

No. 77708

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVE WYNN,

Appellant,

vs.

THE ASSOCIATED PRESS, REGINA GARCIA CANO,

Respondents.

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Appeal from order and judgment entered by the Eighth Judicial District
Court, The Honorable Ronald J. Israel,
District Court Case No. A-18-772715-C

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TABLE OF CONTENTS

	<u>Page(s)</u>
I. INTRODUCTION	1
II. ARGUMENT	4
A. The False Police Report Does Not Trigger the Absolute Fair Report Privilege.....	4
1. The uniform weight of authority and the Court's precedent preclude expansion of the fair report privilege	4
2. The Restatement does not support the AP's attempt to expand the fair report privilege to cover the False Police Report.....	12
3. Mr. Wynn is not advocating for applying the judicial action doctrine.....	13
4. The LVMPD's actions subsequent to the False Police Report did not trigger the absolute fair report privilege.....	16
5. The public does not have a heightened interest in the reporting of police documents	18
B. The AP Article Is Neither Fair, Accurate, Nor Impartial.....	19
C. The District Court Prematurely Applied the Anti-SLAPP Statute	24
III. CONCLUSION.....	26

TABLE OF AUTHORITIES

Cases	<u>Page(s)</u>
<i>Butcher v. Univ. of Mass.</i> , 94 Mass. App. Ct. 33, 111 N.E.3d 294 (2018), review granted, 481 Mass. 1105 (2019).	14, 15
<i>Dorsey v. National Enquirer, Inc.</i> , 973 F.2d 1431 (9th Cir. 1992)	22, 23
<i>John v. Douglas Cty. Sch. Dist.</i> , 125 Nev. 746, 219 P.3d 1276 (2009).....	17
<i>Jones v. Taibbi</i> , 400 Mass. 786 (1987)	15, 16
<i>Lawton v. Georgia Television Co.</i> , 456 S.E.2d 274 (Ga. Ct. App. 1995)	21
<i>Lubin v. Kunin</i> , 117 Nev. 107, 17 P.3d 422 (2001)	23
<i>Oney v. Allen</i> , 529 N.E.2d 471 (Ohio 1988).....	21
<i>Pegasus v. Reno Newspapers, Inc.</i> , 118 Nev. 706, 57 P.3d 82 (2002).....	24
<i>Pope v. Motel 6</i> , 121 Nev. 307, 114 P.3d 277 (2005)	6, 12
<i>Reilly v. Associated Press</i> , 59 Mass. App. Ct. 764 (2003)	2, 14-15
<i>Rosenberg v. Helinski</i> , 616 A.2d 866 (Md. 1992)	20
<i>Sahara Gaming Corp. v. Culinary Workers Union Local 226</i> , 115 Nev. 212, 984 P.2d 164 (1999).....	6-7, 12, 14,
<i>St. v. Nat'l Broad. Co.</i> , 645 F.2d 1227 (6th Cir.1981)	23
<i>Trainor v. Standard Times</i> , 924 A.2d 766 (R.I. 2007)	9
<i>White v. Fraternal Order of Police</i> , 909 F.2d 512 (D.C. Cir. 1990).....	7
<i>Wilson v. Birmingham Post Co.</i> , 482 So. 2d 1209 (Ala. 1986).....	passim
<i>Wood v. Safeway, Inc.</i> , 121 Nev. 724, 121 P.3d 1026 (2005)	17

<i>Wynn v. Smith</i> , 117 Nev. 6, 16 P.3d 424 (2001).....	5, 6, 7, 12
--	-------------

Other Authorities

The Restatement (Second) of Torts ("Restatement") § 611	1, 12, 13, 14
---	---------------

Rules

Ala. Code § 13A-11-161	9
NRS 41.660(3)(a).....	25

I. INTRODUCTION

Through the Answering Brief, the AP¹ asks the Court to take the unprecedented step of providing the media with an absolute immunity to cover a police report filed by a civilian when there was no arrest, no investigation, and no criminal proceeding that sheds any light on the conduct of public representatives. Under the AP's theories, the media, with its exceptional reach, may lay waste to the reputations of some members of the public under an absolute fair report privilege, while feeding other members of the public known lies—lies that are repeated again and again and again.

The fair report privilege is more than a century old, and the AP searched broadly to uncover support for setting the absolute fair report privilege adrift into uncharted waters. *See* Restatement (Second) of Torts § 611 ("Restatement") (citing cases from the 1800s applying the privilege). Unsurprisingly, of the 67 cases the AP cited, spanning 27 states, the District of Columbia, and the territory of Guam, the AP could not uncover a single jurisdiction that applies an absolute fair report privilege to coverage of a civilian's police report when there was no arrest, no investigation, and no criminal proceedings. The danger to the public far outweighs the potential benefit of spreading lies, as the few courts to squarely address the issue

¹ Respondents The Associated Press and Regina Garcia Cano are collectively referred to herein as "the AP". Otherwise, the capitalized terms in this Reply shall have the same definitions as described in "Appellant's Opening Brief" filed on May 8, 2019 (the "Opening Brief").

decided, including in a case in which the AP was also the defendant. *See, e.g., Reilly v. Associated Press*, 59 Mass. App. Ct. 764 (2003).

