IN THE SUPREME COURT OF THE STATE OF NEVADA

RAYMOND RIAD KHOURY,
APPELLANT,
VS.
MARGARET SEASTRAND,
RESPONDENT.

Case Nos. 64702
65007
65172
(Consolidated)

OPPOSITION TO APPELLANT'S MOTION TO STRIKE RESPONDENT'S APPENDIX, OR, IN THE ALTERNATIVE, MOTION TO DEFER CONSIDERATION PENDING RESPONDENT'S EFFORT TO ENLARGE THE RECORD, OR, IN THE ALTERNATIVE, COUNTERMOTION TO STRIKE RULE-VIOLATING PORTIONS OF APPELLANT'S OPENING BRIEF TO WHICH DOCUMENTS WERE TENDERED IN RESPONSE

Respondent Margaret Seastrand tenders a three-tiered response to Appellant Raymond Khoury's motion to strike respondent's appendix: 1) because Khoury does not challenge the authenticity of the documents and because NRCP 5(d) provides a means to make such documents part of the record, it is respectfully submitted that this court should take judicial notice of such documents and summarily deny the motion in the interest of avoiding unnecessary delay; 2) alternatively, if the court requires that the documents be filed in the district court, Seastrand respectfully submits that consideration of Khoury's motion to strike be deferred until such time as Seastrand can avail herself of the procedure set forth in NRCP 5(d); and 3) also alternatively, if the court is inclined to strike the two documents of which Khoury complains, Seastrand countermoves the court to strike the untruthful and rule-violating portions of Khoury's opening brief which the offending documents were tendered by way of response.

This opposition and the alternative countermotions are based upon the accompanying memorandum of points and authorities and all matters properly of record.

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RICHARD HARRIS
LAW FIRM
801 S. Fourth Street
Las Vegas, NV 89101
(702) 444-4444

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE FACTS

In his motion to strike, Khoury complains that two of the three documents were not filed in the district court and thus bear no file stamp, as required by NRAP 10(a). The first document is "Plaintiff's Response to Interrogatories" (Respondent's Appendix, "RA," 002), the Certificate of Service of which recites that it was served upon Khoury's trial counsel by mail and facsimile transmission. It is accompanied by facsimile print-out that verifies that 24 pages were transmitted to (702) 316-4114 at 5:55 p.m. on September 29, 2011. RA 026.

The other document is a condensed version of the transcript of the deposition of Jeffrey D. Gross, M.D. RA 033, *et seq.* Its face page indicates that the deposition was transcribed by certified court reporter Mary V. Warshefski (CCR#738) of the firm of Manning, Hall & Salisbury, LLC, Certified Court Reporters.

Khoury does not question the authenticity of the documents. Nor does he deny that both were part of the discovery proceedings in the district court. He does not challenge the content of either discovery document.

Most importantly, Khoury does not explain in his motion the obvious reason respondent felt compelled to tender them to the court. In violation of his obligation under NRAP 28(e) to cite to the record in support of his factual assertions, Khoury made numerous, undocumented contentions that Seastrand had sandbagged him during discovery. For example, as to Dr. Gross, and with absolutely no record references, Khoury argues as follows:

> Khoury suffered undue prejudice by the court allowing Dr. Gross' new, previously undisclosed opinions. Khoury's counsel had to rebut those opinions without preparation, despite having deposed him during discovery.

Appellant's opening brief ("AOB"), p. 30. Dr. Gross's deposition was

RICHARD HARRIS
LAW FIRM
801 S. Fourth Street
Las Vegas, NV 89101
(702) 444-4444

tendered to show that the foregoing unsupported factual assertions of Khoury's counsel were absolutely false. During his deposition of Dr. Gross, defense counsel was in possession of Dr. Gross's supplemental report and did, in fact, interrogate him extensively as to the physician's opinion that Seastrand's October 27, 2008 medical visit did not reveal the existence of a symptomatic preexisting condition. Thus, Khoury's characterization of Dr. Gross's testimony as "ambush opinions" is not only unsupported by any record references, it is demonstrably and willfully false. *See* Respondent's answering brief ("RAB"), pp. 19-21.

