Case Number 56064

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL MARKING and ELIZABETH FLEMING, Appellants v. VIRGINIA (SISSIE) GALLEGOS, Respondent	APPELLANTS' OPENING BRIEF (Sixth Judicial District Court Case No. CV 9953)

COME NOW Michael Marking and Elizabeth Fleming, in proper person, as Appellants, and hereby submit their APPELLANTS' OPENING BRIEF.

Table of Contents

Table of Authorities

Statement of the Issues

This Appeal presents a question of law: Can an appeal be taken to a district court from a decision by a justice court granting a Temporary Protective Order (TPO) for stalking or harassment, after the TPO has expired?

The District Court, in concluding the negative, reasoned that (1) absent statutory authority, there is no right to appeal; and (2) the TPO having expired, the appeal would be moot. The Adverse Parties, Appellants in the matter, believe that both of those arguments are incorrect, inasmuch as (3) there is sufficient authority to permit the appeal; and (4) the appeal is not moot, given a contemplated action for malicious prosecution by the Adverse Parties.

Statement of the Case

1. Applicant, who is Respondent in this matter, sought and obtained TPOs from Austin Justice Court against the Adverse Parties. (*Gallegos v. Marking and Fleming*, Austin Justice Court, Case Nos. 09 PO 002, 003, filed 8 August 2009; cited for completeness, but documents not required for Argument and not in Appendix) Adverse Parties moved to dissolve the TPO. A hearing was held, the TPO was modified but not dismissed. After expiration of the TPO, Adverse Parties went to file an appeal to the Sixth Judicial District Court, but the Austin Clerk refused to file the Notice of Appeal.

2. Adverse Parties filed an action in the Sixth Judicial District Court, requesting (Appendix, page A-1) the District Court to docket the matter as an appeal, and seeking a Writ of Mandamus (Appendix, page A-8) compelling the Austin Clerk to take steps necessary to perfect the appeal. (*Marking and Fleming v. Gallegos*, Sixth Judicial District Court, Case No.

CV 9953, filed 17 Sept. 2009) Adverse Parties noted (APPENDIX, page A-4) that, given a contemplated action for malicious prosecution, the appeal would not be moot. The District Court (APPENDIX, page A-12) granted the petition for Writ of Mandamus, but concluded that, absent statutory authority, there was no possible appeal.

3. We note that the basis in justice court for the TPO was NRS 200.591. (APPENDIX, page A-1)

4. Adverse Parties moved (APPENDIX, page A-17) to amend judgment under Rule 59, citing additional authority. The District Court (APPENDIX, page A-23) reaffirmed its decision, adding the additional reason that, given the expiration of the TPO, the appeal was moot.

5. Adverse Parties filed a Notice of Appeal to this Court. However, the Lander County clerk indicated (APPENDIX, page A-25) that the District Court had decided that "this matter cannot be appealed to the Supreme Court, as this is not the way to proceed with this matter." The clerk did not forward the Notice of Appeal to this Court.

6. Concluding that the District Court may have viewed the District Court action as an appeal from Justice Court, hence not appealable to the Supreme Court, Adverse Parties petitioned for a Writ of Mandamus from this Court, to compel the District Court to hear the appeal from the Justice Court. (*Marking v. Sixth Judicial Distr. Ct. and Gallegos*, Nevada, Case No. 55539, March 2010) The petition was denied, but this Court in its opinion indicated that an appeal to this Court from the District Court action was proper. Eventually, the Lander County clerk forwarded the Notice of Appeal to this Court.

ARGUMENT

7. JCRCP are authoritative. The JCRCP are authoritative, and derive their authority from the Supreme Court, which in turn derives its rule-making authority from the Legislature, which takes its authorization from the Nevada Constitution.

8. "The District Courts... also have final appellate jurisdiction in cases arising in Justices Courts..." (*Nevada Constitution*, Article 6, §6.1) "The Legislature shall also prescribe by law the manner, and determine the cases in which appeals may be taken from justices and other courts." (*ibid.*, §8)

9. The Legislature, in turn, has delegated this authority to the Supreme Court:

> NRS 2.120 Rules.
>
> 1. The Supreme Court may make rules not inconsistent with the Constitution and laws of the State for its own government, the government of the district courts, and the government of the State Bar of Nevada. Such rules shall be published promptly upon adoption and take effect on a date specified by the Supreme Court...
>
> 2. The Supreme Court, by rules adopted and published from time to time, shall regulate original and appellate civil practice and procedure... in judicial proceedings in all courts of the State..., Such rules shall not abridge, enlarge or modify any substantive right and shall not be inconsistent with the Constitution of the State of Nevada. Such rules shall be published promptly upon adoption and take effect on a date specified by the Supreme Court...