It is, of course, for the Court to decide if Nevada should be at the forefront of expanding the fair report privilege to civilians' criminal allegations that have only a negligible relationship to something that might be deemed official action. Mr. Wynn respectfully urges a cautious approach. After all, this is not really about shielding the media from liability in order to provide the public with critical information. The media already has ample protection under a qualified privilege and the First Amendment to escape liability so long as it does not act with actual malice.

For instance, if the media does not put its head in the sand to publish inherently improbable accusations from a dubious source, or if it does not publish falsehoods while harboring serious doubts about their truth, then the media may escape liability for publishing false police reports filed by civilians. However, this appeal is about whether in the age of 24-hour news, the Internet, and social media run amok, the public is better served through the spread of civilian accusations about a crime (without regard to truth) or by being protected from the publication of known falsehoods that harm reputations and sow misinformation.

Even if the privilege could apply, the AP is not entitled to hide behind it because the AP Article is not a fair, accurate, and impartial description of the False Police Report. The AP says that the gist of the AP Article is that a woman accused

Mr. Wynn of rape. But, the actual gist of the AP Article is conspicuously revealed in its first sentence: "A woman told police *she had a child* with casino mogul Steve Wynn *after he raped her . . .*." (1 J. App. 28 (emphasis added).) The fanciful childbirth scenario is inextricably linked to the rape as the defamatory sting of the AP Article.

Nevertheless, to this day, the AP carefully avoids publicly printing or acknowledging the words "purple doll" and "water bag," or any description of the impossible birth scenario that Ms. Kuta reported. These words do not appear in the AP Article, the AP's anti-SLAPP Motion, the AP's Reply Brief below, and the AP's Answering Brief in this Court. This is no accident. Rather, it is a concerted effort to hide the damaging truth from its readers, and then, the courts.

The AP also continues to ignore the fundamental and self-evident requirement of the fair report privilege: fairness. In one such example, the AP declares victory based only on the requirements of accuracy and impartiality, with no mention of fairness. (*See, e.g.*, Resp't Br. at 45.) And, when the AP does address the fairness requirement, it gives lip service to it by shooting down a fictitious standard that it erroneously accuses Mr. Wynn of proposing—verbatim publication. Mr. Wynn does not propose that the AP was required to recount verbatim Ms. Kuta's fanciful and delusional description of the birth that purportedly resulted from the rape—although such a detailed account would have been sufficient. The AP merely needed

to sufficiently describe the birth scenario in a manner that preserved the sting (or lack thereof) of the False Police Report.

Ultimately, the AP's Answering Brief and the AP Article share much in common. They are neither fair, accurate, nor impartial descriptions of the matter at hand. In both, the AP's single-minded pursuit of attacking Mr. Wynn overtook the AP's desire to adhere to the rules: *e.g.*, the Answering Brief inappropriately cites to 17 internet articles that are not in the record in order to take irrelevant pot shots at Mr. Wynn. The AP's inclusion of these articles says more about the AP than it does about Mr. Wynn.

Simply put, the public is no better for having read the AP Article's specious account of the False Police Report, and the public will be no better if the Court accepts the AP's invitation to craft an unprecedented absolute immunity to knowingly publish lies. The Court should reverse the district court's decision to grant the anti-SLAPP Motion.

II. ARGUMENT

A. The False Police Report Does Not Trigger the Absolute Fair Report Privilege.

1. The uniform weight of authority and the Court's precedent preclude expansion of the fair report privilege.

The AP concedes, as it must, that Nevada has not applied the absolute fair report privilege for police reports filed by civilians. (Resp't Br. at 28.) As detailed

in Mr. Wynn's Opening Brief, the only cases addressing the issue refused to apply the absolute fair report privilege when there was no arrest, no investigation, and no criminal proceeding. The AP's national search for case law failed to uncover a single jurisdiction applying an absolute privilege for an article about a civilian's police report that neither involved an arrest, an investigation, nor a criminal proceeding.² The AP thus turns to mischaracterizing both the law and Mr. Wynn's arguments, often times creating straw men to avoid the law.

The Court has already charted the path for refusing to apply the absolute fair report privilege to the False Police Report. The logical conclusion to draw from the Court's holdings is that the policy behind the absolute fair report privilege would not be advanced by articles about police reports filed by civilians. Indeed, the purpose of the fair report privilege is to inform citizens about the conduct of their public representatives and about what transpires in official or judicial proceedings. *See Wynn v. Smith*, 117 Nev. 6, 14, 16 P.3d 424, 429 (2001) (stating that the purpose of the absolute fair report privilege is "[a]ccess to information *concerning the conduct of public representatives* is critical to the citizenry's supervision and evaluation of *actions taken on its behalf*.") (emphasis added). Adhering to this purpose, the Court has held that the "privilege should not be extended to allow the spread of common

² As discussed below, the AP attempts to rely on the LVMPD having sent an email to the press in order to trigger the fair report privilege, but the AP ignores that the AP Article was about the False Police Report, and not about the LVMPD's email.

innuendo that is not afforded the protection accorded to official or judicial proceedings." *Id.* The AP seek to turn these principles on their heads.

