IN THE SUPREME COURT OF THE STATE OF NEVADA

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VETERANS IN POLITICS INTERNATIONAL, INC. AND STEVE W. SANSON, Appellant, vs. MARSHAL S. WILLICK AND WILLICK LAW GROUP, Respondent.	S.C. NO. 72778 D.C. NO: A-17-750171-C

PETITION FOR REHEARING

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TABLE OF CONTENTS

TABLE OF AUTHORITES

State Cases

Out of State Cases

State Statutes and Rules

Other Authorities & Citations

STATEMENT OF THE ISSUES

I. Whether the defendant’s burden of showing that a statement was "truthful or made without knowledge of its falsehood" should be shifted to the "average reader."

II. Whether a false statement of fact can be "truthful or made without knowledge of its falsehood" under the Anti-SLAPP statute when the author includes a hyperlink to evidence of its falsehood.

III. Whether a series of statements should be analyzed individually when they were re-disseminated thousands of times for months as part of an online campaign.

IV. Whether an online campaign focused on damaging the reputation of a single individual and business can be a "good faith communication in furtherance of the right to petition or the right to free speech in direct connection with a matter of public concern."

STATEMENT OF FACTS

This Court failed to give meaning to the express language of the Anti-SLAPP statute which requires a showing by the defendant that the statement was truthful or made "without knowledge of its falsehood." Instead, this Court relied on the effect of outdated "hyperlinks" under the common law fair report privilege as articulated in *Adelson*[1] to disregard the defendant's knowing lack of truthfulness of the statements and shifting the burden to the "average reader" to figure out that the statements were false.

In doing so, however, this Court did not conduct the required analysis of whether the statements were "newsworthy" or were a "fair, accurate, and impartial" reporting of judicial proceedings as required to qualify under the fair report privilege.[2]

This Court misapprehended the facts relating to the timing and number of disseminations (hundreds, multiple times per week, for months), the content of those disseminations (there was no "correction" and no "two missing commas"), and the current universal knowledge of the illegitimacy of hyperlinks provided in unsolicited emails.

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[1] *Adelson v. Harris*, 133 Nev. ___, 402 P.3d 665 (Adv. Opn. No. 67, Sep. 27, 2017)

[2] *Id*. at 667

A campaign focused on causing damage to the reputation and business income of a single individual is tortious and cannot be a "good faith communication in furtherance of the right to petition or the right to free speech in direct connection with a matter of public concern" per this Court's standard articulated in *Shapiro*.[3]

This *Petition* follows.

ARGUMENT

I. JURISDICTION AND BASIS

This Court has jurisdiction to hear this *Petition* as it is being filed within 18 days of the *Order of Reversal* in accordance with NRAP 40.

The order is inconsistent with the thrust of recent opinions on this subject issued since the argument and it misapprehends some matters of fact. On those bases, some of the individual determinations should be changed to affirm rulings below.

Under the first prong of the Anti-SLAPP statute, Sanson had the burden to show both truth and public interest of the statements at issue. The campaign launched by Sanson cannot legitimately be labeled "truthful or made without knowledge of its falsehood," and a campaign focused on damaging the reputation and business income of a single individual is not in the public interest.

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[3] *Shapiro v. Welt*, 133 Nev. ___, 389 P.3d 262 (Adv. Opn. No. 6, Feb. 2,

II. THE ANTI-SLAPP STATUTE PLACES THE BURDEN OF SHOWING TRUTHFULNESS ON THE AUTHOR, NOT THE READER

This Court has reaffirmed that "the defendant bears the burden of establishing by a preponderance of the evidence that the communication 'is truthful or is made without knowledge of its falsehood.'"[4]

This Court's recital that "In its initial version, Statement 2's grammatical deficiencies arguably implied that Willick was, along with his "pal," convicted of a sex-related crime," and was subsequently "corrected," misapprehends the facts and sequence of publications.

The "original" version of the "sexual coercion" statement was:

> Attorney Marshal Willick and his pal convicted of sexual coercion of a minor Richard Crane was found guilty of defaming a law student in United States District Court Western District of Virginia signed by US District Judge Norman K. Moon.[5]

The statement was accompanied by a picture of Willick only. It was disseminated broadly and repeatedly.

