**IN THE SUPREME COURT OF THE STATE OF NEVADA**

* * * * *

**Case No. 86976**



PIERRE A. HASCHEFF,

Appellant/Cross-Respondent,

vs.

LYNDA HASCHEFF,

Respondent/Cross-Appellant.

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Appeal From Special Order Entered After Final Judgment
Second Judicial District Court Case No. DV13-00656

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# OPPOSITION TO MOTION TO TAKE JUDICIAL NOTICE

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Respondent/Cross-Appellant Lynda Hascheff opposes Appellant/Cross-Respondent Pierre Hascheff's Motion to Take Judicial Notice ("Motion") based on the following points and authorities and the attached declaration and exhibit.

## POINTS AND AUTHORITIES

### A. Introduction

Pierre asks that, on appeal, the Court review documents that he strategically withheld from Lynda and the district court on the basis of alleged attorney-client privilege. Indeed, the parties' entire dispute involves Pierre's refusal to disclose the very documents that he now seeks to present to this Court on appeal. Pierre cannot use the privilege as a sword and a shield.

An appellate court must limit its review to the record that was considered by the district court. Pierre has failed to demonstrate that the Court should make an exception to this well-established rule, and his Motion confirms that his appeal necessarily fails on the record alone. The Court should prohibit Pierre from backfilling his deficient record through judicial notice, particularly when the very reason for the deficiency is his own calculated litigation tactics.

### B. Procedural History

In Case No. 82626, the parties appealed and cross-appealed from an Order Granting Motion for Clarification or Declaratory Relief; Order Denying Motion for Order to Enforce and/or for an Order to Show Cause; Order Denying Request for

Attorney's Fees and Costs. The dispute arose from Pierre's demands for payments from Lynda pursuant to a provision in their Marital Settlement Agreement ("MSA") that required her to indemnify him for one half the fees he incurred to defend against a malpractice action. 3AA0643-0697. The parties had purchased a tail insurance policy to cover such defense costs yet Pierre claimed without proof that Lynda owed thousands of dollars out of pocket and "additional invoices" would be forthcoming. 3AA0662; 4AA805-807. Asserting privilege, Pierre refused to provide Lynda with documentation that the money he demanded was actually within the MSA's language and outside the policy limits. 3AA0682, 0725.

Lynda had to retain counsel, who engaged in extensive back-and-forth communications with Pierre and his lawyer. 3AA0725-0732. As it turned out, the money Pierre demanded was not incurred in defense of a malpractice action but related to a dispute between siblings ("the Jaksicks") over their father's trust that Pierre had prepared ("the collateral trust action"). 3AA0668-69. Pierre was subpoenaed to testify as a witness in that action and had retained lawyer Todd Alexander. *Id.*; 5AA1001-41. Pierre asserted the privilege over communications he and Mr. Alexander had with **opposing counsel**, which could not be protected under any construction of NRS 49.095 or NRCP 26(b)(3). 3AA0669. Lynda repeatedly informed Pierre she was prepared to pay any amounts incurred to

defend a malpractice action but not those that Pierre chose to incur to serve as a witness in the collateral trust action. 3AA0692; 4AA0954-0955.

Lynda sought declaratory relief from the district court as to her rights and obligations under the MSA. 3AA0643-0697. Pierre then moved the district court to have Lynda held in contempt. 3AA0733-4A0762. The district court ruled in Lynda's favor, concluding that Lynda had no obligation to pay Pierre for amounts he incurred in the collateral trust action. 5AA1222-1236.

Pierre appealed, and the Court of Appeals agreed with the district court's conclusion but on different grounds, remanding for the district court to determine: (1) what, if any, fees Pierre incurred in defense of a malpractice action and (2) to award attorneys' fees – as allowed by MSA – to the prevailing party. 6AA1391-1402. On remand, the district court determined that Lynda was the prevailing party and awarded some of her fees. 7AA1699-1711.

Pierre appealed and Lynda cross appealed (as to the amount awarded). Notwithstanding having withheld documents related to the collateral trust action from Lynda and the district court on the basis of alleged privilege, Pierre now asks the Court to consider them through his Motion. In so doing, he seeks to relitigate the Court of Appeals decision against him in Case No. 82626.

