IN THE SUPREME COURT OF THE STATE OF NEVADA

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STEVEN C. JACOBS, Appellant, v. SHELDON G. ADELSON, IN HIS INDIVIDUAL AND REPRESENTATIVE CAPACITIES, Respondent.	No. 58740 District Court Case No. A627691

Appeal from Judgment of the Eighth Judicial District Court

RESPONDENT'S REPLY IN SUPPORT OF PETITION FOR REHEARING

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I. INTRODUCTION

This reply addresses the injustice and unfairness of permitting one party to a lawsuit who plays to the media to freely—and with absolute immunity—defame his adversary so long as the defaming party files his defamatory statements with the court. Here, in this case, under the Court's decision, 130 Nev. Adv. Op. 44, 325 P.3d 1282 (2014) appellant Steven Jacobs is free—he is PRIVILEGED—to defame respondent Sheldon Adelson if he does so in a declaration that has some "connection" with this litigation but is published world-wide by the media. Jacobs has done this in a declaration filed in the district court in connection with a discovery dispute in which he says Sheldon Adelson personally approved a "pro-prostitution strategy" at his casinos in Macau. Prostitution in Macau, however, has nothing to do with the ostensible purpose of the defamatory declaration—to support seeking production documents that could support that Sands China is "at home" and doing business in Nevada and subject to jurisdiction here. Adelson, on the other hand, may not say to the same media that publishes and republishes Jacobs's defamatory statements about him that Jacobs is a delusional liar without incurring liability to Jacobs for "defaming" him—that is, for expressing his opinion of Jacobs, the former President of Sands China, Ltd. The Court's majority for Jacobs, in dismissing Adelson's response to his antagonist, put it this way:

> Essentially, because Adelson's statements were published to a disinterested party [the *Wall Street Journal*], they are not sufficiently connected to the judicial proceedings to warrant application of the absolute privilege.

It is in this context that Adelson now faces motion practice in the district court by which Jacobs seeks to file an amended complaint against him directly and his companies derivatively, here and in Macau, for Adelson's

"defamatory" expression of opinion about Jacobs to the press—the same press that reported the defamation of Adelson by Jacobs in the complaint he filed in this case. What rational reason supports immunizing Jacobs for saying to the "observing" press through a judicial filing that Adelson is a criminal and a morally corrupt businessman who promotes prostitution in his casinos, but makes Adelson liable for saying in reply to the same press that Jacobs is a delusional liar? There is, we submit, *none*.

In today's media-saturated environment, judicial proceedings are matters of intense media interest that are instantaneously reported. There is no good reason to differentiate a defamatory statement filed in a judicial proceeding but reported world-wide by the press from a reply to the statement to the press that published both on the basis that the press is, in the second instance, an "observer" and the statement in reply is "not sufficiently connected to the judicial proceeding" to render it privileged.[1] It would not be good judicial policy to do so, nor would such a rule be compatible with the First Amendment, as the United States Supreme Court has pointed out.

"The central commitment of the First Amendment . . . is that 'debate on public issues should be uninhibited, robust and wide open.' " *Bond v. Floyd*, 385 U.S. 116, 136 (1966) (citing *New York Times Co. v. Sullivan*,

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[1] Jacobs's defamation of Adelson in privileged court filings continues unabated in this Court. For example, in his Answer to Petition for Rehearing, Jacobs assails Adelson, accusing him of "lies and smears", "arrogance", "fear of the truth-finding process", "knowing fabrications", and "malicious falsehoods." Apparently, Jacobs believes these denunciations are encouraged by the Court's decision "to protect the judicial process and [] the sanctity of that process . . ." because he cites the decision as a preface to making these gratuitous defamatory remarks. Answer at 1:21–24.

376 U.S. 254, 270 (1964)). For this salutary constitutional reason, the Court declared that the tort of defamation is constrained by the First Amendment because the common law of defamation can "claim no talismanic immunity from constitutional limitations." *New York Times*, 385 U.S. at 269. It should be no different in Nevada for Jacobs who initiated litigating this case and his characterizations of Adelson in the press. Otherwise, the Court's decision in the *Anzalone* case, 118 Nev. 140, 149, 42 P.3d 233, 239 (2002) (" 'If I am attacked in a newspaper, I may write to that paper to rebut the charges, and I may at the same time retort upon my assailant . . .' " citing *Foretich v. Capital Cities/ABC, Inc.*, 37 F. 3d 1541, 1559 (4th Cir. 1994)), becomes an outlier, whether the district court in this case applied it or not: "Applying this privilege is a question of law, one we can resolve by simply comparing the two documents published." *Id.*

