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5 *Attorneys for Respondents*

Electronically Filed  
Oct 23 2015 01:52 p.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

6  
7 IN THE SUPREME COURT OF THE STATE OF NEVADA

8 PAT SONGER,

Case No. 67414

9 Appellant,

10 v.

11 RAYMOND DELUCCHI and  
TOMMY HOLLIS

12 Respondents  
13 \_\_\_\_\_ /

14 **RESPONDENTS' REPLY TO APPELLANT PAT SONGER'S RESPONSE**  
15 **TO ORDER TO SHOW CAUSE**

16 COMES NOW Respondents Raymond Delucchi and Tommy Hollis by and  
17 through undersigned counsel Adam Levine, Esq. of the Law Office of Daniel  
18 Marks and hereby files their Reply to the Appellant Pat Songer's Response to  
19 Order to Show Cause as follows:

20 ///

1 **I. THIS COURT ALREADY DETERMINED IN DOCKET NO. 66858**  
2 **THAT NO FINAL JUDGMENT HAD BEEN ISSUED BY THE**  
3 **DISTRICT COURT AND THAT DETERMINATION WAS BINDING**  
4 **ON THE PARTIES.**

5 On November 19, 2014 the District Court granted a special motion to  
6 dismiss under Nevada's Anti-SLAPP statutes which stated "the case will be  
7 dismissed with prejudice once the Court has awarded fees and costs". Raymond  
8 Delucchi Tommy Hollis filed their Notice of Appeal on October 27, 2014 under  
9 the belief that the Order granting the Special Motion to Dismiss was a final  
10 judgment. That appeal was docketed as No. 66858.

11 On December 29, 2014 the Order awarding attorney's fees was filed. Pat  
12 Songer filed a Notice of Appeal on January 29, 2015. It was assigned this Docket  
13 No. (67414). On March 10, 2015 Songer filed his docketing statement. Under the  
14 section entitled "Substantive Appealability" Songer cited as authority NRAP 8(b)  
15 claiming that the Order awarding attorney's fees was a "Special Order after  
16 Judgment".

17 On April 14, 2015 this Court issued an Order to Show Cause in Docket No.  
18 66858 on the grounds that the appeal was premature as no final judgment had  
19 been entered in the District Court below. On May 6, 2015 Delucchi and Hollis  
20 filed their Response in Docket No. 66858 arguing that the November 19, 2014  
was a final judgment, or alternatively became a final judgment upon entry of the

1 Order awarding the attorney's fees. (Exhibit "1"). This would have rendered the  
2 Notice of Appeal premature but still effective pursuant to NRAP 4(a)(6).

3 Pat Songer had an opportunity and did in fact file a Reply in Docket No.  
4 66858 so as to be heard on the jurisdictional issue.

5 On June 1, 2015 This Court issued its Order Dismissing Appeal in Docket  
6 No. 66858. That Order stated "We disagree with appellants contention that a  
7 dismissal took effect upon the subsequent entry of an order awarding fees and  
8 costs were appellants represent that the order 'does not state that the action is  
9 dismissed as of the filing of that Order.'" (Exhibit "2"). That order further states  
10 "Appellants [Delucchi and Hollis] may file a notice of appeal from any final  
11 judgment entered in this matter".

12 In response to that Order, on September 15, 2015 the District Court entered  
13 a new Order of Dismissal (Exhibit "3"). A new appeal will be filed shortly in  
14 connection with the order of June 1, 2015.

15 On June 24, 2015 this Court issued an Order to Show Cause why the appeal  
16 should not be dismissed as premature in this Docket No 67414. This Order was  
17 identical to the Order previously filed in Docket No. 66858. There was no reason  
18 to believe that the result would be any different than that filed in Docket No.  
19 66858.

20 ///

1        However, on September 16, 2015 – prior to the due date of any Reply  
2 Delucchi and Hollis might seek to file – this Court inexplicably issued an Order  
3 Reinstating Briefing stating “appellant has demonstrated that the order awarding  
4 attorney’s fees and costs appeal from constituted a final appealable judgment”.

5        The Order awarding attorney’s fees and costs cannot constitute a final  
6 appealable judgment based upon the Court’s disposition in Docket No. 66858.  
7 That Docket No. 66858 involved the same parties and the same issue. It is the law  
8 of the case.

9        “The world does not expect logic and precision in poetry or inspirational  
10 pop-philosophy; it demands them in the law.” *Obergefell v. Hodges*, 576 U. S.  
11 \_\_\_\_ (2015) (J. Scalia dissenting). Respondents Delucchi and Hollis understand  
12 that different appeals may have different law clerks assigned to them. However,  
13 the December 29, 2014 Order awarding attorney’s fees and costs cannot fail to  
14 constitute a final judgment in Docket No. 66858 and constitute just such a final  
15 judgment in Docket No. 67414.

