

In the Supreme Court of the State of Nevada

IN THE MATTER OF JOSHUA RAMOS,
AKA ERNESTO JOSHUA RAMOS, an
individual
Appellant

vs.

DANA WHITE, an individual; UFC
HOLDINGS, LLC, ZUFFA, LLC, doing
business as the ULTIMATE FIGHTING
CHAMPIONSHIP, a Nevada limited
liability company; DOES I through X
inclusive; and ROE CORPORATIONS I
through V, inclusive;
Respondent.

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Supreme Court No.:82102

Eighth Judicial District

District Court Case No.: A-20-813230-C

Hon. David M. Jones, presiding

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner Josh Ramos by and through his attorney, Ian Christopherson hereby moves this court for reconsideration of the panels Order of Affirmance dated 3-17-22, in particular the affirmance of the dismissal of the unjust enrichment claim.

The reconsideration of the Panel's Order conflicts with all prior precedent of this Court, the 9th Circuit and US Supreme Court which hold prior restraint of speech is presumptively unconstitutional and prohibited.

The affirmance of the dismissal of the unjust enrichment claim rests on a reading of the October 2015 Protective Order (*Appendix Ramos 039-040*) in the underlying criminal proceeding as imposing a "legal duty" on Appellant not to publicly disclose White's identity. Appellant's Reply Brief at pages 6 and 7 raises both the issue of a gag order being unconstitutional prior restraint and the Complaints averment in paragraph 76 that Appellant was able to disclose White's identity.

The Panel's reading of the Protective Order is improperly expansive, unconstitutional and contrary to precedent of this Court and the United States Supreme Court which view any such restraint as presumptively suspect and any restraint be narrowly drafted, read and restricted, see *Nebraska Press Association v*

Stuart 427 US 539, 558 (1976), *Levine v. US District Court* 764 F 2d 590 (Cal 1985).

The grounds for this Petition satisfy both NRAP 40 A(a) (1) and (2) and NRAP 40(c)(2) as the decision by the panel upholding dismissal of the claim for unjust enrichment is premised on Ramos being subject to unlawful prior restraint. This is both an issue of constitutional significance and public interest and concern as reflected by substantial media coverage involving claims of at a minimum sexual impropriety which Appellant will establish reaches the level of sexual predation and which was covered up by the employees of Respondents and their employees.

The factual averments in the Complaint directly conflict with the Panel's finding that the October 2015 Protective Order effectuated prior restraint on Appellant (a "gag order") and that therefore any benefit to Respondents was an incidental benefit.

Paragraph 76 of the Complaint (see Reply Brief p 7) directly contradicts what in effect is a finding of facts against Appellant on a Motion to Dismiss.

The Complaint conflicts with the panels finding of fact (as the review is de novo) that the protective Order was a gag order extending to Appellant. The averment in paragraph 76 that Appellant could have "earlier" disclosed White's identity at a minimum creates at a minimum an issue of fact on the issue

underpinning the Panel's dismissal of unjust enrichment claims. On a Motion to Dismiss factual averments must be viewed in a favorable light to the Appellant and accepted as true.

The law, as repeatedly stated by this and the Supreme Court of the United States, that prior restraint comes with the "heavy presumption" of its unconstitutionality, see *Nebraska Press Association v Stuart*, 427 US 539, 558, (1976). In *Johanson v. Eighth Judicial District Court* 182 P. 3rd. 94, 98 (2008) this Court and two of the Panels jurists adopted the standards of *Levine*, supra, regarding imposition of gag orders preventing "participants from making extrajudicial statements about their own case".

The Panel's error in affirming the dismissal of unjust enrichment is set forth in its Order:

"his (Appellants) silence up until June 30,2016, is only an incidental benefit conferred upon respondents because Ramos had an **independent legal obligation to not disclose certain facts under the protective order.**" (emphasis supplied).

That is effectively a finding of fact and law contrary to paragraph 76 of the Compliant which said Appellant could have disclosed White's identity earlier than the close of the criminal case (June of 2016) when any restraint would sunset.

The Protective Order was narrowly drawn, cognizant of *Levine*, by the Federal Court and must be narrowly construed. The Protective Order created no legal duty in Appellant to conceal White's identity. To so hold is an improper extension of a protective order and an improper weighing of evidence against appellant on a Motion to Dismiss.

