Case Number 56064

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL MARKING and ELIZABETH FLEMING, Appellants v. VIRGINIA (SISSIE) GALLEGOS, Respondent	PETITION FOR EN BANC RECONSIDERATION (Sixth Judicial District Court Case No. CV 9953)

COME NOW Michael Marking and Elizabeth Fleming, in proper person, as Appellants, and hereby submit their PETITION FOR EN BANC RECONSIDERATION.

WHEREAS

This Appeal brings a single, clear, material, and unambiguous question of law to this Court (see POINTS & AUTHORITIES, page 4); and

A petition for en banc reconsideration is allowed to secure or to maintain uniformity of this Court's decisions (NRAP 40A(a)(1)), and the instant Appeal has resulted in inconsistent holdings by this Court (see POINTS & AUTHORITIES, page 5); and

A petition for en banc reconsideration is allowed when the proceeding involves substantial precedential, constitutional, or public policy issues (NRAP 40A(a)(2)), and the question brought by the instant Appeal brings all three (see POINTS & AUTHORITIES, pages 5, 6, and 7); and

In this Appeal, Petitioners presented a single, simple question of law to this court, with arguments and citations to this Court's own opinions and to other authorities. Despite the absence of any contrary arguments or authority, and despite a petition for rehearing (denied by this Court), this Court has failed to address the single, clearly stated question brought by this Appeal. In its ORDER OF AFFIRMANCE (15 September 2011) this Court completely avoided and ignored the single issue brought before it. (see Exhibit A, PETITION FOR REHEARING, 3 October 2011) The question question is material, and this Courts avoidance of the issue leaves standing a ruling which contradicts this Court's previous published opinions, violates the constitutional requirements of due process, and establishes a dangerous public policy. Under due process, Petitioner is entitled to a hearing, but has not had one.

THEREFORE

Appellants respectfully petition this Court, as allowed by NRAP 40A, for a reconsideration of the decision in its ORDER OF AFFIRMANCE (2011.09.15), correcting the aforementioned errors; and

Appellants further petition this Court for a ruling on the sole question of law presented to this Court by this Appeal.

IN SUPPORT OF THIS PETITION, Appellants have attached their MEMORANDUM OF POINTS & AUTHORITIES and their Exhibit A, the 3 October 2011 PETITION FOR REHEARING.

DATED this Tuesday, 6 December 2011.

Michael Marking, Appellant

e-mail *marking@tatanka.com*

Elizabeth Fleming, Appellant

e-mail *ryuuza@tatanka.com*

both at General Delivery, Austin, Nevada 89310

Memorandum of Points & Authorities

1. This appeal brings a single, clear, unambiguous question of law to this Court. The question, as asked in the Statement of the Issues on page 4 of Appellants' Opening Brief (2010.06.29), is: "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?" (emphasis added)

2. Continuing, the Statement of the Issues, in only five lines, summarized the arguments on both sides: "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."

3. The District Court's position is summarized in a thirteen line decision, in its Order of 2009.12.07. (Appellants' Appendix, page A-23) Appellants' opposing arguments are made in the record of the District Court, but are repeated with additional authorities in Appellants' Opening Brief.

4. Brief history of the case. The history of this case is simple:

5. Applicant/Respondent sought and obtained a TPO against Appellants/Adverse Parties in Austin Justice Court. After the TPO expired, Appellants attempted to file a Notice of Appeal in the Justice Court. The clerk refused to file it.

6. Appellants sought an extraordinary writ in the Sixth Judicial District Court to compel the Austin Clerk to file the Notice of Appeal. The District Court granted the petition, but determined that it would be futile because TPOs are not appealable. After a Rule 59

motion to amend judgment, the District Court's Order (7 December 2009), was short and unambiguous: "[...] this Court finds that Appellant's Motion to Amend Judgment was based on Appellant's desire to appeal a temporary restraining order that had expired. Under Nevada Law, there is no statutory right to appeal an expired temporary order. Also, since the temporary order has expired, Appellant's appeal is moot. [...]"

7. Although the District Court referred to Petitioners as "appellants", no appeal from Justice Court ever took place: no notice of appeal was filed in justice court, no record was transmitted, there was no hearing and there were no briefs. The issues giving rise to the desire to appeal the Justice Court's actions have never been argued. However, Petitioners still seek an appeal to District Court from the Justice Court's actions.

8. This Appeal from the District Court followed.

9. This Court's affirmance of the District Court contradicts this Court's earlier opinions. First, in *Lippis v. Peters* (112 Nev. 1008, 921 P.2d 1248, Nev. No. 26575, (1996)), this Court held that all cases in justice courts are appealable to district courts. (The complete argument was made in Appellants' Opening Brief.) By affirming the order of the District Court, this court has contradicted its own holding in *Lippis v. Peters*.

10. Second, this Court, by affirming the District Court, has allowed the District Court to contradict this Court's holdings that court rules have the force of law. (see, for example, *Shimrak v. Garcia-Mendoza*, Nev. No. 25100 (1996)) The District Court searched only in statutes for authority to appeal TPOs, not in the JCRCP. Indeed, there probably is no statutory authority for most appeals, and by the District Court's reasoning, affirmed by this court, most justice court cases are <u>not</u> appealable.

