

1 Case Number 56064

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3
4 IN THE SUPREME COURT OF THE STATE OF NEVADA

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8
9 MICHAEL MARKING

10 and

11 ELIZABETH FLEMING,

12 Appellants

13 v.

14 VIRGINIA (SISSIE) GALLEGOS,

15 Respondent

16 PETITION FOR REHEARING

17 (Sixth Judicial District Court
18 Case No. CV 9953)

19
20 COME NOW Michael Marking and Elizabeth Fleming, in proper person, as Appellants, and
21 hereby submit their PETITION FOR REHEARING.

27 **WHEREAS**

28 This Court's ORDER OF AFFIRMANCE in this Appeal was filed 15 September 2011; and
29 In this Appeal, Appellants brought a single, clear, unambiguous question of law to this
30 Court (see POINTS & AUTHORITIES, page 3); and

31 In said ORDER OR AFFIRMANCE,

32 This Court overlooked and misapprehended material facts in this case (see POINTS
33 & AUTHORITIES, page 4); and

34 This Court overlooked and misapprehended material questions of law in this case
35 (see POINTS & AUTHORITIES, page 5); and

36 This Court overlooked and failed to apply procedural rules and controlling
37 decisions in this case (see POINTS & AUTHORITIES, page 6); and

38 This Court completely ignored and disregarded the single question of law brought in this
39 Appeal (see POINTS & AUTHORITIES, page 7);

40
41 **THEREFORE**

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

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

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49 **IN SUPPORT OF THIS PETITION**, Appellants have attached their **MEMORANDUM OF POINTS &**
50 **AUTHORITIES**.

53 DATED this Monday, 3 October 2011.

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57 Michael Marking, Appellant
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61 _____
62 Elizabeth Fleming, Appellant
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65 both at General Delivery, Austin, Nevada 89310
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68 MEMORANDUM OF POINTS & AUTHORITIES
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70 **1. This appeal brings a single, clear, unambiguous question of law to this Court.**

71 The question, as asked in the Statement of the Issues on page 4 of APPELLANTS' OPENING BRIEF
72 (2010.06.29), is: "Can an appeal be taken to a district court from a decision by a justice court
73 granting a Temporary Protective Order (TPO) for stalking or harassment, after the TPO has
74 expired?" (emphasis added)

75 **2.** Continuing, the Statement of the Issues, in only five lines, summarized the
76 arguments on both sides: "The District Court, in concluding the negative, reasoned that (1)
77 absent statutory authority, there is no right to appeal; and (2) the TPO having expired, the
78 appeal would be moot. The Adverse Parties, Appellants in the matter, believe that both of

79 those arguments are incorrect, inasmuch as (3) there is sufficient authority to permit the
80 appeal; and (4) the appeal is not moot, given a contemplated action for malicious prosecution
81 by the Adverse Parties.”

82 **3.** The District Court’s position is summarized in a thirteen line decision, in its ORDER
83 of 2009.12.07. (APPELLANTS’ APPENDIX, page A-23) Appellants’ opposing arguments are made
84 in the record of the District Court, but are repeated with additional authorities in APPELLANTS’
85 OPENING BRIEF.

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87 **4. Overlooked and misapprehended material facts.** This Court overlooked and
88 misapprehended material facts in this case.

89 **5.** Appellants sought to appeal a TPO *after* the TPO had expired; this was *not* an
90 interlocutory appeal. The District Court also misunderstood this at first, in its ORDER of
91 2009.10.14. (APPELLANTS’ APPENDIX, page A-15, lines 15-17). However, the District Court
92 corrected itself in its subsequent ORDER of 2009.12.07. (APPELLANTS’ APPENDIX, page A-23, lines
93 22-23)

94 **6.** This Court concluded that Appellants sought to challenge the TPOs by petition for
95 extraordinary writ. This is also incorrect. Appellants sought writ relief to cause an appeal
96 from the Justice Court to move forward. The Justice Court Clerk had refused to file the notice
97 of appeal, and the appeal needed to be docketed in the district court. (APPELLANTS’ APPENDIX,
98 page A-1 *et seq.*) Appellants contend they have a right to an appeal from a TPO (indeed, that
99 is the main point of *this* appeal from District Court), and, as such, writ relief to challenge the
100 TPO is unavailable. (Writ relief is generally unavailable when there is another remedy, such as
101 an appeal.) The writ was for the *process*, not for the challenge itself.