Although Jacobs acknowledges that the litigation privilege is "designed to ***facilitate*** access to the courts and the truth-finding process," he believes, and the Court's decision in this case supports, that he can say anything he wants about Adelson—even intentionally false and defamatory statements that are wholly unrelated to the merits of the litigation he commenced. So long as his scurrilous statements are made in a court filing, Adelson cannot reply to those media-disseminated statements to the same media that publishes Jacobs's defamatory remarks unless he, too, simultaneously files them in court. This is not good judicial or First Amendment policy.

II. ARGUMENT

A. Immunizing A Defamer In A Media-Intense Case Because He Speaks To The Media Through Court-Filed Documents Should Not Put The Defamed Person At Risk For Defamation If He Replies To His Defamer Through The Same Media.

Following dismissal of Jacobs's defamation claim in June 2011, and while this appeal was pending, Jacobs defamed Adelson in a "scandal-mongering" court filing that had nothing to do with the merits of his claim for wrongful termination against LVSC and SCL. In response to the district court's routine request for a status update on discovery issues in June 2012, Jacobs submitted a sworn declaration, in which he says Sheldon Adelson approved a "pro-prostitution strategy" to promote his casinos in Macau. Ex. 1, Excerpts of Jacobs Decl. at 3:13–19. This salacious and false statement was and is wholly unrelated to the discovery disputes arising out of Jacobs's contention that Sands China is subject to jurisdiction in Nevada for Jacobs's termination in Macau. Jacobs made this false but sensational defamatory statement to feed the media frenzy about anything Adelson during the 2012 presidential election season, and the "observing" press gobbled it up. *See, e.g.*, the *Wall Street Journal*, June 29, 2012, "Sands Suit Alleges 'Prostitution Strategy' " (Steve Jacobs says "chairman Sheldon Adelson approved a 'prostitution strategy' at the casino operator's Macau properties"), Ex. 2 hereto.

Because Jacobs's defamatory statement about prostitution in Macau is wholly untrue and unrelated to this Nevada litigation, Adelson sued him for defamation in Florida, where he resides. Ex. 3, Excerpts of Opp. to Mot. for Summ. J. at pp. 3–7. In the Florida defamation action, Jacobs successfully argued that his defamatory statement about Adelson was absolutely privileged under Nevada law because it was made in a

declaration he filed in Nevada's district court concerning a discovery dispute. Ex. 4, Excerpts of Mot. for Summ. J. at pp. 10, 12–14. In his Florida motion papers, Jacobs argued that the "privilege is 'broad' and it is applied 'liberally'," *id.* at 13, and that "[t]here is no requirement that the communications to the court be 'relevant' in the legal sense." Ex. 5, Excerpts of Reply in Supp. of Mot. for Summ. J. at p. 4. Jacobs also argued to the Florida court that:

> The Nevada Supreme Court in *Circus Circus versus Witherspoon* . . . expressly says that the statements are absolutely privileged. It wouldn't matter if they were false. It wouldn't matter if this statement was false with the very intent of harming Mr. Adelson's reputation. The question then becomes, well, who decides, because the question is, is it in any way . . . Nevada Supreme Court uses the term . . . related to the proceedings. Is it in any way related to the proceedings? Privilege is broad. It has to be applied liberally.

Ex. 6, Excerpts of Tr. of Hr. on Mot. for Summ. J. at 13:19–14:7.

In opposing summary judgment, Adelson contended that Jacobs's position on privilege, if accepted, means there is no limit to what one may say about an adverse party because he is *privileged* to defame that hapless person. The Florida district court approvingly acknowledged Adelson's argument that the "privilege is an easy formula for terrible abuse," Ex. 6, Excerpts of Tr. of Hr. on Mot. for Summ. J. at 38:4–8, 38:14–22,[2] and said the abuse of the privilege[3] gives rise to is the verbal equivalent

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[2] *See also* Ex. 6, Excerpts of Tr. of Hr. on Mot. for Summ. J. at 21:11–24:25 (Adelson's counsel discussing the lack of relevancy of Jacobs's statement to the discovery dispute).

