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Elizabeth A. Brown
Clerk of Supreme Court

10 **IN THE SUPREME COURT OF NEVADA**

11 HOWARD SHAPIRO and JENNA
12 SHAPIRO,

Case No.: 73943

13 Appellants,

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

14 vs.

**APPELLANTS' AMENDED
OPENING BRIEF**

15 GLENN WELT, RHODA WELT,
16 LYNN WELT, and MICHELLE
17 WELT,

18 Respondents.

19 **APPEAL**

20 From the Eighth Judicial District Court, Clark County

21 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 justices 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 to appear for Howard Shapiro and Jenna Shapiro: Alex B. Ghibaudo, PC

DATED this 20th day of February, 2018.

/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 2016 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 7,762 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.



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

5 **Routing Statement**

6 This case should be retained by the Supreme Court in accordance with
7
8 NRAP 17(13) and NRAP 17(14) because it involves a principal issue of first
9 impression involving the Federal and Nevada Constitution, i.e., Speech, and
10 the construction and interpretation of Nevada's Anti-SLAPP statute, which
11 this Court already determined was a matter of first impression.
12

13
14 DATED this 1st day of March, 2018.
15

16 /s/ Alex Ghibaudo

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Certificate of Service

Persuant to NRAP 25, on February 20, 2018 APPELLANTS' OPENING BRIEF was served upon each of the parties to appeal 73943 via electronic service through the Supreme Court of Nevada's electronic filing system.

/s/ Alex Ghibaud

An Employee of Alex B. Ghibaud, PC



Jurisdictional Statement

This is an appeal from the district court's order granting Defendants' Renewed Special Motion to Dismiss under NRS 41.637(3) and (4).¹ On August 7, 2017 notice of entry occurred as to the district court's order granting the Welts' motion to dismiss.² On September 6, 2017, the Shapiros timely filed their notice of appeal from that order. The Shapiros' appeal is from a final judgment.

Statement of the Issues Presented for Review

1. Did the court below commit clear legal error or abuse its discretion in in granting the Respondents renewed motion to dismiss?
2. Did Judge Nancy Alf commit clear legal error in failing to apply the standard in *Shapiro, Fink, and Jacobs* line of cases in favor of California case law?

¹ Appellants' Appendix 141-166.

² Id.

- 1 3. Did the court below commit clear legal error or abuse its discretion in
2 determining that Howard Shapiro sought to be appointed a “public
3 official” or finding that Howard Shapiro is a “limited public figure” and
4 that such a finding cloaks Respondents in protections provided by NRS
5 41.660 and NRS 41.637? Did the court below commit clear legal error or
6 abuse its discretion in finding that “invoking sovereign powers” is an
7 issue of public concern?
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11 4. Did the court below commit clear legal error or abuse its discretion by
12 not applying this Court’s directive concerning the instant matter
13 contained in the decision and order in case no.’s 67363/67596?
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Statement of the Case

The genesis of this litigation is a conservatorship petition that was litigated in New Jersey. Walter Shapiro is the father of plaintiff Howard Shapiro.³ On August 5, 2014 Howard petitioned a New Jersey court to appoint him as Walter's conservator. The Welts are relatives of Walter and opposed Howard's petition. Although not listed in the petition, Glenn Welt is Walter's nephew. Glenn Welt created a website that concerns the New Jersey petition, www.howardshapirovictims.com. After the website was created, the Shapiros filed their civil complaint in Nevada on September 4, 2014.⁴ On December 15, 2014 the Welts filed their motion to dismiss that the district court granted on January 2, 2015. That order was appealed, and this Court reversed and remanded the district court's order with special instructions.⁵

On May 26, 2017, Respondents renewed their special motion to dismiss.⁶ An opposition to that motion was filed and a reply made.⁷ After a short hearing on those matters, Judge Allf granted Respondents' motion and directed counsel for Respondents' to prepare findings of fact and conclusions of law without conducting a fact intensive inquiry that balances the underlying principles of the litigation privilege, over Appellants' counsel's objection.⁸ On August 7, 2017 Respondents entered notice of entry of order. On September 6, 2017 Appellants timely appealed.⁹



Statement of Facts

I. Introduction

This case originates from a petition Howard Shapiro filed in a New Jersey court to appoint him as conservator for his father, Walter Shapiro. The defendants, Glen Welt, Rhoda Welt, Lynn Welt, and Michelle Welt, opposed the petition. During the course of the conservatorship matter, Howard received an email from Glen stating that Howard's "actions have been deemed worthy of [his] own website" and declaring that Glen was "personally inviting EVERY one of [Howard's] known victims to appear in court along with other caretakers, neighbors[,] acquaintances[,] and relatives [Howard] threatened."

The Welts published a website that contained several allegations regarding Howard's past debts, criminal history, and alleged mistreatment of his father, in addition to Howard's personal information. Further, the website stated that it is "dedicated to helping victims of Howard Andrew Shapiro & warning others" and encouraged any person "with knowledge of Howard A.

³ To avoid confusion arising from identical last names, the parties are referenced by their first names.

⁴ Appellants' Appendix at 1-23.

⁵ Id. at 175-176; Authored Opinion in Shapiro v. Welt, 133 Nev. Advance Opinion 6 (2017).

