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IN THE SUPREME COURT OF NEVADA

YOAV EGOSI, Appellant, vs. PATRICIA EGOSI, Respondent.	Case. No.: 76144 Dist. Ct. Case. No.: D-16-540174-D **OPPOSITION TO RESPONDENT'S MOTION TO DISMISS AND COUNTERMOTION FOR AFFIRMATIVE RELIEF IN THE FORM OF SANCTIONS AGAINST RESPONDENT AND HER COUNSEL FOR DILATORY TACTICS, UNDUE DELAY, AND BAD FAITH CONDUCT**

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COMES NOW Yoav Egosi, ("Joe"), through his attorney Alex Ghibaudo, Esq. of Alex B. Ghibaudo, PC, and files his opposition and countermotion as follows:

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MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF FACTS AND PROCEDURAL HISTORY

On September 13, 2018 this Court filed an Order to Show Cause stating:

> *[O]ur preliminary review of the docketing statement and the documents submitted to this court pursuant to NRAP 3(g) reveals an additional potential jurisdictional defect. Specifically, it appears that the judgment or order designated in the notice of appeal is not substantively appealable. See NRAP 3A(b). The notice of appeal states the appeal is from "the district court's May 29, 2018, order denying his [sic] motion to reconsider." This court has jurisdiction to consider an appeal only when the appeal is authorized by statute or court rule. Taylor Constr. Co. v. Hilton Hotels, 100 Nev. 207, 678 P.2d 1152 (1984).*
>
> ***
>
> *Accordingly, appellant shall have 30 days from the date of this order within which to show cause why this appeal should not be dismissed for lack of jurisdiction. In responding to this order, appellant should submit points and authorities and documentation that establishes this court's jurisdiction, such as*

a final written appealable order. We caution appellant that failure to demonstrate that this court has jurisdiction may result in this court's dismissal of this appeal. The briefing schedule in this appeal shall be suspended pending further order of this court. ***Respondent may file any reply within 11 days from the date that appellant's response is served.*** *(Emphasis Added).*

Respondent was served a copy of that order. On September 26, 2018 a response to that Order to Show Cause was filed. That day, Respondent's Counsel was served via the Court's designated electronic service system. Respondent never filed a reply to Appellant's response.

On November 5, 2018, this Court ordered briefing reinstated, stating the following:

Appellant has filed a response and an amended notice of appeal challenging written orders entered on September 4, 2018, that resolve the challenged motions. It thus appears that a final judgment appealable under NRAP (a)(6) has now been entered, see Lee v. GNLV, Corp., 116 Nev. 424, 426, 996 P.2d 416, 417 (2000), and the appeal may proceed.

On January 29, 2019 Appellant filed his opening brief. The same day, Appellant filed a motion to extend time to file an appendix and brief that

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properly references the appendix (at the time of filing, the transcripts of the proceedings were not prepared). At the same time, undersigned counsel contacted counsel for Respondent and suggested stipulating to amending the briefing schedule in light of the delay in preparing the record on appeal. Counsel for Respondent agreed. A draft stipulation and order was prepared and submitted to Respondent's counsel. That briefing schedule was as follows: Appellant to file his opening brief and appendix by February 22, 2018; Respondent to file an answering brief 30 days from that day; Appellant to file reply brief 30 days from filing of answering brief.

On February 21, 2019 a second amended brief was filed and the appendix was filed. The appendix was rejected with instructions to refile correctly. On February 24, 2018 appendix volumes I thru X were filed correctly. The second amended opening brief and appendix have been pending since then. However, on March 6, 2019 Respondent filed a motion to dismiss the appeal – more than 6 months after this Court ordered Appellant to show cause why his appeal should not be dismissed and directed that Respondent may file a reply to Appellant's response within 11 days from the date response is served. According to this Court's schedule, as contained in the Order to Show Cause, Appellant's reply was due October

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11, 2018, ***186 days ago.*** To date, this Court has not ruled on that motion. Thus, this opposition and countermotion follows.

