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## Shapiro, et al., v. Welt, et al., 133 Nev. Adv. Op. 6 (February 2, 2017)

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*Shapiro, et al., v. Welt, et al.*, 133 Nev. Adv. Op. 6 (February 2, 2017)<sup>1</sup>

CONSTITUTIONAL LAW: VAGUENESS; STRATEGIC LAWSUITS  
AGAINST PUBLIC PARTICIPATION  
PRIVILEGES: ABSOLUTE LITIGATION PRIVILEGE

**Summary**

The court considered consolidated appeals and a cross-appeal from a district court order granting a motion to dismiss complaint based on anti-SLAPP statutes and the awarding of attorney fees and costs. The Court considered whether parts of Nevada’s anti-SLAPP statute, NRS 41.637, are unconstitutionally vague, whether statements made in relation to a conservatorship action constitute an issue of public interest under NRS 41.637(4), and whether those statements fall within the scope of the absolute litigation privilege. The Court found that no, NRS 41.637 is not unconstitutionally vague; adopted a California test for determining an issue of public interest—and remanded the present case for further proceedings; and found that the district court did not conduct the specific, fact-intensive inquiry it needed to for the absolute litigation privilege, and accordingly reversed the district court’s order in part, and remanded the case for further proceedings.

**Background**

Appellant Howard Shapiro petitioned a New Jersey court to appoint him as conservator for his father, Walter Shapiro. Respondents Glen Welt, Rhoda Welt, Lynn Welt, and Michelle Welt opposed the petition. Over the course of that action, Howard received an email from Glen stating that Howard’s “actions have been deemed worthy of [his] own website” and stating 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.”<sup>2</sup> Thereafter, the Welts published a website that contained Howard’s personal information as well as multiple allegations about Howard’s past debts, criminal history, and alleged mistreatment of his father. The website stated that it was “dedicated to helping victims” of Howard, warning others of him, and encouraging anyone “with knowledge of Howard A. Shapiro’s actions against Walter Shapiro or other illegal acts committed by Howard Shapiro . . . to appear in court.”<sup>3</sup>

Howard and Jenna Shapiro then filed a complaint in Nevada alleging various causes of action regarding the Welts’ statements on the website including defamation per se, defamation, extortion, civil conspiracy, and fraud. The Welts then filed a motion to dismiss pursuant to NRS 41.660, Nevada’s anti-SLAPP statute, arguing the website constituted a good-faith communication in furtherance of the right to free speech in direct connection with an issue of public concern pursuant to NRS 41.637. Specifically, the Welts argued the statements were protected as statements made in direct connection with an issue under consideration by a judicial body and as communications made in direct connection with an issue of public interest in a public forum.

The district court issued an order granting the Welts’ motion to dismiss finding that the website was a “communication regarding an ongoing lawsuit concerning the rights of an elderly

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<sup>1</sup> By Stephanie Glantz.

<sup>2</sup> *Shapiro v. Welt*, 133 Nev., Adv. Op. 6, \*3 (2016).

<sup>3</sup> *Id.*

individual, and as a matter of public concern under NRS 41.637(4).” Additionally, the district court found the Shapiros failed to show a probability they would prevail on the lawsuit—concluding that the Welts’ statements would likely be protected by the absolute litigation privilege. Subsequently, the district court issued an order granting the Welts’ attorney fees, but failed to explicitly address the Welts’ request for an additional award pursuant to NRS 41.670(1)(b). Thereafter, the Shapiros timely appealed the motion to dismiss, and the Welts cross-appealed the part of the district court’s order denying an additional award pursuant to NRS 41.670(1)(b).

## **Discussion**

### **I. Standard of Review**

The court reviews the constitutionality of a statute and canons of statutory construction *de novo*.<sup>4</sup> But, the court provides greater deference to the lower court’s findings of fact on a motion to dismiss and therefore reviews those for abuse of discretion.

### **II. Vagueness of NRS 41.637**

The Shapiros argued that NRS 41.637 is unconstitutionally vague because the term “good faith” and the phrase “without knowledge of its falsehood” are both vague and inherently contradictory. Although they did not raise this issue in the district court, the Court exercised their discretion to review the issue for the first time on appeal and found NRS 41.637 is not unconstitutionally vague.

