

IN THE SUPREME COURT OF THE STATE OF NEVADA

K.J. BROWN, L.L.C., A NEVADA LIMITED
LIABILITY COMPANY; TIMOTHY D.
GILBERT AND NANCY AVANZINO
GILBERT, AS TRUSTEES OF THE
TIMOTHY D. GILBERT AND NANCY
AVANZINO GILBERT REVOCABLE
FAMILY TRUST DATED DECEMBER 27,
2013,

Appellants,

v.

ELK POINT COUNTRY CLUB
HOMEOWNERS', ASSOCIATION, INC.,
AKA ELK POINT COUNTRY CLUB, INC., A
NEVADA NON-PROFIT, NON-STOCK
CORPORATION,

Respondent.

Supreme Court No. 82824

[District Case No. 2020-CV-00124]

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Elizabeth A. Brown
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APPELLANTS' RESPONSE TO ORDER TO SHOW CAUSE

Appellants, K.J. BROWN, L.L.C., A NEVADA LIMITED LIABILITY COMPANY, TIMOTHY D. GILBERT AND NANCY AVANZINO GILBERT, AS TRUSTEES OF THE TIMOTHY D. GILBERT AND NANCY AVANZINO GILBERT REVOCABLE FAMILY TRUST DATED DECEMBER 27, 2013 ("Appellants"), by and through their counsel of record, respond to the July 13, 2021 Order to Show Cause. Appellants come now to clarify why this Court has proper jurisdiction over this matter, and why the order at issue is appealable order under NRAP 3(A)(b)(3).

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FACTS

Appellants are homeowners within the Elk Point Country Club (“EPCC”) subdivision, which is a private tax-exempt social club (“social club”). Appellants filed a civil action against EPCC seeking, among other things, injunctive relief to enjoin for-profit rental use of units within the social club because such use jeopardizes the private social club’s tax-exempt status. On December 15, 2020, the district court agreed with Appellants, and entered an Order Granting Plaintiffs’ Motion for Preliminary Injunction (“Injunction Order”). The Injunction Order required EPCC to stop, prohibit, and enjoin all for-profit rental use of units within the social club including transient commercial use and long-term rental use of any unit.

EPCC appealed the district court’s Injunction Order in the Nevada Supreme Court, Case No. 82484 (“Appeal No. 82484”). Pending Appeal No. 82484, EPCC moved the district court under NRAP 8(a)(1)(C) to stay or suspend the Injunction Order pending resolution of Appeal No. 82484. On March 15, 2021, the district court entered an Order Granting Stay of Preliminary Injunction Pending Resolution of the Interlocutory Appeal (“Stay Order”), which is the subject of Appellants’ appeal (“Appeal No. 82824”) in the above-entitled action. The effect of the district court’s Stay Order was to completely reverse and dissolve its Injunction Order. The district court’s Stay Order is entirely contrary, in conflict with, and opposite to its actual evidence-based findings made within its Injunction Order, which enjoined transient commercial use and long-term rental use of units because it concluded that the social club’s Bylaws prohibit these commercial uses.

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Thus, because the Stay Order permits all for-profit rental use of units within EPCC to continue unabated, it now exposes the entire social club membership, including Appellants, to irreparable harm in the form of EPCC losing its nearly 100-year-old tax-exempt status. Such conduct is precisely what Appellants had sought to enjoin in the underlying district court action and is the conduct the district court specifically banned in its underlying Injunction Order.

ANALYSIS

A. The Stay Order is an appealable order under NRAP 3A because it is an order that effectively dissolved the underlying preliminary injunction.

An order granting or refusing to grant an injunction or dissolving or refusing to dissolve an injunction is an appealable order under NRAP 3A(b)(3). While NRAP 3A does not explicitly provide for the review of orders staying, suspending or modifying orders granting preliminary injunctions, courts have consistently held that the analysis of whether an order is appealable hinges on the substance and effect of the order and not what the order is called. Here, the Stay Order completely halted the enforcement of the Injunction Order, which means the parties are now left as if no injunction had ever been issued. As a result, by and through the entry of its Stay Order, the district court did dissolve and reverse its previously entered preliminary injunction, despite the evidence-based findings it had made at the preliminary injunction hearing.