## C. Legal Argument

### 1. Pierre Cannot Use The Privilege As A Sword And A Shield

After invoking privilege to strategically withhold documents, Pierre cannot now – through a request for judicial notice – use those withheld documents to his advantage. A party cannot use the privilege as both a sword and a shield. *Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct.*, 133 Nev. 369, 381, 399 P.3d 334, 346 (2017). "[S]elective use of privileged information by one side may garble the truth. The privilege suppresses the truth, but that does not mean that it is a privilege to garble it; ... it should not furnish one side with what may be false evidence and deprive the other of the means of detecting the imposition." *Wardleigh v. Second Jud. Dist. Ct.*, 111 Nev. 345, 355, 891 P.2d 1180, 1186 (1995) (internal quotations omitted). Here, the record shows that the entire dispute between the parties – and the resulting fees incurred by Lynda at issue in this appeal – involved Pierre's refusal to disclose documents related to the collateral trust action on the basis of privilege.

This is clear from the early communications from Lynda's counsel:

> Please provide me with copies of the documents that Lucy requested so that I can evaluate your claim. Lynda is not responsible for payment of any fees related to your deposition etc., in the Jaksick probate matter. I need to determine what fees have actually been charged and paid, without contribution from insurance company, in the malpractice action that appears to be on hold. I cannot do that without seeing the actual bills and time entries. 4AA0954.
>
> Lynda is prepared to honor her obligation to pay her share of the costs and fees incurred in the malpractice action that have not been covered by

> insurance. I do not have sufficient information on which to evaluate what she does or does not owe you at this time because you have objected to providing that information. Upon receipt of the requested documents and other information, I will evaluate your demands with Lynda and she will pay what she owes under the agreement your lawyer drafted. 4AA0955.
>
> I have previously outlined the information I need to review in order to provide my client with thoughtful and informed advice. Judge Hascheff's insistence that my client must simply accept his demands and that she is not entitled to basic and fundamental information about the very fees he insists she must share, is not supported by the law or common sense. Upon receipt of the information I have requested I will be happy to review and evaluate Judge Hascheff's claims and demands in good faith and will respond promptly. 3AA0686.
>
> Ms. Hascheff remains prepared to pay her one-half of the total fees and expenses related to the malpractice action. From my review of the bills provided by Mr. Alexander, the only fees I can see that are directly related to the malpractice action come to $95. I appreciate, although disagree with, your claim that my client is responsible for any fees and costs Judge Hascheff elects to incur that he deems to be prudent in connection with collateral lawsuits. However, I need to know what the fees and costs have been that are directly related to the malpractice action so that Ms. Hascheff can pay her share of the undisputed fees and costs. 3AA0692.

Because of Pierre's refusal to provide supporting documentation, Lynda was forced to seek the district court's assistance to determine the parties' respective rights and obligations and require Pierre to demonstrate that he actually incurred the amounts he demanded from Lynda. 3AA0644-0697. Prior to the district court's hearing on the matter, the parties were given the opportunity to submit exhibits. 4AA0934-5AA1162. Even though eight of the thirteen documents of which Pierre now requests judicial notice predated that hearing, Pierre chose to omit them.

5AA1091. Instead, Pierre offered a declaration from Mr. Alexander. 5AA1196-1200. Lynda's counsel objected:

> Mr. Alexander made sweeping, generalized characterizations about the underlying action, yet refused to provide any documentation to back up such statements… Mr. Alexander declared under penalty of perjury that Judge Hascheff was clearly at risk of a substantial, potentially multimillion-dollar damage award. He concluded that it was prudent the Judge Hascheff retain counsel as the information in the multi-page subpoena was clearly aimed at undermining his estate plan which could lead to a malpractice action….
>
> Ms. Hascheff has repeatedly sought information regarding the bases for these beliefs, yet all requests have been refused….
>
> In a further attempt to obtain the documents, information, facts, or circumstances that led Mr. Alexander to reach such conclusions, Ms. Hascheff sent the correspondence dated June 11, 2020…. All requests have been denied.
>
> Ms. Hascheff should not have to blindly trust her former husband's word that all costs and fees incurred were related to a suit against him for malpractice. Nor should she be ambushed at a hearing with that very information from the source who refused to provide it previously. Mr. Alexander insists that underlying facts of the case, his strategy and analysis of Judge Hascheff's potential liability and the advice he gave to Judge Hascheff is confidential and cannot be disclosed. He should not, therefore, be permitted to offer his characterization, opinions, and speculation about such matters at the hearing. Ms. Hascheff and this Court are entitled to know and understand the facts on which he bases his opinions. Mr. Alexander, as Judge Hascheff's attorney in the underlying action, should not be permitted to deny all requests for information, claim attorney-client privilege, yet come to this hearing and testify about those very same matters as a percipient witness. 5AA1199-1200.
>
> Now I've repeatedly requested information about communications with Mr. Robison and about … Judge Hascheff's communications with his lawyer and their communications with Todd Jaksick's lawyer. I was repeatedly told that it was confidential or protected by the attorney-client privilege. Todd Alexander, Judge Hascheff's lawyer, specifically stated that their