It is beyond dispute that under *Pope v. Motel 6*, 121 Nev. 307, 317, 114 P.3d 277 (2005), the False Police Report is not even afforded the protections accorded to matters preliminary to a judicial proceeding; it is just common innuendo that should not be allowed to spread under the absolute fair report privilege. Undeterred, the AP argues that *Pope* said the exact opposite of what it actually said: "*Pope* held that the police complaint did fall within a judicial proceedings privilege," but in that case "the privilege was *qualified*." (Resp't Br. at 32 (emphasis in original).) This Court's own words are unambiguous: "To the extent that we suggested in *K-Mart* that statements made to police before the initiation of criminal proceedings could be deemed 'communications preliminary to a judicial proceeding' . . . , we recede from that premise." *Pope*, 121 Nev. at 317, 114 P.3d at 283. In short, when a civilian files a police report, such as the False Police Report, it is not part of a judicial proceeding, not preliminary to a judicial proceeding, and not shrouded by the absolute immunity afforded to either.

Additionally, *Pope's* holding that a civilian would only have a qualified privilege in connection with filing a police report militates towards holding that only a qualified privilege should cover an article discussing such a police report. *See*

Sahara Gaming Corp. v. Culinary Workers Union Local 226, 115 Nev. 212, 214, 984 P.2d 164, 165 (1999).³

The AP attempts to thread the needle for the absolute fair report privilege by arguing that the False Police Report reflects official action. (*See e.g.*, Resp't Br. at 36.) But the words of both the AP and the LVMPD demonstrate that the False Police Report reflects the actions of the civilian, Ms. Kuta, who filed the report—not the officers who had no choice but to take the statement from her.

As the first sentences of the AP Article demonstrate, applying the fair report privilege to the False Police Report does not fulfill the purpose of disseminating information about public representatives and their actions. Rather, the conduct at issue is that of a civilian, Ms. Kuta, as the AP Article states: "*A woman [Ms. Kuta] told police she had a child with casino mogul Steve Wynn after he raped her*" The Associated Press on Tuesday obtained copies of *police reports recently filed by the two women* about allegations dating to the 1970s." (1 J. App. 28 (emphasis

³ The AP makes a misguided attempt to render D.C. Circuit law—and particularly *White v. Fraternal Order of Police*, 909 F.2d 512 (D.C. Cir. 1990)—as the primary authority in Nevada. The Court's opinion in *Wynn v. Smith* and the D.C. Circuit's opinion in *White* reached diametrically opposed conclusions about a fundamental issue under the fair report privilege. *Wynn* held the privilege cannot be invoked for confidential records, whereas *White* held that it can. *Wynn*, 117 Nev. at 16; *White*, 909 F.2d at 527. Moreover, *White* sheds no light on the issue at hand because it involved news stories about the investigatory proceedings of an official committee and the letters that prompted those proceedings. *White*, 909 F.2d at 527-28. Simply put, D.C. law actually conflicts with Nevada law in fundamental ways.

added).) It is Ms. Kuta who is taking the relevant actions. Even the subsequent email from the LVMPD's Public Information Officer focuses on the actions of Ms. Kuta rather than the department: "The LVMPD has *received two complaints* against Steve Wynn alleging sexual assault. . . . [The] second *woman filed a report* . . . at an LVMPD Substation" (1 J. App. 93 (emphasis added).) As the AP and the LVMPD acknowledge, for all intents and purposes, the False Police Report is about Ms. Kuta's actions not the LVMPD's.

Indeed, the primary case that the AP relies upon to argue that another court has applied the privilege to an article about an official incident report—*Wilson v. Birmingham Post Co.*—actually reinforces why the False Police Report is not an official action covered by the absolute fair report privilege.⁴ (Resp't Br. at 39 (citing *Wilson v. Birmingham Post Co.*, 482 So. 2d 1209 (Ala. 1986)).)

In *Wilson*, the Alabama Supreme Court applied a version of the fair report privilege because the article at issue was describing "an official investigation," not because the police had eventually prepared an "incident report." 482 So.2d at 1211-12. Indeed, *a police report did not even exist when the article was published. Id.* at

⁴ The AP also cites *Trainor v. Standard Times*, 924 A.2d 766 (R.I. 2007), for the proposition that "courts throughout the country routinely and unequivocally hold that police case or incident reports fall within the privilege." (Resp't Br. at 29.) *Trainor* actually involved an arrest—which is obviously an official action that falls within the fair report privilege. 924 A.2d at 768. If the AP were proposing that it is routine to apply the absolute privilege to police reports filed by private citizens, then *Trainor* cannot hold that weight.