Khoury's disregard for NRAP 28(e) was even more flagrant with his arguments concerning the trial testimony of Dr. Muir. In contending that Dr. Muir should not have been permitted to express his opinion that his treatment of Seastrand's post-accident symptoms (including his neck and back surgeries) was causally related to the accident, Khoury makes the following argument:

> Dr. Muir's failure to comply with expert requirements, combined with the court's refusal to enforce this mandate, unduly prejudiced Khoury. Specifically, this error by the court allowed a completely unexpected witness to opine about a topic never previously anticipated or addressed. Khoury's counsel could not have known to prepare to address this point with Dr. Muir, and was left to "wing it," despite preparing as follows: a) obtaining all of Dr. Muir's records to learn his opinions in advance; b) depose Dr. Muir, to learn all of his opinions in advance; c) serve written discovery to obtain all expected expert witness testimony and opinion testimony of treating physicians, including Dr. Muir, in advance; and, d) move *in limine* to prevent this precise ambush at trail. During the *in limine* argument, Khoury's counsel asserted that everything possible was done to obtain all of the treating physicians' opinions in advance, and to allow those physicians to exceed their opinions stated in records, depositions, or discovery violated Khoury's due process rights. (VI-JA-0959-61.)

AOB, pp. 25-26.

As can be seen, the only record reference in support of the multiple factual assertions contained in the foregoing paragraph is to volume VI, pages 0959 through 0961 of the appendix. Review of the three cited pages reveals that Khoury's counsel ***did not***, in fact, "assert[] that everything possible was

RICHARD HARRIS
LAW FIRM
801 S. Fourth Street
Las Vegas, NV 89101
(702) 444-4444

done to obtain all of the treating physicians' opinions in advance . . .." Nor did he make any reference whatsoever to the prior written discovery that had been propounded and answered. Had he done so, the Plaintiff's Response to Interrogatories would undoubtedly have been filed and we would not now be arguing about the lack of a file stamp. More importantly, however, the argument of counsel does absolutely nothing to support his factual assertions that Dr. Muir was a "completely unexpected witness," that "Khoury's counsel could not have known to prepare to address this point with Dr. Muir," that Khoury's counsel was left to "wing it," that Khoury's deposition of Dr. Muir did not elicit his opinion as to causation, or that the written discovery propounded by Khoury was likewise ineffectual to elicit his opinions.

Fortunately, Dr. Muir's deposition was already part of the appendix and Seastrand could, and did, utilize it to establish Khoury's utter disregard for the truth. The written discovery had not been filed and, therefore, Seastrand included it in respondent's appendix to further demonstrate that Khoury was attempting to mislead this court with his fabricated claim of "ambush." RAB, pp. 7-8.

ARGUMENT

I. BECAUSE KHOURY DOES NOT CONTEST THE DOCUMENTS' AUTHENTICITY OR CONTENTS, THE COURT SHOULD JUDICIALLY NOTICE THEM AND DENY THE MOTION

While Seastrand acknowledges that Plaintiff's Response to Interrogatories and the deposition of Dr. Jeffrey Gross were not filed in the district court, they were nonetheless part of the process of discovery in this case. They were not filed below for two reasons. First, a 1982 amendment to NRCP 5(d) eliminated the routine filing of discovery documents in the district court. *See In the Matter of the Adoption of the Proposed Amendment to Rule 5w(d) and 30(f), Nevada Rules of Civil Procedure*, entered by this court on January 28, 1982. The amendment to NRCP 5(6) is in italics, with the solitary

RICHARD HARRIS
LAW FIRM
801 S. Fourth Street
Las Vegas, NV 89101
(702) 444-4444

deletion shown by brackets, as follows:

