IN THE SUPREME COURT OF THE STATE OF NEVADA

TON VINH LEE, AN INDIVIDUAL, Appellant, vs. INGRID PATIN, AN INDIVIDUAL; AND PATIN LAW GROUP, PLLC, A NEVADA PROFESSIONAL, PLLC, Respondents.	No. 82516

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Docket 82516 Document 2021-30981

NRAP 26.1 DISCLOSURE

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

1. Ingrid Patin is an individual.

2. Patin Law Group, PLLC is a Nevada professional corporation and has no parent company or publicly held company that owns ten percent or more of its stock.

3. Nettles Morris Law Firm represented both Ingrid Patin and Patin Law Group, PLLC before the district court. Nettles Morris represents Ingrid Patin before this court.

4. Kerry J. Doyle of Doyle Law Group represented Patin Law Group, PLLC before the district court.

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5. Claggett & Sykes Law Firm represents both Ingrid Patin and Patin Law Group, PLLC before this court.

DATED this 27th day of October 2021.

CLAGGETT & SYKES LAW FIRM

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ISSUES PRESENTED FOR REVIEW

Whether the district court erred in granting respondents' motion for summary judgment under the fair report privilege.

Alternatively, whether the district court erred in granting respondents' motion for summary judgment because appellant failed to demonstrate the at-issue post was false.

STATEMENT OF THE CASE

This is an appeal from a district court order granting summary judgment in favor of respondents Ingrid M. Patin, Esq. and Patin Law Group, PLLC (Patin). Patin posted a statement on her law firm's website, summarizing a verdict that she obtained for her clients in a professional negligence/wrongful death matter against appellant Dr. Ton Vinh Lee, D.D.S.'s, dental office. 2 AA 283. Dr. Lee filed a defamation complaint, alleging that Patin's statement was defamatory and caused him damages per se. 1 AA 198-201. Patin ultimately moved for summary judgment, arguing, among other things, that the fair report privilege protected the post because it was a fair and impartial summary of the underlying judicial proceeding. 5 AA 1026-47. The district court granted Patin's motion, finding that the statements contained within the

post were a fair and impartial reporting of the underlying judicial proceeding, and concluding that the fair report privilege applied to the post. 6 AA 1237-41. Dr. Lee appeals. 9 AA 1686-90.

STATEMENT OF RELEVANT FACTS

I. *Singletary v. Ton Vinh Lee, DDS, No. A-12-656091-C, 2017 Nev. Dist. LEXIS 826 (Nev. Dist. Ct. Jan. 22, 2014)*

In 2011, Reginald Singletary went to Summerlin Smiles, a dental office which Dr. Lee owns, for a wisdom tooth extraction. 1 AA 216, 234-35. Dr. Florida Traivai, D.M.D., an independent contractor of Summerlin Smiles, performed the extraction. *Id*. at 235. Following the extraction, Reginald experienced severe pain, swelling, difficulty swallowing, difficulty speaking, difficulty breathing, and vomiting. *Id*. Five days after the extraction, an ambulance took Reginald to the emergency room, and the hospital admitted him into the intensive care unit. *Id*. Reginald died four days later. *Id*.

Reginald's widow, Svetlana, filed a professional negligence/wrongful death complaint against Drs. Lee and Traivai and

Summerlin Smiles.[1] *Id.* at 216. Patin served as legal counsel for the Singletary family. *Id.* The jury ultimately found that Dr. Travai and Summerlin Smiles were negligent in caring for Reginald and awarded the Singletary family $3,470,000 in damages before factoring in Reginald's comparative fault. *Id.* at 220-21, 229-31.

Summerlin Smiles moved for judgment as a matter of law under NRCP 50(b), arguing that Svetlana failed to present expert witness testimony demonstrating that Dr. Travai and Summerlin Smiles fell below the standard of care in treating Reginald. *Id.* at 6-28. The district court granted the motion, vacating the jury verdict. *Id.* at 183-94. This court reversed, reinstating the jury verdict. *Singletary v. Lee*, Docket No. 66278, 2016 Nev. Unpub. LEXIS 887 at *4 (Order Affirming in Part, Reversing in Part & Remanding, Oct. 17, 2016).

II. *Patin's post, Dr. Lee's complaint, and Dr. Lee's deposition*

Following the *Singletary* jury verdict, Patin published the at-issue post on her law firm's website:

> DENTAL MALPRACTICE/WRONGFUL DEATH – PLAINTIFF'S VERDICT $3.4M, 2014

[1]Svetlana also named Dr. Jai Park, D.D.S., as a defendant. 1 AA 216. The jury ultimately concluded that Dr. Park was not negligent in caring for Reginald. *Id.* at 219, 222.

> Description: Singletary v. Ton Vinh Lee, DDS, et al.
>
> A dental malpractice-based wrongful death action that arose out of the death of Decedent Reginald Singletary following the extraction of the No. 32 wisdom tooth by Defendants on or about April 16, 2011. Plaintiff sued the dental office, Summerlin Smiles, the owner, Ton Vinh Lee, DDS, and the treating dentists, Florida Traivai, DMD and Jai Park, DDS, on behalf of the Estate, herself and minor son.

2 AA 283. Dr. Lee filed a complaint for defamation, alleging that Patin's post was false, imputed that he was not fit to be a dentist, and injured his business. 1 AA 198-201; 2 AA 349-53, 358-61. At various stages in the litigation, and through various motions, Patin argued that the post was true, was not capable of defamatory construction, and was not subject to defamation liability under the fair report privilege. *See* 1 AA 203-13, 244-60, 363-79, 456-67, 474-90; 3 AA 492-505, 588, 590-91, 596, 615-35. Dr. Lee averred that the post was demonstrably false because a reasonable person could read it and infer that Dr. Lee caused Reginald's death. *Id.* at 593-95.

