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IN THE SUPREME COURT OF THE STATE OF NEVADA

LANCE GILMAN, AN INDIVIDUAL,
Appellant,

No. 81583

vs.

SAM TOLL, AN INDIVIDUAL,
Respondent.

LANCE GILMAN,
Appellant,

No. 81726

vs.

SAM TOLL,
Respondent.

LANCE GILMAN,
Appellant,

No. 81874

vs.

SAM TOLL,
Respondent.

REPLY TO RESPONSE TO ORDER TO SHOW CAUSE

COMES NOW, Respondent SAM TOLL (“Toll”), and hereby files the following Reply to the December 2, 2020 Appellant’s Response to Order to Show Cause (“Response”), filed by Appellant LANCE GILMAN (“Gilman”) to this Court’s November 2, 2020 Order to Show Cause why this matter should not be dismissed for lack of jurisdiction.

MEMORANDUM OF POINTS AND AUTHORITIES

Background

Gilman has filed three appeals before this Court in this case. For Docket No. 81583, the Notice of Appeal for Docket No. 81583 indicates that it was filed with the Storey County District Court Clerk on July 9, 2020, and then with the Clerk of the Supreme Court on August 5, 2020, and states that Gilman seeks appeal of the April 9, 2018 Order Granting Toll’s Anti-SLAPP Motion to Dismiss in Part, the March 19, 2020 Order finding that Toll is protected by the News Shield Privilege, and the June 15, 2020 Order Granting Toll’s Anti-SLAPP Motion to Dismiss (attached hereto As Exhibit 1). In Gilman’s September 2, 2020 Docketing Statement, in response to question 20, where the jurisdictional grounds for the appeal are provided, Gilman responds that the orders in Docket No. 81583 are subject to appeal under NRAP 3A(b)(1), that is, a final order entered in an action.

For Docket No. 81726, the Notice of Appeal for Docket No. 81726 indicates that it was filed with the Storey County District Court Clerk on August 27, 2020,

and then with the Clerk of the Supreme Court on September 1, 2020, and states that Gilman seeks to appeal the District Court's July 29, 2020 Order granting Toll \$10,000 in statutory damages (attached hereto as Exhibit 2). In Gilman's October 1, 2020 Docketing Statement, in response to question 20, where the jurisdictional grounds for the appeal are provided, Gilman responds that the order in Docket No. 81726 are subject to appeal under NRAP 3A(b)(1), i.e. also a final order entered in an action.

In Docket No. 81874, Gilman seeks appeal of the September 24, 2020 Order on Motion for Attorney's Fees and Costs, and Toll has cross appealed. In Gilman's November 9, 2020 Docketing Statement, in response to question 20, where the jurisdictional grounds for the appeal are provided, Gilman responds that the order in Docket No. 81874 is subject to appeal under NRAP 3A(b)(8), i.e. as an appealable post judgment order in an action. Docket No. 81874 is otherwise not pertinent to the issues addressed in the Order to Show Cause.

Issue

The issue to be determined is whether, with respect to Docket No. 81583, Gilman filed an improper appeal of an interlocutory order.

Standard of Review

Jurisdiction of appellate courts is limited to appeals authorized by statute or court rule. *Brown v. MHC Stagecoach, LLC*, 129 Nev. 343, 345 301 P.3d 850

(2013). If this Court determines that Gilman improperly sought appeal of an interlocutory order, it lacks jurisdiction over the appeal and the appeal should be dismissed.

Analysis

Interlocutory orders are not subject to direct appeal and are only subject to challenge upon a timely appeal from final judgment at the conclusion of the action. *Consolidated Generator-Nevada, Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998). Under NCRP 54(a), a judgment “includes a decree and any order from which an appeal lies.”

Here, Gilman filed the appeal of the District Court’s order in Exhibit 1 dismissing the Case before the Court determined the appropriate statutory penalty to be imposed under NRS 41.670(1)(b). Then, Gilman filed another appeal of the Court’s Order awarding \$10,000 in statutory damages, and also claimed that Order (in Exhibit 2) was a “final order” in the October 1, 2020 Docketing Statement.¹ For the reasons made plain below, the later Order was and is an appealable final judgment, the former was clearly not.