A statute is unconstitutionally vague if it “(1) fails to provide a person of ordinary intelligence fair notice of what [conduct] is prohibited; or (2) if it is so standardless that it authorizes or encourages seriously discriminatory enforcement.”<sup>5</sup> The Court concluded that the term “good faith” does not operate independently within the statute. Instead, it is part of the phrase “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.” This phrase is explicitly defined in the statute. Further, the Court concluded the phrase “made without knowledge of falsehood” has a well-settled and ordinarily understood meaning—the declarant must be unaware that the communication is false at the time it was made. Thus, the Court concluded the statute provides notice to a person of ordinary intelligence exactly what conduct is prohibited, and accordingly is not unconstitutionally vague.

### **III. Anti-SLAPP litigation**

In Nevada, a defendant may file a special motion to dismiss if the defendant can show “by preponderance of the evidence, that the claim is based upon a 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.”<sup>6</sup> Once the defendant shows this, the burden switches to the plaintiff to show a

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<sup>4</sup> See *Zohar v. Zbiegien*, 130 Nev., Adv. Op. 74, 334 P.3d 402, 405 (2014).

<sup>5</sup> *State v. Casteneda*, 126 Nev. 478, 481, 245 P.3d 550, 552 (2010).

<sup>6</sup> Nev. Rev. Stat. § 41.660(3)(a).

probability of prevailing on the claim.<sup>7</sup> The Shapiros challenged that the Welts met their initial burden, and that the Shapiros failed to meet theirs because the Welts' statements are protected by the absolute litigation privilege.

#### A. *Issue of Public Interest*

The Shapiros argued that the district court erred in granting the Welts' special motion to dismiss pursuant to NRS 41.660 due to an improper analysis of whether the conservatorship action is an issue of public interest under NRS 41.637(4), and the Court agreed.

Prior to the present action, Nevada had not determined what constitutes "an issue of public interest" in the anti-SLAPP context. However, the Court took this opportunity to adopt California's guiding principles, as enunciated in *Piping Rock Partners*. There, the court noted:

- (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<sup>8</sup>

Since the district court did not apply the *Piping Rock Partners* principles in its analysis of the Welts' statements, the Court reversed the order and remanded it for further proceedings—instructing the district court to apply the *Piping Rock Partners* principles.

#### B. *Absolute Litigation Privilege*

The Shapiros argued that the district court erred in applying the absolute litigation privilege test articulated in *Jacobs v. Adelson*<sup>9</sup>, and the Court agreed. The *Jacobs* test requires that: "(1) a judicial proceeding must be contemplated in good faith and under serious consideration, and (2) the communication must be related to the litigation."<sup>10</sup> However, statements made to someone not directly involved in the judicial proceeding is only covered if the "recipient of the communication is significantly interested in the proceeding."<sup>11</sup> Further, to determine if someone is "significantly interested in the proceeding," the court must make a case-specific, fact-intensive inquiry, into the recipient's legal relationship to the litigation, not their interest as an observer.<sup>12</sup> Since the district court did not conduct a case-specific, fact-intensive inquiry that focused on and balanced the underlying principles of the privilege as required by

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<sup>7</sup> Nev. Rev. Stat. § 41.660(3)(b).

<sup>8</sup> *Piping Rock Partners, Inc. v. David Lerner Assocs., Inc.*, 946 F. Supp. 2d 957, 968 (N.D. Cal. 2013) (*citing* *Weinberg v. Feisel*, 2 Cal. Rptr. 3d 385, 392–93 (Ct. App. 2003), *aff'd*, 609 F. App'x 497 (9th Cir. 2015)).

<sup>9</sup> 130 Nev., Adv. Op. 44, 325 P.3d 1282 (2014).

<sup>10</sup> *Id.* (internal quotation marks omitted).

<sup>11</sup> *Fink v. Oshins*, 118 Nev. 428, 436, 49 P.3d 640, 645–46 (2002) (internal quotation marks omitted).

<sup>12</sup> *Jacobs*, 130 Nev., Adv. Op. 44, 325 P.3d at 1287.

*Jacobs*, the Court found that the lower court erred in its finding, and accordingly remanded for further proceedings.

### **Conclusion**

The district court erred in its analysis of whether the Welts' statements concerned an issue of public interest, and explicitly adopted the California guidelines, enumerated in *Piping Rock Partners*, for determining whether an issue is of public interest under NRS 41.637(4). Additionally, the district court failed to conduct a case-specific, fact-intensive inquiry that focused on and balanced the *Jacobs* principles of the absolute litigation privilege. Thus, the Court reversed, in part, the district court's order granting the Welts' special motion to dismiss pursuant to NRS 41.660, and remanded it for further proceedings.

Additionally, the Court affirmed the part of the district court's order denying an award under NRS 41.660(1)(b), and finally, vacated the district court's order of attorney fees because the district court will conduct further proceedings on this matter.