

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERT H. CAPANNA, M.D.,
Appellant/Cross-Respondent,
vs.
BEAU R. ORTH,
Respondent/Cross-Appellant.

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Elizabeth A. Brown
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ALBERT H. CAPANNA, M.D.,
Appellant,
vs.
BEAU R. ORTH,
Respondent.

No. 70227

**MOTION TO STRIKE PORTIONS OF RESPONDENTS' APPENDIX AND
PORTIONS OF RESPONDENT'S COMBINED ANSWERING BRIEF ON
APPEAL AND OPENING ON CROSS-APPEAL, REFERRING TO THE
STRICKEN PORTIONS**

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ATTORNEYS FOR APPELLANT

Appellant hereby moves to strike certain documents in respondent's appendix on the ground that the appendix contains fugitive documents that are not appropriate for an appeal appendix. Specifically, appellant seeks an order striking all of respondent's appendix documents that were not filed in the district court, and all references to such documents in respondent's combined answering brief on appeal and opening brief on the cross-appeal.¹

This is an appeal from a judgment in a medical malpractice case. Appellant's appendix provided the court with documents that were part of the district court record. To the extent that the opening brief referred to discovery disclosures, deposition transcripts, and other exhibits, they were all contained in (or attached to) documents that were actually filed with the district court clerk. In other words, all of appellant's appendix documents were filed in the district court, either as stand-alone court filings or as exhibits with court-filed documents.

Respondent has now filed an appendix with his brief, consisting of 17 volumes, with 43 tabs and 4,072 pages of documents. The index to respondent's appendix shows that it contains emails, letters, deposition transcripts, and

¹ As of the time of filing this motion, appellant's counsel has not yet seen respondent's combined answering/opening brief, because it has not yet been served on him. Nonetheless, appellant's counsel presumes that the brief contains references and citations to refers to the numerous documents contained in respondent's appendix.

numerous other documents that are not court filings. Neither the appendix nor the index to the appendix shows where or when many of these documents were ever filed in the district court, if ever.

It is possible that some of the documents that are not file-stamped were attached to court-filed documents somewhere in the district court, perhaps even somewhere within appellant's appendix. But it is impossible to determine this from respondent's appendix or its index, and it would be a tremendous burden for appellant's counsel and this court's staff to search through thousands of pages of court-filed documents, looking for attachments that match the documents in respondent's appendix. Appellant's appellate counsel recognizes some items, to which we do not object. But we have been unable to determine whether other documents were ever filed anywhere in the district court record.

Legal authorities

Under NRAP 10(a), the trial court record “consists of the papers and exhibits filed in the district court . . .” See also NRAP 30(b)(3) (documents in an appendix consist of portions of “the record”). An appeal appendix shall consist of “copies of the portions of the trial court record to be used on appeal.” NRAP 10(b)(1); *Carson Ready Mix v. First Nat’l Bank*, 97 Nev. 474, 476, 635 P.2d 276,

277 (1981) (this court will not consider matters outside the record made and considered by the district court).

In deciding cases, an appellate court must confine its consideration to the facts reflected in the record of the district court proceedings, and “this court can only consider the record as it was made and considered by the court below.” *Lindauer v. Allen*, 85 Nev. 430, 433, 456 P.2d 851 (1969). Documents not properly filed in the district court cannot be considered on appeal. *See Buhecker v. R.B. Petersen & Sons Construction Co.*, 112 Nev. 1498, 929 P.2d 937 (1996) (court struck documents from appellate record, when documents had apparently never been filed in the district court); *Vacation Village, Inc. v. Hitachi America, Ltd.*, 111 Nev. 1218, 901 P.2d 706 (1995) (this court “of course” denied motion to supplement appellate record with new documents); *State ex rel. Mathews v. Murray*, 70 Nev. 116, 258 P.2d 982 (1953) (court struck fugitive documents).

These rules apply to preclude appellate consideration of exhibits that were not properly presented to, or considered by, the district court. *Ardmore Leasing Corp. v. State Farm Mut. Auto. Ins. Co.*, 106 Nev. 513, 515 n.1, 796 P.2d 232 (1990).