communications with Todd Jaksick's lawyer were protected by the attorney-client privilege, or were confidential. I'm unaware of any bases on which they could claim it was protected by the attorney-client privilege or that they were confidential; but we're being asked, my client is being asked to pay those charges without having any idea what was discussed in that joint meeting, and without this Court knowing whether there was anything -- what was discussed at that meeting, or whether what was discussed at that meeting was a defense of a malpractice action that had not been filed or threatened.

* * *

And under the argument that Judge Hascheff has made in correspondence to me … the wife would have absolutely no right to any information whatsoever, that all she's entitled to is a copy of the check that he paid a bill. And that can't possibly be, because the language of the indemnity clause is that it has to be in the defense of a malpractice action, that if Pierre is sued, … any defense of that action is covered. So there has to be at a minimum some proof that the fees for which Judge Hascheff seeks indemnity were actually defense of that action.

* * *

She cannot possibly know, based on the information that he provided, whether these fees were incurred in the defense of a malpractice action or to help his client, Todd Jaksick. She can't know that nor can this Court. I repeatedly requested the information on behalf of my client and was told repeatedly we were not entitled to the information….

* * *

Even after I became involved and requested information, if Judge Hascheff had elected to provide the information, I would have been able to evaluate that information with my client. And if that information provided reflected that the bills for which Judge Hascheff seeks indemnity were in the defense of a malpractice action, none of these fees and none of this motion practice would have been necessary. My client acted in complete good faith to come to this Court to say what are my obligations under this contract?

> In correspondence directly with Judge Hascheff and in correspondence with his lawyer, I specifically and repeatedly noted that my client would pay, would honor her obligation to pay half of the fees incurred in any defense of the action. The dispute was just simply what fees fell within that -- that definition, within the language of the indemnity clause.
>
> * * *
>
> So it's our position that it is true that my client has an obligation to indemnify Pierre Hascheff for the expenses he incurred in defense of malpractice action. I just simply have no evidence that any of the fees for which he seeks indemnity were in defense of that action, and it would be unreasonable to require my client to simply, and this Court, to simply rely on Judge Hascheff to be the sole determiner of whether they do or do not fall within an indemnity.
>
> * * *
>
> I think it would be a complete denial of due process for him to come in and share information today that he refused to share when I requested it. 7AA1725-1732, 1734.

The district court underscored Pierre's unwillingness to provide information:

> [T]his billing was redacted… It is clearly redacted to the point we don't even know -- it doesn't even -- telephone call with, and the rest of it redacted, the entire section of that is redacted. I mean everything from that, whatever it is that we look to, for example on 9/18 of 2018, we have two things that are redacted out in totality. We don't know whether or not it's telephone call, whether it was an appearance, whether it was a review, whether it was a draft, we don't even know the simplistic aspect of what the work was. 7AA1733-1734.

Lynda's attorney then reiterated:

> I don't know if this was actually Judge Hascheff defending a malpractice action, particularly when it had not even been filed or threatened, or whether it was about helping Todd Jaksick, his client, against Todd's sister, Wendy. I don't know that and we don't have evidence in this file to reflect that.

> And we don't have it because Judge Hascheff insists we're not entitled to it. We just have to silently accept what he says and pay the bill.
>
> * * *
>
> And I had also asked that in other correspondence…was told I'm not allowed to know the basis of Mr. Alexander's statement. And I have good reason to question Mr. Alexander since he claims that his discussions with Kent Robison, Todd Jaksick's lawyer who sued Judge Hascheff, are protected by the attorney-client privilege. How could that be, that your communications with opposing counsel, who sued you? … On what basis could that possibly be covered by, protected by attorney-client privilege? And yet that's what I'm told. That's what I had to deal with.

8AA1765-1767; *see also* 8AA1772 (Pierre's attorney admitting that he had withheld information related to the underlying trust litigation).

> I specifically, repeatedly requested for this information over and over again. And it's absolutely a denial of due process to allow him to testify here today about information he refused to give me. 8AA1819.