⁶ Appellants' Appendix – Volume I (AAI) at 24-107.

⁷ Id. at 108-140.

⁸ Appellants' Appendix – Volume II (AAII) at 173, lines 2-7.

⁹ Id at 187-189.



1 Shapiro's actions against Walter Shapiro or other illegal acts committed by
2 Howard Shapiro. . . to appear in court."

3 Howard and Jenna Shapiro filed a complaint in Nevada alleging various
4 causes of action related to the Welts' statements on the website. The Shapiros'
5 causes of action included, among other allegations, defamation per se,
6 defamation, extortion, civil conspiracy, and fraud. The Welts subsequently
7 filed a motion to dismiss pursuant to NRS 41.660, Nevada's anti-SLAPP
8 statute. The Welts argued that the website constituted a good-faith
9 communication in furtherance of the right to free speech in direct connection
10 with an issue of public concern pursuant to NRS 41.637. Citing to NRS
11 41.637(3) and (4), the Welts argued that the statements on the website were
12 protected as statements made in direct connection with an issue under
13 consideration by a judicial body and as communications made in direct
14 connection with an issue of public interest in a place open to the public or in a
15 public forum.
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22 The district court issued an order granting the Welts' motion to dismiss.
23 The court concluded that the Welts met their burden to show by a
24 preponderance of the evidence that the Shapiros' complaint was filed in an
25 attempt to prevent a good-faith communication in connection with an issue of
26 public concern. Specifically, the district court concluded that the website was
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28

1 a "communication regarding an ongoing lawsuit concerning the rights of an
2 elderly individual, and a matter of public concern under NRS 41.637(4)."

3 Additionally, the district court concluded that the Shapiros failed to show a
4 probability that they would prevail on the lawsuit. The district court relied on
5 this Court's decision in *Jacobs v. Adelson* to conclude that the Welts'
6 statements would likely be protected by the absolute litigation privilege.
7
8

9 The Appellants timely appealed the district court's order. After briefing
10 and oral argument, this Court concluded that the district court erred in its
11 analysis of whether the Welts' statements concerned an issue of public
12 interest, and explicitly adopted the California guidelines, as enunciated in
13 *Piping Rock Partners*, for determining whether an issue is of public interest
14 under NRS 41.637(4). This Court also concluded that the district court failed
15 to conduct a case specific, fact-intensive inquiry that focused on and balanced
16 the underlying principles of the absolute litigation privilege as required by
17 *Jacobs*.
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22 Therefore, this court reversed, in part, the district court's order granting
23 the Welts' special motion to dismiss pursuant to NRS 41.660 and remanded
24 with instructions to apply California's guiding principles for determining
25 whether an issue is of public interest under NRS 41.637(4) and, prior to
26 determining whether the Shapiros have met their burden of proving a
27
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likelihood of success on the merits, to conduct a fact-intensive inquiry that balances the underlying principles of the absolute litigation privilege as required by *Jacobs*.

However, at the hearing on Respondents' renewed motion to dismiss, the district court conducted no analysis whatsoever; rather, it left counsel for Respondents the task of proposing findings of fact and conclusions of law, as indicated in note 8, *supra*.

II. Legal Analysis.

a. Background on Nevada's Anti-SLAPP Statute: History And Policy

Nevada's Anti-SLAPP statute creates a substantive immunity from suit and procedural mechanism to give shape to that immunity when a Plaintiff's claim seeks to suppress *First Amendment rights*. "A SLAPP suit is characterized as a meritless suit filed primarily to discourage the named defendant's exercise of First Amendment rights."¹⁰ NRS 41.660 was first created by the Nevada Legislature in 1993¹¹ and was amended in 1997.¹² In 2013, the Nevada Legislature gave Nevada's Anti-SLAPP statute its present shape and strength when it passed Senate Bill 286.¹³ The 2013 amendment

¹⁰ S.B. 286, 2013 Leg. Sess., 77th Sess. (Nev. 2013).

¹¹ See S.B. 405, 1993 Leg. Sess., 67th Sess. (Nev. 1993).

¹² See A.B. 485, 1997 Leg. Sess., 67th Sess. (Nev. 1997).

¹³ See S.B. 286, 2013 Leg. Sess., 77th Sess. (Nev. 2013).

1 added, inter alia, NRS 41.637(4), which protects a Defendant’s exercise of his
2 First Amendment rights *in connection with an issue of public interest*. The
3 Statute was most recently amended in 2015, making it more closely
4 resembling California’s statute.¹⁴

5
6 Nevada’s Anti-SLAPP statute reflects the Legislature’s recognition that
7 permitting lawsuits against citizens and corporations for exercising their First
8 Amendment rights chills free speech.¹⁵ The process is the punishment.
9 Dragging out a frivolous suit aimed at First Amendment protected activity not
10 only intimidates Defendants from any further speech but stands to chill other
11 speakers or journalists.

12
13 As the discussion above demonstrates, a Defendant is immune from suit
14 under Nevada’s anti-SLAPP statute so long as the targeted speech is made *in*
15 *connection with an issue of public interest*. The resolution of this case turns
16 upon whether Respondents’ speech was so made.