Nevada's appellate courts determine the finality of an order or judgment "by looking to what the order or judgment actually does, not what it is called." *Valley*

¹ In the Response, Gilman now claims that the Order awarding \$10,000 in statutory damages is a post-judgment issue such as attorney’s fees and costs. *See* Response at 3:10.

Bank of Nev. v. Ginsburg, 110 Nev. 440,445,874 P.2d 729, 733 (1994). "To be final, an order or judgment must 'dispose of all the issues presented in the case, and leave nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs.'" *Brown v. MHC Stagecoach, LLC*, 129 Nev. 343, 345, 301 P.3d 850 (2013) (quoting *Lee v. GNLV Corp.*, 116 Nev. 424,426, 996 P.2d 416, 417 (2000)).

The Court should look to the text of the order at issue to determine whether the order renders a final, appealable judgment. *Id.* at 345. The June 15, 2020 Order in Exhibit 1 unequivocally states: "Gillman will show cause by June 29, 2020 why he should not be ordered to pay Toll \$10,000 in **statutory damages** under NRS 41.670(1)(b)." [**emphasis added**] The District Court left for its future consideration the issue of the damages.

Damages are not a post-judgment issue. "[I]t is obvious that a final judgment for money must, at least, determine, or specify the means of determining the amount." *United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 233, 78 S. Ct. 674, 678 (1958). "[A]n order that determines liability but leaves damages to be calculated is not final." *Harbert v. Healthcare Servs. Grp., Inc.*, 391 F.3d 1140, 1145 (10th Cir. 2004).

In order to be a "final judgment," the order sought to be appealed must adjudicate all of the claims against all of the parties. *KDI Sylvan Pools, Inc. v.*

Workman, 107 Nev. 340, 810 P.2d 1217 (1991). Orders denying a motion for summary judgment or dismissing a complaint with leave to amend are not substantively appealable. See *Bergenfield v. BAC Home Loans Servicing*, 354 P.3d 1282, 1284 (Nev. 2015); *Taylor Constr. Co. v. Hilton Hotels Corp.*, 100 Nev. 207, 209, 678 P.2d 1152, 1153 (1984). While Gilman claims that an order granting summary judgment is a final appealable order² citing *Coker v. Sassone*, 135 Nev. 8, 10, 432 P.3d 746, 749 (2019), this is not always the case. An order granting summary judgment is only appealable where it, "disposes of all the issues presented in the case, and leaves nothing for the future consideration of the court." *Lee v. GNLV Corp.*, 116 Nev. 424, 425, 996 P.2d 416, 417 (2000). An order granting partial summary judgment is interlocutory and is not appealable. *KDI Sylvan Pools v. Workman*, 107 Nev. 340, 810 P.2d 1217 (1991). Here the District Court determined the merits in the June 15, 2020 Order in Exhibit 1, rendering a partial judgment, and the damages in the July 29, 2020 Order in Exhibit 2, rendering a final judgment.

While a post-judgment order awarding attorney's fees and costs is considered a special order entered after final judgment and is substantively

² See Response at fn. 2.

appealable under NRAP 3A(b)(8),³ an order assessing damages is not a special order after final judgment.

Gilman argues that the \$10,000 award, "...is not identified as any specific type of award. The statute is silent on the matter." *See* Response at 5:8. The District Court's Order in Exhibit 1 specifically identified the award contemplated in NRS 41.670(1)(b) as statutory damages. However, numerous Courts refer to the "award" contemplated in NRS 41.670(1)(b) specifically as statutory damages. *See Banerjee v. Cont'l Inc.*, No. 2:17-cv-00466-APG-GWF, 2018 U.S. Dist. LEXIS 158687 (D. Nev. Sep. 17, 2018); *Century Sur. Co. v. Prince*, No. 2:16-CV-2465 JCM (PAL), 2018 U.S. Dist. LEXIS 51382 (D. Nev. Mar. 28, 2018); and *Nolette v. Tobler*, No. 2:12-CV-1414 JCM (PAL), 2018 U.S. Dist. LEXIS 237042, at *17 (D. Nev. July 26, 2018). This is only logical, as statutory damages are damages defined in statute rather than determined based on the degree of harm incurred, which is what the award provided in NRS 41.670(1)(b) is. "Statutory damages" are defined as, "Damages provided by statute..." *Black's Law Dictionary*, 7th ed.