Importantly, Pierre testified that "the underlying case…the collateral case, was extremely important" (8AA1777) and admitted that he refused – based on privilege – to provide Lynda information regarding the collateral trust action and the basis for the statements made in Mr. Alexander's affidavit, including:

- why he believed the collateral trust action allegedly sought "to undermine his estate plan and advice which could lead to a malpractice action"; …
- the "facts, circumstances, and written documents [that] led Mr. Alexander to conclude [he] was at risk of a multi-million dollar claim against him"; and
- whether his attorney still believed that Pierre was at risk of a judgment in excess of his malpractice policy limits.

8AA1793-1794, *referencing* 4AA0971. In fact, even when documents were referenced in emails that Pierre offered as exhibits, Pierre still failed to submit them. 8AA1808-1809. This led the district court to express concern that he was "cherry picking" from the evidence. 8AA1813.

In other words, this dispute revolves around Pierre's refusal to provide information about the collateral trust action and why he and his attorney believed the time he spent on it came within Lynda's indemnity obligation. The entire reason Lynda incurred the fees at issue in the instant appeal is because Pierre withheld this information. Pierre's tactical choice to hide behind the privilege means he cannot ambush Lynda with the withheld documents now.

### 2. The Court Cannot Consider The Extra-Record Documents In Pierre's Appendix Or The Portions Of His Brief That Cite To It

An appellate court "cannot consider matters not properly appearing in the record on appeal." *Tabish v. State*, 119 Nev. 293, 312, 72 P.3d 584, 596 (2003). "The trial court record consists of the papers and exhibits filed in the district court, the transcript of the proceedings, if any, the district court minutes, and the docket entries made by the district court clerk." NRAP 10(a). "[D]ocuments or facts not presented to the district court are not part of the record on appeal." *Smith v. Cent. Ariz. Water Conserv. Dist.*, 418 F.3d 1028, 1034 (9th Cir. 2005).

Here, 764 of the 1869 total pages of the "Appellant's Appendix" – amounting to 41% – are documents that Pierre strategically did not submit below.

*See* Ex. 2. Because these documents were not part of the record considered by the district court, on appeal, the Court may not consider them or any portions of the brief that reference them. *See Tabish*, 119 Nev. at 312, 72 P.3d at 596.

### 3. An Exception To The Rule Against Judicial Notice Is Not Appropriate Here

Judicial notice should not be used to backfill a deficient record, particularly where the litigant could have presented the documents to the district court. "As a general rule, we will not take judicial notice of records in another and different case, even though the cases are connected." *Mack v. Est. of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009) (taking judicial notice only because the record was silent on an issue that the Court deemed "close and serious enough" for policy reasons to warrant judicial notice of a related case). "[E]ven if [a case is] connected in some way," the Court will not take judicial notice "unless the party seeking such notice demonstrates a valid reason for doing so." *In re Amerco Derivative Litig.*, 127 Nev. 196, 221 n.9, 252 P.3d 681, 699 n.9 (2011) (concluding that findings in a related case "are not appropriate matters of which this court may take judicial notice").

Documents that a litigant failed to present as evidence or authenticate should not later be the subject of judicial notice. *Brown v. Abercrombie & Fitch Co.*, No. CV141242JGBVBKX, 2015 WL 9690357, at *6 (C.D. Cal. July 16, 2015); *see Madeja v. Olympic Packers, LLC.*, 310 F.3d 628, 639 (9th Cir. 2002). Litigants "cannot sidestep their neglect to offer evidence in this case by asking the court to

rule on the basis of the record in another case." *Guzman-Ruiz v. Hernandez-Colon*, 406 F.3d 31, 36 (1st Cir. 2005); *see also Shewchun v. Holder*, 658 F.3d 557, 568 (6th Cir. 2011) (declining to take judicial notice of documents that litigant was "fully capable of" presenting earlier). Pierre could have presented these documents to the district court but chose not to. By doing so now, he seeks to relitigate the Court of Appeals decision that ruled against him.

Moreover, a court should "not take judicial notice of fact at issue in another proceeding to serve as evidence of same matter at issue in present proceeding." *Boyd v. City of Oakland*, 458 F.Supp.2d 1015, 1047 (N.D. Cal. 2006). This is consistent with NRS 47.130(2), which only allows judicial notice of facts "not reasonably open to dispute." "[J]udicial notice is limited to the existence and terms of the record; it does not extend to the truth of statements quoted in the record or to factual findings." *Ferris v. Wynn Resorts Ltd.*, 462 F.Supp. 3d 1101, 1118 (D. Nev. 2020). The Court should reject Pierre's request to take judicial notice of disputed facts.