10. Pursuant to this mandate, the Supreme Court adopted the JCRCP in 1959:

> The 1951 legislature authorized the Nevada supreme court to prescribe rules to regulate civil practice and procedure. (See NRS 2.120.) Existing statutes were deemed rules of court, to remain in effect until superseded... [T]here being a recognized demand for the adoption of rules of civil practice in the justices' courts based upon the Nevada Rules of Civil Procedure, the supreme court appointed an Advisory Committee, consisting of the undersigned, to submit a draft of rules... Final recommendations of the committee were submitted to the court on March 23, 1959, and adopted by the court. (Preface to JCRCP)
>
> The vesting of the rulemaking power in the Supreme Court by the Forty-Fifth Legislature (1951)... provided the authority under which, by adoption of simplified rules of practice and procedure, the Supreme Court could greatly improve the administration of justice in the state... (Charles M. Merrill, Chief Justice, 23 July 1959, *ibidem*)

11. "These rules govern the procedure in the justice courts in all suits of a civil nature... They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action..." (JCRCP 1)

12. These rules are applicable to proceedings under NRS 200.594, which are recognized as civil actions by the statutes: "...justice courts have jurisdiction of the following civil actions and proceedings and no others except as otherwise provided by specific statute: ... (q) In any action pursuant to NRS 200.591 for the issuance of a protective order against a person alleged to be committing the crime of stalking, aggravated stalking or harassment..." (NRS 4.370, emphasis added)

13. Accordingly, JCRCP are authoritative, and applicable to Justice Court proceedings involving TPOs pursuant to NRS 200.591.

14. Expired TPO represents a final order. There is no authority permitting the resurrection or modification of an expired Protective Order. After expiration, all questions brought before the justice court in the application have been decided. "A final judgment in an action or proceeding is essentially one that disposes of the issues presented in the case, determines the costs, and leaves nothing for the future consideration of the court." (*Alper v. Posin*, 77 Nev. 328, 363 P.2d 502, (1961))

15. We note, however, that there is authority under NRS 200.594.2 to modify an unexpired protective order, so there is a question whether the date of final judgment is the date of the last order granting or denying the TPO, or, if granted, the date of expiration of the TPO. We submit that the date the order becomes final ought to be the date of expiration of the TPO. Although the question of the exact date of finality is not relevant to this appeal, some clarification from this Court might be useful for other cases in the future.

16. Authority for an appeal. Appellants acknowledge that "An aggrieved party does not have the right to appeal, unless it is expressly granted by statute or rule." (*Alper v. Posin*) However, in this case, the judgment is appealable, because it is final, and because the action commenced in the Justice Court, an appeal is allowed by JCRCP 72A(b)(1).

17. "An appeal may be taken [f]rom a final judgment in an action or proceeding commenced in the court in which the judgment is rendered." (JCRCP 72A(b)(1)) This rule makes no exceptions for protective orders or for any other special kind of orders.

18. Indeed, such an exception would be in derogation of the Nevada Constitution. "The Nevada Constitution [in Article 6, Section 6] proclaims that district courts have final appellate jurisdiction in all cases arising in justices' courts..." (*Lippis v. Peters*, 112 Nev. 1008, 921 P.2d 1248, Nev. No. 26575, (1996), emphasis in the original) In *Lippis*, Nevada held that JCRCP 106, denying appeals from summary evictions, was unconstitutional; that rule (JCRCP 106) has subsequently been repealed.

19. In *Lippis*, the Nevada Supreme Court continued: "JCRCP 106 is also violative of article 4, section 21, which provides that 'all laws shall be general and of uniform operation throughout the State.' There is no reason why parties to landlord-tenant law suits should be denied the right of appeal, while all other justices' courts' litigants are allowed to exercise this right. Henceforth, tenants who have been summarily evicted from their homes by order of a justice's court, will have the right of direct appeal to the district court in order to seek correction of any erroneous judgments that might have been issued by a justice's court." (*Lippis*, at 1011)

20. It is hard to see why the same reasoning would not also apply to litigants in cases arising out of NRS 200.594. Indeed, when *Lippis* came before the Supreme Court, JCRCP 106, which was part of the JCRCP, had been previously approved by the Supreme Court itself. It was challenged and was struck down. In the instant case, there is not even such a rule or statute which prohibits what Appellants seek, so denial of the right to an appeal would be unfounded.

