IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY SCHMIDT,

Appellant,

v.

BEN KIECKHEFER,

Respondent.

Supreme Court Case No. 66528

District Court Case No. CV14-01227

REPLY TO APPELLANT'S RESPONSE TO ORDER TO SHOW CAUSE

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Respondent, State Senator Ben Kieckhefer ("Sen. Kieckhefer"), submits the following Reply to the Response to Order to Show Cause ("Response") by Appellant, Gary Schmidt ("Schmidt").

I. INTRODUCTION

The question asked of Schmidt by this Court is straightforward: why should "this appeal . . . not be dismissed for lack of jurisdiction with respect to the temporary restraining order." (Order to Show Cause, Nov. 24, 2014.) As has been typical throughout this litigation, Schmidt's 217-pages of argument and exhibits fail to answer the Court's simple question. Instead Schmidt uses his Response as a pulpit to further his political agenda and attack Sen. Kieckhefer. Nothing in Schmidt's Response provides a reason why this Court should hear an appeal of a temporary restraining order that is no longer in effect and that has been mooted by the results of an election.

This Court should dismiss the portion of Schmidt's appeal relating to the temporary restraining order. Further, this Court should impose monetary sanctions upon Schmidt for not taking the Court's clear hint that the appeal of the temporary restraining order was frivolous. NRAP 38(a). Sen. Kieckhefer hereby moves for an Order requiring Schmidt to pay costs and attorney's fees.

II. ARGUMENT

Schmidt and Sen. Kieckhefer were opponents in a 2014 Republican primary election for a seat in the Nevada State Senate. Schmidt has appealed the entry of a Temporary Restraining Order that was entered on June 6, 2014 by Judge Flanagan of the Second Judicial District Court in and for Washoe County. That Order

restrained Schmidt from running campaign advertisements "expressing or implying that Ben Kieckhefer has endorsed or supported Harry Reid." (Response Ex. 6.) While it is apparent that Schmidt remains chagrined by that Order, he has not provided this Court with any justification for his appeal of an Order that is no longer in effect. A temporary restraining order expires on its own terms no later than fifteen days after the date of entry. N.R.C.P. 65(b). Accordingly, the Temporary Restraining Order expired at the latest on June 21, 2014 and regardless was mooted by the outcome of the June 10, 2014 election.

A. Temporary Restraining Orders Are Not Appealable As A Rule.

The law in Nevada is clear: "a temporary restraining order, which is necessarily of limited duration pending further proceedings on the injunction request, is not [appealable]." *Sicor, Inc. v. Sacks*, 127 Nev. Adv. Op. 81, 266 P.3d 618, 620 (2011) (citing *Sugarman Co. v. Morse Bros.*, 50 Nev. 191, 255 P. 1010 (1927)). This controlling authority is dispositive of the issue under consideration by the Court and Schmidt fails to cite it. Moreover, Schmidt fails to cite to *any* case where a temporary restraining order was considered by this Court. The cases that Schmidt does offer are far from the mark.

First, Schmidt provides a string cite, without any analysis, to a list of cases that purportedly hold "that when an Appeal is taken from an appealable Judgment, other prior Orders which are not appealable standing alone may properly be reviewed for error simultaneously by the Supreme Court." (Response 2.) These cases are inapplicable because there is not a final judgment in the instant case and because they involve the review of interlocutory orders that are inextricably bound

to the final appealable order. *See Summerfield v. Coca Cola Bottling Co. of the Sw.*, 113 Nev. 1291, 1294-95, 948 P.2d 704, 706 (1997) (reviewing an interlocutory order denying a request for a N.R.C.P. 56(f) continuance because that decision affected the ability of the party to conduct discovery prior to an adverse summary judgment decision). The rationale behind these cases is that the final appealable judgment may depend on the resolution of the interlocutory orders along the way. Here, the Temporary Restraining Order was not the foundation for the District Court's Order denying Schmidt's Special Motion to Dismiss brought under NRS 41.660, which was also not a final judgment. In fact, Judge Polaha indicated that he was not bound by the Temporary Restraining Order or the standards for such orders in making his decision on the Special Motion to Dismiss. (Response Ex. 7, Hearing Tr. August 13, 2014, 32:19-35:5.) The Temporary Restraining Order does not become reviewable, contrary to all other precedent, simply because Schmidt is appealing the denial of an entirely separate motion.