> (d) Filing. All papers after the complaint required to be served upon a party shall be filed with the court whether before service or within a reasonable time thereafter, except as other wise provided in Rule 5(b)[.], *but, unless filing is ordered by the court on motion of a party or upon its own motion, depositions upon oral examination and interrogatories and requests for admission and the answers thereto shall not be filed unless and until they are used in the proceeding.*

This appears to be a change dictated by the sheer volume of filed documents, rather than any concerns about the authenticity of depositions and written discovery. Thus, it is only by virtue of this historical accident that Plaintiff's Responses to Interrogatories and Dr. Gross's deposition have not yet been file stamped.

The second reason the two documents were not filed is because Khoury did not make the same argument in the district court that he has made in his opening brief, *i.e.*, that he made every effort through written discovery requests and oral depositions to elicit the opinions of Drs. Gross and Muir and that such opinions were never disclosed. Had he made this argument below, the discovery documents would have either been filed or appended as exhibits to Seastrand's filings in response to such argument.

While appellate review is ordinarily confined to the record as it was constituted before the lower court, some exceptions are recognized where the authenticity of the material is not in question. For example, in *Mack v. Estate of Mack*, 125 Nev. 80, 206 P.3d 98 (2009). It was a divorce action in which the district court had verbalized several orders from the bench regarding a global settlement. After the oral orders were made, but before they were reduced to writing, the husband shot and killed his wife and also shot the district judge. The wife's estate was substituted into the action and filed a motion to have the prior judge's oral orders reduced to writing. The district court granted the motion and the husband appealed. The husband was

RICHARD HARRIS
LAW FIRM
801 S. Fourth Street
Las Vegas, NV 89101
(702) 444-4444

subsequently convicted of the murder of his wife and of the attempted murder of the district judge.

On his appeal in the divorce action, Mack argued that this court could not consider his convictions for killing his wife and attempted murder of Judge Weller because the "events that occurred in his criminal proceedings and events that occurred after the filing of this appeal are not matters of the record in this appeal." *Id.* at 91, 206 P.3d at 106. This court rejected the contention:

> On appeal, a court can only consider those matters that are contained in the record made by the court below and the necessary inferences that can be drawn therefrom. *Toigo v. Toigo*, 109 Nev. 350, 350, 849 P.2d 259, 259 (1993) (citing *Lindauer v. Allen*, 85 Nev. 430, 433, 456 P.2d 851, 853 (1969)). We will generally not consider on appeal statements made by counsel portraying what purportedly occurred below. *Wichinsky v. Mosa*, 109 Nev. 84, 87, 847 P.2d 727, 729 (1993) (citing *Lindauer*, 85 Nev. at 433, 456 P.2d at 852-53).
>
> However, we may take judicial notice of facts generally known or capable of verification from a reliable source, whether we are requested to or not. NRS 47.150(1). Further, we may take judicial notice of facts that are "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute." *See* NRS 47.130(2)(b).
>
> As a general rule, we will not take judicial notice of records in another and different case, even though the cases are connected. *Occhiuto v. Occhiuto*, 97 Nev. 143, 145, 625 P.2d 568, 569 (1981) (citing *Giannopulos v. Chachas*, 50 Nev. 269, 270, 257 P. 618, 618 (1927). However, this rule is flexible in its application and, under some circumstances, we will invoke judicial notice to take cognizance of the record in another case. *Id.*
>
> To determine if a particular circumstance falls within the exception, we examine the closeness of the relationship between the two cases. *Id.* We have taken judicial notice of other state court and administrative proceedings when a valid reason presented itself.

Id. at 91-92, 206 P.3d at 106. Based on this analysis, this court concluded that it would take judicial notice of matters in Mack's related criminal case.

