Case Nos. 73838 / 75834

IN THE SUPREME COURT OF NEVADA

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Elizabeth A. Brown
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JENNIFER V. ABRAMS; AND THE ABRAMS & MAYO LAW FIRM,
Appellants,

vs.

STEVE W. SANSON; AND VETERANS IN POLITICS INTERNATIONAL, INC, et. al.,
Respondents.

APPEAL

From the Eighth Judicial District Court, Clark County
The Honorable Michelle Leavitt, District Judge
District Court Case No. A-17-749318-C

RESPONDENTS' OPPOSITION TO APPELLANTS' MOTION TO FILE APPENDIX IV UNDER SEAL

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NRAP 26.1 DISCLOSURE

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

1. No parent corporations exist for Respondent Veterans in Politics International, Inc.

2. No publicly held company owns 10% or more of the stock of Veterans in Politics International, Inc.

3. In district court, Margaret A. McLetchie of McLetchie Shell LLC, represented the Steve W. Sanson and Veterans in Politics International, Inc. Ms. McLetchie represents these Respondents on appeal through McLetchie Law Group, PLLC (doing business as "McLetchie Law").

4. Respondent Steve W. Sanson, an individual, does not use a pseudonym.

DATED this 24th day of October, 2018.

/s/ Margaret A. McLetchie
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Appellants Jennifer Abrams and the Abrams & Mayo Law Firm (the "Abrams Parties") seek to seal a transcript of a court hearing which does not merit sealing. The Motion to Seal filed in this Court by the Abrams Parties does not meet the standard for sealing set forth in this Court's rules—or the presumption in favor of access required by the First Amendment. Indeed, sealing a key portion of the appendix would be especially important in this case, which involves free speech by Respondents Steve W. Sanson and Veterans in Politics International, Inc. (the "Sanson Parties") on a matter of public interest, as recognized by the district court.

In addition to failing to meet the standards for sealing court records, the Abrams Parties' Motion to Seal is potentially untimely. Further, because the Abrams Parties failed to oppose a motion to unseal filed in the district court, they have waived the ability to move for sealing here. Moreover, because a video of the court proceeding at issue is publicly available on the internet, sealing the printed transcript of the proceeding is futile (and it is impossible for the Abrams Parties to meet the legal standard for sealing). Finally, even if the Court determines that the transcripts contains sensitive information that merits protection, this Court should require the Abrams Parties to redact only sensitive information rather than allow for sealing of

the transcript in its entirety. Accordingly, the Abrams Parties' Motion must be denied.

II. PROCEDURAL HISTORY

On September 26, 2018, the Abrams Parties moved this Court for a 14-day extension to file their Opening Brief and Appendix in this matter. (Document 2018-37708, on file with this Court.) Respondents Steve W. Sanson and Veterans in Politics International, Inc. (the "Sanson Parties") filed a notice of non-opposition. (*See* Document 2018-37829, on file with this Court.) On October 1, 2018, this Court granted the Abrams Parties' Motion for an Extension in an Order mandating that "Appellants shall have until October 12, 2018, to file and serve the opening brief and appendix." (Document 2018-38343, on file with this Court.) The Order further provided that "[f]ailure to timely file the opening brief and appendix may result in the imposition of sanctions." (*Id*., citing Nev. R. App. P. 31(d)).

On October 15, 2018, the Abrams Parties untimely moved to file Volume IV of Appellants' Appendix Under Seal. (Document 2018-40277 (the "Motion" or the "Motion to Seal"), on file with this Court.)[1] The Abrams Parties argue that Appendix IV—which contains a written transcript of a divorce hearing that was "filed in this

[1] Although Motion purports to have been submitted on October 12, 2018 (Motion, p. 2; *id.*, p. 4; *id*., p. 5 [certificate of service]) the court's electronic filing stamp indicates that it was not filed until 9:39 a.m. on October 15, 2018. (*Id*., p. 1.) Thus, it is not clear that the Abrams Parties timely submitted the Motion.

case's lower court records" (Motion, p. 2)—must be sealed because the case "involved minor children, and the transcript of the hearing … was a closed hearing." (*Id*., p.4.) The Abrams Parties further aver that the district court "entered an *Order to Seal* on October 6, 2016, which in relevant part prevented the dissemination of the case materials, including the transcripts of the hearing on September 29, 2016." (*Id*.)

III. LEGAL ARGUMENT

The Motion to Seal must be denied for multiple reasons. First and most fundamentally, the Abrams Parties have not and cannot meet the standard for sealing.

Second, it is untimely, as noted above. Third, the contents of Appendix Vol. IV—transcripts of the September 29, 2016 hearing—were not sealed in the district court proceedings. While the Sanson Parties moved (out of an abundance of caution) to file the transcripts as Exhibit 13 of the Anti-SLAPP Motion to Dismiss under seal (*See* March 28, 2017 Motion to File Under Seal, on file in Case. No. A-17-749318), the district court never granted said motion. Therefore, Appendix Vol. IV is already part of the public record rendering any sealing ineffective.