II. LEGAL ANALYSIS

a. Respondent's motion to dismiss is frivolous and should be denied because Respondent failed to address the jurisdictional defect when she was given an opportunity to do so by this Court in its Order to Show Cause or when the docketing statement was filed pursuant to NRAP 14(f)

Respondent, through her counsel of record, John Blackmon, of the Blackmon Law Group, filed a motion to dismiss this appeal because it is not substantively appealable. However, that issue was already identified by this Court in its Order to Show Cause issued September 13, 2018, over six (6) months ago. Respondent, and her counsel, where given an opportunity to reply to any response made by Appellant to that Order to Show Cause but no response was made. Indeed, Respondent, and her counsel, could have petitioned this Court to reconsider its decision reinstating briefing over five (5) months ago but did not do so. In fact, Respondent, and her counsel, should have moved to dismiss this appeal pursuant to NRAP 14(f) after Appellant's docketing statement was filed on September 26, 2018 but failed to do that. (NRAP 14(f) provides that "[i]f respondent believes there is a jurisdictional defect, respondent should file a motion to dismiss" within 7 days of service of the docketing statement). Respondent, and her counsel,

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should not be allowed to waste this Court's time, Appellant's limited resources, and undersigned counsel's efforts in a Quixotic quest to delay these proceedings unnecessarily.

This case has been pending below since 2016 and the parties are still not divorced. The evidentiary hearing on relocation occurred on August 31, 2018, almost eight (8) months ago and an answering brief has yet to be filed in this matter. Respondent, through her counsel, filed a largely frivolous motion to dismiss based on arguments already addressed by this Court in its Order to Show Cause and by Appellant in his response to that Order to Show Cause. Worse still, Respondent, and her lawyer's, motion to dismiss was untimely as it was filed one day after the date they were given to file an answering brief and Respondent, and her lawyer, failed to demonstrate extraordinary and compelling circumstances why a further extension of time is necessary. See NRAP 26(b)(1)(B).

Furthermore, Respondent, and her lawyer's, motion is procedurally deficient. A motion that challenges appellate jurisdiction on the basis that the order or judgment appealed from is not appealable should attach copies of essential portions of the trial court record, including the judgment or order appealed from. NRAP 3A(b); NRAP 3(B); NRAP 27(a)(2). Here, no such record was attached to Respondent's motion to dismiss. In short, the entirety

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of Respondent, and her lawyer's, motion to dismiss is an exercise in futility and the epitome of a frivolous motion made for the purposes of delay and to harass.

b. <u>Respondent, and her counsel, should be sanctioned for abusing the appellate process</u>

The appellate court may award attorney fees as costs if it determines that the appeal process has been misused. NRAP 38(a) and (b). A motion for fees as sanctions under NRAP 38 or any other sanctioning authority should be made in the appellate court where the allegedly sanctionable conduct occurred. Cf. *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1356–57, 971 P.2d 383, 388 (1998) (disallowing a district court's fee award for a frivolous appeal). Respondent should be sanctioned by treating her failure to file an answering brief, or moving to extend time as provided in the Nevada Rules of Appellate Procedure, as a confession of error and the appropriate disposition of this appeal thereafter made. See NRAP 31(d)(2).

Counsel for Respondent, John Blackmon, should be sanctioned monetarily. Under the inherent power doctrine, an appellate court may impose sanctions on attorneys. SCR 39; SCR 99(2); *Young v. Ninth Judicial Dist. Ct.*, 107 Nev. 642, 646, 818 P.2d 844, 846 (1991); see also *Ryan's Express Transp. Servs. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 294, 279

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P.3d 166, 169 (2012) (noting "[t]his court and other courts have long recognized that it is within the inherent power of the court to govern the conduct of the members of the bar appearing before it"). A court may sanction an attorney whose performance has fallen below the high standards of diligence, professionalism. *Hansen v. Universal Health Serv. of Nev., Inc.*, 112 Nev. 1245, 1248, 924 P.2d 1345, 1347 (1996) (personally sanctioning attorney who violated numerous court rules). If an attorney or party disregards orders or rules of the appellate court or disregards the court's admonishments concerning dilatory conduct, the court may impose monetary sanctions. *Hansen v. Universal Health Serv. of Nev., Inc.*, 112 Nev. 1245, 1248, 924 P.2d 1345, 1347 (1996) (imposing fine where counsel failed to prosecute the appeal).