During his deposition, Dr. Lee admitted that the following parts of the at-issue post were true: (1) the underlying matter was a dental malpractice-based wrongful death action; (2) the case caption was

correct; (3) the action arose from Reginald's death; (4) Reginald's death followed the defendants' extraction of his tooth; (5) the extraction occurred on April 16, 2011; (6) Svetlana sued Summerlin Smiles and Drs. Lee, Traivai, and Park; and (7) Svetlana sued on behalf of Reginald's estate, herself, and her minor son. 5 AA 989-90. When asked whether *Singletary* resulted in a verdict of $3.4 million for the Singletary family, Dr. Lee responded that he did not know the amount. *Id.* at 989. When asked which specific part of the at-issue post was untrue, Dr. Lee responded, "It's the whole or the sum and not just the parts." *Id.* at 990.

III. *Patin's motion for summary judgment*

Following Dr. Lee's deposition, Patin moved for summary judgment,[2] arguing that the fair report privilege applied to the at-issue

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[2]Patin previously moved for dismissal or, alternatively, for summary judgment on numerous occasions following various material developments as the case progressed in the district court. Patin first moved for dismissal or, alternatively, summary judgment, 1 AA 203-13; and moved for dismissal under NRS 41.660 (providing that a defendant may file an anti-SLAPP special motion to dismiss when the plaintiff brings suit "based upon a good faith communication in furtherance of . . . the right to free speech in direct connection with an issue of public concern"), 2 AA 244-60. She then moved for dismissal or, alternatively, for summary judgment as to herself as an individual since her law firm published the at-issue post. *Id.* at 327-34.

After Dr. Lee filed his second amended complaint, *id.* at 358-61, Patin again moved for dismissal under NRS 41.660, *id.* at 363-79.

post, thereby precluding any defamation liability. *Id.* at 1026-47. Specifically, Patin argued that *Singletary* was a judicial proceeding and that the at-issue post was a fair and impartial summary of the same. *Id.* Additionally, Patin argued that the at-issue post was true, precluding defamation liability. *Id.*

Dr. Lee opposed, asserting that the fair report privilege did not apply to the at-issue post because the at-issue post was not impartial since Patin published it on her website for her financial gain. 6 AA 1202-15. Dr. Lee also contended that the at-issue post was not a complete, fair, or accurate report of *Singletary* because it did not mention that the jury found that he, personally, was not liable. *Id.* Dr. Lee also averred that the district court could not review the truth of each sentence in the statement, but rather it had to review the entirety of the statement in context. *Id.* Dr. Lee also asserted that he made a prima facie case for

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After this court reinstated the *Singletary* jury verdict, and after the Hon. Jennifer P. Togliatti, D.J., recused herself and the Hon. Gloria Sturman, D.J., assumed jurisdiction over the matter, 3 AA 599, Patin again moved for summary judgment, *id.* at 492-505. Patin then moved for summary judgment, arguing that truth is an absolute defense to defamation. *Id.* at 615-35. Finally, Patin moved for dismissal under NRCP 16.1(e)(1) (providing a defendant may move for dismissal when the plaintiff fails to participate in an early case conference). 5 AA 945-50.

defamation per se. *Id.* To support his opposition to Patin's motion for summary judgment, Dr. Lee only included the district court's two prior orders denying Patin's first motion for summary judgment and denying Patin's anti-SLAPP special motion to dismiss. *Id.* at 1217-27.

The district court ultimately granted Patin's motion for summary judgment under the fair report privilege. *Id.* at 1237-41. The district court found that Dr. Lee admitted that each line of the at-issue post, except for the line regarding the verdict, was true. *Id.* at 1238-39. The district court further found that *Singletary* resulted in a jury verdict of $3.4 million for the Singletary family. *Id.* at 1239. Thus, the district court concluded that the at-issue post was a fair and impartial summary of *Singletary* and that the fair report privilege applied. *Id.* at 1239-40. The district court, again relying upon Dr. Lee's admissions, concluded that Dr. Lee failed to present a prima facie defamation case.[3] *Id.* at 1240.

[3]Dr. Lee moved for reconsideration, 6 AA 1251-65, and to alter or amend the judgment, 8 AA 1598-612. The district court denied both motions. *Id.* at 1645-47; 9 AA 1818-19.

ARGUMENT

I. *Standard of review*

"This court reviews an order granting summary judgment de novo." *Cuzze v. Univ. & Cmty. Coll. Sys.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007). Summary judgment is appropriate "when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005). The movant "bears the initial burden of production to show the absence of a genuine issue of material fact." *Cuzze*, 123 Nev. at 602, 172 P.3d at 134. Once made, the nonmovant "assumes a burden of production to show the existence of a genuine issue of material fact." *Id.*

When the nonmovant bears the burden of persuasion at trial, the movant "may satisfy the burden of production by either (1) submitting evidence that negates an essential element of the nonmoving party's claim or (2) pointing out . . . that there is an absence of evidence to support the [nonmovant's] case." *Id.* at 602-03, 172 P.3d at 134 (internal quotations omitted). If the movant makes such a showing, the nonmovant, "in order to defeat summary judgment, . . . must transcend

the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact." *Id.* at 603, 172 P.3d at 134.

While this court construes the pleadings and other proof in a light most favorable to the nonmovant, the nonmovant must "do more than simply show that there is some metaphysical doubt as to the operative facts." *Wood*, 121 Nev. at 732, 121 P.3d at 1031 (internal quotations omitted). Indeed, this court expressly abrogated the slightest doubt standard,[4] noting that the nonmovant "is not entitled to build a case on the gossamer threads of whimsey, speculation, and conjecture." *Id.* (internal quotations omitted). Rather, the nonmovant must produce

[4]Although this court abrogated the slightest doubt standard 16 years ago, *Wood*, 121 Nev. at 732, 121 P.3d at 1031, Dr. Lee nonetheless argues that the slightest doubt standard applies to the instant appeal. AOB 9, 15. This court has repeatedly stated that it expects counsel to pursue appellate relief "with high standards of diligence, professionalism, and competence." *Miller v. Wilfong*, 121 Nev. 619, 625, 119 P.3d 727, 731 (2005). Indeed, Nevada lawyers have a duty of competency to their client and a duty of candor to this court. *See* RPC 1.1 (requiring a lawyer to have "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation"); RPC 3.3 (prohibiting a lawyer from knowingly "mak[ing] a false statement of . . . law to a tribunal" and failing to correct the same).

sufficient evidence "such that a rational trier of fact could return a verdict for the [nonmovant]." *Id.* at 731, 121 P.3d at 1031.