102 **7.** The District Court concluded that the Justice Court Clerk ought to have filed the
103 notice of appeal, but further reasoned that there was no statutory right to an appeal and,
104 therefore, an appeal would be denied. Accordingly, filing the notice of appeal would have

105 been pointless and Appellants therefore brought this Appeal from the District Court's
106 decision.

107 **8.** Appellants argue that the authority for appealing a TPO is not necessarily statutory,
108 but rather from JCRCP, from the Nevada Constitution, and from prior decisions by this Court.
109 (In summary: JCRCP 72A(b) specifies appealable determinations and makes no exceptions
110 for TPOs. The *Nevada Constitution*, Article 6, §6.1 gives the district courts appellate
111 jurisdiction over cases arising in justice courts. This court has said, "The Nevada Constitution
112 [in Article 6, Section 6] proclaims that district courts have final appellate jurisdiction in all
113 cases arising in justices' courts..." (*Lippis v. Peters*, 112 Nev. 1008, 921 P.2d 1248, Nev. No.
114 26575, (1996), emphasis in the original); complete argument is in the APPELLANTS' OPENING
115 BRIEF.)

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117 **9. Overlooked and misapprehended material questions of law.** This Court has
118 overlooked and misapprehended two significant material questions of law.

119 **10.** First, the direct question brought by this Appeal, "Can an appeal be taken to a
120 district court from a decision by a justice court granting a Temporary Protective Order (TPO)
121 for stalking or harassment, after the TPO has expired?" (as explained above)

122 **11.** Second, an indirect question, "Would such an appeal be moot?" The District
123 Court concluded that, the TPO having expired, the appeal would be moot. (APPELLANTS'
124 APPENDIX, page A-23) Appellants argue that in case of an improperly issued TPO, when the
125 purpose of the TPO was malicious and abusive, adverse parties have a right to seek damages
126 in an action for malicious prosecution. However, an element of malicious prosecution is
127 favourable (to the adverse party) termination of the previous litigation, so correcting the error
128 made by the justice court in issuing the TPO is essential to the right of the adverse party to
129 bring the malicious prosecution action. Therefore, an appeal to correct the justice court error
130 is not moot. Put more simply, adverse parties may be entitled to damages when an applicant

131 abuses the TPO process, and the justice court errs by issuing the TPO under the
132 circumstances. (APPELLANTS' OPENING BRIEF, page 9 *et seq.*)

133 **12.** Appellants further argue that there is an exception to the mootness doctrine
134 (APPELLANTS' OPENING BRIEF, page 11), and that a false application for a TPO can give rise to an
135 action for slander or libel (APPELLANTS' OPENING BRIEF, page 12). This Court also failed to
136 consider these arguments with respect to mootness. In fact, this Court, having ignored the
137 main point of the Appeal, failed altogether to consider the mootness question.

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139 **13. Overlooked and unapplied rules and decisions.** As this Court disregarded the
140 single question brought by this Appeal, it consequently disregarded the authorities, rules, and
141 decisions supporting Appellants' arguments. This Court concluded that Appellants'
142 arguments "lacked merit". (ORDER OF AFFIRMANCE, footnote 2) Perhaps they do lack merit when
143 used to answer the wrong question, but Appellants believe they are meritorious when applied to
144 the issue brought before this Court.

145 **14.** Finally, this Court noted that Appellants failed to submit copies of the issued
146 TPOs with their petition to the District Court. As explained above, Appellants sought to
147 correct procedural errors, not to challenge the TPOs. The challenge to the TPOs themselves
148 will be made by appeal from justice court, once it is recognized (as Appellants pray) that a
149 right to such an appeal exists. Accordingly, the TPOs were deemed superfluous to the
150 question brought before the District Court. What Appellants seek is pertinent to *any* TPO, not
151 just to a certain, specific TPO. This Appeal is about a question of law, not about any
152 particular TPOs.

153 **15.** This Court concluded that the TPOs "support the district court's decision". The
154 district court's decision (Appellants' Appendix, page A-23) was a finding of law, and was not
155 itself based on the TPOs. Thus to conclude whether or not the TPOs support the district
156 court's decision seems somewhat absurd.

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16. Point of appeal completely ignored. The single, clear, and unambiguous question brought to this Court by this Appeal (see above, page 3) remains ignored and unanswered: Can an expired TPO be appealed? We seek an answer in the affirmative, and so bring this Appeal from a District Court decision to the contrary.

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 Monday, 3 October 2011.

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 Monday, 3 October 2011.

Michael Marking

(Appellants' electronic document name: *mfvg_petition_for_rehearing_20111003a*)