

IN THE MATTER OF THE
CHRISTIAN FAMILY TRUST U/A/D 10/11/16

SUSAN CHRISTIAN-PAYNE,
ROSEMARY KEACH, AND
RAYMOND CHRISTIAN, JR.,
Appellants,

JACQUELINE UTKIN,

REPLY TO APPELLANTS' RESPONSE TO MOTION FOR SANCTIONS

COUNTERMOTION TO STRIKE MOTION AND/OR DENY RELIEF

LEGAL POINTS AND AUTHORITIES FOR REPLY

On May 16, 2019, Cary Colt Payne, Esq. (hereinafter “Payne”) reaffirmed his legal position that the, “Barney Firm was not a party to the action below, ...and has no standing.” See Appellant’s Response To Motion for Sanctions/Fees; Countermotion to Strike Motion and/or Deny Relief filed May 16, 2019 at Page 2 (hereinafter, “Response filed May 16, 2019”). Notwithstanding this stated belief,

1 Payne and the Appellants prepared their docketing statement under penalty of
2 perjury stating ALB, Ltd. was the only Respondent. *See Appellant's Docketing*
3 *Statement filed 6/7/18 at Paragraph 3 (hereinafter as "ADS 2018")*. To date, the
4 Appellants's docketing statement remains unchanged.
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6 LEGAL ARGUMENT

7 1. Misrepresentations under Penalty of Perjury Bars Appellants

8 This Court specifically held that, "When attorneys do not take seriously their
9 obligations under NRAP 14 to properly and conscientiously complete the
10 docketing statement, they waste the valuable judicial resources of this court,
11 making the imposition of sanctions appropriate. See NRAP 14(c)." *KDI Sylvan*
12 *Pools v. Workman*, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Appellant and
13 Payne's current explanations for their failure to complete a truthful docketing
14 statement amounts to an admission that they did not consider the statements
15 important enough to warrant their careful attention. Payne cannot transfer his duty
16 of candor and trust to this Court upon ALB, Ltd.
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18 Payne argues that the "Barney Firm cannot participate" in this appeal, despite
19 that fact that Barney's participation occurred as the result of Payne and Appellants'
20 admitted misrepresentation to this Court under penalty of perjury. For more than a
21 century, this Court has honored the doctrine of *ex dolo malo non oritur actio* as its
22 public policy. *McCausland v. Ralston*, 12 Nev. 195, 208 (1877). This Court held,
23 "The principle of public policy is this: *ex dolo malo non oritur actio*. No court will
24 lend its aid to a man who founds his cause of action upon an immoral or an illegal
25 act. If from the plaintiff's own stating or otherwise the cause of action appears to
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1 arise *ex turpi causa*, or the transgression of a positive law of this country, there the
2 court says he has no right to be assisted.” *Id.*

3 Payne cannot represent under penalty of perjury that ALB, Ltd. is the real party
4 in interest as the respondent, and then avoid the responsibility for such sworn
5 representations to this Court and the accompanying damages incurred by ALB,
6 Ltd. in responding in good faith to this Court’s briefing orders.

8 **2. Filing a False Docketing Statement Constitutes Intent To Deceive Court**

9 The Appellants and Payne verified under penalty of perjury that ALB, Ltd. was
10 the only Respondent. *See ADS 2018*. Despite their admitted belief to the contrary,
11 Appellants and Payne never corrected the real party in interest designation sworn
12 under penalty of perjury ten (10) months prior, even after given an opportunity to
13 do so by this Court on June 13, 2018. *See Order Modifying Caption filed 6/13/18*
14 *(hereinafter, “OMC 2018”)*. After causing this Court substantial time and energy
15 and causing significant expense to ALB, Ltd., Appellants and Payne filed a motion
16 revealing their sworn statement under penalty or perjury.

19 In *Miller v. Wilfong*, this Court stated, “this court expects all appeals to be
20 pursued with high standards of diligence, professionalism, and competence” and
21 “may impose sanctions against appellate counsel for failing to comply with the
22 [NRAP]. ‘We intend to impress upon the members of the bar our resolve to end the
23 lackadaisical practices of the past and to enforce the [NRAP].’ We again must
24 impress upon the practitioners . . . that we will not permit flagrant [NRAP]
25 violations” 121 Nev. 619, 625, 119 P.3d 727, 731 (2005).

27 It is difficult to imagine a more flagrant use of the appellate process by
28 knowingly naming under penalty of perjury a respondent that Appellants and

1 Payne admittedly concede is not the real party in interest to this appeal. See NRAP
2 14(a)(3) (purpose of docketing statement to assist the Supreme Court in identifying
3 jurisdictional defects, identifying issues on appeal,scheduling cases
4 for...settlement conferences,...). Then, proceeding to attend a settlement
5 conference with a party that Appellants and Payne believed was not the real party
6 in interest with a clear knowledge that any settlement could not be a valid
7 resolution of the appeal. See NRAP 16(g) (The failure of a party, or the party's
8 counsel, to participate in good faith in the settlement conference process by...not
9 complying with the procedural requirements of the program may be grounds for
10 sanctions against the party, the party's counsel, or both.) Appellants and Payne did
11 not enter into the settlement conference process in good faith, because the
12 procedural requirement of naming the correct real party in interest had not been
13 completed prior to the conference being conducted between the parties.
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16 Rather than correct the Appellants docketing statement, Appellants and Payne
17 allowed ten (10) months and briefing to be submitted by a party it believed was not
18 a real party in interest. Rather than correct the docketing statement or
19 certifications, Appellants and Payne instead filed a motion to demonstrate their
20 own perjured docketing statement to this Court, which to date, has still not been
21 corrected. *NRAP Rules 28.2 and NRAP 26.1*.
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24 Such a failure to timely correct a docketing statement and certification has
25 resulted in attorney disbarment in certain circumstances. See *In re Dennis*, 286
26 Kan. 708, 740, 188 P.3d 1, 22 (2008) (In addition to his suspension in this state,
27 the respondent was disbarred by the Tenth Circuit in 1999 for failure to submit a
28 timely response to court orders and failure to perfect a docketing