Here, Seastrand is not asking the court to take judicial notice of matters in another case. The discovery documents in question were generated by in

RICHARD HARRIS
LAW FIRM
801 S. Fourth Street
Las Vegas, NV 89101
(702) 444-4444

this very action by the very parties before the court. And judicial notice is being requested only because Khoury's trial counsel created the need for it by, in the guise of legal argument, tendering "statements made by [his] counsel portraying what purportedly occurred below." *Id.* at 91, 206 P.3d at 106.

Other courts have invoked 'the interests of justice' to create limited exceptions to the general rule that appellate review is ordinarily confined to the record created below. For example, in *Colbert v. Potter*, 471 F.3d 158 (D.C. Cir. 2006), plaintiff Colbert had sued the Postmaster General, asserting various claims of discrimination based on age, race, and disability. The district court granted summary judgment in favor of the defendant on the ground that plaintiff had filed her district court action 92 days after receipt of the final decision exhausting her adminitstrative remedies, 2 days beyond the 90-day period prescribed in Title VII, 42 U.S.C. § 2000e-16(c). However, in support of this argument the defendant had attached to his motion only the back of the Domestic Return Receipt, which appeared to show the date that plaintiff's counsel had signed for receipt of the final decision. On appeal, the plaintiff argued that it was actually the omitted front side of the document that would provide proof as to when the final decision was received by plaintiff's counsel.

In the interests of judicial economy, the D.C. Circuit ordered the Postmaster General to supply the missing document, the authenticity of which was not in question. The court in *Colbert* explained as follows:

> Appellate courts do not ordinarily consider evidence not contained in the record developed at trial. *In re AOV Indus., Inc.*, 797 F.2d 1004, 1012 (D.C.Cir.1986) (citing *Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976)). "It is within the discretion of the court of appeals, however, to make limited exceptions to this rule when 'injustice might otherwise result.'" *Id.* (quoting *Singleton*, 428 U.S. at 121, 96 S.Ct. 2868). *See also CSX Transp., Inc. v. Garden City*, 235 F.3d 1325, 1330 (11th Cir.2000) ("[Courts of appeals] have the inherent equitable power to allow supplementation of the appellate record if it is in the interests of justice."). In this case, appellant (1) clearly challenged the sufficiency and significance of USPS's evidence in the trial court, and (2) made a compelling argument that

RICHARD HARRIS
LAW FIRM
801 S. Fourth Street
Las Vegas, NV 89101
(702) 444-4444

> dispositive evidence appeared on the front side of the Domestic Return Receipt, which was in the possession and control of USPS. Appellant's concerns were well-founded. Therefore, we concluded that, as the entire Domestic Return Receipt "go[es] to the heart of the contested issue, it would be inconsistent with this court's own equitable obligations . . . to pretend that [it does] not exist." *In re AOV Indus., Inc.*, 797 F.2d at 1013.

Id. at 165-66. The court in *Colbert* noted that ordinarily an appellate record is supplemented by remanding the case back to the district court. It held, however, that because the act of supplying the omitted document was ministerial in nature and because the authenticity of the document was not in question, remand in this case "would serve no good purpose and would ultimately amount to a waste of judicial resources." *Id.* at 166.

The D.C. Circuit also mentioned that its decision was not intended to relieve a party from the neglect in failing to adduce evidence below. *Id.* In the case at bench, Seastrand had no reason to anticipate Khoury would make new, unsupported, and false statements in his opening brief concerning the scope of discovery below. Accordingly, she could not have foreseen the need to seek leave in the district court, pursuant to NRCP 5(d), to file these particular discovery documents.

In *Hope v. United States*, 906 F.2d 254 (7th Cir. 1990), the Seventh Circuit recognized that appellate courts can take judicial notice of matters outside the appellate record, where to do so would serve the interests of justice. In *Hope* a criminal defendant appealed his conviction and his enhanced sentencing based on three prior felony convictions. He argued that one of the convictions on which the government relied to invoke enhanced sentencing was not a conviction but rather a deferred prosecution under Illinois' Dangerous Drug Abuse Act. He made this argument for the first time on appeal and based it on a transcript of the prior state court criminal action and Memorandum of Orders enter in such action.

