

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANGELA DeCHAMBEAU AND JEAN-PAUL DeCHAMBEAU, BOTH INDIVIDUALLY AND AS SPECIAL ADMINISTRATORS OF THE ESTATE OF NEIL DeCHAMBEAU, Appellants, VS. STEPHEN C. BALKENBUSH, ESQ.; AND THORND AHL ARMSTRONG DELK BALKENBUSH & EISINGER, A NEVADA PROFESSIONAL CORPORATION, Respondents	No. 64463 Electronically Filed Feb 25 2014 04:00 p.m. Tracie K. Lindeman Clerk of Supreme Court
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**Reply in Support of Motion to Compel Transcript Order
or in the alternative, to Dismiss Appeal**

Respondents, by and through their undersigned counsel of record, submit their Reply Memorandum of Points and Authorities in support of their “Motion to Compel Transcript Order or in the alternative, to Dismiss Appeal,” filed February 12, 2014, as follows:

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Memorandum of Points and Authorities

I. Reply Argument.

Plaintiffs / Appellants have apparently chosen to rely on NRAP 10(b)(1) and disregard any other Rule bearing on the issue, case law and statutory construction. Plaintiffs cite NRAP 10(b)(1), i.e., “the parties shall submit to the Supreme Court copies of the trial court record to be used on appeal, including all transcripts necessary to the Supreme Court’s review ...” [Opp. p. 2], and then declare: “[t]he transcript is not necessary because this Court will conduct a fresh review of the parties’ proffered evidence.... Therefore the District Court’s views and findings at the motion hearing have no bearing on or necessity with respect to the instant appeal.” [Opp. pp. 2, 3].

Plaintiffs’ view of the rules is not in line with a plain reading of the law. In 2007, this Court amended the Nevada Rules of Appellate Procedure “to streamline the filing of transcripts so that copies of necessary transcripts are included in the parties’ appendices under Rule 30 rather than being filed separately ... by the court reporters and recorders.” [*See, ADKT 381* (Nev. 4-3-2007)]. The Court therefore amended NRAP 10 and NRAP 9 in order to implement their expressed desire. Plaintiffs now arrogate to themselves the determination of the term “necessary transcripts.” The Court, however, did not leave that determination in the sole discretion of appellants.

Instead, it amended Rules 9 and 10 to direct litigants as follows:

1. *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) (emphasis added)].*

Clearly, the Court considers transcripts to be important; but rather than have them automatically sent by the district court, requires them to be included in the parties' appendices:

2. *For purposes of appeal, the parties shall submit ... all **transcripts necessary to the Supreme Court's review** ..., as appendices to their briefs. [NRAP 10(b)(1) (emphasis added)].*

Finally, the Court did not leave the meaning of "necessary to the Supreme Court's review" to be immutably determined by appellants:

3. *If the parties cannot agree on the transcripts **necessary to the Supreme Court's review**, appellants **shall** request any additional parts of the transcript that the **respondent** considers necessary.... [NRAP 9(a)(5) (emphasis added)].*

At this point, a respondent is in control of deciding what transcripts are "necessary," not appellants. The term "shall" is unequivocally mandatory. *See, e.g., Washoe Med. Ctr. v. State*, 122 Nev. 1298, 148 P.3d 790 (2006) (term "shall" is mandatory). Finally, in order to attenuate any potential overzealous transcript demands by respondents, NRAP 30(g) provides:

(1) 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. Willful or grossly negligent filing of an

appendix containing nonconforming copies is an unlawful interference with the proceedings of the Supreme Court, and subjects counsel, and the party represented, to monetary and any other appropriate sanctions.

(2) If an appellant's appendix is so inadequate that justice cannot be done without requiring inclusion of documents in the respondent's appendix which should have been in the appellant's appendix, or without the court's independent examination of portions of the original record which should have been in the appellant's appendix, the court may impose monetary sanctions. [NRAP 30(g)].

The entire scheme is, of course, subject to a court's ordering otherwise. NRAP 10(a)(1). Thus, if a respondent demands an entire six-week trial transcript, the appellant can always seek relief from the burden of payment for such transcript.

Plaintiffs' assertions that the transcript of the summary judgment hearing is essentially irrelevant do not withstand scrutiny. *See, e.g., Aspen Financial Services, Inc. v. Eighth Judicial Dist. Ct.*, 128 Nev. Adv. Op. No. 57, 289 P.3d 201 (2012) (transcript of the hearing demonstrated that the district court considered the relevant factors and provided "clear insight into why the court denied the motion); *citing, Holt v. Regional Trustee Services Corp.*, 127 Nev. ___, 266 P.3d 602 (2011) (oral pronouncements on the record may be used by reviewing court to construe an order that is silent on a point).

As noted in Respondent's Motion, the only transcript in this case is that of the September 24, 2013 hearing. Plaintiffs' continued refusal to comply with NRAP 9 is willful at best.

II. Conclusion

Plaintiffs/Appellants' refusal to order and pay the \$166.85 for the only transcript of the only proceeding in the district court is unwarranted, unjustifiable and sanctionable. The Court should dismiss this appeal, or compel compliance with the Rules, including paying the costs and fees associated with this Motion.

WHEREFORE, Respondents request relief as set forth in their Motion, including an additional \$390 in fees incurred in legal analysis and preparation of

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Respondent's Reply, and for such other and further relief as the Court deems appropriate in the circumstances.


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 this 23rd day of February, 2014.

Piscevich & Fenner

By: 
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of PISCEVICH & FENNER, and that on this date I caused to be served a true and correct copy of the document described herein by the method indicated below, addressed to the following:

Document Served:


Reply in Support of MOTION TO COMPEL
/ DISMISS

Person(s) Served:

Charles R. Kozak
3100 Mill Street, Suite 115
Reno, NV 89502

<input type="checkbox"/>	Hand Deliver
<input checked="" type="checkbox"/>	U.S. Mail
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DATED this 25th day of February, 2014.



Beverly Chambers