2017)

[4] *Stark v. Lackey*, 136 Nev. ___, ___ P.3d ___ (Adv. Opn. No. 4, Feb. 27, 2020), citing NRS 41.637; NRS 41.660(3)(a); *Shapiro v. Welt*, 133 Nev. ___, 389 P.3d 262 (Adv. Opn. No. 6, Feb. 2, 2017)

[5] See Answering Brief at 11; also see II AA 269 and VII AA 1465, 1508

The "corrected" version with "two commas" referenced by Ms. Levy during oral argument was actually only the insertion of a single comma, and only on Sanson's website two days later:

> Attorney Marshall Willick and his pal convicted of sexually coercion of a minor, Richard Crane was found guilty of defaming a law student in a United States District Court Western District of Virginia signed by US District Judge Norman K. Moon.[6]

The insertion of the comma was not a "correction." It only sharpened the statement to be an even more direct assertion of a false fact.

Other text relating to the same accusation, which included no retraction ***or*** correction but was falsely called both of those things by Ms. Levy at oral argument, actually stated:

> CLARIFICATION:
> Attorney Marshall Willick's letters against opposing party found defamatory per se in 2008; Willick settled before trial on issue privilege.
> Richard Crane, formerly with Willick's firm, guilty of sexual misconduct involving a minor and suspended from the practice of law.[7]

This text, falsely referred to as a "correction," was not disseminated nearly as widely or repeatedly as the original and never mentioned or retracted the original false assertion - it did ***not*** say that it was "not Willick."

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[6] VII AA 1558

[7] Answering Brief at 12; also see II AA 292

After ***that***, the original version with the picture of Willick was again broadcast widely and repeatedly.[8] It is still posted by Sanson today, as of the writing of this Motion for Rehearing.

This is the equivalent of falsely broadcasting to 10,000 people that Mike is a murderer, and then later, without mentioning that message, or Mike, announcing to 10 people that Fred is a killer, then again announcing to thousands the original assertion that Mike is a murderer. The first large group received no "correction" of any kind, the second small group has no idea that the original statement was even made, and the original statement was then rebroadcast repeatedly.

On rehearing, this Court should replace footnote 2 with the statement that for any party to assert that a "correction" has been made, it must (1) show the actual withdrawal of the original false assertion of fact, and (2) demonstrate that the second statement was made to the substantially same group of recipients. In the absence of those two things, no "correction" is possible.

Yet this Court's order gives Sanson a pass for the obviously false gist of the headline of Statement 2 (plus picture of Willick) on the basis that its "hyperlink to official judicial proceedings involving only Crane allowed the average reader to readily discern that Statement 2's allusion to sexual misconduct referred to Crane,

[8] Answering Brief at 12; also see VII AA 1509 - 1512 (listing when things were broadcasted and in what order); *Respondent's Supplemental Brief Addressing this Court's Requests During Oral Argument* at 7-8.

not to Willick." But the same hyperlink necessarily provided the ***author*** of the statement—Sanson—with actual knowledge of its falsehood.

Much of the above applies to Statement 5 as well. The Court correctly identified the statement as "factually inaccurate"—i.e., false, which appears to violate the "any falsehood" standard for truthfulness just announced in *Stark*.

The hyperlinks—which, as detailed below, should never be clicked—cannot legitimately be found to correct the false statements. And if a hyperlink ***was*** adequate to create a burden for the "average reader," it creates at ***least*** that burden for the author, who is on notice of the falsity of the assertion from his own linked document.

A. Hyperlinks Do Not Change False Statements of Fact into Truth

This Court's holding that "[b]y including hyperlinks from which an average reader could readily discern that Statement 2 summarized official documents and legal proceedings, and verify the statement based on sources included therewith, Veterans In Politics met its burden of showing Statement 2 was made truthfully or without knowledge of its falsehood" misapprehends established Nevada law. The only context in which hyperlinks have been found relevant is under the "fair reporting privilege" as articulated in *Adelson v. Harris*.[9] The fair reporting

[9] *Adelson v. Harris*, 133 Nev. ___, 402 P.3d 665 (Adv. Opn. No. 67, Sep. 27, 2017)

privilege applies to reports or summaries of judicial proceedings that are "newsworthy," and only then if they are "fair, accurate, and impartial."

If this Court's holding was intended to conclude that Statement 2 falls under the fair reporting privilege, it would have had to find that Statement 2 is a fair, accurate, and impartial reporting of judicial proceedings. ***No*** amount of mental gymnastics can legitimately reach the conclusion that the statement: "Marshal Willick and his pal convicted of sexual coercion of a minor child" is a "fair, accurate, and impartial" reporting of judicial proceedings involving ***only*** Richard Crane.