1210. In *Wilson*, the police conducted an "investigation," which included a public "interrogation" of the alleged victims that took place in front of the reporter who wrote the article at issue. *Id.* The article, in part, recounted what the reporter personally observed of the investigation. *Id.* The police report was then filed and dated *two days after* the article was published. *Id.*

The fair report privilege in *Wilson* was statutory, and it explicitly applied to "the fair and impartial report . . . of any *investigation*." *Id.* (quoting Ala. Code § 13A-11-161 (emphasis added)). Given the interrogation, interview, and questioning of the alleged victim, the court held that the police had conducted an investigation, and thus the privilege could be applied to the article describing that investigation: "The news report at issue is conditionally privileged because it accurately reports statements made by the Cuban refugees during an official police investigation." *Id.* at 1212.

Contrary to the AP's misrepresentation of *Wilson*, the court never "makes clear that once a witness statement is memorialized in an official police report, it is imbued with an official governmental character that brings it within the privilege." (Resp't Br. at 40.) The *Wilson* court never even implies as much. The court explicitly states that the privilege attaches because the article was describing "an official police investigation." *Id.* The only thing that was remotely legally significant about the

police report was that it "confirm[ed] the existence of an investigation" and could be used to confirm the accuracy of the article. *Id.*

The AP punctuates its interpretation of *Wilson* by applying it to a fictitious set of facts in this matter to miscast the False Police Report as an investigation:

Whether Mr. Wynn thinks LVMPD conducted an "investigation" into Ms. Kuta's allegation is beside the point. The salient fact is that LVMPD undertook an official government act by formally interviewing Ms. Kuta and filing her allegations in an official police report

(Resp't Br. at 40.)

In no uncertain terms, the LVMPD did not formally interview Ms. Kuta, let alone conduct an investigation. From the LVMPD's email about the False Police Report ("LVMPD Email") to the AP Article, the facts in the record are that a police officer took down Ms. Kuta's statement. (*See, e.g.*, 1 J. App. 28, 93.) The LVMPD Email itself draws a distinction between a case incident report and an investigation, highlighting that the latter will not be undertaken. (1 J. App. 93.) The LVMPD Email states that the department received two complaints (which were transcribed as case incident reports) and "an investigation cannot go forward."⁵ (*Id.*)

⁵ To the extent the statement that an investigation would not occur referred to the case incident report about consensual sex in Las Vegas (as opposed to the False Police Report), the proposition stands that the LVMPD does not consider a case incident report to be an investigation.

The LVMPD Email also states that the "LVMPD has *received* two complaints against Steve Wynn alleging sexual assault"—communicating that it was simply receiving information from private citizens. (*Id.*) The AP Article does not even say the LVMPD filed a report. It puts that action squarely on Ms. Kuta, describing "police reports recently *filed by the two women.*" (1 J. App. 28.) Neither the AP Article nor the LVMPD Email hint that there was an interrogation or something beyond the rote entry of fields on a form. As the AP Article characterized it, the police "had taken the statements," "[a] woman told police" about the alleged rape, and "[s]he reported" the allegations. (*Id.*)

In short, the real action in this case is that of a private citizen making unsubstantiated allegations to a police officer who wrote it down because she had to. Allowing such conduct to be transformed into a free pass for the media to knowingly publish false statements is not only unprecedented, it is dangerous.

The ultimate irony of the AP relying on *Wilson* is that the case did not apply an absolute privilege like the AP proposes for Nevada. Rather, *Wilson* applied a

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conditional privilege, far more similar to the qualified privilege that should be applied here under the Court's reasoning in *Wynn*, *Sahara*, and *Pope*.⁶

As Mr. Wynn stated in his Opening Brief, the AP cannot uncover a case that applied the absolute fair report privilege to an article that discussed a police report when there was no investigation, no arrest, and no criminal proceedings. Because the False Police Report involved none of those things, the fair report privilege should not be expanded to articles that describe it.

2. *The Restatement does not support the AP's attempt to expand the fair report privilege to cover the False Police Report.*

The AP leans heavily on comment (d) of the Restatement § 611, which has never been applied when a private individual files a police report that is not part of an arrest, an investigation, or a criminal proceeding. (*See e.g.*, Resp't Br. at 33-36.) Nor does the AP address that none of the cases the Restatement's reporters relied upon to draft comment (d) allowed the privilege to be used for a private individual's

⁶ While the privilege in *Wilson* is labeled "conditional", the court goes on to liken it to a "qualified" privilege. 482 S.O. at 1213. The qualified privilege in Nevada and the statutory conditional privilege in Alabama both fall short of an absolute privilege because they can be defeated by showing "actual malice." *Pope*, 121 Nev. at 317, 114 P.3d at 283–84 ("Under a qualified privilege, the plaintiff must prove by a preponderance of the evidence that the defendant abused the privilege by publishing the defamatory communication with actual malice."); *Wilson*, 482 So. 2d at 1213 (Section 13A–11–161 provides that the publication is privileged "unless it be proved that the same was published with actual malice," which "refers to the common law standard of malice rather than the constitutional standard of malice").

police report. The AP ignores the importance of this absence of authority from the Restatement, which simply distills the law as it exists into a series of rules.