The fact that the title of the order that is the subject of this appeal (Appeal No. 82824) is an order granting a stay, the name of the order is not determinative as to whether a jurisdictional defect exists. Typically, an “order denying a motion for a stay” is an unappealable determination because, by its plain terms, an order granting or denying a stay of proceedings is not listed as an appealable determination under the statute. *Brunzell Const. Co. v. Harrah’s Club*, Nev 414, 419-20, 404 P.2d 902, 905 (1965), *superseded by statute on other grounds as stated in Casino*

Operations, Inc. v. Graham, 86 Nev. 764, 765, 476 P.2d 953, 954 (1970). See also *Taylor Const. Co. v. Hilton Hotels*, 100 Nev 207, 678 P.2d 1152 (1984) (the right of an appeal is fixed by statute and there can be no appeal except as provided by statute). However, the *Brunzell* court's determination that the order denying the motion for a stay was not an appealable order is set apart from Appellants' Appeal No. 82824. That is because the order in *Brunzell*, denying the motion to stay, had absolutely nothing to do with any injunction or injunctive-related relief. Rather, the *Brunzell* order concerned wholly unrelated relief in the form of a request to stay civil proceedings that were pending in Nevada while an action in California proceeded. Further, it is important to recognize that while the *Brunzell* Court dismissed the appeal as to the stay order, the Court did consider the appeal insofar as it concerned the district court's refusal to dissolve an injunction. Thus, the stay order in *Brunzell* had no relation to, nor effect upon any preliminary injunction order, which is opposite to the Stay Order at issue here in Appeal No. 82824.

To determine whether an order is appealable, this Court must instead look to what the order actually does, and *not* what the order is called. In *Sugarman Co. v. Morse Bros.*, 50 Nev. 191, 198-99, 255 P.1010, 1012 (1927), the Nevada Supreme Court authorized an appeal from an order entitled a "restraining order." The Court properly looked to the legal effect of the order and determined it was to deny injunctive relief. As a result, the Court ruled that the "restraining order" was an order refusing to grant the injunction and was appealable under RL § 5329 (cf. NRAP 3A(b)), despite the order being referred to as a restraining order. Thus, the *Sugarman* case stands for the proposition that no appeal may be taken from an order granting or denying a temporary restraining order *unless* the order's "legal effect" is the grant or denial of an injunction. *Id.* Applying the *Sugarman* rationale to the facts of this case: no appeal may be taken from an order granting a motion to stay *unless* the order's "legal effect" is the grant or denial of an injunction

or dissolving an injunction, which is what we have herein. In this case, an appeal may be taken from the Stay Order at issue because its legal effect is to dissolve the underlying preliminary injunction.

In further support of this position, in *Valley Bank of Nevada v. Ginsburg*, 110 Nev. 440, 445, 874 P.2d 729, 733 (1994), the Nevada Supreme Court held that “the finality of an order or judgment [must be determined] by looking to ***what the order or judgment actually does, not what it is called.***” (*Emphasis added*). Again, the Stay Order is appealable, despite what it is called, because the effect of the order is to dissolve the preliminary injunction.

In addition to the above-referenced authority supporting a finding that the Stay Order is appealable, in *Ortho Pharm. Corp. v. Amgen, Inc.*, 887 F.2d 460, 463 (3d Cir. 1989), the court reviewed a motion that was one to effectively modify an injunction, and determined it must look to substance, not labels, when determining if an order is appealable. Further, in *Smith v. Evans*, 853 F.2d 155, 158-59 (3d. 1988), the court held that “the function of the motion, not the caption” is the determining factor. In *Oxford Fin. Group, Ltd. v. Evans*, 795 N.E.2d 1135, 1141 (Ind. App. 2003), the Court of Appeals of Indiana considered an appeal-enabling rule that mirrors that of Nevada, to determine if an order modifying a preliminary injunction was appealable. The court explained as follows (*emphasis added*):

As a preliminary matter, the Defendants claim this court lacks jurisdiction to entertain this interlocutory appeal, because it is not an appeal as of right and Oxford did not follow the proper procedures to perfect a discretionary interlocutory appeal. Indiana Appellate Rule 14(A)(5) provides that a party may take an appeal as of right from an order ‘***[g]ranted or refusing to grant, dissolving, or refusing to dissolve a preliminary injunction....***’ The Defendants claim that the order Oxford appeals, which modified a preliminary injunction by placing a time limit on certain parts of it, does not fall under the above rule. We disagree. By ***its order, the trial court effectively dissolved part of the injunction, changing it from one of indefinite duration to one with a definite ending point.***”

The *Oxford Fin. Group* court found authority to authorize an appeal from an order modifying an injunction by finding that the trial court's order was a partial dissolution of an injunction, and thus, the effect of the order falls under the purview of the rule granting the appeals court's jurisdiction to entertain an appeal. The same review and analysis applies to this appeal.