17 **b. NRS 41.660: Its Mechanism**

18
19 Under NRS 41.660 et seq.:

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24 ¹⁴ See S.B. 444, 2-15 Leg. Sess., 78th Sess. (Nev. 2015). The final version of
25 the bill added the ability for either party to take discovery, in the event that it
26 is deemed necessary, and lowered a Plaintiff’s burden of proof from “clear
27 and convincing evidence” to “prima facie evidence”.

28 ¹⁵ See Senate Committee on Judiciary hearing on Nev. SB 286, at 4 (Mar. 28,
2013); Assembly Committee on Judiciary hearing on Nev. SB 286, at 4-7
(May 5, 2013).

1 1. *If an action is brought against a person based upon a good*
2 *faith communication in furtherance of the right to petition or*
3 *the right to free speech in direct connection with an issue of*
4 *public concern:*

5 (a) *The person against whom the action is brought may*
6 *file a special motion to dismiss*

7 ...

8 2. *A special motion to dismiss must be filed within 60 days after*
9 *service of the complaint, which period may be extended by the*
10 *court for good cause shown.*

11 3. *If a special motion to dismiss is filed pursuant to subsection*
12 *2, the court shall:*

13 (a) *Determine whether the moving party has established,*
14 *by a preponderance of the evidence, that the claim is*
15 *based upon a good faith communication in*
16 *furtherance of the right to petition or the right to free*
17 *speech in direct connection with an issue of public*
18 *concern;*

19 (b) *If the court determines that the moving party has met*
20 *the burden pursuant to paragraph (a), determine*
21 *whether the plaintiff has demonstrated with prima*
22 *facie evidence a probability of prevailing on the*
23 *claim;*

24 ...

25 (e) *Except as otherwise provided in subsection 4, stay*
26 *discovery pending:*

27 (1) *A ruling by the court on the motion; and*

28 (2) *The disposition of any appeal from the ruling on*
 the motion; and

 (f) *Rule on the motion within 20 judicial days after the*
 motion is served upon the plaintiff.

 ...



5. *If the court dismisses the action pursuant to a special motion to dismiss filed pursuant to subsection 2, the dismissal operates as an adjudication upon the merits.*

Nev. Rev. Stat. Ann. § 41.660 et seq.

The Nevada Legislature and Judiciary have historically looked to California for guidance on crafting and applying its Anti-SLAPP statute. The Nevada Supreme Court has explicitly stated that “we consider California caselaw because California’s Anti-SLAPP statute is similar in purpose and

¹⁷ See NRS 41.660(4).

1 language to Nevada’s anti-SLAPP statute.”¹⁸ Furthermore, the Legislature
2 explicitly incorporated California case law in amending the statute in 2015
3 when it defined a Plaintiff’s evidentiary burden on the second prong of
4 analysis for a special motion to dismiss. The Plaintiff’s burden is that of
5 “prima facie” evidence, which is defined as “the same burden of proof that a
6 plaintiff has been required to meet pursuant to California’s Anti-Strategic
7 Lawsuit Against Public Participation law as of the effective date of this act.”¹⁹

8
9
10 California courts have also noted that “because unnecessarily
11 protracted litigation would have a chilling effect upon the exercise of First
12 Amendment rights, speedy resolution of cases involving free speech is
13 desirable.”²⁰ Thus, summary judgment was deemed to be a “favored” remedy
14 in defamation cases.²¹ Hence, in matters implicating speech a special motion
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19 ¹⁸ See *John v. Douglas Cnty. Sch. Dist.*, 125 Nev. 746, 756 (2009); see also
20 *Shapiro v. Welt*, 133 Nev. Adv. Rep. 6 (Nev. 2017).

21 ¹⁹ See S.B. 444, 2015 Leg. Sess., 78th Sess. (Nev. 2015) at sec. 12.5(2).

22 ²⁰ *Good Government Group, Inc. v. Superior Court of Los Angeles County*, 22
23 Cal. 3d 672, 685, 586 P.2d 572, 578 (Cal. 1978); citing *Dombrowski v.*
24 *Pfister*, 380 U.S. 479, 486-487 (1965).

25 ²¹ See *id.*; see also *Reader’s Digest Assn. v. Superior Court*, 37 Cal. 3d 244,
26 252, 690 P.2d 610, 614 208 Cal. Rptr. 137, 141, 1984 Cal. LEXIS 125, *10,
27 11 Media L. Rep. 1065 (Cal. 1984) (“summary judgment was a ‘favored’
28 remedy in defamation cases involving the issue of ‘actual malice’ under the
New York Times standard.”); *Jensen v. Hewlett-Packard Co.*, 14 Cal. App. 4th
958, 965, 18 Cal. Rptr. 2d 83, 86 (Cal. App. 4th Dist. 1993) (affirming a
nonsuit, i.e. a judgement after opening statements, as similarly a “favored
remedy”).