"The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant." *Id.* To prevail on his defamation claim, Dr. Lee must present evidence of: "(1) a false and defamatory statement by [Patin] concerning [Dr. Lee]; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages." *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 718, 57 P.3d 82, 90 (2002) (internal quotations omitted). To defeat a defamation claim under the fair report privilege, Patin must demonstrate that the at-issue publication was an "accurate and complete or fair abridgment" of an official action or proceeding. *Wynn v. Associated Press*, 136 Nev., Adv. Op. 70, 475 P.3d 44, 48 (2020).

II. *The district court correctly applied the fair report privilege to Patin's post*

This court "has long recognized a special privilege of absolute immunity from defamation given to the news media and the general public to report newsworthy events in judicial proceedings." *Sahara Gaming Corp. v. Culinary Workers Union Local 266*, 115 Nev. 212, 215,

984 P.2d 164, 166 (1999). The rationale for the fair report privilege is "that members of the public have a manifest interest in observing and being made aware of public proceedings and actions." *Wynn v. Smith*, 117 Nev. 6, 14, 16 P.3d 424, 429 (2001). To fall within the privilege, the publication must "be fair, accurate, and impartial," *Sahara Gaming Corp.*, 115 Nev. at 215, 984 P.2d at 166, or the publication must contain a specific attribution referencing an underlying public proceeding or action, *Adelson v. Harris*, 133 Nev. 512, 516, 402 P.3d 665, 668 (2017). Dr. Lee does not, nor could he, argue that *Singletary* was not a judicial proceeding. Thus, the dispositive question before this court is whether the at-issue post was fair, accurate, and impartial, or whether the at-issue post contains a specific attribution to an underlying public proceeding or action.

A. *The at-issue post was a fair, accurate, and impartial summary of Singletary*

This court first addressed whether a publication was a fair, accurate, and impartial report of a judicial proceeding under the fair report privilege in *Lubin v. Kunin*, 117 Nev. 107, 17 P.3d 422 (2001). In so doing, this court relied upon three federal circuit court decisions. *Id.* at 114-15, 17 P.3d at 427-28. Also, this court has consistently relied upon

the *Restatement (Second) of Torts* § 611 (Am. Law Inst. 1977) in developing Nevada's fair report privilege jurisprudence. *See Wynn*, 136 Nev., Adv. Op. 70, 475 P.3d at 47-50 (looking to § 611 for guidance as to whether a citizen's complaint to law enforcement falls within the fair report privilege); *Wynn*, 117 Nev. at 14, 16 P.3d at 429 (looking to § 611 for guidance as to whether an unofficial report falls within the fair report privilege). This answering brief addresses each in turn.

1. *Nevada jurisprudence*

In *Lubin*, a group of parents filed a complaint against the owner of a parochial school and others, alleging "child abuse, assault, battery, negligence, and other causes of action." *Id*. at 109-10, 17 P.3d at 424. Shortly thereafter, the parents "distributed various letters and handouts to [other] parents, local newspapers, and public officials regarding" the lawsuit. *Id*. at 109, 17 P.3d at 424. The handout stated, "***This is not a frivolous law suit*** [sic] ***there is an abundance of evidence as well as eye-witnesses.*** These parents never envisioned that anything of this nature could or would happen to their child. **IT DID!** It is time to protect our children." *Id*. at 110, 17 P.3d at 424 (emphasis in original). The school's director filed a defamation suit

against the parents, and the parents moved to dismiss citing, among other defenses, the fair report privilege. *Id.* at 110, 17 P.3d at 425. The district court granted dismissal. *Id.*

On appeal, this court rejected the district court's application of the fair report privilege. *Id.* at 114-15, 17 P.3d at 427-28. First, this court noted that whether a publication is a fair, accurate, and impartial summary of an underlying proceeding is a question of law for the district court where there is no dispute about what happened in the underlying proceeding or what the publication contains. *Id.* at 114-15, 17 P.3d at 427 (citing *Dorsey v. Nat'l Enquirer, Inc.*, 973 F.2d 1431, 1435 (9th Cir. 1992)). Next, this court reviewed the statement in the letters and handouts. *Lubin*, 117 Nev. at 115, 17 P.3d at 427-28. This court held that the statement in the letters "went beyond fair, accurate, and impartial reporting of the child abuse complaint" because it presented "a one-sided view of the action." *Id.* at 115, 17 P.3d at 427. Since the underlying proceeding was still in its early stages, and the fact finder had yet to determine what occurred, the fair report privilege could not apply to the statement in the letters, as the parents had "don[ned] [themselves]

with the judge's mantle, crack[ed] the gavel, and publish[ed] a verdict through its [letters]" by asserting that the alleged abuse occurred. *Id.*

Here, there is no dispute as to what occurred in *Singletary*. There is also no dispute as to the text of the at-issue post. Thus, this court may properly review, as a matter of law, whether the fair report privilege applies to the at-issue post.[5] The at-issue post does not contain any assertions of opinion that go beyond what occurred in *Singletary*. Rather, the at-issue post merely names the nature of the case, the amount of the eventual judgment, the case caption, the essential facts of the case, and each defendant and their relation to the case. 2 AA 283. Indeed, the at-issue post specifically states that Dr. Lee was a named