Here, Mr. Blackmon has pursued dilatory tactics in bad faith, in an effort to delay these proceedings and extend the time Appellant must remain in Nevada (he moved to relocate to Israel with his minor child, which was denied, and is now on appeal). Those tactics culminated in a frivolous and meritless motion to dismiss before this court. Monetary sanctions are appropriate in an amount and to a party this court sees fit to award damages to.

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The appellate court has discretion to determine who will receive the payment of the monetary sanctions. The Supreme Court Law Library, the Clark County Law Library and the opposing party are among those to whom the court may direct the offending party to pay the fine. See, e.g., *Moran v. Bonneville Square Assocs.*, 117 Nev. 525, 531, 25 P.3d 898, 901 (2001) (requiring counsel to personally pay $500 in sanctions to Clark County Law Library); see also *Hoffman v. Grames-Hoffman*, No. 55571, 2010 WL 4675790, at *1 (Nev. Nov. 12, 2010) (unpublished disposition) (mandating counsel to personally pay $500 in sanctions, even though appeal was dismissed because of automatic bankruptcy stay); *Baumgartner v. Venetian Casino Resort, LLC*, 124 Nev. 1451, 238 P.3d 795 (July 7, 2008) (unpublished disposition) (dismissing appeal and requiring counsel to pay a $500 sanction to the Supreme Court Law Library and an additional $250 sanction for failure to respond to Supreme Court orders). The appellate court has considerable discretion when quantifying sanctions. See, e.g., *Imperial Palace v. Dawson*, 102 Nev. 88, 93, 715 P.2d 1318, 1321 (1986) (awarding damages of 1 percent interest per month and warning self-insured employers who engage in unacceptable dilatory tactics that the court may award, in addition to attorney fees, double costs and damages computed on the basis of 2 percent interest per month on all sums improperly withheld); *Varnum v.*

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Grady, 90 Nev. 374, 377, 528 P.2d 1027, 1029 (1974) (awarding damages in the amount of 2 percent interest per month, attorney fees and double costs accrued for appellant's failure to comply with multiple procedural rules, failure to prosecute the appeal and failure to demonstrate any legal justification for the dilatory conduct). Appellant contends that monetary sanctions if imposed should be awarded to him as compensation for attorney Blackmon's bad faith conduct.

Counsel whose performance has fallen below the high standards of diligence, professionalism and competence required for appellate practice may be removed from a case. See *Burke v. State*, 110 Nev. 1366, 1370, 887 P.2d 267, 269 (1994); *Cuzdey v. State*, 103 Nev. 575, 580, 747 P.2d 233, 236 (1987). Here, Respondent's counsel has gone out of his way to delay these proceedings for an improper purpose and has demonstrated a complete inability to understand basic rules of Appellate procedure. As such, it is appropriate that he be removed from this case to prohibit further dilatory and wasteful acts made in bad faith.

III. CONCLUSION

For the foregoing reasons Appellant requests this Court deny Respondent's motion to dismiss and sanction Respondent and her attorney,

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John Blackmon, Esq., for dilatory tactics, abuse of the appellate process, and undue delay as indicated above.

DATED this 15th day of April, 2019.

/s/ Alex Ghibaudo
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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, on April 22nd, 2019 **OPPOSITION TO RESPONDENT'S MOTION TO DISMISS AND COUNTERMOTION FOR AFFIRMATIVE RELIEF IN THE FORM OF SANCTIONS AGAINST RESPONDENT AND HER COUNSEL FOR DILATORY TACTICS, UNDUE DELAY, AND BAD FAITH CONDUCT** was served upon each of the parties to appeal 76144 via electronic service through the Supreme Court of Nevada's electronic filing system.

*/s/ Alex Ghibaudo*_____

An Employee of ALEX B. GHIBAUDO, P.C.