The reported law in this nation and the territory of Guam has never applied the fair report privilege to a police report filed by a private citizen when there is no arrest, no investigation, and no criminal proceedings. Rather, the only courts to address the question have declined to apply the privilege. Thus, when the Restatement asserts that "the filing of a report by an officer or agency of the government is an action bringing a reporting of the governmental report within the scope of the privilege," this necessarily does not refer to the scenario presented by Ms. Kuta's filing of the False Police Report.

3. *Mr. Wynn is not advocating for applying the judicial action doctrine.*

The AP creatively argues that Mr. Wynn is attempting to import a version of the judicial action limitation into the fair report privilege's application to official police records. (Resp't Br. at 30.) The judicial action limitation actually applies to reports of *civil proceedings* and requires that a judge first take action in the

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proceeding upon before the fair report privilege can be triggered. *See, e.g.*, Restatement § 611 cmt. (e).⁷

To be clear, Mr. Wynn is not arguing that a judge *must* take action before the fair report privilege can be triggered for police reports. Rather, he is arguing that because there was no official proceeding, the fair report privilege could only be triggered if the False Police Report were deemed some form of official action. Put another way, Mr. Wynn is not trying to import a judicial action limitation; rather, he is relying on the fundamental requirement of the privilege: that there be either an official proceeding or an official action. According to courts that have addressed the issue—and as suggested by the Court's precedent—because there was no proceeding and the False Police Report is merely a civilian's accusations that is neither related to an investigation nor an arrest, the fair report privilege does not apply.

The AP relies on its off-base argument about the judicial action doctrine to distinguish the Massachusetts cases that squarely refused to apply the fair report privilege to articles about civilian complaints to law enforcement. (*See* Resp't Br. at 36-37 (discussing *Butcher v. Univ. of Mass.*, 94 Mass App. Ct. 33, 40 (2018), *review granted*, 481 Mass. 1105 (2019), and *Reilly v. Associated Press*, 59 Mass. App. Ct.

⁷ The AP is misleading the Court to the extent it suggests that Nevada has rejected the judicial action doctrine. (*See* Resp't Br. at 37.) Other than a concurrence in *Sahara Gaming*, the Court has not addressed the doctrine, and it is unclear whether the civil action that had been reported on in that case had ever been subject to judicial action. *Sahara Gaming*, 115 Nev. at 220, 984 P.2d at 169.

764 (2003)).) Neither *Butcher* nor *Reilly* purported to require judicial action, as both would allow the fair report privilege to be applied had there been some official action that fell short of a judicial action: *e.g.*, an arrest, an official press statement, or the charging of a crime. *See Butcher*, 94 Mass. App. Ct. at 40; *Reilly*, 59 Mass. App. Ct. at 77.

The AP's discussion of *Butcher* and *Reilly* also reveals the AP's fundamental misunderstanding of the fair report privilege. The AP writes that "the courts in *Butcher* and *Reilly* only declined to apply the privilege to police reports that resulted in *no additional police action whatsoever*." (Resp't Br. at 48 (emphasis in original).) That is only half the story. The primary reason that the fair report privilege did not apply is because a civilian complaint about the occurrence of a crime *is not itself an official action*, even if a police officer writes it down. *Butcher* and *Reilly* also recognized that even while a civilian complaint would not initially be considered an official action, subsequent official actions (such as an investigation) may bring such complaints under the fair report privilege.⁸

⁸ Contrary to the AP's argument, neither *Reilly* nor *Butcher* held that the fair report privilege would apply to the police report itself if it subsequently became "the subject of additional public statements from law enforcement." (Resp't Br. at 48.) *Butcher* simply cited *Jones v. Taibbi*, 400 Mass. 786 (1987), which held that the media would be privileged to report on a police chief's statements at a press conference about a citizen's accusations of murder; but, *Jones* did not hold that the press conference provided the media with carte blanche to report on any previous records related to the accusations. *Butcher*, 94 Mass. App. Ct. at 40 (citing *Jones*, 400 Mass. at 797).

4. *The LVMPD's actions subsequent to the False Police Report did not trigger the absolute fair report privilege.*

The couple steps the LVMPD may have taken after Ms. Kuta filed the False Police Report did not trigger the absolute fair report privilege, as there was no arrest, no investigation, and no criminal proceeding. At most, the fair report privilege may apply to reports about the LVMPD Email, which, charitably viewed, might come close to resembling an official action.⁹ But that is beside any relevant point. The AP Article was not reporting on the LVMPD Email. Even still, sending an email in no way initiated an official proceeding that then falsely cloaked the False Police Report, which was not attached to the LVMPD Email, with the gloss of the fair report privilege. *See Jones*, 400 Mass. at 797 (applying privilege to report of law enforcement press conference's telling of a citizen's accusations of murder rather than to the source material relied upon for the press conference).

