

1 MICHAEL P. LOWRY, ESQ.
Nevada Bar No. 10666
2 E-mail: Michael.Lowry@wilsonelser.com
WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP
3 300 South Fourth Street, 11th Floor
Las Vegas, Nevada 89101-6014
Telephone: (702) 727-1400
4 Facsimile: (702) 727-1401
Attorneys for Glenn Welt, Rhoda Welt, Lynn Welt, and Michele Welt

Electronically Filed
Mar 30 2018 02:40 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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

7 HOWARD SHAPIRO and JENNA
SHAPIRO

8 Appellants,

9 vs.

10 GLENN WELT, RHODA WELT,
LYNN WELT, and MICHELLE WELT,

11 Respondents.

Supreme Court No.: 73943

Case No. A-14-706566-C

Respondents' Answering Brief

12 **APPEAL**

13
14 From the Eighth Judicial District Court, Clark County
The Honorable Nancy L. Allf, District Judge

Table of Contents

Table of Authorities	iii
Attorney’s Certificate of Compliance.....	iv
NRAP 26.1(a) Disclosure	vi
Routing Statement.....	vii
Certificate of Service	viii
Jurisdictional Statement	1
Statement of Issues Presented for Review.....	1
Statement of the Case & Facts.....	2
Summary of the Argument	2
Argument	3
1. The Shapiros’ appeal only a narrow point.....	3
2. The Shapiros did not present clear, convincing, and admissible evidence of a probability of success on their claims.	4
a. Howard made himself a limited-purpose public figure, but failed to demonstrate actual malice.....	5
b. Howard sought a public appointment but failed to demonstrate actual malice.	5
c. The district court correctly analyzed the litigation privilege.	6
Conclusion	8

Table of Authorities

Cases

Clark Cnty. Sch. Dist. v. Virtual Educ. Software, Inc., 125 Nev. 374, 213 P.3d 496
(2009).....1

Shapiro v. Welt, 133 Nev. Adv. Op. 6, 389 P.3d 262 (2017) 2, 7, 8

Young v. CBS Broad., Inc., 212 Cal. App. 4th 551 (2012).....6

Statutes

NRS 41.637 2, 3, 6

NRS 41.6603

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 1,672 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. I understand that I may be subject to sanctions in the event that the accompanying petition is not in conformity with the

///

///

///

1 requirements of the Nevada Rules of Appellate Procedure.

2 DATED this 30th day of March, 2018.

3 WILSON ELSER MOSKOWITZ
4 EDELMAN & DICKER LLP

5 /s/ Michael P. Lowry

6 MICHAEL P. LOWRY, ESQ.

7 Nevada Bar No. 10666

8 E-mail: Michael.Lowry@wilsonelser.com

9 300 South Fourth Street, 11th Floor

10 Las Vegas, Nevada 89101-6014

11 Tel: 702.727.1400/Fax: 702.727.1401

12 Attorneys for Glenn Welt, Rhoda Welt,
13 Lynn Welt, and Michele Welt
14
15
16
17
18
19
20

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 20

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 Global Experience Specialists, Inc.: Thorndal Armstrong Delk Balkenbush & Eisinger, P.C.; Wilson Elser Moskowitz Edelman & Dicker, LLP

DATED this 30th day of March, 2018.

/s/ Michael P. Lowry
MICHAEL P. LOWRY, ESQ.
Nevada Bar No. 10666
E-mail: Michael.Lowry@wilsonelser.com
300 South Fourth Street, 11th Floor
Las Vegas, Nevada 89101-6014
Tel: 702.727.1400/Fax: 702.727.1401
Attorneys for Glenn Welt, Rhoda Welt,
Lynn Welt, and Michele Welt

Routing Statement

The Supreme Court retained jurisdiction in the first appeal concerning this case, docket 67363. The Shapiros argue the Supreme Court should retain jurisdiction on this appeal too. They cite NRAP 17(a)(13), arguing the principal issue on appeal is an issue of first impression involving the United States and Nevada Constitutions. However, their briefing does not present any cogent argument that some aspect of the district court's order is contrary to either. They also cite NRAP 17(a)(14), but do not explain why it applies.

