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IN THE SUPREME COURT OF THE STATE OF NEVADA

REZA ZANDIAN, A/K/A GOLAMREZA ZANDIANJAZI, A/K/A GHOLAM REZA ZANDIAN, A/K/A REZA JAZI, A/K/A J. REZA JAZI, A/K/A G. REZA JAZI, A/K/A GHONOREZA ZANDIAN JAZI, an individual,

Appellant,

vs.

JED MARGOLIN, an individual,

Respondent.
_____/

Supreme Court Case No. 82559
District Court Case No. 09OC005791B

APPELLANT'S RESPONSE TO RESPONDENT'S NRAP 38 MOTION FOR SANCTIONS

COMES NOW Appellant, Reza Zandian, A/K/A Golamreza Zandianjazi, A/K/A Gholam Reza Zandian, A/K/A Reza Jazi, A/K/A J. Reza Jazi, A/K/A G. Reza Jazi, A/K/A Ghonoreza Zandian Jazi ("Appellant"), by and through his attorneys, Mark Forsberg, Esq. and Oshinski & Forsberg, Ltd., and hereby responds to Respondent's NRAP 38 Motion for Sanctions.

Respondent Jed Margolin moves this Court to award sanctions for the filing of this appeal under NRAP 38. Rule 38 provides as follows:

> (a) **Frivolous Appeals; Costs.** If the Supreme Court or Court of Appeals determine that an appeal is frivolous, it may impose monetary sanctions.
> (b) **Frivolous Appeals; Attorneys Fees as Costs.** When an appeal has frivolously been taken or been presented in a frivolous manner; when circumstances indicate that an appeal has been taken or processed solely for the purpose of delay, when an appeal has been occasioned through respondent's imposition on the court below; or whenever the appellate processes of the court have otherwise been misused, the court may, on its own motion, require the offending party to pay, as costs, on appeal, such attorney fees as it deems appropriate to discourage like conduct in the future.

Respondent's argument that NRAP 38 supports such an award in this case is based on two premises. First, Respondent argues that an appeal that lacks merit automatically constitutes a misuse of the appellate process and is frivolous. Second, Respondent contends that, in effect, the appeal has been rendered frivolous by the Court's determination that it lacks jurisdiction under NRAP 3A(b)(8). Neither of these contentions is supported by the record or this Court's prior jurisprudence in considering NRAP 38 applications for attorney fees as a sanction.

A. An Appeal is Not Frivolous Because it Lacks Merit.

Rule 38 does not mean, nor does any case decided by this Court, hold that an appeal that lacks merit is, *ipso facto*, a misuse of the appellate process and therefore frivolous. Rule 38 does not authorize attorney fees for appeals that are determined to be without merit. It only provides for such an award when an appeal has been frivolously taken or processed in a frivolous manner or when the appellate processes of the court have been misused. It is only under those circumstances that the court may, on its own motion, require the offending party to pay attorney fees, and then

only as it deems appropriate to discourage like conduct in the future. *Works v. Kuhn*, 103 Nev. 65, 732 P.2d 1373 (1987) does not, as Respondent suggests, hold that a meritless appeal is frivolous. Rather, the court held that under the circumstances presented in that case, the conduct of the appellant, himself an attorney, led to the conclusion that the appeal was frivolous. Works, the attorney/appellant, had accepted a settlement offer in the district court proceedings, attempted to set the respondent's counterclaim for trial after he had consented to its dismissal based on the settlement offer and acceptance thereof, then appealed the district court's denial of his motion for attorney's fees. The supreme court found that Works was not the prevailing party, that attorney's fees were not permitted under NRS 18.010, that Works had agreed to and accepted a settlement and had failed to raise some of his arguments in the district court. The court awarded a sanction under NRAP 38 because it found "appellant's contentions on appeal…so lacking in merit as to constitute a frivolous appeal and misuse of the appellate processes of this court." The court ordered "Attorney Works" to pay the sanction.

