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

7 HOWARD SHAPIRO and JENNA  
SHAPIRO

Supreme Court No.: 80395

8 Appellants,

Case No. A-14-706566-C

9 vs.

**Respondents' Answering Brief**

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

11 Respondents.

12 **APPEAL**

13  
14 From the Eighth Judicial District Court, Clark County  
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 2013 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 1,672 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 ///

19 ///

20 ///

1 requirements of the Nevada Rules of Appellate Procedure.

2 DATED this 15th day of October, 2020.



4  
5 BY: /s/ Michael P. Lowry

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1 **NRAP 26.1(a) Disclosure**

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

- 6 1. Parent Corporation: None.  
7 2. Publicly held company that owns 10% or more of the party's stock: None.  
8 3. Law firms who have appeared or are expected to appear for the Welts:

9 Wilson Elser Moskowitz Edelman & Dicker, LLP

10 DATED this 15th day of October, 2020.



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1 **Routing Statement**

2 The Supreme Court retained jurisdiction in the first and second appeals  
3 concerning this case, dockets 67363 and 73943. The Shapiros argue the Supreme  
4 Court should retain jurisdiction on this appeal too. They seem to invoke NRAP  
5 17(a)(11) and (12), arguing the principal issue on appeal is a constitutional issue of  
6 first impression. However, their briefing does not present any constitutional  
7 challenge. Nor does the briefing present as a principal issue a question of  
8 statewide public importance. The Shapiros did not oppose part of a valid motion,  
9 the district court granted the parts they did not oppose, and then awarded fees and  
10 costs per statute. While that ruling does affect the Shapiros, it is not a question of  
11 statewide public importance.

12 The issue in this appeal is closer to NRAP 17(b)(5) or (b)(7), so the case  
13 should presumptively be assigned to the Court of Appeals.

14 DATED this 15th day of October, 2020.



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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 October 15, 2020, **Respondents’**  
4 **Answering Brief** was served via electronic means by operation of the Court’s  
5 electronic filing system to:

6 Alex B. Ghibauda, Esq.  
7 197 E. California Ave., Suite 250  
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9 Tel: 702.978.7090  
10 Attorney for Appellant



12 BY: /s/ Agnes R. Wong



1 **Jurisdictional Statement**

2 The Welts defer to the opening brief’s jurisdictional statement.

3 **Statement of Issues Presented for Review**

- 4 1. The Welts moved to dismiss per NRS 41.660. The Shapiros opposed that
- 5 motion only in part, so the district court granted those parts that were not
- 6 opposed. When such a motion is granted, NRS 41.670(1)(a) states the
- 7 district court “shall award reasonable costs and attorney’s fees to the person
- 8 against whom the action was brought....” The district court followed NRS
- 9 41.670(1)(a) and entered a reasonable award. Is that an abuse of discretion?

10 **Statement of the Case & Facts**

11 The basic facts and history of this case were stated in the court’s order

12 disposing of a prior appeal concerning an order granting a motion to dismiss per

13 NRS 41.660.<sup>1</sup> After remand the motion to dismiss was re-filed, granted, appealed,

14 and reversed again.<sup>2</sup> After the second remand, the Welts filed two motions to

15 dismiss. One was based upon NRS 41.660,<sup>3</sup> the other was not.<sup>4</sup> The Shapiros filed

16 a limited opposition.<sup>5</sup> As to Jenna they stated an intent “to amend their complaint

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18 <sup>1</sup> *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.

19 <sup>2</sup> Docket 73943.

20 <sup>3</sup> App. Vol. 1 at 7-82.

<sup>4</sup> App. Vol. 1 at 1-6.

<sup>5</sup> App. Vol. 1 at 83-96.

1 to remove Jenna Shapiro as a party.”<sup>6</sup> As to Howard, the complaint pled six causes  
2 of action. But “the only claims Howard intends to move forward on are 1)  
3 defamation per se, and 2) civil conspiracy.”<sup>7</sup> The Welts’ reply noted the limits of  
4 the Shapiros’ opposition and asked that the motion at least be granted on those  
5 points that were not opposed.<sup>8</sup>

6 The district court entered an order granting the motion as to those points that  
7 were not opposed. As to the motion to dismiss per NRS 41.660, the order stated:

8 Second, the Shapiros’ opposition conceded Jenna Shapiro cannot meet  
9 her burden of proof as to NRS 41.660. Howard Shapiro conceded he  
10 could not meet the burden as to four of the six causes of action alleged  
11 in the complaint. Those that he did argue are the defamation per se  
12 and civil conspiracy causes of action. This was confirmed in open  
13 court on July 17. The Welts’ motion to dismiss as to Jenna Shapiro is  
14 granted. It is also granted as to all causes of action except defamation  
15 per se and civil conspiracy.<sup>9</sup>

16 As to the alternative motion to dismiss only certain causes of action, the order  
17 stated just that “[t]his motion is granted in part as to Jenna Shapiro and all causes  
18 of action except defamation and civil conspiracy, as previously described.”<sup>10</sup>

19 After this order was granted, the Welts then moved for an award of  
20 attorneys’ fees and costs per NRS 41.670(1)(a), as well as a discretionary award

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<sup>6</sup> *Id.* at 92:2-3.

<sup>7</sup> *Id.* at 92:3-4.

<sup>8</sup> *Id.* at 102:13-22.

<sup>9</sup> *Id.* at 113:1-6.

<sup>10</sup> *Id.* at 118:13-14.

