

IN THE SUPREME COURT OF THE STATE OF NEVADA

Robert Kern, Esq.,

Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF
NEVADA, IN AND FOR THE
COUNTY OF CLARK COUNTY
and THE HONORABLE NANCY ALLF,
DISTRICT COURT JUDGE,

Respondent.

Supreme Court Case No:

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Elizabeth A. Brown
Clerk of Supreme Court

PETITION FOR

EXTRAORDINARY RELIEF

From the Eighth Judicial District Court, Clark County
The Honorable Nancy Allf, District Judge
District Court Case No. A-19-803488-B

PETITION FOR EXTRAORDINARY RELIEF

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RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal. Petitioner Robert Kern has no parent corporations, no stock, no corporate affiliation, and is present under his true name. He is self-represented, and has been the attorney for the Defendants in the underlying matter. He expects to be represented by no other counsel in this matter.

DATED this 14th day of October, 2021

KERN LAW

By: /s/ Robert Kern
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I.

ROUTING STATEMENT

The Writ Petition does not fall within any of the categories of cases presumptively assigned to the Court of Appeals pursuant to NRAP 17(b).

This case is presumptively retained for the Supreme Court to hear and decide, pursuant to NRAP 17(a)(5) and (13) because it involves attorney discipline and raises a question of first impression involving common law.

This case presents the following questions: (1) was Mr. Kern's inability to attend the emergency hearing misconduct, (2) if Mr. Kern's action was misconduct, did it rise to the level to justify attorney sanctions, (3) were the sanctions imposed without appropriate notice and opportunity to be heard. This statement is made pursuant to NRAP 28(a)(5).

II.

RELIEF SOUGHT

Petitioner Robert Kern ("Mr. Kern") seeks an extraordinary writ of mandamus vacating the Attorney Sanctions issued by the District Court.

III.

ISSUES PRESENTED

1. Whether an inability to attend an emergency hearing on approximately three hours' notice constituted misconduct.
2. If the inability to attend the hearing was misconduct, whether it rose to the level to justify attorney sanctions.
3. Whether the sanctions were imposed without sufficient notice and opportunity to be heard.

IV.

STATEMENT OF FACTS

Mr. Kern has been practicing in Nevada and California for seventeen years. In that time he has never had a bar complaint, never been subject to discipline, never been cited or threatened with contempt, and never been subject to sanctions of any kind.

The underlying case is a business dispute between the two equal owners of a company, Plaintiff Dominique Arnould (“Arnould”) and Defendant Clement

Muney (“Muney”). The business was essentially a distributor of non-perishable foodservice supplies, in which Arnould operated the Los Angeles division of the Company, and Muney operated the Las Vegas side of the Company. Petitioner Robert Kern is counsel for Defendant Muney in the matter.

On the morning of June 10, 2020, Arnould filed an emergency motion for appointment of receiver, and a preliminary injunction, seeking a hearing the same day. Arnould claimed that he had, without notice to Muney, driven to the Las Vegas warehouse, and found it locked, and wanted entry. Neither Muney nor his counsel were informed that Arnould was driving to Las Vegas prior to the filing of the emergency motion, and no other explanation of the emergency nature of the motion was provided. Counsel for Muney was scheduled for a Nevada Supreme Court oral argument the following day, and had scheduled, at great difficulty, six other appellate attorneys to assist him in moot arguments, at the same time as the requested hearing. As the oral argument was for the following day, the moot argument could not be rescheduled, and a very significant amount of client resources had been invested in setting it up. Counsel for Muney informed the parties and the Court that he was unable to attend a hearing that afternoon and explained why, and also drafted a quick opposition (filed 41 minutes after the emergency motion had been filed) that morning pointing out that no irreparable

harm or emergency had been alleged, and that he was unable to attend a hearing that afternoon. (See 6/10 Opp & Emails, Appendix p.09).

The Court nonetheless scheduled the hearing for the same day, over Muney's protest, and then continued the hearing to June 12, two days later, after Muney's counsel did not appear. On June 12, 2020, a hearing was held on Arnould's motion. At that hearing the Court issued sanctions against counsel for Muney, alleging that his failure to attend the same day hearing, despite his conflict, showed disrespect to the Court. (See 6/12 Transcript Appendix p.14 & 6/12 Order, Appendix p.12). This appeal followed.