16        Accordingly, Delucchi and Hollis request that this court either (1) dismiss  
17 the Appeal in Docket No. 67414 so as to permit Songer to file a new Notice of  
18 Appeal within 30 days of notice of entry of the District Court’s September 15,  
19 2015 Order (Exhibit “3”) in accordance with its disposition in Dockets No. 66858,  
20 or (2) reinstate Docket No. 66858 and consolidate the two appeals treating the

1 appeal from the award of attorney's fees under Docket No. 67414 as the "Special  
2 Order after Judgment" it was represented to be in the docketing statement.

3 DATED this 23<sup>rd</sup> day of September, 2015.

4 LAW OFFICE OF DANIEL MARKS

5 

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13 *Attorneys for Respondents*  
14  
15  
16  
17  
18  
19  
20

1 **CERTIFICATE OF SERVICE**

2 I certify that on the 23rd day of September, 2015, I served a copy of this  
3 completed Respondents' Reply to Appellant Pat Songer's Response to Order to  
4 Show Cause upon all counsel of record:

5 ☐ By personally serving it upon him/her; or

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

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

10 Dated this 23rd day of September, 2015.

11   
12 \_\_\_\_\_  
Signature

EXHIBIT “1”

1 DANIEL MARKS, ESQ.  
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Electronically Filed  
May 06 2015 09:13 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

6 IN THE SUPREME COURT OF THE STATE OF NEVADA  
7

8 RAYMOND DELUCCHI and  
TOMMY HOLLIS,  
9

Case No. 66858  
District Court: CV35969

Appellants,  
10

v.  
11

PAT SONGER and ERICKSON  
12 THORPE & SWAINSTON, LTD.

13 Respondents  
14

15 RESPONSE TO ORDER TO SHOW CAUSE

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

20 ///



1 **I. THE ORDER GRANTING SONGER'S MOTION TO DISMISS IS A**  
2 **FINAL JUDGMENT.**

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

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

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

19 \_\_\_\_\_  
20 <sup>1</sup> The notice of appeal of the Order granting ETS' Motion was premature.

<sup>2</sup> Counsel for Appellants did not draft or approve the language of the Order as to form or content.

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

3       Although, when an appeal is perfected, the district court is divested  
4 of jurisdiction to revisit issues that are pending before this court, the  
5 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.

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

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

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

17       As set forth above the Order of the district court dated November 19, 2014  
18 should be deemed the final judgment. However, if the court were to take the  
19 alternative construction of the Order's language it would mean that the dismissal  
20

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

3 This court has long interpreted NRAP 4(a)(6) in a manner such that  
4 “unless the premature appeal has already been dismissed, a premature notice of  
5 appeal shall be considered filed on the date of and after entry of the order” at  
6 issue. See e.g. *AA Primo Builders, LLC v. Washington*, 126 Nev. \_\_\_, 245 P.3d  
7 1190 (2010).

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

14 Appellees, who were not involved in the drafting of the language of the  
15 November 19, 2014 order should not be required to “guess” as to whether the  
16 dismissal was effective as stated in the language “IT IS HEREBY ORDERED  
17 that Defendant Songer’s Special Motion to Dismiss Pursuant to NRS §41.660 is  
18 GRANTED” or whether it would become effective at a later date. Because the  
19 appeal was not dismissed as premature prior to the effective date of the  
20 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

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

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

9 DATED this 5<sup>th</sup> day of May, 2015.

10 LAW OFFICE OF DANIEL MARKS

11 

12 DANIEL MARKS, ESQ.

13 Nevada State Bar No.: 002003

14 ADAM LEVINE, ESQ.

15 Nevada State Bar No.: 004673

16 610 South Ninth Street

17 Las Vegas, Nevada 89101

18 *Attorneys for Appellants*

**CERTIFICATE OF SERVICE**

I certify that on the 5<sup>th</sup> 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 5<sup>th</sup> 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

FILED

MAR 13 2014

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY R. Malone  
DEPUTY CLERK

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.<sup>1</sup> See *Karcher Firestopping v. Meadow Valley*

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<sup>1</sup>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.

L. Hardesty, J.  
Hardesty

Douglas, J.  
Douglas

Cherry, J.  
Cherry

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

EXHIBIT “2”

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAYMOND DELUCCHI; AND TOMMY  
HOLLIS,

No. 66858

Appellants,

vs.

PAT SONGER,

Respondents.

**FILED**

JUN 01 2015

*ORDER DISMISSING APPEAL*

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

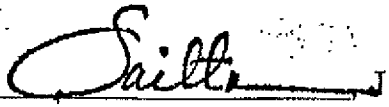
This is an appeal from district court orders granting special motions to dismiss pursuant to NRS 41.660, Fifth Judicial District Court, Nye County; Kimberly A. Wanker, Judge.