#### 4. The Court Should Strike The Nonconforming Appendix And Portions Of Pierre's Brief That Cite To It

Because Pierre's Appendix includes extra-record documents and fails to distinguish between documents that are in the record and those that are not, the Court should strike the non-confirming appendix and portions of Pierre's brief that

cite to it.[1] *See In re Nevada State Eng'r Ruling No. 5823*, 128 Nev. 232, 238 n.4, 277 P.3d 449, 453 n.4 (2012) (striking documents that were "never filed with the district court"); *In re Candidacy of Hansen*, 118 Nev. 570, 574, 52 P.3d 938, 940 (2002) (noting, "We did not consider" "appendix documents that were not part of the district court record" "in the resolution of this appeal."). The Court may reject an appendix that does not conform to the rules. *See* NRAP 32(e); *Middleton v. Warden*, 120 Nev. 664, 667, 98 P.3d 694, 696-97 (2004). Because Lynda should not be forced to respond to any portions of Pierre's brief that rely on unauthorized citations, she requests that the Court order Pierre to re-file the Appendix and his brief without the extra-record documents and references. Otherwise, Lynda will be unfairly prejudiced in this appeal.

**5. The Court Should Sanction Pierre**

Pierre also should be ordered to pay Lynda's fees associated with bringing his tactics to the Court's attention. "Filing an appendix constitutes a representation by counsel that the appendix consists of true and correct copies **of the papers in the district court file**." NRAP 30(g)(1) (emphasis added). Parties and their "counsel are under a duty to omit from the record on appeal all material that is not essential to decision of the questions on appeal." *Beattie v. Thomas*, 99 Nev. 579, 589, 668 P.2d 268, 274–75 (1983), *citing Driscoll v. Erreguible*, 87 Nev. 97, 102,

[1] Pierre's Appendix is also deficient because it is missing many of the documents required by NRAP 30(b)(2).

482 P.2d 291, 294 (1971). "Willful or grossly negligent filing of an appendix containing nonconforming copies is an unlawful interference with the proceedings of the Supreme Court or Court of Appeals, and subjects counsel, and the party represented, to monetary and any other appropriate sanctions." NRAP 30(g)(1).

Contrary to the requirements of NRAP 30(g)(1), Pierre's "Appendix" is not a reflection of the actual district court record but a collection of new documents that Pierre strategically withheld below. By filing a non-conforming appendix that fails to distinguish between record and non-record documents, and through his Motion, Pierre has forced Lynda to incur additional fees to point the Court to his misconduct. Pierre himself is not only a lawyer but a judge; his latest violation of the rules is just another example of his misuse of the legal system to harm Lynda. As a result, an award of fees against Pierre and in favor of Lynda for all fees associated with responding to his Motion, or some other sanction, is appropriate. *See* NRAP 30(g)(1); *see also* NRAP 38(b) ("[W]henever 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"). At the Court's direction, Lynda's counsel will present a supporting declaration for the amount of fees and costs incurred to draft this opposition.

## AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED December 11, 2023

LEONARD LAW, PC

By: /s/ Debbie Leonard

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*Attorney for Respondent/*
*Cross-Appellant*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Leonard Law, PC, and that on December 11 2023, a copy of the foregoing document was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (E-Flex). Participants in the case who are registered with E-Flex as users will be served by the eFlex system. All others will be served by first-class mail.

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7800 Rancharrah Pkwy
Reno, NV 89511

*/s/ Tricia Trevino*
An employee of Leonard Law, PC

# EXHIBIT 1

# EXHIBIT 1

**DECLARATION OF DEBBIE LEONARD IN SUPPORT OF OPPOSITION TO MOTION TO TAKE JUDICIAL NOTICE**

I, Debbie Leonard, do hereby swear under penalty of perjury that the assertions in this declaration are true and correct.

1. I am over the age of eighteen (18) years. I have personal knowledge of the facts stated within this declaration. If called as a witness, I would be competent to testify to these facts.

2. I am the owner of Leonard Law, PC and counsel of record for Respondent/Cross-Appellant Lynda Hascheff in this case.

3. This declaration is offered in support of Appellant's Opposition to Motion to Take Judicial Notice ("Opposition").

4. Attached as Exhibit 2 to the Opposition is a true and correct copy of the index to Appellant's Appendix, which I highlighted to show the documents that Pierre did not submit to the district court and, therefore, are not part of the record on appeal. By my count, 764 out of the 1869 total pages in Appellant's Appendix – amounting to 41% – are documents that are not in the record.

5. I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

DATED December 11, 2023

/s/ Debbie Leonard
Debbie Leonard

# EXHIBIT 2

# EXHIBIT 2

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