IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVE WYNN, Appellant, v. THE ASSOCIATED PRESS, and REGINA GARCIA CANO, Respondents.	Case No. 85804

STEVE WYNN'S PETITION FOR REHEARING

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I. INTRODUCTION

On February 8, 2024, this Court issued an opinion resolving Wynn's appeal of the order granting AP Respondents' anti-SLAPP motion to dismiss ("Opinion" or "Op."). The Panel's Opinion both overlooked or misapprehended Wynn's arguments, controlling statutes and case law, as well as violated the principle of party presentation, by constructing an argument that AP Respondents never advanced. In doing so, the Panel rewrote NRS 41.660, disregarding the statute's plain language and the Legislature's statutory amendments. Moreover, the Opinion effectively eviscerates this Court's analysis in *Taylor v. Colon*, 136 Nev. 434, 482 P.3d 1212 (2020), reraising the concern that Nevada's anti-SLAPP statutes violate a plaintiff's constitutional right to a jury trial for defamation cases and how the judicially created actual malice standard interferes with that right. Thus, rehearing is appropriate to resolve the overlooked or misapprehended law.

II. ARGUMENT

A. Legal Standard.

Rehearing is proper where the panel "overlooked or misapprehended a material fact . . . or a material question of law" or "overlooked, misapplied or failed to consider a . . . decision directly controlling a dispositive issue." NRAP 40(c)(2). On rehearing, while parties may not "reargue matters they presented in their appellate briefs," *City of N. Las Vegas v. 5th & Centennial, LLC*, 130 Nev. 619, 624, 331 P.3d 896, 898 (2014), they must ordinarily cite to their briefs where the material

fact, question of law, or overlooked authorities appear, NRAP 40(c)(2).

B. The Panel's Opinion Violated the Principle of Party Presentation.

This Court follows "the principle of party presentation" where the parties "frame the issues for decision" and the Court acts as a "neutral arbiter of the matters" presented. *State v. Eighth Jud. Dist. Ct.*, 138 Nev., Adv. Op. 90, 521 P.3d 1215, 1221 (2022) (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008)). In other words, the "judicial role is not to research or construct a litigant's case or arguments for him or her." *State v. Bristol*, 654 S.W.3d 917, 924 (Tenn. 2022) (citations and internal quotation marks omitted); *cf. In re Marriage of Kahn*, No. A128001, 2012 WL 1079579, at *9 (Cal. Ct. App. Apr. 2, 2012) ("While the trier of fact may from time to time credit a party's presentation but adjust certain portions to make it more reasonable, it is an entirely different matter to use a party's presentation as a tool kit to construct whatever result seems 'just.'").

Here, the Panel departed from the principle of party presentation by constructing a legal argument that the AP Respondents never made. The Panel concluded that the clear-and-convincing-evidence standard applies at the second prong by "turn[ing] to California law," which applies the clear-and-convincing-evidence standard to the second prong of the anti-SLAPP analysis when the case involves a public figure. Op. at 8-11. But this was not an argument made by AP Respondents. AP Respondents never urged this Court to look to California law when

interpreting Nevada's anti-SLAPP statute, nor did they cite any case from California holding that the clear-and-convincing-evidence standard applies to the second prong of the anti-SLAPP analysis in cases involving public figures for a basis to uphold the district court's decision. *See* RAB 41-43. Indeed, AP Respondents did not cite a single case from any court applying the clear-and-convincing-evidence standard to the actual malice determination at the second prong of the anti-SLAPP analysis. *See id.*

Rather, AP Respondents simply asserted that general First Amendment principles required the Court to apply the clear-and-convincing-evidence standard to the second prong of the anti-SLAPP analysis. *See id.* Yet the Panel "construct[ed]" AP Respondents' argument by relying on its own extraneous research and the resulting cases and principles the Panel found that AP Respondents never offered. *Compare id.*, *with* Op. at 8-10. *See Lee v. Patin*, No. 83213, at *8 (Order of Reversal Mar. 9, 2023) (Cadish, C.J., dissenting) ("I cannot agree with the court's *sua sponte* reversal based on an issue never raised by any party."), *en banc recons. granted Patin*, No. 83213 (Order Granting En Banc Reconsideration Aug. 28, 2023).

a. The Panel Overlooked or Misapprehended *Taylor v. Colon*, 136 Nev. 434, 482 P.3d 1212 (2020).

