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IN THE SUPREME COURT OF THE STATE OF NEVADA

PARVIZ SAFARI, an individual; MANDANA ZAHEDI, an individual; and on behalf of MEDITEX, LLC, a Nevada limited liability company,

Appellants,

vs.

HAMID MODJTAHED, individually and derivatively on behalf of MEDITEX, LLC, a Nevada limited liability company; and MOHAMMAD MOJTAHED, individually and derivatively on behalf of MEDITEX, LLC, a Nevada limited liability company,

Respondents.

Case No.: 79926

REPLY IN SUPPORT OF MOTION TO VOLUNTARILY DISMISS APPEAL

Appeal from the Eighth Judicial District Court, The Honorable Mark R. Denton Presiding.

MAC:15922-001 4020338_1

I. INTRODUCTION

Respondents request for fees and costs is unreasonable and lacks any applicable legal authority. NRAP 38 allows fees only in cases where an appeal is deemed frivolous, with the intent being to punish attorneys to discourage similar conduct in the future. This case is not one that can plausibly be deemed frivolous. Rather, Appellants' prior counsel, whom the undersigned replaced after the Notice of Appeal was filed, erred on the side of caution and preserved what he felt was the need for appellate review.

However, when Appellants retained appellate counsel, following a diligent review of the file and the remaining issues in the District Court, counsel took the most appropriate action and informed Respondents the appeal was going to be dismissed. Thus, Respondents knew very early the appeal was going to be dismissed, but refused to stipulate to dismissal of the appeal without Appellants waiving future appellate rights or agreeing to pay Respondents.

This action is nowhere close to sanctionable conduct, but, instead, consists of a case where pervasive appellate issues fill the District Court record, and Appellants' prior counsel, acting in good faith, sought to preserve an appellate right he believed spawned from a final appealable order. While Appellants' trial counsel was incorrect, that error was based on a nuanced issue and cannot reasonably be deemed "frivolous." Indeed, Respondents never informed Appellants' prior counsel the appeal was "frivolous" and the first time this argument has been raised is in

Respondents' Opposition.

In addition to no frivolous conduct, it is curious how Respondents have spent $2,190.00 on an "appeal" when there has been nothing substantive done in regards to the instant appeal except for a phone call and a few e-mail exchanges. While Respondents spent an additional 2.8 hours opposing Appellants' voluntary dismissal, that was unnecessary and unreasonable based on the circumstances.

II. LEGAL ARGUMENT

A. ATTORNEY FEES ARE NOT WARRANTED AS THE APPEAL WAS NOT FRIVOLOUS.

Sanctions in appellate proceedings are rare and reserved for instances of truly frivolous conduct, and the Court takes necessary action to preserve the integrity of the appellate process. NRAP 42(b) draws its language from FRAP42(b) Almost without exception, federal courts have rejected the argument that, in allowing voluntary dismissal "on terms ... fixed by the court," FRAP 42(b) authorizes an award of attorney fees against the party moving to dismiss. *Breeden v. Eighth Jud. Dist. Ct.*, 131 Nev. 96, 98, 343 P.3d 1242, 1243 (2015) (citations omitted). Like NRAP 38, FRAP 38 authorizes fee-shifting but limits the authorization to frivolous filings. Normally, courts encourage rather than discourage voluntary, self-determined case resolutions. *Id.*

The Nevada Rules of Appellate Procedure similarly impose affirmative obligations on appellate counsel," and this court may impose sanctions for failure to

comply with those rules. *Barry v. Lindner*, 119 Nev. 661, 671, 81 P.3d 537, 543 (2003) (sanctioning ***appellant's counsel*** $500 for "exaggerat[ing] the record," incompletely citing the record in briefs, and failing to cite relevant legal authority and observe formatting requirements) (emphasis added); *see also, Thomas v. City of N. Las Vegas*, 122 Nev. 82, 95-96, 127 P.3d 1057, 1066-67 (2006) (sanctioning ***appellant's counsel*** $1,000 for misrepresenting material facts, incompletely citing the record in briefs, and failing to cite relevant legal authority) (emphasis added).

Here, the instant case is far from a case that has any type of frivolous argument advanced. Rather, a Notice of Appeal was filed by Appellants' prior counsel to ensure Appellants' appellate rights were preserved. In erring on the side of caution, Appellants' prior counsel filed the notice following a non-appealable order. However, this mistake is far from a black and white issue that could reasonably be deemed frivolous. Judge Denton's Findings of Fact did not indicate the decision was not "final," and, while it indicated a "subsequent proceeding pursuant to NRS 42.005(3) shall be conducted for punitive damages," the Findings of Fact presented a nuanced issue that Appellants' prior counsel was apparently unsure of. This Court should not penalize prudent counsel who acts in the best interest of his client when a novel legal issue is presented.

In addition, Respondents fail to state why or how Appellants' counsel should be responsible for paying their fees and costs under NRAP 38(b). While

Respondents are apparently now disagreeing with the appeal filed, no identified conduct on behalf of the undersigned or his firm suggests anything frivolous has taken place. Rather, a serious and timely inquiry was made into the trial record, the Findings of Fact, and legal research to conclude a final appealable order did not exist. When this review was finished, the undersigned sought to dismiss the appeal in an orderly manner. During that time, fluid conversations regarding resolution[1] took place between the parties that directly implicated future appellate rights and the District Court proceedings. It would be patently unfair to now suggest that Respondents' counsel is not responsible for any type of fees.

B. THE FEES SOUGHT ARE UNREASONABLE.

In addition to the lack of any frivolous conduct, the fees sought are unreasonable. This Court has imposed sanctions on conduct dealing with blatant misrepresentations to this Court on a number of occasions. *See Barry v. Lindner*, 119 Nev. 661, 671, 81 P.3d 537, 543 (2003) (sanctioning ***appellant's counsel*** $500 for "exaggerat[ing] the record," incompletely citing the record in briefs, and failing to cite relevant legal authority and observe formatting requirements) (emphasis added); *see also, Thomas v. City of N. Las Vegas*, 122 Nev. 82, 95-96, 127 P.3d 1057, 1066-67 (2006) (sanctioning ***appellant's counsel*** $1,000

[1] It is unclear from the redacted invoices provided, but the undersigned believes most, if not all of the time spent on this "appeal" was for discussions of a global resolution. This is not time that should be compensated, as it was not dedicated solely to this "appeal."

for misrepresenting material facts, incompletely citing the record in briefs, and failing to cite relevant legal authority) (emphasis added). In those cases, the Court's sanctions were far less than the amount sought by Respondents, despite the existence of patently frivolous conduct.

Additionally, Respondents, in choosing to dedicate an additional 2.8 hours to oppose a voluntary dismissal, knowing a future appeal would be imminent is unreasonable. Respondents chose to incur fees on this issue and that decision does not change the fact that there is no frivolous conduct at issue to the Notice of Appeal filed by Appellants' prior counsel. Furthermore, Respondents' completely redacted billing invoice does not provide the Court, nor the undersigned with sufficient information to challenge or analyze the reasonableness of the billing entries. The invoice is filled with redactions to an extent the entries cannot logically be analyzed. As such, the fees sought are unreasonable and unsupported.

III. CONCLUSION

Based on the foregoing, Respondent's Motion should be denied.

Dated this 7th day of April, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **REPLY IN SUPPORT OF MOTION TO VOLUNTARILY DISMISS APPEAL** was filed electronically with the Nevada Supreme Court on the 7th day of April, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Kristine Kuzemka
Jonathan Blum
Scott Fleming
Andrew Flahive

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

N/A

/s/ Leah Dell
An employee of Marquis Aurbach Coffing