1 statement....Disbarment is also appropriate where a lawyer, "with the intent to
2 deceive the court, makes a false statement, submits a false document, or
3 improperly withholds material information, and causes serious or potentially
4 serious injury to a party, or causes a significant or potentially significant adverse
5 effect on the legal proceeding." ABA Standard 6.11.) Payne and Appellants never
6 corrected their sworn docketing statement or corrected their certification under
7 NRAP within fourteen (14) days despite their admitted knowledge.
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10 **3. Jurisdiction of this Court is Proper For Purposes of Sanctions Upon**
11 **Payne and Appellants**

12 Under the incorrect theory set forth by Payne and the Appellants, a party can
13 name another to an appeal by sworn statement only to wait until their respective
14 briefs have been submitted to move for their dismissal as a "non-party," all while
15 denying the real party in interest an opportunity to defend the appeal. Such a
16 twisted and incorrect theory cannot be used to expend time and resources from this
17 Court or the non-party named without the imposition of sanctions. This Court has
18 clearly held that, "Jurisdiction in an appeal is vested solely in the supreme court
19 until the remittitur issues to the district court. Under the relevant statutes, the
20 supreme court has control and supervision of an appealed matter from the filing of
21 the notice of appeal until the issuance of the certificate of judgment. NRS 177.155;
22 177.305. The 'certificate of judgment' and various other documents constitute the
23 remittitur. See NRAP 41(a)." *Buffington v. State*, 110 Nev. 124, 126, 868 P.2d 643,
24 644 (1994); See also *Bryan v. Bank of Am.*, 86 Cal. App. 4th 185, 190-91, 103 Cal.
25 Rptr. 2d 148, 151-52 (2001) (When the remittitur issues, the jurisdiction of the
26 appellate court ceases, and that of the trial court attaches.....If the remittitur issues
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1 by inadvertence or mistake, or as a result of fraud or imposition practiced on the
2 appellate court, the court has inherent power to recall it and thereby reassert its
3 jurisdiction over the cause.) This Court continues to possess proper jurisdiction to
4 award sanctions and attorney's fees.
5

6 **B. CONCLUSION**

7 Based upon the foregoing, ALB, Ltd. requests the relief set forth in their Motion.

8 **LEGAL POINTS AND AUTHORITIES FOR RESPONSE**

9 **A. LEGAL ARGUMENTS**

10 **1. Payne and Appellants Named Attorney For Nancy Christian as Real** 11 **Party in Interest**

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13 Payne and Appellants named ALB, Ltd., the prior attorney for Nancy Christian,
14 as the respondent under penalty of perjury. *See ADS 2018*. When ALB, Ltd. was
15 forced to substantively respond to their sworn statements to this Court, Payne and
16 Appellants now cite to *Albert D. Massi Ltd v. Bellmyre*, 111 Nev. 1520, 908 P.2d
17 705 (1995). This citation seems only to reaffirm Payne and Appellant's prior
18 beliefs (i.e. that ALB, Ltd. was never the real party interest as attorney for Nancy
19 Christian) during the period in which they falsely represented the contrary to this
20 Court. *See ADS 2018*. This argument does nothing to prohibit this Court from
21 exercising jurisdiction over Payne and Appellants for the imposition of sanctions
22 for their willful misrepresentations in naming a party that they admittedly believed
23 did not have legal standing to respond to their appeal.
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26 **2. Proper Forum To Enforce Sanctions Against Appellants and Payne**

27 NRAP 38(b) authorizes only this court to make such an award if it determines
28 that the appeals process has been misused. *Bd. of Gallery of History Inc. v. Datecs*

1 Corp., 116 Nev. 286, 288, 994 P.2d 1149, 1150 (2000). This Court is the only
2 forum in which violations of NRAP can be determined for purposes of ALB, Ltd.'s
3 prior motion and therefore Appellant's counter motions must be entirely dismissed.
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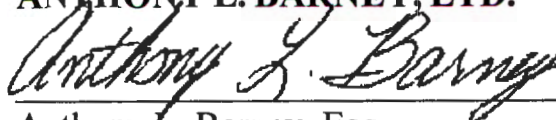
5 **3. ALB, Ltd. Filing Is Warranted and Clearly Demonstrates Appellants**
6 **and Payne's Misrepresentations to this Court**

7 ALB, Ltd., when given the opportunity to express its belief as the real party in
8 interest, did so with clarity. *See Response to Order Granting Motion and*
9 *Regarding Caption dated 2/4/19 at Pages 1-2 hereinafter "ROGM 2019."*
10

11 ALB, Ltd. followed every order this Court in responding as directed.
12 Unfortunately, this Court was acting upon false statements proffered by Appellants
13 and Payne as to the real party in interest for the last approximately ten (10) months.
14 Appellants and Payne cannot now foist their duty of candor and honesty to which
15 they failed upon ALB, Ltd., a party that they never believed was the real party in
16 interest. Their request for motion to strike is an attempt to hide their perjured
17 statements from the Court record, and their request for sanctions for filings that
18 they occasioned by their false statements were clearly warranted under the
19 circumstances and demonstrate the frivolousness of their appeal in naming the
20 wrong respondent. Appellants' counter motions must be denied in their entirety.
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22 DATED this 10th day of May 2019.
23

24 Respectfully Submitted,
25 **ANTHONY L. BARNEY, LTD.**

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