Gilman also argues that, should this Court decide to dismiss Docket No. 81583 for lack of jurisdiction, then the Order entered on July 29, 2020 would be the final appealable order and the District Court's Order granting dismissal would be challenged as an interlocutory appeal within Docket No 81726. *See* Response

³ *Winston Products Co. v. DeBoer*, 122 Nev. 517, 525, 134 P.3d 726, 731 (2006).

at 6:16. However, Gilman’s September 1, 2020 Notice of Appeal for Docket No. 81726 does not list the June 15, 2020 Order as a “judgment, order or part thereof being appealed” as required by NRAP 3(c)(1)(B) – only the July 29, 2020 Order granting statutory damages is listed. “[A] judgment or order which is not included in the notice of appeal will not be considered on appeal.” *Collins v. Union Fed. Sav. & Loan Ass’n*, 97 Nev. 88, 89-90, 624 P.2d 496, 497 (1981). It is clear that it was Gilman’s intent in Docket No. 81726 to only challenge the award of statutory damages.

In some circumstances, a premature appeal of an order will be tolled by the Court in virtue of the filing of a tolling motion. In *AA Primo Builders, Ltd. Liab. Co. v. Washington*, 126 Nev. 578, 245 P.3d 1190 (2010) this Court found that a company's post-judgment “Motion to Amend Order” should be construed as a motion to alter or amend judgment, which tolled time AA Primo Builders, LLC had to file notice of appeal. The Motion at issue in *AA Primo Builders* was: (1) in writing, (2) invoked NRCP 59, and (3) asked the Court to vacate the judgment. *Id.* at 582. In *AA Primo Builders* this Court recognized that a party who waits to file the notice of appeal until a ruling on post-judgment motion risks being too late if the motion turns out to be non-tolling *Id.* at 584. However, Gilman never filed a tolling motion, so the reasoning in *AA Primo Builders* is wholly inapplicable.

NRAP 4(a)(6) states that a premature notice of appeal does not divest the district court of jurisdiction. However, NRAP 4(a)(6) only applies to a premature notice of appeal that is subject to a tolling motion, and there is no tolling motion at issue in this case. Gilman's appeal in Docket No. 81583 is not a "premature appeal" of an otherwise final order as the term is contemplated in NRAP 4(a)(6), rather, it is an appeal of an interlocutory order. There is no basis in statute or this Court's rules to assert jurisdiction over an interlocutory order.

WHEREFORE, Toll requests that the Court find that Gilman has failed to show cause as to why his appeal should not be dismissed, and that the Court dismiss the appeal in Docket No. 81583.

Dated this December 3, 2020:

By: 

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570 Marsh Ave.
Reno, Nevada 89509
Telephone: (775) 303-4882
johnladuemarshall@gmail.com

LUKE A. BUSBY, ESQ.
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Exhibit List

1. June 15, 2020 Order Granting Toll's Anti-SLAPP Motion to Dismiss
2. July 29, 2020 Order Awarding Toll \$10,000 In Statutory Damages

CERTIFICATE OF SERVICE

Pursuant to NRCP 25(c), I certify that on the date indicated below, I caused service to be completed by:

_____ personally delivering;

_____ delivery via Reno/Carson Messenger Service;

_____ sending via Federal Express (or other overnight delivery service);

_____ depositing for mailing in the U.S. mail, with sufficient postage affixed thereto; or,

 x delivery via electronic means (fax, eflex, NEF, etc.)

a true and correct copy of the foregoing pleading addressed to:

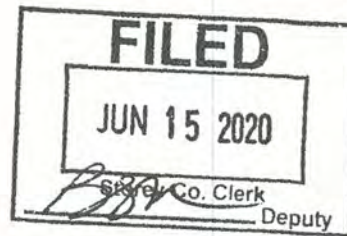
GUS W. FLANGAS
JESSICA K. PETERSON
3275 South Jones Blvd. Suite 105
Las Vegas, NV 89146
702-307-9500

By: 
Luke Busby

Dated: December 3, 2020

Exhibit 1

Exhibit 1



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6 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
7 **IN AND FOR STOREY COUNTY**

8 * * *

9 LANCE GILMAN,

Case No. 18 TRT 00001 1E

10 Plaintiff,

Dept. II

11 vs.