It instead appears NRAP 17(b)(2) applies as this is an appeal arising from a tort case where a judgment of less than \$250,000 was entered.

DATED this 30th day of March, 2018.

WILSON ELSER MOSKOWITZ
EDELMAN & DICKER LLP

/s/ Michael P. Lowry

MICHAEL P. LOWRY, ESQ.

Nevada Bar No. 10666

E-mail: Michael.Lowry@wilsonelser.com

300 South Fourth Street, 11th Floor

Las Vegas, Nevada 89101-6014

Tel: 702.727.1400/Fax: 702.727.1401

Attorneys for Glenn Welt, Rhoda Welt,
Lynn Welt, and Michele Welt

1 **Certificate of Service**

2 Per NRAP 25(c), I certify that I am an employee of Wilson Elser
3 Moskowitz Edelman & Dicker LLP, and that on March 30, 2018, **Respondents’**
4 **Answering Brief** was served via electronic means by operation of the Court’s
5 electronic filing system to:

6 Alex B. Ghibaud, Esq.
7 G Law
7 703 S. 8th St.
Las Vegas, NV 89101
8 Tel: 702.978.7090
Attorney for Howard and Jenna Shapiro
9

10 BY: /s/ Naomi E. Sudranski
11 An Employee of WILSON ELSER
12 MOSKOWITZ EDELMAN & DICKER LLP
13
14
15
16
17
18
19
20

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19

The Welts agree the Shapiros timely appealed from a final judgment.

Statement of Issues Presented for Review

1. The district court gave three alternative reasons why Howard could not present clear, convincing, and admissible evidence of a probability of success on the merits of his defamation claim. Howard appeals only two of those reasons. Is that fatal to his appeal?
2. Howard petitioned a New Jersey court to appoint him as conservator over Walter Shapiro. The district court concluded this voluntary action subjected Howard to the public official standard for defamation requiring actual malice. Is a person seeking court appointment subject to the public official standard for defamation?
3. If a lawyer searching for witnesses and evidence on a client's behalf made statements similar to those attributed to the Welts, the district court concluded they would qualify for the litigation privilege. Nevada previously concluded "there is no good reason to distinguish between communications between lawyers and nonlawyers."¹ If so, did the district court correctly conclude the litigation privilege applied to the Welts?

¹ *Clark Cnty. Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 383, 213 P.3d 496, 502 (2009).

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20

The basic facts and history of this case were stated in the court's order disposing of a prior appeal.² After remand, the Welts renewed their motion to dismiss per NRS 41.637(3) or NRS 41.637(4).³ The Shapiros opposed,⁴ and the Welts replied.⁵ The Welts filed a supplemental brief.⁶ The motion was granted at a hearing on July 19, 2017.⁷ The notice of entry of the final, corrected order granting the motion to dismiss was filed on October 24, 2017.⁸

Summary of the Argument

In this appeal, the Shapiros seek to overturn the district court's ruling that neither of them presented clear, convincing, and admissible evidence indicating a probability of success on their claims. Jenna presented no argument to the district court and presents none on appeal. As to Howard, the only claim he contested was defamation. The district court gave three alternative reasons as to why he could not demonstrate a probability of success on that claim, but Howard appeals only two of those reasons. This is fatal to his appeal. Even considering the other

² *Shapiro v. Welt*, 133 Nev. Adv. Op. 6, 389 P.3d 262 (2017). As before, the parties are referenced by their first names to avoid confusion arising from identical last names.

³ App Vol. 1 at 24-107.

⁴ *Id.* at 108-131.

⁵ App. Vol. 2 at 132-140.

⁶ Respondent's App. at 1-5.

⁷ App. Vol. 2 at 175-186.

⁸ Respondent's App. at 6-31.

1 alternative reasons, the district court correctly concluded Howard presented no
2 clear, convincing, and admissible evidence to meet his burden of proof. The
3 district court should be affirmed.