The same applies to the Virginia action, which was a ***civil*** suit. The statement that Willick was found "guilty" of defamation is a false statement[10] and not a "fair" or "accurate" or "impartial" report of the judicial proceedings. The very court opinion Sanson hyperlinked says that using the word "guilty" in a statement is actionable defamation accusing someone of a *crime*.

As to the burden of establishing truthfulness, if a "reasonable reader" can be charged with "discerning" that no sex crimes involved Willick by closely reading referenced documents, then the ***author*** should be charged with actual knowledge of its falsehood. The Virginia civil action did not involve anyone being found "guilty" of anything.

[10] Defamation is a crime in Virginia.

Statement two simply did ***not*** "summarize official documents and legal proceedings"—it lied about them. Sanson falsely stated that the Virginia action was a criminal conviction, and the actionable falsehood of his accusation was proven by the very document he hyperlinked. A headline saying a false fact does not make the statement "an opinion." It makes it a lie, made with knowledge of falsehood.

In *Stark*, this Court made it clear that the finding of good faith was based on the absence of evidence in the record of knowing falsity by the speaker.[11] In this case, there is plenty of "evidence to the contrary" showing that Sanson knew his statements were false, *including* (but not limited to) the hyperlinked documents, despite the excuses made by his lawyers in his later self-serving declaration.

That Sanson ***later*** re-interpreted his statement to express an opinion about fees is irrelevant—the burden of proving truthfulness has to do with what was stated, not the author's (or his lawyers') retroactive excuse-making for saying it. Statement 4 had nothing to do with "commentary about official legal proceedings" because the subject of the false assertion (that Willick "scammed" the district court) had nothing whatsoever to do with the *Holyoak* argument or decision.

[11] *See also Shapiro*: "the phrase 'made without knowledge of its 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."

The "average reader" would have no idea whatsoever about who won what in the appeal or how *Leventhal* might be relevant to it (and it isn't)—leaving that reader only with the false accusation that Willick scammed someone out of something, and lost a case (which he won). That is just as false as the accusation that Willick ever had anything whatsoever to do with sexual coercion of a minor.[12]

The false assertions of fact were not newsworthy, nor accurate, nor fair, nor impartial, nor true, and at least as to those "facts" were necessarily made with knowledge of their falsity. Most recently, this Court has stated that the applicable standard for truthfulness is that statements must be "true or made without knowledge of ***any*** falsehood."[13] Sanson's statements do not pass that test.

If authors are not held to at least the standard of diligence required of readers, then Nevada case law will veer down a path likely to encourage defamation, to the unnecessary harm of many innocent parties. That should not be permitted.

Further, while hyperlinks may have been widely utilized in 2012 when the events leading to the Adelson v. Harris litigation took place, they are no longer so utilized. Today, ***every*** information technology department—presumably including

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[12] *Cf. Sahara Gaming Corp. v. Culinary Workers Union Local 226*, 115 Nev. 212, 214, 984 P.2d 164, 166 (1999) (describing the privilege given to the "fair, accurate, and impartial" reporting of judicial proceedings and noting "There is no factual dispute here that the Union's letter was a fair and accurate report of the complaint in the Mississippi litigation")

this Court's own—sends out repeated warnings to all users to ***never*** click on a hyperlink provided by any but a known and trusted source.[14] Sanson culls email addresses from every available source without permission—undersigned counsel and every other attorney in Nevada is an unwilling recipient of his e-mail barrages. He is an exemplar of an "unreliable source."[15] No one with any concept of internet security would click on *any* hyperlink he provides, as this Court's own I.T. personnel should confirm.

For that reason, it is no longer an excuse for making a false assertion of fact to provide a hyperlink potentially connecting readers with information from which, with effort, they could verify that the information provided was false.[16] Headlines asserting false statements of fact are not cured by hyperlinks that no one should click, and it would be intellectually dishonest to maintain otherwise.

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[13] *Stark v. Lackey*, *supra*, Slip Opinion at 1

[14] *See*, *e.g.*, Caleb Green, *Phishing in the Desert*, Clark County Bar *Communique*, March, 2020, at 18: "Often, the email or message will contain a malware-infected attachment or hyperlink that if opened, will install malicious software on the device and surrender sensitive information . . . ." The article detailed such an attack on Las Vegas City government in January, 2020.

[15] This was discussed below and is unrefuted, but if the Court had any doubt on the matter, it could easily remand for brief discovery on that point.

