Case Number _____

In the Supreme Court of the State of Nevada

Michael Marking, and Elizabeth Fleming Petitioners v. The Sixth Judicial District Court of the State of Nevada, in and for the County of Lander, and the Honourable Richard A. Wagner, District Judge Respondents and Virginia Gallegos, Real Party In Interest	Petition for Writ of Mandamus (Sixth Judicial District Court Case Number CV 9953)

Come Now Michael Marking and Elizabeth Fleming, in proper person, and hereby petition this Court as follows:

Whereas,

(1) Petitioners Marking and Fleming were Adverse Parties in an action brought by

Applicant Virginia (Sissie) Gallegos in the Justice Court of Austin Township (Case Number 09 P002/P003) under NRS 200.591 for a Temporary Restraining Order; and

(2) Petitioners Marking and Fleming subsequently sought to appeal, under JCRCP 72A(b)(1), the Justice Court's decision to the Sixth Judicial District Court; and

(3) Petitioners noted in pleadings that the matter was not moot, given the implications of the res judicata doctrine in a contemplated derivative action for malicious prosecution; and

(4) The District Court held that the Justice Court's decision, due to lack of statutory authority, was not appealable, and also held that the matter was moot (the TRO having expired); and

(5) The Nevada Constitution empowers the Legislature to determine rules for appeals; the Legislature delegated its rule-making power to the Supreme Court; the Supreme Court promulgated the JCRCP; and

(6) The District Court's decision is in violation of JCRCP and the Nevada Constitution, as previously interpreted by this Court, and deprives Petitioners of their rights as granted by those documents; and

(7) There is no other mechanism, aside from this Petition for an extraordinary writ, for Petitioners Marking and Fleming to avail themselves of their right to appeal; and

(8) The issues raised in this Petition are significant, yet easily capable of evading review; and

(9) This Petition, as well as the appeal which it seeks to allow, are brought for legitimate purposes;

THEREFORE,

Petitioners hereby pray to this Court for a Writ of Mandamus, directing the District Court as follows:

(1) To accept and hear Petitioners' appeal from the Justice Court; and

(2) To defer any decisions on mootness until the appeal itself; and

(3) To consider the implications of the res judicata doctrine for the question of mootness, given the contemplated derivative action for malicious prosecution; and

(4) To consider an exception to the mootness doctrine for matters capable of repetition yet evading review.

IN SUPPORT of this request, Petitioners attach their MEMORANDUM OF POINTS AND AUTHORITIES and their EXHIBITS, as follow.

DATED Tuesday, 16 February 2010.

Michael Marking, Petitioner

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Elizabeth Fleming, Petitioner

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both at: General Delivery, Austin,

Nevada 89310

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Memorandum of Points and Authorities

1. Abbreviated Case History. The Application for TRO was filed in the Justice Court of Austin Township on 10 August 2009, as was assigned case number 09 PO 002/003. The application was granted. Adverse parties requested a hearing to dissolve the injunction; the hearing was held 25 August; the Justice Court slightly modified the order but did not dissolve it. The TRO was set to expire 10 September. Petitioners (as Adverse Parties) filed a Rule 59 motion on 3 September, which was denied.

2. Petitioners attempted to appeal on 14 September, but the Justice Court clerk refused to accept the Notice of Appeal, saying that the matter was not appealable. Petitioners then, on the same day, filed directly with the District Court, making a Motion to Docket Appeal, and a Petition for Writ of Mandamus to direct the Justice Court clerk to accept the Notice of Appeal. In the pleadings, Petitioners relied on JCRCP 72A(b)(1) for the appeal, and noted that the matter was not moot in light of a contemplated action for malicious prosecution.

3. The District Court granted the Writ of Mandamus, but determined anyway that the matter was not appealable. Although the appeal was not interlocutory, the District Court cited NRS 200.591.4, which permits an interlocutory appeal from an extended order. Since the TRO in question was not extended, and no similar allowance was made in the Statutes for TROs which were not extended, the District Court concluded that there was no authority for the appeal.

4. Petitioners then made a Motion to Amend Judgment, explaining that the authority for the appeal lay in JCRCP 72A(b)(1). The District Court did not change its position, and further concluded that the matter was moot because the TRO had expired.

5. 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.

6. "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)

7. 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...