4 **Argument**

5 **1. The Shapiros' appeal only a narrow point.**

6 Deciding the Welts' motion to dismiss required the district court to use a two
7 part process. The Welts first had to demonstrate the speech on the website was
8 within NRS 41.637(3) and NRS 41.637(4)'s definitions. If so, then NRS 41.660(1)
9 protected that speech. The district court concluded the Welts meet that burden. As
10 a result, the Shapiros then had to present admissible evidence supporting a
11 conclusion that "the plaintiff has established by clear and convincing evidence a
12 probability of prevailing on the claim."⁹ The district court stated why Jenna did
13 not meet that burden. It then gave three, different reasons why Howard did not
14 meet that burden: 1) the Welts' speech was within the litigation privilege; 2)
15 Howard sought to be appointed a public official and did not demonstrate actual
16 malice; and 3) Howard was a limited-purpose public figure and did not
17 demonstrate actual malice.

18 On appeal, the Shapiros do not dispute the district court's conclusion that the
19 Welts met their burden of proof. They instead dispute only the district court's

20 ⁹ NRS 41.660(3)(b).

1 conclusion that they failed to present clear, convincing, and admissible evidence
2 demonstrating a probability of prevailing on the claim.

3 **2. The Shapiros did not present clear, convincing, and admissible evidence**
4 **of a probability of success on their claims.**

5 The district court separately analyzed whether Howard or Jenna could
6 demonstrate a probability of success on their claims. In this appeal from that
7 order, Jenna has not argued the district court's analysis as to her claims was
8 erroneous, in any aspect. The district court's order as to her should be affirmed.

9 As to Howard, the complaint alleged causes of action for extortion, civil
10 conspiracy, "fraud," and punitive damages. Howard's arguments to the district
11 court did not address or provide evidence concerning these claims. His arguments
12 on appeal do not address them. The district court's order as to these causes of
13 action should also be affirmed.

14 Howard's appeal instead argues that the district court erred only in ruling he
15 did not present a probability of success as to his defamation claim. The district
16 court stated three, independent reasons why he did not meet his burden. Even if
17 only one of these reasons is affirmed, the district court's order as to Howard should
18 also be affirmed.

1 **a. Howard made himself a limited-purpose public figure, but failed**
2 **to demonstrate actual malice.**

3 One of the district court's three alternative conclusions was that Howard
4 made himself a limited-purpose public figure. He voluntarily petitioned a New
5 Jersey court to be appointed as Walter's conservator, putting his qualifications and
6 suitability for that position at issue. The district court concluded the Welts' speech
7 was within the scope of that issue.

8 Howard presents no argument that this ruling was erroneous. As only one of
9 the district court's three alternatives must be correct to affirm, Howard's decision
10 not to dispute this conclusion is fatal to his appeal.

11 **b. Howard sought a public appointment but failed to demonstrate**
12 **actual malice.**

13 The district court also alternatively concluded that Howard could not
14 demonstrate a probability of success on the merits because he was subject to the
15 actual malice standard for a public official. Howard sought to be appointed
16 Walter's conservator. The district court relied upon persuasive California authority
17 to conclude a conservator is a public official and subject to the actual malice
18 standard, but Howard provided no clear and convincing evidence of actual malice.

19 On appeal Howard argues only that he was not subject to the public official
20 standard, conceding a lack of clear and convincing evidence. His primary

1 argument is that when the website was published, his petition to be appointed as
2 Walter's conservator was still pending, so he was not yet a public official. This
3 statement conflicts with *Young v. CBS Broad., Inc.*'s conclusion that by becoming a
4 conservator, the person "became an agent of the state with the power to interfere in
5 the personal interests of a private citizen to whom she was not related and without
6 that citizen's consent."¹⁰ In that circumstance, a conservator is a public official
7 subject to the actual malice standard.¹¹

8 The logic of Howard's argument is also flawed. If two candidates are vying
9 for elected office and the incumbent was sued for statements about the challenger,
10 the challenger would need only show negligence. However, if the challenger was
11 sued for statements about the incumbent, the incumbent would be required to
12 demonstrate actual malice. This is illogical as both voluntarily chose to stand for
13 election. The fact that one was previously elected, but one had not, should not
14 create two distinct burdens of proof.

