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### Wynn v. The Associated Press, 140 Nev. Adv. Op. 6 (Feb. 8, 2024)

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#### Recommended Citation

Miller, Elijah, "Wynn v. The Associated Press, 140 Nev. Adv. Op. 6 (Feb. 8, 2024)" (2024). *Nevada Supreme Court Summaries*. 1635.

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*Wynn v. The Associated Press*, 140 Nev. Adv. Op. 6 (Feb. 8, 2024)<sup>1</sup>

PURSUANT TO NRS 41.660(3), TO AVOID A GRANT OF SPECIAL MOTION TO DISMISS, A PLAINTIFF MUST DEMONSTRATE BY CLEAR AND CONVINCING EVIDENCE THAT DEFENDANT ACTED WITH ACTUAL MALICE TO MEET THE STATUTE’S SECOND PRONG’S PRIMA FACIE EVIDENTIARY STANDARD OF PREVAILING ON THE CLAIM.

### **Summary**

For the first time, the Nevada Supreme Court directly discussed a plaintiff’s burden of proof, under the second prong of NRS 41.660(3). Specifically, the Court held that the second prong’s burden on the plaintiff to produce prima facie evidence of a probability of prevailing on the respective public figure defamation claim was only met if the plaintiff proffers evidence sufficient for a jury to find, by clear and convincing evidence, in favor of the plaintiff on the actual malice element. A failure by the plaintiff to meet the clear and convincing standard requires the court to dismiss a public figure defamation claim pursuant to NRS 41.650 and NRS 41.660(1)(a), as to limit the chilling effect of civil litigation on First Amendment free speech.

### **Background**

Steve Wynn, a prominent figure in Nevada gaming and politics, brought a public figure defamation claim against The Associated Press and one of its reporters, Regina Garcia Cano (collectively, AP). The suit was in response to an article that detailed two separate citizens’ complaints alleging sexual assault by Mr. Wynn in the 1970s. One such detailed complaint (the Chicago complaint) described allegations that Mr. Wynn raped the complainant three times at her Chicago apartment between 1973 and 1974, resulting in a pregnancy and subsequent birth of the child in a gas station bathroom under “unusual circumstances.”<sup>2</sup>

In response to the publication, Mr. Wynn filed a complaint against AP, asserting that the Chicago complaint was false and improbable on its face and that AP published the article with actual malice. In response, AP filed a special motion to dismiss pursuant to Nevada’s anti-SLAPP statutes.<sup>3</sup> Following limited discovery on the issue of actual malice, the district court granted a renewed version of AP’s special motion to dismiss, finding that the article was a good faith communication in furtherance of the right to free speech in direct connection with an issue of public concern and that Mr. Wynn failed to meet his burden of establishing a probability of prevailing on his claim’s merits.

Mr. Wynn appealed, arguing that the district court erred in finding that AP met their burden under NRS 41.660(3)’s first prong. Further, he argued that the district court erred in concluding that he failed to meet his burden under the statute’s second prong as applied to public figures.

### **Discussion**

The anti-SLAPP framework articulated in NRS 41.660(3) requires a two-prong analysis for a special motion to dismiss. The first prong requires the moving party to establish “by a preponderance of the evidence, that the claim is based upon a good faith communication in

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<sup>1</sup> By Elijah J. Miller.

<sup>2</sup> *Wynn v. The Associated Press*, 140 Nev. Adv. Op. 6 at 3 (Feb. 8, 2024).

<sup>3</sup> See NEV. REV. STAT. § 41.650 (2023); NEV. REV. STAT. § 41.660(1) (2023).

furtherance of . . . the right to free speech in direct connection with an issue of public concern.”<sup>4</sup> If the moving party satisfies this first prong, the burden shifts to the plaintiff under the second prong to demonstrate “with prima facie evidence a probability of prevailing on the claim.”<sup>5</sup> Here, the Court reviewed both prongs de novo.

