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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

**WELTS' REPLY BRIEF 67363  
(CROSS-APPEAL) & 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 **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 1,423 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 16<sup>th</sup> day of February, 2016.

20 THORNDAL, ARMSTRONG, DELK,  
21 BALKENBUSH & EISINGER

22 */s/ Michael P. Lowry*

23 

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

2 Pursuant to NRAP 25, on February 16, 2016 **WELTS' REPLY BRIEF**  
3 **67363 (CROSS-APPEAL) & 67596** was served upon each of the parties to appeal  
4 67363 via electronic service through the Supreme Court of Nevada's electronic  
5 filing.

6  
7 */s/ Michael P. Lowry*

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

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**Jurisdictional Statement**

The Welts’ incorporate their jurisdictional statement from their response and opening brief filed November 23, 2015.

**Routing Statement**

Although the Welts argue the Shapiros have not adequately presented constitutional issues, the Shapiros’ principal arguments are constitutional in nature. The arguments also raise issues of statewide importance concerning the applicability of Nevada’s anti-SLAPP statutes. The Supreme Court should presumptively retain this appeal.<sup>1</sup>

**Statement of the Issues Presented for Review in Cross-Appeal**

- 1. 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.
- 2. Did the district court abuse its discretion by denying, without explanation, the Welts’ request for relief per NRS 41.670(1)(b)?
- 3. If the district court did abuse its discretion as to NRS 41.670(1)(b), what factors should a district court consider in deciding whether to issue an award such as NRS 41.670(1)(b) provides? This is an issue of first impression.

**Statement of the Case & Statement of the Facts**

The Welts’ incorporate their statement of the case and statement of the facts contained in their response and opening brief filed November 23, 2015.

**Summary of the Argument**

The district court correctly dismissed the Shapiros’ complaint per NRS 41.660. However, it abused its discretion by limiting the reasonable costs and attorney’s fees the Welts’ could recover per NRS 41.670(1)(a). The district court improperly added limiting language to an unambiguous statute. This order should be reversed and remanded to allow the Welts’ to recover all reasonable costs and

<sup>1</sup> NRAP 17(a)(13), (14).

1 attorney's fees incurred defending against the Shapiros' complaint. The district  
2 court also abused its discretion by denying, without explanation, the Welts' request  
3 for an award per NRS 41.670(1)(b). On remand, the district court should consider  
4 factors that evaluate if a sanction is needed to deter repetition of such conduct and  
5 comparable conduct by others similarly situated.

6 The Shapiros' agree NRS 41.670(1)(a) contains no language limiting the  
7 award of attorneys' fees to those specifically relating to the motion to dismiss, but  
8 instead argue NRS 41.670(1)(a) allows the district court to select certain categories  
9 of fees as reasonable and exclude all others. This language is not in the statute, nor  
10 is the Shapiros' argument supported by citation to authority. This interpretation is  
11 also contrary to statute's unambiguous language and the legislative intent the  
12 Supreme Court of Nevada has previously applied to Nevada's anti-SLAPP statutes.

### 13 Argument

#### 14 **A. Standard of Review**

15 Statutory construction is a question of law that is reviewed de novo.<sup>2</sup>

#### 16 **B. NRS 41.670 is unambiguous and requires an award of all 17 reasonable attorneys' fees.**

18 The Welts' special motion to dismiss per NRS 41.660 was granted,<sup>3</sup>  
19 triggering NRS 41.670(1)(a)'s language that the district court "shall award  
20 reasonable costs and attorney's fees to the person against whom the action was  
21 brought...." The district court awarded all of the Welts' costs, but a limited  
22 amount of attorney's fees. The Welts appealed the order limiting their recoverable  
23 attorney's fees.

24 The parties' arguments focus on the meaning of "reasonable" in NRS  
25 41.670(1)(a). The Welts' argue the term was used to invoke the *Brunzell*<sup>4</sup> factors  
26 as applied to all attorney's fees the prevailing party incurred defending the SLAPP

27 <sup>2</sup> *Egan v. Chambers*, 129 Nev. Adv. Op. 25, 299 P.3d 364, 366 (2013).

28 <sup>3</sup> Respondents' Appendix at 158-160.

<sup>4</sup> *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

1 lawsuit. According to the Welts, in operation all of the attorney’s fees incurred are  
2 recoverable if those fees satisfy *Brunzell*. The Shapiros argue “reasonable” means  
3 the district court may select and award certain categories of attorney’s fees and  
4 exclude others, although all of the attorney’s fees satisfy *Brunzell*.

5 The district court’s order concerning the Welts’ request for attorney’s fees  
6 first applied *Brunzell* to all of the attorney’s fees requested.<sup>5</sup> The court did not find  
7 any reason under *Brunzell* to dispute the attorney’s fees. Instead, the district court  
8 read a new requirement into NRS 41.670(1)(a). “In applying a reasonableness  
9 standard, it is appropriate to only allow the work specifically relating to the  
10 successful Motion to Dismiss under NRS 41.660.”<sup>6</sup> The district court provided no  
11 further explanation for this ruling.

12 The parties agree NRS 41.670(1)(a) contains no language restricting the  
13 attorney’s fees that may be awarded in the manner that the district court did.  
14 However, the Shapiros argue the statute also does not contain any language  
15 requiring the district court to award all attorney’s fees that satisfy *Brunzell*.  
16 Although textually accurate, the Shapiros’ argument ignores the Welts’ citation to  
17 Guam’s anti-SLAPP statute that specifically limits the award of attorney’s fees to  
18 those “incurred in connection with the motion....”<sup>7</sup> Had the Nevada Legislature  
19 intended to restrict the recoverable attorney’s fees as the Shapiros argue, it could  
20 have included similar language. As it did not, NRS 41.670(1)(a) is unambiguous  
21 and requires the district court to award all attorney’s fees that satisfy *Brunzell*.  
22 This includes the Welts’ attorney’s fees incurred in these appeals.

