IN THE SUPREME COURT OF THE STATE OF NEVADA

JENNIFER V. ABRAMS, AND THE ABRAMS & MAYO LAW FIRM, Appellants, vs. STEVE W. SANSON, VETERANS IN POLITICS INTERNATIONAL, INC., Respondents.	Supreme Court Nos.: 73838/75834 District Court No.: A-17-749318-C
JENNIFER V. ABRAMS, AND THE ABRAMS & MAYO LAW FIRM, Appellants, vs. LOUIS C. SCHNEIDER, AND LAW OFFICE OF LOUIS C. SCHNEIDER, LLC, Respondents.	

MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF PETITION FOR EN BANC RECONSIDERATION

COME NOW Appellants, JENNIFER V. ABRAMS and THE ABRAMS & MAYO LAW FIRM ("Abrams"), by and through their attorneys of record, Marshal S. Willick, Esq. of Willick Law Group and Mitchell J. Langberg, Esq. of Brownstein Hyatt Farber Schreck, LLP and hereby move this Court for leave to file a reply brief in support of Appellants' pending Petition for En Banc Reconsideration. NRAP 40A only allows replies when requested by the Court. Here, Respondents' (individually "Sanson" and "Schneider" and collectively

"Respondents") Answer to the Petition includes substantive factual and legal arguments that are incorrect, inapposite, and misleading. ***A reply is necessary so that Respondents' misrepresentations of fact and incorrect statements of law can be elucidated, lest this Court inadvertently make a decision in reliance on any of those inaccuracies.***

I. SUMMARY OF ISSUES TO BE ADDRESSED ON REPLY

Abrams Petition for En Banc Reconsideration (the "Petition") centered on the issues of: 1) whether "speech" that was used to carry out an extortionate threat can ever come under the protections of Nevada's anti-SLAPP statute, and 2) whether people could make knowingly false and defamatory statements of fact about what occurred in a judicial proceeding, yet insulate themselves from liability merely by providing a link to the lengthy proceeding that would prove they were lying.

The Answers advance extensive (and misleading) arguments that merit response on reply including:

A. Extortion is Unprotected by the Anti-SLAPP Statute

Under Nevada's anti-SLAPP statute, there are ***two*** elements a defendant must prove by a preponderance of the evidence to satisfy their Prong 1 burden. First, that the communications at issue were in "furtherance of" certain First Amendment rights. Second, that the claim is based on a "good faith

communication."

The Petition relies, in part, on California authority holding that speech that is part of a scheme of extortion is not in furtherance of First Amendment rights and, therefore, not protected by the anti-SLAPP statue. In their Answers, Respondents rely on other California cases and argue that the *Flatley* exception (excluding extortion from anti-SLAPP protection) only applies when the defendant "concedes the illegality" or the "illegality is conclusively shown by the evidence."

Respondents ignore the crucial difference between Nevada and California's anti-SLAPP statues: in Nevada, on the Prong 1 analysis, ***Respondents carry the burden of establishing by a preponderance of the evidence*** that their speech was in furtherance of anti-SLAPP protected First Amendment speech and was made in good faith (meaning it was truthful or not knowingly false). California's anti-SLAPP statute places no such burden on defendants.

This distinction matters. As explained below, in the face of Abrams evidence that Respondents' "speech" was part of a scheme of extortion, it was Respondents' burden to show by a preponderance of evidence that their speech was not part of such a scheme. They did not even try.

Abrams should be given leave to more fully address the distinction between the California and Nevada anti-SLAPP statutes and the impact it has on Respondents' evidentiary burdens.

B. Sanson's Declaration did not Carry His Burden

Respondents' have never denied their admissions of extortion.[1] Again, that matters. It is Abrams' evidence that is unrebutted. That is enough to find that Respondents' failed to meet their Prong 1 burden.

Abrams provided admissible evidence that Respondents admitted their "speech" was the consequence of her refusal to cede to Respondents' extortionate threats. Neither Sanson's declaration nor any other evidence offered by Respondents ever denied or otherwise refuted the evidence Abrams submitted that both Sanson and Schneider admitted their extortion scheme. Thus, Respondents did not demonstrate by a preponderance of the evidence that their "speech" was in furtherance of their protected First Amendment rights.

On the separate issue of "good faith," which deals with truth and falsity, Sanson claims that his declaration professing good faith is enough, on its own. That ignores prior decisions by this Court. Although a declaration of a defendant, by itself, can be sufficient to meet the Prong 1 burden, it does not meet that burden when there is "evidence that clearly and directly overcomes such declarations." *Omerza v. Fore Stars, Ltd*, 455 P.3d 841 (Nev. 2020) (unpublished). Here,

[1] Footnote 8 of Sanson's Answer falsely states that Abrams did not provide a citation to this assertion in her brief and suggests that this Court sanction Abrams and her counsel. Citations were provided. For example, with respect to the admissible evidence that Sanson and Schneider both admitted that the "speech" was a consequence for not giving in to the extortion, Abrams provides citations to the record in footnotes 8 and 9 of the Petition.