As for the other two LVMPD actions, the AP has blatantly misrepresented the record. The AP claims that the LVMPD "encouraged other women to come forward

⁹ At first blush, the Public Information Officer's LVMPD Email could be viewed as an official action because it evinces a public official's discretionary decision to send an email to members of the media informing them that two women filed complaints that would not be investigated, including because the statute of limitations had run—rather than spend the time and resources to field numerous telephone calls and other inquiries from the media. However, when LVMPD issues an official statement, it does so through formal press releases, which are publicly available and can be found online at <https://www.lvmpd.com/en-us/Pages/Press-Releases.aspx> (last visited Aug. 20, 2019). LVMPD did not issue any such formal press release regarding the False Police Report.

if they had similar experiences with Mr. Wynn." (Resp't Br. at 13 (citing 1 J. App. 87).) In fact, an LVMPD officer merely stated that the department "would encourage all victims [of sexual assault] to come forward," regardless of the passing of a statute of limitations. (1 J. App. 87.) There was no suggestion that the officer was seeking out alleged victims of Mr. Wynn. *Id.* At best, the AP is seeking an impermissible inference in its favor to support its skewed reading of the statement.¹⁰

The AP also seeks an impermissible inference that the LVMPD forwarded the False Police Report to Chicago law enforcement. (Resp't Br. at 23 (stating the LVMPD "forwarded it to authorities in Chicago").) The record merely reflects that an LVMPD officer said the report would be forwarded, without any confirmation that it was. (See 1 J. App. 87, 93.) Even if the False Police Report had been forwarded to Chicago authorities, the AP cannot identify any case law holding that such conduct would bring the report within the absolute fair report privilege.

The fact remains that the False Police Report was not part of an investigation (or other official proceeding or action) and thus would not even qualify for the statutory privilege in *Wilson*, which the AP touts as the case most analogous to this

¹⁰ Under the Court's precedent for deciding an anti-SLAPP motion, all evidence and any reasonable inferences derived therefrom must be viewed in a light most favorable to the non-movant. See *John v. Douglas Cnty. Sch. Dist.*, 125 Nev. 746, 753, 219 P.3d 1276, 1281 (2009) (holding that anti-SLAPP motion is treated as a motion for summary judgment); *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (setting forth motion for summary judgment standard).

matter. Under the AP's rationale, the fair report privilege would be triggered whenever the government transmitted any document pursuant to an open records request—which would serve as a wild card to bring most any government document within the privilege. The Court should refuse to expand the fair report privilege in this manner.

5. *The public does not have a heightened interest in the reporting of police documents.*

The AP proposes that the public may have a heightened interest in the reporting of police documents bearing on a decision not to prosecute a case, particularly when the allegations are against "a high-profile and powerful individual." (Resp't Br. at 28.) The AP is implying that public servants can be dissuaded from performing their duty when an individual like Mr. Wynn is the accused—a proposition that many public servants would take issue with and deem offensive.

If anything, high-profile individuals (and public servants themselves) can become the subject of the delusions and obsessions of mentally ill individuals who, like Ms. Kuta, can freely walk into a police station and file a report levying false and heinous accusations. The public has little interest in learning about such false accusations.

And, if the media catches wind that a public figure has somehow convinced public servants to ignore legitimate criminal allegations, the First Amendment's

actual malice standard provides ample leeway to ring the alarm publicly without any liability. The true interest at play is the AP's desire to publish salacious accusations to drive clicks and generate profit, not to provide the public with information about the workings of the government, or for that matter, with the truth.¹¹

B. The AP Article Is Neither Fair, Accurate, Nor Impartial.

The AP Article is far from a fair, accurate, and impartial telling of the False Police Report, including because it increased the defamatory sting by omitting the fanciful and surreal allegations that the rape resulted in Ms. Kuta giving birth to a "purple doll" in a "water bag." In response, the AP's primary arguments are that the birth scenario was a "collateral aspect[] of the underlying . . . report," (Resp't Br. at 48), and that Mr. Wynn's proposed standard would force the media to provide "a verbatim recitation" of an official record. AP's arguments can be responded to in one word: Untrue.

The first sentence of the AP Article puts to rest the notion that the birth was collateral to the rape, as opposed to an integral part of the accusation being made against Mr. Wynn: "A woman told police *she had a child* with casino mogul Steve

¹¹ The AP could have arguably brought itself within the absolute fair report privilege had it covered the LVMPD Email, only. The LVMPD Email did not, however, mention that any woman had alleged a child was born out of a rape. (1 J. App. 93.) For obvious reasons, the AP wanted to depict Mr. Wynn in the most sordid way possible and thus chose to report upon the False Police Report, which used the word "rape" and was run through with vivid details.