1 to dismiss²² under Nevada’s Anti-SLAPP statute promotes the speedy
2 resolution of cases involving free speech early on, sans protracted, expensive,
3 litigation where a Plaintiff has a meritless lawsuit or one that is unlikely to
4 succeed on the merits.
5

6 Unfortunately for Respondents, they failed in the first instance: that is,
7 their speech is not protected. Specifically, it is not protected by the litigation
8 privilege and it is of no public interest. Despite that, and in spite of the
9 decision in *Shapiro v. Welt*, Respondents renewed their motion to dismiss.
10 Indeed, if anything, an anti-SLAPP motion has become far more difficult to
11 prevail on after the *Shapiro* decision for the Respondents. This is because the
12 factors adopted by this Court in the *Shapiro* matter limit speech that is
13 protected by Nevada’s anti-SLAPP statute and address those circumstances
14 where speech is of no public interest, as the Welts’ speech is in this case.
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19 **c. NRS 41.637-Defining “good faith communication in furtherance**
20 **of the right to petition or the right to free speech in direct**
21 **connection with an issue of public concern**

22 Nev. Rev. Stat. Ann. § 41.637 et seq. provides the meaning of “*Good*
23 *faith communication in furtherance of the right to petition or the right to free*
24

25
26 _____
27 ²² A “special motion to dismiss” under Nev. Rev. Stat. Ann. § 41.637 et seq.
28 and Nev. Rev. Stat. Ann. § 41.660 and Nev. Rev. Stat. Ann. § 41.637 is
commonly referred to as an anti-SLAPP motion.

speech in direct connection with an issue of public concern”. It states the following:

“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*
- 4. Communication made in direct connection with an issue of public interest in a place open to the public or in a public forum,*

which is truthful or is made without knowledge of its falsehood.

Nev. Rev. Stat. Ann. § 41.637. For the purposes of the instant case, subsections 3 and 4 were implicated. The following discussion centers on those two factors. If broken down into simple elements, in order to shift the burden to Defendants, Plaintiffs must show:

- a) A “good faith communication”
- b) In furtherance of the right to free speech

- 1 c) In direct connection with an issue of public concern²³
2 d) Made in a place open to the public or in a public forum
3 e) Which is truthful or is made without knowledge of its falsehood.
4

5 **d. The District Court Incorrectly Turned to California Case Law**
6 **After Incorrectly Determining That No Nevada Case Law Is On**
7 **Point, Amounting to Clear Legal Error and Abuse of Discretion.**

8 On the issue of the litigation privilege, the challenged order contains
9 misstatements of law and fact that are material to this matter. As an example,
10 the following was contained in this court's order:
11

12 The core question under review by the New Jersey judicial body
13 was whether Walter needed a conservator and, if so, whether
14 Howard was qualified and suitable for that role. NRS 41.637(3)
15 protects a "written or oral statement made in direct connection
16 with an issue under consideration by a...judicial body." *No*
17 *Nevada appellate court has yet addressed this definition*, so the
18 court considers persuasive California case law interpreting its

18 ²³ In *Shapiro v. Welt*, the Nevada Supreme Court adopted California's guiding
19 principles, as enunciated in *Piping Rock Partners*, for determining whether an
20 issue is of public interest under NRS 41.637(4). Those principles are as
21 follows: (1) "public interest" does not equate with mere curiosity; (2) a matter
22 of public interest should be something of concern to a substantial number of
23 people; a matter of concern to a speaker and a relatively small specific
24 audience is not a matter of public interest; (3) there should be some degree of
25 closeness between the challenged statements and the asserted public interest—
26 the assertion of a broad and amorphous public interest is not sufficient; (4) the
27 focus of the speaker's conduct should be the public interest rather than a mere
28 effort to gather ammunition for another round of private controversy; and (5) a
person cannot turn otherwise private information into a matter of public
interest simply by communicating it to a large number of people. *Shapiro v.*
Welt, 133 Nev. Adv. Rep. 6 (Nev. 2017).



1 statute protecting “any written or oral statement or writing made
2 in connection with an issue under consideration or review by
3 a...judicial body....” (Emphasis Added).²⁴

4 This statement is incorrect. In fact, not only was the issue previously
5 addressed at least twice by this Court, *it was addressed in the previous appeal*
6 *in this matter*. In their answering brief, Defendants specifically addressed this
7 issue as follows:
8

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

16 The Welts’ statements on the website were “made in direct
17 connection with an issue under consideration by a ... judicial
18 body....” This qualifies the statements as “[g]ood faith
19 communication in furtherance of the right ... to free speech in
20 direct connection with an issue of public concern.” The Shapiros’
21 complaint is premised exclusively upon these statements. Given
22 these facts, the Welts’ statements are protected and they are
immune from suit. The district court’s conclusion was correct and
should be affirmed.²⁵

23 In response, in its opinion on that case, the Nevada Supreme Court held
24 the following:

25
26 **Absolute litigation privilege**

27
28 ²⁴ AAIL at 147, lines 10-16.

²⁵ AAIL at 208, lines 3-16.



1 The Shapiros argue that the district court erred in its application of
2 the absolute litigation privilege test articulated in *Jacobs v.*
3 *Adelson*, 130 Nev., Adv. Op. 44, 325 P.3d 1282 (2014), in this
4 matter. We agree.

5 "Nevada has long recognized the existence of an absolute privilege
6 for defamatory statements made during the course of judicial and
7 quasi-judicial proceedings." *Id.* at 1285.

8 This privilege, which acts as a complete bar to
9 defamation claims based on privileged statements,
10 recognizes that certain communications, although
11 defamatory, should not serve as a basis for liability
12 in a defamation action and are entitled to an absolute
13 privilege because the public interest in having
14 people speak freely outweighs the risk that
15 individuals will occasionally abuse the privilege by
16 making false and malicious statements.