In granting Hope's request that the count consider these matters, the

RICHARD HARRIS
LAW FIRM
801 S. Fourth Street
Las Vegas, NV 89101
(702) 444-4444

court explained as follows:

> While it is true that Fed.R.App.P. 10(a) does not contemplate the supplementing of the appellate record with evidence not presented to the district court, and that we generally will not consider facts which were not made part of the record at the district court level [citations omitted], we have the power to take judicial notice of "proceedings in other courts, both within and outside of the federal system, if the proceedings have a direct relation to matters at issue." *Green* [*v. Warden*, 699 F.2d 364, 369 (7th Cir. 1983)]. This is true even though those proceedings were not made a part of the record before the district court. [Citations omitted.]

Id. at 260 n. 1. After reviewing the materials Hope submitted, the court found them relevant and, "in the interest of justice," took judicial notice of them. *Id.* *See also Trigueros v. Adams*, 658 F.3d 983, 987 (9th Cir. 2011) (appellate court retains discretion to take judicial notice of proceedings in other courts if those proceedings have a direct relation to the matters at issue); *Brown v. Home Ins. Co.*, 176 F.3d 1102, 1104-05 (8th Cir. 1999) (appellee's motion to strike separate appendix denied, where appendix contained, among other things, an deposition transcript that had not been made a part of the record below); *French v. Chosin Few, Inc.*, 173 F.Supp.2d 451, 457 (W.D.N.C. 2001) (demands of justice sometimes require courts to "make use of established and uncontroverted facts not formally of record in the pending litigation.")

In summary, Khoury has made the prior discovery documents relevant by arguing, for the first time on appeal, that despite his counsel's efforts, he was unable to probe the opinions of Drs. Gross and Muir during discovery. Had Khoury clearly articulated these assertions below, the documents would have no doubt been included in the trial court record. The authenticity of the documents is not subject to any legitimate question. By his motion, Khoury asks this court to "pretend that [they do] not exist," *Colbert*, 471 F.3d at 166, so that his false claims of "ambush" can go unanswered. Clearly, the interests of justice and judicial economy require that Khoury's motion be denied.

RICHARD HARRIS
LAW FIRM
801 S. Fourth Street
Las Vegas, NV 89101
(702) 444-4444

II. ALTERNATIVELY, SEASTRAND SUBMITS THE COURT SHOULD DEFER A RULING ON KHOURY'S MOTION TO AFFORD HER AN OPPORTUNITY TO UTILIZE NRCP 5(d)

As noted above, NRCP 5(d) provides a procedure whereby discovery documents may be filed in the district court "on motion of a party." If the court is not inclined to take judicial notice of these two documents, Seastrand respectfully submits that it should defer ruling on Khoury's motion to strike in order to afford her the opportunity to move the district court to permit their filing below so that the appellate record can be supplemented.

III. ALTERNATIVELY, SEASTRAND HEREBY COUNTERMOVES THIS COURT TO STRIKE THE BELATED ARGUMENTS THAT KHOURY HAS MADE IN VIOLATION OF NRAP 28(e)

A. The Undocumented Arguments of Khoury's Counsel as to What Occurred During Discovery Are, Themselves, Dehors the Record and Should Be Stricken

If the court is unwilling to take judicial notice of the two discovery documents in dispute, and is also unwilling to defer its consideration of the motion to strike so that Seastrand can secure file stamped copies of the documents, then she countermoves the court to enter its order striking the arguments to which the two documents were tendered in response. As noted above, the arguments in Khoury's opening brief constitute the very type of material that should not be considered. *See*, again, *Mack*, 125 Nev. at 91, 206 P.3d at 106 ("We will generally not consider on appeal statements made by counsel portraying what purportedly occurred below. *Wichinsky v. Mosa*, 109 Nev. 84, 87, 847 P.2d 727, 729 (1993) (citing *Lindauer*, 85 Nev. at 433, 456 P.2d at 852-53).")