[5]Dr. Lee's reliance upon *Circus Circus Hotels v. Witherspoon*, 99 Nev. 56, 657 P.2d 101 (1983), and *Bull v. McCuskey*, 96 Nev. 706, 615 P.2d 957 (1980), is misplaced. As this court has noted, Nevada's judicial proceedings privilege "protects different actors and promotes different interests than the fair report privilege." *Wynn*, 136 Nev., Adv. Op. 70, 475 P.3d at 49 n.4. As *Circus Circus Hotels*, 99 Nev. at 61, 657 P.2d at 105 (applying the judicial proceedings privilege to allegedly defamatory statements made during an Employment Security Department hearing), and *Bull*, 96 Nev. at 712, 615 P.2d at 961 (applying the judicial proceedings privilege to allegedly defamatory statements made by an attorney during trial), concern the judicial proceedings privilege, they are inapposite to the instant fair report privilege matter, *see Wynn*, 136 Nev., Adv. Op. 70, 475 P.3d at 49 n.4 (declining to apply the judicial proceedings privilege to resolve a fair report privilege matter).

defendant in *Singletary* because he owned the dental office that performed the wisdom tooth extraction. 2 AA 283. The at-issue post further states that Dr. Lee did not perform the extraction, as it specifically identifies the treating dentists as Drs. Traivai and Park. *Id*. Thus, under *Lubin*, the at-issue post did not go beyond a fair, accurate, and impartial report of *Singletary* because it did not present a one-sided view of the action, nor did it include any assertions that the *Singletary* record did not support.

2. *Relied upon federal authority*

In addressing whether the fair report privilege applied to the at-issue letters in *Lubin,* this court relied upon three federal circuit court opinions. 117 Nev. at 114-15, 17 P.3d at 427-28. Read together, those authorities support the district court's grant of summary judgment.

In *Dorsey*, a magazine published an article based upon a mother's reply affidavit from a family court matter. 973 F.2d at 1433. The affidavit requested that the father purchase life insurance, characterizing it as a "dire necessity," because "the [father] ha[d] AIDS related syndrome and ha[d] been treated . . . in New York." *Id.* The magazine obtained the affidavit and "published an article that

highlighted the . . . allegation that [the father] carrie[d] the AIDS virus." *Id.* The magazine's front page displayed a photo of the father with the headline "*Mother of His Child Claims in Court . . . [Father] Has AIDS Virus*." *Id.* (internal quotations omitted). The actual article bore the headline "*Mom of Superstar Singer's Love Child Claims in Court . . . [Father] Has AIDS Virus*." *Id.* (internal quotations omitted). The article quoted the affidavit twice and quoted the mother as saying, "I never would have filed the court papers if I wasn't 100 percent convinced he ha[d] the AIDS virus." *Id.* (internal quotations omitted). The article also included the statement of an investigator asserting that the father had AIDS. *Id.* Additionally, the article stated that the father's attorney "said there was no truth whatsoever to the charge that the singer has the AIDS virus and called it an utter fabrication." *Id.* (internal quotations omitted). Finally, the article included a picture of the father with the caption "*[FATHER] DENIES* he has the AIDS virus." *Id.* (internal quotations omitted). The father filed a defamation claim, and the magazine moved for summary judgment, which the district court granted under the fair report privilege. *Id.*

On appeal, the Ninth Circuit Court of Appeals affirmed the district court's grant of summary judgment under the fair report privilege. *Id.* at 1438. While the court noted that the article included statements from the mother and investigator that the affidavit did not include, it nonetheless concluded that the article was a "fair and true" summary of the mother's affidavit because the statements did not "go beyond the gist or sting of the affidavit." *Id.* at 1436-37. Thus, because the article carried the same gist or sting as the underlying affidavit, the fair report privilege applied.

The two other federal circuit court cases that this court relied upon in *Lubin* demonstrate when the fair report privilege does not apply to a publication because it is not a fair and true report of an official report or proceeding. 117 Nev. at 115, 17 P.3d at 428.

In *Brown & Williamson Tobacco Corp. v. Jacobson*, a television station aired a news broadcast, alleging that a tobacco manufacturer adopted a marketing strategy from an advertising firm to entice children to smoke. 713 F.2d 262, 265-66 (7th Cir. 1983). The broadcast was based off a Federal Trade Commission (FTC) investigation into cigarette advertising and subsequent report on the same. *Id.* The

tobacco manufacturer filed a defamation complaint, and the television station moved for dismissal, which the district court granted under the fair report privilege. *Id.* at 266-67. The Seventh Circuit Court of Appeals reversed, concluding that the broadcast was an unfair summary of the FTC report because it carried a greater defamatory sting. *Id.* at 271-72. Specifically, the court contrasted the messages of the FTC report and the broadcast:

> The FTC staff report conveys the following message: six years ago a market-research firm submitted to [the manufacturer] a set of rather lurid proposals for enticing young people to smoke cigarettes and [the manufacturer] adopted many of its ideas (though not necessarily the specific proposals quoted in the report) in an advertising campaign aimed at young smokers which it conducted the following year. The . . . broadcast conveys the following message: [the manufacturer] currently is advertising cigarettes in a manner designed to entice children to smoke by associating smoking with drinking, sex, marijuana, and other illicit pleasures of youth.

Id. at 271. Thus, the court concluded that a rational juror could determine that the broadcast carried a greater sting than the FTC report and was thus unfair. *Id.* at 271-72.

In *Street v. National Broadcasting Co.*, a television station broadcast a historical drama about an infamous rape trial that occurred

in Alabama 40 years prior. 645 F.2d 1227, 1229 (6th Cir. 1981). The drama portrayed the prosecutrix and lead witness of the rape trial "as a woman attempting to send nine innocent [African-Americans] to the electric chair for a rape they did not commit." *Id*. The prosecutrix filed a defamation complaint, and the television station raised the fair report privilege, among others, as a defense.[6] *Id*. On appeal, the Sixth Circuit Court of Appeals concluded that the fair report privilege did not apply to the drama. *Id*. at 1233. The court noted that the television station did not express the drama "as a matter of opinion" and did not inform the viewer that the drama constituted the station's "opinion about the character and actions of [the prosecutrix]." *Id*. Rather, the station presented the drama "as concrete fact." *Id*. Thus, the drama's omission of witnesses that corroborated the prosecutrix, emphasis on portions of the trial that showed the prosecutrix "as a perjurer and promiscuous woman," and use of "flashbacks consistently show[ing] [the prosecutrix's] conduct in a derogatory light" precluded application of the fair report

[6]The district court ultimately entered a directed verdict for the television station on alternative grounds. *Street*, 645 F.2d at 1229.

privilege because the required "element of balance and neutrality" was absent. *Id.*

Synthesizing the federal circuit court caselaw, a summary of an official proceeding or report is fair and true if it carries the same gist or sting as the original official proceeding or report, *Dorsey*, 973 F.2d at 1436-37; *Brown*, 713 F.2d at 271-72, or constitutes a balanced and neutral portrayal of the same, *Street*, 645 F.2d at 1233. Thus, the fair report privilege does not apply to a publication that misstates facts, *Brown*, 713 F.2d at 271, or that omits some facts and emphasizes others, *Street*, 645 F.2d at 1233, such that the publication carries a greater sting than the underlying report.