12 SAM TOLL,

13 Defendant.

14
15 **ORDER GRANTING TOLL'S ANTI-SLAPP**
16 **SPECIAL MOTION TO DISMISS**

17 This Court issued its Order After Remand on March 8, 2020. The Court directed
18 the parties, if necessary, to file supplemental points and authorities to address only the
19 specific issue of facts gleaned during Toll's deposition that show whether Toll knew the
20 "resident communications" were false, or whether he acted with a high degree of
21 awareness of the probable falsity of the statements, or had serious doubts as to the
22 publication's truth. Before the Court is the parties' points and authorities.

23 There is no evidence that Toll's alleged belief that Gilman does not live where he
24 claims to live, i.e. at a building adjacent to the Mustang Ranch Brothel, was not held in
25 good faith or was made with knowledge that the statement was false.

26 Gilman argued Toll did not conduct sufficient investigation regarding Gilman's
27 residence. Toll testified he believed Gilman does not live at the Mustang Ranch based
28 upon the following information: the zoning of the property; the unusual nature of

1 Gilman's claimed residence given his wealth and stature; the fact that numerous other
2 persons claimed addresses at the Mustang Ranch were their residence; the fact that
3 Gilman owned other residential property in Washoe County; and that confidential
4 sources told Toll that Gilman did not actually live at the Mustang Ranch.

5 Gilman argued Toll had a motive and intent to make false statements about
6 Gilman with reckless disregard for their veracity. There is no evidence that the resident
7 communications were made with actual malice, that is, with knowledge that the
8 statement was false. In the August 9, 2018 Order, this Court concluded that Gilman
9 failed to produce prima facie evidence that Toll published the resident communications
10 with actual malice, and nothing presented by Gilman that was gleaned from Toll's
11 deposition moves the Court from its prior conclusion on this issue.

12 Gilman bore the burden of showing under prong two of an anti-SLAPP analysis
13 that his claims have minimal merit. See *Abrams v. Sanson*, 458 P.3d 1062, 1069 (Nev.
14 2020) citing NRS 41.665(2) stating that a plaintiff's burden under prong two is the same
15 as a plaintiff's burden under California's anti-SLAPP law and *Navellier v. Sletten*, 29
16 Cal. 4th 82, 124 Cal. Rptr. 2d 530, 52 P.3d 703, 712-13 (Cal. 2002), which established
17 the "minimal merit" burden for a plaintiff.

18 There is no credible evidence that Toll published the resident communications
19 with actual malice. The Court concludes Gilman has failed to show that his defamation
20 claim against Toll has minimal merit. There is no credible evidence that Toll's
21 communications were not in good faith and in furtherance of the right to petition or the
22 right to free speech in direct connection with an issue of public concern, and therefore
23 it must be dismissed.

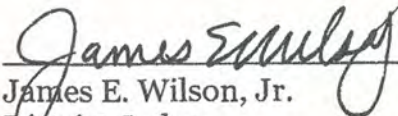
24 **THE COURT ORDERS:**

25 Gilman's complaint is dismissed.

26 Under NRS 41.670(1)(a), Toll may make an application to the Court for
27 reasonable attorney's fees and costs within **ten (10) days** of the date of entry of this
28 order;

1 Gilman will show cause by **June 29, 2020** why he should not be ordered to pay
2 Toll \$10,000 in statutory damages under NRS 41.670(1)(b).