Wynn *after he raped her....*" (1 J. App. 28 (emphasis added).) Indeed, the AP attempted to distinguish itself from the other (salacious and untrue) articles that accused Mr. Wynn of sexually assaulting a woman by leading with the attention grabbing statement that this woman claimed to have bore a child out of "rape."

Tellingly, the AP begins its analysis of whether the birth was collateral to the rape by relying on the inapposite case of *Rosenberg v. Helinski*, 616 A.2d 866 (Md. 1992). (Resp't Br. at 45.) In *Rosenberg*, the news report focused on an expert's testimony that a child had been molested by her father, while failing to disclose that in the same hearing, the child's mother had been held in contempt for violating a court order allowing the father to visit the child. *Id.* at 669-71. The court held that the contempt ruling "existed apart" from the expert's testimony about molestation, that "the contempt citation of the mother certainly did not lessen the defamatory sting of that testimony," and that "a report of the mother's motives for inviting the court's displeasure—her wish to protect Jackie from further abuse—might have multiplied the damage" to the father's reputation. *Id.* at 682-83. The AP cannot seriously maintain that *Rosenberg* sheds light on its own conduct. Unlike *Rosenberg*, the AP failed to disclose a central aspect of the statement at issue that bore directly on the truthfulness of the individual providing the statement, as opposed to some other individual.

The AP's reliance on *Oney v. Allen*, 529 N.E.2d 471 (Ohio 1988), is equally confounding. There, the media correctly reported that a named individual had been indicted, although it then became clear that the indictment was wrongful. *Id.* at 474. The article reported only on the legal name of the indicted individual and left out the nickname that had been listed on the indictment—a detail of no apparent import that did not alter the sting of the underlying report. *Id.* Under *Oney*, however, the AP Article is unfair and inaccurate because it fails to "convey[] the essence of" the False Police Report "to the ordinary reader," and is instead "misleading [due to] the exclusion of relevant information in the record." *Id.* at 473. Indeed, the AP Article's first sentence admits that the essence of the False Police Report is that "she had a child with . . . Steve Wynn after he raped her," but then misleads the reader by excluding the fanciful and surreal details about the birth that undercut the truth of the accusation. (1 J. App. 25-31.)

The other two cases the AP discusses in depth miss the mark. *Lawton v. Georgia Television Co.*, 456 S.E.2d 274 (Ga. Ct. App. 1995), involved an accuser who had apparent psychiatric issues, which was at least disclosed in the news article. *Id.* at 278 ("Though James' psychiatric history was not detailed in the broadcast, references were made to her psychiatric treatment."). Here, the AP hid every detail that revealed Ms. Kuta had psychiatric issues that bore upon the accusations.

Likewise, the article in *Dorsey v. National Enquirer, Inc.*, 973 F.2d 1431 (9th Cir. 1992), discussed the allegations from an affidavit but did not include a detail from another court document that was not accessible to the media. *Id.* at 1438. In this instance, Ms. Kuta's fanciful and surreal description of the resulting childbirth was part of the record that was being discussed, was indisputably in the AP's hands, and struck directly at the heart of the accusations against Mr. Wynn.

After discussing case law, the AP trots out its straw man argument, which ignores both Mr. Wynn's arguments and the law. The AP laments that if "the news media [were] responsible for reporting verbatim every collateral matter potentially relevant to the credibility of allegations . . . , it is hard to imagine how a news organization could ever report on [official actions and proceedings]." (Resp't Br. at 50-51.) This hyperbolic proposition deflects from the real inquiry.

As Mr. Wynn discussed in his Opening Brief, verbatim recitation would have been sufficient to meet the requirements of fairness and accuracy, but it was not necessary. The problem is that the AP Article makes no attempt to describe the four fantastical sentences in the False Police Report that detail the surreal birth. The fanciful and delusional birth scenario was central to the gist of the AP Article; it was relevant (without qualification), and it indisputably spoke to whether the allegations were fiction. The issue here is not that the AP failed to report the fantastical birth scenario verbatim. It is that the AP described in detail the rape allegations in the

False Police Report, while excluding any discussion of the lengthy allegations that described a facially impossible birth scenario that was the supposed result of the rape. In that respect, the AP has made the question of fairness straightforward. The Court need not determine how detailed the AP's description of the four sentences would need to be to be fair; rather, it need only find that because the AP provided no description, the fair report privilege does not apply.¹²

The AP caps off its analysis by misrepresenting the impartiality requirement, arguing that Mr. Wynn must show that the AP Article endorsed the accuracy of the False Police Report. (Resp't Br. at 44.) But, impartiality can be shown in many ways, including when "[t]he element of balance and neutrality is missing." *Lubin v. Kunin*, 117 Nev. 107, 115, 17 P.3d 422, 428 (2001) (quoting *St. v. Nat'l Broad. Co.*, 645 F.2d 1227, 1233 (6th Cir.1981)).