### ***AP Respondents Met Their Burden under the First Prong***

The Court first determined whether the district court erred in finding that AP had met their burden under the statute’s first prong. To meet the first prong, a defendant must show “that the comments at issue fall into one of the four categories . . . enumerated in NRS 41.637.”<sup>6</sup> Here, AP relied on NRS 41.637(4), which protects a “[c]ommunication made in direct connection with an issue of public interest in a place open to the public or in a public form, which is truthful or is made without knowledge of its falsehood.”<sup>7</sup> On appeal, Mr. Wynn argued that AP’s article did not discuss an issue of public interest and that it was not truthful.

The Court relied on guidelines articulated in *Shapiro v. Welt*<sup>8</sup> and determined that the article and its surrounding context point to an issue of clear public interest. The article was produced and published in the wake of national reports alleging Mr. Wynn’s pattern of misconduct spanning decades, detailing two new such allegations. Ultimately, the public had an interest in understanding the history of misconduct alleged to have been committed by one of the most recognized figures in Nevada.

Next, the Court assessed whether the district court erred in concluding that AP published the article in good faith.<sup>9</sup> Absent contradictory evidence, an affidavit stating that the defendant believed the communications to be truthful or made without knowledge of their falsehood is sufficient to meet its burden under the first prong of NRS 41.660(3).<sup>10</sup> Here, AP filed such an affidavit. Mr. Wynn contended that the record contained contradictory evidence, particularly asserting AP must have known the Chicago complaint to be false due to its facial absurdity, and pointing to a text sent by Ms. Garcia Cano to a coworker describing one of the complaints as “crazy.” The Court, however, found this evidence not sufficient to establish AP’s awareness of the complaint’s falsity. While unusual, the complaint was not so unrealistic as to put AP on adequate notice as to its falsity. Additionally, Ms. Garcia Cano’s characterization of the complaint as “crazy” was not persuasive evidence that she knew the complaint was false. Finally, given the redacted nature of the complaint received from LVMPD, AP was unable to investigate the complaint’s veracity any further. Thus, the Court held that the district court had properly found the article to be a good faith communication in furtherance of the right to free speech in direct connection with an issue of public importance.

### ***A Public Figure Plaintiff’s Burden under the Second Prong***

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<sup>4</sup> NEV. REV. STAT. § 41.660(3)(a) (2023).

<sup>5</sup> NEV. REV. STAT. § 41.660(3)(b) (2023).

<sup>6</sup> *Stark v. Lackey*, 136 Nev. 38, 40, 458 P.3d 342, 345 (2020).

<sup>7</sup> NEV. REV. STAT. § 41.637(4) (2023).

<sup>8</sup> Under the *Shapiro* guidelines, public interest (1) does not equate with mere curiosity; (2) should be something of concern to a *substantial* number of people; (3) should have some degree of closeness to the challenged statement(s); (4) should be the focus of the speaker’s conduct, rather than a mere effort to gather ammunition for another round of private controversy; and (5) cannot be private information that is made a public interest simply because it was communicated to a large number of people. *Shapiro v. Welt*, 133 Nev. 35, 39, 389 P.3d 262, 268 (2017).

<sup>9</sup> See NEV. REV. STAT. § 41.637 (2023); NEV. REV. STAT. § 41.660(3)(a) (2023).

<sup>10</sup> *Stark*, 136 Nev. at 43, 458 P.3d at 347.

The Court next assessed the second prong of NRS 41.660(3), which articulates that the plaintiff must demonstrate with prima facie evidence a probability of prevailing on the claim. However, Mr. Wynn's claim required him to prove by clear and convincing evidence that the article was made with actual malice.<sup>11</sup> NRS 41.660(3)'s second prong's prima facie standard requires the plaintiff to show that the respective claim has at least "minimal merit."<sup>12</sup> Minimal merit exists when the plaintiff makes "a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."<sup>13</sup> Here, Mr. Wynn would have to prove actual malice, by clear and convincing evidence, to sustain a favorable judgment. The Legislature also spoke to this burden issue, requiring a plaintiff to meet the same burden of proof required pursuant to California's [anti-SLAPP] law to demonstrate a probability of success of prevailing on a claim pursuant to NRS 41.660.<sup>14</sup> California caselaw supports the conclusion that, under NRS 41.660(3)'s second prong, a plaintiff must provide evidence sufficient for a jury, by clear and convincing evidence, to reasonably infer that the publication was made with actual malice in order to meet the statute's prima facie standard.<sup>15</sup> This requirement aligns with the policy behind the anti-SLAPP statutes to resolve meritless defamation claims early and expeditiously.