17 *Id.* (internal quotation marks omitted). In order for the privilege to
18 apply to defamatory statements made in the context of a judicial
19 proceeding, "(1) a judicial proceeding must be contemplated in
20 good faith and under serious consideration, and (2) the
21 communication must be related to the litigation." *Id.* (internal
22 quotation marks omitted). However, a "[party's] statements to
23 someone who is not directly involved with the actual or anticipated
24 judicial proceeding will be covered by the absolute privilege only
25 if the recipient of the communication is significantly interested in
26 the proceeding" *Fink v. Oshins*, 118 Nev. 428, 436, 49 P.3d 640,
27 645-46 (2002) (internal quotation marks omitted).

28 For a statement to fall within the scope of the absolute litigation
privilege it must be made to a recipient who has a significant
interest in the outcome of the litigation or who has a role in the
litigation. *Id.* at 436, 49 P.3d at 645-46; see also *Jacobs*, 130 Nev.,
Adv. Op. 44, 325 P.3d at 1287. In order to determine whether a
person who is not directly involved in the judicial proceeding may
still be "significantly interested in the proceeding," the district
court must review "the recipient's legal relationship to the



1 litigation, not their interest as an observer." *Jacobs*, 130 Nev., Adv.
2 Op. 44, 325 P.3d at 1287. The review "is a case-specific, fact-
3 intensive inquiry that must focus on and balance the underlying
4 principles of the privilege." *Id.* (internal quotation marks omitted).

5 Here, the district court failed to conduct a case-specific, fact
6 intensive inquiry that focused on and balanced the underlying
7 principles of the privilege as required by *Jacobs*. Thus, the district
8 court erred in its analysis of the Welts' statements. Accordingly,
9 we reverse the district court's order and remand for further
10 proceedings consistent with this opinion.²⁶

11 In short, in the *Jacobs*, *Oshins*, and *Shapiro* matter this Court addressed
12 the issue that the district court stated was never addressed. Because of that, the
13 district court incorrectly turned to California case law for answers. This is
14 clear legal error that merits reversing the district court's decision and
15 remanding for further proceedings.

16 A correct consideration of the above referenced cases would have
17 yielded a different result – denial of Respondents' motion to dismiss. It should
18 be noted at the outset that "[t]he absolute litigation privilege's purpose is not
19 to protect those making defamatory comments but 'to lessen the chilling effect
20 on those who seek to utilize the judicial process to seek relief.'" ²⁷ Thus, the
21 litigation privilege is not intended to provide cover to anyone under any
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26 ²⁶ AAI at 182-185.

27 ²⁷ *Jacobs v. Adelson*, 325 P.3d 1282, 1286, 2014 Nev. LEXIS 53, *8-10, 38
28 I.E.R. Cas. (BNA) 1690, 164 Lab. Cas. (CCH) P61,481, 98 Empl. Prac. Dec.
(CCH) P45,087, 130 Nev. Adv. Rep. 44, 2014 WL 2451201 (Nev. May 30,
2014)



1 circumstances. As is the case with any rule, there are exceptions, there are
2 provisions that narrow the rule, clauses that foreclose that possibility that
3 those not intended to be protected are not. That is the case with the litigation
4 privilege in Nevada.
5

6 In their motion to dismiss, Respondents relied on California case law to
7 support their contention that the content on the website at issue
8 (www.howardshapirovictims.com) was protected speech.²⁸ What Respondents
9 failed to do is address Nevada case law that is on point.
10
11

12 Nevada has long recognized the existence of an absolute privilege for
13 defamatory statements made during judicial and quasi-judicial proceedings.²⁹
14 This privilege, which acts as a complete bar to defamation claims based on
15 privileged statements, recognizes that:
16

17 [c]ertain communications, although defamatory, should not
18 serve as a basis for liability in a defamation action and are
19

20 ²⁸ Citing *Briggs v. Eden Council for Hope & Opportunity*, 969 P.2d 564 (Cal.
21 1999); *People ex rel. 20th Century Ins. Co. v. Bldg. Permit Consultants, Inc.*,
22 86 Cal. App. 4th 280, 282

23 (2000); *Paul v. Friedman*, 95 Cal. App. 4th 853 (2002); *Neville v. Chudacoff*,
24 160 Cal. App. 4th 1255 (2008); *McConnell v. Innovative Artists Talent &*
25 *Literary Agency, Inc.*, 175 Cal. App. 4th 169 (2009);

26 ²⁹ *Jacobs v. Adelson*, 325 P.3d 1282, 1285, 2014 Nev. LEXIS 53, *5-7, 38
27 I.E.R. Cas. (BNA)1690, 164 Lab. Cas. (CCH) P61,481, 98 Empl. Prac. Dec.
28 (CCH) P45,087, 130 Nev. Adv. Rep. 44, 2014 WL 2451201 (Nev. May 30,
2014); citing, *Clark Cnty. Sch. Dist. v. Virtual Educ. Software, Inc. (VESI)*,
125 Nev. 374, 382, 213 P.3d 496, 502 (2009); *Fink v. Oshins*, 118 Nev. 428,
432-33, 49 P.3d 640, 643-44 (2002).