11. This appeal raises substantial precedential issues. There is no precedent in Nevada for the issues brought by this appeal.

12. First, this Court has never ruled on the appealability of TPOs issued under NRS 200.594. Nevada's TPO statutes are not exactly the same as any other state's; while there is precedent available in other jurisdictions that TPOs are appealable, it cannot be applied directly to Nevada cases. Furthermore, because appeals from justice courts do not ordinarily reach this Court, it is unlikely that this Court will confront the question often. (This case arose, not from an appeal from justice court, but from a district court petition for an extraordinary writ, so this is an exception.) Therefore, this is an opportunity for this Court to decide an issue which may be highly relevant below, but which would not normally reach it.

13. Second, petitioners have found no Nevada precedent regarding the question of whether an improperly obtained TPO, injunction, or similar process may give rise to an action for malicious prosecution or abuse of process. This is a common law matter, and there is authority in other jurisdictions holding in the affirmative, but apparently, under Nevada law, the answer is otherwise in the Sixth Judicial District Court. Thus, Nevada might be seen to contradict most other states.

14. This appeal raises substantial constitutional issues. As this Court decided in *Lippis v. Peters*, the question brought to this Court is a constitutional question. Why should adverse parties in TPO cases not have the same protections afforded all other justice court litigants? As the matter now stands, this court now has singled out TPO litigants for special mistreatment, with no constitutional basis.

15. In *Lippis v. Peters*, this Court determined that the Constitutional issues were substantial enough to invalidate portions of the JCRCP. There is no significant difference here in the importance of the determination.

16. The Constitution also proclaims that everyone is entitled to due process, which has been interpreted by the U.S. Supreme Court to mean a hearing at the least. There has been no hearing on this question. By declining to review the District Court's decision, this court

has said, in effect, that it will decide matters without due process, without a hearing of the arguments and supporting authorities. If Appellant had brought a rambling, confusing brief, or had made unsubstantiated arguments, then it might be understandable if this court were to misapprehend the question brought before it. In this case, however, it was this Court's decision which was rambling. This Court did not even read, apparently, the eight line Statement of the Issues in Appellants' Opening Brief. There has been no hearing and due process is lacking.

17. This appeal raises substantial public policy issues. The Legislature has seen a need for TPOs, by enacting the laws which clarify their issuance and other matters. It went even further, when it allowed interlocutory appeals, as a matter of law, for extended TPOs. Normally, interlocutory appeals are available only under limited circumstances. Clearly, the Legislature, by authorizing interlocutory appeals for extended TPOs, foresaw possible problems with the justice courts, or with the possibility of errors. In fact, the Legislature apparently felt that litigants in TPO cases deserved more than ordinary protection.

18. By allowing appeals from justice court decisions on TPOs, the same as with all other cases, there are various possible results. Although in this case the TPO was issued improperly and maliciously, it is also possible that a justice court might deny a TPO which should be issued. An appeal gives both parties the right to correct justice court errors.

19. The errors can indeed be egregious. In the underlying TPO case, it is a matter of record that Justice of the Peace Joe Dory and Applicant/Respondent Virginia (Sissie) Gallegos have a child together; that Gallegos under oath testified that she filed the application with ulterior motives; that Dory said he did not understand the law but would rule with his heart; that Dory was concerned only that Gallegos was "afraid"; and that Dory sees no problem having ex parte, off-the-record communications with the attorneys of one party to garner legal advice; and that Dory failed even to read Appellants'/Adverse Parties' motions

before ruling against them. Dory issued the TPO solely on the basis that Gallegos was "afraid", and then explicitly ascribed the burden of proof to Marking and Fleming. What kind of fair trial is possible when the defendant is asked to prove that the plaintiff isn't afraid, and nothing else matters? Against this background, Dory and Gallegos conspired together to issue the TPO, believing that the action would not be appealable. With no possibility of review, there would be little possibility of negative consequences for either Dory or Gallegos in the improper procedure.

20. Review is essential to prevent abuses such as the one just described.

21. Without appeals, how can we even know how often such situations occur? Certainly, with appeals, they would occur less often.

22. Of course, the threat of a lawsuit for malicious prosecution or abuse of process might deter legitimate applicants. However, that is always the nature of civil (or even criminal) prosecution. There are safeguards incorporated into the laws and processes to minimize the hazards. No system is perfect, but no just system should allow anyone to take action without the possibility of review.

23. Denying appeals to litigants is a dangerous policy, because it invites abuses such as the ones in the Austin Justice Court.

24. Conclusion. To maintain uniformity of this Court's decisions; to address substantial precedential, constitutional, and public policy issues; and to provide due process of law to Appellants, Petitioners ask this Court to grant this PETITION FOR EN BANC RECONSIDERATION, and to allow us to address the issues brought forth in this Appeal as set forth in APPELLANTS' OPENING BRIEF.

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, 6 December 2011.

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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, 6 December 2011.

_____

Michael Marking

(Appellants' electronic document name: *mfvg_petition_for_en_banc_reconsideration_20111206a)*