Here, the at-issue post contains no misstatements of fact. *Compare* 1 AA 1-5, 215-162 *with* 2 AA 283. Indeed, Dr. Lee admitted that each sentence of the at-issue post was true except for the sentence about the jury verdict amount, which he could not remember. 5 AA 989-90. The district court found that the sentence about the jury verdict amount was true. 6 AA 1235. Thus, there are no misstatements of fact such that *Brown* would apply.

Furthermore, the at-issue post does not carry a greater gist or sting than the underlying *Singletary* matter. If a reasonable juror read all the motion practice, transcripts, and verdict from *Singletary*, he or she would learn that: Reginald died following a wisdom tooth extraction, the extraction occurred at Summerlin Smiles, Dr. Lee owns Summerlin Smiles, Dr. Traivai performed the extraction, the jury found Summerlin Smiles and Dr. Traivai liable for Reginald's death, and the jury awarded the Singletary family $3,470,000 in damages before assessing comparative fault. 1 AA 216, 220-21, 229-31, 234-35. Thus, as to Dr. Lee, the defamatory gist or sting of the *Singletary* matter is that he owned a dental practice that a jury found liable for a wrongful death sounding in professional negligence. The at-issue post carries the same defamatory gist or sting, as it specifically states that Svetlana sued Dr. Lee in his capacity as the owner of Summerlin Smiles. 2 AA 283. The at-issue post further distinguishes Dr. Lee from the treating dentists that performed Reginald's extraction. *Id*. Accordingly, the at-issue post carries the same defamatory gist or sting as the *Singletary* matter such that the fair report privilege applies. *Dorsey*, 973 F.2d at 1436-37; *cf. Street*, 645 F.2d at 1233.

3. *Restatement (Second) of Torts § 611, comment f and relied upon authority*

When analyzing fair report privilege jurisprudence, this court has consistently relied upon the *Restatement (Second) of Torts* § 611. *See See Wynn*, 136 Nev., Adv. Op. 70, 475 P.3d at 47-50; *Wynn*, 117 Nev. at 14, 16 P.3d at 429. Section 611, comment f provides:

> The rule stated in this Section requires the report to be accurate. It is not necessary that it be exact in every immaterial detail or that it conform to that precision demanded in technical or scientific reporting. It is enough that it conveys to the persons who read it a substantially correct account of the proceedings.
>
> Not only must the report be accurate, but it must be fair. Even a report that is accurate so far as it goes may be so edited and deleted as to misrepresent the proceeding and thus be misleading. Thus, although it is unnecessary that the report be exhaustive and complete, it is necessary that nothing be omitted or misplaced in such a manner as to convey an erroneous impression to those who hear or read it, as for example a report of the discreditable testimony in a judicial proceeding and a failure to publish the exculpatory evidence, or the use of a defamatory headline in a newspaper report, qualification of which is found only in the text of the article. The reporter is not privileged under this Section to make additions of his own that would convey a defamatory impression, nor to impute corrupt motives to any one, nor to indict expressly or by innuendo the veracity or integrity of any of the parties.

Restatement (Second) of Torts (Am. Law Inst. 1977). The cited caselaw supporting comment f is instructive.

a) *Substantial accuracy*

In determining whether a report is accurate, Section 611, comment f requires substantial accuracy. *Cf. Hartzog v. United Press Ass'ns*, 202 F.2d 81, 82-84 (4th Cir. 1953) (declining application of the fair report privilege where the newspaper erroneously reported that police forcibly removed a member of a political party committee at the request of another committee member); *Atlanta News Publ'g Co. v. Medlock*, 51 S.E. 756, (Ga. 1905) (declining application of the fair report privilege to a publication that erroneously reported that a company bribed witnesses to falsely testify); *Whitcomb v. Hearst Corp.*, 107 N.E.2d 295, 297-99 (Mass. 1952) (declining application of the fair report privilege to a publication erroneously identifying the wrong man that a military court found guilty of removing valuables from a house in Germany, sentenced to two years hard labor, and dismissed from the military).

For example, in *Hopkins v. Keith*, the court noted that "[n]ot every error or inaccuracy should be actionable." 348 So. 2d 999, 1002 (La. App. 1977). Rather, only "significant variation[s] from the truth [may]

give rise to liability." *Id.* To hold otherwise would create a chilling effect on First Amendment rights. *Id.* Thus, the fair report privilege applied to a newspaper article erroneously reporting that a man had a "convict[ion] for running a gambling game" where the man actually forfeited a substantial bond "on a charge of letting a disorderly house, arising out of allowing gambling on the premises." *Id.* While the article and the truth had significant legal distinctions, the court could not overlook the similarities between the two in the mind of a layperson. *Id.*

Similarly, in *Dudley v. Farmers Branch Daily Times*, the court affirmed a trial court's grant of summary judgment on fair report privilege grounds. 550 S.W.2d 99, 101 (Tex. App. 1977). There, the state charged a man with stealing 62,660 pounds of polyethylene pellets and scrap, with a total value of $6,655.50, from the personal property of another man. *Id.* at 100. A newspaper covered the story, reporting that the state charged two men with stealing $168,000 worth of polyethylene resin from a plant. *Id.* Despite the difference between the article and the facts, the court concluded that the fair report privilege applied to the article. *Id.* at 100-01.