Fourth, even if the district court had granted the March 28, 2017 Motion to File Under Seal, the Sanson Parties petitioned the district court to unseal that material. (*See* May 26, 2017 Motion to File Under Seal, on file in Case. No. A-17-

749318.) While the district court did not rule on this request, neither did the Abrams Parties file an opposition. Therefore, the Abrams Parties have consented to that material being in the public record of this litigation and have waived the right to have Appendix Vol. IV filed under seal.

Fifth, sealing the transcript contained in Appendix Vol. IV is pointless given that a video of the hearing is publicly accessible on the internet. Certainly, if an electronic recording of the hearing is already in the public domain, sealing the typed transcript of the hearing would be akin to trying to unring a bell. Sixth and finally, should this Court determine that the material in Appendix Vol. IV should remain private, redaction of those details rather than wholesale sealing of Appendix Vol. IV is appropriate.

A. THIS COURT MUST DENY THE ABRAMS PARTIES' MOTION TO SEAL.

1. The Rules Governing Sealing and Redacting Court Records Apply to this Action, and the Abrams Parties Cannot Meet the Standard.

In their Motion, the Abrams parties argue, without citation, that the Rules Governing Sealing and Redacting Court Records (SRCR) "do not apply to actions for divorce, as they are specifically provided for by NRS Chapter 125." (Motion, p. 3.) However, NRS Chapter 125 did not repeal or modify the SRCR; rather, the sealing provisions of NRS Chapter 125 and the SRCR can be construed in harmony. *See Bowyer v. Taack*, 107 Nev. 625, 627–28, 817 P.2d 1176, 1178 (1991) *superseded*

by statute and rule on other grounds as recognized by McCrary v. Bianco, 122 Nev. 102, 131 P.3d 573 (2006) ("[A]pparent conflicts between a court rule and a statutory provision should be harmonized and both should be given effect if possible.").

Furthermore, the SRCR applies to the instant case because—although the material at issue contains a transcript of a divorce hearing—this is not a divorce case. Therefore, the SRCR's rules should apply to sealing Appellant's Appendix Vol. IV.

The SRCR rules and the underlying principles of access dictate that the transcript not be sealed. The United States Supreme Court has recognized the public's right to inspect and copy court documents and otherwise have access to judicial proceedings. *See, e.g., Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978). This right, which includes access to records and documents in judicial proceedings, is anchored in the value of keeping "a watchful eye on the workings of public agencies," and in publishing "information concerning the operation of government." *Id.* at 597-98. This right stems from both the First Amendment and the common law. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1980); *see also Globe Newspapers, Inc. v. Virginia*, 448 U.S. 555, 588 (1980).

In Nevada, there is a presumption that all stages of court proceedings should be open to the public. *See, e.g., Stephens Media LLC v. Eighth Judicial District Court*, 125 Nev. 849, 859 221 P.3d 1240, 1248 (Nev. 2009). This is so because

"public access inherently promotes public scrutiny of the judicial process, which enhances both the fairness of [] proceedings and the public confidence in the criminal justice system." *Id.* at 860, 1248 (citing *Forum Communs. Co. v. Paulson*, 752 N.W.2d 177, 181 (N.D. 2008)).

Given this presumption of access, a party seeking to seal a proceeding to identify a compelling privacy or safety interest which outweighs the public interest in access to the court record. *Jones v. Nev. Comm'n on Judicial Discipline*, 318 P.3d 1078, 1085 (Nev. 2014) (noting that in civil cases, SRCR 3(4) mandates that courts "may only seal their records or documents when the sealing is 'justified by identified compelling privacy or safety interests that outweigh the public interest in access to the court record'"); *see also Howard v. State*, 291 P.3d 137, 143 (Nev. 2012) (holding the same standard applies to criminal cases). In order to seal court records, this Court requires:

> First, a party seeking to seal a document must file a written motion and serve the motion on all parties involved in the action. Second, the motion must identify the document or information the party seeks to seal. Third, the motion must identify the grounds upon which sealing the subject documents is justified and specify the duration of the sealing order. . . . Fourth, the motion must explain why less restrictive means will not adequately protect the material.

Howard, 291 P.3d at 143. Thus, the circumstances under which a court record may be sealed are limited, and the Abrams Parties have failed to meet the stringent standard for sealing. In short, the Abrams Parties have not shown any compelling

interest that outweighs the presumption in favor of access.

2. The Motion Was Untimely.

As this Court made clear, The Abrams Parties' Opening Brief and appendix in this appeal was due on October 12, 2018. (Document 2018-38343, on file with this Court.) However, the file stamp on the Abrams Parties' Motion indicates that it was filed on October 15, 2018 at 9:38 a.m. (Motion, p. 1). Because this Motion may not have been filed on or before the appendix's due date, it is potentially untimely. If so, the Motion should be denied.