When our initial review of the docketing statement and other documents before this court revealed a potential jurisdictional defect, we ordered appellants to show cause why this appeal should not be dismissed for lack of jurisdiction. Having considered appellants' response and respondent's reply, we are not convinced that the district court has entered a final appealable judgment in this matter.

Although the district court's November 19, 2014, order grants a special motion to dismiss, it also states that "the case will be dismissed with prejudice once the Court has awarded fees and costs." The order thus contemplates dismissal of the action at a later date and does not constitute a final judgment. See NRAP 3A(b)(1); *Lee v. GNLV Corp.*, 116 Nev. 424, 426; 996 P.2d 416, 417 (2000). We disagree with appellants' contention that a dismissal took effect upon the subsequent entry of an order awarding fees and costs where appellants represent that that the order

"does not state that the action is dismissed as of the filing of that Order."<sup>1</sup>  
Further, we decline to remand this matter to the district court for entry of an order of dismissal. Appellants may file a notice of appeal from any final judgment entered in this matter. Accordingly, we

ORDER this appeal DISMISSED.

  
Saitta

  
Gibbons

  
Pickering

cc: Hon. Kimberly A. Wanker, District Judge  
Carolyn Worrell, Settlement Judge  
Law Office of Daniel Marks  
Lipson Neilson Cole Seltzer & Garin, P.C.  
Nye County Clerk

---

<sup>1</sup>Appellants have not provided a copy of the order awarding fees and costs.

EXHIBIT “3”

Case No. CV35969  
Dept. 1

FILED

2015 SEP 15 10:25  
Sarah Westfall

NYE COUNTY CLERK  
BY DEPUTY

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF NYE

RAYMOND DELUCCHI and TOMMY  
HOLLIS,

Plaintiffs,

**ORDER OF DISMISSAL**

vs.

PAT SONGER and EROCKSON, THORPE  
& SWAINSTON, LTD,

Defendants.

RECEIVED  
SEP 15 2015  
BY

On September 17, 2014, the Court entered Findings of Fact, Conclusions of Law and an Order Granting Defendant Erickson, Thorpe & Swainston's Special Motion to Dismiss. The Court did not award attorneys' fees and costs as part of said Order, instead ordering said parties to file a motion, opposition and reply concerning said attorneys' fees and costs. A Notice of Entry of Order was filed on October 7, 2014. Plaintiffs filed a Notice of Appeal on October 28, 2014.

On November 19, 2014, the Court entered a written Order on Pat Songer's Special Motion to Dismiss Pursuant to NRS 41.660. The Court advised the parties the case would be dismissed with prejudice once the Court awarded attorneys' fees and costs. The Court set a hearing on Songer's Motion for Attorneys Fees and Costs for December 2, 2014. A Notice of Entry of Order was entered on the Songer Order on December 4, 2014.





1 The Plaintiffs filed an Amended Notice of Appeal on December 17, 2014, to  
2 encompass both the District Court's September 17, 2014 Order, and its November 19, 2014  
3 Order. The Court on December 29, 2014 issued an Order Awarding Attorneys' Fees and  
4 Costs. The December 29, 2014 Order failed to specifically state that the District Court was  
5 dismissing the case with prejudice.

6 On June 1, 2015, the Nevada Supreme Court issued an Order Dismissing Appeal,  
7 finding that the District Court had not issued a final order of dismissal in this case.

8 It was the intention of the District Court, in entering its September 17, 2014 Order,  
9 its November 19, 2014 Order, and its December 29, 2014 Order, read together, to dismiss  
10 this case in its entirety. In light of the Nevada Supreme Court's June 1, 2015 Order, and  
11 based upon the District Court's previous three orders, this case is now dismissed in its  
12 entirety, with prejudice.

13 Dated this 15<sup>th</sup> day of September, 2015.

A handwritten signature in black ink, appearing to read "Kimberly A. Wanker", is written over a horizontal line.

KIMBERLY A. WANKER,  
DISTRICT COURT JUDGE





**CERTIFICATION OF SERVICE**

The undersigned hereby certifies that on the 15<sup>TH</sup> day of September 2015, she mailed via U.S. mail a copy of the foregoing ORDER to the following:

Siria L. Gutierrez, Esq.  
9900 Covington Cross Drive, Suite 120  
Las Vegas, NV 89144

Adam Levine, Esq.  
610 South Ninth Street  
Las Vegas, NV 89101

*Christel Raimondo*

CHRISTEL RAIMONDO, Clerk to  
DISTRICT JUDGE

**AFFIRMATION**

The undersigned hereby affirms that this Court Order does not contain the social security number of any person.

*Christel Raimondo*

CHRISTEL RAIMONDO, Clerk to  
DISTRICT JUDGE