Case Nos. 64702, 65007 and 65172

In the Supreme Court of Nevada

RAYMOND RIAD KHOURY,

Appellant,

vs.

MARGARET SEASTRAND,

Respondent,

REPLY IN SUPPORT OF MOTION TO STRIKE RESPONDENT'S APPENDIX

This is a purely procedural matter. The rules of procedure are clear. Seastrand does not dispute that respondent's appendix is comprised mostly of materials that were never filed in the district court.

1. An Appendix Cannot Contain Unfiled Papers

Seastrand does not dispute the applicability of NRAP 30: "the appendix [must] consist[] of true and correct copies of the papers in the district court file"; an appendix that contains unfiled papers must be stricken. *In re Nev. State Eng'r Ruling No. 5823*, 128 Nev. ___, ___ n.4, 277 P.3d 449, 453 n.4 (2012) (quoting NRAP 30(g)(1)); *accord In re Discipline of Serota*, 129 Nev. ___, ___ n.5, 309 P.3d 1037, 1041 n.5 (2013); *In re Candidacy of Hansen*, 118 Nev. 570, 574, 52 P.3d 938, 940 (2002).

2. Even under the More Liberal Federal Rules, Civil Litigants Cannot Introduce on Appeal Documents the District Court Did Not See

The few exceptional cases Seastrand cites only prove the rule. Federal appeals courts, under broader rules inapplicable to this Court,[1] may peek at unfiled documents that were in fact considered by the district court[2] or take notice of judicial proceedings as necessary to protect the rights of a criminal defendant.[3] Even under those more liberal rules, however, courts will strike from an appendix documents that could have been, but were not, considered by the district court.[4]

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[1] *Compare* FRE 201(d) *and* FRAP 10(e)(2)(C), *with* NRS 47.170 *and* NRAP 10(c); *cf. Petition of Rudder*, 159 F.2d 695, 696 (2d Cir. 1947) (rejecting an appendix of unfiled documents under an older rule similar to NRAP 10(c)).

[2] *Brown v. Home Ins. Co.*, 176 F.3d 1102, 1105 n.1 (8th Cir. 1999) (applying FRAP 10(e)).

[3] *Trigueros v. Adams*, 658 F.3d 983, 987 (9th Cir. 2011) (applying what is now FRE 102(d)); *United States v. Hope*, 906 F.2d 254, 260 n.1 (7th Cir. 1990).

[4] *See, e.g., Snow v. McDaniel*, 681 F.3d 978, 991–92 (9th Cir. 2012), *overruled on other grounds by Peralta v. Dillard*, 744 F.3d 1076 (9th Cir. 2014); *C.N. v. Willmar Pub. Sch., Indep. Sch. Dist. No. 347*, 591 F.3d 624, 629 n.4 (8th Cir. 2010); *Acumed LLC v. Advanced Surgical Servs., Inc.*, 561 F.3d 199, 226-27 (3d Cir. 2009); *Coyle v. Sec'y of Air Force*, 87 F.3d 1313 (5th Cir. 1996) (unpublished); *Galvin v. OSHA*, 860 F.2d 181, 185 (5th Cir. 1988); *Stotts v. Memphis Fire Dept.*, 774 F.2d 1164 (6th Cir. 1985); *Anthony v. United States*, 667 F.2d 870, 875 (10th Cir. 1981); *United States v. Gray*, 611 F.2d 194, 196 (7th Cir. 1979); *United States v. Walker*, 601 F.2d 1051, 1054–55 (9th Cir. 1979); *Wilson v. Volkswagen of Am., Inc.*, 561 F.2d 494, 510 n.38 (4th Cir. 1977); *Massachusetts v. U.S. Veterans Admin.*, 541 F.2d 119, 123 (1st Cir. 1976).

The bizarre *Colbert v. Potter* case—where the court of appeals *requested* a copy of the front side of a filed document to "establish beyond any doubt the proper resolution of the pending issues" (471 F.3d 158, 166 (D.C. Cir. 2006))—is criticized and inapplicable here (*id.* at 169 (Sentelle, J., concurring)). This Court has not requested Seastrand's unfiled documents, and their admission will not conclusively establish a fact that disposes of the appeal.

3. Judicial Notice would be Inappropriate

In any case, "judicial notice" is the wrong tool here. In Nevada, Seastrand must ask the district court, not this Court, to correct the record. NRAP 10(c). Once, this Court took judicial notice of a post-judgment murder conviction to prevent the killer from evading Nevada's slayer statute on appeal. *Mack v. Estate of Mack*, 125 Nev. 80, 206 P.3d 98 (2009). That case, if not limited to its extraordinary facts, does not mean that this Court can—under the guise of "judicial notice"—admit evidence that could have been (but was not) submitted to the district court, then weigh it against the existing record to resolve a factual dispute. *Bounds v. Superior Court*, 229 Cal. App. 4th 468, 477 (2014); *Abrishamian v. Wash. Med. Gr., P.C.*, 86 A.3d 681, 698 (Md. Ct. Spec. App. 2014).

4. Seastrand's Alternative Arguments would Defeat NRAP 30

Nor should this Court defer ruling on this motion or address the merits of the appeal in this procedural motion. (Opp. 10.) As an "alternative" to filing a proper appendix under NRAP 30, Seastrand wants a ruling that Khoury's arguments on the merits are unsupported by the record. Permitting this tactic on a procedural motion would defeat the purpose of NRAP 30.

CONCLUSION

Since Seastrand admits her appendix contains documents that are not part of the record, that appendix and corresponding arguments should be stricken.

Dated this 1st day of May, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 1, 2015, I submitted the foregoing "REPLY IN SUPPORT OF MOTION TO STRIKE RESPONDENT'S APPENDIX" for filing via the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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