Though Petitioner does not concede the upholding of the contract claims, it is clear that the upholding of the dismissal of the unjust enrichment claims is contrary to established precedent and is premised on unconstitutional prior restraint.

Because all the elements of unjust enrichment were pled and the benefit to Respondents was not "incidental" but rather an understood and requested benefit.

The Panel is directed to pages 6 and 7 of Appellant's reply brief in which the arguments herein are addressed.

Appellant' Complaint states a prima facie claim of unjust enrichment and dismissal thereof is error.

The following brief is submitted in support of this Petition.

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STATEMENT OF THE CASE

Petitioner seeks reconsideration of the Order of Affirmance dated 3-17-20.

The decision of the panel conflicts with established precedent, ignores the law of the case as enunciated by Judge Navarro and is based on an expansive interpretation of a “narrowly drafted” protective order in violation of the constitution.

The decision of the panel’s interpretation of the protective order which was necessary to uphold dismissal of the unjust enrichment claim is contrary to and ignores well seasoned precedent precluding the Panel’s holding that the Protective Order was a prior restraint of extrajudicial speech by Appellant.

FACTS REVELANT TO THIS PETITION

In October 2015 the US district Court entered a protective order *Appendix RAMOS p 039-040*.

The protective order did not, nor could it constitutionally preclude Appellant from disclosing White’s identity publicly.

The 9th Circuit’s opinion in *Levine*, supra, noted it was considering an Order that only applied to and restricted disclosure by “trial participants” i.e. counsel noting that the trial Court had earlier redacted from its order the parties and witnesses from its order at page 593. The Federal District Court herein cognizant of *Levine* limited the Protective Order to disclosure of White’s identity

by counsel in the Court proceeding. *Levine* recognized a critical distinction between limitations on counsel and parties with respect to controlling their speech.

The only part of the Protective Order directed at Appellant required that the case discovery could only be reviewed by Appellant in his counsel's presence. The Protective Order contains no language constituting prior restraint of Appellant from publicly disclosing White's identity.

Appellant could not be constrained without affecting his rights to due process as *Johanson* , supra at p.98 notes.

An example why this is critical is after White's identity in this case was disclosed, another individual came forward to counsel with confirming evidence of White course of conduct, including that White himself liked to record his sexual activity, that would arguably have relevance at trial. To have prevented Appellant from disclosing White's identity would conflict with his rights to due process and public trial.

Counsel does not elaborate at this time on the importance of the fundamental right of freedom to speak, to freedom. If a court has the power to constrain the speech of a criminal defendant it has the power to negate the guarantee of a public trial.

Before his plea hearing, Respondent's counsel solicited a NDA from Appellant which indicated both that they understood the Protective Order did not

constrain Appellant's speech and that they would pay for the NDA. The request and the offer to pay indicate that Respondents did not view the silence of Appellant as an incidental benefit. The timing of the withdrawal raises a clear implication or even a presumption understood by Respondents that the benefit conferred related to the sale of the UFC and not as claimed White's public reputation or privacy.

Appellant did not disclose White's identity and negotiations, which continued and were ongoing until they were unilaterally terminated by Respondents on July 5, 2016, 4 or 5 days before announcement of the sale of the UFC for \$4.2 Billion dollars.

Judge Navarro had expressly allowed Appellant and Respondent to agree to a NDA *Appendix RAMOS 063 L 1-7*.

ISSUES

1. Does the panels order rest on an expansive reading of the Protective Order contrary to this courts clear recognition of precedent prohibiting prior restraint of speech?
2. If Appellant personally was under no legal duty not to disclose White's identity, was it error to dismiss the unjust enrichment claim?

DISCUSSION

ISSUE NO.1

Does the panels order rest on an expansive interpretation of the Protective Order contrary to this courts clear recognition of precedent prohibiting prior restraint of speech?

The panel upheld dismissal of Appellants claim for unjust enrichment asserting that the protective order in Appellants criminal case imposed a **legal duty** not to disclose the identity of White.

The court by doing so held that the US District court's protective order effectuated prior restraint on Appellant. The US District Court could not do so "legally" and did not.

