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IN THE SUPREME COURT OF THE STATE OF NEVADA

RAYMOND DELUCCHI and
TOMMY HOLLIS,

Appellants,

v.

PAT SONGER and ERICKSON
THORPE & SWAINSTON, LTD.

Respondents
_____/

Case No. 66858
District Court: CV35969

**RESPONSE TO ORDERTO SHOW CAUSE**

COMES NOW Appellants Raymond Delucchi and Tommy Hollis by and through undersigned counsel Adam Levine, Esq. of the Law Office of Daniel Marks and here by submits their Response to the Order to Show Cause as follows:

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## I. THE ORDER GRANTING SONGER'S MOTION TO DISMISS IS A FINAL JUDGMENT.

The district court's Order filed November 19, 2014 is a final judgment for purposes of NRAP 3A(b)(1). The Order, following the Order granting Erickson, Thorpe & Swainston's ("ETS") Motion to Dismiss dated September 17, 2014, disposed of all remaining claims between the parties.[1]

This court has raised jurisdictional concerns because of the language used within the November 19, 2014 Order that "the case will be dismissed with prejudice once the Court has awarded fees and costs". However in-artfully drafted, the Order is still a final judgment.[2] The first clause of the sentence states "IT IS HEREBY ORDERED that Defendant Songer's Special Motion to Dismiss Pursuant to NRS §41.660 is GRANTED". This is sufficient in and of itself to render the Order a final judgment notwithstanding the subsequent language at issue.

The language regarding future intent was simply an attempt by the district court to ensure that it kept jurisdiction to enter an award of fees and costs as required by Nevada's anti-SLAPP statutes. What the District Court did not properly recognize was the fact that a district court always retained such

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[1] The notice of appeal of the Order granting ETS' Motion was premature.

[2] Counsel for Appellants did not draft or approve the language of the Order as to form or content.

jurisdiction after a final judgment as such awards of fees and costs. This Court has repeatedly held:

> Although, when an appeal is perfected, the district court is divested of jurisdiction to revisit issues that are pending before this court, the district court retains jurisdiction to enter orders on matters that are collateral and independent from the appealed order, *i.e.*, matters that in no way affect the appeal's merits.

*Mack-Manley v. Manley*, 122 Nev. 849, 855, 138 P.3d 525, 530 (2006) citing *Kantor v. Kantor*, 116 Nev. 86, 8 P.3d 825 (2000). In *Kantor* this Court specifically held that an award of attorney's fees is a collateral matter for which a trial court is not deprived of jurisdiction where an appeal is taken.

Notwithstanding the district court's intent to issue an order relating to a collateral matter, the fact that the Order stated that the Special Motion to Dismiss "is GRANTED" is in fact sufficient to render a final judgment because it disposed of all remaining claims between the parties other than the collateral matter of fees.

## II. EVEN IF THE DISMISSAL ONLY BECAME EFFECTIVE UPON THE ENTRY OF THE FEE AWARDS, THERE IS STILL NO JURISDICTIONAL DEFECT PURSUANT TO NRAP 4(a)(6).

As set forth above the Order of the district court dated November 19, 2014 should be deemed the final judgment. However, if the court were to take the alternative construction of the Order's language it would mean that the dismissal

was not intended to that take effect until the filing of the Order Awarding Fees in Costs on December 29, 2014.

This court has long interpreted NRAP 4(a)(6) in a manner such that "unless the premature appeal has already been dismissed, a premature notice of appeal shall be considered filed on the date of and after entry of the order" at issue. See e.g. *AA Primo Builders, LLC v. Washington*, 126 Nev. ___, 245 P.3d 1190 (2010).

In *Winston Products Co. v. DeBoer*, 122 Nev. 517, 134 P.3d 726 (2006) this court announced what it has referred to as "an overarching rule" that "[o]ur interpretation of [modern] NRAP 4(a)(4) tolling motions should reflect our intent to preserve a simple and efficient procedure for filing a notice of appeal" and "not be used as a technical trap for the unwary draftsman." *Id.* at 526, 134 P.3d at 732.

Appellees, who were not involved in the drafting of the language of the November 19, 2014 order should not be required to "guess" as to whether the dismissal was effective as stated in the language "IT IS HEREBY ORDERED that Defendant Songer's Special Motion to Dismiss Pursuant to NRS §41.660 is GRANTED" or whether it would become effective at a later date. Because the appeal was not dismissed as premature prior to the effective date of the December 29, 2014 Order Awarding Fees and Costs, even if this Court

determines that the dismissal was intended to become effective as that date this court to deem the Amended Notice of Appeal filed as of that date.

## III. IF THIS COURT FINDS THAT A JURISDICTIONAL DEFECT DOES EXIST, IT COULD BE REMEDIED THROUGH AN "ORDER LIMITED REMAND" INSTEAD OF A DISMISSAL.