[16] *Cf. Adelson v. Harris*, 133 Nev. ___, 402 P.3d 665 (Adv. Opn. No. 67, Sep. 27, 2017) (discussing hyperlink in Associated Press materials). If this Court's prior holdings relating to hyperlinks have any remaining vitality in the current age of daily "phishing," ransomware, data breaches, and mal-ware cyber-attacks, it is limited to desired communications from trusted providers.

The hyperlinks are not so much "ironic" as "irrelevant."[17] The issue is the Statements themselves, and is part of the reason this Court should affirm the district court decision as to Statements 4 ("scammed his client") and 5 ("lost his appeal"). The *Holyoak* case had nothing whatsoever to do with attorney's fees; attaching a hyperlink to the *Leventhal* decision—which did not involve or concern *Holyoak*, or Willick's firm at all—was entirely irrelevant to the case, and intended to confer the false impression that it was.

III. A DEFAMATION CAMPAIGN FOCUSED ON DAMAGING THE REPUTATION AND BUSINESS OF A SINGLE INDIVIDUAL IS NOT IN THE PUBLIC INTEREST

A. A Campaign Should Be Evaluated as a Whole

This Court's recent opinion in *Rosen v. Tarkanian*—which was not referenced in the order in this case—correctly found that words are not to be parsed in isolation, but reviewed collectively to determine what a reasonable reader would conclude was their gist or central meaning.[18]

This Court's order here incorrectly recites (at 4) that the suit at issue was based on "5 statements." Actually, it is undisputed that there were ***hundreds*** of

[17] Respectfully, nothing Sanson posted can be fairly compared to a "consumer review"—which is only permitted by actual former clients. Sanson was never a client of the Willick firm, or Crane for that matter, and is no position to "review" anything.

[18] *See also Shapiro v. Welt*, 133 Nev. ___, 389 P.3d 262 (Adv. Opn. No. 6, Feb. 2, 2017); *Abrams v. Sanson*, 136 Nev. ___, ___ (Adv. Opn. No. 9, March 5, 2020)

messages broadcast repeatedly—***multiple times per week for months***—to tens of thousands of recipients, all intended to do cumulative damage.[19] More were broadcast after the Complaint going beyond those statements, for which the Complaint can be amended on remand.

Where, as here, a campaign of targeted false accusations was disseminated via email and online back-to-back hundreds of times, including multiple variations of statements, cross references, and re-dissemination of statements such that the attacks were being posted, disseminated, re-distributed, and referenced again and again ***multiple times per week for months***, the question is the impression made on that "reasonable reader," which should alter this Court's order because "examin[ing] each statement in turn" (at 7) produces a false summary of the impression collectively made. A campaign is perceived differently by a reasonable reader than isolated "statements."

The context here is that, in a very short time in this very personal controversy, Sanson stated (1) Willick is against veterans; (2) Willick is a criminal (convicted of both sexual coercion of a minor ***and*** "found guilty of defamation"—both false); (3) don't hire Willick's law firm (a "consumer review" from someone who was never a client and based on criticism that has nothing to do with quality of legal services, as noted by this court); (4) Willick charges excessive fees (again,

[19] See Pages 2 - 8 of *Respondent's Supplemental Brief Addressing this Court's*

a “consumer review” from a non-client with no knowledge of the work done or fees charged); and (5) Willick lost an appeal (which he actually won).

The focus and gist of the collective statements is to damage Willick’s reputation and business, not to talk about the broad and amorphous topic of "court proceedings" as alleged. Marshal Willick is well respected nationally as a family law expert with special expertise in retirement benefits and pensions, and especially military pensions. The focus of the false statements are damage to Willick’s reputation and business. They are no different than the statements made to damage the reputation and business of a surgeon in *Bongiovi*.[20]

If, as this Court has held, it is to look to the impression on the “average reader” then the question is the cumulative effect of months of these communications as a whole, not parsing out the individual words of each of them, and the message collectively conveyed is a personal attack based on false assertions. As detailed above, hyperlinks do not change the falsity of the accusations or their vitriolic nature, nor do they make them matters of public interest.

Any neutral reader would perceive the collective gist of those statements as the assertion that Willick should be ineligible to practice law—which is the very

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Requests During Oral Argument; also see VII AA 1509 – 1512.

[20] *Bongiovi v. Sullivan*, 122 Nev. 556, 138 P.3d 433 (2006)

essence of a defamation *per se* and a business disparagement claim, and the reason the underlying defamation case was filed.