1 entitled to an absolute privilege because 'the public interest in
2 having people speak freely outweighs the risk that individuals
3 will occasionally abuse the privilege by making false and
malicious statements.'"³⁰

4 An absolute privilege constitutes "an immunity, which protects against even
5 the threat that a court or jury will inquire into a communication."³¹
6

7 In order for the absolute privilege to apply to defamatory statements
8 made in the context of a judicial or quasi-judicial proceeding, "(1) a judicial
9 proceeding must be contemplated in good faith and under serious
10 consideration, and (2) the communication must be related to the litigation."³²
11

12 Therefore, the privilege applies to communications made by either an attorney
13 or a non-attorney that are related to ongoing litigation or future litigation
14 contemplated in good faith.³³ When the communications are made in this type
15 of litigation setting and are in some way pertinent to the subject of the
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19 ³⁰ *Jacobs v. Adelson*, 325 P.3d 1282, 1285, 2014 Nev. LEXIS 53, *5-7, 38
20 I.E.R. Cas. (BNA)1690, 164 Lab. Cas. (CCH) P61,481, 98 Empl. Prac. Dec.
21 (CCH) P45,087, 130 Nev. Adv. Rep. 44, 2014 WL 2451201 (Nev. May 30,
22 2014); see also *Hampe v. Foote*, 118 Nev. 405, 409, 47 P.3d 438, 440(2002),
23 overruled on other grounds by *Buzz Stew, L.L.C.*, 124 Nev. at 228 n.6, 181
24 P.3d at 672 n.6. An absolute privilege constitutes "an immunity, which
protects against even the threat that a court or jury will inquire into a
communication." *Hampe*, 118 Nev. at 409, 47 P.3d at 440.

25 ³¹ *Jacobs v. Adelson*, 325 P.3d 1282, 1285, 2014 Nev. LEXIS 53, *5-7, 38
26 I.E.R. Cas. (BNA) 1690, 164 Lab. Cas. (CCH) P61,481, 98 Empl. Prac. Dec.
27 (CCH) P45,087, 130 Nev. Adv. Rep. 44, 2014 WL 2451201 (Nev. May 30,
2014).

28 ³² *Id.*

³³ *Id.*



1 controversy, the absolute privilege protects them even when the motives
2 behind them are malicious and they are made with knowledge of the
3 communications' falsity.³⁴
4

5 But this Court has also recognized that "[a]n attorney's statements to
6 someone who is not directly involved with the actual or anticipated judicial
7 proceeding will be covered by the absolute privilege only if the recipient of
8 the communication is 'significantly interested' in the proceeding."³⁵ Therefore,
9 in Nevada, **the content of Defendants' website is protected speech if and only**
10 **if the audience that the website targets is 'significantly interested' in the**
11 **proceeding.**
12
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15 According to the Respondents, the website's stated goal is to "invite
16 Howard Shapiro's known victims to appear in court along with other
17 caretakers, neighbors, acquaintances and relatives you've threatened."³⁶ This
18 does not cloak the contents of the website with the protections afforded speech
19 under Nevada's anti-SLAPP statute. Even taking their word for it, and if the
20 stated purpose of the website is taken at face value (which is a stretch),
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25 ³⁴ *Jacobs v. Adelson*, 325 P.3d 1282, 1285, 2014 Nev. LEXIS 53, *5-7, 38
26 I.E.R. Cas. (BNA) 1690, 164 Lab. Cas. (CCH) P61,481, 98 Empl. Prac. Dec.
27 (CCH) P45,087, 130 Nev. Adv. Rep. 44, 2014 WL 2451201 (Nev. May 30,
2014).

28 ³⁵ *Id.*; citing, *Fink*, 118 Nev. at 436, 49 P.3d at 645-46.

³⁶ AAI at 25, lines 14-16.

1 Respondents failed to explain how Howard Shapiro’s purported “victims” are
2 “significantly interested” in the conservatorship proceeding.

3
4 They do not because they cannot. Presumably, Respondents contend
5 that the “significant interest” referred to in the *Jacobs* case is a general interest
6 in the operation of the courts. However, this construction would necessarily
7 swallow the rule: that is, there would be no instance where the public at large
8 would not be significantly interested in a matter under consideration by a
9 judicial body because everything that happens in the courts is of interest to
10 the public. This would render the “significant interest” proscription to the
11 general rule hollow. Rather, “general interest” means an interest in the
12 outcome of the litigation. *Jacobs v. Adelson* and *Fink v. Oshins* addressed this
13 specifically.
14

15
16 In *Jacobs v. Adelson*, Jacobs argued that the district court improperly
17 applied the absolute privilege because the statements were made outside of the
18 judicial proceedings to disinterested persons, including the media and the
19 press, and were thus unrelated to the litigation. Jacobs argued that the press
20 lacked any legal interest in the outcome of the underlying case and so had no
21 functional ties to his claims or Adelson's defenses. Adelson, argued that the
22 district court properly dismissed Jacobs' defamation claim because his
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statements³⁷ were absolutely privileged since they were made during the course of the judicial proceeding and were directly related to the subject of the underlying lawsuit—Jacobs' claim for wrongful termination. Adelson also argued that statements made to the media should be included in the scope of Nevada's absolute privilege rule.