The Panel further overlooked or misapprehended *Taylor v. Colon* when it concluded *Taylor* did not preclude application of the clear-and-convincing-evidence

standard at the second prong of the anti-SLAPP analysis.[1] In *Taylor*, this Court addressed whether "Nevada's anti-SLAPP statutes . . . violate the constitutional right to a jury trial."[2] 136 Nev. at 434, 482 P.3d at 1213. In its analysis, this Court explained that the second prong does not violate the right to a civil jury trial because "[t]he court does not make any findings of fact" or otherwise weigh evidence. *Id.* at 437, 482 P.3d at 1216. But when addressing other courts that have concluded that their states' anti-SLAPP statutes violated the right to a jury trial, this Court looked solely at the burden of proof. *See id.* at 438-39, 482 P.3d at 1216. Specifically, this Court explained that neither *Leiendecker v. Asian Women United of Minnesota*,[3] nor *Davis v. Cox*,[4] applied because "[b]oth Minnesota's and Washington's anti-SLAPP

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[1] Wynn raised this argument, as well as his argument that application of the clear-and-convincing standard at the second prong violates his right to a jury trial. AOB 21 n.8; ARB 11-13.

[2] Wynn's right to a civil jury trial arises under both state and federal constitutions. *See Taylor*, 136 Nev. at 436, 482 P.3d at 1215 (recognizing the Nevada Constitution provides for a right to a civil jury trial); s*ee also Ross v. Bernhard*, 396 U.S. 531, 533 (1970) ("The Seventh Amendment . . . entitled the parties to a jury trial in actions for damages to a person or property, for libel and slander, for recovery of land, and for conversion of personal property"); *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935) (recognizing that the Seventh Amendment preserves the right to a jury trial that "existed under the English common law when the amendment was adopted").

[3] 895 N.W.2d 623, 636 (Minn. 2017) (holding, among other things, that the application of the clear-and-convincing-evidence standard at the second prong of the anti-SLAPP statutes violated the right to a jury trial).

[4] 351 P.35 862, 871, 874-75 (Wash. 2015) (concluding that requiring the plaintiff to show "by clear and convincing evidence a probability of prevailing on the claim" violates the right to a jury trial), *abrogated on other grounds by Maytown Sand & Gravel, LLC v. Thurston Cty.*, 423 P.3d 223 (Wash. 2018).

statutes included the higher burden of 'clear and convincing evidence' under prong two of the anti-SLAPP analysis, whereas Nevada's anti-SLAPP statutes in their current form only require a plaintiff to demonstrate 'with prima facie evidence a probability of prevailing on the claim.'" *Id.* Thus, the different burdens of proof plaintiffs faced at the second prong of the anti-SLAPP analysis was the sole distinguishing feature upon which this Court relied. *See id.*

However, the Panel overlooked or misapprehended *Taylor* by reading in an atextual, higher burden of proof into Nevada's anti-SLAPP statute. The Panel concluded that Wynn failed at the second prong "because he failed to meet the clear and convincing evidence standard under the second prong that is applicable to his public figure defamation claim," Op. at 14-15, a standard the *Taylor* court explicitly rejected from the second prong analysis, *see Taylor*, 136 Nev. at 438-39, 482 P.3d at 1216. The Panel's explanation that *Taylor* "did not preclude" requiring clear and convincing evidence in certain instances, Op. at 11, is, at best, a misreading of *Taylor*. The Panel's Opinion effectively does away with *Taylor*'s rationale that avoided the constitutional problem. Now it squarely putting Nevada's anti-SLAPP statute in conflict with the right to a jury trial and furthermore underscores concerns regarding the validity of the actual malice standard of *New York Times v. Sullivan*, 376 U.S. 254 (1964), particularly when it is applied at such an early stage without

the benefit of full discovery.[5] *Compare* Op. at 14-15 ("Wynn, on the other hand, did not establish with prima facie evidence a probability of prevailing on the merits of his defamation claim because he failed to meet the clear and convincing evidence standard under the second prong . . . ."), *with Davis*, 351 P.3d at 873-74 (concluding that Washington's anti-SLAPP statute violates the right to a civil jury trial because it "requires the trial judge to make a factual determination of whether the plaintiff has established by clear and convincing evidence a probability of prevailing on the claim"). As such, rehearing is proper as the Panel overlooked or misapprehended Wynn's right to a jury trial to resolve issues of fact.

Indeed, the central thrust of *Taylor* is that no court makes factual findings or weighs evidence when resolving an anti-SLAPP motion. 136 Nev. at 437-39, 482 P.3d at 1215-16. However, the Panel itself weighed competing interpretations of evidence to resolve the anti-SLAPP motion. Op. at 13 n.8 ("Looking at Wynn's evidence in the light most favorable to him does not require us to assume that by 'crazy' Garcia Cano meant 'not believable' or 'unreliable.' *A more reasonable inference* from her characterization is that she believed the complaint to be

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[5] *See Berisha v. Lawson*, 141 S. Ct. 2424, 2429-30 (2021) (Gorsuch, J., dissenting from denial of certiorari) (explaining that the actual malice standard has "evolved into a subsidy for published falsehoods on a scale no one could have foreseen [and] it has come to leave far more people without redress than anyone could have predicted"); *see also id.* at 2425 (Thomas, J., dissenting from denial of certiorari) ("Our reconsideration is all the more needed because of the [actual malice] doctrine's real-world effects. Public figure or private, lies impose real harm.").