[3] *Id.* at 40:15–21, where the court said, "I don't happen to agree with the privilege. I think it's a terrible thing where people can come in and use that license to go ahead and tarnish someone's reputation. I see it all the time. I think it's terrible, and I wish it didn't exist, but it does exist." This privilege

of "somebody just throwing in a hand grenade."[4] Nevertheless, the court ruled in Jacobs's favor and granted summary judgment against Adelson, *even though it found that Jacobs's defamatory statement was not relevant to the discovery dispute in which it was offered*. Ex. 6, Excerpts of Tr. of Hr. on Mot. for Summ. J. at 52:18–24 ("All right. I think it is - - I agree with you that it is not relevant, but it bears a connection with the subject of inquiry, which was the jurisdiction of the court in Nevada. So I believe that the privilege applies. I'm granting the motion.").

Thus, Nevada's law of litigation privilege, in Jacobs's view, is both a shield and a sword: He can freely and falsely defame Adelson in the press—as his counsel said, "It wouldn't matter if the[] [statements] were false. It wouldn't matter if this statement was false with the very intent of harming Mr. Adelson's reputation." Ex. 6, Excerpts of Tr. of Hr. on Mot. for Summ. J. at 13:24–14:1. But Adelson cannot under the Court's decision reply with his opinion on Jacobs's defamatory attacks on him because Jacobs's attacks were made in a court filing that the media picked up as an item of public interest and published throughout the world. This distinction between immune and actionable defamation, which the majority's opinion in this case supports, grants an unrestricted license to

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that Jacobs successfully invoked in Florida, relying on *Witherspoon* and this Court's decision in *VESI*, is the same privilege the Court's 4–3 decision denies to Adelson for expressing his opinion of Jacobs. Is this fair? Is the "sanctity" of the judicial process with which Jacobs is so concerned (Answer at 1:21–24) "protected" by sanctioning Jacobs to call Adelson a whore master with impunity, but holding Adelson for libeling Jacobs by referring to him as a delusional liar? What laudable social or judicial policy is served by such a result? *None*.

[4] Ex. 6, Excerpts of Tr. of Hr. on Mot. for Summ. J. at 38:9–10.

the mudslinger while muzzling his target. Surely, the Court did not intend this result when it delivered its split 4–3 decision.

It is in this real-world context that Jacobs, relying on the Court's decision, has recently moved the Clark County District Court for permission to reinstate his defamation claim against Adelson, LVSC, and SCL. According to Jacobs, the Court's decision is "an intervening *change in law* entitling Jacobs to reinstatement of his defamation claims" because "the Nevada Supreme Court has *clarified* the legal issues surrounding Nevada's litigation privilege." Ex. 7, Excerpts of Mot. to Reconsider Dismissal of Defamation Claim Against Defendants Las Vegas Sands Corp. and Sands China Ltd. at 1:24–26, 5:14–15 (emphasis added). This gives mudslinger Jacobs an unconscionable, unjust advantage: He gets to "try his case in the press" with impunity, but his opponent cannot reply in like manner without submitting to a defamation lawsuit. Is this what the Court intended to "clarify" and set as policy for guidance of future litigants who solicit media attention to bait their adversaries to commit a defamation tort by speaking in reply to the press?

If the Court's decision stands as published, it will confer on opportunistic litigants and their lawyers an unrestricted mudslinger's license, as this case so richly illustrates. It will *encourage* them to sensationalize their pleadings with all manner of provocative personal denunciatory allegations in anticipation of prompting a response from the attacked party out of court which, under the majority's view, would appropriately give rise to more litigation, in derogation of free speech and in contrast to the purpose of the absolute privilege.

III. CONCLUSION

The current decision does not reflect sound judicial and First Amendment policy, and for this reason the Court should grant Adelson's petition for rehearing.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this reply in support of petition for rehearing 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 this reply has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14 point Palatino font.

2. I further certify that this reply complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the petition exempted by NRAP 32(a)(7)(C), it does not exceed 8 pages.

3. Finally, I hereby certify that I have read this reply, 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 reply complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the reply 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 is to be found. I understand that I may be subject to sanctions in the event that the accompanying reply is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. P. 25(b) and NEFR 9(f), I hereby certify that I am an employee of Morris Law Group; that on this date I electronically filed the foregoing **RESPONDENT'S REPLY IN SUPPORT OF PETITION FOR REHEARING** with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (Eflex). Participants in the case who are registered with Eflex as users will be served by the Eflex system as follows:

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