1 per NRS 41.660(1)(b).<sup>11</sup> The Shapiros opposed. Jenna argued that she “was not  
2 dismissed on the merits. Rather, after 5 years of litigation, she opted to end any  
3 further participation in this case.”<sup>12</sup> Howard argued the causes of action he  
4 conceded “were not related to Defendants’ good faith communication in  
5 furtherance of their right to petition or speech.”<sup>13</sup>

6 The district court granted the Welts’ motion and entered an award of  
7 attorneys’ fees and costs per NRS 41.670(1)(a), as well as a discretionary award  
8 per NRS 41.660(1)(b). The order noted both Howard and Jenna had conceded they  
9 could not prevail on certain causes of action.

10 On August 7, 2019 the court entered an order granting, in part, relief  
11 per NRS 41.660. Specifically, it was granted as to Jenna Shapiro  
12 because she conceded she cannot meet her burden of proof as to NRS  
13 41.660. The motion was granted in part as to Howard Shapiro  
because he conceded he could not meet the burden as to four of the six  
causes of action alleged in the complaint. This was confirmed in open  
court on July 17.<sup>14</sup>

14 The district court then awarded fees and costs to the Welts per NRS  
15 41.670(1)(a).<sup>15</sup> The award against Jenna was \$32,261.61, the award against  
16 Howard was \$21,440.60. The district court then also entered \$100.00 awards for  
17 each Welt against each Shapiro, per NRS 41.660(1)(b).

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18 <sup>11</sup> *Id.* at 133-239.

19 <sup>12</sup> *Id.* at 241:6-7.

<sup>13</sup> *Id.* at 241:17-19.

20 <sup>14</sup> *Id.* at 256:16-20.

<sup>15</sup> *Id.* at 259.

1 **Summary of the Argument**

2 The district court granted the part of the motion the Shapiros did not oppose.  
3 As the district court granted, in part, a motion to dismiss per NRS 41.660, it was  
4 required to award fees and costs per NRS 41.670(1)(a). The district court’s order  
5 awarding part of those fees and costs was well within its discretion.

6 **Argument**

7 **1. A motion to dismiss per NRS 41.660 was granted, in part.**

8 The Welts filed a properly supported motion to dismiss per NRS 41.660.  
9 Jenna elected not to oppose it at all, Howard opposed only in part. The district  
10 court then granted the unopposed aspects of the motion. The Shapiros do not argue  
11 the district court erred by doing so.

12 **2. Consequently, NRS 41.670(1)(a) required an award of fees and costs.**

13 The decision “to award attorney’s fees is within the sound discretion of the  
14 trial court” and is reviewed for an abuse of discretion.<sup>16</sup> When a district court  
15 “exercises its discretion in clear disregard of the guiding legal principles, this  
16 action may constitute an abuse of discretion.”<sup>17</sup> Nevada does not allow an “award  
17 attorney’s fees unless authorized by statute, rule or contract.”<sup>18</sup>

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<sup>16</sup> *Bergmann v. Boyce*, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993).

20 <sup>17</sup> *Id.*

<sup>18</sup> *State, Dep’t of Human Res. v. Fowler*, 109 Nev. 782, 784, 858 P.2d 375, 376 (1993).

1 A motion to dismiss per NRS 41.660 was granted, in part. In that  
2 circumstance, NRS 41.670(1)(a) required the district court to award reasonable  
3 costs and attorney’s fees. The Welts moved for those fees and costs, relied upon  
4 NRS 41.670(1)(a), and provided documentation supporting their request. The  
5 district court then expressly considered the *Brunzell* factors and entered an award.

6 This appeal does not challenge the substance of the award though. It instead  
7 challenges only whether the district court could enter an award.

8 **3. Jenna was a party and did not oppose dismissal per NRS 41.660.**

9 Jenna asserts the district court lacked the ability to enter the award against  
10 her. She specifically argues the district court’s order granting, in part, the motion  
11 to dismiss per NRS 41.660 was “not made on the merits” because she “no longer  
12 wished to pursue the claim and wanted to be dismissed from it.”<sup>19</sup> NRCP 41(a)  
13 provides methods for a plaintiff to dismiss her case. This case’s history and  
14 procedural posture meant NRCP 41(a)(1)(A)(i) was not available to Jenna. She  
15 never obtained a stipulated dismissal per NRCP 41(a)(1)(A)(ii) either. Finally, she  
16 did not obtain a court ordered dismissal per NRCP 41(a)(2).

17 Consequently, she was still a party when the Welts moved to dismiss. She  
18 chose not to oppose that motion, but that choice did not dismiss her from the case.  
19 She was still a party when the district court entered its order granting, in part, the

20 \_\_\_\_\_  
<sup>19</sup> Brief at 4.

1 Welts' motion to dismiss per NRS 41.660. If Jenna wanted out of this lawsuit,  
2 there were options available to her but she did not use them.

3 **4. The claims at issue were dismissed per NRS 41.660.**

4 Jenna alternatively argues the district court granted only the Welts'  
5 alternative motion to dismiss. That alternative motion did not rely upon NRS  
6 41.660, thus Jenna argues the district court lacked authority to award fees and costs  
7 per NRS 41.670(1)(a).

8 This argument is inconsistent with plain text of the district court's order.

9 *Both* motions to dismiss to dismiss were granted. The order specifically noted that  
10 Jenna had not opposed the motion to dismiss per NRS 41.660.

11 Second, the Shapiros' opposition conceded Jenna Shapiro cannot meet  
12 her burden of proof as to NRS 41.660. Howard Shapiro conceded he  
13 could not meet the burden as to four of the six causes of action alleged  
14 in the complaint. Those that he did argue are the defamation per se  
15 and civil conspiracy causes of action. This was confirmed in open  
16 court on July 17. The Welts' motion to dismiss as to Jenna Shapiro is  
17 granted. It is also granted as to all causes of action except defamation  
18 per se and civil conspiracy.<sup>20</sup>

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<sup>20</sup> *Id.* at 113:1-6.