This Court has consistently cited, followed and restated the law governing prior restraint, an examples being *Johanson v Eighth Judicial District Court*, supra. Which followed with approval the Levine case which followed *Near v Minnesota* 283 US 697 (1931) and *Nebraska Press Association v Stuart*, supra. The Levine standards were reaffirmed in *Las Vegas Review Journal v. Eighth Judicial District Court* 412 P. 3d. 23,26 (2018). Without meeting the Levine standard a Protective Order restricting speech cannot issue.

The first issue precluding restraint on Appellant is that the Nevada legislature does not recognize disclosure of White's activities as a "protected

interest”. NRS 200.770(2) (c) excludes from its protections “public figures”. As the face of the UFC White clearly is a “public figure.

In *Levine* the trial Court had issued an order directed at comments made by counsel to the press. After initially restricting “parties” as well as counsel from publicly discussing the case, the trial court recognizing it had gone to far, altered its order allowing parties and witnesses to discuss the facts publicly. *Levine* went on to delineate the considerations in making any restriction and remanded the consideration to the trial court.

In *Levine* the order, as here, only restrained speech by the “participants” meaning the government and defense lawyers. The power of the courts to regulate the conduct of counsel does not extend to the power of prior restraint of individuals.

The Panel’s decision ignores the limitations on prior restraint and the mandate above and liberally reads a “narrowly drafted” protective order expansively to unconstitutionally extend to Appellant personally.

The need to protect White from harm caused by disclosure of his Brazilian tryst is rebutted by his epiphany upon the sale of the UFC in July 2016 that disclosure of his Brazilian tryst was no longer necessary.

Resolving that question in the light most favorable to Appellant the unjust enrichment dismissal must be reversed.

There was no finding of prospective harm, threat to a fair trial or other grounds expressed as basis by the US District Court sufficient to have justified any imposition of prior restraint on Appellant under Levine. White's experienced counsel recognized that Appellant was not and could not be restrained by the/a Protective Order which prompted their request for the NDA only after the protective order was issued. The Panel should not retrospectively do what the US District Court did not do and could not do.

Judge Navarro also confirmed Appellant was free to name White when she expressly stated the parties were free to negotiate and privately reach an agreement, *Appendix RAMOS 063 L 1-7*. This Panel must respect the holding of Judge Navarro as the law of this case. That ruling was made in a lengthy hearing which is not before the Panel except for the limited excerpt of record.

The Panel's finding of Appellant being under a gag order ignores paragraph 76 of the complaint which alleges that Appellant was free to disclose White's identity after sentencing "**.....or earlier**.". This is found on page 7 of the Appellants Reply Brief.

There is at a minimum a question of fact contravening the finding by the Panel's that Appellant was under a "legal duty" not to disclose White's identity. The Panel is constrained to resolve that issue in a light most favorable to Appellant.

As discussed above, the Complaint specifically averred that Appellant was not constrained from disclosing White's identity by the Court and there is nothing before the Court sufficient to ignore to paragraphs 76's averment that Appellant could have disclosed White identity earlier than the conclusion of the case.

Paragraph 76 is diametrically opposed to that conclusion when it states the following:

“[*Nothing in* the plea agreement or, *the protective order* or the terms of supervised release as directed by the court *constrained in any way Ramos from disclosing the events at issue or White's activities* subsequent to completion of his sentence *or earlier.*” (emphasis added) see Appellants reply brief page 7.

The Protective Order, attached hereto as exhibit 1 notably contains only one directive concerning Appellant, #2, which reads “Defendant shall not be permitted to have or view discovery materials outside the presence of Defense Counsel of Record.”. The remainder of its provisions all pertain to conduct of defense counsel and that in part 4 that “During all proceedings in this case....” White is to be referred to by the pseudonym “Victim 1 ”.

The Panel's decision converts that language made under FR Crim P 16(d)(1) (since removed) and cognizant of the strict limits and powers of the court to effectuate prior restraint into prior restraint of Appellants rights of free speech.

The Protective Order's also provides it can be modified at any time. Appellant did not seek to modify or clarify the Protective Order or disclose White's identity having been induced to silence by the offer to pay for the NDA which required his continuing silence and which the Respondents have enjoyed the full benefit thereof.