Second, Schmidt cites to several First Amendment cases at various places in his Response. Each of these cases is based on a unique fact pattern and is easily distinguishable. This Court considered First Amendment issues in *Republic Entm't, Inc. v. Clark Cnty. Liquor & Gaming Licensing Bd.*, 99 Nev. 811, 813, 672 P.2d 634, 636 (1983). Although Schmidt implies that this case held that this Court reviewed a moot temporary restraining order, this is not correct. The district court had dissolved a temporary restraining order, but the appeal was solely based on the district court's denial of a preliminary injunction. *Id.* at 813. Neither questions relating to a temporary restraining order nor to mootness were before the Court. In

the other Nevada case, *Talk of the Town Bookstore v. City of Las Vegas*, the Court analyzed a general challenge to constitutionality of a specific ordinance as well as an injunction that was still in effect. 92 Nev. 466, 469, 553 P.2d 959, 960-61 (1976). The ordinance presented a ripe issue as did the ongoing injunction. Here, the Temporary Restraining Order has expired and does not present this Court with a justiciable case susceptible of resolution.

Schmidt also cites to *Carroll v. President & Comm'rs of Princess Anne* where the United States Supreme Court considered an order preventing a white supremacist organization from holding rallies for ten days. 393 U.S. 175, 176 (1968). *Carroll* held that review of that order was not moot because "petitioners have sought to continue their activities . . . and it appears that the decision of the Maryland Court of Appeals continues to play a substantial role in the response of officials to their activities." *Id.* at 178. Similarly, in *Nebraska Press Ass'n v. Stuart*, the Supreme Court held that review of an otherwise moot order was appropriate because the dispute was capable of repetition. 427 U.S. 539, 546 (1976). The key distinction is that in both *Carroll* and *Nebraska Press Ass'n*, the government, rather than a private individual, was the party enforcing a restriction of speech. Thus, the static position of the government was the critical element that allowed the Supreme Court to declare that the restriction of speech was capable of repetition. In this private civil lawsuit, not only is Schmidt's speech unlikely to continue as the election has been over for months, but any restraint is unlikely to be imposed due to the reduced lack of harm to Sen. Kieckhefer after the election.

B. The Appeal Of The Temporary Restraining Order Is Untimely.

The Order Granting Temporary Restraining Order was entered on June 6, 2014 and Schmidt's Notice of Appeal was not filed until September 12, 2014. "[A] notice of appeal must be filed after entry of a written judgment or order, and no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served." NRAP 4(a)(1). The Notice of Appeal was not filed until well after the expiration of the thirty-day appeal period. Therefore, the appeal of the Order Granting Temporary Restraining Order is untimely and in violation of NRAP 4(a)(1). Schmidt cannot salvage his untimely filing by trying to bundle his appeal of the Temporary Restraining Order with his appeal of an entirely separate Order denying his Special Motion to Dismiss.

C. Schmidt's Appeal Of The Temporary Restraining Order And His Continued Defense Of This Appeal Are Frivolous And Sanctionable.

This Court strongly cautioned Schmidt that the appeal of a temporary restraining order constituted a jurisdictional defect. By filing that appeal in the first place and then defending it despite this Court's clear precedent in *Sicor*, 266 P.3d at 620, Schmidt has wasted Sen. Kieckhefer's and the Court's time by chasing a futile and frivolous argument. NRAP 38(a)(b) permit the Court to order a party making a frivolous appeal or misusing the appellate process to pay costs and attorney's fees. Such sanctions are appropriate here.

CONCLUSION

For all of the foregoing reasons, Sen. Kieckhefer requests that this Court dismiss the portion of Schmidt's appeal relating to the temporary restraining order and impose sanctions against Schmidt for that frivolous portion of the appeal.

AFFIRMATION

The undersigned does hereby affirm that the preceding document does not contain the Social Security number of any person.

Respectfully submitted this 17th day of December, 2014.

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CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I hereby certify that I am an employee of McDONALD CARANO WILSON LLP and that on December 17, 2014, a true and correct copy of the foregoing **REPLY TO APPELLANT'S RESPONSE TO ORDER TO SHOW CAUSE** was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system and by United States First-Class mail to all unregistered parties as listed below:

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