

SUPREME COURT CASE NO. 59272
District Court Case No. D-373016

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Tracie K. Lindeman
Clerk of Supreme Court

KRISTI RAE FREDIANELLI, AND
TONY FREDIANELLI,
Appellants.

Vs.
SEBASTIAN MARTINEZ,
Respondent

**PETITION TO RECONSIDER DISMISSAL OF APPEAL AND PRAYER
TO REINSTATE APPEAL**

COMES NOW, MATTHEW Q. CALLISTER, ESQ., of the firm of Callister and Associates, LLC, and hereby submits this *PETITION TO RECONSIDER DISMISSAL OF APPEAL AND PRAYER TO REINSTATE APPEAL*.

This Petition is based upon the pleadings and exhibits submitted in support, the facts contained in this Motion, as well as the Points and Authorities submitted and respectfully contained in this motion.

By way of underscoring the importance of this appeal, at current there are two custody orders involving ONE child, they are inconsistent, one being a California order unilaterally and without notice to the California court holding its order void, and the custody order that exists in this case, entered by the trial court without any UCCJEA conference by the trial court, by the Honorable T. Arthur Ritchie Jr., said order being the basis of this appeal. The orders are in such conflict that even the name of the father on the birth certificate is currently in conflict.

1 By way of further introduction, the exhibits submitted may not all be file
2 stamped, including the Nevada order that is the subject of this appeal, and the
3 California custody order, which was obtained pursuant to a good faith belief that
4 the rendering of a dismissal from Judge Duckworth in this case constituted
5 dismissal with regards to the UCCJEA declaration made in the California case that
6 there were no pending cases. *Rhrng Docs 000001*. (The representations were made
7 with full disclosure to her California counsel by Ed Kainen, Esq. ; his declaration
8 is forthcoming.) As the clients/appellants are residents of California, and due to
9 the confidential nature of custody cases, the file stamped copies are not readily
10 retrievable, counsel only recently being retained. The undersigned is submitting his
11 Notice of Appearance on this date. Further, some of the items - most notably the
12 Henderson police activity report - although not part of the district court record, are
13 submitted in order to underscore the need for this appeal to be considered. As an
14 officer of the Court, counsel represents that the items submitted herewith are
15 accurate, and the submission of these documents is intended to give this Honorable
16 Court a flavor of this case in order that this Motion to reinstate appeal may be
17 considered in its important context. These documents are offered for this limited
18 purpose. Additionally, counsel asks this court to take judicial notice of the related
19 appeal, case number 55073.

20 Dated this 6th day of February, 2012

21 Respectfully submitted,
22 **CALLISTER + ASSOCIATES, LLC**

23
24 By: /s/ Matthew Q. Callister, Esq.
25 **MATTHEW Q. CALLISTER, ESQ.**
26 Nevada Bar No. 001369
27 823 Las Vegas Blvd. South, 5th Floor
28 702-385-3343 Fax 385-2899
Las Vegas, NV 89101
Attorney for Defendants /Appellants

1 **FACTS IN SUPPORT OF MOTION TO RECONSIDER AND MOTION TO**
2 **REINSTATE APPEAL**

3 **A. PROCEDURAL BACKGROUND AND STATUS**

4 This appeal involves an order entered by a California trial court in which a
5 California custody order regarding Mikaella Rae Flannery, born January 30, 2007,
6 *Exh 1, PP 0001-0014*, which was unilaterally invalidated by the Honorable T.
7 Arthur Ritchie, Jr. on September 6, 2011. *Exh 2, P 40*. Notice of Appeal was timely
8 filed on September 26, 2011. Likewise, a cross-appeal was filed on October 11,
9 2011, by Plaintiff/Respondent, Sebastian Martinez. Mr. Martinez also filed an
10 Application to Proceed in Former Pauperis on October 20, 2011, in which he stated
11 that **Maekella was dependent on him for support**. *Exh 3, P 041*. Interestingly, he
12 is under **NO** order to pay child support, *Exh 2, P0040*, even though Kristi was
13 granted primary physical custody in the Nevada decree. *Exh 2, PP 033-34*.