V.

TIMING OF THIS PETITION

Extraordinary writ relief must be timely sought by a petitioner. *Widdis v. Dist. Ct.*, 114 Nev. 1224, 968 P.2d 1165, 1167 (1998). The Sanction Order was filed on March 5, 2018, and Petitioner initially appealed the sanction order along with appeal of another issue within the same order, under ancillary jurisdiction of this Court (Docket # 81356). After an Order to Show Cause, this Court initially concluded that it had ancillary jurisdiction to hear the appeal of the sanction order, however in the final decision in the appeal, this Court determined that it did not have appellate jurisdiction over the sanctions order, and dismissed the appeal (*See*

Order of Dismissal 9/16/21, Docket # 81356). Accordingly, Petitioner has prepared and filed this Writ Petition within one month of the order of dismissal; therefore in a timely manner.

VI.

ARGUMENT

I.

THE DISTRICT COURT ERRED BY IMPOSING SANCTIONS ON MR. KERN FOR CONDUCT THAT DID NOT CONSTITUTE MISCONDUCT, WITHOUT NOTICE OR AN OPPORTUNITY TO BE HEARD ON THE MATTER

a. A Writ is Procedurally and Substantively Appropriate in this Case.

This Court has original jurisdiction to issue writs of mandamus. Nev. Const. Art. 6 § 4; see also NRS 34.160 "A writ of mandamus is an extraordinary remedy that will not issue if the petitioner has a plain, speedy, and adequate remedy at law." *Leibowitz v. Dist. Ct.*, 119 Nev. 523, 529, 78 P.3d 515,519 (2003) (citing NRS 34.170). Because an attorney is usually not a party to the underlying lawsuit, counsel of record subjected to sanctions may pursue review of that sanction through an extraordinary writ. *Watson Rounds v. Dist. Ct.*, 358 P.3d 228, 231 (2015); *Vaile v. Valle*, 133 Nev. 213, 217, 396 P.3d 791, 794-95 (2017); *Pengilly v. Rancho Santa Fe Homeowners Ass'n*, 116 Nev. 646, 649, 5 P.3d 569, 571 (2000)

(recognizing that a contempt order entered in an ancillary proceeding is not appealable). This Court has previously held that the question of whether an attorney's actions constitute misconduct is a question of law and must be reviewed de novo. *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970, 982 (Nev. 2008). In this instance, this Writ is Petitioner's only available remedy for review of the district court's findings of ethical misconduct, as explained by this Court in its dismissal of this matter as an appeal (*See* Order of Dismissal 9/16/21, Docket # 81356).

b. Standard of Review

Issuance of sanctions within a Court's authority are reviewed for an abuse of discretion. *Young v. Johnny Ribeiro Bldg., Inc.*, 787 P. 2d 777 (Nev: Supreme Court 1990). Determination of whether a sanction was within the Court's authority is a question of law, and all questions of law are reviewed de novo. *Franchise Tax Bd. of State of California v. Hyatt*, 407 P.3d 717, 733 (Nev. 2017), cert. granted sub nom. *Franchise Tax Bd. of California v. Hyatt*, No. 17-1299, 2018 WL 1335506 (U.S. June 28, 2018); *Matter of L.J.A.*, 401 P.3d 1146 (Nev. 2017).

c. Attorney Sanctions are Only Appropriate in Cases of Significant Misconduct.

"[C]ourts have inherent equitable powers to dismiss actions or enter default judgments for ... abusive litigation practices." (Internal citations omitted); *Young v.*

Johnny Ribeiro Bldg., Inc., 787 P. 2d 777 (Nev: Supreme Court 1990). However, the discretion to impose sanctions is not unlimited. The Nevada Supreme Court explained one such limit in its decision in *Emerson*, holding that “[a] district court may only impose sanctions that are reasonably proportionate to the litigant's misconduct.” *Emerson v. Eighth Judicial Dist. Court*, 263 P. 3d 224 (Nev: Supreme Court 2011). In the present case, there is no clear indication of any misconduct whatsoever.