3. The District Court Did Not Seal Exhibit 13 to the Sanson Parties' Anti-SLAPP Motion to Dismiss.

As noted above, the Sanson Parties provisionally moved to file Exhibit 13 to their Anti-SLAPP Motion to Dismiss under seal out of an abundance of caution. (*See* March 28, 2017 Motion to File Under Seal, on file in Case. No. A-17-749318) However, the district court neither granted nor denied said motion. Instead, the district court granted the Sanson Parties' Anti-SLAPP Motion to Dismiss in a June 22, 2017 Minute Order without issuing a ruling on the sealing of Exhibit 13.

As a default, exhibits attached to motions are part of the public record. *See Howard v. State*, 128 Nev. 736, 744, 291 P.3d 137, 142 (2012) ("there exists a presumption in favor of public access to records and documents filed in this court."). Without a court order granting a motion to file an exhibit under seal, said exhibit becomes part of the district court's public record. No such order was propounded by

the district court in response to the March 28, 2017 Motion to File Under Seal. Therefore, Exhibit 13 to the Anti-SLAPP Motion to Dismiss was never filed under seal in this litigation, and should not be filed under seal during the appellate process.

4. The Abrams Parties Did Not Respond to the Sanson Parties' Request to the Court that Exhibit 13 Be Unsealed.

Before the district court granted the Sanson Parties' Anti-SLAPP Motion to Dismiss, the Sanson Parties requested the district court unseal Exhibit 13. (*See* May 26, 2017 Motion to File Under Seal, on file in Case. No. A-17-749318.) The Abrams parties simply never responded to oppose this request. "Failure of the opposing party to serve and file written opposition may be construed as an admission that the motion and/or joinder is meritorious and a consent to granting the same." EDCR 2.20(e); *see also Walls v. Brewster*, 112 Nev. 175, 178, 912 P.2d 261, 263 (1996) (noting propriety of district court construing the failure to oppose a motion to dismiss as "an admission that the motion was meritorious and as a consent to grant the motion").

Because the Abrams Parties failed to oppose the Sanson Parties' request that Exhibit 13 be unsealed, it can be inferred that they consented to it being unsealed. Now, on appeal, it is too late for the Abrams Parties to do what they should have done in district court. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("[a] point not urged in the [district] court ... is deemed to have been waived and will not be considered on appeal"). Therefore, the Motion should be denied.

5. A Video Transcript of the Hearing is Already in the Public Domain.

In addition to eliding the fact that they failed to respond to the Sanson Parties' request that the transcript at issue be unsealed by the district court, the Abrams Parties also fail to acknowledge that a video of the September 26, 2016 hearing is available online.[2] Because the video of the hearing is already public, the cat has already been let out of the bag, and the Abrams Parties cannot try to force it back in. *Cf. Gambale v. Deutsche Bank AG*, 377 F.3d 133, 144 n. 11 (2d Cir.2004) ("Once the cat is out of the bag, the ball game is over.") (quoting *Calabrian Co. v. Bangkok Bank, Ltd.*, 55 F.R.D. 82 (S.D.N.Y.1972)). Accordingly, the Abrams Parties' Motion is an exercise in futility.

6. Redaction of Sensitive Information is Preferred Over Wholesale Sealing.

The SRCR, which applies to sealing records in the instant appeal, contains an unambiguous preference for redaction instead of wholesale sealing. *See* SRCR 3(5)(b) ("A court record shall not be sealed under these rules when reasonable redaction will adequately resolve the issues before the court under subsection 4 above.") In the instant case, the Abrams Parties request sealing of Appellant's Appendix Vol. IV because it "contains private discussions of the parties' children and [the parties'] personal finances." However, these issues can be made private via

[2] *See* https://veteransinpolitics.org/2016/10/nevada-attorney-attacks-clark-county-family-court-judge-open-court/ (last accessed October 23, 2018).

redaction of any discussion of the parties' children and personal finances. The remainder of the transcript should remain open to public inspection.

IV. CONCLUSION

The Abrams Parties and their counsel had many opportunities to keep the messy details of their clients' divorce proceedings private during district court proceedings. Instead of protecting their clients' privacy interests, they chose to exploit their clients' case as a springboard for meritless litigation designed to silence the Sanson Parties' criticism. Volume IV of Appellants' Appendix was not filed under seal at the district court, and therefore should not be filed under seal with the Nevada Supreme Court. For the foregoing reasons, this Court must deny the Abrams Parties' Motion.

Respectfully submitted this 24th day of October, 2018.

/s/ Margaret A. McLetchie

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing RESPONDENTS' OPPOSITION TO APPELLANTS' MOTION TO FILE APPENDIX IV UNDER SEAL was filed electronically with the Nevada Supreme Court on the 24th day of October, 2018. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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