14 The pilot program notice was sent to Kristi Fredianelli, but was returned on
15 October 3, 2011, according to the Nevada Supreme Court website. Both the appeal
16 and cross appeal were dismissed on January 20, 2012. The appellants, Mr. and
17 Mrs. Fredianelli have not abandoned this appeal, and submit that this appeal should
18 be reinstated. The appellants have attempted to appeal this matter in proper
19 person, have not received matters in the mail, and in any event, have now retained
20 the undersigned to diligently pursue this appeal.

21
22 **B. FACTS UNDERLYING APPEAL AND CURRENT CASE STATUS**

23 The trial court below amply summarized the history of the underlying case, and
24 accordingly, references shall be taken herein from that Order. There was a previous
25 appeal in the underlying case, number 55073, a sealed case. On August 26, 2009,
26 Judge Duckworth dismissed the underlying case, no.D-373016. *Exh 2, P 00023, LL*
27 *8-13*. Said case was eventually reversed on January 18, 2011, with remittitur issued
28 on February 14, 2011.

1 The appellants and their trial counsel collaborated with counsel in California
2 regarding the effect of Judge Duckworth's oral dismissal, and after these
3 consultations, California counsel was of the good faith belief that the
4 pronouncement of the Dismissal from the bench was sufficient, and the
5 clients/appellants execution of the same, stating that there were "no other actions
6 pending," was accurate. *Exh 1P 0001*. The California Court subsequently entered
7 orders changing the last name of Mikaella to Fredianelli, and ordered the birth
8 certificate to additionally be changed, adding Appellant Tony Fredianelli's name to
9 the birth certificate. *Exh 1, P 002*. Accordingly, Sebastian Martinez was clearly
10 aware of the California proceeding and any Orders arising thereof in plenty of time
11 to challenge the same.

12 As the trial court pointed out, actual Notice of Entry of Order of dismissal
13 was not filed until October 14, 2009. *Exh 2, P 0023, LL 12-15*. Therein, the trial
14 court stated that the "timing" of the entry of the order was important, as it related
15 to the California custody case. *Id.* Sebastian filed a non-tolling motion to
16 reconsider on November 12, 2009, along with a Notice of Appeal. *Id, LL17-23.*¹

17 After reversal, there was a hearing on April 15, 2011, to establish whether
18 there was valid service on Tony Fredianelli. *Exh 2 PP024. LL 12-13*. The court
19 subsequently found that the 2007 service was invalid, but that the November, 2009
20 service was valid. *Exh 2, P 025, LL 1-7*. Unfortunately, but critically, there had
21 never been an application by Sebastian to extend the time within which to serve the
22 2007 Summons. Nevertheless, the trial court found that prior directives and the
23 directive by Judge Duckworth had implicitly allowed service to be extended
24 beyond the traditional 120 days, and consequently denied the motion to dismiss. In
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26
27 ¹ Any Motion to Reconsider could not have been part of an appeal, as it must be
28 heard and decided within 30 days of the Entry of Order, per **Arnold v. Kip** 123
Nev. 410, 168 P.3d 1050 (Nev.,2007)

1 this case, the extension would have been well over a year, three times the statutory
2 date required pursuant to **NRCP 4**.²

3 The trial court ultimately ruled that despite Judge Duckworth's oral dismissal
4 in August 2009, Kristi and Tony, even though they were represented by counsel,
5 "knew or should have known" that when they stated that the Nevada case had been
6 dismissed, that it actually had not been dismissed. *Exh 2, P 0028*. The court then
7 stated that the matter of jurisdiction should have been addressed first, and that then
8 there would have been an appropriate conference between the two courts. *Id*. The
9 court thus deemed material the statements that no other action was pending, *id, P*
10 *00028, L 25*, and determined that the appellants had consequently perpetrated a
11 fraud on the California court by seeking a judgment based on a "false allegation
12 that the Nevada case had been dismissed." *Id, P 029, LL 10-15*. Unfortunately, the
13 Nevada trial court failed to contact the California court at, during, or near the time
14 of this hearing, and instead, unilaterally and without appropriate notice to the
15 California court declared the California decree void. *Id, P 0029, LL 9-10*.
16 Accordingly, this lack of a conference between Judge Duckworth, who had orally
17 dismissed this matter, and the California Court that was relied upon by Judge
18 Ritchie to void the California decree. It is respectfully submitted that Judge
19 Ritchie's order may suffer from the same omission. It is additionally respectfully
20 submitted that in all likelihood had the California court known that the matter had
21 been orally dismissed without knowing of the lack of a formal Notice of Entry then
22 the California court would have maintained jurisdiction with the blessing and
23 acquiescence of Judge Duckworth, who had made a full legal and factual
24 determination and ruling of dismissal.