8. 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*)

9. "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)

10. 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)

11. Accordingly, JCRCP are authoritative, and applicable to the Justice Court proceeding giving rise to this Petition.

12. The Attempted Appeal Was from a Final Order. Petitioners attempted to file their Notice of Appeal in the Justice Court on 14 September, after the Protective Order had expired. Thus the attempted appeal was not interlocutory, and NRS 200.591.4 (as cited by the District Court in its Order) is not the controlling rule for the appeal.

13. 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))

14. We submit that the correct interpretation of the statutory permission for interlocutory appeals (NRS 200.491.4) 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 TROs or extended orders on other authority. The statute does not reduce the rights granted by JCRCP 72A; rather, it expands them.

15. There is no authority permitting the resurrection or modification of an expired Protective Order, and all questions before the Justice Court had been decided. Therefore, the

25 August 2009 decision of the Justice Court was final. “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))

16. (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 was 25 September or at the expiration of the Protective Order. In either event, the decision of the Justice Court was final before the date of the attempted appeal.)

17. Appeals from Final Orders Are Permitted by JCRCP 72A. Petitioner acknowledges 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).

18. “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.

19. 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 <u>all</u> 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.

20. 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)

21. 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 Petitioners seek, so denial of the right to an appeal is unfounded.

22. 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.

23. The Question Is Not Moot. It is contemplated that this action may give rise to a subsequent claim for malicious prosecution and abuse of process. One of the elements of such a claim is an unsuccessful outcome for the applicant (plaintiff) in the precedent litigation. Thus, although the TRO has expired, the outcome of this litigation is germane to the malicious prosecution claim by Petitioners. Therefore, the question is not academic or dead. The issue has not ceased to exist merely because the TRO has expired.

24. However, the decision of this Justice Court case will become res judicata, and cannot be revisited in a subsequent action. For that reason, it is imperative that the issue be resolved properly, else the subsequent litigation will falter.

25. An expired wrongful restraining order is analogous to a wrongful lien which has already been removed. In a similar 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))

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

27. 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 and law.

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

29. 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))

30. 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 200.491 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.

31. Therefore, this case, even if the issues were moot, should be heard on appeal in the District Court.

32. A Writ of Mandamus Is Appropriate. This petition is a proper mechanism to rectify the error of the District Court.

33. An appeal from Justice Court has not yet taken place. The Justice Court clerk refused to file the Notice of Appeal, no transcripts have been ordered, and neither briefs nor arguments on the substantive matter of the Justice Court action have been given to District Court. At this point, this matter might be viewed two ways: either as an original action in District Court (similar to this Petition in the Supreme Court), or, alternatively, as a failed attempt to appeal from Justice Court to District Court. In the former view, an appeal to the Supreme Court according to NRAP is possible. In the latter view, since the District Court has final appellate jurisdiction in matters arising in Justice Court, no appeal to the Supreme Court is possible.

34. With an abundance of caution, if this might be viewed as being better done as an appeal, Petitioners have timely filed their Notice of Appeal in the District Court in order to preserve their rights to an appeal, should such rights be deemed to exist. However, since Petitioners have not been notified (as required by NRAP 12(a)) by the Supreme Court clerk that the appeal was docketed, we have concluded that the District Court clerk has declined

to treat this matter as an appeal. (We note that such a failure may be contrary to the decision in *Bowman v. Eighth Judicial District Court*, 192 Nev. 474 (1986), that the clerk has no authority to make any decision concerning the propriety of any document, such as a Notice of Appeal, filed, and the notice should have been sent to the Supreme Court anyway.)

35. It is acknowledged that an extraordinary writ should be used only where there is no other mechanism to achieve the desired end. In the present instance, that appears to be the case. If the matter is deemed to have originated in the District Court, that court's clerk has not processed the appeal as required, and the writ is required. On the other hand, if the matter is deemed to have originated in the Justice Court, there is no appeal from District Court, and the writ is required.

List of Citations

Certificate of Service

I hereby certify under penalties of perjury that on this date I served true and correct copies of the foregoing Motion to Amend Judgment, as follows:

(1) by depositing one copy for mailing, in a sealed envelope, U.S. Postage prepaid, at Fallon, Nevada, addressed to Virginia (Sissie) Gallegos, Austin, Nevada 89310; and

(2) by similarly mailing a second copy, addressed to the Austin Justice Court, Austin, Nevada, 89310.

Dated Wednesday, 28 October 2009.

Michael Marking

AFFIRMATION

(Pursuant to NRS 239B.030)

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

Dated Wednesday, 28 October 2009.

_____

Michael Marking

(Appellants' electronic document name: *petition_for_writ_of_mandamus_20100216*)