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Elizabeth A. Brown
Clerk of Supreme Court

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

IN THE MATTER OF SEARCH WARRANTS REGARDING SEIZURE OF DOCUMENTS, LAPTOP COMPUTERS, CELLULAR TELEPHONES, AND OTHER DIGITAL STORAGE DEVICES FROM THE PREMISES OF LAS VEGAS BISTRO, LLC AND LITTLE DARLINGS OF LAS VEGAS, LLC	Case No.: 84931-COA
LAS VEGAS BISTRO, LLC D/B/A LARRY FLYNT'S HUSTLER CLUB; AND LITTLE DARLINGS OF LAS VEGAS, LLC, Appellants, vs. LAS VEGAS METROPOLITAN POLICE DEPARTMENT, Respondent.	

RESPONDENT LAS VEGAS METROPOLITAN POLICE DEPARTMENT'S RESPONSE TO LAS VEGAS REVIEW-JOURNAL'S MOTION TO ORDER PUBLICATION OF UNPUBLISHED OPINION ENTERED ON APRIL 7, 2023

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

LVRJ's request to publish this Court's April 7, 2023 order must be denied. First and foremost, LVRJ did not timely file its request. In light of the mandatory language within Rule 36(f)(1) only permitting the Court to extend the deadline prior to the expiration of the deadline, LVRJ's request is untimely and must be denied. Second, LVRJ cannot satisfy the standard for publication of an unpublished disposition. Additionally, LVRJ failed to advise the Court that there are currently four pending cases before the Supreme Court, including a Writ Petition addressing the very issue of the search protocol in LVRJ's case. Accordingly, the Court should deny LVRJ's request to publish the April 7, 2023 Order.

II. LEGAL ARGUMENT

A. LVRJ'S REQUEST IS UNTIMELY.

Rule 36(f)(1) makes clear that a motion to reissue an Order as an Opinion must be filed no later than 14 days after filing of the order. Moreover, a motion to extend the time to file such motion **must** be filed before the expiration of the 14-

day deadline. *Id*. (emphasis added). The term must within the Rule denotes a mandatory requirement. *Washoe Cnty. v. Otto*, 128 Nev. 424, 432, 282 P.3d 719, 725 (2012) (interpreting NRS 233B130(2) and concluding that the term "must" establishes mandatory requirements). When interpreting a statute, the Court first looks to its language, and when the language used has a certain and clear meaning, the Court will not look beyond it. *Harris Assocs. v. Clark County Sch. Dist.*, 119 Nev. 638, 641–42, 81 P.3d 532, 534 (2003).

Because Rule 36(f) contains a mandatory requirement, the Court must conclude that it requires strict compliance. "A [rule] may contain both mandatory and directory provisions." *Markowitz v. Saxon Special Servicing*, 129 Nev. 660, 664, 310 P.3d 569, 571 (2013). A rule's provisions are mandatory "when its language states a specific time and manner for performance." *Id*. at 664, 310 P.3d at 572 (internal quotation omitted). "Time and manner refers to when performance must take place and the way in which the deadline must be met." *Id*.

Here, the plain language of this rule confirms that this Court is powerless to extend this filing deadline after it has expired. *Cf. SFPP, L.P. v. Dist. Ct.*, 123 Nev. 608, 612, 173 P.3d 715, 717 (2007) ("We thus conclude that when the district court entered the order for dismissal, its jurisdiction, with respect to this order, ended even in the face of the parties' contracting agreement purporting to

extend the district court's jurisdiction beyond this termination of the case."). The Supreme Court has previously rejected untimely filings in relation to similar appellate rules denoting time and manner requirements. *See* NRAP 3(a)(1); *Walker v. Scully*, 99 Nev. 45, 46, 657 P.2d 94, 94–95 (1983) (appellate court lacks jurisdiction to entertain an untimely appeal); *Zugel by Zugel v. Miller*, 99 Nev. 100, 101, 659 P.2d 296, 297 (1983) (the timely filing of an appeal is jurisdictional). Notably, the time to appeal cannot be extended by an appellate court, a district court, or a stipulation between parties. *See Walker*, 99 Nev. at 46, 657 P.2d at 94–95. A district court has no jurisdiction to entertain an untimely post-judgment motion, and such untimely motions do not suspend the time for filing a notice of appeal. *See Ross v. Giacomo*, 97 Nev. 550, 553, 635 P.2d 298, 300 (1981), *abrogated on other grounds by Winston Prods. Co. v. DeBoer*, 122 Nev. 517, 134 P.3d 726 (2006); *Morrell v. Edwards*, 98 Nev. 91, 93, 640 P.2d 1322, 1324 (1982); *Oelsner v. Charles C. Meek Lumber Co.*, 92 Nev. 576, 577, 555 P.2d 217, 217 (1976).