Finally, in *Boogher v. Knapp*, the court affirmed a jury verdict in favor of a newspaper on fair report privilege grounds. 11 S.W. 45, 47 (Mo. 1888). There, the state filed two informations against a defendant, alleging malicious conspiracy to libel and malicious libel. *Id.* at 45-46. The defendant received a guilty verdict and a one dollar fine on the first charge. *Id.* at 46. He moved for a new trial, which the court granted pending resolution of his second charge. *Id.* He received a guilty verdict, a $150 fine, and 2 months imprisonment on his second charge. *Id.* He moved for a new trial as to the second charge, which the court denied. *Id.* A newspaper published an article on the matter, erroneously stating that the defendant received a guilty verdict on both offenses, the court granted the defendant's motion for a new trial, and the defendant received a guilty verdict in the second trial. *Id.* The article further stated that the defendant received a $150 fine and 60 days imprisonment. *Id.* The court upheld the jury verdict on fair report privilege grounds, noting that the privilege applied to reports that are "a fair and impartial report of what took place with reference to its effect on [the defendant's] character." *Id.* at 47. Thus, because "it [was] evident the report in no way changed the

affair from the complexion it wore upon the record," the court affirmed. *Id.*

Here, the at-issue post is substantially accurate under the *Restatement (Second) of Torts* § 611, cmt. f. The at-issue post contains no significant variation from the truth such that a lay person could reasonably conclude that Dr. Lee caused Reginald's death. *See Hopkins*, 348 So. 2d at 1002. Indeed, the at-issue post expressly states that Svetlana sued Dr. Lee in his capacity as the owner of Summerlin Smiles, not as the dentist that extracted Reginald's wisdom tooth. 2 AA 283. As such, the at-issue post has the same impact on Dr. Lee as a verbatim recital of the *Singletary* matter would have. Dr. Lee's attempt to characterize the at-issue post as false because the *Singletary* jury did not find him personally liable for Reginald's death is unavailing sophistry, as a lay person would not make a meaningful distinction between Dr. Lee the individual and Dr. Lee's limited liability corporation that owned Summerlin Smiles. *See Hopkins*, 348 So. 2d at 1002. Dr. Lee owned a dental practice that negligently caused Reginald's death. That is the gist or sting of *Singletary,* and it is the gist or sting of the at-issue post.

Accordingly, the at-issue post is substantially accurate such that the fair report privilege applies.

b) *Fairness*

Regarding fairness, Section 611, comment f provides substantial caselaw, from which this court may analyze the at-issue post.

Generally, the privilege does not apply to publications that omit material facts. *See Robinson v. Johnson*, 239 F. 671, 673-74 (8th Cir. 1917) (declining application of the fair report privilege to a publication that "distorted, . . . partly set forth, . . . [and gave] an evil aspect" to a person by alleging serious and indictable crimes without also mentioning commendations the person received); *Boyer v. Pitt Publ'g Co.*, 188 A. 203, 205 (Pa. 1936) (declining application of the fair report privilege to a publication that omitted material facts as to why a witness changed his testimony at trial, unfairly imputing perjury).

The privilege also does not apply to publications that go beyond the facts of an official proceeding or report by adding defamatory matter, inferences, or innuendos. *See Atlanta Journal Co. v. Doyal*, 60 S.E.2d 802, 808-11 (Ga. Ct. App. 1950) (declining de novo application of the fair report privilege to a publication that, based on trial witness

testimony, inferred that a person unlawfully gambled with dice); *Cass v. New Orleans Times*, 27 La. Ann. 214, 215-18 (1875) (declining application of the fair report privilege where a publication suggested that an affidavit's alleged facts were true even though no fact finder had examined them); *Moore v. Dispatch Printing Co.*, 92 N.W. 396, 397 (Minn. 1902) (declining application of the fair report privilege were the publication went beyond what occurred during a trial by speculating that the state would press charges against a woman for bringing a loaded revolver into court and that the woman was insane); *Purcell v. Westinghouse Broad. Co.*, 191 A.2d 662, 666-69 (Pa. 1963) (declining application of the fair report privilege to a radio broadcast that "spliced together disconnected statements" from a judicial proceeding and added exaggerations and embellishments such that the public believed one of the accused "was a mug, a thug, a racketeer, one who gypped others, and one who terrified his victims who were afraid of reprisals" (internal quotations omitted)); *Brown v. Providence Telegram Publ'g Co.*, 54 A. 1061, 1062 (R.I. 1903) (declining application of the fair report privilege to a publication containing true statements of fact regarding a politician's

financial liabilities but suggesting that he could not pay off his obligations and would lose his house).

Here, Dr. Lee protests that the at-issue post omitted that the *Singletary* jury did not hold him, as the owner of Summerlin Smiles, liable for Reginald's death, thus bringing the at-issue post outside of the fair report privilege. AOB 20-21. However, the weight of authority demonstrates that such a minor omission is not material. For example, the at-issue post does not omit facts such that a reasonable juror could infer that Dr. Lee committed acts that the *Singletary* record does not support, *see Robinson*, 239 F. at 673-74, because it expressly states that Dr. Lee did not perform the extraction. 2 AA 283. Furthermore, the at-issue post does not go beyond the facts of *Singletary* by adding express defamatory matter, inferences, or innuendos. Accordingly, the at-issue post is a fair report of the *Singletary* matter.[7]

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[7]Dr. Lee suggests that a "heightened standard" applies to the at-issue post because Patin published it in her capacity as an attorney. AOB 21-22. As he cited no caselaw, from Nevada or from any other jurisdiction, or treatise supporting such a proposition, he has failed to cogently argue this point, and this court should summarily disregard it. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1286 n.38 (2006) (declining to consider claims where the appellant "neglected his responsibility to cogently argue, and present relevant authority, in support of his appellate concerns").