This Court turned to the policy considerations underlying the litigation privilege to resolve the matter. Specifically, the Court stated that statements to the media (which was the target audience) "do little, if anything, to promote the truth finding process in a judicial proceeding [They] do not generally encourage open and honest discussion between the parties and their counsel in order to resolve disputes; indeed, such statements often do just the opposite."³⁸ Furthermore, the Court considered whether allowing such defamation claims would hinder investigations or the detailing of claims.³⁹ Since statements to

³⁷ Sheldon Adelson sent an email to the Wall Street Journal stating, "While I have largely stayed silent on the matter to this point, the recycling of his allegations must be addressed . . . We have a substantial list of reasons why Steve Jacobs was fired for cause and interestingly he has not refuted a single one of them. Instead, he has attempted to explain his termination by using outright lies and fabrications which seem to have their origins in delusion." This statement led Jacobs to amend his complaint and add a cause of action for defamation per se

³⁸ *Jacobs v. Adelson*, 325 P.3d 1282, 1286, 2014 Nev. LEXIS 53, *8, 38 I.E.R. Cas. (BNA) 1690, 164 Lab. Cas. (CCH) P61,481, 98 Empl. Prac. Dec. (CCH) P45,087, 130 Nev. Adv. Rep. 44, 2014 WL 2451201 (Nev. May 30, 2014).

³⁹ *Id.*

1 the press do very little to promote the truth finding process, do not encourage
2 settlement, indeed the opposite, and because allowing defamation claims in
3 that context do not hinder the investigation or detailing of claims, the Nevada
4 Supreme Court declined to extend the privilege in that context.
5

6 Application of those underlying policy considerations to the case below
7 necessarily render a similar result: that is, that the litigation privilege should
8 not be extended under these circumstances. The contents of the website do
9 little if anything to promote the truth finding process (the net was cast too
10 wide, the statements too outrageous, and the message was not focused and
11 driven), it certainly does not promote settlement, and allowing the Shapiro's
12 claim does not, in fact did not, hinder the Defendants investigation into their
13 claims or prohibit them from detailing those claims. Therefore, the litigation
14 privilege should not have been extended to the Respondents in this matter.
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19 Respondents may argue that the *Jacobs* case was limited to the “media
20 context”. However, in *Fink v. Oshins*, this Court recognized that
21 communications are not sufficiently related to judicial proceedings when they
22 are made to someone without an interest in the outcome.⁴⁰ Here, the stated
23 targets of the Respondents website have no interest in the outcome of the
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28 ⁴⁰ *Fink v. Oshins*, 118 Nev. 428, 49 P.3d 640, 2002 Nev. LEXIS 64, 118 Nev.
Adv. Rep. 45(Nev. July 17, 2002).

litigation. In other words, though the public may arguably have a legitimate interest in the operation of its courts and the conduct of its officers, *it does not have any interest in who has guardianship over Walter Shapiro.*

e. The District Court Committed Legal Error in Turning To California Courts to Determine If Appellant Seeking Conservatorship In New Jersey Was A Matter of Public Concern.

In *Shapiro v. Welt*, this Court adopted California's guiding principles, as enunciated in *Piping Rock Partners*, for determining whether an issue is of public interest under NRS 41.637(4). Those principles are as follows:

- (1) "public interest" does not equate with mere curiosity;
- (2) a matter of public interest should be something of concern to a substantial number of people; a matter of concern to a speaker and a relatively small specific audience is not a matter of public interest;
- (3) there should be some degree of closeness between the challenged statements and the asserted public interest—the assertion of a broad and amorphous public interest is not sufficient;
- (4) the focus of the speaker's conduct should be the public interest rather than a mere effort to gather ammunition for another round of private controversy; and
- (5) a person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people.

Shapiro v. Welt, 133 Nev. Adv. Rep. 6 (Nev. 2017).

1 The focus here is whether the contents of the website, i.e., the
2 allegations made against Howard Shapiro, are of public interest without
3 regard to the target audience. The question necessarily turns on whether
4 Howard Shapiro is of interest to the public.
5

6 Recognizing that the factors delineated in the *Shapiro* case foreclose a
7 favorable result for the Defendants (Howard Shapiro and the underlying
8 conservatorship proceeding was determined to be of no public interest by this
9 Court – hence the outcome of the prior appeal in this matter), Respondents
10 sought to cast Howard Shapiro as a “public figure”.
11

12 Respondents framed the question thusly:
13

14 the core question under review by the New Jersey judicial body
15 was whether Walter needed a conservator and, if so, whether
16 Howard was qualified and suitable for that role. The Welts’
17 website directly concerned Howard’s suitability and sought
18 information from others that might reflect upon that topic. NRS
19 41.637(3) protects that speech.⁴¹

20 Respondents acknowledged that neither California nor Nevada courts have
21 “expressly determined whether speech concerning the qualifications and
22 suitability of a person who has petitioned for a conservator appointment
23 concerns ‘an issue of public interest.’”⁴² California courts, according to
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27 ⁴¹ AAI at 36, lines 9-12.

28 ⁴² AAI at 38, lines 19-22.