B. Time and Timing Are Relevant

As this Court said recently in *Colin*,[21] timing is pretty good circumstantial evidence of knowing falsity. As this Court knows from the companion case,[22] the campaign against Willick was initiated when Sanson's defamation campaign against Abrams failed to get her to take off calendar her sanctions motion against attorney Schneider. It was launched over a year ***after*** the 2015 radio interview, and the great bulk of the statements had nothing to do with that interview.

C. The Focus of the Campaign was to Damage Willick, Not on "Judicial Proceedings"

The matters primarily addressed in the statements—Willick's employee's years-old personal legal troubles, the nearly decade-old civil case with Vaile in Virginia—had no "degree of closeness" to the broad and amorphous public interest in "judicial proceedings," and their timing establishes directly that they were not focused on that public interest, but on "another round of private controversy."[23]

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[21] *In re Discipline of Colin*, 135 Nev. ___, ___ (Adv. Opn. No. 43, Sept. 19, 2019)

[22] *Abrams v. Sanson*, Nos. 73838 & 75834

[23] ***Any*** doubt on that point was resolved by the posted offer of a $10,000 bounty for anyone who could dig up dirt on Willick. *See* Answering Brief at 16; see also VII AA 1531 and VIII AA 1646.

The Supreme Court of California recently held in *Wilson v. Cable News*[24] that there just is ***no*** legitimate public interest in a "garden-variety dispute"—like a decade old civil suit in Virginia—because "Absent unusual circumstances, a garden-variety dispute concerning a nonpublic figure will implicate no public issue."

Shapiro itself was a guardianship case; if it was true that *everything* that happens in a courtroom is automatically a matter of public interest, that case would not *exist*, and this Court would not have approved court rules permitting divorce hearings to be closed, those cases to be sealed, and forbidding the video or other records of those closed hearings from being posted on the internet by third parties.

While the application of law in court proceedings is an amorphous "public interest," the connection of private individuals somehow involved in a case are too attenuated to have attacks against them considered "protected," as the California Supreme Court has just held in *Wilson*. This Court should find similarly if, as it claims, it intends to follow the California line of authority.

Suppose a JEA to a member of this Court had a traffic ticket or filed bankruptcy; does that garden-variety matter become one of "public concern" that can be misrepresented to thousands of people with impunity by someone in a dispute with the JEA because she works in a taxpayer's courtroom? In short, the

[24] 444 P.3d 706 (2019)

public had no interest of any kind in those years-old matters, and the months-long defamation campaign composed of many thousands of communications was on its face an attempt to turn the information into a matter of public interest “simply by communicating it to a large number of people.” Unless the Court wishes to overrule the fourth factor of *Shapiro*, it should so find here.

CONCLUSION

The defendant’s burden of showing that a statement was "truthful or made without knowledge of its falsehood" may not legitimately be shifted to the "average reader.” Hyperlinks, which should never be used, do not change the falsity of the statements, or the knowledge of falsity of the author, who should be held to at least the standard of any “reasonable reader.”

When false statements are presented in a campaign, rather than as isolated statements, the issue is the impression on the average reader of the campaign as a whole. The timing of such a campaign is relevant to evaluating its knowing falsity.

A campaign of defamatory statements directed at a single individual and his business does not constitute a "good faith communication in furtherance of the right to petition or the right to free speech in direct connection with a matter of public concern." There has to be some “degree of closeness” between the asserted public interest and the statements at issue.

Here, Sanson offered a "bounty" for "dirt" on Willick. If Sanson's written ***admission*** that the "focus" of his activities was the "effort to gather ammunition for another round of private controversy" is not sufficient evidence, it is difficult to conceive of any conduct that might be, and this Court will have eviscerated and overruled the fourth factor of *Shapiro* and *Piping Rock*.

We respectfully request that the Court rehear this matter, withdraw the *Order of Reversal*, and issue a new decision affirming, at minimum, the district court's order relating to Statements 2, 4, and 5. Footnote two should be replaced as detailed above.

DATED: Tuesday, March 10, 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby 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:

[x] It has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in font-size 14 of Times New Roman; or

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2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 40(b)(3) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[x] Proportionately spaced, has a typeface of 14 points or more, and does not exceed 4,667 words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and does not exceed 433 lines of text; or

[ ] Does not exceed 10 pages.

3. Further, I hereby certify that I have read this petition, and to the best of my knowledge, 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 requirements of the Nevada Rules of Appellate Procedure.

DATED: Tuesday, March 10, 2020.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of THE ABRAMS & MAYO LAW FIRM and that, on this 10th day of March, 2020, *Respondents' Petition for Rehearingt* was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows, to the attorney's listed below:

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