B. *The at-issue post contained sufficient attribution to Singletary to bring it within the fair report privilege*

Alternatively, the fair report privilege applies to a publication where the publication contains "specific attributions . . . sufficiently referencing underlying sources" such that it is "apparent to an average reader that a document draws from judicial proceedings." *Adelson*, 133 Nev. at 516, 402 P.3d at 668.

In *Adelson*, a political organization posted an online petition to pressure a presidential candidate to reject a political donor's money. *Id.* at 513, 402 P.3d at 666. The petition stated that the political donor "reportedly approved of prostitution at his Macau casinos and included a hyperlink to an Associated Press . . . article discussing ongoing litigation" involving that allegation and summarizing a sworn declaration supporting the same. *Id.* at 513, 402 P.3d at 666-67. The donor filed a defamation claim, and the federal district court dismissed the complaint under the fair report privilege. *Id.* at 514, 402 P.3d at 666. The donor appealed, and the federal circuit court certified a question to this court under NRAP 5 as to whether a specific attribution could bring a publication within the fair report privilege's protection. *Id.* at 513-14, 402 P.3d at 666-67.

This court answered in the affirmative. *Id.* at 516-18, 402 P.3d at 668-70. First, this court explained that an attribution that sufficiently references underlying judicial proceedings will bring a publication within the fair report privilege's protection even if the overall context of the publication would not otherwise fall within the privilege. *Id.* at 516, 402 P.3d at 668. Thus, the fair report privilege protected a petition containing a hyperlink to a newspaper article summarizing a filed, sworn declaration from a judicial proceeding because the reader could immediately determine that the petition implicated judicial proceedings. *Id.* at 517, 402 P.3d at 669. Second, this court explained that such an attribution must be "conspicuous" such that the reader has notice that other sources support the specific claim. *Id.* at 518-19, 402 P.3d at 670. Thus, a hyperlink over text, which this court characterized as being like a footnote, was sufficiently conspicuous to bring a petition within the fair report privilege. *Id.*

Here, the at-issue post specifically references the case caption of *Singletary* in the second line. 2 AA 283. This case caption immediately precedes the at-issue post's summary of *Singletary*. *Id.* Any lay person can perform an internet search of the case caption and determine that

the at-issue post draws from a judicial proceeding. Accordingly, the at-issue post's specific and conspicuous attribution to *Singletary* is sufficient to bring the at-issue post within the fair report privilege's protection.

III. *The district court correctly concluded that the at-issue post was true, precluding defamation liability*

Alternatively, Dr. Lee argues that the district court erred in concluding that the at-issue post was true, thereby defeating his defamation claim. AOB 8-18. First, he complains that the district court failed to read the at-issue post in context and in its entirety. *Id*. at 10-13. Second, he contends that whether the at-issue post was defamatory was a question for the jury.[8] *Id*. at 15-17. This answering brief addresses each in turn.

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[8]Dr. Lee also asserts that the district court erred in concluding that no genuine issues of material fact remained regarding the truth of the at-issue post because the district court previously denied Patin's prior motions for summary judgment. AOB 13-15. He contends that the district court had the same facts before it when denied Patin's prior motions for summary judgment, which he suggests renders the operative order granting summary judgment for Patin erroneous. *Id*. A cursory examination of the record before this court belies Dr. Lee's assertion. The district court's prior denials of Patin's various motions for dismissal or summary judgment occurred before Dr. Lee sat for his deposition. 2 AA 325-26, 345-47, 356-57, 452-53; 4 AA 937-38; 5 AA 941-42, 954-55. During his deposition, Dr. Lee admitted that all the statements that the at-issue post contained were true except for the statement regarding the amount of the jury verdict, which he claimed he did not remember. *Id*.

A. *The district court reviewed the at-issue post in context and in its entirety*

Dr. Lee relies upon *Branda v. Sanford*, 97 Nev. 643, 637 P.2d 1223 (1981), and *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 851 P.2d 459 (1993), to argue that the district court failed to review the at-issue post in context and in its entirety. AOB 10-13. However, a careful reading of both *Branda* and *Chowdhry* demonstrates that they are inapposite to the instant matter.

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at 989-90. The district court specifically relied upon Dr. Lee's admissions when it ultimately granted Patin's last motion for summary judgment. 6 AA 1237-41. Thus, Dr. Lee's contention that the district court had the same facts before it when it granted summary judgment as it did when it previously denied Patin's prior motions is demonstrably false and beneath the high standards that this court expects in appellate practice. *Miller*, 121 Nev. at 625, 119 P.3d at 731; RPC 3.3(a)(1) (providing "[a] lawyer shall not knowingly . . . [m]ake a false statement of fact . . . to a tribunal").

Dr. Lee also avers that the district court erred in concluding that the at-issue post was true because the at-issue post was false when Patin posted it. AOB 17-18. However, the record before this court contains no findings as to when Patin made the post. Indeed, Dr. Lee stated in his deposition that he did not know when Patin made the post. 5 AA 982-83. Furthermore, the district court made no findings as to when Patin made the post. 6 AA 1237-41. As Dr. Lee has failed to include the necessary documentation in the record to support this particular appellate concern, this court must "presume that the missing portion supports the district court's decision." *Cuzze*, 123 Nev. at 603, 172 P.3d at 135.

In *Branda*, a prominent comedian accosted and verbally abused a 15-year-old girl as she worked as a busgirl at a hotel. 97 Nev. at 645, 637 P.2d at 1224. The girl and two witnesses testified that the comedian asked the girl "if her name was like in cherry" and yelled "that she was a f--k--g bitch, f--k--g c--t and no lady," among other things. *Id.* (internal quotations omitted). The girl filed a complaint for slander and other causes of action. *Id.* at 644, 637 P.2d at 1224. After the girl's case-in-chief, the comedian moved for dismissal, arguing that the statements were not slanderous per se. *Id.* at 645, 637 P.2d at 1225. The district court granted the motion, concluding that "cherry and bitch did not imply unchastity" and that the girl failed to prove special damages. *Id.* (internal quotations omitted). This court reversed, holding that the district court erred in solely focusing on "cherry" and "bitch" and not considering whether either word could impute unchastity when read with all the other statements that the comedian made. *Id.* at 646-47, 637 P.2d at 1225-26. Indeed, this court concluded that the words were susceptible of such a meaning. *Id.* at 647, 637 P.2d at 1226. In so doing, this court reminded district courts "that words do not exist in isolation." *Id.* at 646-47, 637 P.2d at 1226.