15 **c. The district court correctly analyzed the litigation privilege.**

16 The district court's other alternative conclusion was that Nevada's litigation
17 privilege protected the Welts' speech. Howard argues this conclusion was
18 erroneous, but conflates the litigation privilege and NRS 41.637(3). Although he
19 notes the district court's statements concerning NRS 41.637(3), his argument cites

20 ¹⁰ 212 Cal. App. 4th 551, 561 (2012).

¹¹ The same analysis applied to Howard as a limited-purpose public figure.

1 *Shapiro I*'s discussion of Nevada's litigation privilege.¹² *Shapiro I* did not address
2 NRS 41.637(3), at all. It did not state NRS 41.637(3) and the litigation privilege
3 are co-extensive. Each has its own analysis.

4 As to the litigation privilege, *Shapiro I* directed the district court to "conduct
5 a case-specific, fact-intensive inquiry that focused on and balanced the underlying
6 principles of the privilege as required by *Jacobs*."¹³ The district court did exactly
7 that. Howard first argues the district court improperly applied California law to
8 determine whether the litigation privilege applied, however the district court's
9 analysis of this privilege did not cite any California law or decision.¹⁴

10 "In order for the privilege to apply to defamatory statements made in the
11 context of a judicial proceeding, (1) a judicial proceeding must be contemplated in
12 good faith and under serious consideration, and (2) the communication must be
13 related to the litigation."¹⁵ Howard does not dispute that the Welts satisfied these
14 two elements. Howard instead disputes whether "the recipient of the
15 communication is significantly interested in the proceeding."¹⁶ To determine if a
16 person meets this definition, "the district court must review the recipient's legal
17

18
19 ¹² Opening Brief at 15:26-17:15.

¹³ *Shapiro*, 389 P.3d at 269.

¹⁴ Respondent's App. at 25-26.

20 ¹⁵ *Shapiro*, 389 P.3d at 268.

¹⁶ *Id.* at 269.

1 relationship to the litigation, not their interest as an observer.”¹⁷ As a threshold
2 matter, Howard has not identified a recipient of the communication. It is
3 impossible to assess the recipient’s legal relationship if the recipient is unknown or
4 there is no recipient.

5 Lacking this information, the district court instead analyzed whether the
6 speech on the website would be privileged if it came from the parties’ attorneys in
7 the New Jersey conservatorship matter. It concluded the speech presented would
8 be privileged because it was the modern equivalent of sending letters to witnesses,
9 identifying the subject of interest, and then requesting information about that
10 subject. In that circumstance, the recipient’s legal relationship would be that of a
11 potential witness and the purpose of the privilege would be served by extending
12 protection to the speech. If the privilege is limited as Howard contends, then
13 communications with non-party witnesses would never be privileged because non-
14 party witnesses do not have a direct interest in the litigation’s outcome. Every
15 letter, call, e-mail, or meeting could expose those involved to defamation claims, in
16 turn chilling the litigant’s ability to investigate claims and gather evidence.

17 **Conclusion**

18 Jenna Shapiro presented no evidence to indicate a probability of success on
19 the merits of her claims, let alone the clear, convincing, and admissible evidence
20

¹⁷ *Id.*

1 she was required to provide. The district court's order as to her should be
2 affirmed. Howard Shapiro disputes only two of the three independent reasons the
3 district court concluded he lacked clear, convincing, and admissible evidence
4 indicating a probability of success on the merits. As one of the reasons is
5 undisputed, Howard's appeal is moot. Even if not, the district court's analysis of
6 the other two reasons was correct and should be affirmed.

7 DATED this 30th day of March, 2018.

8 WILSON ELSEER MOSKOWITZ
9 EDELMAN & DICKER LLP

10 /s/ Michael P. Lowry

MICHAEL P. LOWRY, ESQ.

Nevada Bar No. 10666

E-mail: Michael.Lowry@wilsonelser.com

300 South Fourth Street, 11th Floor

Las Vegas, Nevada 89101-6014

Tel: 702.727.1400/Fax: 702.727.1401

Attorneys for Glenn Welt, Rhoda Welt,
Lynn Welt, and Michele Welt