Sanson's declaration did not stand alone. Instead, it was clearly overcome by the documentary evidence that showed his statements were, in fact, false. Respondents citation to this Court's recent decision in *Taylor v. Colon*, 136 Nev. Adv. Op. 50, at *5 (July 30, 2020) does not change the analysis. There, the issue was a dispute about what was and was not said as it relates to the issue of truth and falsity. Obviously, when a trial court is considering whether a defendant has met its burden by a preponderance of the evidence, it must consider the evidence from both sides and make credibility determinations. That is what the Court in *Taylor* did, determining that the defendant's testimony by declaration was sufficient to meet his burden. Here, the documentary evidence is what refutes Sanson's declaration.

Abrams should be allowed the opportunity to reply to fully flesh out these issues. Respondents have made general assertions that sometimes sound intriguing, but under scrutiny fail. Abrams should be allowed to respond.

C. Misapplication of the *Rosen* Case

Respondents misapply the "gist and sting" doctrine recognized by this Court in *Rosen v. Tarkanian*, 135 Nev. 436, 440, 453 P.3d 1220, 1224 (2019). In *Rosen*, this Court explained that on Prong 1, the preponderance of the evidence must demonstrate that "the gist of the story, ***or the portion of the story that carries 'the sting' of the statement, is true.***" *Id* at 441, 1224 (emphasis added, internal

citations and quotation omitted). So, while Sanson would like to focus only on the gist of the overall "opinions" he claims to assert, this Court cannot ignore the portion of his posts that carry "the sting."

Among other things, Sanson falsely stated that the family court judge made "findings" that Abrams engaged in "undue influence" and had "ethical problems," all the while knowing that the judge was not speaking about Abrams at al, made no finding against anyone, and ultimately retracted her concerns. He also said that Abrams "sealed many of her cases" which he falsely stated is "specifically disallowed by law."

This is not mere quibbling about words Sanson used to express so-called opinions. These are ***false accusations of fact*** that Sanson used to support his opinion while ***he*** was parsing words to create a false message. The sting of these false accusations—that a court had made serious adverse findings about an attorney and that Abrams violated the law—is self-evident and quite distinct from Sanson's general opinion that Abrams "misbehaves in court." That is, Sanson can have that opinion. He can be hyperbolic in expressing it. But, when Sanson tries to support his opinions by making false statements of fact that Abrams was found by a judge to have engaged in undue influence and to have ethical problems, or that Abrams has violated the law, Sanson has changed the "gist and sting" of his "speech" from a statement of opinion into false and defamatory statements of fact.

Abrams should be permitted to file a reply that includes a fulsome response to this issue.

D. <u>The Fair Report Privilege</u>

Sanson admits (on pages of 11 and 12 of his Answer) to abusing the fair report privilege, even if it applied. He acknowledges he selectively quoted from the judicial proceedings at issue. According to Sanson, selectively quoting what Judge Elliott said "about Abrams,"[2] without disclosing that it was retracted is perfectly acceptable because the fact "[t]hat Judge Elliot later decided she was mistaken about those assertions does not eliminate the fact that they were said, nor does it obligate Sanson to change his opinions about Abrams."

Abrams has never claimed that Sanson had to change his opinion. However, what is clear is that ***citing only what the judge initially said (about someone else) when he knew she retracted it in the same proceeding does not qualify for protection under the "fair report privilege" because it is neither a fair nor accurate report of what happened.*** As noted in the Petition, a report that is edited so as to misrepresent the proceeding in a misleading way does not enjoy protection under the fair report privilege. Restatement (Second) Torts, § 611.

This only serves to emphasize the misapplication of the fair report privilege and its attribution rule. The purpose of the privilege is to allow a reporter to

[2] Sanson knows that Judge Elliott's statements were ***not*** about Abrams, but about someone else in the courtroom.

accurately report what happened in a judicial proceeding without becoming liable as a republisher for ***what someone else said in that proceeding***. *See Wynn v. Smith*, 117 Nev. 6, 14, 16 P.3d 424, 429 (2001). But, here, Sanson made false and defamatory statements of fact which he ***claimed*** were reports of what occurred in the judicial proceeding. That is not protected by the privilege.

Even if this Court determined the fair report privilege might somehow apply in this case, the Answers do nothing to respond to Abrams' primary argument that the fair report privilege has nothing to do with the Prong 1 analysis in anti-SLAPP. The only issues on Prong 1 are whether the statements were in furtherance of protected First Amendment rights (they were not, because of the scheme of extortion) and whether they were true or made without knowledge of falsehood (they were not because Sanson made knowingly false statements of fact about what happened in court). Privilege does not come into play in either analysis.

Abrams should be allowed a reply to fully address Respondents' misapplication of the fair report privilege in their Answer.

E. <u>The Prong 2 Burden</u>

The Answers contain substantial argument regarding Abrams' Prong 2 burden. In light of Respondents' failure to meet their Prong 1 burden, the anti-SLAPP motion should have been denied. Abrams had no Prong 2 burden. But, on reply, Abrams should be permitted to respond to the arguments regarding Prong 2

contained in the Answers.

II. CONCLUSION

For all of the foregoing reasons, Abrams respectfully requests that this Court issue an order allowing her to file a reply in support of her Petition for En Banc Reconsideration.

DATED this 7th day of August, 2020

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Brownstein Hyatt Farber Schreck, LLP, and that on this 7th day of August, 2020, I electronically filed and served by electronic mail a true and correct copies of the above and foregoing **MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF PETITION FOR EN BANC RECONSIDERATION** properly addressed to the following:

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