In *Chowdhry*, a doctor filed a complaint for defamation, among other causes of action, alleging that hospital workers defamed him by stating "that he failed to respond or would not come" to their hospital to treat his patient. 109 Nev. at 484, 851 P.2d at 463 (internal quotations omitted). The doctor alleged that the statements "charged him with patient abandonment," which damaged his medical practice. *Id.* at 483, 851 P.2d at 462. This court summarily disregarded the doctor's characterization of the hospital workers' statements and instead looked to the "actual statements" they made. *Id.* at 484, 851 P.2d at 463. To determine if the statements were susceptible to different meanings, this court considered them in their entirety and in their context. *Id.* This court noted that the hospital workers made the statements to other hospital workers and the patient's mother to explain why the doctor would not come to their hospital. *Id.* This court further concluded that the doctor's characterization of the statements as charging him with patient abandonment was not reasonable. *Id.* Accordingly, this court held that the doctor failed to establish a prima facie case of defamation. *Id.*

Here, the district court reviewed the entirety of the at-issue post in granting summary judgment. Indeed, the district court's order contains a finding of fact for each sentence that the at-issue post contains. 6 AA 1238-39. Thus, the instant matter is distinguishable from *Branda* because the district court did not rely on just two words and ignore the remainder of the at-issue post.

Dr. Lee's reliance upon *Chowdhry* is similarly unavailing. *Chowdhry* demonstrates that this court should not be swayed by Dr. Lee's characterization of what the at-issue post could mean. Rather, this court should focus on the actual words contained in the at-issue post and read it within its larger context. Patin published the at-issue post on her law firm's website to advertise her success at trial. 2 AA 283. The at-issue post expressly states that Svetlana sued Dr. Lee in his capacity as owner of Summerlin Smiles. *Id.* The at-issue post further expressly states that Dr. Lee did not perform the extraction that caused Reginald's death. *Id.* These statements are not reasonably susceptible to a construction that Dr. Lee performed the extraction and caused Reginald's death. Accordingly, the district court read the at-issue post in context and in its entirety.

B. *The district court correctly concluded as a matter of law that the at-issue post is true and not capable of defamatory construction*

Dr. Lee relies upon *Posadas v. City of Reno*, 109 Nev. 448, 851 P.2d 438 (1993), and *Chowdhry* to argue that whether the at-issue post was defamatory was a question for the jury. AOB 15-17. However, Dr. Lee selectively cites both *Posadas* and *Chowdhry*, and omits the holdings of both that are averse to his appellate concerns. A complete reading of both demonstrates that Dr. Lee's reliance upon *Posadas* and *Chowdhry* is misplaced.

In *Posadas*, this court noted that

> [i]t is generally accepted that for both libel and slander it is a question of law and, therefore, within the province of the court, to determine if a statement is capable of a defamatory construction. If susceptible of different constructions, one of which is defamatory, resolution of the ambiguity is a question of fact for the jury.

109 Nev. at 453, 851 P.2d at 442 (quoting *Branda*, 97 Nev. at 646, 637 P.2d at 1225-26 (citations omitted)). This court gave a similar rule statement in *Chowdhry*. 109 Nev. at 484, 851 P.2d at 463 ("Whether a statement is capable of a defamatory construction is a question of law. A jury question arises when the statement is susceptible of different meanings, one of which is defamatory." (citation omitted)).

Here, the district court correctly concluded, as a matter of law, that the at-issue was post true, and thus not capable of defamatory construction. 6 AA 1239-41. Indeed, this court has long recognized that truth is a defense to defamation. *See Thompson v. Powning*, 15 Nev. 195, 204-05 (1880). Dr. Lee admitted that all the statements that the at-issue post contained were true except for the statement regarding the amount of the jury verdict, which he claimed he did not remember. 5 AA 989-90. He did not present any evidence in opposing Patin's motion for summary judgment demonstrating that the at-issue post was false. 6 AA 1202-34. As Dr. Lee failed to demonstrate that the at-issue post was false, and therefore not capable of defamatory construction, he was not entitled to have his defamation claim go to the jury. *Branda*, 97 Nev. at 646, 637 P.2d at 1225-26; *Posadas*, 109 Nev. at 453, 851 P.2d at 442; *Chowdhry*, 109 Nev. at 484, 851 P.2d at 463.

CONCLUSION

The district court correctly granted Patin's motion for summary judgment. The record before this court and the weight of authority demonstrate that the fair report privilege applied to the at-issue post. The at-issue post was a fair, accurate, and impartial summary

of the *Singletary* matter. Additionally, the at-issue post contained a sufficiently conspicuous attribution to the *Singletary* matter. Alternatively, the district court correctly concluded that the at-issue post was true, and thus not capable of defamatory construction. Dr. Lee admitted as much, and he failed to provide any evidence in his opposition to Patin's motion for summary judgment to the contrary.

Based on the foregoing, Patin respectfully requests that this court affirm the district court's order granting summary judgment.

DATED this 27th day of October 2021.

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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 I prepared this brief in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook font.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of brief that NRAP 32(a)(7)(C) exempts, it is either:

☒ Proportionally spaced, has a typeface of 14 points or more and contains 8,362 words; or

☐ Does not exceed _____ pages.

Finally, I hereby certify that I have read this 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 a reference to the page and volume number, if any, of the transcript or appendix to support every assertion in the brief regarding matters in the record.

I understand that I may be subject to sanctions if the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 27th day of October 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Respondents' Answering Brief with the Supreme Court of Nevada on the 27th day of October 2021. I shall make electronic service of the foregoing document in accordance with the Master Service List as follows:

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