3 **DATED** this 15, June, 2020

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5 
6 James E. Wilson, Jr.
District Judge

7
8
9 **CERTIFICATE OF SERVICE**

10 I certify that I am an employee of the First Judicial District Court of Nevada; that
11 on the 15 day of June 2020, I served a copy of this document by placing a true copy
12 in an envelope addressed to:

13
14 John L. Marshall, Esq.
570 Marsh Avenue
Reno, NV 89509

Gus W. Flangas, Esq.
3275 South Jones Blvd., Suite 105
Las Vegas, NV 89146

15
16 Luke Andrew Busby, Ltd.
316 California Ave., #82
17 Reno, NV 89509

18 the envelope sealed and then deposited in the Court's central mailing basket in the court
19 clerk's office for delivery to the USPS at 1111 South Roop Street, Carson City, Nevada, for
20 mailing.

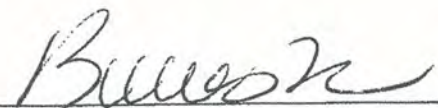
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23 Billie Shadron
Judicial Assistant
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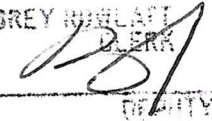
Exhibit 2

Exhibit 2

REC'D & FILED

2020 JUL 29 AM 10:26

AUDREY HOWLATT
CLERK

BY  DEPUTY

**IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR STOREY COUNTY**

* * *

LANCE GILMAN,

Plaintiff,

vs.

Case No. 18-TRT-00001-1E

SAM TOLL,

Dept. No. II

Defendant.

ORDER AWARDING TOLL \$10,000 IN STATUTORY DAMAGES

Before the Court are the briefs of the parties in response to the Court's June 15, 2020 Order requiring Plaintiff LANCE GILMAN to show cause why he should not be ordered to pay \$10,000 in statutory damages to Defendant SAM TOLL.

Pursuant to the provisions of NRS 41.670(1)(b), it is within this Court's discretion to award up to \$10,000 in statutory damages.

Statutory damages are intended to deter the conduct at issue and are calculated based on the statute and not the degree of harm to the victim. The amount of statutory damages should be sufficient to deter the targeted conduct. *Int'l Korwin Corp. v. Kowalczyk*, 665 F.Supp. 652 (N.D.Ill.1987).

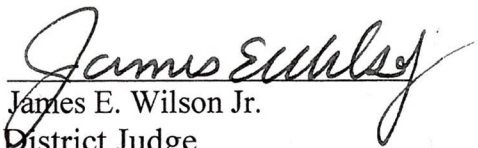
This Court determined in its April 9, 2018 and June 15, 2020 Orders that Gilman's suit lacked minimal merit and Toll's communications for which he was sued were made in good faith and were made in furtherance of the right to petition or the right to free

1 speech in direct connection with an issue of public concern. Pursuant to NRS 41.650 Toll
2 was immune from suit for exercising his rights under and within the scope protected by
3 the First Amendment. Gilman and similarly situated persons should be deterred from
4 bringing suits that lack minimal merit.

5 **THE COURT ORDERS:**

6 Toll is awarded \$10,000 under NRS 41.650(3).

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8 Dated this 29 of July, 2020:

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11 James E. Wilson Jr.
12 District Judge
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1
2 **CERTIFICATE OF SERVICE**

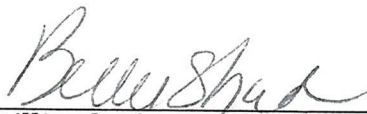
3 I certify that I am an employee of the First Judicial District Court of Nevada; that on
4 the 29 day of July 2020, I served a copy of this document by placing a true copy in an
5 envelope addressed to:

6 John Marshall, Esq.
7 570 Marsh Avenue
8 Reno, NV 89509

Luke A. Busby
316 California Ave.
Reno, NV 89509

8 Gus W. Flangas, Esq,
9 Jessica K. Peterson, Esq.
10 3275 South Jones Blvd.
Suite 105
Las Vegas, NV 89146

11
12 the envelope sealed and then deposited in the Court's central mailing basket in the court
13 clerk's office for delivery to the USPS at 1111 South Roop Street, Carson City, Nevada, for
14 mailing.

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16 
17 Billie Shadron
18 Judicial Assistant
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27
28