisions since, in the absence of such definitions, Judges will supplant their own understanding, or misunderstanding, of "good faith communication", "direct

connection", "public interest", "public concern", and "without knowledge of its falsehood", as Judge Alff did in the matter currently before the Court.

Finally, the 1st, 5th, 7th and 14th Amendments to the United States Constitution are violated by the standard set forth prior to passage, of S.B. 444. During the proceedings at issue here, it was necessary that the moving party make a minimal showing that the Plaintiff's claims are based upon protected communication, the burden shifts to the Plaintiff to show, within seven (7) days of receiving Defendant's special motion to dismiss, that Plaintiff's case has merit, ***upon clear and convincing evidence***.

This high burden coupled with the short span of time to respond to the Defendant's claims almost ensure Defendant will prevail, depriving the Plaintiff his right to petition the court for his grievances, his procedural due process rights, and his right to a trial, by jury or otherwise, since such a high standard would necessarily require substantial documentation and preparation that is difficult to achieve under normal circumstances in seven (7) days: that is, a plaintiff who is seeking to defend his reputation is going to have to prove, in less than seven days, by clear and convincing evidence, every single element of his claim including that the statement is defamatory, false, and in some cases, the defendant knew or had serious doubt about truth at the time the statement was made to survive a special motion to dismiss. This blatantly violates a Plaintiff's Constitutional rights, as enumerated above.

J. There is no cause to disturb the courts award of attorney's fees and costs or its denial of fees under NRS 41.670(1)(b).

As stated in Respondents' opening brief, the Welts special motion to dismiss was filed per NRS 41.660 and was granted. They then filed the affidavit of fees and costs. The affidavit requested $14,775.00 of attorneys' fees, consisting of 59.1 hours at $250.00 per hour. As the Respondents' explain, "In reviewing this affidavit and the Shapiros' response, the district court then applied the Brunzell factors. It accurately noted the Welts "affidavit requested attorneys' fees that accrued throughout the entirety of the case."" The district court refused to award this amount.

In making its award, the court noted that "In applying a reasonableness standard, it is appropriate to only allow the work specifically relating to the successful Motion to Dismiss under NRS 41.660." It then awarded $4,500 of attorneys' fees that it concluded related to that motion. Respondents contend this was legal error.

NRS 41.670(1)(a) states the court "shall award reasonable costs and attorney's fees to the person against whom the action was brought…." Respondents contend that the statute contains no language limiting the award of attorney's fees to those specifically relating to the motion to dismiss. This is true. Nor does the statute contain language compelling the court to award all fees incurred. Rather, the statute demands that reasonable fees shall be awarded. The language is discretionary in nature. What is reasonable is subjective and by its nature discretionary.

As to statutory interpretation, a well established semantic canon of interpretation states that a matter not covered is to be treated as not covered. In considering this canon of interpretation, Justice Felix Frankfurter stated: "Whatever temptations the statesmanship of policymaking might wisely suggest, construction must eschew interpolation and evisceration. [The Judge] must not read in by way of creation."[45]

Respondents would have this court read into the statute a provision compelling the court to award fees incurred throughout a case in the absence of plain language or case law. Instead, they cite case law from Guam that seems to limit attorney's fees. That is not the case here.

Respondents ask this court to provide guidance for determining how much should be awarded. That guidance is provided under *Brunzell*,[46] as Respondents note. Respondents also complain that the statutory $10,000.00 that ***may*** be awarded when a special motion to dismiss should have been awarded. Here, the statute is plain and unambiguous. Whereas attorney's fees shall be awarded, statutory fees in the amount of $10,000.00 may be awarded at the court's discretion. Respondents provide no reason why this case should result in an award or how the court abused its discretion. Nor do they provide any legal reason why or how this court can enact legislation and award sanctions for this appeal in the absence of statute or case law. That argument is so frivolous it really merits no response, though one was made. As such, Respondents'

[45] 47 Colum. L. Rev. 527, 533 (1947).
[46] *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

prayer for relief should be denied in its entirety as they are asking, in essence, for this court to read into the statutes cited language not present and find an abuse of discretion where no such abuse occurred.

Conclusion

Standard of Review for determining the district court's decision concerning dismissal of the Shapiros' complaint is de novo. In reviewing the matter, the definitions, and case law, it is clear that the statements made in the website at issue were not good faith communications entitled to protection under NRS 41.367 et seq. Moreover, this case is of no public interest since it involves a mere curiosity and so does not warrant the protection of the anti-slapp statute. As with public interest, there is no public concern in this dispute that merits protection under Nevada's Anti-Slapp statute since there is no political or social interest to the community. Nor is there any direct connection with a matter under consideration by a judicial body as the statements made are not pertinent to the judicial proceedings, they are merely invective aimed at the Shapiros.

Moreover, NRS 41.637 is unconstitutionally vague and should be struck down. The standard of review is also de novo. In this case, the pertinent terms contained in the statute are unconstitutionally vague, such as "good faith communication", "direct connection", "without knowledge of its falsehood", "public interest", and "public concern". Because these terms are vague, there is no specific standard that can be

followed by a reasonable person considering the statute. Therefore, the statute is unconstitutionally vague and should be struck down.

Finally, there is no cause to disturb the courts award of attorney's fees and costs or its denial of fees under NRS 41.670(1)(b) as Respondents request. Simply put, the court exercised its discretion and Respondents failed to show why that discretion should be disturbed.

Dated this 10th day of February, 2016.

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