21. In fact, when it said that "all other justice court litigants are allowed to exercise this right" of appeal (*Lippis*, emphasis added), Nevada was implying in 1996 that litigants in NRS 200.591 cases already had, in 1996, a recognized right to appeal to district court.

22. Interpretation of NRS 200.591.4. The district court reasoned that, since NRS 200.591.4 grants the right to an interlocutory appeal for an extended order, but does not grant any other right to an appeal, either for TPOs or for extended orders, then no such other appeal rights exist. We submit that this thinking was incorrect: it is erroneous to conclude that the grant of one right takes away another right.

23. The right to an interlocutory appeal is not equivalent to the right to an appeal from a final judgment. Although interlocutory appeals are available when authorized by specific rule, statute, or judicial policy, they are in most other cases generally discouraged. (*Hallicrafters Co. v. Moore*, 102 Nev. 526, 728 P.2d 441, Nev. No. 17387 (1986))

24. We submit that the correct interpretation of the statutory permission for interlocutory appeals (NRS 200.591.4) from extended protective orders is to expand the right to appeal, rather than to limit the rights to those explicitly granted. In other words, merely because an interlocutory appeal is allowed by the statute for one reason, does not preclude appeals from final judgments involving TPOs or extended orders on other authority. The statute does not reduce the rights granted by JCRCP 72A; rather, it expands them.

25. Interlocutory appeals usually require the showing of some special condition, such as irreparable harm, which would occur absent the appeal. Although the question of interlocutory appeals is not brought before this Court in this appeal, we believe that interlocutory appeals are available without statutory authority when one of those special conditions adheres. Ordinarily, for example, upon showing irreparable harm, an interlocutory appeal might lie with the district court from an order granting or denying a TPO or extended order. However, under NRS 200.591.4, there is an additional right to appeal an extended order, regardless of whether irreparable harm is shown.

26. The matter is not moot. Although a TPO might have expired, the rights of the

litigants are still contingent upon proper adjudication of the request presented by the application, and therefore an appeal is not moot. In particular, a wrongly-granted TPO may give rise to an action for malicious prosecution, abuse of process, or other claim.

27. One of the element of malicious prosecution is "termination [of the previous action] in favor of present plaintiff" (*Black's Law Dictionary*, Fifth Edition, citing *Palermo v. Cottom*, Mo. App., 525 S.W.2d. 758 at 764) Once the TPO proceedings are terminated, the action becomes res judicata, and errors in the proceedings cannot be revisited in a subsequent case. Therefore, the rights of the adverse party in a TPO action, to file a subsequent action for malicious prosecution, hinge on the correct outcome of the TPO action itself. When errors are made in the judicial court, the only opportunity to correct those errors is on appeal.

28. This is especially important, given the abbreviated nature of the proceedings. An adverse party may have no warning of the action, and may have inadequate time to prepare a proper defense. By the time the TPO has expired, in other civil actions a hearing would not likely have yet been held. The opportunity for error is greater than in most other civil matters, so an appeal is all the more important.

29. A search of Nevada cases has found no directly applicable decision relating to mootness in the context of a derivative action for malicious prosecution. However, an expired wrongful restraining order is analogous to a wrongful lien which has already been removed. In such a situation, it was held in Utah that "This court has stated that an issue only becomes 'moot when 'the requested judicial relief cannot affect the rights of the litigants.'' [...] Because Winters may request relief [...] for the alleged wrongful lien on his property, a request that, if granted, will affect both his and Schulman's legal rights, this claim is not moot." (*Winters v. Schulman*, Utah Ct. App., Case No. 980242-CA, (1999))

30. The rights of the litigants in the derivative action will be affected by this issue. Accordingly, it is not moot.

31. Furthermore, although the contemplated action for malicious prosecution was

brought to the District Court's attention in the Motion to Docket Appeal, it was inappropriate for the District Court to rule on the question of mootness until the appeal itself takes place. In order to reach a proper decision on whether or not a particular appeal is moot, the District Court should consider the arguments framed in the appeal briefs, and not make a cursory judgment without all of the salient facts as shown in the record, and law as argued in the briefs.

32. Exception to mootness doctrine. Regardless of whether the issues are held to be moot, they fall under an exception to the mootness doctrine.