The Protective Order Must be narrowly construed as it affects two of the fundamental rights guaranteed by our Constitution, free speech and the right to a free **and public trial.**

The extremely unusual protection of White's identity in the Protective Order was itself an affront to due process and constitutionally protected trial rights. Extending its restraint to Appellant is unconstitutional. There is no statutory protection of the identity of victims with few exceptions, none of which govern herein.

The facetious nature of the need to protect White's identity is established by his termination of his request for a NDA concurrent with the sale of the UFC. That disclosure that the UFC president was transporting and paying women for sex with the knowledge and support of the UFC would adversely affect a sale of the UFC would be an invalid and rejected basis to support or justify prior restraint.

ISSUE NO.2

“If Appellant personally was under no legal duty not to disclose White's identity, was it error to dismiss the unjust enrichment claim?”

The Panel's Order sets out the elements of unjust enrichment per *Certified Fire Protection v Precision Construction Inc.* 283 P. 3d. 250, 257 (2012).

To state a claim for unjust enrichment a party must confer a benefit which is appreciation of that benefit and there is acceptance and retention of the under circumstances such retention without payment is inequitable, see *Certified* at page 257.

The uncontroverted facts set forth in the Complaint which the Panel and the District Court's ruling are premised on set forth a prima facie claim of unjust enrichment.

The defense and the grounds for the Panel's Order of Affirmance, that Appellant had a legal duty to not disclose White's, being rejected as factually and constitutionally in error, all elements of unjust enrichment are pled and supported under the standard of review on a motion to dismiss:.

- 1.The Respondents requested performance of an NDA.
- 2.The Respondents indicated they would pay Appellant for an NDA.
- 3.The Appellant and respondents negotiated compensation for the NDA until July 5, 2016, some 8 months, during which time Appellant provided Respondents with the requested benefit, not disclosing White's identity.
4. The Respondents enjoyed the full benefit of the performance and did not pay Appellant for that benefit.

5. The Respondents having received and retained the full benefit the apparently required and refusing to honor their offer to pay for the performance by Appellant is inequitable and unjust enrichment remedies apply.

Appellant asserts the temporal proximity of the withdrawal of the request and offer to pay Appellant on July 5th, 2016 establishes the reasons for the NDA were related to the sale.

Respondents may contest the issue of the value of the benefit, but that is what discovery and trial are for. The Complaint's assertions taken in the most favorable light sufficiently state and support a claim for unjust enrichment upon which Appellant can prevail upon at trial.

As this is a petition for reconsideration, without leave of this Court for further briefing, Appellant does not argue further on this point as it is clear that the case should proceed on remand on unjust enrichment.

CONCLUSION

The Panel's Order of Affirmance erred in expansively extending the Protective Order to impose a legal duty on Appellant and thus dismissing unjust enrichment because any benefit to White was incidental to a "legal duty".

Respondents were fully cognizant both of the need to conceal White's conduct and that Appellant was not, as the Panel concluded in its Order, that Appellant could reveal White's identity. Even Judge Jones, while dismissing the case, was forced to

concede that the temporal proximity between abandoning the request for an NDA and the completion of the sale if the UFC support Appellants unjust enrichment scenario.

Unjust enrichment is the remedy herein in the absence of contract. Appellant provided the benefit of his silence at respondents request and they retain the benefit thereof without paying for the requested performance. Appellant has pled a prima facie case of unjust enrichment and averred sufficient facts in support thereof.

The Appellant does not concede that the Order of affirmance is correct on other points but under the limitations of NRAP Rule 40 they are not addressed herein but can be considered at the Panel's discretion.

Dated this 4th day of April 2022.

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NRAP 28.2 ATTORNEY CERTIFICATE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: This brief has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman and is double-spaced.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7)(i)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is: Proportionately spaced, has a typeface of 14 points or more, and contains 3327 words.

3. Finally, I hereby certify that I have read this Petition for Rehearing and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I certify that I did, pursuant to NRAP 25(c), electronically file the foregoing Petition for Rehearing with the Clerk of the Court by using its electronic filing system on the 4th day of April, 2022. I further certify that the following participants in the case are registered electronic filing system users, and will be served electronically:

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