27 ² This issue is intended to be part of this appeal, it appears to be an issue of
28 fundamental importance, whether a court can determine that another court
retroactively granted an extension of service by merely telling a party to serve a

1 Currently, there exists are two orders in two states. With respect to the Nevada
2 case, a hearing was set on September 2011. Although the notice was directed to
3 Appellants, it was addressed and sent solely to Ms. Lubritz, prior counsel for
4 Appellants herein. *Exh 4, P 044-45*. Accordingly, the trial court, despite the lack
5 of Appellant's appearance or their counsel, switched custody, directed that the
6 birth certificate be changed, and issued a no bail bench warrant for Kristi
7 Fredianielli. See minutes, *Exh 7, PP 049-51*, and No Bail Bench Warrant, *Exh 5,*
8 *PP 46-47*.

9 The posture of these dueling and parallel custody orders is irreconcilable, and
10 has resulted in the very thing that the UCCJEA was designed to prevent:
11 competing custody orders. As is clear from the Court Minutes referred to herein
12 below, when the Guardian Ad Litem Nevada contacted Kristi, she exercised her
13 clear 6th Amendment right to counsel and deferred to her California attorney, who
14 had represented to the Guardian Ad Litem that the California decree was valid and
15 questioned Nevada jurisdiction. See Minutes, *Exh 7, P 050-51*.

16 Astonishingly, Sebastian had even filed a missing person report, despite
17 knowing that Mikaella resides and has resided in California with Appellants
18 herein. Indeed, even the Guardian ad litem knows where the child resides.

19 As a byproduct of these dueling custody orders, Henderson Police, on Jan.
20 24, 2012, were summoned to the home of the maternal grandmother, Mrs.
21 Flannery, who told the police exactly where the child was residing, and
22 accordingly, San Diego Police followed up, verified this fact, and the warrant for
23 Kristi was taken removed from NCIC. *Exh 6, P 0049*. As it now stands, there is
24 exists a "no bail warrant", no bench warrant and a custody modification order that
25 is not enforceable only in Nevada and not in California. Indeed, there is a custody
26 order in California that is valid in California.

27
28 necessary party. This finding seems to away with the requirement of making
written application for an extension of time to serve.

LAW AND ARGUMENT

Pursuant to **NRAP 40 (a) (1)** this Petition is timely filed within eighteen (18) days of this Honorable Court's Order Dismissing the Appeal on January 20, 2012. Specifically that the appellants have NOT abandoned their appeal, as evidenced by this Petition. Further, the issues on appeal rise to the level of the grounds required by **NRAP 40 (a)(2)**, as the following issues of substantial precedential, constitutional or public policy exist.

First, there is the precedential issue of a retroactive implied extension of service, as well as the precedential issue of whether a good faith belief that the oral pronouncement of a dismissal, without a written order, constitutes a fraud upon a court with respect to a UCJEA declaration. There is a constitutional issue of due process in the Nevada trial court's voiding of a California custody decree without affording the California court the opportunity to respond. Finally, from a matter of public policy standpoint, the matter of these dueling decrees should if at all possible attempt to be remedied, and this appeal could very well serve to accomplish these legitimate public policy concerns. Kristi and Mikealla literally have safe harbor under the umbrella of the California decree, a point referenced in the minutes of the October 11, 2011 minutes, vis a vis the communications between the Nevada Guardian Ad Litem and Kristi's California counsel.

