

EVOLVING PROTECTION:

Nevada's Anti-SLAPP Law Post-*Adelson* and *Shapiro*

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A strategic lawsuit against public participation (SLAPP) is a lawsuit instituted to intimidate and silence critics (effectively censoring them) by burdening them with excessive legal fees and costs of defense until they abandon their criticism or opposition. Nevada's anti-SLAPP statute (NRS 41.653-670) affords defendants in SLAPP lawsuits a strong countermeasure: a motion to dismiss filed under the statute can quickly (and with no burdensome discovery) vindicate the speaker's rights, resulting in dismissal with prejudice. And—critically—the statute shifts the burden of paying the defendant's legal fees back onto the party unlawfully suing.

The 2015 amendments to the statute made Nevada's law one of the strongest anti-SLAPP laws in the

country. However, as with many changes to an existing statute, the amendments left a gap. New precedent has emerged to fill that gap, clarifying and contouring the law's application. That clarification began in earnest in 2017, first with *Shapiro v. Welt*, 133 Nev. Adv. Op. 6 (Feb. 2, 2017) and then in *Adelson v. Harris, et. al.*, 133 Nev. Adv. Op. 67 (Sept. 27, 2017).

Welt, Constitutionality and the Public Interest

In *Shapiro*, the Nevada Supreme Court dealt both with a direct challenge to the constitutionality of the statute, and with questions concerning what constitutes a matter of public interest under NRS 41.637(4), the category of expression that the statute protects and the scope of the absolute litigation privilege. In response to appellant Howard Shapiro's underlying attempts to become the conservator for his father, respondents published a website that, among other things, contained allegations regarding Howard's past debts, criminal history and alleged maltreatment of his father. Howard filed a lawsuit in Nevada, alleging defamation per se and related causes of action. The respondents filed an anti-SLAPP motion to dismiss in response, arguing that the website constituted a good-faith communication

in furtherance of the right to free speech regarding an issue of public concern pursuant to NRS 41.637. The district court granted the motion to dismiss, finding that the website was a "communication regarding an ongoing lawsuit concerning the rights of an elderly individual, and a matter of public concern under NRS 41.637." Howard appealed, arguing, among other things, that the statute was unconstitutionally vague and that the statements regarding the conservatorship action did not constitute an issue of public interest.

As a preliminary matter, the Nevada Supreme Court found that the statute was constitutional, because it provided sufficient notice to a person "of ordinary intelligence exactly what conduct [was] prohibited." However, where the *Shapiro* case made its greatest impact concerning the statute was in its express adoption of the California standard of what constitutes an issue of public interest, as set forth in *Piping Rock Partners, Inc. v. David Lerner Assocs., Inc.*, 946 F. Supp. 2d 957, 958 (N. D. Cal. 2013), *aff'd*, 609 F. App'x 497 (9th Cir. 2015). California first enacted its anti-SLAPP statute in 1992 and, since then, has developed one of the largest bodies of case law among states with similar statutes. Nevada's statute was modeled, at least in part, on California's statute.

In adopting *Piping Rock Partners*, the Nevada Supreme Court found that the public interest “does not equate to mere curiosity” and “should be something of concern to a substantial number of people.” Additionally, the challenged statements should be somewhat close to the asserted public interest. As the lower court had not expressly reviewed the statements within the context of the *Piping Rock Partners* factors, the case was ultimately remanded for further proceedings, where the case was

ultimately dismissed via the respondent’s renewed anti-SLAPP motion.

Adelson, Attribution and the Fair Report Privilege

Later in 2017, the *en banc* Nevada Supreme Court issued its decision in *Adelson*. Although it interpreted the pre-2015 version of the statute, its ruling is instructive in proceedings filed under the current version of the law.

During the 2012 presidential election cycle, the National Jewish Democratic Council (collectively, the NJDC) posted an online petition calling upon Mitt Romney to reject campaign contributions from appellant Sheldon Adelson. The petition contained a hyperlink to an Associated Press (AP) article that discussed then-ongoing litigation between Adelson and Steven Jacobs. The AP article further provided a summary of, and quoted from, a sworn declaration submitted by Jacobs in that underlying case, alleging certain facts about Adelson’s strategy for operating his Macau casino resorts. Based on that petition, Adelson filed a defamation suit against the NJDC and two of its officials in the U.S. District Court for the Southern District of New York, which in turn determined that Nevada law governed the controversy. The New York court dismissed Adelson’s complaint under both Federal Rule 12(b)(6) and the version of the Nevada Anti-SLAPP

Statute then in effect. Adelson appealed to the U.S. Court of Appeals for the Second Circuit, which affirmed most of the district court’s ruling, but certified certain questions of state law to the Nevada Supreme Court.

First, the Second Circuit asked if hyperlinking to source material about judicial proceedings was sufficient to qualify as a report for purposes of applying the fair report privilege. Second, the Second Circuit sought an interpretation of the Nevada Anti-SLAPP Statute prior to its amendment, including whether that prior version of the statute applied to speech that was not directed at a government official, and whether NJDC’s petition qualified as a “communication aimed at procuring any governmental or electoral action, result or outcome.” As this issue had been previously decided while the certification proceedings were pending, the court summarily referred the Second Circuit to a prior Nevada Supreme Court opinion. See *Delucchi v. Songer*, 133 Nev. Adv. Op. 42, 396 P.3d 826, 830 (2017).

The Nevada Supreme Court examined the remaining certified question, weighing whether or not the fair report privilege protects an internet communication that in turn draws information from an underlying report of judicial proceedings available to the public. First, the court reaffirmed the absolute nature of the fair report privilege and formally adopted the fair report privilege test set out in *Dameron v. Wash. Magazine, Inc.*, 779 F.2d 736, 739 (D.C. Cir. 1985). The court examined the nature of hyperlinks and found that they can possess inherently strong attribution qualities, providing readers with immediate access to determine whether official proceedings were implicated. The court described hyperlinks as “the twenty-first century equivalent of a footnote.” The court ultimately found that the NJDC petition’s hyperlink to the AP story—itsself a summary of existing judicial proceedings—was sufficient to qualify for the fair report privilege. The court cautioned that hyperlinks that are in some way hidden or otherwise inconspicuous might not impart the appropriate notice. In finding that the fair

report privilege protected the petition, the Nevada Supreme Court also found that the petition satisfied the requirement that it be a fair and accurate description of the official proceeding.

Following the Nevada Supreme Court’s decision answering the certified questions in NJDC’s favor, the Second Circuit affirmed the dismissal under both Rule 12(b)(6) and the Nevada Anti-SLAPP Statute and, on remand, the federal district court awarded NJDC roughly \$2 million in attorneys’ fees and costs under the Nevada Anti-SLAPP Statute.

Anti-SLAPP in 2018 and Beyond

Nevada’s anti-SLAPP law provides strong protections for individuals, including those who fairly and accurately report on matters of public interest, especially those related to judicial proceedings. The *Adelson* court’s embrace of modern methods of attribution (particularly hyperlinks) suggests that the law of defamation and the statute’s application will likely grow and adapt alongside the technical evolution in online communications.

Public discourse, particularly as embodied by the press, is a critical part of governance in America. The current social and political landscape makes it more important than ever that all citizens—journalist or not—be free to openly, honestly and lawfully comment on the world around them. Nevada’s strong anti-SLAPP protections, coupled with Nevada’s clear application of the fair report privilege, serve as a bulwark against lawsuits that would otherwise dissuade or penalize those who would appropriately exercise their First Amendment rights. **NL**



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