'shocking,' disturbing,' or, as Garcia Cano put it in her testimony, 'explosive and impactful.'" (emphasis added)). By concluding that AP Respondents' proffered explanation—created after Wynn sued—was "more reasonable," the Panel made a factual finding by weighing evidence despite the fact that courts cannot do so without violating a plaintiff's right to a jury trial. *Taylor*, 136 Nev. at 437-39, 482 P.3d at 1215-16.

b. The Panel Discounts the Legislature's Changes to Nevada's anti-SLAPP Statutes and Standards.

The Panel further overlooked, misapprehended, or failed to consider the legislative amendments to, and their effects on, Nevada's anti-SLAPP statutes by effectively rewriting the anti-SLAPP statutes to include a burden of proof the Legislature expressly rejected.[6] "The Legislature amended the anti-SLAPP statute in 2015" to "require a plaintiff in the second step of the anti-SLAPP analysis to demonstrate with 'prima facie evidence,' instead of 'clear and convincing evidence,' a probability of prevailing on the claim," *Patin v. Ton Vinh Lee*, 134 Nev. 722, 724 n.1, 429 P.3d 1248, 1250 n.1 (2018), which the Panel recognized, Op. at 11 n.6. As this Court previously explained, the Legislature's 2015 amendments "*decreased* the plaintiff's burden of proof." *Coker v. Sassone*, 135 Nev. 8, 10, 432 P.3d 746, 748 (2019) (emphasis in original).

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[6] Wynn raised this argument in his reply brief, ARB 11-13, in response to the AP Respondents' answering brief.

But the Panel broke with the Legislature's enactments, and *Coker*'s recognition, by rewriting the anti-SLAPP statute to require plaintiffs like Wynn to meet the clear-and-convincing-evidence standard rather than the lower prima facie standard. The Panel explicitly held that the clear-and-convincing-evidence standard applies at the second prong. Op. at 11. Indeed, in affirming the district court, the Panel expressly relied on the clear-and-convincing-evidence standard: "Wynn . . . did not establish with prima facie evidence a probability of prevailing on the merits of his defamation claim because *he failed to meet the clear and convincing evidence standard under the second prong* . . . ." *Id.* at 14-15 (emphasis added). Thus, despite the plain language of NRS 41.660, NRS 41.665, and *Coker*'s acknowledgement, the Panel reinserted a clear-and-convincing evidence standard into NRS 41.660. *See id.*

The Panel's disclaimer that it did "not rewrite the statute to return the plaintiff's burden of proof to a clear and convincing standard" but rather "merely recognize[d] that evidence of actual malice must meet the clear and convincing standard to sufficiently demonstrate with prima facie evidence a probability of prevailing" is but judicial legislating. *Id.* at 11 n.6. Regardless of the Panel's attempted hair-splitting, the clear-and-convincing-evidence standard is now the operative standard under the second prong for any supposed public figure. *See id.* at 11 (requiring plaintiffs to meet the clear-and-convincing-evidence standard to show actual malice at the second prong of the anti-SLAPP analysis and stating such a standard "is merely a

part of the plaintiff's prima facie showing"), 14-15 (holding that Wynn did not satisfy his burden under the second prong because he did not meet the clear-and-convincing-evidence standard).

By pushing past the text and legislative changes to dig into the underling claim, the Panel unearthed all of the constitutional concerns with the actual malice standard and grafted them on to the statute. Effectively, the Opinion "leave[s] far more people without redress than anyone could have predicted," *Berisha*, 141 S. Ct. at 2429 (Gorsuch, J., dissenting from denial of certiorari) (recognizing that "[i]ndividuals can be deemed 'famous' because of their notoriety in certain channels of our now-highly segmented media even as they remain unknown in most" and that "[l]ower courts have even said that an individual can become a limited public figure simply by defending himself from a defamatory statement"), despite the Legislature decreasing the burden of proof to prevent such issues.

By rewriting the statute to include a legislatively rejected (and constitutionally dubious) standard, the Panel overlooked or misapprehended NRS 41.660, *Coker*, and an otherwise unbroken line of cases recognizing the lower burden plaintiffs have under Nevada's anti-SLAPP statutes.

III. CONCLUSION

For these reasons, the Court should grant Wynn's Petition for Rehearing.

DATED this 11th day of March 2024.

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULES 40 AND 40A

I hereby certify that this petition for rehearing 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 it has been prepared in a proportionally spaced typeface using Office Word 2007 in size 14 font in Times New Roman.

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DATED this 11th day of March 2024.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Pisanelli Bice, PLLC, and that on this 11th day of March 2024, I electronically filed and served the foregoing **STEVE WYNN'S PETITION FOR REHEARING** with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court E-Filing system (Eflex), addressed to the following:

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