23 **C. If NRS 41.670 is ambiguous, Legislative intent requires an award**  
24 **of all reasonable attorney’s fees.**

25 The Shapiros’ response could also be read as arguing NRS 41.670(1)(a) is  
26 ambiguous in that it does not define what is meant by “reasonable.” “Reasonable”

27 <sup>5</sup> Respondents’ Appendix at 192-93.

28 <sup>6</sup> *Id.* at 193.

<sup>7</sup> GUAM CODE tit. 7 § 17106(g)(1) (2014).



1 could plausibly mean all attorney’s fees that satisfy *Brunzell*, but it could also  
2 plausibly mean only those the district court selects. No Nevada appellate court has  
3 yet interpreted this statute on this point. The Legislature has used similar language  
4 in at least two other statutes, however the meaning of “reasonable” in these statutes  
5 has not yet been interpreted.<sup>8</sup>

6 If ambiguous, a statute is interpreted based upon the Nevada Legislature’s  
7 intent when enacting it. The Supreme Court of Nevada has previously concluded  
8 the Nevada Legislature enacted prior anti-SLAPP statutes because “SLAPP  
9 lawsuits abuse the judicial process by chilling, intimidating, and punishing  
10 individuals for their involvement in public affairs.”<sup>9</sup> “The hallmark of a SLAPP  
11 lawsuit is that it is filed to obtain a financial advantage over one’s adversary by  
12 increasing litigation costs until the adversary’s case is weakened or abandoned.”<sup>10</sup>  
13 If “reasonable” as used in NRS 41.670(1)(a) is interpreted to limit the recoverable  
14 attorney’s fees to only those fees related to the NRS 41.660 special motion to  
15 dismiss, the deterrent the Legislature intended is weakened and SLAPP plaintiffs  
16 could still gain the financial advantage that motivated the Legislature to enact the  
17 statute. The Shapiros’ responding brief offered no argument to the contrary.

18 If “reasonable” as used in NRS 41.670(1)(a) is ambiguous, then it should be  
19 interpreted to require the district court to award all attorney’s fees that satisfy the  
20 *Brunzell* factors. Applied to the Welts, the district court already concluded all of  
21 their attorney’s fees contained in their request met the *Brunzell* factors. The  
22 district court’s judgment should be reversed and remanded with instructions to  
23 award the Welts the full \$14,775.00 they requested. The district court would then  
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25 <sup>8</sup> NRS 237.250(4) (“The court shall award reasonable costs, including court costs and  
26 attorney's fees to the prevailing party in an action brought pursuant to this section.”);  
27 NRS 613.333(3) (“The court shall award reasonable costs, including court costs and  
28 attorney's fees to the prevailing party in an action brought pursuant to this section.”).

<sup>9</sup> *John v. Douglas Cnty. Sch. Dist.*, 125 Nev. 746, 752, 219 P.3d 1276, 1281 (2009)  
(citing 1997 Nev. Stat., ch. 387, preamble, at 1364).

<sup>10</sup> *Id.* at 752, 219 P.3d at 1280.

1 also apply the *Brunzell* factors to the attorney’s fees the Welts have incurred  
2 defending this appeal.

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

5 The Welts also requested an award per NRS 41.670(1)(b). This award is  
6 separate and distinct from the award of attorney’s fees requested per NRS  
7 41.670(1)(a). Although NRS 41.670(1)(b) is discretionary, the district court  
8 provided no explanation for its ruling, preventing meaningful appellate review of  
9 the ruling. The Shapiros’ argue in response that the Welts have not demonstrated  
10 how the district court abused its discretion in denying the Welts’ NRS 41.670(1)(b)  
11 request. This argument is premature. Without an explanation for the district  
12 court’s ruling, it is impossible to evaluate the district court’s reasoning against an  
13 abuse of discretion standard. At a minimum, the order denying a NRS  
14 41.670(1)(b) award must be reversed and remanded so the district court can  
15 provide an explanation of its reasoning.

16 If remanded, the Welts also requested guidance as to what factors should be  
17 considered in deciding if NRS 41.670(1)(b) discretionary relief is appropriate, as  
18 the statute itself and its legislative history are silent. Nevada appellate courts have  
19 previously provided similar guidance on other questions in hopes of minimizing  
20 the potential for further appeals.<sup>11</sup> The Welts’ identified various factors utilized in  
21 other jurisdictions, the Shapiros’ response did not address this request or the Welts’  
22 authorities.

23 **Conclusion**

24 If the district court’s order granting the Welts’ motion to dismiss is affirmed,  
25 the case must still be remanded. The district court misinterpreted NRS  
26 41.670(1)(a) by limiting the Welts’ recoverable attorney’s fees to a specific

27 <sup>11</sup> *Michaels v. Pentair Water Pool & Spa, Inc.*, 131 Nev. Adv. Rep. 81, 357 P.3d 387 (Ct.  
28 App. 2015) (“To assist the district court, we identify some factors that must be considered  
on remand.”).

1 category of fees rather than all attorney's fees that satisfied *Brunzell*. It also erred  
2 by denying, without explanation, the Welts' request for a NRS 41.670(1)(b) award.  
3 The district court's orders as to NRS 41.670(1)(a) and NRS 41.670(1)(b) should be  
4 reversed and remanded for further proceedings.

5 DATED this 16<sup>th</sup> day of February, 2016.

6 THORNDAL, ARMSTRONG, DELK,  
7 BALKENBUSH & EISINGER

8 */s/ Michael P. Lowry*

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