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### Wynn v. The Associated Press, 136 Nev. Adv. Op. 70 (Oct. 29, 2020)

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## DEFAMATION AND THE FAIR REPORT PRIVILEGE

### **Summary**

The Nevada Supreme Court reversed a district court order dismissing former casino mogul Steve Wynn's defamation complaint against The Associated Press based on a published article reporting on two 2018 citizens' complaints to the Las Vegas Metropolitan Police Department in which the complaint alleged that Wynn sexually assaulted a woman. The Court concluded that the trial judge, District Judge Ronald Israel, erred in dismissing The Associated Press from the case on fair report privilege grounds.

### **Background**

In February 2018, the Las Vegas Metropolitan Police Department (LVMPD) held a press conference advising the public that two women filed complaints alleging that appellant Steve Wynn sexually assaulted them. After reading the article that the *Las Vegas Review-Journal* published summarizing the press conference, respondent Regina Garcia Cano, a reporter for respondent The Associated Press, inquired about the complaints to the LVMPD.

In response, the LVMPD sent Garcia Cano a copy of an email, indicating that the two women alleged Wynn sexually assaulted them in the 1970s. Additionally, the email indicated that one woman alleged the assault took place in Las Vegas, and the other woman alleged the assault took place in Chicago, Illinois. The LVMPD said police would not investigate the allegations and would not pursue law enforcement action due to the statute of limitations.

Per the Nevada Public Records Act (NPRA), Garcia Cano requested copies of the citizens' complaints to the LVMPD. Garcia Cano then wrote an article about the allegations within the 2018 citizens' complaints, and The Associated Press published the article.

The article reported that one woman told officers that she became pregnant and gave birth in a gas station restroom after Wynn sexually assaulted her at least three times in her Chicago apartment between 1973 and 1974. The article also stated that the woman and her child currently live in Las Vegas.

Wynn filed a defamation complaint against The Associated Press, arguing that the Chicago allegations were false and improbable on their face. The Associated Press moved for dismissal, arguing that the fair report privilege provided absolute immunity because the article reported the allegations contained in an official police report. District Judge Ronald Israel dismissed Wynn's

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<sup>1</sup> By Samantha Goett.

defamation complaint, concluding that the fair report privilege applied to the article. Wynn appealed, arguing that the district court erred.

## **Discussion**

### *The fair report privilege*

Wynn argued that the district court erred by concluding that the fair report privilege applied to the article reporting on a citizen's complaint to law enforcement that did not engender investigation or law enforcement action. Under the fair report privilege,

“The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.”<sup>2</sup>

Courts recognize that allowing the press to freely report on public affairs requires the protection of some lies in the interest of protecting pertinent speech. However, courts also recognize that defamatory statements hinder society's interests in maintaining individual's right to privacy and freedom from defamation.<sup>3</sup>

### *The article reporting on the complainant's allegations is not a report of an official action or proceeding*

Wynn argued that the district court erred by concluding that the article constitutes a report of an official action or proceeding that is shielded by the fair report privilege because it described a citizen's complaint that simply reported the complainant's allegations. The Court agreed for the reasons below.

### *The citizen's complaint was not an official report*

The Court evaluated whether the filing of a report depicting the complainant's allegations to police constitutes an official action for purposes of applying the fair report privilege. Here, the LVMPD did not pursue any law enforcement action on the complaint because the statute of limitations period expired. Therefore, there was no government action. Accordingly, the Court held that the LVMPD's transcription and filing of the allegations does not constitute an official action under the fair report privilege.

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<sup>2</sup> Restatement (Second) of Torts § 611 (Am. Law Inst. 1977).

<sup>3</sup> Butcher v. Univ. of Mass., 136 N.E.3d 719, 729 (Mass. 2019).

*The LVMPD's press conference and subsequent email did not bring AP Respondents' article reporting on the complainant's allegations within the fair report privilege*

Neither the press conference nor the email addressed the substance of the allegations described in the article published. Therefore, both the LVMPD's press conference and publicly released email did not bring the article within the fair report privilege.

*The LVMPD's turnover of the documented citizen's complaint in response to a public records request did not bring AP Respondents' article within the fair report privilege*

Relying on *Northland Wheels Roller Skating Center, Inc. v. Detroit Free Press, Inc.*, the respondents argued that records available to the public are subject to the fair report privilege.<sup>4</sup> The Court concluded that respondents' reliance on *Northland Wheels* is misplaced, because whether a report falls within the fair report privilege depends on whether the record is a report of an official action or proceeding.

The Court held that the report in the article does not fall within the fair report privilege because it is not a report of an official action or proceeding, despite being available under the NPRA.

## **Conclusion**

The Court concluded that the district court erred in dismissing The Associated Press from Wynn's defamation claim based on an article about accounts to Las Vegas police from two women who alleged sexual misconduct. The district court's order dismissing The Associated Press from Wynn's complaint was therefore reversed and remanded.

On remand, the district court must consider if respondents will meet their burden under the first prong of the anti-SLAPP framework under NRS 41.660(3)(a). If so, the district court must determine if Wynn can show a probability of prevailing on his defamation claim under NRS 41.660(3)(b).

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<sup>4</sup> *Northland Wheels Roller Skating Center, Inc. v. Detroit Free Press, Inc.*, 539 N.W.2d 774 (Mich. Ct. App. 1995).