There are many reported cases in which this Court denied NRAP 38 motions for attorneys' fees on appeal where the issues raised were deemed "without merit." *See, e.g., Young v. Johnny Ribeiro Building*, 106 Nev. 88, 787 P.2d 777 (1990) (declining to award NRAP 38 sanctions even where the court had concluded that the appellant had fabricated evidence that formed the basis of the appeal and the appeal was without merit); *Burr v. Burr*, 96 Nev. 480, 611 P.2d 623 (1980) (declining to award fees pursuant to NRAP 38 and NRAP 39 after concluding that all of the appellant's arguments on appeal were without merit); *General Motors Corp. v. Reagle*, 102 Nev. 8, 714 P.2d 176 (1986) (finding appeal unmeritorious and denying request for NRAP 38 sanctions). The reluctance of an appellate court to impose sanctions under NRAP 38 is also reflected in cases where a sanction *was* awarded. In *Carroll v. Carroll*, No. 73534-COA (Nev. App. May 7, 2019), the court noted that appeals courts expect all appeals to be pursued with "high standards of diligence,

professionalism, and competence." Citing *Barry v. Lindner*, 119 Nev. 661, 81 P.3d 573 (2003). Examples of breaches of those obligations cited in *Barry v. Lindner* and *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 127 P.3d 1057 (2006), include exaggerating the record, incompletely citing the record in briefs, failing to cite relevant legal authority, misrepresenting material facts, etc. In *Carroll*, the appellant made arguments that the court considered to be frivolous, made several and repeated misrepresentations, presented an argument that contradicted a supreme court ruling in that very case and made extensive complaints of bias that the record show were unsupported or based on misrepresentations. For this egregious conduct, the court of appeals sanctioned the appellant's counsel $250.

Here, the record reveals none of those types of misconduct. No Rule 38 sanctions is appropriate in this case.

B. Appellant Makes A Non-Frivolous Argument That The Supreme Court Has Jurisdiction.

Appellant argues in his Reply Brief that this Court has jurisdiction over the appeal under NRAP 3A(b)(8), which specifically approves appeals of special orders after a final judgment. Respondent directs the Court's attention to its Order of March 4, 2016, dismissing an earlier appeal for lack of jurisdiction based on the court's conclusion that the order appealed from was not a special order after final judgment and suggests that this appeal is frivolous because of that order. But the appeal that was the subject of the 2016 order was from an order setting a debtor's examination and was not a challenge to the creditor's ability to execute on the underlying judgment. This Court dismissed the prior appeal and determined that an order setting a debtor's exam is not a special order after final judgment because such an order did not affect the rights arising out of the judgment of either the appellant or the respondent. Notably, the Court in that case, No. 69372, denied Margolin's motion for sanctions, which, like the pending motion, argued that the appeal was frivolously filed. *See Order dated April 1, 2016 in Case No. 69372.* The Court noted: "This

court's jurisdictional rules are notoriously complex, and a party's effort to protect itself by filing a notice of appeal, except in extreme circumstances not present here, is not frivolous."

This appeal is no more frivolous than the appeal referenced in this Court's April 1, 2016 order. The nature of the order appealed from in 2021 is substantively different here than the order appealed from in 2016 and therefore does not flout earlier rulings of this Court that are the law of the case. The 2016 appeal challenged the district court's order setting a debtor's examination. Clearly, such an order did not, in and of itself, affect the rights of a party in a way sufficient to establish the jurisdiction of this Court under NRAP 3A(b)(8) or the holding of, for example, *Gumm v. Mainor*, 118 Nev. 912, 59 P.3d 1220 (2002). In this appeal, Zandian argues that, unlike an order setting a debtor's exam, the order of the district court affects the rights of both Appellant and Respondent in that it orders the reconveyance of deeds even though a statutory lien against those properties was never perfected under NRS 17.150(4). Zandian here is not appealing from the same or identical order of the district court, a course of conduct which might be considered frivolous. Rather, he is appealing now from a different order of a different character based on different law. This kind of conduct, as the Court recognized in its April 1, 2016 order is not frivolous.

CONCLUSION

For the above reasons, Appellant Zandian respectfully requests that the NRAP 38 Motion for Sanctions be denied.

Dated this 3rd day of March, 2022.

OSHINSKI & FORSBERG, LTD.

By /s/ Mark Forsberg, Esq.
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Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that and that on March 3, 2022, I filed a true and correct copy of the foregoing **Appellant's Response to Respondent's Motion for Sanctions** with the Clerk of the Court through the Court's CM/ECF system, which sent electronic notification to all parties as follows:

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