This Court issued the underlying Order on April 7, 2023—nearly three months before the instant request. The plain language of the rule only permits an extension prior by the Court prior to the expiration of the deadline. Accordingly,

the Court must deny LVRJ's request to publish the Order as the time and manner requirements of NRAP 36(f)(1) are mandatory.

B. LVRJ CANNOT SATISFY RULE 36(C).

A motion to reissue an unpublished disposition or order as an opinion to be published in the *Nevada Reports* may be made under the provisions of NRAP 36(f) by any interested person. NRAP 36(f)(3) outlines the criteria in NRAP 36(c)(1)(A)–(C) as the basis to file such a motion, which are: (A) Presents an issue of first impression; (B) Alters, modifies, or significantly clarifies a rule of law previously announced by either the Supreme Court or the Court of Appeals; or (C) involves an issue of public importance that has application beyond the parties. The motion must state concisely and specifically on which criteria it is based and set forth argument in support of such contention. NRAP 36(f)(3).

Here, LVRJ argues that the Court's order should be published because it presents an issue of first impression and because it involves an issue of public importance that has application beyond the parties. First, LVRJ asserts that the Court's order presents an issue of first impression regarding how law enforcement should handle privileged material. LVRJ interprets the Court's order too broadly. In that regard, the Court expressly concluded that the District Court erred because it presumed that there was confidential material without determining whether aby

of the materials were, in fact, covered by a privilege. Order at *14. To that end, the Court determined it was premature for the district court to find that it was not unreasonable for LVMPD to retain the seized property which constituted to include the copies and mirror images of the electronic devices, because such a determination could not properly have been made until appellants had a full opportunity to demonstrate privilege. *Id*. at *15.

Whether, and when, retention of property is reasonable under NRS 179.085(1)(e) is fact specific and based on the totality of the circumstances. *In re 12067 Oakland Hills, Las Vegas, Nevada 89141*, 134 Nev. 799, 805, 435 P.3d 672, 678 (Nev. App. 2018). Indeed, a published opinion by this Court expressly provides the standard that a district court should apply in determining reasonableness. Thus, this is not an issue of first impression as this Court previously addressed and provided the seminal framework, including the burden shifting analysis, regarding NRS 179.085(1)(e).

For the same reason, LVRJ's argument that the Order pertains to an issue of public importance and has application beyond the parties fails. Moreover, LVRJ's explanation of its case is wrong as the LVRJ significantly differs. First and foremost, there is a criminal proceeding involving a criminal defendant. *See* Supreme Court Case No. 86295. Additionally, the district court entered a

protective order barring public disclosure of the confidential materials and directed the Search Team to provide the materials to the LVRJ so that it could assert its privileges before the district court issues a ruling. *Id*. Outside of its case, LVRJ proffers no other examples in which the Order would apply to other parties. Indeed, determining whether a seizure is unreasonable is based on the specific facts and circumstances in each case.

Notably, LVRJ fails to advise this Court that there are several pending appeals in LVRJ's case asking the Supreme Court to decide this very issue. *See* Supreme Court Case Nos. 85553[1]; 85634; 86295[2]; and 86857. Thus, to the extent the Court believes that LVRJ raises appropriate arguments under NRAP 36(c), the issue LVRJ is raising, search protocols by a law enforcement agency, is currently pending before the Supreme Court, negating any basis for this Court to publish its prior Order. Accordingly, the Court should deny LVRJ's request to publish the April 7, 2023 Order.

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[1] The Supreme Court issued a stay of the search protocol on July 21, 2023, as well as expedited briefing to address the specific issues raised by LVRJ's appeal, with briefing to be complete within 35 days.

[2] This is a Petition for Writ of Mandamus concerning the search protocol entered by the district court. The matter has been fully briefed and is currently pending decision from the Nevada Supreme Court.

III. CONCLUSION

LVMPD respectfully requests that the Court deny LVRJ's Motion to Order Publication of Unpublished Opinion Entered on April 7, 2023.

Dated this 21st day of July, 2023.

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By:/s/ Jackie V. Nichols

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **RESPONDENT LAS VEGAS METROPOLITAN POLICE DEPARTMENT'S RESPONSE TO LAS VEGAS REVIEW-JOURNAL'S MOTION TO ORDER PUBLICATION OF UNPUBLISHED OPINION ENTERED ON APRIL 7, 2023** was filed electronically with the Nevada Supreme Court on the 21st day of July, 2023. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

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