The clear and convincing evidence standard at this pre-trial stage of litigation did not violate Mr. Wynn's constitutional right to a civil jury trial. Whether evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law.<sup>16</sup> Since the prima facie standard of NRS 41.660(3)'s second prong does not interfere with a jury's fact-finding abilities, this prong has been held to be constitutional.<sup>17</sup>

### ***Wynn Failed to Meet His Burden under the Second Prong***

Having fleshed out the requirements of the second prong of NRS 41.660(3), the Court had to determine whether Mr. Wynn had met this burden. To prove AP's actual malice at trial, Mr. Wynn would have had to produce sufficient evidence that the article was "published . . . with reckless disregard for its veracity."<sup>18</sup> Reckless disregard for the truth extends also to an instance in which the defendant entertained serious doubts as to the statement's truth but published it anyway.<sup>19</sup> However, given that these elements were weighed pre-trial, the Court looked to California courts for guidance and determined that California courts treat the second prong as they do a motion for summary judgment.<sup>20</sup>

Here, Mr. Wynn failed to establish actual malice by clear and convincing evidence to sustain a favorable verdict. While the Chicago complaint contained unusual elements, the presence

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<sup>11</sup> *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 719, 57 P.3d 82, 90 (2002) (articulating the additional elements a plaintiff must prove to prevail on a public figure defamation claim beyond the one element reasonably in controversy on appeal here: actual malice)

<sup>12</sup> *Abrams v. Sanson*, 136 Nev. 83, 91, 458 P.3d 1062, 1069 (2020).

<sup>13</sup> *Wilson v. Parker, Covert & Chidester*, 28 Cal.4th 811, 821, 50 P.3d 733, 739 (2002).

<sup>14</sup> NEV. REV. STAT. § 41.665(2) (2023).

<sup>15</sup> *See, e.g., Padres L.P. v. Henderson*, 8 Cal. Rptr. 3d 584, 594 (Ct. App. 2003); *Robertson v. Rodriguez*, 42 Cal. Rptr. 2d 464, 470 (Ct. App. 1995); *Looney v. Superior Ct.*, 20 Cal. Rptr. 2d 182, 192–93 (Ct. App. 1993).

<sup>16</sup> *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 685, 109 S.Ct. 2678, 2694 (1989); *Pegasus*, 118 Nev. at 721–22, 57 P.3d at 92.

<sup>17</sup> *Taylor v. Colon*, 136 Nev. 434, 439, 482 P.3d 1212, 1216 (2020).

<sup>18</sup> *Pegasus*, 118 Nev. at 722, 57 P.3d at 92.

<sup>19</sup> *Id.*

<sup>20</sup> *Coker v. Sassone*, 135 Nev. 8, 11, 432 P.3d 746, 749 (2019).

of said elements did not mean that the gist of the allegations—that Mr. Wynn sexually assaulted a woman in Chicago in the 1970s—was untrue or that AP should have had serious doubt about the allegations’ veracity. Additionally, the Court found it more reasonable to infer that Ms. Garcia Cano’s “crazy” characterization was a belief the complaint was “shocking” or “disturbing,” rather than “not believable.” Further, the Court found that AP’s motivation to publish the story quickly was merely a standard industry desire to publish a story before their competitors.

By failing to show by clear and convincing evidence that AP published the article with actual malice, Mr. Wynn failed to meet his burden under NRS 41.660(3)(b). Thus, the Court was required to grant the special motion to dismiss.

### **Conclusion**

The Court held that while NRS 41.660(3)’s second prong requires the plaintiff to show with prima facie evidence a probability of prevailing on the claim, the plaintiff can only meet the minimal merit requirement of the prima facie standard by providing evidence sufficient for a jury to find, by clear and convincing evidence, in favor of the plaintiff. Here, Mr. Wynn failed to proffer clear and convincing evidence to support his contention that AP acted with actual malice. With AP having met their burden under the first prong and Mr. Wynn subsequently failing to meet his burden under the second prong, the Court therefore affirmed the district court’s granting AP’s special motion to dismiss the complaint.