A motion to strike is an appropriate method to challenge improper matters contained in a brief or a record on appeal (i.e., an appendix). *E.g., A-NLV-Cab Co.*

v. State Taxicab Authority, 108 Nev. 92, 95-96, 825 P.2d 585 (1992); *Mathews*, *supra*; *Buhecker*, *supra*.

Documents that should be stricken

Appellant requests the court to strike all of the fugitive documents contained in respondent's appendix, as identified below, and to strike any references to those documents in respondent's combined answering/opening brief. If respondent's opposition to this motion contends that the documents were filed somewhere in the district court as attachments to other court-filed documents, respondent should be required to file a new appendix that contains the actual court-filed documents, identified by date and title, with an amended brief that cites to the pages where the attached documents can be located.

(1) *1 R.App. 1-3 (Tab 1)*: This document is a ten-year-old unpublished Nevada Supreme Court order in an unrelated case. We have been unable to find it in the district court record. To the extent that respondent relies on it in his brief, such reliance would violate NRAP 36(c)(2) and (3), which preclude citations to unpublished orders issued before January 1, 2016.

(2) *2 R.App. 339 through 6 R.App. 1427 (Tab 5)*: This document is not file-stamped, and a search of the district court eflex website does not indicate that the document was ever filed.

(3) *6 R.App. 1431 through 9 R.App. 2199 (Tab 7)*: This document is not file-stamped, and a search of the district court eflex website does not indicate that the document was ever filed.

(4) *9 R.App. 2200 through 10 R.App. 2298 (Tab 8)*: This document is not file-stamped, and a search of the district court eflex website does not indicate that the document was ever filed.

(5) *10 R.App. 2299 (Tab 9)*: This is an email, with no indication that it was attached to a document filed in the district court.

(6) *10 R.App. 2232 through 11 R.App. 2511 (Tab 11)*: This is a deposition transcript. It is not file-stamped. It is not signed by the witness or the court reporter (10 R.App. 2490-91).

(7) *11 R.App. 2556-2644 (Tab 14)*: This is a deposition transcript that is not file-stamped and was not signed by the witness (11 R.App. 2632).

(8) *11 R.App. 2670-2737 (Tab 17)*: This is a deposition transcript that is not file-stamped and was not signed by the witness (11 R.App. 2722).

(9) *11 R.App. 2738 through 12 R.App. 2820 (Tab 18)*: This is a deposition transcript that is not file-stamped and was not certified or signed by the court reporter (12 R.App. 2808).

(10) *12 R.App. 2848-2906 (Tab 20)*: This is a deposition transcript that is not file-stamped and is not certified by the court reporter (12 R.App. 2897).

(11) *12 R.App. 2907-2922 (Tab 21)*: This is a deposition transcript that is not file-stamped. It was not signed by the witness (12 R.App. 2922). Although the cover page indicates the transcript was certified, there is no certification page from the court reporter.

(12) *12 R.App. 2932-2999 (Tab 23)*: This is a deposition transcript that is not file-stamped. It was not signed by the witness, and there is no certification page from the court reporter.

(13) *17 R.App. 4057-4059 (Tab 41)*: This is a letter dated May 1, 2016, which was months after all of the district court proceedings were finished, and months after this appeal was filed. It was obviously not part of the district court record. And it is not authenticated, and there is no explanation for it.


(14) *17 R.App. 4060-4064 (Tab 42)*: This document purports to be a medical journal article dated May 3, 2016, which was months after this appeal was filed. It was obviously never filed in the district court.

Conclusion

For the foregoing reasons, the court should strike these documents from respondent's appendix, and respondent should be ordered to file an amended brief

that does not contain any references to the stricken documents. If respondent's opposition to this motion shows that the disputed documents were actually filed somewhere in the district court, either as separate filings or as exhibits to other court-filed papers, respondent should be required to provide sufficient information regarding where the documents can be located in the district court record.

DATED: Feb. 2, 2017


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CERTIFICATE OF SERVICE

I certify that I am employee of Lemons, Grundy & Eisenberg and that on this date the foregoing Motion was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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DATED: 2/2/17

Miki Shapiro