B. The Arguments in Khoury's Opening Brief Constitute Violations of NRAP 28(e)(1) and Are Improperly Tendered for the First Time on Appeal

NRAP 28(e)(1) provides as follows:

> Every assertion in briefs regarding matters in the record shall be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found.

RICHARD HARRIS
LAW FIRM
801 S. Fourth Street
Las Vegas, NV 89101
(702) 444-4444

The court has frequently warned members of the bar that undocumented assertions of fact will not be considered and may result in the imposition of sanctions. *See, e.g., Pittman v. Lower Court Counseling*, 110 Nev. 359, 871 P.2d 953 (1994). Indeed, the very attorney who prepared Khoury's opening brief (and who was also his trial counsel) certified to this court that he had complied with NRAP 28(e)(1) and acknowledged he was subject to sanctions if such certification proved to be false. As shown above, the single record reference that Khoury's counsel included in his litany of factual misstatements lends no support to his claims as to what occurred in discovery. Thus, if the court is inclined to grant Khoury's motion to strike, it should, in fairness, also strike his arguments A and B, both of which rest on the undocumented assertion as to what was and was not disclosed in discovery.

Finally, the reason that Khoury's counsel did not meet his obligations under Rule 28(e)(1) is that he could not because the arguments – about his purportedly valiant but fruitless efforts regarding written and oral discovery – were not made below. *A fortiori* such efforts could not be documented with record references. This court has long held that it will not consider arguments made for the first time on appeal. *See, e.g., Naimo v. Fleming*, 95 Nev. 13, 14 n. 2, 588 P.2d 1025, 1026 n. 2 (1979). This constitutes an independent ground upon which to strike Khoury's undocumented assertions that the opinions of Dr. Muir and Dr. Gross were not disclosed during discovery, despite his purported efforts to secure them.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the court should deny Khoury's motion to strike respondent's appendix. If the court is otherwise inclined, Seastrand respectfully submits that, in the alternative, the court defer consideration of such motion and enter its order granting her leave to return to the district court in order to move such court to permit filing of the

RICHARD HARRIS
LAW FIRM
801 S. Fourth Street
Las Vegas, NV 89101
(702) 444-4444

two discovery documents.

Finally, if the court is not disposed to either of the foregoing alternatives, Seastrand hereby countermoves the court to strike Khoury's legal arguments A and B, inasmuch as both of such arguments rest on the improper and inaccurate representation – tendered for the first time on appeal and in violation of NRAP 28(e) – as to what purportedly occurred during discovery in the district court.

DATED this 24th day of April, 2015.

RICHARD HARRIS LAW FIRM

By _____

Benjamin P. Cloward, Esq.
Nevada State Bar No. 11087
Alison Brasier, Esq.
Nevada State Bar No. 10522
801 South Fourth Street
Las Vegas, Nevada 89101
Telephone: (702) 444-4444
Facsimile: (702) 444-4455
Email: Benjamin@RichardHarrisLaw.com
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 24, 2015, I submitted the foregoing "Opposition to Appellant's Motion to Strike Respondent's Appendix, or, in the Alternative, Motion to Defer Consideration Pending Respondent's Effort to Enlarge the Record, or, in the Alternative, Countermotion to Strike Rule-violating Portions of Appellant's Opening Brief to Which Documents Were Tendered in Response" for filing via the court's electronic filing system. Electronic notification will be sent to the following:

Daniel F Polsenberg, Esq.
Joel D. Henroid, Esq.
LEWIS ROCA ROTHGERBER LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169

and

Steven T. Jaffe, Esq.
HALL JAFFE & CLAYTON, LLP
7425 Peak Drive
Las Vegas, Nevada 89128

On Behalf of Richard Harris Law Firm

RICHARD HARRIS
LAW FIRM
801 S. Fourth Street
Las Vegas, NV 89101
(702) 444-4444