Finally, this appeal should be reinstated based upon excusable neglect. In **Bateman v US Postal Service**, 231 F 3rd 1220 (9th Cir. 2000) 60 (b) relief was granted to a summary judgment where the attorney failed to respond to summary judgment motion because of "negligence and carelessness." The Court stated that the determination of whether neglect is excusable is an equitable one, that depends on at least four factors: (1) the danger of prejudice to the opposing party, (2) the length of the delay and its potential impact on the proceedings, (3) the reason for the delay, and (4) whether the movant acted in good faith; these factors, are not

1 exclusive, but provide a framework to determine whether missing a filing deadline
2 constitutes excusable neglect. **Bateman**, supra, 1220-1221. The Court further
3 stated, at 1221 that excusable neglect “*covers cases of negligence, carelessness,*
4 *and inadvertent mistakes.*” Further, in this instance there is no prejudice to the
5 respondent, who also cross-appealed, and there could be some flexibility afforded
6 the pro se litigants, given that the undersigned has been retained and the issues are
7 so weighty.

8 By way of persuasive authority, in **Briones v. Riviera** 116 F.3d 379 (9th Cir.
9 1996), Plaintiff Jesus Briones filed a complaint, *pro se*, in the United States
10 District Court for the District of Nevada against Riviera, his former employer,
11 alleging that he was subjected to a racially hostile work environment and then
12 unlawfully discharged from his position with Riviera. Riviera filed a motion to
13 dismiss on July 19, 1995, based partially on lack of proper service. Briones filed an
14 opposition to the motion ***three and one-half months*** after the filing deadline. The
15 district court had previously granted Riviera's motion and entered a judgment
16 against Briones on August 18, 1995, when he failed to respond to Riviera's motion.

17 Briones then filed a motion pursuant to Fed. R. Civ. P. 60(b) to set aside the
18 judgment. ***The 9th Circuit set aside the dismissal.*** The 9th Circuit, in allowing the
19 extension, relied on Supreme Court case law. It recognized that the Supreme Court
20 analyzed the circumstances under which missing a filing deadline counts as

21 "excusable" or "inexcusable" neglect in ***Pioneer Inv. Servs. Co. v. Brunswick***
22 ***Assocs. Ltd. Partnership***, 507 U.S. 380, 123 L. Ed. 2d 74, 113 S. Ct. 1489 (1993).

23 In Pioneer, the Supreme Court concluded that the determination is at bottom an
24 equitable one, taking account of all relevant circumstances surrounding the party's
25 omission. These include, as the Court of Appeals found, ***the danger of prejudice to***
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the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. “

In this case, the equities favor granting the petition for reconsideration and reinstating the appeal. Should this court find either that the time for service of the summons was not retroactively extended by implication, the case would be dismissed. Further, should this court find that the actions of Kristi and Tony Fredianelli in stating that the Nevada case had been dismissed in their California declarations did not rise to the level of fraud upon the court, then full faith and credit would be given to the California decree, which in all ways is considered valid and binding in California . Clearly, Sebastian’s remedy would be to seek relief in California. The order has not been declared void by any California or 9th Circuit court.

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1 WHEREFORE, the appellants, KRISTI AND TONY FREDIANELLI, pray that
2 this court grant this Petition for Reconsideration, and allow this important appeal to
3 proceed.
4

5 Dated this 6th day of February, 2012
6

7 Respectfully submitted,
8 **CALLISTER + ASSOCIATES, LLC**

9
10 By: /s/ Matthew Q. Callister, Esq.
11 **MATTHEW Q. CALLISTER, ESQ.**
12 Nevada Bar No. 001369
13 823 Las Vegas Blvd. South, 5th Floor
14 702-385-3343 Fax 385-2899
15 Las Vegas, NV 89101
16 *Attorney for Defendants /Appellants*

17 **CERTIFICATE OF MAILING**

18 I certify that I am an employee of CALLISTER AND ASSOCIATES, LLC.,
19 and on this day I deposited for mailing in the U.S. Mail at Las Vegas, Nevada, a
20 true copy of the following enclosed in a sealed envelope upon which first-class
21 postage was prepaid: PETITION FOR RECONSIDERATION and EXHIBITS,
22 sent to:
23
24

25 ///

26
27 ///

1 Sebastian Martinez
2 261 Lenape Heights Avenue
3 Las Vegas, Nevada 89148

4 Hon. T. Arthur Ritchie, Jr.
5 Family Division Department H
6 Las Vegas Nevada 89144

7 DATED this 6th day of February, 2012

8 /s/ Gaylynn West
9 Employee of CALLISTER AND ASSOCIATES, LLC.
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