The AP Article was far from impartial, balanced, or neutral. Its one-sided narrative endorsed the allegations in the False Police Report by packing the AP Article with unrelated and unproven allegations of sexual misconduct against Mr. Wynn. (1 J. App. 28-31.) The message is clear to the reader: the False Police Report

¹² The AP incorrectly argues that the issue of fairness, accuracy, and impartiality is to be decided as a matter of law. However, because there is a genuine dispute as to whether the report the LVMPD provided to the AP stated that the accuser was Mr. Wynn's spouse, the issue should be left to a jury. *See Dorsey v. Nat'l Enquirer, Inc.*, 973 F.2d 1431, 1434 (9th Cir. 1992).

must be true because other people have made accusations against Mr. Wynn. The AP's lack of balance and neutrality is further shown by its detailed coverage of the allegations in the False Police Report that lent credence to Ms. Kuta's accusations, and its complete exclusion of allegations that undermined the report's veracity.

The AP then invents an escape hatch for the impartiality requirement by arguing that true statements cannot be part of the analysis. (Resp't Br. at 51 (citing *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 715, 57 P.3d 82, 88 (2002)).) The AP is blatantly grafting the falsity element as to the defamatory statement itself onto the distinct impartiality analysis for the fair report privilege—a leap that has no support in precedent. Moreover, the AP's attempt to paint the other accusations against Mr. Wynn as "true" is highly misleading. While accusations may have been made, they are unproven hearsay and far from true. In the final analysis, the AP Article carefully cherry-picked allegations from the record of Mr. Wynn's life to lend credence to the False Police Report, thereby abandoning the fair report privilege.

C. The District Court Prematurely Applied the Anti-SLAPP Statute.

The district court disregarded its own order, per the parties' stipulation, to bifurcate the proceeding and only address the "consider[ation of] the fair report privilege under the Nevada Anti-SLAPP Statute"—which was an inquiry under the second prong of the Anti-SLAPP Statute. The district court's order never stated, and Mr. Wynn never conceded, that the AP had satisfied its burden under the first prong

of showing that the Anti-SLAPP Statute applied: *i.e.*, that the AP "established, by a preponderance of the evidence, that [Mr. Wynn's] . . . claim is based upon a good faith communication in furtherance of . . . the right to free speech in direct connection with an issue of public concern." N.R.S. 41.660 (3)(a).

After the stipulated order was entered, Mr. Wynn filed his response to the AP's Anti-SLAPP Motion in which he expressly reserved the right to challenge the AP's showing under the first prong. (1 J. App. 146 at n. 7.) Then, at the hearing on the Anti-SLAPP Motion, both parties acknowledged that the only issue before the district court was whether the fair report privilege shielded the AP Article. (1 J. App. 238, lines 11-15; 1 J. App. 248, Line 20-1 J. App. 249, line 3.)

The district court's decision to disregard its own order on the parties' stipulation should not stand, particularly because the AP may be unable to establish that it published the article in good faith. The AP likely knew that the allegations in the

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False Police Report were fake, including because of the impossible birth scenario and the report stating that the victim was Mr. Wynn's spouse.¹³

III. CONCLUSION

For the reasons set forth above and in Mr. Wynn's Opening Brief, the Court should find as a matter of law that the fair report privilege does not extend to the AP Article's statements about the False Police Report. Alternatively, the Court should find, as a matter of law, that because the AP Article is neither fair, accurate, nor impartial, the fair report privilege does not apply. Finally, the Court should hold that the district court erred when it found that the anti-SLAPP statute applied. Thus, this

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¹³ The AP inappropriately asks this Court to make inferences in its favor to resolve a factual dispute over whether it ever obtained a version of the False Police Report stating that "Victim Was Spouse"—as opposed to the redacted version attached to Defendant Cano's affidavit. (Resp't Br. at 13-14 n.12.) The fact is that the LVMPD stated that "[a]ll documents that were provided [to the press] were exactly the same." (1 J. App. 194-95.) The AP wrongly asks the Court to draw "the logical conclusion" and "obvious conclusion" that Ms. Cano did not receive an unredacted copy, as if an inference by another name is not an inference. (Resp't Br. at 13-14 n.12.) Instead, under the Court's precedent for deciding an anti-SLAPP motion, all evidence and any reasonable inferences derived therefrom must be viewed in a light most favorable to the non-movant, here Mr. Wynn. (*See* Section II(A)(4) at n.10, *supra*.) The Court should refuse to resolve the factual dispute over whether Ms. Cano obtained an unredacted version of the False Police Report in the AP's favor.

Court should reverse the district court's decision to grant the anti-SLAPP Motion, and remand this action for further proceedings.

Respectfully submitted this 21st day of August, 2019.

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CERTIFICATE OF COMPLIANCE

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word in double-spaced, 14-point Times New Roman.

I further certify that this brief complies with the type-volume limitations of NRAP 29(e) and 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 6,877 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief 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 brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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Pursuant to NRAP 21(a)(1), I certify that the foregoing **APPELLANT'S**
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