33. This Court has recognized an exception to the mootness doctrine:

> Even when an appeal is moot, however, this court may consider it when the matter is capable of repetition, yet evading review. [FN7]
> ...
> FN7. *Traffic Control Servs. v. United Rentals*, 120 Nev. 168, 171-72, 87 P.3d 1054, 1057 (2004) (recognizing that the "capable of repetition, yet evading review" exception to the mootness doctrine applies when the duration of the challenged action is "relatively short," and there is a "likelihood that a similar issue will arise in the future").
>
> -- *University and Community College System of Nevada v. Nevadans for Sound Government*, 120 Nev. 712, 100 P.3d 179, (2004)

34. The prerequisite conditions described in *Traffic Control Services*, and affirmed in *University and Community College System of Nevada*, exist here: the issues are capable of repetition, yet evading review. The issues are questions of law, not specific to this case: the Justice Court made significant errors of law in handling this matter. The challenged action is "relatively short", only thirty days, and there certainly is a likelihood that additional actions under NRS 200.591 will be brought before the Justice Court in the future. The issues are easily capable of evading review, since the District Court regards NRS 200.591 actions as being "unappealable". In fact, they are not only *capable* of evading review, but quite

successful at doing so, apparently for decades: NRS 200.591 was added in 1989, and Nevada case law appears nonexistent.

35. Therefore, when repeatable issues are raised, even if the matter itself might otherwise be moot, justice court actions involving TPOs, as other justice court actions, should be heard on appeal in the District Court.

36. Libel and slander. An unjustified application for a TPO can be tantamount to an unsubstantiated accusation of harassment or stalking. Were it not for the privileged nature of court documents, such an unsubstantiated accusation would be libellous or slanderous. When such an unsubstantiated application is made in conjunction with other similar but unprivileged acts of libel or slander, if the adverse party as victim were to to make a case for libel or slander, there is likelihood that a successful application for a TPO would be used as a defense by the applicant.

37. The law holds slander of one's moral character as actionable. Slander per se does not require the proof of damages needed by other slanderous accusations. Should not the law consider defense of one's reputation to be important enough to allow an appeal by the adverse party to attempt to clear his or her name?

38. The serious nature of the accusations by an applicant may, perhaps appropriately, lead a justice court to err on the side of caution and safety and grant a TPO to forestall possible future harm to the applicant. (This is not in the record here, but is in the record of the corresponding lower court case.) Other civil process allows time for discovery, calling witnesses, and other mechanisms to protect both defendant and plaintiff from inaccurate portrayals to the court of the incomplete body of evidence which might be readily at hand. The absence of such mechanisms, combined with a lack of potential accountability coming from the inability of a party to appeal a justice court's decision granting or denying a TPO, can lead to an unfair and unjust outcome.

39. Indeed, although this appeal regards law and there are few facts in evidence in the underlying district court case, there is ample anecdotal evidence in the public domain that TPOs are sometimes used as "hit and run" or "drive by" tactics against spouses, especially in domestic disputes; they also seem to be used in the same way in instances of workplace harassment. The need for an efficient mechanism to protect genuine victims of harassment and stalking is compelling. Equally compelling, however, is the need for a subsequent review of those mechanisms, in the form of an appeal, to prevent or correct abuse of the system.

Conclusions

Appellants respectfully seek from this Court an order holding that

Decisions made in justice courts granting protective orders under NRS 200.591 are appealable to district courts; and

Further, notwithstanding the expiration of such TPOs, those appeals are not moot, given the possibility of subsequent derivative actions for malicious prosecution; and

Further, a showing of a significant issue which is repeatable but easily capable of evading review may, by itself, justify an appeal notwithstanding mootness.

Appellants' Certificate

Appellants hereby certify that

We have written and read this brief; and

To the best of our knowledge, information and belief, the brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or

needless increase in the cost of litigation; and

The brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e) that every assertion in the briefs regarding matters in the record be supported by a reference to the page of the appendix where the matter relied on is to be found.

DATED this Tuesday, 29 June 2010.

_____

Michael Marking, Appellant

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Elizabeth Fleming, Appellant

both at General Delivery, Austin, Nevada 89310

APPELLANTS' APPENDIX

Appellants' Appendix follows this brief, with pages numbered A-1 to A-25.

Certificate of Service

I hereby certify under penalties of perjury that on this date I served true and correct copies of the foregoing document by depositing them for mailing, in sealed envelopes, U.S. postage prepaid, at Austin, Nevada, addressed as follows:

Virginia (Sissie) Gallegos; Post Office Box 221; Austin, Nevada 89310

Dated Tuesday, 29 June 2010.

_____

Michael Marking

Affirmation

(Pursuant to NRS 239B.030)

I hereby affirm that the preceding document filed in the above-described manner does not contain the social security number of any person.

Dated Tuesday, 29 June 2010.

_____

Michael Marking

(Appellants' electronic document name: *mfvg_appellants_opening_brief_20100629c_pfe)*