As explained above, the only misconduct alleged was the failure to attend a hearing with two hours’ notice, for which Kern had an unavoidable conflict, and fully advised the Court of his inability to attend, both before the hearing was scheduled, and after. (See Emails, Appendix p.09). Kern had scheduled a moot argument to prepare for the Nevada Supreme Court oral argument that was occurring less than 24 hours after the scheduled hearing. Kern had arranged for six experienced appellate attorneys to conduct the moot with him and act as judges. To miss the moot argument would have left him unprepared for the oral argument, and wasted a vast amount of client resources from that case. As the argument was scheduled for the next day, rescheduling was impossible, and would not have avoided the immense waste of client resources. Kern believed that attending the emergency hearing rather than preparing for the Supreme Court oral argument

would have constituted malpractice against the client whose case was being argued. Despite review of the order for sanctions, Kern still has no idea what about the conduct constituted any sort of malfeasance, nor what course of conduct might have been more appropriate to have taken.

If neither the hearing transcript, nor the order for sanctions is capable of explaining what acts might have constituted misconduct, then it seems unlikely that the conduct warranted personal sanctions against the attorney pursuant to the “reasonably proportional” standard from *Emerson*. 263 P. 3d 224 (Nev: Supreme Court 2011).

The Nevada Supreme Court has further explained that the imposition of personal sanctions against an attorney are only warranted in “extreme cases”. With no identifiable misconduct, this case can not be considered an extreme case by any standard. *McGuire v. State*, 677 P. 2d 1060 (Nev: Supreme Court 1984). Because Kern committed no conduct that was clearly misconduct of any kind, the imposition of sanctions was improper, and should be reversed.

d. Issuance of Sanctions Requires Notice and an Opportunity to be Heard.

Finally, pursuant to the Court’s decision in *Lioce*, the imposition of sanctions against an attorney is authorized only if the offending party is given

“notice and an opportunity to respond.” *Lioce v. Cohen*, 174 P. 3d 970 (Nev: Supreme Court 2008) (Cited in Sanctions Order as justifying authority) (“[T]he district court may, on a party's motion or sua sponte, impose sanctions for professional misconduct at trial, after providing the offending party with *notice and an opportunity to respond*.”) (emphasis added). In the present case, Kern was given no notice that sanctions, or any other form of discipline were being considered until the Court announced that it was imposing sanctions. Kern was given no notice that he would be defending himself from sanctions, and once he was told the Court was considering sanctions, the order was made, and no further opportunity to defend himself was provided. As this violated the requirement for imposition of professional sanctions, it was procedurally improper, and should be reversed.

VII.

CONCLUSION

As clearly outlined in this petition, the District Court manifestly abused its discretion by entering its unfounded order imposing attorney sanctions, without being able to identify any actual misconduct on the part of the attorney. Petitioner respectfully requests this Court to issue a writ of mandamus compelling the District Court to vacate its order issuing sanctions against Mr. Kern.

ATTORNEY'S CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Petition complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 97 in Times New Roman 14pt type.
2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 1,778 words.
3. Finally, I hereby certify that I have read this Petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 15th day of October, 2021.

KERN LAW

By: /s/ Robert Kern

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VERIFICATION

I, ROBERT KERN, declare as follows:

1. I, Robert Kern, am the Petitioner herein and I hereby certify that I have read the Petition for Extraordinary Relief and have personal knowledge concerning the matters raised therein, and to the best of my knowledge, information, and belief, the factual matters set forth are as documented in the records of the case and Appendix, and that the arguments herein are not frivolous or interposed for any improper purpose.

I declare under penalty of perjury that the foregoing is true and correct

Dated this 15th day of October, 2021

/s/ Robert Kern
Robert Kern Esq.

CERTIFICATE OF SERVICE

I certify that on the 15th day of October, 2021, a true and correct copy of the foregoing Petition for Extraordinary Relief, was electronically filed with the Nevada Supreme Court by using the Nevada Supreme Court E-Filing system.

I further certify that on the 15th day of October, 2021 the following party was served with a copy of the Petition for Extraordinary Relief by traditional means via U.S. Mail in a sealed envelope with postage fully prepaid.

Eighth Judicial District Court
200 Lewis Ave,
Las Vegas, NV 89101

Nancy Allf District Judge
Department 27
Eighth Judicial District Court
200 Lewis Ave,
Las Vegas, NV 89101

/S/ Melissa Milroy
An employee of Kern Law, Ltd.