The Order Awarding Fees and Costs filed December 29, 2014 does not state that the action is dismissed as of the filing of that Order. Accordingly, if this Court determines that the language of the November 19, 2014 Order at issue should be construed as a statement of intent to take future action on the claims between the parties, as opposed to an intent to enter a collateral order (i.e. an award of fees), a new Order of dismissal will need to be entered before an appeal can be perfected.

In other cases, this Court has handled such defects in the language of District Court orders through an "Order of Limited Remand". By way of example, in *Judkins v. Las Vegas Metropolitan Police Department*, Docket No. 62695 this Court issued such an Order of Limited Remand on March 13, 2014 where the district court denied a petition to vacate an arbitrator's award which was clearly intended to dispose of the dispute, but did not, concurrently enter an order confirming the arbitrator's award as required by NRS 38.241(4). This Court did not deem it necessary to dismiss the pending appeal; rather it resolved jurisdictional issues by a limited remand for purpose of entering an order

confirming the award and requiring the district court to transmit the appropriate order within 30 days to this Court. A copy of that Order of Limited Remand is attached hereto as Exhibit "1".

Accordingly, if this Court does not deem the November 19, 2014 Order to be a final judgment, and likewise does not deem the matter cured by NRAP(4)(a)(6), and Order of Limited Remand should issue directing the district court to enter a new Order of Dismissal and to transmit that new order to this Court so that the previously filed appeal may proceed.

DATED this 5th day of May, 2015.

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## CERTIFICATE OF SERVICE

I certify that on the 5th day of May, 2015, I served a copy of this completed Amended Docketing Statement upon all counsel of record:

☐ By personally serving it upon him/her; or

☐ By mailing it by first class mail with sufficient postage prepaid to the following address(es):

■ By serving it upon him/her via electronic filing as mandated by the Court to the email address as provided to the Court by opposing counsel.

Dated this 5th day of May, 2015.

Signature

# EXHIBIT “1”

IN THE SUPREME COURT OF THE STATE OF NEVADA

ERIC JUDKINS,
Appellant,
vs.
LAS VEGAS METROPOLITAN POLICE DEPARTMENT,
Respondent.

No. 62695



*ORDER OF LIMITED REMAND*

This is an appeal from a district court order denying a petition and motion to vacate an arbitration award.

When our preliminary review of the docketing statement and the NRAP 3(g) documents revealed a potential jurisdictional defect, we ordered appellant to show cause why this appeal should not be dismissed for lack of jurisdiction. In particular, we were concerned that an order refusing to vacate an arbitration award is not among the orders listed as appealable under NRS 38.247, and it was unclear whether the order could be considered the functional equivalent of an order confirming an arbitration award, which is appealable under NRS 38.247(1)(c).

Having considered the parties' timely responses to our show cause order, we conclude that the order is not appealable under NRS 38.247(1)(c) as the functional equivalent to an order confirming the arbitration award.[1] *See Karcher Firestopping v. Meadow Valley*

[1]Although the order apparently also denied appellant's request for relief under NRS 289.120, that portion of the order is inseparable from the portion covering the arbitration award, and thus, cannot be independently appealed.

*Contractors, Inc.*, 125 Nev. 111, 116-17, 204 P.3d 1262, 1265-66 (2009) (adhering to a strict, plain language reading of NRS 38.247 in concluding that orders vacating an arbitration decision and directing a rehearing are not appealable, even though the orders also deny confirmation of the award and would be otherwise appealable, and noting that such orders do not contain the degree of finality required of orders appealable under NRS 38.247); *W. Waterproofing Co. v. Lindenwood Colls.*, 662 S.W.2d 288, 289 (Mo. Ct. App. 1983) (holding that no appeal lies from an order denying a motion to vacate); *Dunlap by Hoffman v. State Farm Ins. Co.*, 546 A.2d 1209, 1210–11 (Pa. Super. Ct. 1988) (holding that an order denying a motion to vacate was not final because the trial court had failed to also enter an order confirming the arbitration award and remanding for entry of the confirmation order). NRS 38.241(4) provides that "[i]f the court denies a motion to vacate an award, it shall confirm the award unless a motion to modify or correct the award is pending." Here, however, the court failed to expressly confirm the award, even though no motion to modify or correct was pending and the 90 days in which to file such a motion ostensibly had expired. NRS 38.242; *see Casey v. Wells Fargo Bank, N.A.*, 128 Nev. ___, 290 P.3d 265 (2012).

It is the court's duty to confirm an award once it has denied a petition to vacate the award, *see Dunlap*, 546 A.2d at 1211, and the district court's failure to do so here prevented the order from attaining the finality necessary to appeal. *See Karcher Firestopping*, 125 Nev. at 117, 204 P.3d at 1266. Accordingly, because the court was required to confirm the arbitration award, we remand this matter to the district court for the limited purpose of entering an order confirming the award. The district

court shall have 30 days from the date of this order to enter the confirmation order and transmit it to this court. The briefing schedule remains suspended pending further order of this court.

It is so ORDERED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Cherry

cc: Hon. Kenneth C. Cory, District Judge
Law Office of Daniel Marks
Marquis Aurbach Coffing
Eighth District Court Clerk