B. The District Court's Stay Order effectively dissolved the preliminary injunction without any supporting evidence.

The district court's Stay Order is directed exclusively at the operation of the Injunction Order pending resolution of EPCC's interlocutory appeal (Appeal No. 82484). It has the undisputed effect of completely reversing and dissolving the preliminary injunction that it put in place so that all for-profit use of units within EPCC can continue unabated, thereby exposing Appellants to a serious risk of irreparable harm. The result of the Stay Order is directly contrary and equally opposite to the well-reasoned and evidence-based Injunction Order. The district court's Injunction Order opined that such for-profit use of units within EPCC is in direct violation of the Bylaws and Rules for EPCC, and further, that said unpermitted, for-profit use would subject EPCC to the threat of losing its IRC 501(c)(7) tax-exempt status, which is "potentially serious" and would have a "lasting adverse impact" to EPCC. As such, Appellants are entitled to a review of the district court's Stay Order because it has the exact same effect as dissolving the preliminary injunction.

The basis for Appellant's Appeal No. 82824 is that when the district court dissolved its Injunction Order, it did so without having been provided any admissible evidence to support the four (4) necessary factors to grant or deny a stay of its preliminary injunction. EPCC failed to

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provide any admissible evidence to support its Motion to Stay. This Court reviews a district court's decision regarding the dissolution of a preliminary injunction for an abuse of discretion. *See Finkel v. Cashman Profl, Inc.*, 128 Nev. 68, 72, 270 P.3d 1259, 1262 (2012). Accordingly, the district court's decision will be reversed if the district court abused its discretion or, if the decision was based on an incorrect legal standard or clearly erroneous finding of fact. *Boulder Oaks Cmty. Ass'n v. B & J Andrews Enters., LLC*, 125 Nev. 397, 403, 215 P.3d 27, 31 (2009). Questions of law within this context, however, are reviewed de novo. *Id.* A decision is clearly erroneous "when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Union America Mortgage & Equity v. McDonald*, 97 Nev. 210, 211-212, 626 P.2d 1271, 1273 (1981), citing *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948).

Here, there was no admissible evidence to support the District Court's decision in granting the Stay Order, which effectively dissolved the preliminary injunction. Undoubtedly, there is a significant question concerning the district court reversing its Injunction Order without the benefit of receiving, reviewing or considering any admissible evidence to support the Stay Order. The facts foster a definite and firm conviction that either a mistake has been committed, or that the outcome was clearly erroneous.

CONCLUSION

This Court has jurisdiction under NRAP 3A(b)(3) to consider Appellant's Appeal No. 82824 of the district court's order granting the motion to stay the injunction pending EPCC appeal because, despite the title of the order, the order's sole and exclusive effect is to reverse the district

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court's prior findings. Thus, the Stay Order completely dissolved the Injunction Order. Because an order dissolving an injunction is an appealable order under NRAP 3A(b)(3), there is no jurisdictional defect, and this appeal should be permitted to proceed.

Signed this 11th day of August 2021 in Washoe County, State of Nevada.

Appellants:

K. J. Brown, L.L.C. and Timothy D. Gilbert and Nancy Avanzino Gilbert as Trustees of the Timothy D. Gilbert and Nancy Avanzino Gilbert Revocable Family Trust dated December 27, 2013

***Appellants' Counsel of Record:
Leach Kern Gruchow Anderson Song***

/s/ Sophie A. Karadanis, Esq.
GAYLE A. KERN, ESQ.
Nevada Bar No. 1620
SOPHIE A. KARADANIS, ESQ.
Nevada Bar No. 12006
5421 Kietzke Lane, Ste. 200
Reno, NV 89511
Tel: (775)324-5930
E-Mail: gkern@lkglawfirm.com
E-Mail: skaradanis@lkglawfirm.com

and

RICHARD H. BRYAN, ESQ.
Nevada Bar No. 2029
Fennemore Craig, P.C.
300 S. Fourth St., Ste. 1400
Las Vegas, NV 89101
Tel: (702) 692-8000
E-Mail: rbryan@fennemorelaw.com
Attorneys for Appellants

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c), I certify that I am an employee of the law firm of Leach Kern Gruchow Anderson Song, and that on this day I served the foregoing document described as ***APPELLANTS' RESPONSE TO ORDER TO SHOW CAUSE*** on the parties set forth below, at the address listed below by:

 X Electronic means to registered user of the Court's electronic filing system consistent with NEFCR 9:

Prescott Jones, Esq. | Resnick & Louis, P.C. | Las Vegas

Gayle A. Kern, Esq. | Leach Kern Gruchow Anderson Song | Reno

 X Notification by traditional means must be sent to the following:

Joshua Ang, Esq.
Carissa Yuhas, Esq.
c/o Resnick & Louis, P.C.
8925 W. Russell Rd., Ste 220
Las Vegas, NV 89148

Richard H. Bryan, Esq.
c/o Fennemore Craig, P.C.
300 S. Fourth St., Ste. 1400
Las Vegas, NV 89101

David Wasick
PO Box 568
Glenbrook, NV 89413

DATED this 11th day of August 2021.

/s/ Teresa A. Gearhart
TERESA A. GEARHART