1 Respondents, have weighed in on whether “being appointed a conservator
2 makes a person a public official, subject to public scrutiny.”⁴³ Defendants then
3 launch into a lengthy discussion on California courts’ view on the subject.
4

5 The problem is that when the website was published, Howard Shapiro
6 was not appointed a conservator. Rather, the matter was still under
7 consideration. Therefore, the cases cited by Defendants in support of their
8 contention that “[i]nvoking sovereign powers is an issue of public interest” are
9 distinguished in a material way from the facts of this case and inapplicable.
10
11 What remains is *Shapiro v. Welt*, a case that is very much on point. *Even if it*
12 *were the case that Mr. Shapiro was a “public figure”, the Shapiro factors*
13 *still weigh against granting the motion to dismiss – and the Shapiro factors*
14 *are on point when determining if a matter is of public concern.*
15
16

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18 Indeed, application of the *Shapiro* factors to this case yield a single
19 result: that the conservatorship proceeding in New Jersey and Howard
20 Shapiro’s involvement in that proceeding is of no interest to the public. First,
21 since the public has no significant interest in the outcome of the litigation, the
22 proceedings are necessarily a “mere curiosity”. Second, by their very own
23 description of the purpose and intent of the website and its contents, i.e.,
24 reaching out to Howard Shapiro’s “victims”, Defendants necessarily limit the
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⁴³ AAI at 38, lines 19-22.

1 target audience to a very few people; indeed, the communication is limited to
2 “a small specific audience” – hardly the “substantial number” envisaged in the
3 Shapiro case. Third, since there is no public interest, there can be no degree of
4 closeness between the statements and the public interest. Fourth, the focus of
5 the Welts’ statements, by their own admission, is an effort to gather
6 ammunition for a pending controversy, not the public interest, in violation of
7 the fourth factor contained in the Shapiro matter. The fifth factor involves the
8 communication of private information to a large number of people. The
9 statements at issue here fail this factor because the statements are not targeted
10 at a large number of people.

11
12 Rather than conduct that fact intensive, case by case analysis, the
13 court below relied on California case law – the following statement was
14 contained in the order granting Defendants motion to dismiss that materially
15 affects the analysis:

16
17 By borrowing from California, Nevada implicitly adopted
18 ***California case law*** interpreting that statute, citing *International*
19 *Game Technology, Inc. v. Dist. Ct.*, 122 Nev. 132, 153, 127 P.3d
20 1088, 1103 (2006).⁴⁴ (***Emphasis added***).

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⁴⁴ AAI at 146, lines 20-21.

1 There is absolutely no authority that supports this contention – nor do
2 Defendants cite any such authority. Instead, Defendants misstate the
3 law. The case cited in support actually states the following:
4

5 "[W]hen a federal statute is adopted in a statute of this state, a
6 presumption arises that the legislature knew and intended to
7 adopt the construction placed on the federal statute by federal
8 courts. This rule of [statutory] construction is applicable,
9 however, only if the state and federal acts are substantially
10 similar and the state statute does not reflect a contrary legislative
11 intent."⁴⁵

12 Though the district court erroneously stated that the Nevada legislature
13 adopted California case law, in actuality, the rule is that a presumption arises
14 that the legislature intended to adopt such a construction. This court missed a
15 step in the analysis by stating the Nevada legislature adopted case law that
16 may not be inapplicable.

17 Indeed, in the previous appellate matter in this case, *Shapiro v. Welt*,
18 Nev., Adv. Op. 74, 334 P.3d 402, 405 (2014), the Nevada Supreme Court
19 stated something entirely different:
20

21 Because this court has recognized that California's and Nevada's
22 anti-SLAPP "statutes are similar in purpose and language," John,
23 125 Nev. at 752, 219 P.3d at 1281; compare NRS 41.637(4), with
24 Cal. Civ. Proc. Code § 425.16(e) (West 2016), *we look to*
25 *California law for guidance on this issue.*⁴⁶ (*Emphasis Added*).
26

27 ⁴⁵ *Edgington v. Edgington*, 119 Nev. 577, 80 P.3d 1282 (Nev., 2003) [80 P.3d
28 1288].

⁴⁶ AAI at 182.

1 That is, rather than adopting California case law, this Court looks to it
2 as persuasive authority, nothing more. On appeal, questions of statutory
3 construction, i.e., whether or not California case law is adopted in this matter
4 or not, is reviewed de novo, whether reference to this court's findings, which
5 are threadbare to begin with.⁴⁷ Whether California case law is adopted,
6 whether a presumption should have arisen in determining its adoption, is a
7 material question of law that this Court must consider de novo.
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27 ⁴⁷ *Shapiro v. Welt*, Nev., Adv. Op. 74, 334 P.3d 402, 405 (2014). (This court
28 reviews the constitutionality of a statute and questions of statutory construction
de novo).

Conclusion

The district court's order granting the well's special motion to dismiss per NRS 41.660 was improper and should be reversed and remanded. This Court directed the district court to conduct a case specific, fact intensive inquiry that focused on and balanced the underlying principles of the privilege as required by Jacobs. The district court did not do that. Instead, it relied on California case law to skirt the issue when the Shapiro, Fink, and Jacobs line of cases are on point. As such, the district court abused its discretion and committed clear legal error.

DATED this 1st day of March, 2018.

/s/ Alex Ghibaud

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